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REGULATORY REFORM—1974

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HEARINGS

BEFORE THE

COMMITTEE ON GOVERNMENT OPERATIONS UNITED STATES SENATE

NINETY-THIRD CONGRESS

SECOND SESSION

ON

S. 704, S. 770, S. 3604, S. 4145, S. 4167, and S.J. Res. 265

NOVEMBER 26, 1974

PART 2

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REGULATORY REFORM—1974

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CONTENTS

WITNESSES

TUESDAY, NOVEMBER 26, 1974

	Page
Taft, Hon. Robert A., Jr., a U.S. Senator from the State of Ohio	551
Schmidt, Alexander M., M.D., Commissioner of Food and Drugs; Sam D. Fine, Associate Commissioner for Compliance, FDA; Peter Barton Hutt, Assistant General Counsel, Food and Drug Division, Office of General Counsel, Department of HEW; and Robert C. Wetherell, Director, Office of Legislative Services, FDA	619
White, Lee, Attorney at the firm of White, Fine & Ambrogne, Washington, D.C.; accompanied by William Doub, Herbert Denenberg, and A. Everette MacIntyre	636
Doub, William O., former Commissioner, U.S. Atomic Energy Commission	650
Denenberg, Herbert S., special adviser to the Governor of Pennsylvania on Consumer Affairs	673
MacIntyre, A. Everette, practicing attorney and former member of Federal Trade Commission	681
Seevers, Gary L., Council of Economic Advisers	732

STATEMENTS

Denenberg, Herbert S., special adviser to the Governor of Pennsylvania on Consumer Affairs	673
Prepared statement (with attachment)	676
Doub, William O., former Commissioner, U.S. Atomic Energy Commission	650
Prepared statement	652
MacIntyre, A. Everette, practicing attorney and former member of Federal Trade Commission	681
Prepared statement	685
Schmidt, Alexander M., M.D., Commissioner of Food and Drugs; Sam D. Fine, Associate Commissioner for Compliance, FDA; Peter Barton Hutt, Assistant General Counsel, Food and Drug Division, Office of General Counsel, Department of HEW; and Robert C. Wetherell, Director, Office of Legislative Services, FDA	619
Prepared statement	629
Seevers, Gary L., Council of Economic Advisers	732
Prepared statement	734
Taft, Hon. Robert A., Jr., a U.S. Senator from the State of Ohio	551
White, Lee, attorney at the firm of White, Fine & Ambrogne, Washington, D.C.; accompanied by William Doub, Herbert Denenberg, and A. Everette MacIntyre	636

ADDITIONAL INFORMATION

ARTICLES AND PUBLICATIONS

"An Unconscionable Delay," editorial from the Chicago Tribune, November 15, 1974	562
"Angry Lawyers Blast SEC," from Business Week, August 10, 1974	568
"Federal Energy Regulation: An Organizational Study," by William O. Doub, former Chairman, Atomic Energy Commission	656
"Freight Transportation Regulation," by Thomas Gale Moore, excerpt from chapter V, Effects of Regulation	571
"Garrett Speaks Out . . .", from Business Week, August 10, 1974	567
Improving Railroad Productivity: Final Report (Washington National Commission on Productivity and Council of Economic Advisers, 1973: Chapter VI—Regulatory Modernization, excerpt from	738

Additional Information—Articles and Publications—Continued

Page

"Problems of the CAB and the Independent Regulatory Commissions," by Louis J. Hector, from the Yale Law Journal, Vol. 69, No. 6, May 1960 585
"Securities Exchange Act Amendments of 1973—Part 1," hearings before House Subcommittee on Commerce and Finance, Serial No. 93–50, 1973: "Statement of Hon. A. Everette MacIntyre, Commissioner, Federal Trade Commission," excerpt from 689
"The Markets: Cracking Down on Fixed Rates and Full Disclosure—the SEC's New Impact on Corporations," from Business Week, August 10, 1974 563
"U.S. Spending on Key Biscayne," by Jack Anderson, from the Washington Merry-Go-Round, in the Washington Post, November 26, 1974 633
"Mid-November Auto Sales Off 34.7 Percent—Losses Range from 31.3 Percent at Ford to 41.7 Percent at Chrysler," from the Washington Post, November 26, 1974 770
"More Layoffs, Higher Prices," from the Washington Star-News, November 26, 1974 772

COMMUNICATIONS

Letters to:
All Governors by Senator Lee Metcalf, dated July 7, 1972, relative to basic concept of S. 1177, with responses from:
George C. Wallace, State of Alabama, July 19, 1972 726
Jimmy Carter, State of Georgia, July 17, 1972 727
Milton J. Shapp, State of Pennsylvania, August 7, 1972 727
Wendell Ford, State of Kentucky, August 10, 1972 727
John A. Burns, State of Hawaii, July 25, 1972 728
Patrick J. Lucey, State of Wisconsin, July 27, 1972 728
Daniel J. Evans, State of Washington, July 19, 1972 728
Stan Hathaway, State of Wyoming, July 11, 1972 729
Dale Bumpers, State of Arkansas, August 14, 1972 729
Mike O'Callaghan, State of Nevada, July 27, 1972 729
Robert Docking, State of Kansas, September 7, 1972 730
William L. Guy, State of North Dakota, July 17, 1972 730
Forrest H. Anderson, State of Montana, July 20, 1972 730
John C. West, State of South Carolina, July 19, 1972 731
Ronald Reagan, State of California, August 8, 1972 731
Ervin, Hon. Sam J., Jr., Chairman, Committee on Government Operations, U.S. Senate, from Joseph A. Califano, Jr., dated November 23, 1974, with comments concerning regulatory agencies 771

QUESTIONS AND ANSWERS

Question submitted by Senator Metcalf to Food and Drug Commissioner Alexander M. Schmidt, with response 635

REQUESTED INFORMATION

Comments on S. 704 by Herbert S. Denenberg, special adviser to the Governor of Pennsylvania on Consumer Affairs, in letter dated December 9, 1974 725

APPENDICES

Appendix 1

S. 704, text of 775
S. 770, text of 789
S. 3604, text of 814
S. 4145, text of 818
S. 4167, text of 824
Senate Joint Resolution 256, text of 837

Appendix 2

AGENCY COMMENTS

Department of the Treasury:
Richard R. Albrecht, General Counsel, November 7, 1974 851
Gerald L. Parsky, Assistant Secretary, November 29, 1974 859

Appendix 2—Agency Comments—Continued

Page

Federal Communications Commission, Richard E. Wiley, Chairman, December 17, 1974 ---- 856
Federal Home Loan Bank Board, Charles E. Allen, General Counsel, November 25, 1974 ---- 860
Federal Power Commission, John N. Nassikas, Chairman, December 13, 1974 (with attachment) ---- 861
National Labor Relations Board, Edward B. Miller, Chairman, December 3, 1974 ---- 851
U.S. Consumer Product Safety Commission:
Richard O. Simpson, Chairman, November 22, 1974; December 16, 1974 ---- 851, 857
Constance B. Newman, Commissioner, November 26, 1974 ---- 852
R. David Pittle, Ph. D., Commissioner, December 3, 1974 ---- 853
Barbara Hackman Franklin, Commissioner, December 6, 1974 ---- 854

APPENDIX 3

COMMUNICATIONS

Letters to:
Brand, Wallace, Esquire, Pearce & Brand, Washington, D.C., from Drexel D. Journey, Acting General Counsel, Federal Power Commission, December 19, 1974, re letter to Vic Reinemer, staff director, subcommittee on Budgeting, Management and Expenditures of the Committee on Government Operations, U.S. Senate (with enclosures) ---- 910
Committee on Government Operations, U.S. Senate, from David Garret, executive director, Baptist Memorial Hospital System, San Antonio, Tex., November 12, 1974, re governmental agency regulations ---- 884
Ervin, Hon. Sam J., chairman, Government Operations Committee, U.S. Senate, from:
Bonner, Z. D., Gulf Oil Co., U.S., Houston, Tex., November 22, 1974, re support for S. 4145, with attachment ---- 889
Channell, Donald E., Southern Furniture Manufacturers Association, Washington, D.C., November 27, 1974, re support for S. 4145 ---- 887
Gosnell, W. Lee, National Association of Wholesaler-Distributors, Washington, D.C., December 6, 1974, re the establishment of a National Commission on Regulatory Reform ---- 903
Johnson, Nicholas, National Citizens Committee for Broadcasting, Washington, D.C., December 6, 1974, re secrecy in decisions concerning TV programing (with enclosure) ---- 885
Peltzman, Sam, professor of business economics, University of Chicago, December 12, 1974, re independent regulatory commissions ---- 888
Jones, David D., supervisor traffic, Transcon Lines, Los Angeles, Calif., from John R. Kuehn, Chief, Section of Rates and Informal Cases, Interstate Commerce Commission, Bureau of Traffic, Washington, D.C., re to correct rates and charges concerning import shipments ---- 888
Metcalf, Hon. Lee, a U.S. Senator from the State of Montana, from R. E. Witzell, owner, Traffic Service Bureau, freight traffic management, Pittsburgh, Pa., November 19, 1974, re support for S. 4145, to create a National Commission on Regulatory Reform ---- 887
Reinemer, Victor, staff director, Subcommittee on Budgeting, Management and Expenditures, Committee on Government Operations, U.S. Senate, from:
Brand, Wallace Edward, of Pearce & Brand, attorneys at law, Washington, D.C.: November 13, 1974, re Federal Government's failure to enforce claims for expropriation from development of water power ---- 907
January 6, 1975, re letter to Mr. Reinemer of November 13, 1974 ---- 913

MISCELLANEOUS

	Page
Revised Procedures at Federal Communications Commission	913
Appendix A—Commission announces increased "Openness"	922
Appendix B—Departmental records of outside contacts	924
Appendix C—Title 16—Commercial practices	925
Appendix D:	
Consumer Product Safety Commission:	
Notice of meeting	927
Official meetings log	928
Appendix E—Consumer Product Safety Commission Public Calendar: July 22–28; November 11–17, and November 18–24, 1974	928
Appendix F—Chart: House of Representatives open and closed bill drafting meetings, 1973	937
Appendix G—Open letter to Senators of three Senate committees from David Cohen, director of operations, Common Cause, Washington, D.C., April 18, 1974, regarding open markup sessions, with response	938
Appendix H—Open meetings requirements in the States	943
Iowa open meetings testimonials	950
Council of State Governments 1973 Eastern Regional Conference—Open legislative committees: The Pennsylvania Experience	950

STATEMENTS

Bonner, Z. D., Gulf Oil Co., U.S., Houston, Tex	889
General Motors Corp	896
Kaleczyc, Stanley T., Jr., on National Commission on Regulatory Reform for the Chamber of Commerce of the United States	900
Linowes, David F., partner in auditing and consulting firm of Laventhol, Krekstein, Horwath & Horwath	894
Waltersdorf, John M., president, National Association of Wholesaler-Distributors	903

REGULATORY REFORM—1974

TUESDAY, NOVEMBER 26, 1974

U.S. SENATE,
COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 3302, Dirksen Senate Office Building, Senator James B. Allen presiding.

Present: Senator Allen.

Also present: Vic Reinemer, staff director; E. Winslow Turner, chief counsel; and Alan Chvotkin, professional staff member, Subcommittee on Budgeting, Management and Expenditures; and Stuart M. Statler, chief minority counsel to the Permanent Subcommittee on Investigations.

Senator ALLEN. Our first witness this morning is Senator Robert A. Taft, Jr.

Senator Taft, we are delighted to have you return before the committee and give us the benefit of your views on this important subject.

You may proceed in any manner you see fit.

STATEMENT OF HON. ROBERT A. TAFT, JR., A U.S. SENATOR FROM THE STATE OF OHIO

Senator TAFT. Thank you very much, Mr. Chairman.

I appreciate very much the opportunity to appear before the subcommittee. I want to thank the committee for taking this review at this time.

I have a prepared statement I will read. I will at the outset say this is a subject I think should take great priority with all of us today. I think that has been brought into focus in a good many ways. I don't mean to be exclusive in making a particular approach this morning. I thought perhaps I could be most helpful to the committee by concentrating on the whole approach by attempting to improve the operation of our regulatory agency insofar as consumers are concerned. We have had a good deal of attention paid to the entire consumer field. I think without zeroing in on this as a major impact in regulatory reform would be a fundamental error.

The state of many of our regulatory agencies is near collapse. Experience has dictated that they have betrayed not only consumers, but they have also wasted the taxpayers' money and constituted a bureaucratic nightmare for American industry. As the President attempts to control the soaring rate of inflation, I cannot think of a better way to proceed than to review thoroughly the purposes, objectives, and performances of our regulatory activities with a view to recommending

appropriate revisions to improve the effectiveness of these agencies. If our free enterprise system means anything, regulatory review must focus upon the interests of American consumers. Any ultimate recommendation for reform must assure fairness, balance and completeness in the consideration of their interests before the Federal regulatory bodies.

I have long been an advocate of regulatory revision. It is not seriously questioned today that overregulation of American business cuts back on our national productivity. This is nowhere more clear than in the area of ICC regulations. The ICC was created in large part to prohibit arbitrary and discriminatory rates. Unfortunately, the record of the ICC shows that it has sometimes done exactly the opposite. I have maintained that railroad rate regulation has consistently resulted in higher costs for shippers and consumers. When rates are set by regional cartels with the blessing of the ICC, it is the American consumer who has to pick up the check.

As additional examples of how government regulation worked to raise prices or costs, consider the ICC's regulation of the transportation of fresh dressed poultry in interstate commerce. After the Supreme Court ruled the ICC had no jurisdiction over this agricultural commodity, shipping prices dropped by 33 percent, to the benefit of the American consumer.

The ICC is not the only culprit in this regulatory abomination. Let's look at the performance of the CAB in failing to approve the entry of a new trunk carrier to the market since 1938. And just last month, the CAB rejected an application by Laker Airways, a privately owned British airline, to fly regularly scheduled New York-London flights for $125 each way. That would have saved the traveler more than one-third of the fares charged by the major carriers.

These, I think, are clear examples of the actions of regulatory agencies which force consumers to pay more because of condonation and encouragement of price fixing. NRA was the real base for price-fixing cases for three decades.

In almost any price-fixing antitrust case it reflects back to the price-fixing setup under NRA.

It may also be true, as some critics suggest, that regulatory agencies are often too close to the industries which they are supposed to regulate. The wining and dining of regulatory "watchdogs" by the interest they obligated to control, arouse the suspicion that at all times the consumer may not be the paramount subject of concern. It is long since time these practices were brought to an end and that regulatory agencies be compelled to be truly responsive to the interests of consumers. The President's bill is a logical step in that direction.

I might say in that regard I have reviewed the provisions of S.4145, the President's bill, and that I find myself very much in agreement with it.

My only suggestions in that regard is that some more specific language relating to consumer interests be included in it.

In the discussion of S. 707 on the floor back earlier this year in our sessions, I did introduce an amendment No. 1648 to that bill. Some of the language which related to consumers in that amendment might prove to be useful to the subcommittee if it should desire to include specific references to consumer interest in any legislation it might recommend.

It was exactly these kinds of regulatory abuses which prompted me in 1971, to introduce S. 1092, the Modern Railway Transportation Act. I was as concerned about the plight of consumers then as I am now. That bill would have deregulated railroad rates with a resulting greater price competition in transportation and lower rather than higher rates. Based on our staff study, I estimated at that time that the American shipper and consumer could have saved up to $7 billion per year meaning cheaper cars and cheaper food for every American family.

Subsequent to my introduction of S. 1092, a study conducted by Prof. Thomas Moore of Michigan State University confirmed my view that price competition in transportation would result overall in lower rather than higher rates. Moore made an estimate of a welfare loss of $175 million to $400 million from commodities which do not move at all owing to the high level of common-carrier rates. Moore concluded, based upon his careful estimate, that the cartelization costs consumers around $5 billion per year, or about $25 for every one of us.

Mr. Chairman, Professor Moore's thoughtful study is contained in a book entitled, "Freight Transportation Regulation." [1] I am submitting for the record chapter V of this book which is an excellent treatment of the effect of regulation on prices, service, market share and cost to the economy. I ask that it be included in the record following the completion of my remarks.

Senator ALLEN. Without objection, so ordered.

Senator TAFT. Mr. Chairman, I believe consumers are entitled to fair treatment. I believe we have reached the point where over-regulation is detrimental to our general economic welfare. Unfortunately, the problem of over-regulation has largely been a problem for the businessman. Consumers and members of the general public for the most part have not been concerned about the regulatory problems of American industry on the assumption they were far removed from the problems. They do not equate over-regulation as their problem, but simply as a problem for business.

The average American consumer must understand, however, that over-regulation has a real dollars and cents, bread and butter meaning for him. The average American must understand in clear and unmistakeable terms, that over-regulation adds to his cost of living and reduces his purchasing power at places like the supermarket. Only when we begin to translate this cost of over-regulation into terms of costs of autos and food will the average American join with American industry in seeking a release from the straitjacket of over-regulation.

By freeing American business from types of over-regulation such as I have just described, I believe we can permit our economy better to serve the American people and enhance our Nation's standard of living. The elimination of certain agencies could solve part of the problem. There are no agencies which should be immune from elimination where the result will be a benefit to the American taxpaying consumer and businessman. This is not to suggest that some degree of inefficiency is not acceptable to us as a people because of the quality

[1] See p. 571.

of life we want to experience. For example, most of us would not be prepared to undercut programs to protect equal opportunity, our health, our safety, our environment or other measures which may, by their nature, tend to somewhat reduce productivity.

What I am suggesting is that we should be continually reviewing and monitoring the extent to which our productivity system is being distorted by unnecessary over-regulation. The time has come for the Congress to see that the consumers of this country are given protection to which they are entitled by freeing business—especially small business—from needless shackles which bind their productivity and reduce competition. I would hope that the President's proposal receives the support of the subcommittee and committee and that a permanent program for accomplishing these goal is embodied in any forthcoming recommendations.

Notwithstanding the devastating impact on consumers of government over-regulation, look at the adverse effect upon all of us as taxpayers. This point was vividly brought home when Mr. Herbert Whitten, a transportation consultant for the Department of Transportation, wrote to me in 1971 and estimated that there are in existence 43 trillion railroad rates on file at the ICC with an index. He has personally measured the tariffs on file in the ICC tariff room. This is equal to a stack 7½ to 8 times as tall as the Washington Monument and 3½ times as tall as the Empire State Building.

Government regulatory agencies today employ about 64,000 persons and spend $2.2 billion in regulating business. A large paperwork burden is imposed on business, requiring it to file 5,000 different forms to assist the Government in regulation-making, statistics-gathering and corporate supervision. This regulation, often unnecessary, drives up costs and consumer prices and represents in essence a "hidden tax" which is shifted to the consumer who ultimately pays the tax.

I might mention that the small businessman, is in my opinion, affected by this in a very adverse way from a competitive point of view. This, too, adds to the burden upon the consumers in additional costs and the additional impact of large industry and the price structure of various product lines.

Again, the consumer taxpayer is stuck because regulations have been put into effect with little concern for the underlying costs.

The third premise of my testimony is founded upon what I believe to be the fundamental unfairness of the legislative process as it bears upon the bureaucratic harassment of American industry.

Nothing is more unfair than having a commission which orders the issuance of a complaint later pass on the merits of the case. Inherent in this system is a conflict of interest within the agency between its responsibilities as a prosecutor and as a judge. This conflict of interest offends even the most basic notions of fairness and justice.

This principle is recognized by Louis J. Hector, a former member of the Civil Aeronautics Board, who in his resignation letter to President Eisenhower on September 10, 1959, stated, and I quote,

> As a lawyer, I have been disturbed at the inability of an administrative agency, such as the CAB, to give a true judicial hearing to parties who come before it in litigated cases. The agencies are long on judicial form and short on judicial substance.

In the course of his recommendations as to how the Civil Aeronautics Board could be made more competent, Mr. Hector suggested that transfer of judicial and appellate duties of the Board to a true administrative court. He, then, recommended the transfer of the duties of investigation and prosecution to an executive agency, such as the Department of Justice.

This could apply to many, many other agencies. That has been suggested, for instance, in the labor relations field. I remember way back in 1963 and 1964 in the House Labor Committee that Senator Griffin—when I was the minority whip—and I cosponsored legislation at that time to bring about such separation of functions.

Mr. Chairman, the substance of the Hector resignation letter and its accompanying memorandum has been published in the Yale Law Journal,[1] volume 69, dated May 1960. I submit this article for the record as it contains an illuminating discussion of the problems of independent regulatory agencies and recommendations for their improvement. I ask that that article be inserted in the record following the termination of my statement.

Senator ALLEN. Without objection, so ordered.

Senator TAFT. Mr. Chairman, the dangers recognized by Mr. Hector and others who have written on this subject, including Madison and Blackstone, is the unification of powers in our regulatory agencies. The fact that judicial review constrains arbitrary actions and, therefore, makes them constitutional does make this joinder of powers a desirable or responsible means of carrying out the legislative mandate for the public good.

I would contend there are already more than sufficient Federal agencies in existence to protect the consumer interests. The real job of the Congress is to insure that those agencies discharge their duties in the interests of consumers in a manner that assures procedural fairness for those who are regulated. That is the real reason I introduced an amendment in the nature of a substitute to S. 707, the Agency for Consumer Advocacy Bill, which would have brought the expertise of these agencies to protect the consumer interest by concentrating their role in the area of investigation and prosecution of offenses, especially those which have an impact on consumers. The adjudicatory functions of these agencies would have been transferred to administrative law courts for independent and unbiased judgment of the issues. Such a separation would result in the most effective and efficient representation of consumer and public interests. I believe this separation will be far more effective because the particular expertise could be utilized rather than building up some type of consumer protection agencies.

I am recommending that the National Commission give serious consideration to revising and updating the 1955 Hoover Commission Recommendations relative to the desirability and feasibility of transferring the adjudicatory, licensing, and rulemaking functions of our regulatory agencies to newly created administrative law courts. Furthermore, it should be the function of this new Commission to make recommendations within the Agency studied a prime responsibility for protecting the interests of consumers as they relate to the functions performed by such agencies and administrative courts.

---

[1] See p. 585.

Congress should then be in a position to proceed intelligently with legislation to accomplish fundamental reform to protect the consumer interest.

There are other problems in administrative agencies which must be resolved if they are to be effective and helpful for American industry. One of the problems was touched upon by Mr. Hector when he said:

> The CAB is a creature imprisoned by its own structure and procedures. It is unable to form clear policy. It is unable to make sound and comprehensive plans. It is unable to administer its affairs with vigor and dispatch.
>
> The policy and plans of the CAB are not coordinated with those of other agencies of our government. * * * The consequences that our country has today no effective national policy on transportation.

And William Simon, once General Counsel for the Senate Interstate and Foreign Commerce Committee, Subcommittee on Pricing—to be distinguished from the current Treasury Secretary—wrote in a University of Chicago Law Review article entitled, "The Case Against FTC":

> The impact on American business of the Federal Trade Commission's policies determines its value to the national economy. The failure of the Commission to have a coordinated and consistent antitrust policy itself causes an injury to the economy.

Mr. Chairman, I think these two most distinguished lawyers and former high-level Government officials have independently arrived at the same conclusion—the inability of regulatory agencies to have coordinated and clear-cut policies cause confusion and uncertainty for businessmen and waste the taxapyer's money. For example, it does not make sense for the Federal Government to be enforcing the antitrust laws differently through different agencies, the FTC and the Department of Justice, while the CAB is busy exempting an important segment of industry from these laws. The problem is that there is no machinery whatever for coordination. Indeed, even today if the CAB and the Justice Department attempted to establish a coordinated policy on antitrust matters, the CAB might be accused of compromising its "independence."

Mr. Chairman, I believe these highlights of regulatory maladministration point to the fact that congressional legislative oversight cannot deal with substantive policy consideration. The machinery of Congress is not adapted to day-by-day policy coordination. Detailed coordination and other regulatory problem-solving capabilities have to be invested in the Executive. Regulatory agencies responsible to the Executive can be coordinated, made more efficient, and have unified approaches to the conduct of their business, with the consumer in mind.

In addition, look at the delays which needlessly protract regulatory proceedings. A recent editorial in the Chicago Tribune, which I am including as part of my testimony, calls for the elimination of the ICC based upon its unconscionable 9-year delay in conditionally approving the merger of the Union Pacific-Rock Island Lines. I agree with a part of the article which reads:

> No other business enterprise could long survive under the delays and restrictions imposed by the ICC on the railroads. That the railroads have survived is in large part the result of their ability to move large volumes of goods across the country.

And who will forget the FTC's *Carter's Little Liver Pill* case which took 16 years for disposition. These kinds of delays constitute an

abuse of the regulatory system and result in its injustice, paralysis, defensiveness, and maladministration to the detriment of business and the taxpaying consumer.

In summary, Mr. Chairman, the consumers of America should be outraged by the fact that the regulatory process, which purports to benefit them, has completely broken down. The delay in their proceedings, the mountains of paperwork, the general ineptitude on the part of some regulators and their nonrecognition of costs to the consumers are only part of the inquiry which a study commission should make. I hope that the Congress will see fit to put this National Commission in motion as soon as possible so that these urgent matters may be given prompt attention.

I thank the committee.

Senator ALLEN. Thank you very much, Senator Taft, for your very fine statement which certainly reflects keen insight into the Federal regulatory problem and some very valuable suggestions as to the areas in which effective reform may be achieved.

I was very much impressed with your arguments on the Senate floor regarding S. 707, where you contended, as you have stated here today, that you feel that there are already sufficient Federal agencies to protect the consumer interest, and that the real job of the Congress is to insure that those agencies discharge their duties in the interest of consumers in a manner that insures procedural fairness to those who are regulated. I am hopeful if this legislation passes, and I am confident it will pass in some form, that you will be asked to serve on the commission, and that you will accept that assignment. I know of no one who has studied the problems of Federal regulatory agencies more than you or no one who has a better grasp of these problems.

I was interested in your comments on overregulation. Do you feel that many regulations should be abolished, that there should be no Federal regulation? At what point does it become overregulation as distinguished from proper regulation?

Senator TAFT. Well, I don't feel we can do with no regulation, Mr. Chairman. We live in a very complicated society today. In order to maintain the basic principles of government that I think are respected generally in this country, I think regulation in many industries is necessary. There has to be a balance of the public interest in this regard.

What I am suggesting basically is the best way to achieve that balance is to put in the agency that is concerned and directed to develop a degree of expertise and understanding of a particular field a responsibility for representing the public in it and exercising our oversight and executive direction to see to it that is carried out.

I think we have sort of lost sight of that. There is very often criticism of agencies as failing to represent the consumers and other sectors of the public. Just how we go about solving that is, or course, a difficult problem.

My feeling is that a separation—I want to get away from it—but a separation of the prosecutorial and adjudicative functions will help in this regard.

Senator ALLEN. Do you feel that the problem lies with an excessive amount of red tape and paperwork, or is it a deficiency in the work of the heads of these Federal regulatory agencies?

Senator TAFT. I think it is both. I think that we tend to think we can solve problems by additional regulations and additional questionnaires and additional accumulation of information. Certainly, a degree of this is necessary. But we, I think, have compounded today, and particularly for small businesses I find it is really a great burden.

I have attempted in some legislative proposals I have brought in to try to alleviate that burden—for instance, withholding tax and other various taxes.

But just generally I think that the tendency always seems to complicate the forms and add to the tremendous flow of very often useless information into the Federal regulatory agencies. I think they ought to put a priority on trying to continually sift down and limit the demand they are making on the economy to report and to file various papers continually that often don't mean very much.

Senator ALLEN. You gave the ICC as a classic example of overregulation in some instances, and also spoke of the fact that some of the regulatory agencies do come somewhat under the control or domination of the business interests they propose to regulate.

Do you feel all carriers would like more flexibility, more power to set rates rather than to have to go to the ICC for this?

Senator TAFT. I believe so. I think there is, of course, the whole question of competition between different methods of transportation. It may well be that some of the industries regulated in the transportation—some segments of the transportation industry—as with some other regulated areas may see some particular advantage in regulatory structure they face today insofar as their competitive position, inasfar as some other types of carrier is concerned. I can't see the public is served. I think there is a danger. I don't think we can make the assumption all those regulated don't want to be regulated.

I recall my experience particularly at the State level serving in the State legislature. I recall very often we would see industry in a particular business which legislation decided to regulate in some way or to limit in some way because of a feeling they were harming the public interest, come along and within a year or two you would see them accept regulation and then they would start moving to what I would call fence bills, sort of fence themselves in against competition from the outside by building within that regulatory structure a protection for the particular industry involved.

I don't think we should allow that insofar as the public interest is concerned. The Chairman's question as to some extent—certainly generally, I would answer the question, that I think industry would welcome a reduction in regulation and reporting and so forth and it would help free competition and lower prices, but at the same time I don't think you can say that is necessarily true of some who were in regulated industries who feel they may be protected in what might otherwise be a more competitive situation than they otherwise face.

Senator ALLEN. If the common carriers might have influence with the Interstate Commerce Commission, why are they not able, desiring more flexibility to get that flexibility?

Senator TAFT. Well, of course, they have competition within themselves. The agencies I think build up some bureaucratic tendencies of their own. Not pointing any particular finger, but I would say the committee might as well at least recognize some of the jurisdictional

considerations here in the various congressional committees which have oversight over the particular regulatory agencies. They, themselves constitute something of a force against regulatory change to simplify and move toward deregulation because there is a relaxation of our control in the various legislative committees that are involved.

Senator ALLEN. I think some weeks ago Senator Proxmire suggested abolishing the ICC. How would you feel about that?

Senator TAFT. Well, I introduced a bill along these lines and I have reintroduced it from time to time back quite a few years ago. There were others who joined with me, the distinguished majority leader, Senator Mansfield, maybe even cosponsored that legislation. At least he gave it support.

Senator ALLEN. I am sorry I didn't give you proper credit, Senator Taft.

I noted Senator Proxmire's account in the newspapers. Your introduction of similar legislation in the past should have been given more coverage.

I notice your suggestion here that with more flexibility on setting rates by the carriers, more competition in this area, that the American shipper and consumer could have saved up to $7 billion a year. I am just wondering—that is fine on the one side of the coin, but I am wondering if the carriers could stand that loss in revenue. Nearly every railroad in the country, with some notable expansions in the south and west are in trouble. Could the carriers absorb a $7 billion reduction in rates?

Senator TAFT. Well, Mr. Chairman, of course there might be a severe initial impact, and it may well be that any changes we make in this area ought to be on a graduated basis showing some concern for what the economic effect on particular carriers might be. I recognize the CAB situation also, that in my prepared testimony with regard to the CAB and the British private airline that was abandoned, there may be pretty good reasons right now insofar as the viability of the American international carriers are concerned in making a decision of that kind. But at the same time, in the long run I am convinced that American business can and will respond and will respond better in so far as consumer interests are concerned if we allow competition to work by reducing over-regulation. The entire ICC situation is historical and grew out of a situation where it was a practice monopoly involved. Regulation itself is, of course, continuing to require the perpetuation of many uneconomic practices by the various rail carriers. Where trucks might better serve the purpose except that rail rates are set at a particular level and there is a requirement for a real service to a particular area or a particular product received a favored treatment. I think all of these factors have been considered.

I am convinced that certainly a change of regulation is called for—I am not saying that all rail traffic should be deregulated. I don't believe that you can possibly do that. I do think the ICC has become such a bureaucratic mass it may be time to wipe it out and transfer its functions to an area where there is some identifiable responsible involved either on the part of the Congress or Executive. To the extent that regulation is required in this industry, I would really prefer to see it in the Department of Transportation, because it seems to me there you have a little bit more direct say by the people in the election

and control of the Executive than you have today in the amorphous relationship of the Congress to the ICC.

Senator ALLEN. Now, your recommendations here on the CAB, suggesting transfer of the judicial appellate duties to a true administrative court. I believe this is Mr. Hector's recommendation.

Senator TAFT. Yes.

Senator ALLEN. And then the transfer of the duties of investigative and prosecution to functions executive agencies, such as the Department of Justice. Well, that would pretty well dismember the board, would it not?

Senator TAFT. Yes, it would. It would break up these two functions. Breaking up these two functions would be a desirable thing, and would advance the consumer's viewpoint by effective administration.

Senator ALLEN. Do you think the same rule might apply to the other regulatory agencies?

Senator TAFT. Yes, I do. I think there are some exceptions. The separation of powers, I think, call in some circumstances for an effective arm of the legislative branch of Government such as the General Accounting Office, and it is probably desirable to keep a degree of direct legislative information gathering at least in this area. But by and large it seems to me that the entire structure of expanding and building up independent regulatory agencies out of the control of the Federal and executive branch is not desirable. The FTC is a good example of that. Why the FTC and the Justice Department should really be operating under one source of direction is hard for me to see.

Senator ALLEN. What do you think of the preemptions by the Congress of certain regulatory phases of work of the agencies setting rates themselves, as in the case of natural gas at the wellhead as a classic illustration? Should the regulatory agencies, when properly set up and themselves regulated, should they have the whole field of regulation or in certain cases should Congress take over that function?

Senator TAFT. Well, I believe that Congress certainly has the duty to establish general policy in these areas. I don't think we ought to cede that in any sense to the executive branch and such a decision going to the regulation question is one that we very well could and have acted on in so far as the Congress is concerned. Whether it is wise at this point, I seriously question. I respect the support and deregulation concept and that doesn't mean we should abandon that decision. On the other hand, as to how that is carried out and how the entire regulation on the interstate shipment of natural gas is carried out almost has to be left to a regulatory agency of some kind, whether the Federal Power Commission or the executive branch of the Government—that is a very serious question for the subcommittee.

I would say the execution role ought to be left to the executive branch of Government.

Senator ALLEN. Do you think some provision ought to be made for the withdrawal of the Senate's advise and consent from some of the agency heads who are falling down on the job or what is your thought on that? How would you relieve of the duties of an agency head who was not properly performing his duties?

Senator TAFT. Well, the advise and consent, of course, goes to the original appointment. It doesn't go beyond that.

Senator ALLEN. I am talking about a possible mechanism for withdrawal.

Senator TAFT. The mechanisms I recall might well be accepted by the subcommittee. I have not gone into that myself, but it seems to me if we are going to have effective and economical administration of these agencies over and beyond the expiration of the term might well be desirable.

Senator ALLEN. Do you think a proper field of study by the commission might be that an agency for consumer advocacy might be advisable? Do you think that would be a proper field for study?

Senator TAFT. Yes, I think that would be a very proper area of inquiry. I have perhaps already indicated my conviction that the expertise ought to be built up in these agencies. If they are really properly constituted they should be to cover this aspect of the problem as well as any other.

As the distinguished Chairman pointed out when we were debating the consumer protection bill the various aspects of the public, of the consumer ought to be considered. He is something other than a consumer. A consumer isn't an isolated entity. He is also a wage earner, a producer. He is everything, really, that comes up in our society and making a judgment as to how a particular regulatory decision affects him, I don't think ought to be solely read in his role as a consumer. I think that balancing of interest in a regulatory agency, in carrying out the public interest is what we ought to be looking for rather than dividing up the various factions of the individual with whom we are attempting to deal.

Senator ALLEN. Do you think that personnel on the regulatory agencies themselves should be eligible for appointment to the commission?

Senator TAFT. I see no reason why not. It seems to me that they will have developed knowledge and expertise and experience in these fields and they might be the best people available for appointment. This is the public, too. Each agency ought to have not merely an experience in the particular field, but also broad enough background in its membership so that various other aspects of the public interest are weighed properly by it.

Senator ALLEN. But if there were a sufficient number of personnel from the agencies under review, might there not be some log-rolling on their part to maintain the status quo?

Senator TAFT. Yes, I think that is a danger. It certainly is. Certainly an infusion from the outside of the agency in a major way ought to be desirable. For instance, one of the brighter spots that I have seen recently in my opinion on the entire regulatory agency front is the SEC. There seems to have been a tendency of the staff of the SEC to somewhat dominate the policy of the SEC. Two or three new members and particularly a new chairman as well as a new member of my own home state in my opinion have changed the agency attitudes in a way to make it desirable for the public. In so far as the consumer is concerned it is very, very desirable. They have gotten very tough in pointing out for example, attorneys, who came into practice before them have a duty to the individual investing public as well as to the particular claimant they may be attempting to represent. That decision is a very important one.

43-362 O - 75 - pt. 2 - 2

In that regard the Committee might be interested in an article reported recently, I think it was Business Week dealing with that particular SEC situation. It is the August 10, 1974, edition of Business Week, the FTC's impact on corporations.

Senator ALLEN. Would you like to have that inserted into the record along with the Chicago Tribune editorial?

Senator TAFT. Yes, Mr. Chairman.

[The editorial and Business Week article referred to, follow:]

[From the Chicago Tribune, Nov. 15, 1974]

AN UNCONSCIONABLE DELAY

The Interstate Commerce Commission has given its conditional approval to the merger of the Chicago, Rock Island and Pacific Railroad into the Union Pacific Railroad, but the restrictions and indemnities imposed by the ICC may make its approval meaningless.

If all the conditions are accepted—and this is a big if—the Union Pacific would take over the Rock Island, selling off the Rock Island's lines south of Kansas City to the Southern Pacific and the Santa Fe Railroads and the line from Denver to Colorado Springs to the Denver and Rio Grande Western Railroad. The merger is also conditional on the Santa Fe's acquisition of the Missouri-Kansas-Texas Railroad and the payment of indemnities to other railroads to protect them from the competitive effects of the merger.

To paraphrase the saying, "justice delayed is justice denied," government delayed is no government at all. It is more than 11 years since directors of the U.P. and the Rock Island agreed to the merger. Conditions that existed in June, 1963, have changed; the Rock Island, for example, has had only one profitable year and its debt has increased. As a result, the original terms of the merger are no longer valid and are subject to renegotiation. And if the approval is challenged in court, which is likely, several more years may elapse before the merger is resolved.

This is an unconscionable delay. Without doubt, the ICC is gunshy because of the bankruptcy of the Penn Central after the merger of the Pennsylvania and New York Central Railroads. The failure of Penn Central, however, does not relieve the commission of its responsibility under the law to act with reasonable dispatch in handling cases that come before it. Eleven years cannot be considered reasonable.

Moreover, the ICC had in the U.P.-Rock Island case a unique opportunity to restructure the Western railroad network into four strong, competitive carriers as recommended by Nathan Klitenic, the administrative law judge, who heard the testimony.

As the decision now stands, a number of weaker railroads, notably the Chicago and North Western, the Chicago, Milwaukee, St. Paul and Pacific, the St. Louis-San Francisco, and the Kansas City Southern, will be hard-pressed to compete with the four rail giants in the West despite the proposed indemnities.

In 1920, Congress adopted a law urging the ICC to create a rational system of railroads throughout the country thru the merger of hundreds of small railroads into 10 superrailroads. After 20 years of commission procrastination, Congress in disgust repealed the law.

Since World War II, the railroads' share of intercity freight business has dropped by more than 50 per cent and passenger service has all but dispapeared. Trucks and airlines now have the lion's share of the business, and what little passenger service remains on the rails is largely government owned and taxpayer subsidized.

The Interstate Commerce Commission has long outlived its usefulness. It was created in the late 19th century to protect the public from the absolute monopoly held by the railroads. But that monopoly no longer exists. The railroads compete against trucks, airlines, and barge lines. Subsequent antitrust laws—the Sherman and Clayton Acts—are fully capable of protecting the public against unfair competition.

No other business enterprise could long survive under the delays and restrictions imposed by the ICC on the railroads. That the railroads have survived is in large part the result of their ability to move large volumes of goods across the country.

The delay by the ICC in acting on the U. P.-Rock Island merger and the irresponsible and unrealistic conditions imposed in its decision are further reasons why Congress should eliminate the ICC.

[From Business Week, Aug. 10, 1974]

THE MARKETS: CRACKING DOWN ON FIXED RATES AND FULL DISCLOSURE—THE SEC'S NEW IMPACT ON CORPORATIONS

The securities industry today is in the worst financial straits it has seen since the early 1930s. Many Wall Streeters are fearful that commercial banks, which which already have a toehold in the brokerage field, may usurp their business. So bad is the situation on Wall Street—with most smaller investors completely out of the market—that some underwriters and bankers are looking past the the Securities & Exchange Commission, the industry's traditional watchdog, to a proposal for forming a super agency to bolster their beleaguered industry. They see a need not so much for regulatory reform—for instance, a central market—which might only contribute to further weakening of the securities industry but for a kind of giant shot in the arm for Wall Street.

In the thick of all this is a hearty, articulate man who just a year ago was a little-known Chicago securities lawyer suddenly appointed to the chairmanship of the SEC. Ray Garrett, Jr. took the job as SEC chairman just as the widening ripples of Watergate were starting to lap over the agency's doorstep. Garrett, in fact replaced G. Bradford Cook, who had resigned amid criticism that he had mishandled a complaint against financier Robert L. Vesco. Like Cook, he vowed to carry out an ambitious program of SEC reform that had been initiated by Cook's predecessor, the flamboyant William J. Casey, now president of the Export-Import Bank.

"Casey left the pipelines clogged," Garrett says, and today, he is busily unclogging them. For Garrett, the urgent need now is to strengthen the SEC's policeman role, even while his agency copes with the longer-term Casey reforms, and to watch any developments that might lead to a radical restructuring of the SEC. Garrett's primary levers for achieving reform are the accountants and the lawyers. He is asking corporations to be more responsible in fully disclosing their financial affairs, and he wants their lawyers to share with the SEC and the public any information about a company that indicates fraud. As Garrett sees it, he is merely exercising his agency's basic franchise. What he hopes to accomplish is to help restore investor confidence in the securities of the nation's corporations.

Garrett commands the support of an aggressive staff, typified by enforcement chief Stanley Sporkin and chief accountant John C. "Sandy" Burton. Some critics say the triumvirate has exercised its authority overzealously. In any case, the hallmark of Garrett's administration has been rapport with his staff. He runs the agency on a consensus basis. "There is," says a 20-year staff veteran, "more a feeling of mutual trust between this chairman and the staff than with any other commission I've known."

NO GREAT CHANGES SOON

The 54-year-old Garrett, mostly a pragmatist, voices doubts that any far-reaching SEC reforms are likely soon. As he recently told the Securities Industry Assn., "All the industry has now is us, and all we have, in addition to our personnel, are the present statutes that we administer."

Yet many of the top people in the securities industry want the SEC to give them a big helping hand—right now. If it does not, they say, the agency should be supplemented or replaced with entirely new institutions better equipped to help Wall Street perform its essential task of providing capital to U.S. business.

Last week, an ad hoc committee of underwriters and bankers headed by Salim L. Lewis, senior partner of Bear, Stearns & Co., met with Treasury Secretary William Simon and other Presidential advisers to press for the creation of a super agency in the executive branch that would coordinate all governmental policies, including those of the SEC, that bear directly on the health of the markets. John C. Whitehead of Goldman, Sachs & Co., former chairman of the Securities Industry Assn., would go even further. He proposes that the SEC be replaced outright by a more benevolent agency to be known as the Federal Capital Markets Board, patterned somewhat after the Federal Reserve Board. The new agency would have power to do something that the SEC today is neither authorized nor structured to do: to lend government money to bolster faltering brokerage houses.

SEC statutes empower the commission to protect investors against fraud in the markets and to require registration of public offerings, with full disclosure of corporate business and financial affairs. Last week, for example, the SEC sued Mattel, Inc., for allegedly issuing false financial reports and press releases and overstating its earnings for the year ended Feb. 3, 1973. Mattel consented to the SEC's charges without admitting or denying guilt. The laws also require securities exchanges and the National Assn. of Securities Dealers to submit to SEC regulation. Under legislation now pending in Congress and endorsed by Garrett, the SEC's authority in these areas would be strengthened and made more explicit. But, despite the ferment in the industry, the commission's basic mission would not be changed.

Garrett has experience carrying out that mission. A former SEC staffer, he was director of corporate regulation in the 1950s. As chairman, he listens closely to the staff. "With him," says another staffer, "you put in your five cents' worth, and pretty soon it's a dollar."

The staff orientation of the SEC does not stop with Garrett. Two of his fellow commissioners also are former staffers: Irving Pollack, former enforcement chief, and Philip A. Loomis, Jr., former general counsel. The remaining commissioners are A. A. Sommer, Jr., a Cleveland securities lawyer, and John R. Evans, former minority staff director of the Senate Banking Committee.

AGGRESSIVE STAFF WORK

Among the 1,920-man staff serving the commission, no one stirs more public controversy than Sporkin, the 42-year-old enforcement director who is known to Wall Street as a tough cop, and Burton, the agency's top accountant, who has forced sweeping changes in what corporations must disclose about their finances. Both have come to be as well known to the business world as Garrett himself. Burton, who is portly and affable and even resembles Garrett, is a former Columbia University accounting professor who has been with the SEC only 2½ years. Sporkin is an intense, combative, restless SEC veteran of 13 years on the staff.

The program that Garrett and his staff are pushing would:

End fixed minimum commissions on the stock exchanges by May 1, 1975, in favor of negotiated rates. The goal is to spur competition among brokers. Though Wall Street already has started to adapt to this requirement, many brokers fear that it will lead to lower revenues and will only worsen the industry's financial difficulties, which have recently become so acute—in the official NYSE view, at least—that the Big Board plans to apply for an increase of up to 10% on most commissions, pending next year's introduction of freely competitive rates.

Establish a central market system, including a consolidated ticker tape for all trading in listed stocks and an automated quotation system for bid and asked prices. The aim is to abolish exchange trading monopolies by forcing exchange members into competition with all other dealers.

Require companies to make fuller disclosure in financial reports and force company lawyers and accountants to acknowledge that they have a broad responsibility to the public as well as to their clients. Under certain circumstances, the SEC insists, when a client may be committing fraud and refuses to accept his lawyers' advice to desist, the lawyers have a duty to resign the account and to notify stockholders or the SEC.

But many in the securities industry argue that Garrett's prescriptions will do more harm than good. They point to the precipitous plunge in the financial fortunes of Wall Street, with more than 150 NYSE brokerage houses having merged or gone out of business. Not only will competitive rates for brokers further depress revenues but, they fear, the industry will not be able to afford to install and operate a new automated market system. Moreover, they insist, the SEC's toughened enforcement policies are giving securities dealers and corporate management an intolerably bad image, driving even more investors away.

Paul Kolton, chairman of the American Stock Exchange, says of the Garrett program: "Events have moved quickly because of economic conditions, and concern focuses elsewhere. The central stock market idea came in an entirely different environment. Today we must address ouselves to other priorities—the capital-raising programs of business and the market liquidity."

"It is a lousy market," Garrett agrees. "We are caught up in the cycle of the ages. Inflation, depression, and equity market collapse are the significant threats, more significant than the central market. But they are problems beyond the SEC's jurisdiction."

Also beyond the SEC's jurisdiction is a force that is feared by the regulators and the regulated alike: competition from the giant commercial banks. Despite a popular misconception, the Glass-Steagall Act of 1935 did not bar banks completely from the securities business. Banks retain the legal right to act as stockbrokers for customers, and they constitute the largest group of underwriters in municipal bonds.

THE THREAT FROM THE BANKS

In the past few years, the banks, which see themselves as the ultimate "financial shopping centers," have become more aggressive. They have begun to push their brokerage services through automatic dividend reinvestment plans and stock purchase programs for account holders.

Next year, Congress may reexamine the whole question of limitations under the Glass-Steagall Act. Most likely, the basic restriction—that banks cannot do any underwriting of corporate securities issues—will remain unchanged. But even with the act as it stands, banks have many advantages over brokerage houses in a securities business. Their branches are everywhere, and the checking account and loan services they offer make them centers of business life.

Garrett recognizes the threat that banks pose to the existing securities market. "After all," he says, "you reach a point where you can no longer deny a business to those who have the capital and the resources to carry it out."

BUT NO SPECIAL BREAKS

Despite such formidable challenges to the industry's very existence, Garrett discourages any expectation that the securities business will get any breaks from his agency. "We are primarily an enforcement agency, with the responsibility to police fraud in securities transactions," he reiterates. And he denies that his agency's enforcement actions "have measurable negative effects on the ability of business to raise capital."

However, many in the securities industry feel that it is time for the SEC to weigh economic realities more heavily in its regulatory activities. "You have to consider the SEC's mentality," says a vice-president of a major brokerage house. "They are mainly lawyers, and they approach our problems from the fairness side of the picture–the SEC was born out of the need to create fairness in the markets, under the notion that if everything was fair, everything would work out. What we need now is an institution that can weigh questions of equity against questions of efficiency and economics."

Whitehead of Goldman Sachs put it this way in a recent letter to Garrett: "I would ask you to consider whether it is not a fact that the conditions that created the SEC in the 1930s have not changed—changed, in fact, by exactly 180 degrees. Investors no longer invest without information; they have available to them a tremendous array of facts. . . . Security prices are no longer artificially inflated; they are at all-time lows. The boiler-room operation no longer exists in our industry; securities dealers generally perform with pretty high standards."

Garrett says that the commission has no official view on Whitehead's proposal for a capital markets board. "We have been devoting our thoughts to what we can do with what we have," he explains. The industry, he adds, is seeking "mercy, not justice."

As for the idea of creating an executive superagency to coordinate the activities of all government agencies that deal with problems of the capital market, he says, "I would like to see the government give all the attention it can to this." But he then asserts the independence of regulatory agencies from the executive branch. "We [the SEC] could not commit ourselves to follow the instructions of outside people."

Even so, Garrett and his staff have not closed their minds about the securities industry and its problems. Garrett encourages lively staff dialogue. Shortly after he became chairman, he took the commission and its top staffers to the Bedford Springs Hotel, a resort hotel in Pennsylvania, for three days of brainstorming on the agency and its role. That had never been done before. The Garrett regime has also adopted a regular feature of informal "brown-bagger" lunches in the chairman's inner office, where Garrett, his fellow commissioners, and a staff man or two informally discuss regulatory strategy in "an atmosphere of intellectual insubordination," as one staffer puts it.

STANDARDS FOR LAWYERS

Perhaps no strategy has caused so much heated discussion at such sessions as the SEC's moves in the past two years to hold lawyers liable in some instances when

their clients run afoul of the securities laws. Lawyers have been charged with negligence or with aiding and abetting fraud. In a 1972 landmark case against National Student Marketing Corp., the SEC also named two prestigious law firms as defendants, declaring that "the task of enforcing the securities laws rests in overwhelming measure on the bar's shoulders." That concept, says Sporkin, "marks a great revolution in SEC enforcement."

Technically, registration statements filed with the SEC do not require lawyers' opinions on the legality of securities issues. The statutory requirement is the names and addresses of any attorneys who gave such opinions to their clients. However, as Commissioner Sommer points out, lawyers nowadays are "the field marshals" of many transactions involving securities. And it is an established doctrine of the courts that lawyers—and accountants, too—have professional responsibilities to the public as well as to their clients. A phrase that Sporkin and his staff never tire of repeating comes from a 1964 federal court decision in a securities fraud case: "In our complex society, the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar."

Before the National Student Marketing Corp. case, lawyers had been named in suits by the SEC, but only in their capacity as corporate officers or directors. With the NSMC case, however, the SEC lobbed a bombshell into the legal profession's ranks. Along with the company and some of its officers, directors, and accountants, the agency named as co-defendants the New York law firm of White & Case, which was NSMC's counsel, and Chicago's respected Lord, Bissell & Brook, representing Interstate National Corp. in a merger with NSMC.

The two law firms were charged with approving the closing papers in the merger when they allegedly knew that NSMC's public financial statements, on which the merger relied, were substatinally incorrect, painting a picture of profitable operations when there actually was a loss. NSMC signed a consent decree, without either admitting or denying guilt, but the law firms denied the allegations against them and are going to court. The case is in the pre-trial stage.

The SEC's action worries the legal profession, especially as a threat to the lawyer-client relationship. Says one lawyer, "The SEC has set the dangerous precedent of second-guessing professionals by light of hindsight." Even some SEC staff members feel that attacks on "white knight" law firms that investors have come to respect could backfire.

But Sporkin feels strongly that all attorneys in securities practice must take full responsibility for notifying the SEC when their clients commit fraud, unless they can put a stop to it privately. As a practical matter, more and more law firms that get into major squabbles with clients over possible fraud and that resign the accounts are notifying Sporkin's office to clear themselves.

SWAY OVER ACCOUNTANTS

The SEC has a firmer statutory hold over public accountants, the other professional group that it says must serve the public as well as the client. Securities law requires that "independent public accountants" certify the financial reports filed with the SEC and mailed to stockholders under proxy rules. Stock exchange rules also require certification of annual reports. And the law gives the SEC sweeping authority over the form and contents of reports and over the accounting principles that companies use.

Over the years, the SEC has in effect delegated its authority to establish accounting principles to the profession itself. But the profession has come under increasing fire for allegedly dragging its feet on stiffer accounting rules out of deference to corporate executives who like to "massage the figures." Accountants live in fear that the SEC will snatch back its authority from the profession's own rulemakers. This fear has reached new heights during Burton's tenure as SEC's chief accountant.

One dramatic measure of Burton's activist approach is that during his 2½-year tenure he has issued 20% of all the Accounting Series Releases—the SEC's statements and rules—that the agency has promulgated over its 40-year history. Burton has been careful not to make rulings immediately before the profession's own Financial Accounting Standards Board acts on a point—"I believe the determination of proper business accounting can best be made in the private sector"—but he has prodded accountants toward reform.

For example, he has questioned the counting of land developments as sold when the promoters hold only unenforceable installment notes and have not completed promised improvements on the land. In a package of reforms expected

to be adopted soon, he wants companies to disclose their accounting procedures in detail and to explain the reasons for any changes, plus restating new income figures as if the changes had not been made. He wants to discourage companies from "managing" their earnings by switching accounting methods.

"Some people laugh when I say this, but I don't think we've taken huge steps," Burton says. "We're not trying to dramatically change the basic framework."

There are people who neither believe Burton nor are laughing. They can be found at some of the five major accounting firms named by the SEC as co-defendants in fraud cases or censured by the agency for unprofessional conduct. The charges have ranged from "poor accounting judgment" to "deficiencies in audit work in the presence of a bribe."

CONGRESS TAKES A HAND

Whatever the trend of debates among the regulated about the course that SEC is following, the commission and its staff are ultimately answerable chiefly to Congress. As an independent regulatory agency, it is in fact an arm of Congress. And so far, its activist policies are winning applause at the Senate Banking Committee and the House Interstate and Foreign Commerce Committee, the two groups that oversee the SEC.

"I do not view the SEC's job as being to represent the securities industry's interests," says Senator William Proxmire (D-Wis.), who next year becomes chairman of the Banking Committee. "I know that industry people think it is. I think Garrett is an extraordinarily capable man, and I'm very impressed by the commission. It is one of the strongest we've ever had, from a public interest standpoint, in my 17 years in the Senate."

Representative John E. Moss (D-Calif.) also thinks that the Garrett SEC is "a very competent body." He has deep reservations about proposals to replace the SEC with a new agency or to interpose other agencies between the SEC and those whom it regulates. Moss is the sponsor of a bill to make the SEC even more independent and powerful without altering its existing role.

Under the Moss bill, a companion to a bill that has already passed the Senate, the commissioner whom the President designates as chairman would be guaranteed a full 5-year term as chairman instead of holding the title "at the pleasure of the President" as he does now. It also empowers the SEC to force exchanges to police their own rules for members, and it gives the SEC explicit authority to supervise the creation and operation of the central market. Says a Moss aide: "Our bill gives the SEC a mandate to say who is to be in and who is to be out of the central market. It is a very broad grant of direct authority over some very ticklish matters." In Garrett's view, the SEC already has that power, but he and his fellow commissioners fully support the Moss bill.

Thus, after 40 years of federal securities regulation, Congress clearly wants the SEC to have more, not less, power. The SEC's critics can take scant satisfaction from the fact that the current reform legislation has not passed Congress. Indeed, should Congress fail to pass these reforms, the possibility that it would ever pass more radical proposals is made even more remote. And since the Supreme Court has traditionally been reluctant—and in practically all cases has downright refused—to second-guess expert regulatory bodies on their decisions, Garrett and his activist commission are not likely to be forced from their present course.

[From Business Week, Aug. 10, 1974]

GARRETT SPEAKS OUT ON . . .

The stock market.—"The markets are in a distressing and possibly dangerous condition."

Stockbrokers.—"For all of Wall Street's financial problems, the sudden collapse of a broker, without fraud and without cheating, is not likely to happen at all."

His relations with the securities industry.—"I see no reason to increase the temperature by generating unnecessary confrontations. I assume people will be reasonable, by and large. . . . We've got enough fundamental economic problem in the securities industry without generating problems of face."

The future central market system.—"I think the SEC will undoubtedly have to keept the pressure on to keep things moving. . . . I think it is the commission's mission now to see to it that a central stock market is created and then, to step

back to our oversight, inspection, and enforcement role. We do not intend to get into the business of operating the system. . . . I don't spend a lot of time worrying about what exchange prospers or fails."

The SEC's role.—"I wouldn't think it at all fair that we be pressed by government or business to use our power in a manner unrelated to the statutes. . . . I don't think anybody is suggesting that we should not uphold the law because they are not making profits."

Accountants.—"I am amazed to find in the letters I get that some people are still fighting the battle that government and not the accounting profession should audit corporations."

Banks.—"I think an independent nonbank-dominated securities industry is a good thing. I don't want to see it dominated by a handful of major banks. . . . If banks were allowed unbridled access to all phases of the securities markets, they would very quickly drive out everybody but a few firms."

SEC decisionmaking.—"We don't beat heads to get unanimity. But usually we can talk our way into unanimity. . . . I like to push responsibility down."

The state of the capital markets.—"We all went crazy in the late 1960s, and we are still paying for it."

[From Business Week, Aug. 10, 1974]

Angry Lawyers Blast the SEC

Monroe H. Freedman, dean of New York's Hofstra University Law School and a controversial civil libertarian (he is not a securities lawyer), has accused the SEC of employing enforcement practices "that are probably unparalleled in our jurisprudence for their open violation of basic rights." These include, he charges, intimidating witnesses, pressuring business associates to use separate counsel, and failing to warn those who are targets of investigation. He does not spare the bar. Because "the whole professional training" of the securities lawyer "is directed toward caving in," Freedman declares, "there has been a complete failure of the securities bar adequately to represent the people being regulated."

The SEC flatly denies pursuing a policy of harassing the legal profession. Martin Lipton, a prominent New York securities lawyer and partner in Wachtell, Lipton, Rosen & Katz, says there is no evidence that the commission follows any policy of violating the rights of those being investigated.

But, talking with top securities lawyers in New York, BUSINESS WEEK finds that, whether or not the charges are valid, the SEC has engendered, in attorney Kenneth J. Bialkin's phrase, "a climate of fear" within the securities bar. Bialkin, a partner of Wall Street's prestigious Wilkie, Farr & Gallagher, and chairman of an American Bar Assn. securities committee, is one of the leaders in a fight against a recent SEC proposal that all disciplinary proceedings against attorneys be public.

PRESSURE TO COOPERATE

The proposal for public disciplinary hearings is significant because, in the view of many lawyers, it is another step in the SEC's steady pressure on the attorney to cooperate with the commission's staff rather than litigate all-out on behalf of a client. According to Bialkin, there are no concrete standards to guide the SEC; it can discipline attorneys for "unprofessional conduct," a vague charge that can encompass simple noncooperation and even devotion to client.

Indeed, one of the current horror stories making the rounds of the securities bar is the case of securities lawyer Joseph Churvin, who was attending a Washington meeting at the SEC to discuss a forthcoming investigation of a client. Within minutes after refusing to disclose the contents of conversations he had had with witnesses in connection with his client's case, Churvin was handed a personal subpoena. Staff members threatened to have him "sequestered"—removed from the particular case on the grounds of conflict of interest—and reminded him that his primary duty was to the commission, not the client. Ultimately, the subpoena was quashed, and Churvin continued to represent his client. According to Robert Smith, who represented Churvin before the commission and was formerly his law partner, senior SEC officials conceded privately that the staff had acted improperly.

The problem of professional conduct worries lawyers because of changing SEC standards. According to Louis Lowenstein, partner in New York's Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll, the SEC's conventional position was that it could not bring proceedings against an attorney unless he was active in a conspiracy to defraud. Now, says Lowenstein, the SEC is pursuing a "turnstile theory": In other words, if a lawyer signs a prospectus, proxy statement, or other material that is made public, and the material turns out to be fraudulent, the lawyer may be held accountable even if he was ignorant of the fraud. To protect himself, the lawyer must therefore treat his client as an adversary.

Lowenstein agrees with the SEC that the lawyer cannot deliberately look the other way while fraud is being committed, but he questions how far attorneys must be required to go in investigating their own clients.

THE GREATEST FEAR

This is where the uncertainty and the fear are greatest. The SEC, as one lawyer has put it in pointed exaggeration, "is expanding the definition of fraud daily." The bar does not want to be caught on the wrong side of a constantly moving line. Even those who completely support the thrust of the SEC's enforcement policies argue, like Martin Lipton, that a lawyer should not be "second-guessed for making a good-faith decision, even if it turns out to be wrong."

As a result of the SEC's enforcement position, many lawyers are beginning to extricate themselves from their clients' affairs, pushed to some degree by the fact that insurance companies are canceling liability insurance for securities practitioners. Several law firms have stopped signing "closing certificates" required in registration statements and are letting corporate treasurers sign them instead. And the companies that issue such statements, the new companies and shaky old companies that most need new capital, are precisely the ones that attorneys want least to do with these days.

Many attorneys privately state their belief that the SEC policy, rather than leading to more disclosure, will ultimately lead to less, either because lawyers will simply withdraw from active involvement or because corporate clients themselves will learn that it is imprudent to reveal too much to a lawyer who may have an obligation to tell all to the SEC.

Senator ALLEN. Do you feel this review by the Commission should be confined to the top independent agencies? I believe Mr. Ash in his testimony the first day listed these nine agencies he thought should be checked, reviewed, and studied. Do you feel there should be a limit on the agencies to be investigated or should the Commission be allowed, if it saw fit, to investigate all agencies exercising a regulatory function?

Senator TAFT. I would defer to the committee on that decision, but it does seem to me that the problem is so vast that limiting the targets at least initially might have some practical advantages.

Senator ALLEN. Do you think it ought to be confined to independent agencies or agencies under the executive branch as well?

Senator TAFT. Well, I would like to see both investigated, but perhaps separately or with a different basic approach to them and to the problem. It seems to me we have a special responsibility in the Congress for the independent agencies that have been set up. The Office of Management and Budget, does to a degree, I think, continue to carry out the supervisory function in so far as the executive branches of Government are concerned. Perhaps in dealing with these agencies the question we ought to address ourselves to is whether that job is being done properly by OMB and whether we ought to continue the role OMB has assumed in this area.

Senator ALLEN. What should be the life of these commissions?

Senator TAFT. Well, it is always desirable, I think, to put a specific date on the actions taken by the Commission, and in this case I would think that it would be desirable to put a specific life on it. I would hope that in putting of a specific life on the commission, it

should be a 3- to 5-year period, because I think it is a pretty monumental job we are talking about. This would not prevent the commission from attempting to make some specific recommendations and taking specific action within a far shorter period.

Senator ALLEN. I believe the administration bill has just a 1-year period. Of course, that could be extended by an act of Congress, but it really wouldn't be realistic to start out with a 1-year period.

Senator TAFT. I don't believe it would, no.

Senator ALLEN. I believe Mr. Ash stated his reasons for 1 year was that he would be in a better position to call on top flight individuals to serve if he thought they could get through in a year. But in view of the magnitude of the task, it doesn't seem like there would be any chance at all of finishing in a year's time.

Senator TAFT. I agree.

Senator ALLEN. Thank you very much.

Senator TAFT. Thank you very much.

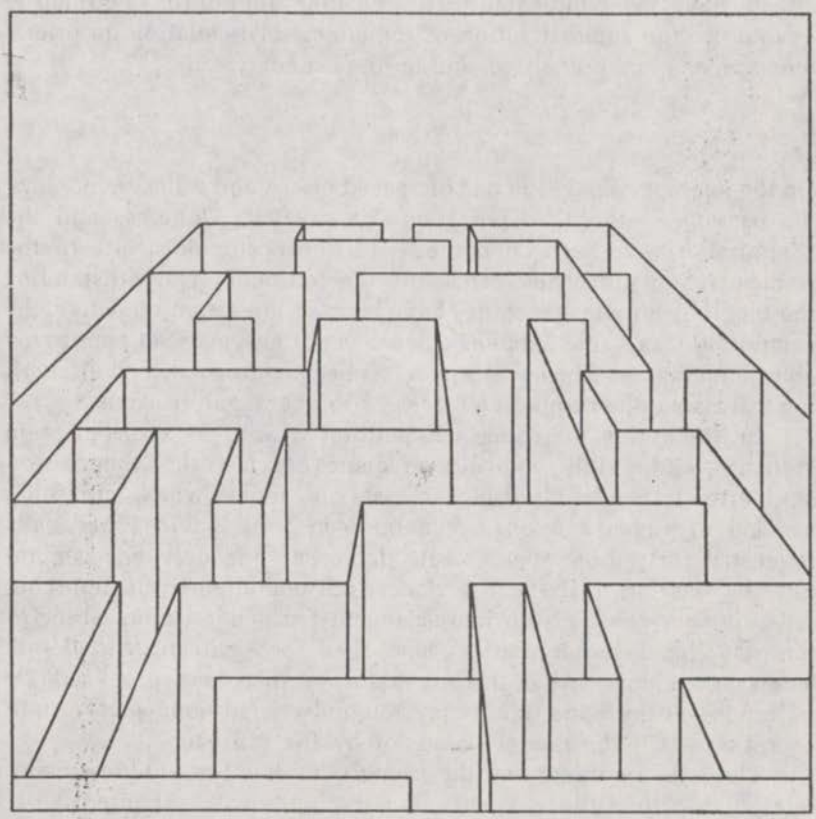
[Additional information supplied by Senator Taft follows:]

EXCERPT FROM

Evaluative Studies

FREIGHT TRANSPORTATION REGULATION

Thomas Gale Moore



CHAPTER V

EFFECTS OF REGULATION

In discussing the history of regulation, and how it works, many of its effects have been indicated. This chapter, therefore, is primarily devoted to the summarization of the effects of regulation on prices, on service, on market share, and on the economy.

Prices

On the average, regulation has increased prices and rates. Ever since the passage of the Transportation Act of 1920, Congress and the commission have been concerned with the economic health of the transportation industries, especially the railroads. Notwithstanding the fact that sufficient earnings have been an important objective, the commission, as Table 5 makes clear, has not automatically approved all rate increases. The commission has been concerned with attempting to balance the competing forces of shippers and of carriers.

In attempting to reduce competition within the transportation industry while still requiring adequate service, the commission inadvertently has imposed higher costs on carriers which, naturally, has led to higher rates. As can be seen from Table 5, railroads requested forty-three specific rate decreases and only one general rate decrease in a six-year period, while simultaneously applying for only four specific rate increases and ten general increases. On the other hand, motor carriers have filed for eighteen general rate increases—almost twice the general rate increases proposed by railroads—at the same time requesting only twenty-one specific rate decreases—half the number filed for by the railroads.

These data suggest that the commission has been holding many rates higher than the railroads find in their own best interest. If

Table 5
ICC RATE CHANGE CASES
(January 1965–January 1970)

Type of Carrier and Case	Rate Changes			% of Total Rate Changes Disapproved
	Approved	Disapproved	Total	
RAIL				
Increased rates				
General	6	4	10	40
Specific	2	2	4	50
Decreased rates				
General	1	—	1	—
Specific	28	15	43	35
Protested rates				
Too high	5	—	5	—
Too low	3	1	4	—
Unjust, unreasonable,[a] or discriminatory	19	17	36	47
MOTOR				
Increased rates				
General	4	14	18	73
Specific	2	1	3	—
Decreased rates				
General	2	—	2	—
Specific	10	11	21	52
Protested rates				
Too high	2	—	2	—
Too low	2	—	2	—
Unjust, unreasonable,[a] or discriminatory	5	6	11	55
WATER				
Decreased rates				
Specific	1	—	1	—
FREIGHT FORWARDERS				
Decreased rates				
General	2	1	3	—
Specific	5	4	9	44

[a] This category includes cases where rates were too high or too low.
Source: *Interstate Commerce Commission Reports*, vols. 223-237.

regulation was reduced or eliminated, lower rates for many products would likely be posted by the rail carriers. As Table 5 shows, most of the rate increase proposals were general across-the-board changes, whereas the rate decreases were normally for specific commodities.

The table also shows that rate decreases were not the overwhelming proportion of the proposed rate changes for motor carriers, as they were for rail carriers, which suggests that there was somewhat less pressure for rate decreases among motor carriers. If the difference between rates and costs is reflected in the pressures for rate cuts, rail rates must be higher relative to expenses than are truck rates. Yet we know from a number of studies that trucking rates, absent regulation, would fall considerably. After the courts held that frozen fruits and vegetables came under the agricultural exemption, rates for these commodities declined sharply—an average decline of 19 percent.[1] The courts also found that fresh dressed poultry and frozen poultry were exempt commodities, with the result that rates on them also fell considerably with the unweighted average rate decline being 33 percent, according to a DOA study.[2] On the basis of another study, using Canadian data, James Sloss concluded that "had regulation not been applied to U.S. common carriers, it may be surmised that their revenues per ton mile would have been reduced by this 6.73 percent."[3] Since regulation tends to be less strict in Canada than in the United States, and since railroads have considerably greater freedom in pricing in Canada than in the United States—a fact which puts downward pressure on truck prices—Sloss's procedure tended to underestimate the impact of regulation on U.S. motor carrier rates. The true inflation in rates due to regulation must lie above 7 percent and could easily be 20 percent or more.

Actually, the Department of Agriculture studies may underestimate the amount that rates on nonagricultural-related products would decline if regulation were abolished. A recent study by Olson demonstrates that class rates of motor carriers are reasonably consistent with a profit maximizing, price discriminating model.[4] Her model predicts that the percentage markup over costs of moving a commodity is a function of the cost of the product per hundredweight. Agricultural commodities, in particular poultry and frozen fruits and vegetables, have a very low cost per hundredweight for production. Hence, under her model, a profit maximizing cartel would establish a relatively low markup over the cost of hauling these commodities while rates for other, more typical products, should be higher relative to costs. In other words, the rate declines after deregulation of 19 percent and 33 percent are for commodities

whose rate markups would be less than average. Therefore, it is quite possible that, on the average, rates are inflated for trucking greater than 20 percent.

Freight Forwarding. Table 5 also presents the frequency of rate increases and rate decreases for freight forwarders. All rate proposals by freight forwarders are for decreases. Downward pressure on rates is evidenced here also. Indirect evidence on the cost/price margin for freight forwarders indicates that it has been growing. The freight forwarding business is mainly one of collecting small shipments, combining them into truckload and carload lots, utilizing a common carrier to move them to a breakbulk point, and finally distributing them to the ultimate consignees. The major cost of freight forwarding is the outlay for common carrier transportation. The other major component arises from the labor of collecting the shipments, sorting and combining them, and then breaking up the load into individual shipments at the final point for distribution. Table 9, Column (a), exhibits the costs of freight forwarding minus the payment to rail carriers, water carriers, and motor carriers—that is, the costs of administration and handling the shipment. Column (b) divides those costs by the amount of tons moved by freight forwarders and presents the outlay per ton. Labor charges have obvi-

Table 9
FREIGHT FORWARDER OPERATING COSTS
(selected years, 1936–1970)

Year	Costs of Administration and Handling		Costs of Administration and Handling Minus Employee Compensations	
	$ millions (a)	Per ton (b)	$ millions (c)	Per ton (d)
1936	18.4	n.a.	—	—
1942	31.6	7.50	13.6	3.22
1950	68.9	16.36	36.7	8.73
1955	98.7	21.02	50.3	10.71
1960	127.2	31.02	69.6	16.98
1965	152.9	38.29	97.7	24.46
1970	206.9	49.19	124.6	29.62

Source: *Transport Economics*, May 1971, and *Freight Forwarder Investigation*, 229 I.C.C. 201.

ously escalated rapidly in recent years. Consequently, Column (c) subtracts the payment to employees from the cost of administration and handling, leaving figures representing mainly profit and a return on fixed assets. Column (d) shows these costs per ton. It can be seen that costs have increased significantly over the period of regulation. In fact, in 1970 the return on investment per ton including profit [Column (d)] was 820 percent greater than the costs in 1942, when freight forwarders were first regulated.

One can only speculate about the reasons for such a rapid increase in freight forwarding payments to and for capital. It may be that regulation has imposed significant costs on freight forwarders as well as other modes of transportation. Or, it may be that the freight forwarding business has changed and become more capital intensive. Such a change could easily be the result of regulation, which tends to encourage a substitution of capital for labor because the larger the rate base the larger total profit the regulated firms can earn.

Column (d) also includes profit to the industry, both cost of capital and any profit stemming from monopoly power of the freight forwarding industry. Since Table 3 indicates that freight forwarding is at least as attractive an industry to enter as the motor carrier industry, judging by the attempted rate of entry, it seems fair to presume that rates are significantly inflated in this industry as well.

Finally, the history of the industry indicates that regulation may have raised rates substantially. The 1938 study of the freight forwarding business by the Interstate Commerce Commission claimed that the industry was growing very rapidly.[5] They reported the number of freight forwarders as twenty in 1936. Six years later the number of firms had more than doubled to fifty-one. Since 1942 the number of such firms has increased only slightly.

In addition, while data on tonnage moved by freight forwarders prior to regulation are nonexistent, it is apparent that the industry was growing rapidly not only in terms of number of firms but also in terms of total volume handled. Since regulation began, total tonnage handled has been stagnant in the face of a growing economy and increased less-than-truckload shipments. One possible hypothesis is that over time rates have gone up sufficiently to keep total freight forwarder shipments constant.

Water Carriers. In 1971 only 6.7 percent of water ton-miles were regulated. Although there is little data on the effect this regulation has had on rates and costs in water carriage, Karl Ruppenthal did estimate the cost of strictly enforcing an ICC ban on mixing exempt

and nonexempt commodities in the same tow.[6] He found that this would raise the cost per ton-mile from 2.30 mills in 1967 to between 3.02 mills and 3.34 mills depending upon certain assumptions of the size of the economic tow handled. This implies that cost would have gone up between 31 percent and 45 percent per ton-mile. While Congress has repealed the ICC's ruling and permitted barge companies to operate under older and more flexible practices, it seems quite likely that regulation has had some impact on costs and rates in water carriage; however, it is not possible to identify the magnitude.

Service

The effect of regulation on service has been indicated in a prior chapter. The reader will recall that regulated motor common carriers often refuse to handle small shipments and shipments to out-of-the-way places, whereas users of exempt carriage continuously lobby to continue the agricultural exemption. They point to the good service under exempt carriage, and justifiably fear that regulation would reduce the quality of service. For example, in a recent Interstate Commerce Commission case the need for exempt carriage was given as follows:

> Gold Kist [a producer and marketing cooperative of over 125 million chickens a year] believes that it would be unable to move its traffic by regulated carriers because of its need for four to eight stops a truckload with exact timed deliveries.[7]

In the same case, Pillsbury Company, another large producer of poultry, testified:

> Few shipments of the involved commodities are truckload in volume and most require approximate six to eight stop-offs for partial unloading. As motor common carriers will not usually provide that many stops, Pillsbury assertedly will turn to private carriage if the involved commodities are . . . 'not exempt.'[8]

Studies by the Department of Agriculture show that the exempt hauler provides many services that his regulated counterpart does not or cannot. Unregulated carriers provide small shipment deliveries, multiple origin and destination duty, and time oriented scheduling of pickup and delivery. A spokesman for the Department of Agriculture testifying before Congress in 1972 said:

> The benefits of the unregulated trucking system are required if we are to maintain the present marketing system for farm

43-362 O - 75 - pt. 2 - 3

> and food products. Food items are not comparable to industrial products. The perishability of the product, even when frozen, limits the duration of storage or warehousing. . . .
>
> The quality of the exempt hauler's equipment is good. Service is the selling point of the exempt hauler. . . .
>
> Because of the effectiveness and efficiency found in motor carriers operating under the exemption, we strongly oppose any curtailment of the agricultural exemption. Increased truck regulation of agricultural commodities will only result in more shipper-owned trucks rather than greater use of common carriers. The higher transportation bill will increase marketing costs and mean less income to the farmer and a larger food bill to the consumer.[9]

Normally the maintenance of above cost rates with rival firms generates non-price competition which often takes the form of better service. While such a tendency could be expected in trucking, the regulatory constraints have apparently been such as to lead, on balance, to a decline in the quality of service to most shippers.

Railroads. The effect of regulation on railroad service has already been amply described above. Regulation requiring uniform rates throughout the year has contributed significantly to the periodic boxcar shortage during peak seasons. Regulation, by providing an inadequate per diem and an inadequate private car allowance, has discouraged investment in new boxcars and led to the hoarding of other companies' freight cars. The net result has been a diminishing fleet of boxcars and continuous complaints by shippers, all resulting from regulatory practices.

It can be argued that, on the positive side, regulation has discouraged and prevented the immediate abandonment by railroads of unprofitable lines. While no railroad should be forced into maintaining an unprofitable line indefinitely, too precipitous an abandonment might create rather costly adjustments for many shippers. On the other hand, if railroads were free to abandon trackage at will, the cost of keeping a service in operation would reside with the communities and shippers involved. If they wish to offer the railroad sufficient subsidy in addition to the rates to cover carrier losses, the service would be offered. If they are not willing to offer such a subsidy, the service is unjustified. Therefore, while the existing system does prevent the railroads from precipitously abandoning service, it also tends to foster cross-subsidization, a practice which forces other shippers to support the uneconomic service. Under

current law the test for an abandonment proposal is one of legality and not one of economic viability.

Regulation, by inhibiting rate flexibility, has discouraged innovation with the result that costs are higher and services poorer than would be true otherwise. For example, in the "Big John" case of 1961, the Southern Railway System proposed a cut in grain rates of 60 percent based on the use of a new aluminum hopper car that cut costs significantly.[10] To be economic, however, the new cars had to generate large increases in traffic. The commission, on a review, set aside the new rate. In August 1965, four years after the original rate filing and following a successful appeal to the Supreme Court, the ICC reversed itself and found the rates legal. Although the Southern Railway was eventually successful—albeit at a significant legal cost—the full exploitation of this innovation was significantly retarded.

Another example of how regulation held up innovation was described by Paul MacAvoy and James Sloss in a study of unit coal trains. They found that ICC regulation held up the introduction of such trains for about four years.[11] ICC control prevented railroads from offering "tailored" trainload rates for specific markets which would have made the introduction of unit trains profitable in 1958.

Rate flexibility is often necessary to innovation with new technology or new techniques. Carriers may be reluctant to experiment if a proposed rate must be permanent. Thus, inhibiting experimentation in rates may delay innovation in hardware.

Market Share

In the decade of the 1960s, the market share of each of the three modes of surface freight transportation—railroads, motor vehicles, and water carriers—remained roughly constant. Prior to this decade, as can be seen from Table 10, the market share of railroads fell nearly 30 percent—from almost 70 percent in 1940 to slightly over half of the intercity ton-miles twenty years later. Motor vehicles, on the other hand, increased their share from slightly over 10 percent to slightly over one-quarter of the market by 1960. Throughout this period water carriers continued to hold 20 percent of the market.

To what extent the changes and market shares have been affected by regulation is uncertain. In spite of the fact that motor vehicles were brought under control by the federal government to protect railroads from their competition, that objective failed. While no good data exist on the percent of intercity ton-miles carried by

Table 10
MARKET SHARES OF INTERCITY NON-PIPELINE FREIGHT, BY TRANSPORTATION MODE
(selected years, 1940–1970)

Year	Railroads		Motor Vehicles		Water	
	Millions of ton-miles	% of total	Millions of ton-miles	% of total	Millions of ton-miles	% of total
1970	768,000	51.6	412,000	27.7	307,000	20.6
1965	721,055	53.7	359,218	26.8	262,421	19.5
1960	594,855	54.1	285,483	25.9	220,253	20.0
1955	654,573	59.8	223,254	20.4	216,508	19.8
1950	628,463	65.1	172,860	17.9	163,344	16.9
1940	411,813	69.6	62,043	10.5	118,057	20.0

Source: ICC *Annual Report*, 1971, and *Statistical Abstract of the United States* (Washington, D. C.: U.S. Bureau of the Census, 1971), Table No. 831.

motor vehicle prior to regulation, after 1935 trucks took an increasing share of the market away from railroads. Whether this was because of, or in spite of, regulation cannot be said with any certainty.

Harbeson, in a recent study of the relative costs of rail and motor carriers, found that for almost all mileage blocks rail carriage had a cost advantage, with this advantage growing with distance. He reported:

> Thus even with very generous allowances for the limitations of the underlying data the magnitude of the economic loss resulting from the misallocation of traffic between rail and for-hire intercity truck transportation must be conceded to be impressive. . . . Even the generally accepted proposition that trucks have an advantage over rail for short hauls, while true for particular segments of traffic under certain conditions, appears not to hold for short haul traffic as a whole.[12]

One of the best studies of transportation competition also found that for all but the shortest hauls trains have an advantage over trucks. This work indicated that 37 percent more revenue ton-miles could be handled by rail than water at the same total cost.[13]

This author has made no independent study of the question of the allocation of traffic among modes, nevertheless a casual reading of rate cases indicates that railroads have more often gone after

water traffic in recent years than truck traffic. Moreover, given that motor carriers were brought under regulation to protect railroads, and assuming that the ICC has wanted to provide impartial regulation among all regulated carriers, it seems unlikely that the commission would have operated in such a way as to shift a significant portion of traffic from rail carriers to motor carriers.

There does appear to be some indication that regulation has deterred the growth of the freight forwarding business. As indicated above, the number of freight forwarders and the amount of the traffic handled grew rapidly prior to regulation, but since regulation the number of freight forwarders has expanded only from fifty-one to sixty-five with almost no change in the total tonnage shipped. In 1942 freight forwarders received 4,219,000 tons of freight from shippers, while in 1970 freight forwarders collected 4,206,000 tons of freight from shippers, down 13,000 tons from the 1942 figure.[14] The freight forwarding business, in other words, has not grown at all in the period of time it has been regulated. In the light of the hostility of the ICC to freight forwarders, as exemplified in the 1938 study and their recommendations to Congress, it is not surprising that freight forwarders' business has remained stagnant.

Cost to the Economy

All impartial observers of transportation regulation have concluded that its costs to the economy are substantial. While no individual has yet been able to identify and quantify all of the costs imposed by regulation on the economy, major elements have been estimated. The most complete set of estimates of cost of regulation to the economy were prepared by this author and are being published elsewhere.[15]

To estimate the waste regulation imposes on common carrier trucking, this author assumed that if regulation were abolished common carrier trucking rates would decline an average of 20 percent. This assumed percentage reduction was based on the rate decrease experienced when frozen fruits and vegetables, and fresh dressed and frozen poultry were deregulated by the courts on the grounds that these products came under the agricultural exemption. Such a decline in rates on the same volume of traffic would lead to a 20 percent decline in revenues. Assuming that at these lower tariffs, all costs including a minimum profit are being covered, this reduction would have to come from profits, from lower costs or both. Since profits could only absorb a small portion of the decrease, cost reductions would have to absorb most of it. Depending on the

method of estimating how much of the cut in revenue could be absorbed by profits, the curtailment in expenses would have to be between $1.4 billion and $1.9 billion. (See Table 11 for detailed figures.)

Regulation, by prohibiting private motor carriers from soliciting backhauls, imposes significant inefficiencies on that segment of the industry. To estimate the loss involved in private trucking, the author assumed that, absent regulation, private trucks would be as successful as common carrier trucks in securing backhauls. Or more specifically, it was assumed that private owners of each type of tractor trailer truck—van, open top vans, platform, and insulated—could achieve the same rate of utilization as common carriers secured with the same type of equipment. Since regulation has generated excess capacity in common carrier operations, this is a conservative assumption. On this basis, assuming that only trucks owned by certain sectors of the economy could secure these backhauls, the author found that the savings would be about $100 million. If all private motor vehicles of the general type were able to do as well as common carriers, the saving would be as high as $1 billion.

Table 11

ESTIMATES OF THE ECONOMIC LOSS FROM ICC REGULATION IN 1968

($ millions)

Type of Loss	Low	Medium	High
Inefficient use of:			
Common carrier trucks	1,400	1,690	1,890
Private trucks	100	200	1,000
Rails	1,700	2,000	2,400
Water carriers	200	300	300+
Subtotal	3,400	4,190	5,590
Loss from traffic carried by:			
Trucks instead of rails	200	1,100	2,900
Water carriers instead of rails	[a]	[a]	[a]
Loss from traffic not carried	175	300	400
Total estimated	3,775	5,590	8,790

[a] Not estimated.

Source: Moore, *The Feasibility of Deregulating Surface Freight Transportation* (Washington, D. C.: Brookings Institution, forthcoming).

This author estimated the loss to rail carriers from regulation as between $1.7 billion and $2.4 billion. The lower figure was based on the assumption that in the absence of regulation, rail carriers would move the same total tonnage as they do with regulation. If, as Harbeson, Meyer, Friedlaender and others claim, the railroads would be able to increase their share of traffic, then the $1.7 billion is an underestimate of the loss due to regulation of rail carriers. The high figure was taken from Professor Friedlaender's estimate of the economic loss due to excess capacity generated by regulation.[16]

The loss regulation imposes on water carriers was only partly identified. Based on Karl Ruppenthal's study of the added expenses inflicted by the ICC's strict interpretation of the law, the cost of regulation varied from $200 to $300 million.[17] However, it should be recognized that the law has been changed. At least this portion of the cost is no longer being borne by society.

While this author remains unconvinced that the amount of traffic that would shift from motor carriers to rails is substantial, other authors have clearly predicted such a shift. Morton J. Peck estimated that rails could attract no more than 10 percent of truck revenue under deregulation.[18] On this basis the loss from the misallocation of traffic between modes would be $200 million. Harbeson, on the other hand, found the numbers to be much higher, ranging between $1.1 billion and $2.9 billion.[19] No data are available to estimate the loss due to the carriage by water carriers of traffic that would be more economical to move by rails.

Traditionally, the loss from monopoly pricing has been estimated by simply looking at the traffic that would have moved had pricing been set at competitive levels. This economic waste is small compared to the other elements. This author has estimated that it ranges between $175 million to $400 million with the higher number being Ann Friedlaender's estimate.[20]

As can be seen from Table 11, the total of these losses is substantial. It falls somewhere between nearly $4 billion and almost $9 billion. Yet not all elements of the loss from regulation are in fact clearly identified. With many of the figures chosen on the basis of conservative assumptions, it would not be unreasonable to expect that elimination of regulation would result in a saving to the economy, in terms of resources, as high as $10 billion a year.

NOTES TO CHAPTER V

[1] U.S. Department of Agriculture, *Interstate Trucking*, report no. 316.

[2] U.S. Department of Agriculture, *Interstate Trucking of Fresh and Frozen Poultry under Agricultural Exemption*, Marketing Research Report No. 224, 1958.

[3] James Sloss, "Regulation of Motor Freight Transportation: A Quantitative Evaluation of Policy," *The Bell Journal of Economics and Management Science*, Autumn 1970, p. 351.

[4] Josephine E. Olson, "Price Discrimination by Regulated Motor Carriers," *American Economic Review*, June 1972.

[5] *Freight Forwarder Investigation*, 229 I.C.C. 201 (1938).

[6] Karl M. Ruppenthal, "Some Economic Aspects of the Barge Line Mixing Rule," *Transportation Journal*, vol. 9, no. 3 (Spring 1970), pp. 5-43.

[7] 113 M.C.C. 225, pp. 226-227.

[8] Ibid., p. 227.

[9] *House Transportation Hearings*, pp. 1365-1366.

[10] 318 I.C.C. 641; 321 I.C.C. 582; 325 I.C.C. 752.

[11] Paul W. MacAvoy and James Sloss, *Regulation of Transport Innovation* (New York: Random House, 1967).

[12] Robert W. Harbeson, "Toward Better Resource Allocation in Transport," *The Journal of Law & Economics*, October 1969, p. 334.

[13] John A. Meyer, Morton J. Peck, John Stenason, and Charles Zwick, *The Economics of Competition in the Transportation Industries* (Cambridge, Massachusetts: Harvard University Press, 1960), p. 165.

[14] Interstate Commerce Commission, *Transport Economics*, monthly comment by the Bureau of Economics, May 1971.

[15] Moore, "Deregulating Surface Freight Transportation."

[16] Friedlaender, "Social Cost of Regulating Railroads," pp. 226-234.

[17] Ruppenthal, *Barge Line Mixing Rule*, pp. 5-43.

[18] Morton J. Peck, "Competitive Policy for Transportation?" in *Perspectives on Antitrust Policy*, ed. Almarin Phillips (Princeton: Princeton University Press, 1965), pp. 244-272.

[19] Harbeson, "Resource Allocation in Transport," p. 334.

[20] Ann F. Friedlaender, *The Dilemma of Freight Transport Regulation* (Washington, D. C.: The Brookings Institution, 1969), p. 65.

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PROBLEMS OF THE CAB AND THE INDEPENDENT REGULATORY COMMISSIONS*

LOUIS J. HECTOR†

WASHINGTON, D.C.
10 September 1959

THE PRESIDENT
The White House
Washington, D.C.

DEAR MR. PRESIDENT:

As I stated in my letter of resignation to you, my experience on the Civil Aeronautics Board has convinced me that an independent regulatory commission is not competent in these days to regulate a vital national industry in the public interest.

This is not a judgment of the character or ability of the men who serve on the commissions today. Not with the Founding Fathers as members of its board do I think the CAB as now organized could fulfill its obligations to the American people.

In our time, civil aviation has become so necessary to the economy and the defense of a nation that we must make certain it is not handicapped in the United States by a regulatory system which does not work.

We have seen in recent years that an independent commission is not competent to regulate the safety of aviation; and we have therefore placed this grave responsibility in a single Executive agency—the FAA. I believe that a similar change in the machinery for regulating the economics of aviation is now also required, and in the hope that my experience as a member of the CAB may help in some way the advance of civil aviation, I submit this memorandum with recommendations to you.

The CAB is a creature imprisoned by its own structure and procedures. It is unable to form clear policy. It is unable to make sound and comprehensive plans. It is unable to administer its affairs with vigor and dispatch.

As a lawyer, I have been disturbed at the inability of an administrative agency, such as the CAB, to give a true judicial hearing to parties who come before it in litigated cases. The agencies are long on judicial form and short on judicial substance.

The policies and plans of the CAB are not coordinated with those of other agencies of our government; they are not responsive to the general policies of the President. The consequence is that our country has today no effective national policy on transportation.

The members of the CAB, like those of other regulatory commissions, have duties and responsibilities of policy-making, adjudication, administration

*Originally prepared as a Memorandum to President Eisenhower, September 10, 1959, on the occasion of the author's resignation from the Civil Aeronautics Board.

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and investigation which are by their very nature incompatible. In large part, this causes the personnel troubles so characteristic of the agencies.

The problems of the CAB are not transitory or superficial. They are basic. In my opinion, they are born of the very concept of an independent administrative commission.

In view of what seem to be these organic faults, I would recommend the following:

1. Transfer policy-making, planning and administration from the CAB to an executive agency, such as the Department of Commerce, the Federal Aviation Agency, or a new Department of Transportation.

2. Transfer the judicial and appellate duties of the CAB to a true administrative court.

3. Transfer the duties of investigation and prosecution to an executive agency such as the Department of Justice.

Respectfully,

LOUIS J. HECTOR

PLANNING AND ADMINISTRATION

The Organization and Procedures of the Civil Aeronautics Board Preclude Timely and Effective Policymaking, Planning, and Administration

THE most important responsibility of an economic regulatory agency such as the CAB is the formulation of broad plans and general policies to ensure that the regulated segment of the economy operates for the public benefit as defined by Congress.[1] This is more important than the decision of specific litigated cases. Planning and policymaking, however, when entrusted to an independent commission, are often accomplished with appalling inefficiency.

A specific case will best illustrate this—the *Seven States Area Investigation*.[2] This was the machinery through which the CAB formulated a plan of local air service for the states of North Dakota, South Dakota, Nebraska, Iowa, Illinois, Wisconsin, and Minnesota. It was an important and an urgent case, since the long-haul trunklines were not rendering adequate local air service, and the rapid decrease of passenger train service in the area had produced a serious transportation crisis for many smaller cities and towns.

The Board ordered the formulation of a plan of local air service for this area on December 14, 1955.[3] It took three years to complete. It was a big job, but it was not a highly complicated one, nor were there a great many vigorously contested issues. The job took so long almost entirely because of the inefficient procedures by which it was handled.

A well-run Government agency or military command or business would handle a project like this by first blocking out the boundaries of the problem, making a few broad policy decisions at the top level, and then designating a

1. The congressional Declaration of Policy for the CAB is set forth in APPENDIX A, *infra* at 964.

2. No. 7475, CAB, Dec. 8, 1958.

3. Order No. E-9847, CAB, Dec. 14, 1955.

project director or chief of staff in charge of planning. The director would assemble the necessary personnel, divide up the research, set up a system of supervision, provide for necessary coordination, and within a few months have all the basic data in hand. This would be processed and systematized by a planning group which would pull together the outlines of a program in conformity with general policies already established. If more facts were needed, they would be secured. As problems arose they would go to the project director who would refer on to the top policy group any new major policy issues. As the job neared completion, the top policy group would become familiar with much of the detail. By the time the plan was finished, the staff, the project director and the policy makers would all be in substantial agreement, and final approval would follow swiftly. A job like the *Seven States* plan should take about a year.

The CAB did it differently. It designated a hearing examiner and defined the geographical scope of the case, but gave him no policy direction whatever. Instead, it told the examiner "to review the local air service pattern in the area covered by the States involved and develop a sound pattern of service to meet the needs of the entire area."[4]

For two years there was no further communication between the Board and the examiner. If he had questions of policy, he could not ask for guidance from his superiors—the members of the Board; if they had any views on policy as they saw the general local service picture developing, they could not communicate them to their subordinate—the examiner.

For the first two years the examiner worked at the job all alone. There was no machinery for him to seek out actively the information which he thought he needed; instead, he just sat and took what the interested towns and airlines brought him. One hundred ninety-four witnesses testified before him, and they filed over a thousand exhibits. The examiner personally read or listened to every word of this. By the time he sat down to draw up his plan for local service almost a year had passed; he had before him a pile of pleadings, transcripts, exhibits, and briefs five and a half feet high. It took him a year and two months to work through all this material and come up with a plan. He could not talk to anyone, or ask anyone for help or guidance. Even if he found he needed additional facts, he had to do without them. He had no assistance of any kind except a secretary.

Two years after the Board started the proceedings, on December 13, 1957, the examiner announced his plan in a document of 658 pages.[5] It was a good job considering the handicaps built into the system under which it was prepared. Few of the parties were completely satisfied, however, and most of the parties petitioned the Board to change the plan in one detail or another. They filed an eight-inch pile of briefs and argued orally to the entire five-man Board for four solid days—a total of twenty-one hours and thirty-five minutes.

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4. *Ibid.* These instructions were repeated in Order No. E-10100, CAB, March 20, 1956.
5. Initial Decision, No. 7454, CAB, 1957.

When the Board sat down to talk about the plan for the first time—two years and four months after the job had started—they quickly decided that the examiner had been restrictive in his proposals and that a considerably larger number of towns than he had recommended deserved local air service. So they had to do the plan all over.

The Board might have sent the plan back to the examiner to redo, but this would probably have taken another six months, and after that there would have been more briefs and another four-day oral argument. The five presidentially appointed members and their personal assistants therefore sat down together and in meetings totalling over thirty hours devised a new plan. In this process, they could not utilize the services of the examiner, nor any of the parties, nor even of the Board's own staff of experts. They did not have time, of course, to review the five and one-half feet of testimony and exhibits in the case. They worked mainly from briefs and from their memory of the long oral argument. They were not able to seek any additional facts even though they might be thought necessary to a sound decision. Finally, after seven months' work at the Board level, the plan appeared in December 1958, to take effect the following February [6]—well over three years from the day the job started.

A more inefficient, ineffective way to accomplish a major planning job would be difficult to conceive.

I believe that such planning jobs as determining the type of subsidized local air service required in the public interest and selecting the cities to be served should be accomplished within the executive branch as a normal governmental planning function. The selection of carriers to perform this service is the only issue which requires true judicial procedure in this type of case, and I believe that such issues, carefully delineated, can be handled quickly and effectively by a true administrative court not burdened with other duties.

The CAB and other regulatory agencies develop many of their basic plans and policies in the same manner as in the *Seven States* case. For example, the CAB *Latin Am. Air Serv. Case*,[7] whereby a plan for air service by United States carriers to Central and South America was established, took almost five years—from 1943 to 1948. Three different plans were formulated—one by the examiner, one by the Board, and one by the White House staff, since the President must approve international decisions—without any one of these three groups consulting the other.

If a private business tried to conduct its affairs this way, it would go broke. If the federal government tried to formulate its foreign policy or its military strategy this way, the United States would never have become a great nation.

Railroad regulatory policy has been made this way for decades, and it is

6. Order No. E-13254, CAB, Dec. 8, 1958.

7. Pan Am.-Grace Airways Inc., 9 C.A.B. 325 (1948); Latin Am. Air Serv., 8 C.A.B. 65 (1947); Additional Serv. Latin America, 6 C.A.B. 857 (1946). For discussion of these cases see COMM. ON PUBLIC ADMINISTRATION CASES, THE LATIN AMERICAN PROCEEDING (1949).

little wonder that the railroads today seem to be in one more of their periodic rounds of trouble. I fear that our civil aviation industry will in time become similarly hobbled by regulation unless we stop formulating plans and policies for Government control of business by procedures fashioned after legal proceedings which were never designed for this purpose.

Until the end of 1958, air safety policy was made in generally this same fashion. Following the Curtis report [8] and a series of midair collisions in 1957 and 1958, however, both the Executive and Congress agreed that air safety policy, planning, and administration could not wait on endless debate and formal procedures. These functions were therefore transferred by Congress to an executive agency, the Federal Aviation Agency.[9] I think it is now clear that the policy, planning, and administration of important economic regulatory matters must likewise be handled by executive agencies. Indeed, in some economic matters, such as the encouragement of air cargo, where the Board has achieved almost nothing in a decade, the FAA has already proved the value of an executive agency by evolving in a few months an imaginative and far-reaching program.

Because the procedures for making policies and plans in an independent commission are so inefficient, they are often not formulated in time and in some cases not at all. Thus the development of a reasonably clear policy for the nonscheduled carriers took from the end of World War II until the decision in the *Large Irregular Air Carrier Investigation* in early 1959.[10] In the twenty years since its creation, the CAB has still not finished the formulation of a policy on the general level of passenger fares.

Our international civil aviation policy has needed a basic reappraisal for some time, as United States carriers are subjected to ever-increasing foreign competition and carry a steadily smaller percentage of international traffic. Congress, the carriers, and the executive branch have urged the necessity of such a basic policy review. But nothing has been done. We are still proceeding on the basis of a set of principles derived generally from an agreement made with the British at Bermuda in 1946, which has become confused and unrealistic in recent years. Not only has the CAB not taken a broad fresh look at international policy, it has refused assistance from others. In June 1958, the State Department offered to finance a study by independent consultants.[11] The CAB turned down the offer on the grounds that the Board could do the job better.[12] The study was not even started until more than a year later. This is not a criticism of the Board's excellent international staff, but rather one further example of how the whole structure of the agency discourages general planning.

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8. U.S. PRESIDENT'S SPECIAL ASSISTANT, FINAL REPORT—AVIATION FACILITIES PLANNING (1957).
9. Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. § 1301 (1958).
10. No. 5132, CAB, Jan. 28, 1959 (Order No. E-13436).
11. Letter From Asst. Sec'y Mann to CAB, June 14, 1958.
12. Letter From CAB to Asst. Sec'y Mann, July 1, 1958.

One of the important reasons why major policy and planning matters are handled inefficiently by the CAB and other regulatory agencies is that so much of the time of agency members is taken up with minor details.

The First Hoover Commission Task Force concluded that "the members of many commissions are too preoccupied with minor matters to be able to devote the necessary time and thought to the more basic issues of regulation."[13] This report recommended positive steps to cure this. "The Commissions should devote more attention," it stated, "to developing standards and objectives and to planning the regulatory program." It urged that all administrative and supervisory duties be given to the chairman and an executive officer and that less important work should be delegated to the staff in order to free the time of members for more basic matters.[14]

Following this suggestion, a formal transfer of "the executive and administrative functions of the Board" to the Chairman was accomplished by Reorganization Plan No. 13 of 1950. But in the long run this really changed nothing, at least so far as the CAB is concerned. The theory of the reorganization was that the Chairman, as executive head of the agency, would direct the work of the agency in conformity with "general policies of the Board and by such regulatory decisions, findings, and determinations as the Board may by law be authorized to make."[15] As a matter of practice, however, the Chairman performs only the most routine ministerial duties without Board consultation. For example, all letters of any substance from the Board are cleared with all five members; all statements or intergovernmental memoranda are cleared. In fact, any document which leaves the Board undergoes not only substantive but also stylistic clearance by the whole membership. The mem-

13. U.S. COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT app. N, at ix (1949) [hereinafter cited as TASK FORCE REPORT]. See also Subcomm. on Surface Transportation, *Report*, S. REP. No. 1647, 85th Cong., 2d Sess. 12 (1958):

> Over a period of many years regulatory commissions, like individuals dealing with controversial issues, tend to form habits of belaboring relatively unimportant details involving form rather than substance, while procrastinating on coming to grips with important policy matters that involve serious matters of public interest.

14. TASK FORCE REPORT ix. This was not the first time such a recommendation was made. The Attorney General's Committee had found exactly the same problem eight years before and had proposed the same solution:

> Delegation must begin with internal management. The Committee has been impressed by the frequent reluctance of high officers, charged with serious policy-making functions, to relinquish control over the most picayune phases of personnel and business management .... Intelligent conservation of an agency's resources demands the sloughing off of many of these routine tasks by assignment of the work of internal management to an executive officer.

U.S. Attorney General's Comm. on Administrative Procedure, *Final Report—Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 21 (1941) [hereinafter cited as *Ad. Proc. in Gov't Agencies*].

15. Reorganization Plan No. 13 of 1950, 64 Stat. 1266, 5 U.S.C. § 1332z-15, No. 13, § 1(b)(*l*) (1958).

bers spend hours in full Board meetings debating the phrasing or even the "tone" of letters.

Theoretically, the Board should agree by majority vote on a general policy and then leave it to the Chairman and the staff to draft documents, fill in details and apply the policy to routine cases. I am told that it has never worked that way. Certainly, it did not during my service on the Board. The CAB and apparently other regulatory agencies still spend many hours on routine licenses, exemptions, permits, approvals, waivers, interventions, and even minor personnel matters. Such waste is inevitable, I believe, in a large agency with extensive policymaking, planning and administrative functions headed up by a multimember bipartisan board or commission, where each member is appointed for a fixed term and has equal authority over policy.

Why do not members of the CAB and other agencies delegate all responsibilities except adjudication and basic policymaking to the Chairman as the reorganization plan clearly intended? The answer is this: the Chairman is a member as well, and he inevitably has strong personal views on matters on which the agency is sharply divided.

Suppose the Chairman is in the minority. The majority fear that he will not push their decision as vigorously and as firmly as they would like. Even when he is in the majority, the minority members want to be certain that the Chairman carries through only to the extent of the Board decision and no further. S[illegible] conflicts pose little difficulty on the usual multimember court, whose d[illegible]ions are more or less self-executing. But in carrying out a large administrative job where policy affects every detailed action, it is very hard for a man to be at the same time an active participating member of a sharply divided multimember commission, and at the same time a neutral executive director acting always on behalf of the majority.

The same is true of personnel actions. A Chairman naturally tends to appoint and promote staff personnel whose work methods he approves and whose policy recommendations he deems sound. But other members may feel differently about the work of specific staff members. This is why all Board members continue to concern themselves with personnel. They must rely almost entirely on the staff for factual data, for policy recommendations, and for legal advice. If a Chairman were given free rein, the staff would inevitably come to be a reflection of his own policies and work methods. That is why the agencies do not give him a free rein, despite the reorganization plan.

A specific example may illustrate the inefficiency of multimember agency handling of administrative and executive decisions. The CAB recently decided to investigate an aviation trade organization which conducts numerous activities that would violate the antitrust laws were they not exempted by Board action. The organization had never before been investigated by the Board, and the decision was made that the Board has a continuing duty to see whether such substantial exemptions from the antitrust laws are in the public interest.

The order of investigation was not issued without long Board discussion. Some members felt that there was really very little necessity for an investiga-

tion and that in any event there should be no public order because it might reflect adversely on the organization. Others felt that the Board's duty was clear and that no discredit would be caused by a public order. Phrases were changed in the order proposed by the staff, sentences omitted, footnotes altered, and as a final concession to the members who did not see any necessity for an order, the word "Investigation" was changed to "Inspection and Review."

In this, as in all investigations, there have been many disagreements with the trade association over the scope of inquiry, access to documents, privileged status of documents, etc. Almost every point thus raised has been brought to the full Board for review. Each has been the subject of lengthy discussion at Board meetings.

Up to the present, the Board has spent over twelve hours in full Board meetings on the procedural details of this investigation. This means twelve hours of the time of five presidentially appointed officials whose total annual pay is 100,000 dollars and of a staff whose pay is at least equal.

It may be asked why the Chairman, or the executive director, or even a lesser staff officer, does not make the purely procedural decisions. The answer is that they cannot, because the Board is so divided in opinion that it is impossible to tell on any specific point just what Board policy might be.

At each step of the investigation, the battle between those who strongly support it and those who are lukewarm is fought out all over again. The members are not to be criticized for this. They have strong convictions on the matter, and they continue to hope that they can persuade their fellow members. There is no top executive who can bring discussion to a close, announce a policy and then carry it out.

Here, I neither support nor oppose the investigation in question—that is a matter of reasonable differing opinions. What is clear is that no agency can ever conduct a satisfactory investigation if every procedural step is debated by five men. If the Department of Justice or the FBI tried to run an investigation this way they would never get their work done. And no board or commission can ever make basic policy or devote themselves to serious adjudicatory matters if the major part of their time is taken up with administrative detail of this type.

A survey of the regulatory agencies will disclose today, I believe, the same inefficient and ineffective preoccupation with detail that has been criticized in past studies of the agencies. This is inevitable so long as we try to make plans and administer positive programs through agencies where five, seven, or eleven men are in practice all equally the boss.[16]

16. The Task Force of the First Hoover Commission saw this point clearly:

> The common experience is that groups are better fitted for judgment and decision than for the execution of large-scale operations.
>
> The very qualities which make these agencies valuable for regulation, especially group deliberation and discussion, make them unsuited for executive and operating activities. The work of day-to-day regulation and decision and the related super-

ADJUDICATION

Present CAB Procedures and Practices in Adjudicated Cases Do Not Give the Parties the Full Judicial Hearing to Which They Are Entitled

Not only the parties to litigated cases before the Board, but also the public in whose behalf regulation is undertaken, have the right to expect, as a part of basic judicial process:

1. That adjudicated cases will be decided on the basis of general principles and standards known to the parties and applicable to all cases, and

2. That the persons who decide adjudicated cases will do so on the basis of the voluminous testimony and arguments advanced by the parties and this alone, and that they will personally state the reasons for their decision.

Neither of these reasonable expectations is satisfied by present Board procedures and practices.

I. The historic lack of standards in CAB proceedings was pointed out in 1949 by the Hoover Commission Task Force: "In granting new route cases, for instance, the Civil Aeronautics Board provides little real help in understanding its governing principles; its opinions suggest that the Board has failed to face squarely the need for an underlying program."[17] The Board's "handling of the domestic route pattern . . . has proceeded largely on an *ad hoc* basis."[18]

The example of the *Seven States* case discussed above shows how very inefficient it is to set up and try a case with no general policies or standards from the Board.

The lack of standards is not only inefficient, however. Equally serious is the fact that it is unfair to the parties, who have to try their case without knowing the policies to be applied.

Take the matter of competitive air service. Within the last year the Board has held that two-carrier competitive service to the southeast is needed from St. Louis, Louisville, Indianapolis, Cincinnati, Detroit, Cleveland, and Pittsburgh, but is not needed from Minneapolis, Milwaukee or Buffalo, although the traffic figures and the general characteristics of these markets are very similar.[19] As the Hoover Commission Task Force commented, "Without ac-

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vision of staff fully occupies most of the commissions and overtaxes the capacity of some of them . . . .

Ordinarily, we believe, such operating functions should be placed in the regular departments where they may be carried out under direct executive supervision and responsibility. This is more consistent with the structure of our Government and with the position of the President as Chief Executive.

TASK FORCE REPORT 30.

17. *Id.* at 40.

18. *Id.* at 41-42.

19. See Great Lakes-Southeast Serv. Case, No. 2396, CAB, Sept. 30, 1958 (Order No. E-13024); *id.*, May 7, 1959 (Order No. E-13835); St. Louis-Southeast Serv. Case, No. 7735, CAB, Sept. 30, 1958 (Order No. E-13026); Chicago-Milwaukee-Twin Cities Case, No. 3207, CAB, May 19, 1959 (Order No. E-13890).

cepted standards, . . . the agency often appears to act in an unfair or arbitrary manner."[20]

Similarly inconsistent have been Board decisions selecting trunk carriers for new route awards. In the *New York-Chicago Serv. Case* in 1955,[21] for instance, Capital and Northwest were awarded significant new routes for two reasons: (1) they were small carriers which needed strengthening, and (2) they could give the same or better service to the public as other larger applicant carriers. Colonial, although a small carrier that needed strengthening also, was not given any of the new routes because it was doubtful whether it could render as good service as other carriers. Later that same year, in the *Denver Serv. Case*,[22] Continental and Western were given significant new route grants in the West because they were small regional carriers which needed strengthening and because they could presumably give good service to that region, although service comparisons were not emphasized as much as in the previous case.

Later, in the *Southwest-Northeast Serv. Case*,[23] Capital, Braniff, and Delta were all granted new routes on the sole ground that it was in the general public interest that they be strengthened, although it was clear in this case that on certain routes they could not offer the same public benefits as the larger trunk carriers which had been recommended by the examiner. The Board made it clear that the strengthening of weaker carriers was a positive goal to be pursued even when the service achieved might not be as good as that provided by bigger carriers.[24]

Then in the *New York-Florida Serv. Case* in 1956,[25] a majority of the Board overrode the hearing examiner's recommendation of Delta and gave a new New York-Miami route to Northeast on the grounds of strengthening the weakest trunk carrier, although there was no real question but that Delta could do a better job on the route.

By this time it seemed clear that a definite Board policy had been established: strengthening of weaker trunks is the basic criterion to be applied in the selection of a carrier for a new route, and it overrides the greater public service potential of larger trunk carriers. Examiners were criticized in Board opinions for failing to follow this policy fully in their recommended decisions.[26] After the *New York-Florida Case*, an examiner had no alternative in a route case but to strengthen the weakest carrier.

It was on this basis that the examiners in the *Great Lakes-Southeast Serv.*

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20. TASK FORCE REPORT 40.
21. No. 986, CAB, Sept. 1, 1955 (Order No. E-9537).
22. No. 1841, CAB, Nov. 14, 1955 (Order No. E-9735).
23. No. 2355, CAB, Nov. 21, 1955 (Order No. E-9758).
24. *Id.* at 2A-8.
25. No. 3051, CAB, Sept. 28, 1956 (Order No. E-10645).
26. See Southwest-Northeast Serv. Case, No. 2355, Nov. 21, 1955, at 2A-3 (Order No. E-9758).

Case[27] and the *St. Louis-Southeast Serv. Case*[28] the following year awarded National Airlines new routes from St. Louis and from Chicago to Florida. Thereupon, the Board in a sudden reversal of policy gave the St. Louis route to TWA and the Chicago route to Northwest because these carriers could give better service to the public.[29] Some months later a new Florida-Twin Cities route was given to Eastern, over the claims of Delta, Capital and other smaller carriers, on the same grounds.[30]

There is no way to explain the outcome of these cases on the basis of consistent principles. The Board just changed its mind on policy from one case to another, and this in a field where rights worth many millions of dollars were at stake. Although I participated in the latter cases and have strong personal views on the policy issues involved, I do not argue here that one policy is better or worse than another. The point is rather that basic policy was changed by the Board with no advance notice, no opportunity for argument by the parties on a proposed change in policy, and no opportunity for the parties to present new evidence in the light of the new policies. Carriers who had prepared and argued their cases on the basis of a policy applied consistently in route cases for three years, suddenly found that the rules had been changed in the middle of the game.

So far as I know, this violates no applicable statute or regulation, but it does violate any normal idea of fair play. In my belief, true judicial process requires that the policies and criteria used to decide a case be made known in advance. If the policies are changed during a case, it should be tried over and the parties given a chance to introduce new evidence and argument in the light of the new policy.

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27. Initial Decision, No. 2396, CAB, 1957.

28. Initial Decision, No. 7735, CAB, 1957.

29. Great Lakes-Southeast Serv. Case, No. 2396, Sept. 30, 1958 (Order No. E-13024); St. Louis-Southeast Serv. Case, No. 7735, Sept. 30, 1958 (Order No. E-13026). In the *St. Louis-Southeast Serv. Case*, the Board said:

> . . . It is true that the need of a smaller carrier for route strengthening has been, and should be, an important factor to be considered by us in selecting a carrier to provide a needed service. But we have never regarded the strengthening factor as necessarily overriding the needs of the traveling public, any more than we have found the absence of such a need for strengthening as precluding an applicant from being selected. In determining the public interest no one factor is automatically controlling. All of the criteria applicable to selection of carrier must be considered and weighed in the light of the circumstances of each given case before we can reach a decision as to the choice of carrier.

Order No. E-13026, at 7, 1A Av. L. Rep. ¶ 22210.02, at 14216.

This is a typical statement of regulatory agency policy. It is little wonder that a long-time practitioner before the Board recently referred to "the grubby, uninspired, and sometimes incoherent 'opinions' of the agencies." Westwood, *The Davis Treatise*, 43 Minn. L. Rev. 608 (1959).

30. Chicago-Milwaukee-Twin Cities Case, No. 3207, May 19, 1959 (Order No. E-13890).

Actually the Board has almost no general policies whatever. Only a few minor matters have been covered by published general policy statements. In almost all fields of economic regulation, the Board proceeds on a pure case-by-case basis with policies changing suddenly, without notice, and often with no explanation or any indication that the Board knows it has changed policy.

The Board is not alone in this. It seems to be characteristic of the economic regulatory agencies.[31]

There are a number of reasons, in addition to those outlined under "Planning and Administration," for the failure of the regulatory agencies to develop general policies.

In the first place, it is harder work to devise clear, workable general policies than it is to make specific decisions in individual cases. There is a persistent desire on the part of the agencies for what they like to call "flexibility"; they say they must be free to change their policies as circumstances change. This is, of course, true of all government. No one can complain if an agency, after careful deliberation and hearing, changes a basic policy. What is complained of is that the agencies proceed with no clear statement of policy at all or on the basis of policies which seem to change without reason from one case to the next.

Another important reason for the failure of the agencies to enunciate principles is the fact that commissioners in most cases do not personally give the reasons for their votes and hence have no need to think in general policy terms. As explained below, in the CAB and other regulatory agencies, the members of the agency merely vote on the outcome of a case and the opinion justifying the outcome is written by a professional staff. Members of these opinion writing staffs explain that they consciously avoid statements of general principle as much as possible in the opinions they write, because they must be able to

31. Apparently the situation has not changed much over the years. The Attorney General's Committee in 1941 had this to say about the FCC:

> The Federal Communications Commission is especially interesting with respect to adherence to precedents. It is believed by some that the Communications Commission goes further than other agencies of comparable importance in refusing to give weight to its own prior decisions. This view seems to be supported to some extent by the Commission's reluctance to cite in its formal opinions any of its own earlier decisions . . . . Particularly in the broadcast field it is generally felt that there are seldom two cases where the facts are substantially alike and that any attempted general principles will necessarily have to give way in most cases to special circumstances.

Ad. Proc. in Gov't Agencies 469.

In 1958, the Chairman of the FCC said on the same subject: "You can't have any reliance. There is nothing, especially in the FCC, that you can really get hold of with a firm grip and say that you can rely on." 11 AD. L. BULL. 137 (1958).

The Board itself said in a recent opinion: "We waived [the *Sherman* doctrine] in this instance because of unusual circumstances which evolved in this proceeding. This, however, does not indicate that we would take the same action if a similar situation should arise in the future." Transocean-Atlas Case, No. 8943, CAB, Aug. 21, 1959 (Order No. E-14370).

write an opinion justifying an opposite conclusion the next day, and hence must not be hampered by prior statements of general principles.

Many policies actually followed by the regulatory agencies in practice probably could not stand the light of clear public expression. Suppose the CAB, for instance, were to enunciate the following policies:

1. New routes will always be given to existing trunk carriers so as to strengthen them, and no new carrier will ever be given a route.

2. Even though an air carrier could cut tariffs or improve its service and still make a profit thereby, this will not be permitted if it would hurt the business of other certificated carriers.

3. Even though a large carrier could do a better job for the public on a new route, the route will be awarded to a small carrier if possible in order to strengthen that private business enterprise.

Suppose the Interstate Commerce Commission were to announce publicly that even though trucks can carry a certain class of freight more cheaply than the railroads, the trucks will not be permitted to carry it at lower rates if this type of freight has been historically carried by the railroads and the railroads would be significantly injured by loss of the traffic. If any of these policies were announced publicly, there would be an immediate popular outcry, and probably congressional and Executive inquiry. They might well be changed by l[illegible]ation. Yet it is clear to anyone who reads the decisions of these agencies that these are basic policies which have apparently guided many decisions over the years.

The failure to make clear policy is thus not only unfair to individual litigants. Far more pernicious is the immunity from public, congressional, and Executive criticism and control which this failure entails. It is almost impossible to examine and weigh the policies of the agencies because it is almost impossible to find out what they are. They must be deduced from a string of disconnected, particular decisions often conflicting and seldom articulate. This seems to be the reason why so many congressional investigations into the work of the agencies concentrate on the wisdom of specific actions or on procedural or ethical problems rather than on fundamental substantive policies and plans.

A good example of this is the work of the Subcommittee on Legislative Oversight of the House Commerce Committee. Created in early 1957, the prime purpose of the subcommittee as expressed in the House resolution[32] and in statements on the floor was to examine the substantive policies and plans of the agencies "to see whether or not the law as we intended it is being carried out . . . ."[33] The subcommittee, with ample appropriations and staff, has been hard at work on the agencies for over two years now, but most of its studies have concerned procedural and ethical problems. The reason, I believe, is that such matters are readily susceptible to investigation, study and

32. H.R. Res. 99, 85th Cong., 1st Sess. (1957).

33. 103 CONG. REC. 1556 (1957) (remarks of Speaker Rayburn on the floor of the House).

appraisal, whereas the substantive regulatory policy of the independent commissions is so diffuse, indeed so nonexistent in many areas, that it is all but impossible to pin it down long enough to study or appraise.

This result of the failure of policymaking in the agencies has received much less attention than the effect on individual litigants. In terms of the general public interest, however, the inability of Congress to control the policies of the agencies it has created and the inability of the Executive to coordinate their policies, all because of the failure of the agencies to make any explicit, consistent policy, may well be the most urgent reason for a substantial change in the machinery for government control of business.

II. The failure of the members of regulatory commissions to decide cases solely on the basis of firsthand acquaintance with the record and their failure to explain personally the reasons for their decisions mean that the so-called "quasi-judicial" processes of the agencies bear little relation to what is normally thought of as judicial process.

An indispensable requirement of judicial process is that decisions be made on the basis of the facts in the record. The decision and knowledge of the record must go together.

In our court systems, trial courts make determinations of fact on the basis of personal familiarity with the record. Appellate procedures are confined to specific questions of law which the appellate court can decide on the basis of personal familiarity with those portions of the record which bear on the questions to be decided. If a change is made in the lower court's view of the law, the case is usually sent back to the lower court so that the corrected legal principles may be applied to the facts by one who is familiar with the facts.

In adjudicated cases before the CAB and other regulatory agencies, decisions are made on fact, policy, and legal questions by the Board or commission itself with little personal familiarity with the record. This process of decision has a long history of justification.[34] The fact of the matter is, however, that the system does not produce consistent, informed, responsible, or articulate judgments. And it is an ideal breeding ground for *ex parte* presentations and improper influence.

The Attorney General's Committee in 1941 recommended that hearings and appeals in the agencies be on much the same basis as trials and appeals in our courts.[35] The Administrative Procedure Act of 1947, although in large part an outgrowth of the committee's studies, did not adopt this theory. It gave the members of agencies full power to decide all aspects of a case.[36] This

34. A full statement is 2 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 11.01-.21 (1958).

35. "In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court." *Ad. Proc. in Gov't Agencies* 51.

36. Administrative Procedure Act § 8(a), 60 Stat. 242 (1946), 5 U.S.C. § 1007a (1958); see U.S. ATTORNEY GENERAL, MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 83-85 (1947):

> In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains com-

power has been used to the full and then stretched. And it could not have been granted with the expectation that decisions would be changed by agencies with little reference to the record.

In an adjudicated case before the CAB, all the evidence is heard by a hearing examiner, a permanent Civil Service employee. He conducts what amounts to a trial, and renders a decision. While this may be an inefficient process for the decision of certain types of questions as discussed above, it does give every party a full and fair hearing on controverted issues.

In almost every case before the CAB, every significant conclusion of the examiner on important issues is challenged by the losing parties, and the appeal procedure to the Board covers every aspect of the case—legal, factual, and policy. The Board, in effect, tries the case all over again, frequently overturning the examiner's conclusions, which are certainly not considered binding and, on major issues, are not even treated as persuasive. There is often no mention of the examiner's decision or discussion of his specific mistakes or errors in the arguments to the Board. The appeal is treated by most parties as a new proceeding to be argued all over again. Under the law this is proper. But the law could not have contemplated a situation such as that at the CAB, where cases are tried virtually de novo on the basis of briefs and oral arguments, to a body which will never really become familiar with the record.

If an administrative agency fulfilled its policymaking obligations as it should, it would seldom be necessary to reverse an examiner on policy grounds. He would know the policy to be followed. As pointed out, however, policy is not enunciated on a general, formal basis by the agencies but is made rather on a case-by-case *ad hoc* basis, with the result that any resemblance between an examiner's recommended decision and the final decision of the Board in a significant case is almost coincidental.

The ideal situation, of course, and the one I recommend, is that general policy and plans be made and enunciated by an executive agency of the Government and then applied to specific cases by an independent administrative court or set of courts. This is the only way to ensure that policy will be clearly formulated and publicly announced. If this be not the case, however, the least that comports with fair procedure is that a regulatory commission, when it disagrees with the policy decisions of an examiner, announce clearly what the policy is and then send the case back to the man who knows the facts. This is almost never done by the Board or the other regulatory agencies. They simply take the case over and decide it themselves.

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plete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature . . . . The agency in reviewing either initial or recommended decisions may adopt in whole or in part the findings either upon the record or upon new evidence which it takes. Also, it may remand the case to the hearing officer for any appropriate further proceedings.

It should be noted, however, that the *Manual* assumes that new findings by the agency will be made *"upon the record or upon new evidence which it takes."* (Emphasis added.)

What justification is given for this? First, that the examiners are not competent. If that is true, they should be replaced, rather than pervert a whole procedural system to overcome their deficiencies. Second, that the examiners do not understand politics. That, of course, is all to the good. Decisions in specific adjudicated cases are not supposed to be influenced by politics. Third, that the examiners cannot make policy, which must be made instead by commissioners appointed by the President and confirmed by the Senate. This is true; the agency members should make policy. The trouble, however, is that commissioners seldom enunciate policy, and therefore examiners must decide cases in a policy vacuum.

Having taken over decision of a case, the members of the Board do the best they can, but there is no real chance for a review of the record. Cases are decided on the basis of an outline of the issues and a list of questions to be decided prepared by the General Counsel's office and never seen by the parties. The members hear the oral argument—or read it if they are not present—and study the examiner's decision and the briefs to the Board, either personally or through their single personal assistant. The pressure of administrative matters, routine decisions and other major cases effectively prevents any contact with the record. The thousands of man-hours which go into the making of a record are thus virtually ignored at the crucial moment of final decision.

The Attorney General's Committee in 1941 laid down a principle which seems unexceptionable: "[R]eview should be given by the official charged with the responsibility for it, and the review so given should include a personal mastery of at least the portions of the records embraced within the exceptions."[37] This "personal mastery" seldom obtains at the Board or any of the other regulatory commissions.

It is argued sometimes that the judges of appellate courts do not read the entire record in cases before them. This is true. But appellate judges do not purport to decide all the factual issues in a case on the basis of the evidence, as do the regulatory agencies. They decide only specific disputed issues of law and need therefore to refer only to the specific portions of the record which involve those issues. The agencies, on the other hand, undertake to redecide all the factual issues in a case on the entire record as compiled by the examiner.

There could be one saving grace in all this. The Administrative Procedure Act provides that "all decisions . . . shall . . . include a statement of . . . findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record."[38] If this were done personally by the members of the agency who make the final decisions in adjudicated cases, the litigants and the public would know why the agency decided as it did, and at least one member would have to study the

37. *Ad. Proc. in Gov't Agencies* 52.

38. Administrative Procedure Act § 8(b), 60 Stat. 242 (1946), 5 U.S.C. § 1007(b) (1958).

record personally in order to draft the opinion.[39] This, of course, is the procedure followed in all our appellate courts.

Not so on the CAB or other regulatory agencies. The decisions are written there by a staff of expert opinion-writers after the decision has been made, and often—in the case of the CAB and the FCC—after it has been announced publicly. Any safeguard that the opinion requirement might provide is dissipated by the public announcement of a naked conclusion and the subsequent delegation of the opinion-writing job. It is somewhat like playing golf by telling experts where to hit the ball for you and then claiming the score at the end.

There have been times when the Board made decisions in executive session and then told the opinion writers what answer the opinion should come out with. Major decisions of the Board have been made in that way. More often, the opinion writers sit with the Board when a case is discussed. There can be no real claim, however, that the Board tells the opinion writers in detail what to put in the opinion. The members do not know the detailed facts and statistics until the opinion writers dig them out of the record and present them in an opinion. A simple comparison in a number of major cases of the time spent in what is known as "giving instructions" to the opinion-writing division with the length and detail of the final opinion would afford simple proof that only a small part of the contents of the opinion was conveyed by the Board to the staff.[40]

Nor can it be claimed that the opinions prepared by the staff are mere drafts and that the Board carefully reviews, edits, modifies, and rewrites the opinion. A comparison of the opinions as sent to the Board in what is known as "Study Copies" with the final published opinions will disclose significant variation in few cases.[41] If the opinions of the Board express what actually goes on in the minds of the deciding members, this is coincidental or the result of the in-

39. The requirement of an opinion provides considerable assurance that the case will be thought through by the deciding authority. There is a salutary discipline in formulating reasons for a result, a discipline wholly absent where there is freedom to announce a naked conclusion. Error and carelessness may be squeezed out in the opinion-shaping process . . . . [T]he exposure of reasoning to public scrutiny and criticism is healthy. An agency will benefit from having its decisions run a professional and academic gauntlet.

Ad. Proc. in Gov't Agencies 30.

40. The job of the opinion writers is to draft an appeal-proof document which will support the result already reached by the commissioners. An important part of this process consists of having an attorney go through every brief and make a list of every point raised by every party. Each point of any significance is then mentioned in the opinion, often by the formula: "We have considered the contention of ——— to the effect that ———, but we find that this does not alter our conclusion."

41. The scant importance attached to members' review of opinions was dramatically illustrated in a recent case in which four hours of opinion-writing instructions had been given to the staff in mid-1958. A detailed draft opinion of seventy-one pages first reached the members of the Board from the opinion-writing division early in March 1959. At a

tuition that a good staff can develop over the years. In neither case are the requirements of true judicial process satisfied.

I know of no case where the opinion writers ever came back to the Board and said that the facts in the record of a case simply would not support a substantial decision previously made by the Board. It is too much to expect that the ultimate facts of record when dispassionately viewed will always support a decision previously reached without close personal knowledge of the record.[42]

It is sometimes argued that members of agencies should be able to hire skilled lawyers to explain their actions just as businessmen or government executives have attorneys to justify their actions legally. This argument merely serves to confirm the nonjudicial nature of the so-called "adjudicatory" processes of the regulatory agencies as they are conducted today. They are not really judicial at all, for the judicial process requires that the decider personally know the record on the basis of which his decision is made and that he state the reasons for his decision.

As the Attorney General's Committee said, "The heads of the agency should do personally what the heads purport to do."[43] Or as the *Declaration of Independence* puts it, "A decent respect to the opinions of mankind requires that they should declare the causes which impel them."

Board meeting the next day, members were urged to sign and release the opinion that same day because inquiries had been made about the delay in the case.

A similar episode occurred recently in the case of one of the most important general rulings made by the Board in many years. The request for the ruling was filed in early 1958. There were many lengthy comments from interested parties. The Board, however, for well over a year, never discussed the matter with each other or with the staff, and the staff at no time had any indication of the Board's thinking. The General Counsel's office proceeded to draft an opinion of the Board on the basis of what they thought the Board should hold and finally sent this to the Board more than a year after the request was filed. This twenty-nine page opinion was discussed for about an hour by the Board, a few changes were made in the text, and the document was issued within a few days. The document is headed "Opinion and Interpretative Ruling, By the Board." The phrase "By the Board" cannot be construed in anything like the customary judicial sense.

This is the procedure followed also in the great majority of safety appeals to the Board. The members never see the pleadings, the record, the examiner's decision, or the briefs. As a matter of fact, there are not even enough copies of some of these documents to go around. The General Counsel's office usually studies these documents and prepares a decision with no instructions from the Board, and then circulates the proposed decision together with a covering memorandum. This is not a true judicial appeal.

42. See LANDIS, THE ADMINISTRATIVE PROCESS 106 (1938):

> . . . Any judge can testify to the experience of working on opinions that won't write with the result that his conclusions are changed because of his inability to state to his satisfaction the reasons upon which they depend. Delegation of opinion writing has the danger of forcing a cavalier treatment of a record in order to support a conclusion reached only upon a superficial examination of that record. General impressions rather than that tightness that derives from the articulation of reasons may thus govern the trend of administrative adjudication.

43. *Ad. Proc. in Gov't Agencies* 52.

POLICY COORDINATION

The Plans and Policies of the CAB Are Not Coordinated in Any Way With Those of Other Government Agencies or With General National Policies as Established by the Executive

The CAB, like other independent regulatory agencies, operates with scant reference to other branches of the Government even when their activities have close interconnections. It operates also quite independently of general coordination by the Executive.

So far as the adjudicating of litigated cases is concerned, this is as it should be. A judicial body such as a court or an administrative tribunal should be guided only by the record. In the field of policy and planning, however, this lack of coordination makes no sense.

The CAB in recent years, for instance, has been busily engaged in certificating subsidized local air service into the smaller cities of the country as the railroads reduce or terminate passenger service to those towns.[44] The Board has done this on the general theory that the Board's job is to promote air travel, and that as the railroads pull out the airlines should move in and take up the slack. The ICC has permitted the railroads to reduce or eliminate passenger service because they have been losing so much money on it. But the airlines also lose money when they take over local passenger service in small towns. The only difference is that the federal government makes up the loss to the airlines in the form of subsidy.

Whether this takeover of nonsubsidized losing railroad passenger service by subsidized losing air service is in accord with sound national transportation policy or with the broader national interest is not a subject for discussion here. The point here is that there is today no machinery for determining such a question since there is no coordination between the ICC and the CAB on this matter, nor does either agency receive any coordinated guidance from the Executive branch.

The statutes enacted by Congress are far too general in their terms to provide detailed policy guidance on a matter of this kind. Thus each agency pursues an independent policy with no coordination of any sort, although the actions of each closely concern the other.

To take another example, the CAB has the power to exempt air carriers from the operation of the antitrust laws.[45] This is one of the most formidable powers possessed by any Government agency. The laws against monopolies and restraints of trade are built into the very fabric of our national economy and our business life. Not one, but two agencies of the federal government are charged with actively enforcing these laws—the Department of Justice and the Federal Trade Commission. Standing subcommittees of Congress keep

44. For example, the Northern Nebraska towns given air service for the first time in the *Seven States Case*. No. 7454, CAB, Dec. 8, 1958 (Order No. E-13254).

45. Federal Aviation Act of 1958, § 414, 72 Stat. 770, 49 U.S.C. § 1384 (1958).

continual surveillance over monopolistic aspects of our economy. Any attempt to weaken these basic laws meets with strong public and governmental objection. Even the President himself cannot suspend them. But the CAB can, and it can do so without consultation or coordination with the Department of Justice, the FTC, Congress or anyone else, and the courts have severely limited their review of such cases by the doctrine of "primary jurisdiction."

It does not make sense for the federal government to be enforcing the antitrust laws diligently through two agencies while a third agency on the basis of no coordinated policy is busy exempting an important segment of industry from these laws. No criticism of the Justice Department, the FTC or the CAB is implied in this. The problem is that there is no machinery whatever for coordination. Indeed if the CAB and Justice Department today attempted to establish a coordinated policy on antitrust matters, the CAB might well be accused of compromising its "independence."

The CAB has the power to obligate the federal government for large sums of money with no coordination whatever with the Bureau of the Budget or the President, and with no prior approval by Congress. By merely issuing or withholding certificates of public convenience and necessity for air service which will not pay its own way, the CAB can decide to spend twenty-five, thirty, sixty or a hundred million dollars a year on subsidy—and this without regard to the President's budget, the fiscal policy of the Government, or general transportation policy. Under today's conditions, with national budgetary and transportation policy of critical importance, such uncontrolled, uncoordinated expenditures are not good government. No criticism is intended here of any specific Board action on subsidy. Within the limitations imposed by its present organization and procedures, the Board has done a careful and conscientious job. But this job has been performed in a policy vacuum and may or may not comport with the best interests of national transportation generally or national fiscal policy.

Another example of the serious lack of coordination of civil aviation is in the defense field. The civil air fleet will be urgently needed in time of national emergency. The new fleets of civil jet aircraft, for instance, were justified by the carriers to the Board in part by defense considerations. And yet there has been no joint planning, no discussions, not even any high-level exchange of views between the CAB and the Defense Establishment on these matters. The CAB certificates routes, sets rates, encourages or discourages certain types and classes of air carriage—all of which may have important defense implications—without any real military consultations.

For the past several years the CAB and the Department of Defense have been engaged in a running battle over the proper role of the civilian carriers in peace time military airlift. What the proper answer to this problem is cannot be solved here. What is important is that there is no machinery whereby the actions of the CAB and Defense Department can be authoritatively coordinated on such a problem. It was only with the creation of FAA, an executive agency, that some coordinated policy began to develop.

It may be said that policy coordination of the regulatory agencies is effected through Congress, but this is true in only the most general sense. The basic statutes such as the Civil Aeronautics Act, the Interstate Commerce Act and the Motor Carrier Act list a large number of regulatory goals and purposes—all general and frequently overlapping or conflicting in character. Within these very general goals and purposes, the individual independent regulatory commissions develop their own specific policies and programs without reference to any larger program.

Although Congress exercises a legislative oversight over the regulatory agencies, this, as mentioned above,[46] is often concerned with specific cases and problems or with procedures and not with substantive policy. Because of its multitude of diverse responsibilities, the machinery of Congress is not adapted to day-by-day detailed policy coordination.

The only possible source of detailed coordination of economic regulatory policy is the Executive. Policy is made today by groups of men, whose composition is determined to a great degree by the accidents of terms, appointments, resignations, etc. These groups are in practice not responsible to anyone. Economic regulatory policy will not become fully responsive to the national needs and purposes until it is made within the framework of congressional legislation by men responsible to the Executive.

The Task Force of the First Hoover Commission believed that necessary coordination could be achieved by the President's power to name the chairman of each regulatory agency.[47] "This will enable the President," they said, "to obtain a sympathetic hearing for broader considerations of national policy which he feels the commission should take into account."[48]

This, of course, has not worked as anticipated. In the first place, the chairman is only one member and often cannot command the concurrence of a majority of the commission. Indeed, the very fact that he does have private, personal communications or discussions with the executive branch may well produce a negative reaction by the other members, who feel that their role in determining regulatory policy is just as important as that of the chairman—which indeed it is in a multimember agency.

Furthermore, Congress clearly does not accept the idea of informal Executive influence through the chairman of the independent agencies or through other means. The whole drift of the hearings and reports of the House Subcommittee on Legislative Oversight[49] for the past two years is that neither the Executive nor anyone else should exercise any influence over the independent regulatory agencies. This is not just the particular view of one committee. The CAB has been severely criticized by the House Committee on

46. See text at 493-94 *supra*.

47. TASK FORCE REPORT 31-33.

48. *Id.* at 32.

49. See, *e.g.*, House Subcomm. on Legislative Oversight, *Independent Regulatory Commissions*, H.R. REP. No. 2711, 85th Cong., 2d Sess. (1959).

Government Operations for membership in the Air Coordinating Committee,[50] which has been about the only instrument for coordination of civil aviation policy in recent years. Appointees to regulatory agencies are carefully quizzed by Senate committees on their determination to avoid any forms of Executive influence.[51]

The reason for this great emphasis on avoiding any influence on the regulatory agencies is clear. It was set forth in the *Report* of the First Hoover Commission Task Force: "[T]he commission should be independent and free from partisan influence *in the decisions affecting individual rights* and in the ordinary administration of the statute."[52] The Task Force believed, as does everyone who considers the subject, that individual cases must be decided on the record alone. They felt, however, that such independence could be maintained in adjudicated cases despite Executive influence and coordination on policy matters.[53]

This is the heart of the problem. Judgments in adjudicated cases affecting individual rights must be made with full judicial process and independent of any influence from the Executive, Congress or anyone else. Policy and general plans, however, if they are to be effective, must be made under the coordination and direction of the Executive within the framework of congressional policy determination. It is argued that commissioners can do both, that they can be independent half of the time as judges, and subordinate or at least "coordinated" the other half of the time as executives. Recent experience belies this.

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50. The presence of the Civil Aeronautics Board, an independent, quasi-legislative, quasi-judicial, regulatory body on the Air Coordinating Committee should be terminated at once. This is equally applicable to the membership of the Federal Communications Commission.

. . . .

The subcommittee believes that the continued membership in the Air Coordinating Committee by these regulatory bodies represents an undermining by the executive branch of the careful standards and safeguards of administrative law procedures prescribed by the Congress in creating both the Federal Communications Commission and the Civil Aeronautics Board . . . .

It is an illegal and unwarranted invasion by the executive branch by means of an Executive Order to assume, without consent of the Congress, powers the Congress specifically conferred on these independent tribunals.

Participation by regulatory bodies in Air Coordinating Committee matters and according Air Coordinating Committee decisions binding effect, without adherence to procedures prescribed by the Congress represents a flagrant flouting of the will of the Congress.

H.R. Rep. No. 2979, 84th Cong., 2d Sess. 21 (1956).

51. See, *e.g.*, *Hearings on Miscellaneous Nominations Before the Senate Committee on Interstate and Foreign Commerce (Louis J. Hector to CAB)*, 85th Cong., 1st & 2d Sess. 52, 54 (1957).

52. Task Force Report 31. (Emphasis added.)

53. *Id.* at 25-28.

One trend today is to make the agencies completely independent—both for adjudication and for policy and planning. The theory behind this is that if a body of men are to act like a court they must do so one-hundred per cent of the time. Congress and the public demand this, and I think the basic principle is sound. It is impractical and unrealistic for a man to try to be an independent judge part of the time and a coordinated administrator the rest of the time if he is dealing in both capacities with exactly the same industry, the same people and the same problems.

It would seem therefore that the only way to secure the necessary coordination of economic regulatory policies of the agencies and at the same time preserve the independence of adjudication of individual rights is to split the two types of responsibility, putting one in the Executive and the other in a special administrative court. In this way, the policies of economic regulation can be made fully responsive to national needs and purposes, and at the same time adjudication in individual cases can be guaranteed that independence which Congress and the public rightfully demand.

Duties and Responsibilities

The Members of the CAB, Like Those of Other Regulatory Agencies, Have Policymaking, Adjudicative, Administrative and Investigative Duties and Responsibilities Which Are by Their Very Nature Incompatible

1. The debilitating conflict between routine administration and the major tasks of policy formulation and adjudication in a multimember commission has already been discussed. The only way to solve this conflict is to remove administration from those charged with adjudication and to place it in an executive agency headed by one man who can delegate it in accordance with normal executive procedures.

2. The conflict between policy formulation and adjudication involves profound differences in attitude and procedure.

Policy—like legislation—is usually formulated on the basis of free, extensive, informal discussion with many interested or informed individuals or groups and on the basis of delegated staff work.

Most executives or legislators feel that they should see and talk informally with as many people as they can; they feel that they should see for themselves as much as possible the actual facts with which they are dealing. They will, of course, receive differing opinions and views from their constituents or those with whom they discuss matters, but an executive makes a constant series of pragmatic informal judgments on the basis of his own experience, the advice of his own staff, and on his varying confidence in the different people with whom he talks. An executive or a legislator cannot hold a judicial hearing every time he makes a decision. He would never get his work done.

Adjudication, on the other hand, depends on formalized procedures, the building of a record with opportunity for presentation and cross-examination of evidence, and final judgment on the basis of the record alone by the persons

responsible for decision. By the very nature of his job, a judge cannot talk informally with the litigants before him; he cannot personally view the subject matter of a case except under circumstances carefully arranged to give neither party an advantage. Judges decide cases on the formal record and must forget any other particular knowledge of the persons and problems involved.

There can be no informal, one-party presentations to judges. On the other hand, general planning and policy probably cannot be made efficiently without such presentations.

It has been suggested that commissioners should divide their work—making policy according to one set of standards and adjudicating according to another. But the work of one individual cannot be so neatly divided into watertight compartments.

The CAB, for instance, has for two years been urging the carriers to introduce new low promotional fares to build traffic. As a natural part of developing this policy, members of the Board discuss with the carriers various plans and proposals for new fares, the cost aspects, the potential stimulation of traffic, and such matters. This is the way policy is developed by the legislature, by the Executive, or by a private business organization, and in the process personal relationships naturally develop between men who are concerned with common problems.

But suppose in the case of the Board that one of the carriers makes a formal filing of a new low promotional tariff, and two other carriers file a protest that the fare is unjust and unreasonable. The gears are now supposed to shift. This is an issue on which all parties are entitled to a full hearing with all the elements of judicial process. They are entitled to a judgment on the record and the record alone, without any *ex parte* presentations.

But the *ex parte* presentations were already made when the members talked generally to the carrier about tariffs while they were still in the planning stage. How can the members of the agency now forget the talks and discussions held as policymakers and become judges who look only to the formal record—particularly when they are probably still talking informally to the same carriers on other tariffs still in the planning stage? The mind of man is not so neatly compartmented, and any system based on a theory that it is, is doomed to failure.

In one specific case, of course, a commissioner might be able to keep these two roles completely separate, driving from his mind as a judge what he knows as an administrator. But no man can possibly work all day every day with the same people in the same industry and discuss all aspects of it informally as a policymaker and then from time to time wipe every bit of that out of his mind in order to become a judge and decide a case solely on the record. As Donald C. Beelar, a former Chairman of the Administrative Law Section of the ABA has often said. "It is not possible for a man to be a judge on Monday, Wednesday and Friday and a legislator on Tuesday and Thursday."

Both Congress and the courts have recently criticized members of the FCC

for meeting informally with applicants for television licenses even though the specific application was not discussed.[54] The criticism is of course valid. It cannot improve the quality and impartiality of adjudication for the judges to have informal private chats with the litigants.

But what is a member of the CAB to do? Every airline of any size always has a case of some kind pending before the board. Following out the strict letter of judicial proprieties would mean that no Board member could ever talk to anyone in any airline, and policy would thereby be made by the CAB in a complete vacuum. On the other hand, the informal conversations customarily employed in policy formulation undoubtedly influence adjudication since the facts and impressions gained thereby cannot by an act of will be forgotten.

The answer to this problem, to repeat, is to separate policymaking from adjudication, putting the former in the Executive and the latter in a special administrative court. If the regulatory executive were thus freed from judicial responsibilities and restraints, he could maintain sufficiently close relationships with persons who have views or facts about the regulated industry to keep informed, without sacrificing the dignity and reserve appropriate to a responsible government officer. And the officers of the administrative court would be able to conduct themselves like judges.

3. The conflict between adjudication and prosecution has been explored more extensively in prior studies and hearings than any other type of conflict within the regulatory agencies.[55] The Administrative Procedure Act and other statutory reforms such as the recent changes in the organization of the NLRB [56] and the FCC [57] reflect the outcome of these studies. The basic purpose of these changes has been to protect defendants against a judicial hearing where the judges have already made up their minds because they initiated the investigation and directed the prosecution. Although there are still unsolved problems,[58] by and large this area of conflict and incompatibility has been handled by the ever-increasing application of the separation of powers doctrine.

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54. See House Subcomm. on Legislative Oversight, *Independent Regulatory Commissions*, H.R. Rep. No. 2711, 85th Cong., 2d Sess. (1959); Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959), *on remand from* 358 U.S. 49, *vacating per curiam* 255 F.2d 191 (D.C. Cir. 1958); WORZ v. FCC, 268 F.2d 889 (D.C. Cir. 1959), *on remand from* 358 U.S. 55, *vacating per curiam* 257 F.2d 199 (D.C. Cir. 1958); Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55 (D.C. Cir. 1958); WKAT, Inc. v. FCC, 258 F.2d 418 (D.C. Cir. 1958); WIRL Television Co. v. United States, 253 F.2d 863 (D.C. Cir.), *vacated and remanded per curiam*, 358 U.S. 51 (1958).

55. See the full treatment in 2 Davis, Administrative Law Treatise §§ 13.01-.11 (1958), and authorities cited. The most influential statement of the problem was undoubtedly that in *Ad. Proc. in Gov't Agencies* 55-60, which led to § 5(c) of the Administrative Procedure Act, 60 Stat. 240 (1946), 5 U.S.C. § 1004(c) (1958).

56. Labor-Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. §§ 141-66 (1958).

57. 66 Stat. 712, 721 (1952), 47 U.S.C. §§ 155(c), 409 (1958).

58. See, *e.g.*, Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir. 1959).

4. A serious conflict of duties and responsibilities which has yet been little mentioned is that between the responsibility for investigation and prosecution of law violations and the responsibility for formulating plans and policies to promote the economic well-being of an industry. It is this conflict which explains the failure of the so-called promotional regulatory agencies—the FCC, CAB, ICC, Federal Power Commission—to crack down vigorously on law violators within the industry except in those cases where the actions of one member of the industry threatens the economic stability of the industry as a whole.

A clear example of this conflict has occurred recently in the CAB. In July 1957, the staff informed the Board that certain loans to air carriers involved the possibility of illegal control situations or conflicts of interest. The staff was instructed to watch the matter. During the following year, the number, size, and complexity of the loans increased. It was generally agreed that the problem was serious, that potential control and interlocking relationships were possibly being created, and that the Board's staff was having little success in digging out the facts by informal means. Some of the staff urged an investigation; others took a different view. They urged that since the carriers were then having a hard time financing new equipment, the investigation might have an adverse effect on their negotiations, and that this was incompatible with the Board's promotional responsibilities. A majority of the Board accepted this argument and voted not to institute any investigation.

Again, I do not here support or oppose the proposed investigation. It can be argued that investigations should never be called off solely because they might hurt business, that investigations should be called off only when it appears that there is no significant probability of violation of the law. On the other hand, it is difficult to urge that the Board was neglectful of its duties, because it does have a statutory duty to promote the economic well-being of the industry and an investigation right at that time might have made financing more difficult. The answer to such conflicts is to separate promotional policymaking from investigation and prosecution.

Another example of the incompatibility between promotional policymaking and prosecution is the Board's treatment of the so-called Sherman Doctrine. This is the doctrine that if persons enter into control or interlocking relationships which require prior approval of the Board under sections 408 and 409, without having secured such approval in advance, the Board will require that the transaction be undone and the illegal relationship terminated before the Board will consider whether or not to give its approval. The doctrine was announced squarely and unequivocally in 1952, after long experience had shown that this was the only way to prevent the prior consummation of innumerable illegal transactions in the hope that the Board would subsequently approve them.[59]

This policy was followed strictly for a few years and the number of illegal transactions under sections 408 and 409 markedly declined. Exceptions were

59. Sherman, Interlocking Relationships and Stock Ownership, 15 C.A.B. 876 (1952).

made when transactions were entered into in the honest and reasonable belief that they were legal, but exceptions were not made merely because of the size or urgency of the transaction, or the hardship of undoing the transaction. The most notable example of the firm application of the doctrine was when President Eisenhower disapproved an agreement whereby Eastern would acquire Colonial because Eastern had already acquired Colonial illegally,[60] and the Board in response to his views compelled Eastern to terminate this illegal control before considering whether to grant its approval to a prospective agreement.[61] This, of course, was a very large transaction and the firm application of the doctrine worked hardship on the parties, but that did not deter the President nor the Board from applying it in the same way it had been applied in smaller cases.

Because of what the Board conceives to be its promotional responsibilities, however, they have now largely nullified the doctrine. In the last year, a number of transactions, some of them very large, have been approved by the Board, although they were entered into without Board approval. This has been done on the grounds that there was an urgent necessity for the transactions and that the parties would suffer hardship if they were made to disentangle or suspend them.

It is not argued here that these transactions are adverse to the public interest or should not have been approved if Board approval had been requested first. Nor is it argued that the Board or its staff have been derelict in carrying out their duties and responsibilities. The problem is that the Board has incompatible responsibilities. A body whose duty it is to look after the economic well-being of an industry cannot be expected at the same time to enforce vigorously penalty provisions when these would work economic hardship on members of the industry. The duties of promotion and investigation-prosecution can both be vigorously performed only when they are entrusted to different agencies.

Agency Membership

The rapid turnover of personnel on the regulatory agencies has long been a problem.[62] It has produced equally rapid changes of policy and has made almost meaningless the "expertise" which agency members are supposed to develop in long terms of service. *Ex parte* presentations to members of regulatory agencies, excessive entertainment and presents, and questions of improper influence—the so-called ethical problems—are matters of general growing concern. In my judgment, such personnel problems are inevitable with the present organization and procedures of the agencies, which ensure inefficiency, lack of judicial process, and incompatibility of duties.

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60. Eastern-Colonial, Acquisition of Assets, 18 C.A.B. 453 (1954).

61. Eastern-Colonial Control Case, 20 C.A.B. 629 (1955); No. 6998, CAB, Jan. 11, 1956 (Order Nos. E-9945, -9946).

62. See Task Force Report 24, where the rapid turnover of Commissioners is discussed agency-by-agency with statistics showing the short average length of service.

No competent executive—Government, military or business—can tolerate for long the inefficiency and the confused administration of the regulatory agencies as they exist today. An executive accustomed to getting a job done cannot be content with procedures which preclude both an intelligent attack on general planning and policy problems and an expeditious handling of routine business.

No attorney who takes judicial procedures seriously, who has a lawyer's pride of draftsmanship, and who has a strong feeling for basic procedural fairness, can put up for long with a system where cases are decided without clear general policy and without an opportunity for actual study of the record, and where opinions do not necessarily have any connection with the thoughts of the deciders. It may be said that an attorney-commissioner could perform the job as it should be done even if other agency members do not, but such is not the case. Agency policy cannot be made without meaningful policy discussion between agency members. Cases cannot be approached in a judicial manner when most of a commissioner's time is absorbed in routine matters and when adequate personal staffs are not provided.

No man with a broad interest in the economy of our nation and in government processes as a whole can be content for long to regulate a slice of our national economy in a vacuum without any coordination either with other economic regulatory activity or with national policy in general.

These are some of the strongest reasons for the rapid turnover of commissioners. Men tend to move on to other positions where there is not only a job to be done, but where also they will have the tools to do the job.

The ethical problems, I am convinced, are likewise the product of the system. The proper mode of conduct—the ethical standards to be observed—in any particular job must be reasonably clear if compliance is to be expected. Yet members of regulatory agencies are in reality trying to live in two worlds with two separate sets of standards.

As discussed above, there are quite different codes of personal behavior for an executive or a legislator on the one hand, and for a judge on the other. It is quite customary, for instance, for an executive or a legislator to play golf or go fishing with someone who can give him information or opinions which he values. As a matter of fact, a busy executive often thus combines recreation with his job in order to get all of his work done, and no criticism is made, for a competent executive can maintain such informal relationships and still preserve his dignity, his reserve and his independence.

A judge in a litigated case cannot transact business in this way. He cannot get into any situation where he accepts favors or hospitality or obtains information or views informally from those who are actively litigating before him. How, then, is a member of an independent regulatory commission to conduct his personal affairs?

There are commissioners in our regulatory agencies who are fine executives, who do a splendid job of administration, who get results speedily and effectively, but who have no real concept of the judicial process. There are others

who make such a strong effort to comply with the ethics and conduct appropriate to a judge that they do not see or talk with members of the industry as much as they should.

Members of agencies are criticized today chiefly because they do not act enough like judges, in other words because they mix too freely and easily with those who appear before them in adjudicated cases. If they did not do so, however, they might well be criticized for failing to keep in touch with the industry they regulate, or as is often said, for regulating "in an ivory tower."

When men try simultaneously to abide by two such disparate patterns of work and codes of conduct, trouble and confusion inevitably results. It might be thought that a code somewhere in the middle could be established. Much sincere effort has been devoted to this end, and this is what most thoughtful commissioners try to do in practice. But like many compromises, this has really never satisfied anyone. The present agency codes as practiced do not really allow sufficient flexibility for an executive to get the jobs of planning and policymaking done with effectiveness and dispatch. But at the same time, present practices are too flexible to ensure full due process and fair judicial proceedings.

The whole system of adjudication by commissioners as practiced today inevitably raises suspicions of *ex parte* influence. Commissioners circulate more or less freely in the industry they regulate. As a part of this, there develops the social intercourse which is normal in business, executive or legislative life. When some of the groups in the industry then enter into a litigated case, the same commissioner climbs on the bench and is supposed suddenly to become a judge. But everyone knows that he really has no chance to familiarize himself with the record, and that the oral argument and briefs which only summarize the case are about all he will ever learn about it. It is obvious that under such circumstances, memories of casual conversations, tid-bits of information picked up here and there, trade-press editorials, and congressional or Executive views or desires, can exert a powerful influence which they would not have on judges intimately familiar with the record. Everyone knows that commissioners usually cast their votes with only the examiner's opinion, the briefs and oral argument to guide them, and that the record is thereafter combed by an opinion-writing staff for facts and data to support a predetermined conclusion. It is known indeed that in some agencies, such as the CAB, the decision is publicly announced in a press release and parties begin to act in reliance thereon, before the opinion writers even start their work. It is known that the staff prepares the opinion with little or no guidance or correction by the commissioners who sign it.

Under such circumstances, it is inevitable that charges of improper influence will be made. And the system is actually so inviting to improper influence that it will inevitably occur from time to time.

In such an atmosphere, it is not strange that the turnover of agency membership is a continuing problem.

Conclusions

In the last two decades, there have been many detailed, intensive studies of the regulatory commissions by official government committees, by the American Bar Association and other private groups, and by individual scholars.

The many changes in the regulatory commissions proposed in these studies have been of two general types: (1) basic reorganization of our whole governmental machinery for economic controls, or (2) procedural improvements in the existing organizations. The reforms actually adopted by Congress or the Executive during this period have been largely of the second type, for example, the Administrative Procedure Act, and the various reorganization plans. Much of the current discussion, within the Congress and within the agencies themselves, is devoted to further procedural improvements in the existing agencies.

It is my belief, based on personal experience as a member of a federal regulatory agency, that a far more basic and radical reorganization is required in order to bring to the regulatory process the efficiency and impartial judicial process which it should have. Such a reorganization would transfer to an appropriate executive department the functions of policymaking and administration, to an administrative court or courts the adjudicatory responsibility in major litigated cases and appeals from administrative actions, and to the Department of Justice the prosecution functions. Such a reorganization is supported by an ever-growing body of responsible opinion both within and without the government.

This is a matter of importance to the nation. The federal regulatory agencies wield great power over major segments of our economy and adjudicate private interests of vast size. Despite the importance of their missions, however, it is doubtful whether any branch of the Government today functions with less effectiveness.

Every session of Congress sees many proposals for new economic regulation or controls, and almost invariably these proposals involve the creation of new regulatory commissions. It would seem that before any new commissions are created along the old lines, it is important to find out why the ones we already have are not working as they should and to reorganize them or redistribute their duties so that the jobs of economic regulation already undertaken will be properly performed.

1. The formulation of the basic policies of Federal economic control can no longer be left to a group of agencies each operating independently of the other and independent of any executive coordination or control. This is particularly true in the transportation field, *i.e.*, the CAB, ICC, and the Federal Maritime Commission, but it is also true of economic controls in general where these infringe on broad economic policy, *i.e.*, the FPC and FCC. Economic regulatory policy should be formulated, within the broad boundaries established by Congress, on a unified and rational basis by the Executive branch of the Government under the direction of the President. A great nation with

worldwide responsibilities cannot continue to have an important part of its economy regulated without any coordination with the economic and defense policies of the President.

It may be argued that Congress would not delegate such sweeping powers to the Executive, but only to independent agencies thought to be "arms of the Congress" and therefore under close supervision and control of the Congress. I would hazard the opinion, however, that recent years have lessened the confidence of Congress that it can effectively supervise and control the substantive policymaking of independent commissions. Indeed, the House Subcommittee on Legislative Oversight was established largely on the premise that Congress had not sufficiently overseen the work of the agencies.[63] As described above, the work of the committee thus far, although productive in the procedural field, gives little hope that such oversight can be effective on a continuing basis in substantive matters.

I would further hazard the view that recent congressional hearings and actions indicate a renewed interest in more detailed regulatory policy formulation by Congress itself. If Congress does in the future make regulatory policy with greater specificity, surely there must at the same time be a renewed inquiry into the most suitable machinery for carrying out such policy. It is my belief that instead of giving such duties to multiheaded deliberative bodies which neither administer nor adjudicate effectively and which in truth are responsible to no one in the long run, the regulatory job should be given to the appropriate arm of the executive branch. Effective plans and policies to implement congressional policy could then be made in the normal executive manner; these actions could be coordinated properly with other governmental activities; one man would be in charge and fully responsible to the President; policies and plans would be more clearly articulated because they would be separated from adjudication; and Congress could keep greater control because policies and plans would be spelled out and responsibility for them pinpointed.

The transfer of policymaking and planning to the Executive of course does not mean that actions will be taken without necessary publicity. There is ample precedent for administrative notice and hearing procedures in many activities already carried on by the Executive.

2. Routine administration of economic regulation would under such a system be handled by delegation within the Executive branch in the same way that countless other administrative tasks are performed.

Agencies run by a group do not delegate and do not handle administration efficiently. Commissioners in the agencies are today solemnly discussing and voting on thousands of minor administrative matters, which should be handled by civil servants in an executive department or agency on the basis of general policy determinations. As shown above, this is one of the prime factors preventing commissioners from making clear policy determinations or handling

63. See remarks of Speaker Rayburn on the floor of the House, April 11, 1957. 103 CONG. REC. 5503 (1957).

adjudicative cases in a judicial manner. If policymaking and planning are transferred to an executive department under a single head, administrative detail can be handled properly.

3. Adjudication of major litigated cases and appeals from administrative action should be performed by an administrative court, free from policymaking or administrative detail. The members of such courts should be appointed for a fixed term and they should be as genuinely independent as judges of other statutory courts such as the Court of Claims and the Tax Court.

There is an old legal prejudice that since only "cases and controversies" are proper subject matter for constitutional courts, other matters such as the granting of franchises and the determination of the reasonableness of rates should therefore be handled by some group which does not act like a court. Licensing and rate determination are actually susceptible of full judicial consideration, provided the general policies to be applied have been announced by the executive branch. These matters involve complex situations in which factual conclusions must be drawn and policy applied to them.

Admittedly, the separation of policymaking and planning from adjudication is not a simple task. As is pointed out by many writers on administrative law, there is a large area of overlap in any field of regulation, and it is often difficult to say where general policymaking stops and adjudication of specific cases starts. This is a reason often given for putting both responsibilities in the same agency. But there has always been the same basic overlap between the legislative powers of the Congress and the judicial powers of the courts, and we have coped with that successfully for a century and three-quarters. The fact that there are gray areas does not mean that black and white are the same. Difficult as it may be on occasion to separate policymaking from adjudication, even a more or less arbitrary division is better than the confusion which has resulted from putting both in the same agency.

In any field of Government regulation there are major, contested matters, where there are parties in substantial and vigorous opposition, and where substantial rights—public and private—are involved. Such cases should be tried by an administrative court de novo, either by the court itself or by hearing officers performing the functions of special masters. Such cases should be decided on the basis of policies formally established and announced in regulations, or formal policy statements by the appropriate arm of the executive branch. Such policies would be binding on the administrative court unless they were held to go beyond the basic statutory authorization.

The extent and success with which the executive branch formulates general plans and policies would depend upon the vigor, interest and competence of the agency involved. If it did not make plans or policy, this failure would be clearly evident; the administrative court would be compelled then to interpret the broad congressional mandate as best it could. If the executive agency did actively make policy, the exact nature and content of its policies would be explicitly known and they could be judged both by the President and by the Congress.

A separation of adjudication from policymaking would compel active policymaking. No longer could policy statements be mere vague generalities in opinions prepared by professional staffs to justify particular results in particular cases. No longer could policymaking be put off until litigants had already made their factual cases.

An administrative court with more strictly judicial duties would require more explicit and detailed policy guidance than an administrative agency which purports to legislate as well. Congress itself might well in some instances retrieve some of its delegated legislative authority and make more specific policy by legislation on Government control of business. Certainly the Executive would be called on to fill in the details of congressional action with clear, detailed rules and plans. And both together would be far more responsive to the public will and to the needs of the nation than the specialized agencies which today find it far too easy to think only of the industry they regulate.

Regulatory matters of an informal or uncontested or comparatively unimportant character should be handled by delegation within the executive branch as countless other governmental transactions are presently handled. If a new administrative court were burdened with the same mass of detailed business that now smothers the members of our regulatory agencies, little progress would have been made.

This is a practical matter. Every case cannot be given the same full judicial treatment as every other case, and many small matters must be handled administratively if critical and important matters are to be given the full judicial process they have so long deserved and failed to enjoy. Just as there is a ten thousand dollar minimum amount for diversity suits in the federal district courts,[64] so there must be minimums of importance on the original jurisdiction of any administrative court, lesser cases being handled by executive processes. For the lesser cases, of course, there must always remain the safeguard of an appeal,[65] probably though not necessarily to the same administrative court that handles the major cases from the beginning.

One frequent objection to an administrative court is that it would lack the necessary "expertise." But we already have very "expert" courts—the Tax Court, the Court of Claims, the Court of Customs and Patent Appeals—and it cannot be claimed that they are any less expert than the regulatory agencies. Even our federal district courts with the vast purview of their jurisdiction are amazingly expert in such diverse and complicated matters as federal taxation, antitrust, admiralty, and bankruptcy. If administrative courts are given

64. 28 U.S.C. § 1332 (1958). Minimums, furthermore, must change as the burden of work changes. The diversity minimum was $3,000 until raised in 1958.

65. Compare the new appellate jurisdiction of the Civil Aeronautics Board over certificate actions of the Federal Aviation Agency. Federal Aviation Act of 1958, §§ 602, 609, 72 Stat. 776, 779, 49 U.S.C. §§ 1422, 1429 (1958). Previously the Board heard many of these cases from the beginning. The new system has greatly reduced the burden on the Board and expedited the disposition of cases without imparing any of the rights of the pilots.

the status and the tenure to attract good men, they will be of a caliber to acquire quickly the necessary expert qualifications.

4. Investigation and prosecution is a minor part of the work of the promotional-regulatory agencies, and, as has been stated, they do not do it enthusiastically or successfully. These responsibilities should be given to an Executive department or agency, such as the Department of Justice, which does not have incompatible duties.

It has been argued for several decades now that the job of economic regulation cannot be handled by the Executive branch and administrative courts, but that it can be accomplished only by independent commissions combining both. The present state of the regulatory agencies and the fruits of their labors do not inspire much confidence nor hold much promise for the future.

Proposals in the direction of those advocated here have been made from time to time for the last twenty years both by official committees and by private groups. Such proposals deal with the basic problems of the regulatory agencies rather than with mere procedural changes. To get the regulatory job done properly, a basic overhaul is necessary. The Executive should undertake those tasks which are actually executive in character and special administrative courts should bear the duty of adjudication.

Appendix A

Section 102 of the Federal Aviation Act of 1958, 72 Stat. 740, 49 U.S.C. § 1302 (1958), reads as follows:

Declaration of Policy: The Board

Sec. 102. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

Senator ALLEN. Mr. Alexander Schmidt, please.

Mr. Schmidt, we are delighted to have you appear before the subcommittee and invite you to proceed in any way you see fit.

I might suggest, also if you would care to read your statement at length, that you might summarize it and then have the entire statement included in the record. It is entirely up to you, however.

STATEMENTS OF ALEXANDER M. SCHMIDT, M.D., COMMISSIONER OF FOOD AND DRUGS; SAM D. FINE, ASSOCIATE COMMISSIONER FOR COMPLIANCE, FDA; PETER BARTON HUTT, ASSISTANT GENERAL COUNSEL, FOOD AND DRUG DIVISION, OFFICE OF GENERAL COUNSEL, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; AND ROBERT C. WETHERELL, DIRECTOR, OFFICE OF LEGISLATIVE SERVICES, FDA

Dr. SCHMIDT. I thank you, Mr. Chairman.

I thought I might just go through it and hit the highlights of the statement.

First, with your permission, I would like to introduce the individuals with me. On my right is Peter Barton Hutt, Assistant General Counsel; on my left is Sam Fine, Associate Commissioner for Compliance; and on his left is Robert C. Wetherell, Director, Office of Legislative Services.

Senator ALLEN. Thank you.

Dr. SCHMIDT. We understand and share the concern recently expressed on this subject by the President, by Members of Congress, and many others. We strongly support the President's call in S. 4145 for a comprehensive review of the performance of our Nation's regulatory agencies and for the identification of needed reforms.

By your invitation to me to testify today, we have inferred that you are considering whether the Food and Drug Administration should be included in any such study. As you know, FDA is a health agency that exists to protect consumers from hazards from food, drugs, biologicals, medical devices, cosmetics, and radiation in electronic, products. As with programs of other health agencies, any economic impact we have is a byproduct of our role in setting standards for industry performance and then enforcing these standards. Thus, in contrast to the ratemaking agencies, the economic impact of health agencies is indirect rather than direct. Yet, on occasion health agency policies and regulations can have as great an impact—albeit indirectly—upon prices and competition as can regulatory programs specifically directed at affecting these matters. For this reason, the President has requested that the Council on Wage and Price Stability review the impact of FDA and other executive branch regulatory agencies during the coming year.

We were impressed by your committee's thoughtful questions for the witnesses at these hearings; I will touch on them very briefly. I will begin by discussing what FDA is and what FDA is not, in terms of the types of agencies which you will be discussing here today. I will next discuss matters of regulatory agency organizations and procedure, specifically as these matters affect FDA. Finally, I will conclude by addressing the impact of FDA programs upon the industry we regulate, and areas of needed reforms.

The Food and Drug Administration is not an independent regulatory commission. Ever since its creation in the early part of the century, the FDA has been a part of an executive branch department—first the Department of Agriculture, then the Federal Security Agency, and finally the Department of Health, Education, and Welfare upon its creation in 1953. A law has never been passed establishing FDA as a statutory entity, in contrast to the independent regulatory commissions. Unlike many other regulatory agencies, FDA is headed by a single Commissioner rather than by a collegial body composed of a number of members. This, too, is a matter of history and tradition and continues because of the nature of FDA's responsibilities. Finally, FDA proceeds more often through rulemaking and direct regulatory action rather than by quasi-judicial decisions in individual cases, which are more commonplace in the independent regulatory commissions.

Speaking to the issue of independence, we feel strongly, however that a regulatory agency like FDA must be sufficiently independent to take regulatory action and to make decisions without fear of reversal not directly charged with administering consumer protection laws. The agency has been fortunate in having a relationship with the recent Secretaries of Health, Education, and Welfare, in which the need for independent FDA regulatory policy has been clearly recognized.

In regard to the question of whether regulatory agencies should have more than one Commissioner, FDA cannot speak for other regulatory agencies or for the Government as a whole, but we strongly prefer our system of having a single Commissioner in charge of the agency. FDA's activities quite often require rapid decisionmaking in times of emergency. As just one example, we may find it necessary to take action against a dangerously contaminated food or drug within a very few hours. Frankly, we do not see how our volume of activity could be handled by a multimember body. We feel having a single Commissioner also enhances accountability to the executive branch, the Congress, and the public for the decisions that are made.

Concerning oversight and agency responsiveness, you have questioned whether regulatory agencies are too dependent upon the executive branch, the Congress, or the regulated industries. Here I will add to what I have said earlier about the value of being in an executive branch department. The Office of the Secretary has in the past at various times performed a buffering function to help shield the agency from undue political pressure from various sources. Thus, at times being a part of the Department can help enhance agency independence.

Congressional oversight represents an important aspect of our checks and balances system of government. Congress gives us the tools to do a job, and it has a responsibility to assure that it is done properly. FDA has experienced very close review by Congress for a good many years. In our view, congressional oversight is most valuable to the agency, and ultimately to the public, when it helps stimulate desirable and effective policies and programs to help the Agency better protect consumers.

In regard to our policies and procedures, some of your questions, Mr. Chairman, dealt with matters of internal agency policy and procedure. We believe regulatory agencies should be encouraged to

develop and adhere to broad policy guidelines explained to the public in advance. FDA has been moving more and more toward this approach over the years. We have stressed the use of rulemaking procedures in lieu of case-by-case adjudications. This policy is evidenced by our broad food labeling regulations and our class approach to assuring safety and efficacy of hundreds of thousands of nonprescription drugs and other products, to name examples where we have adopted this approach.

We have also moved toward greater openness, through Freedom of Information Act regulations soon to be published in final form, and through elaborate procedural regulations, now undergoing final review within the Agency. In operating under the proposed Freedom of Information regulations prior to formal promulgation, we have already made 90 percent of FDA's records available to the public. The procedural regulations will spell out the rights of participants in FDA proceedings and the means by which all citizens can be heard by the agency.

More recently, we have developed more productive ways to increase participation by interested parties. We have supplemented ordinary notice-and-comment procedures with innovations such as (1) use of scientific advisory committees operating under formal procedures with consumer and industry representatives, (2) providing appeal mechanisms to the Commissioner and other Agency officials, and (3) holding informal public hearings. These approaches will, of course, be codified in our procedural regulations and made available in any appropriate FDA proceeding.

The question of whether regulatory agency budgets should go directly to Congress has been considered many times in the past. Frankly, we doubt that direct submission of a budget to Congress would make too much difference in the ultimate outcome of our budget.

In terms of the impact of FDA regulations on industry, we must acknowledge, first, that regulation necessarily costs something; and second, that these costs are not borne by corporations from their profits but rather are passed on to consumers. Thus, in considering the need for FDA regulation, it must be recognized that producers' interests are not alone on the cost side of the cost-benefit equation, since the consumer ultimately pays the cost. The consumer ultimately pays the bill for everything we require, and thus FDA's effectiveness should be judged on the basis of whether the extra costs we impose are outweighed by the benefits provided, which generally involves better health protection.

We feel our programs can also result in considerable consumer savings, if individuals are spared the purchase of harmful or worthless products or given label information which enables wiser purchasing decisions. Our primary goal, however, is protecting the public health.

Most of us would probably agree that small concerns generally find it harder to meet Government regulatory requirements. Any regulation, including FDA's, runs the risk of making it harder for small firms to survive or of otherwise dampening competitive ardor.

We do not believe FDA's mission involves—or should involve—deliberate policies to enable companies which are incapable of satisfying basic safety and other consumer protection requirements to

continue in business. But it is entirely proper for us to try to devise policies and procedures which minimize undue adverse impact on small firms and on competition generally.

We believe the general concept can be stated as follows: the regulatory agency should attempt to devise the least restrictive means of control which is adequate for effective regulation. This principle underlies the medical device legislation which we have proposed and FDA regulations covering nonprescription drugs and diagnostic products.

This has meant two things. First, procedures such as premarket clearance of devices are avoided unless they are really required to assure public protection. If something less will do—such as device standards or labeling—why require preclearance?

Second, compliance is eased by broad class-type regulations, such as those we are developing for nonprescription drugs, which avoid requiring individual new drug applications for each manufacturer's product. Anyone who can comply with the monograph and other requirements of the act can market the product, without developing costly safety substantiation data for the individual product or securing specific approval. We are now developing regulations to extend the monograph approach to certain long-established prescription drugs.

We are concerned about areas of overregulation. The drug industry is subject to tight regulation of its research and to premarket clearance of its new products for both safety and effectiveness. These are stringent requirements which have led to considerable complaint by the industry that it is overregulated and increasing focus in recent years on the possibility of a "drug lag." While we do not agree with all of these charges, we are concerned that regulatory constraints on research may shift innovation in new drugs overseas.

We have also been concerned that the current individual new drug application approach, supported by the trade secret confidentiality provision, may have resulted in overregulation of many prescription new drugs. In the future, monographs for certain well-established prescription drugs will increasingly replace the individual new drug application approach, without relaxing our public health vigilance. However, individual new drug applications remain the best mechanism to control the introduction of new pharmaceuticals into our society.

Another area where there may have been some overregulation by FDA involves standards of identity and quality for foods. FDA has made an effort to get away from overly specific food standards. We have also used alternative approaches, such as developing common or usual names and nutritional guidelines for food and requiring percentage ingredient labeling of characterizing ingredients. These regulations aim at assuring that food labels provide consumers with information needed for value comparison without stifling innovation.

Occasionally, mandatory overregulation has been proposed. One example is the perennial proposal for continuous inspection of fisheries. We believe, in general, that continuous inspection of fisheries would be a misallocation of resources, resulting in excessive cost and control compared to the benefits derived.

We also strongly object to narrow categorical bills which purport to be enacted to protect consumers. We are very concerned about the

legislation presently receiving serious consideration in the House Agriculture Committee which would require onerous and unnecessary inspections of imported dairy products—which we suspect is aimed at reducing the quantities imported.

Some obsolete, excessive regulatory statutes are being done away with by Congress and the courts.

Some areas are underregulated. A major category of products regulated by FDA which is not subject to adequate safety controls is medical devices. We strongly urge Congress to persist in its efforts to enact a medical device bill to assure the safety and effectiveness of medical devices before the close of this Congress. Although we have developed various new regulations to better assure cosmetic and food safety, there are some deficiencies in our authority over these products which would be addressed by Department-sponsored legislation.

There are other deficiencies in FDA regulatory authority—principally in our information-gathering and remedial powers—which would be corrected by S. 3012, the Department's proposed food, drug, and cosmetic amendments. Other regulatory agencies have long possessed the authority proposed in this bill for records inspection, record-keeping and reporting, subpenas, and administrative detention of suspect products. We strongly urge the enactment of this bill, which will greatly strengthen our ability to protect the public.

We also believe it appropriate for the proposed National Commission on Regulatory Reform to consider appropriate State regulatory responsibilities, as well as Federal responsibilities, and recommend improved mechanisms for assuring uniformity of Federal and State laws.

I have read what I consider to be the most important points in the testimony, and I will be very happy to respond to any questions you may have.

Senator ALLEN. Thank you very much, Dr. Schmidt. I appreciate your fine statement and your coming before the subcommittee to give us the benefit of your views.

In general, I gather that while you favor—think well of the objectives of a National Commission on Regulatory Reform, you don't feel that it is necessary for the FDA to be studied by the commission inasmuch the FDA in effect is a part of HEW and it is also going to be checked by the Council on Wage and Price Stability; is that correct?

Dr. SCHMIDT. Well, as was mentioned just previously, Mr. Ash expressed the administration's belief that the inclusion of agencies like FDA would not be necessary. As a general view I welcome any and all carefully done investigations of the Food and Drug Administration, and, speaking for myself, I certainly would not object to any close look at the Food and Drug Administration and how it fits into the regulatory world.

Senator ALLEN. Do you think that it functions best as a bureau of a department rather than as a separate agency?

Dr. SCHMIDT. We feel that any regulatory agency has to have a certain amount of independence, and we feel that within the Department of Health, Education, and Welfare we have within the recent few years had that necessary amount of independence.

There are some virtues to our being in HEW. We are perhaps more scientifically oriented, just by nature of our responsibility—regulation of food and drugs—than are many other regulatory agen-

cies. I think that it is true that our interaction with the National Institutes of Health and the other parts of the health establishment has been enhanced by our being in HEW.

Senator ALLEN. You speak of the independence of the Federal Drug Administration, you don't think you would enjoy greater independence as a separate agency?

Dr. SCHMIDT. Well, by definition, one would, but I have seen myself, since I have been Commissioner, no great need for that additional amount of independence.

Secretary Weinberger has delegated to me the authorities that I need and has not in any way second-guessed us, or interfered with or in any other way gotten into the regulatory business.

Senator ALLEN. Who would have the final say on a decision of the FDA? Would that be you, subject to review by the Secretary or would you have the final say?

Mr. HUTT. Senator Allen, from a legal standpoint the statutory authority is vested in the Secretary. However, the Secretary has by regulation delegated authority to the Commissioner of Food and Drugs to implement the Federal Food, Drug, and Cosmetic Act. Therefore, at this moment by regulation the Commissioner of Food and Drugs has final say in all of these matters.

The Food and Drug Administration is the only component of the Department of HEW which now has the legal authority to issue its own regulations without going through any other component of the Department.

Senator ALLEN. Do you serve at the pleasure of the Secretary, Doctor?

Dr. SCHMIDT. Yes; I do.

Senator ALLEN. You feel that in your administration one-man control would be better than a collegial system; is that correct?

Dr. SCHMIDT. Yes, sir, I very strongly believe that to be so.

Senator ALLEN. That is because of the nature of the decisions you make and the area of your work rather than as to all regulatory agencies; is that not correct?

Dr. SCHMIDT. Well, I have not worked in any of the other regulatory agencies that do have the collegial commission. I have, however, from time to time watched multimember agencies struggle with issues and have contrasted what they must do compared to how we could handle the same issue. I was just reminded of my previous administrative experience as dean of a large medical school, where I evolved the philosophy that the best committee is a committee of one.

In terms of efficiency, responding quickly, and not advocating averages and means, the single commissioner had greater advantage. I think one can move more decisively.

Senator ALLEN. I believe the President's recommendation that your bureau be checked or studied by the Council on Wage and Price had to do with the economic impact of the work of your Administration more than the matter of efficiency of your bureau; is that not correct, your procedures have more to do with economic impact than regulatory impact; does it not?

Dr. SCHMIDT. Yes, sir, I believe that is true. Of course, what really points out the importance of this is the current world food crisis and the impact of regulation on the food industry.

Senator ALLEN. Are you constantly in process of revising your rules and regulations and procedures in order to give quicker final decisions in matters pending before your bureau?

Dr. SCHMIDT. Yes, sir. Certainly right now we are constantly looking for efficiencies in achieving our goal of public protection.

There are many different things we are doing—from essentially totally revising our regulatory procedures through looking at all of the products that we regulate by classes to see in what better ways we can insure their safety and so on.

Senator ALLEN. Do you feel that Congress should turn the whole field of drugs over to the Food and Drug Administration or should it from time to time step in and express its views on these matters?

Dr. SCHMIDT. Well, there kind of two levels of review in a sense. Certainly the oversight committees have every right to look at how we are discharging our responsibilities and to pick us up short in areas wherein it is thought by Congress we have abdicated our responsibilities or are doing wrong. I object strongly from time to time when our decisions are second-guessed by oversight committees or they take on the function of the Commissioner, which I think is inappropriate.

In general, Congress should specify the policies of the American people and give us policy direction—but not get into the everyday workings of the agency.

Senator ALLEN. Congress has done that from time to time?

Dr. SCHMIDT. On occasion I believe they have, yes.

Senator ALLEN. This vitamin bill of Senator Proxmire's, was that a classic example?

Dr. SCHMIDT. No; I don't think so, at least not in intent. I think that some of the vitamin bills proposed would advertently or inadvertently do bad things and things that would not be in the public interest. But there are a number of differences of opinion as to what we are doing, and as to the extent of regulatory authority we should have, and I don't think that it is improper for Congress to suggest legislation in the vitamin-mineral field. I just feel it is unwise.

Senator ALLEN. Do you have any control over the price at which drugs are sold at retail or wholesale?

Dr. SCHMIDT. No, sir.

Senator ALLEN. Is the drug industry sometimes charging excessive amounts for their products, in your judgment?

Dr. SCHMIDT. Well, that is kind of a difficult question for me to answer. I think that sometimes prices are surprisingly high.

Senator ALLEN. I will withdraw the question.

Mr. HUTT. Senator, this is an area over which Congress has not given us any statutory authority. Nor, might I add have we ever requested any statutory authority in the area of pricing foods, drugs, cosmetic, or any of the other products we regulate.

Senator ALLEN. Don't you feel, though if the National Commission on Regulatory Reform made a study of the work of FDA then it might be better informed as to legislation that is needed by your bureau? In

43-362 O - 75 - pt. 2 - 6

other words, I am wondering about the merit of your plea, more or less, that you are not being included in review.

Dr. SCHMIDT. Well, I think it would be entirely appropriate and quite beneficial to look at the pricing implications of the regulation of the drug industry to insure safety and effectiveness of drugs. This I think would help all the way around.

Senator ALLEN. But if Congress or this reform commission did make a review or study of the area of FDA operations and its procedural methods in individual cases and the carrying out of the scope of its—carrying out its assignment, would it not be then in a better position to make recommendations to the Congress as to legislation that might be needed?

Dr. SCHMIDT. I think that would be undeniably true, yes.

Senator ALLEN. In other words, I see no reason why the FDA should not be included in the study. Their study might come back and say yes, this administration is doing a fine job with HEW, we don't suggest anything, they are doing a great job where they are and let's leave them where they are. On the other hand, they might come up with other recommendations that would help you in you work.

Thank you very much, Dr. Schmidt, gentlemen.

Dr. SCHMIDT. Thank you.

Senator ALLEN. Excuse me. Mr. Statler, the minority counsel.

Mr. STATLER. Mr. Schmidt, have you had an opportunity to formally review either Senator Allen's bill, S. Res. 356 or the bill introduced by Senators Percy and Ervin, S. 4167.

Dr. SCHMIDT. I have read the bills. We have not had formal discussions of them in the agency or in the Department.

Mr. STATLER. On this question of pressure and independence, you say that the fact that you are within a department insulates you from pressure from outside, from lobby groups; does that also include from administration pressure—from the White House?

Dr. SCHMIDT. Yes. There has been in the last year and a half no pressure that I have been aware of at all from the White House, but the point I would make is that the Secretary of HEW can by virtue of his position help buffer the agency from pressure from whatever direction. I can call on him if I wish to help speak for the agency and lend the force of his office to whatever I might say.

Mr. STATLER. In your tenure, I believe that is about a year and a half now, are you aware of any White House pressure on any FDA decisional process?

Dr. SCHMIDT. No, I am absolutely not aware of any.

Mr. STATLER. Has there been any pressure from the Secretary's office at HEW on any FDA decisionmaking process?

Dr. SCHMIDT. No, none whatsoever.

Mr. STATLER. Let me raise a specific situation that occurred recently, and ask for your perspective on the issues raised.

There was an HEW task force set up on hearing aids which studied the problem. It was headed by a bureau head within FDA, but the task force extended throughout HEW. After 4 or 5 months of study, the task force came up with a recommendation which was exclusively within the purview of FDA, to wit: "That hearing aids be redesignated prescription medical devices and that they be regulated as such."

Now, interestingly, following these months of study, and just prior to public release of the report, there was a memorandum that came down from the Secretary's office indicating that somebody in the Secretary's office did not believe that that particular recommendation should be adopted; and within 3 days after a hastily-convened task force meeting, that recommendation was overturned. In place of it, a fairly wishy-washy recommendation issued to the effect that the whole issue of hearing aids being prescription medical devices should be looked at anew. Could you comment on that, in connection with the independence that you indicated FDA has?

Dr. SCHMIDT. Yes; I am thoroughly familiar with every aspect of that report, and I think that your narrative is a little bit off.

First of all, the whole thing had nothing to do with FDA as an agency. This task force that was an interdepartmental task force was set up by the Secretary. The acting head of our Bureau of Devices, in chairing that task force, acted as an independent agent for the Secretary. None of this had anything to do with FDA. I knew nothing about what was going on until the final process.

What happened was that the chairman sent to the Secretary's office for information purposes a draft of the final report, at the same time sending the draft back to the committee members in NIH and other places for their review. He had prepared this simply as a draft of the report. I am totally unaware of any direction or any memorandum from the Secretary's office back to the committee in regard to any of the recommendations. There was a memorandum from the National Institute of Health and I think from one other agency member of the committee that said, "Hey, this draft is inaccurate. We have not formally, as a committee and so on, agreed to this wording." The committee itself changed the recommendation so that it read as it finally did.

If there is a memorandum from the Secretary's office relating to that, it never surfaced and I never heard of it.

Mr. STATLER. Where is the office of Policy and Evaluation?

Dr. SCHMIDT. Well, I think the one you are referring to is in Dr. Edwards' office. After the Secretary received a copy of this early information draft of the final report, he turned to Dr. Edwards and said, "Hey, what's this," and asked if there was proper coordination of the members of this task force. Dr. Edwards turned to a group within his office and said, would you please be sure that this task force completes it and sends up not an early draft that not everybody has agreed to, but a final task force report that everybody agrees to. That office then worked with the head of the Bureau of Devices to get the report done, circulated, and in the Federal Register for public comment.

Mr. STATLER. This being uniquely within the purview of FDA, if you personally feel, based upon the evidence submitted to you, that such a designation should be made—I know you have been quoted in the public print to that effect—do you intend to pursue that by regulation or by requesting whatever legislation may or may not be necessary to do it?

Dr. SCHMIDT. Well, we will do what in our judgment we feel is necessary to protect the public. We get advice from all directions

daily; we welcome advice and evaluate it, clearly. Then we must go ahead and do what we feel is good and proper and necessary.

I don't look upon advise as pressure, and I certainly would not look on this task force report as mandating any particular FDA action.

Mr. STATLER. Two other questions.

Do you believe that there should be a requirement that your position as Commissioner of FDA be subject to Senate advice and consent?

Dr. SCHMIDT. My own personal opinion, after looking at the job, what is involved and the critical importance of the decisions that the agency makes, is that such confirmation of the Commissioner of Food and Drugs by the Senate would be entirely appropriate.

Mr. STATLER. I ask that question with no adverse connotation intended with respect to you or your predecessor. I know quite a bit of evidence was adduced here as to your own qualifications for office. I know, speaking on behalf of the ranking minority member of this committee, Senator Percy, that the achievements within the FDA during the tenure of Dr. Edwards and yourself have truly been remarkable.

But in terms of future commissioners being selected, you would agree that such confirmation by the Senate would be appropriate.

Dr. SCHMIDT. Yes, I would.

Mr. STATLER. And a final question.

One alleged anticompetitive policy of FDA that has been a source of a great deal of criticism deals with the question of duplicate testing for chemical entities which have already cleared FDA's drug review process. In other words, if one company has already performed the tests, the argument is why should another have to repeat those tests in order to get an identical product on the market. Would you please respond to that criticism?

Mr. HUTT. Mr. Statler, that arises out of the statutory structure enacted by Congress in 1938 for the approval by the Food and Drug Administration of new drugs. The law requires that every manufacturer submit his own evidence of safety and effectiveness and further provides that any Food and Drug Administration employee who would make public any of that trade secret material would be prosecuted as a criminal. It is, in short, a criminal offense for any one in FDA to release that material.

We have done our best within the Agency to establish policy in the last 3 years that would reduce this duplicative testing to the minimum required by the statute. The Commissioner's testimony points out that in the area of over-the-counter drugs we have established a regulatory system which permits the promulgation of broad class monographs. Any manufacturer who meets the requirements of those monographs may market his product without obtaining the separate testing for safety or effectiveness. This has been so successful in the over-the-counter drug area that we are right at this moment preparing regulations that will adopt the same approach for prescription drugs.

This can be adopted under the statute, however, only in the area of so-called old drugs, that is, those that are generally recognized as safe and effective after they have been on the market for some years.

Eventually we will be able to use this broader or more effective form of regulation for perhaps 90 percent of all drugs. But until

Congress changes the Federal Food, Drug, and Cosmetics Act we could not adopt it for any new entities coming on the market for the first time.

Mr. STATLER. And you would recommend Congress look at that law again?

Mr. HUTT. We have recommended at least four or five times in the past few years that Congress reevaluate that portion of the law.

Mr. STATLER. Thank you.

Senator ALLEN. Thank you very much, gentlemen.

[The prepared statement of Dr. Schmidt follows:]

PREPARED STATEMENT OF ALEXANDER M. SCHMIDT, M.D., COMMISSIONER OF FOOD AND DRUG ADMINISTRATION

Mr. Chairman and Members of the Committee: It is a pleasure to be with you today to discuss regulatory agencies and their impact on the economy. We understand and share the concern recently expressed on this subject by the President, by members of Congress, and many others. We strongly support the President's call in S. 4145 for a comprehensive review of the performance of our Nation's regulatory agencies and for the identification of needed reforms.

By your invitation to me to testify today, we have inferred that you are considering whether the Food and Drug Administration should be included in any such study. As you know, FDA is a health agency that exists to protect consumers from hazards from food, drugs, biologicals, medical devices, cosmetics, and radiation in electronic products. Other Federal health regulatory programs include those of the Consumer Product Safety Commission, the Environmental Protection Agency, the National Highway Traffic Safety Administration in the Department of Transportation, the Occupational Safety and Health Administration in the Department of Labor, and the Animal and Plant Health Inspection Service in the Department of Agriculture. As with programs of the other agencies I have named, any economic impact we have is a byproduct of our role in setting standards for industry performance and then enforcing these standards. Thus, in contrast to the rate-making agencies, the economic impact of health agencies is indirect rather than direct. Yet, on occasion health agency policies and regulations can have as great an impact—albeit indirectly—upon prices and competition as can regulatory programs specifically directed at affecting these matters. For this reason, the President has requested that the Council on Wage and Price Stability review the impact of FDA and other executive branch regulatory agencies during the coming year. Such an economic review is to be undertaken in conjunction with the review of independent regulatory agencies proposed by the President to be conducted by a National Commission on Regulatory Reform. Certainly FDA would consider the Council's recommendations helpful in framing future policy. It would thus be inappropriate for FDA to be considered by the proposed National Commission on Regulatory Reform.

We were impressed by your Committee's thoughtful questions for the witnesses at these hearings; I will address many of them broadly in this brief statement. I will begin by discussing what FDA is and what FDA is not, in terms of the types of agencies which you will be discussing here today. I will next discuss matters of regulatory agency organization and procedure, specifically as these matters affect FDA. Finally, I will conclude by addressing the impact of FDA programs upon the industry we regulate, and areas of needed reforms.

The Food and Drug Administration is not an independent regulatory commission. Ever since its creation in the early part of the century, the FDA has been a part of an executive branch department—first the Department of Agriculture, then the Federal Security Agency, and finally the Department of Health, Education, and Welfare upon its creation in 1953.

A law has never been passed establishing FDA as a statutory entity, in contrast to the independent regulatory commissions. Unlike many other regulatory agencies, FDA is headed by a single Commissioner rather than by a collegial body composed of a number of members. This, too, is a matter of history and tradition and continues because of the nature of FDA's responsibilities, as I will discuss later. Finally, FDA proceeds more often through rulemaking and direct regulatory action rather than by quasi-judicial decisions in individual cases, which are more commonplace in the independent regulatory commissions.

INDEPENDENCE

There is virtue to FDA's current organizational status in the Department of Health, Education, and Welfare. As a scientific regulatory agency, FDA needs to have access to scientific resources in other agencies, particularly those involved in research. In early years, the FDA was an offspring of research activities of the Department of Agriculture. More recently since FDA has become one of several Federal health agencies in the Department of Health, Education, and Welfare, we have benefited from close organizational proximity to agencies like the National Institute of Health.

We feel strongly, however, that a regulatory agency like FDA must be sufficiently independent to take regulatory action and to make decisions without fear of reversal by officials not directly charged with administering consumer protection laws. The Agency has been fortunate in having a relationship with the recent Secretaries of Health, Education, and Welfare, in which the need for independent FDA regulatory policy has been clearly recognized. In some ways, inclusion in an executive branch department has actually contributed to independence. I will discuss this more in a few minutes.

COMMISSIONER OF REGULATORY AGENCIES

FDA cannot speak for other regulatory agencies or for the Government as a whole, but we strongly prefer our system of having a single Commissioner in charge of the Agency. This may be more appropriate for FDA than for other regulatory bodies because of the nature of the program in which we are involved. FDA's activities require rapid decisionmaking in times of emergency. As just one example, we may find it necessary to take action against a dangerously contaminated food or drug within a very few hours. Frankly, we do not see how our volume of activity could be handled by a multimember body. Having a single Commissioner also enhances accountability to the executive branch, the Congress, and the public for the decisions that are made.

OVERSIGHT AND AGENCY RESPONSIVENESS

You have questioned whether regulatory agencies are too dependent upon the executive branch, the Congress, or the regulated industries. Here I will add to what I have said earlier about the value of being in an executive branch department. The Office of the Secretary has in the past at various times performed a buffering function to help shield the Agency from undue political pressure from various sources. Thus, being a part of the Department can help enhance agency independence.

It is quite natural for an agency, like FDA, to be the subject of "pressures"—by which I mean efforts of varying degrees of forcefulness to get the Agency to adopt the particular point of view espoused by the particular person involved. We do, and indeed should, listen and be responsive to the views of all concerned groups, but FDA is not a captive of any of these groups. But in the end, FDA must discharge its statutory responsibilities, as we interpret them, to meet the needs of the American public.

This leads me to your question about the adequacy of congressional oversight of regulatory agencies, and whether Congress should provide agencies with statutory standards reflecting policy goals, or should provide more specific policy guidelines.

Congressional oversight represents an important aspect of our checks and balances system of Government. Congress gives us the tools to do a job, and it has a responsibility to assure that it is done properly. FDA has experienced very close review by Congress for a good many years. In our view, congressional oversight is most valuable to the Agency, and ultimately to the public, when it helps stimulate desirable and effective policies and programs to help the Agency better protect consumers.

Let me give an example of the kind of oversight we consider beneficial. You undoubtedly remember the soup recalls of 1971, following a death from botulism associated with consumption of canned vichyssoise from the Bon Vivant company. Thereafter, the Subcommittee on Public Health and Environment of the House Committee on Interstate and Foreign Commerce launched hearings on regulation of the food industry. The specifics of the Bon Vivant episode were considered, but merely as a springboard to consideration of deficiencies in industry quality control and in FDA's regulatory procedures, statutory authority, and resources. These hearings helped stimulate a new emphasis on food safety and sanitation and helped FDA to identify weaknesses in its programs which needed correction.

AGENCY POLICY AND PROCEDURE

Some of your questions, Mr. Chairman, dealt with matters of internal agency policy and procedure. We believe regulatory agencies should be encouraged to develop and adhere to broad policy guidelines explained to the public in advance. FDA has been moving more and more toward this policy over the years. We have stressed the use of rulemaking procedures in lieu of case-by-case adjudications. This policy is evidenced by our broad food labeling regulations and our class approach to assuring safety and efficacy of hundreds of thousands of nonprescription drugs and other products, to name examples where we have adopted this approach.

We have also moved toward greater openness, through Freedom of Information Act regulations soon to be published in final form, and through elaborate procedural regulations, now undergoing final review within the Agency. In operating under the proposed Freedom of Information regulations prior to formal promulgation, we have already made 90 percent of FDA's records available to the public. The procedural regulations will spell out the rights of participants in FDA proceedings, and the means by which all citizens can be heard by the Agency.

Most of our procedural reforms are being accomplished without difficulty under existing law.

More recently, we have developed more productive ways to increase participation by interested parties. We have supplemented ordinary notice-and-comment procedures with innovations such as (1) use of scientific advisory committees operating under formal procedures with consumer and industry representatives, (2) providing appeal mechanisms to the Commissioner and other Agency officials, and (3) holding informal public hearings. These approaches will, ot course, be codified in our procedural regulations and made available in any appropriate FDA proceeding. These regulations will also, to the extent possible streamline formal rulemaking proceedings.

BUDGET RECOMMENDATIONS

The question of whether regulatory agency budgets should go directly to Congress has been considered many times in the past. Frankly, we doubt that direct submission of a budget to Congress would make much difference in the ultimate outcome of our budget. Every agency's resource needs must necessarily be considered in relation to the total Federal budget by the President and by Congress, pursuant to the new Congressional Budget Act. At the same time, information on how much money the agency asked for and did not get is freely available. Although the history of FDA's budget requests at all stages routinely appears in the printed appropriation hearings, we cannot say that availability of this information has necessarily affected the levels of our appropriations.

IMPACT OF FDA REGULATIONS ON INDUSTRY

Turning now to the impact of our programs on regulated industry, we must acknowledge, first, that regulation necessarily costs something; and, second, that these costs are not borne by corporations from their profits but rather are passed on to consumers. Thus, in considering the need for FDA regulation, it must be recognized that producers' interests are not alone on the cost side of the cost-benefit equation, since the consumer ultimately pays the cost. The consumer ultimately pays the bill for everything we require, and thus FDA's effectiveness should be judged on the basis of whether the extra costs we impose are outweighed by the benefits provided, which generally involves better health protection.

Our programs can also result in considerable consumer savings, if individuals are spared the purchase of harmful or worthless products or given label information which enables wiser purchasing decisions. Our primary goal, however, is protecting the public.

An example of advancing consumer protection through new regulations without undue economic dislocation has been the uniform effective date for our omnibus food labeling regulations. This date was set at January 1, 1974, many months in advance, to aid companies in planning to reduce inventories, order new labels, and discard old ones. More recently, in view of the Nation's efforts to cope with its economic problems and the difficulties some firms have experienced in meeting the January 1 deadline, we have extended the uniform effective date to July 1, 1975—a total lead time of almost two years following initial announcement of the uniform effective date in August 1973.

Most of us would probably agree that small concerns generally find it harder to meet Government regulatory requirements. Compliance with new regulations

generally requires the outlay of capital, as well as the ability to follow regulatory developments. Thus, any regulation, including FDA's, runs the risk of making it harder for small firms to survive or of otherwise dampening competitive ardor.

We do not believe FDA's mission involves, or should involve, deliberate policies to enable companies which are incapable of satisfying basic safety and other consumer protection requirements to continue in business. But it is entirely proper for us to try to devise policies and procedures which minimize undue adverse impact on small firms and on competition generally.

We believe the general concept can be stated as follows: the regulatory agency should attempt to devise the least restrictive means of control which is adequate for effective regulation.

This principle underlies the medical device legislation (S. 1446) which we have proposed and FDA regulations covering nonprescription drugs and diagnostic products.

This has meant two things. First, procedures such as preclearance of devices are avoided unless they are really required to assure public protection. If something less will do—such as device standards or labelling—why require preclearance?

Second, compliance is eased by broad class-type regulations, such as those we are developing for nonprescription drugs, which avoid requiring individual new drug applications for each manufacturer's product. Anyone who can comply with the monograph and other requirements of the Act can market that product, without developing costly safety substantiation data for the individual product or securing specific approval. We are now developing regulations to extend the monograph approach to certain long-established prescription drugs.

AREAS OF OVERREGULATION

The drug industry is subject to tight regulation of its research and to premarket clearance of its new products for both safety and effectiveness. These are stringent requirements which have led to considerable complaint by the industry that it is overregulated and increasing focus in recent years on the possibility of a "drug lag." While we do not agree with all of these charges, we are concerned that constraints on research may shift innovation in new drugs overseas.

We have also been concerned that the current individual new drug application approach, supported by the trade secret confidentiality provision, may have resulted in over-regulation of many prescription new drugs. About 90 percent of all prescription drugs have separate new drug applications, although product monographs would in many cases work as well from a safety and efficacy standpoint. The current requirements for abbreviated new drug applications are probably rather excessive also. In the future, monographs for certain well-established prescription drugs will increasingly replace the individual new drug application approach, without relaxing our public health vigilance. However, individual new drug applications remain the best mechanism to control the introduction of new pharmaceuticals into our society. With respect to these new products, benefit-risk judgments will ultimately determine whether the tight controls on these new products represent a health gain or a health loss to our citizens.

Another area where there may have been some over-regulation by FDA involves standards of identity and quality for foods. These standards, established under section 401 of the Federal Food, Drug, and Cosmetic Act, traditionally involved a recipe approach which discouraged competition and improvements in standardized products. Guided by the recommendations of the 1969 White House Conference on Food, Nutrition, and Health, FDA has made an effort to get away from overly specific food standards. We have also used alternative approaches, such as developing common or usual names and nutritional guidelines for food and requiring percentage ingredient labeling of characterizing ingredients. These regulations aim at assuring that food labels provide consumers with information needed for value comparison. Another desirable effect of percentage ingredient labeling regulations will be to stimulate competition between firms with respect to quantities of valuable characterizing ingredients—such as the percentage of shrimp in shrimp cocktail.

Occasionally, mandatory over-regulation has been proposed. One example is the perennial proposal for continuous inspection of fisheries. We believe, in general, that continuous inspection of fisheries would be a misallocation of resources, resulting in excessive cost and control compared to the benefits derived.

We also strongly object to narrow categorical bills prompted by efforts to deal with economic dislocations in domestic product markets through legislation

which purports to be enacted to protect consumers. We are very concerned about the legislation presently receiving serious consideration in the House Agriculture Committee which would require onerous and unnecessary inspections of imported dairy products—which we suspect is aimed at reducing the quantities of imported dairy products.

Some obsolete, excessive regulatory statutes are being done away with by Congress and the Courts. Congress recently repealed the filled cheese provisions of the Internal Revenue Code. This law and the Filled Milk Act of 1923, administered by FDA, prevented the marketing of nutritious products which combine milk solids with vegetable oils. FDA ceased enforcing the Filled Milk Act in 1971 after it was declared unconstitutional by a Federal court, and we have recommended its elimination from the statute books by formal repeal. There is also the Tea Importation Act of 1898, which requires examination and taste tests of samples of tea offered for importation into this country. This program is rather effective, does not cost much, and provides at least some degree of consumer protection. But since it is a form of industry service, FDA should be able to charge the tea industry fees commensurate with costs.

AREAS OF UNDER-REGULATION

A major category of products regulated by FDA which is not subject to adequate safety controls is medical devices. We strongly urge Congress to persist in its efforts to enact a medical device bill to assure the safety and effectiveness of medical devices before the close of this Congress. Although FDA has developed various new regulations to better assure cosmetic and food safety, there are some deficiencies in our authority over these products, which would be addressed by Department sponsored legislation.

There are other deficiencies in FDA regulatory authority—principally in our information-gathering and remedial powers—which would be corrected by S. 3012, the Department's proposed Food, Drug, and Cosmetic Amendments. Other regulatory agencies have long possessed the authority proposed in this bill for records inspection, recordkeeping and reporting, subpoenas, and administrative detention of suspect products. We strongly urge the enactment of this bill, which will greatly strengthen FDA's ability to protect the public.

STATE REGULATION

We also believe it appropriate for the proposed National Commission on Regulatory Reform to consider appropriate State regulation responsibilities, as well as Federal responsibilities, and recommend improved mechanisms for assuring uniformity of Federal and State regulatory laws.

Mr. Chairman and Members of the Committee, this concludes my formal statement. My colleagues and I would be pleased to answer any questions you may have.

[From the Washington Post, Nov. 26, 1974]

U.S. Still Spending on Key Biscayne

(By Jack Anderson)

Despite all the rhubarb over secret expenditures on former President Nixon's estates in Florida and California, federal money is still being poured into the Key Biscayne compound.

A team of General Services Administration workmen is busily ripping out partitions and repairing walls in at least two of the buildings, just as if Watergate never happened.

And seven Secret Service men are still puttering around the premises on vague security details, even though the former President has not even visited Key Biscayne since he left office Aug. 9.

When we approached the General Services Administration concerning the continued use of federal manpower and material for the Nixon home, a spokesman huffily denied any such activities.

But when my associate Bob Owens pointed out that, posing as a sandal-shod Florida tourist, he had observed the comings and goings of the government workmen, GSA conceded that repair work was going on.

It was only fair to "restore" the Nixon homes and other, rented dwellings in the compound to their pre-presidential condition, the GSA said. One of the homes under repair is owned by Nixon crony Robert Abplanalp.

Actually, the government had already done considerable work on Abplanalp's home. While it was being used by the White House, it got a $1,667 paint job and other improvements.

The GSA said the new work would be completed by Christmas, although the negotiations to get compensation from Nixon for improvements on the Key Biscayne property may go on for months.

Still at issue, for instance, is whether the Nixon-designed "security fence," costing $66,314 and $4,786 worth of carnation hibiscus shrubs surrounding it will be paid for by Nixon.

The Secret Service, meanwhile, has pulled out most of its detection equipment. The Coast Guard has phased out its five-year-old $2 million patrol of the Nixon beach area. And the Navy has removed the $20,267 shark net that had protected the waterfront swimming areas of Nixon and his friend Bebe Rebozo.

Undiplomatic Slip—Rarely do America's envoys in rundown foreign capitals relax their stiff upper lips and criticize their hosts.

But a "Limited Official Use" cable in the State Department's file drawers bluntly reveals how U.S. Ambassador John Reinhardt regards his militarist Nigerian hosts.

Apparently upset over a proposed junket to the Nigerian capital of Lagos by Sen. Jacob K. Javits (R-N.Y.), Reinhardt wired the State Department that appointments with government leaders might be hard to line up because the Nigerians preferred fun to fidelity.

"Must state frankly that arranging Sunday meetings with FMG (Federal Military Government) officials will not be easy," the diplomat cabled, "most of whom cannot be budged to attend any weekend gathering which is remotely official."

Reinhardt then switched to the Javits' hotel reservations, "I am having some second thoughts about the adequacy of Ikoyi hotel accommodations, which are only ones available," he wrote. "Hence, I urge that Sen. and Mrs. Javits stay at residence where I believe I can arrange some informal gatherings with articulate FMG representatives and at the same time hopefully provide a few amenities not otherwise available in Lagos."

The document wryly concludes: "Assume that senator's seeming reluctance to spend two nights in Lagos stems from city's earned rating among the world's least inviting. However, we can guarantee some compensations for one eager to feel the African pulse, which beats rapidly and strongly in Nigeria."

Fuddle Factory—Sometimes Washington seems an enormous "Fuddle Factory" where everything goes wrong for the ordinary Americans the bureaucracy is supposed to serve.

For example, E. H. Weder, head of the Highland, Ill., Manufacturing and Sales Co., had for years sold cellophane Easter grass, which was flammable. When the Food and Drug Administration ordered him to stop, he dutifully complied.

At a cost of $950,000 he destroyed his flammable stocks and converted his machines to produce safe, nonflammable grass. But he and many of his employees had to work 16 hours a day to fill enough new grass orders to stave off bankruptcy.

Then, a few months ago, he saw unsafe flammable grass for sale in a drugstore. To his bewilderment, he learned that the government had given the go-ahead to another manufacturer as long as the dangerous Easter grass was marked "Flammable."

Outraged, he called the FDA. It was all a $950,000 misunderstanding, he was assured. Weder's only recourse now is to sue the government, which he lacks the time and money to do. In a letter to his sympathetic congressman, Phil Crane, (R-Mich.), Weder sounded the plaint of many small businessmen trapped inside Washington's "Fuddle Factory."

It is, he said, "persecution of small businesses by an unfeeling, stupid, cold, calculating, anti-business bureaucracy." The government goof almost destroyed his own life work and "the means of livelihood of hundreds of employees," he wrote.

Question for Food and Drug Commissioner Schmidt From Senator Metcalf

BACKGROUND

I would appreciate your comment on an article about the Food and Drug Administration in Jack Anderson's column in this morning's Washington Post.

According to this article, FDA ordered a small firm in Highand, Illinois to stop the sale of cellophane Easter grass—the kind in which the Easter bunny lays his eggs—because it was flammable.

The manufacturer complied, and destroyed almost a million dollars worth of flammable material. He converted his machines to produce safe nonflammable material.

Then, he saw flammable Easter grass for sale in a drugstore. And, according to the article, he was told that the government had given the go-ahead to the manufacturer of that material, so long as it was marked flammable.

According to this article, the manufacturer called the FDA and was told there had been a misunderstanding.

So his recourse is to sue the government, which isn't easy for a businessman who has just destroyed almost a million dollars worth of his inventory in order to comply with FDA's order to him.

QUESTION

Now, it seems to me that, if this article is correct, FDA has applied a double standard to two different businesses. Either both of them should be prohibited from selling flammable material or both of them should be permitted to sell it with cautionary labeling that it is flammable. Do you agree?

FDA Response to Question by Senator Metcalf

The Food and Drug Administration (FDA) agrees that in this instance there should have been no such "double standard" applied, and states that to the best of our information, any such characterization of the problem involving the Highland, Illinois Manufacturing and Sales Company is inaccurate.

As far as we have been able to determine, the facts of this matter are that on March 28, 1972, FDA's Bureau of Product Safety (BPS) issued a press release warning consumers about the flammability of certain Easter grass. On April 13, 1972, FDA began sending letters to all identifiable producers of this substance advising them of our press release and urging them to try to market only the fire-resistant product—on a voluntary basis. Subsequently, on May 14, 1973, the responsibility for enforcing the Child Protection and Toy Safety Act, the flammable Fabrics Act, and the Hazardous Substances Act was transferred from FDA to the then newly created Consumer Product Safety Commission (CPSC).

In June 1973, the CPSC sent letters to Easter grass manufacturers which: (1) again urged the manufacture of only flame-resistant material; (2) stated that any nonflame-resistant grass thenceforth manufactured was to be tagged as "flammable;" and (3) warned that the makers of any Easter grass falsely labeled as "flame-resistant" would be prosecuted. The point at which Mr. Weder of the Highland Company caused the destruction of his inventory and began conversion to production of nonflammable grass is uncertain.

In his column of November 26, 1974, Jack Anderson maintained that the Highland Company was "ordered" to stop selling flammable Easter grass. In fact, however, it must be pointed out that when Highland acted to destroy its stock, neither a court order nor a rule promulgated by FDA forced it to do so. Further, it appears from our investigation that the primary thrust of the BPS efforts concerning Easter grass during the 1973 Easter season was to assure the accurate labeling of flammable substances by all manufacturers in the field. It appears that this goal was communicated to Mr. Weder during a meeting held at his request at which Mr. Weder, other representatives of the Highland Company, the Director of BPS, Congressmen Crane and Goldwater, and staff members of Congressmen Camp, Gray, O'Neill, and Steed were present. At this meeting, Highland requested a delay in the effective date of the application of the labeling requirements of the regulations under the Hazardous Substances Act to Easter grass for the 1973 Easter season. According to these regulations, flammable

materials must be clearly labeled as such. Highland was informed that the statute intended no such delay, but that their request would be considered. (Highland was subsequently notified that the request was denied.) While the company was also advised of its right to petition for an exemption, no such petition was ever received. It is also noteworthy that a number of other manufacturers indicated at the time that they would have no difficulty in marketing any onhand stock of flammable materials for purposes other than use as Easter grass. No manufacturer indicated any anticipated difficulty of such alternative marketing. Thus, it seems to us that the Highland Company was treated no differently than any other cellophane grass manufacturers. It also seems probable that Mr. Anderson's column of November 26, 1974, contained something less than a full exposition of the facts surrounding this sequence of events.

Finally, the Committee might wish to contact the CPSC directly for additional or more detailed information, as the relevant records were transferred from FDA to the CPSC at the time CPSC gained status independent of FDA.

Senator ALLEN. At this time we will have a panel composed of Mr. Lee White, Mr. William Doub, Herbert Denenberg and A. Everette MacIntyre.

Gentlemen, we wish to conserve time, and at the same time we wish to give you an opportunity to include in the record your full statement, which will be done.

I wonder if we could in say 10 minutes or less summarize your statement and have the full statement put in the record and then jointly allow us to question the panel.

Which of you gentlemen would like to start first?

TESTIMONY OF LEE WHITE, ATTORNEY AT THE FIRM OF WHITE, FINE & AMBROGNE, WASHINGTON, D.C.

Mr. WHITE. Mr. Chairman, I am not sure I am the oldest member, but I hope the record will note I have been seated to the left of Herb Denenberg, my old friend from Omaha.

Senator ALLEN. Yes.

Mr. WHITE. I thank you for the opportunity to come here. My formal statement is comparatively brief, and I would like it to be incorporated into the record. I would like to just touch a couple of the spots.

I believe that it is now very nearly universally accepted that there should be a review and you are really now trying to get some advice on the scope and whether the particular body should be a Presidentially appointed committee, a congressional committee, or some Hoover-type commission.

On the question of scope, it seems to me that the committee would be well advised to recognize the enormous difference between policy recommendations and procedural recommendations. As a young fellow I served as the assistant to a member of the Hoover Commission but it was the second Hoover Commission. The first Hoover Commission in late 1940's focused on management and how the government ought to operate. The General Services Administration, for example, came out of that commission's recommendations. They had an enormously high batting average.

About 8 years later a reincarnation of the Hoover Commission came along and they got deeply into policy. I don't remember the batting average but it was pretty puny. It certainly wouldn't make

the big leagues. It was not 300 percent. I don't even think it was 100 percent out of 1,000.

I think the reason is that, by and large, Congress is the mechanism in our society that makes policy. Anybody can advise and make recommendations and it certainly would be useful to have a coherent proposal come from a distinghished body, but nobody should delude themselves. If they are going to be making very important substantive recommendations those are likely to be very controversial and Congress will have to plow through them anyhow.

So I would emphasize, if it is possible, that this group you are about to let loose on the world, focus primarily on some of the management problems, at least initially.

As to the consolidation of functions, I have a hunch that it is probably going to be the most fruitful of the areas that the commission is likely to undertake, and it ought to be.

Senator ALLEN. By consolidation do you mean within our agency or possibly transferring duties from one agency to another?

Mr. WHITE. Primarily the latter. For example, I happened to be on the White House staff at the time the Department of Transportation legislation was proposed by President Johnson. At the same time there was a twin recommendation that the regulatory functions in the Transportation field should also be consolidated. If I recall correctly President Johnson's attitude was one thing at a time and we simply never got around to the regulatory consolidation. I have sort of a deep-seated belief that that is where a commission is likely to come up with some recommendations and I know that is equally true on the energy side.

Right now, we have in the field of electric utility regulation the Nuclear Regulatory Commission, the Federal Power Commission, and the Securities and Exchange Commission still has a public utilities holding company responsibility. Those obviously ought to be pulled together.

As to the examination of State and local agencies, it seems to me that is something that ought to be done only on a tangential basis by the commission partly because of the "States rights" issue and partly because I really think the Federal responsibilities ought to be examined first. When I heard 3 to 5 years mentioned as the term for the proposed Commission this morning in Senator Taft's discussion it sort of startled me. I can't believe it should take that long to make these recommendations, especially if the Congress has to start plowing through each of those major policy issues. I would propose something considerably shorter than that.

Senator ALLEN. Is 1 year long enough?

Mr. WHITE. Well, in my statement that will be put in the record, I suggest 18 months with a requirement that there be an interim report at the end of the first year. I once worked for a fellow who recognized very quickly that regardless of how long he gave people to do a job, they only did it in the last 3 days. Thus he generally only gave us 3 days for any assignment. The product wouldn't be much better in 3 or 4 or 5 years than if the Commission had only a year and a half.

On the question of whether the review ought to include semi-independent agencies such as FDA, I think the answer is yes. It may well be that there will be a recommendation that they ought to be

abolished or folded in with some other agency or perhaps an agency should not be independent. It would seem to me to be a mistake not to include some of them in the scope of the review.

The problem, it seems, is the enormous number, and presumably the commission will have enough good commonsense and wisdom not to go beyond their capacity and to meet any fixed time schedule.

As to whether this commission ought to be a Hoover-type commission or a congressional committee, or perhaps a presidentially appointed commission, I am inclined to the view that it ought to be outside of a congressional committee.

Senator ALLEN. That Congress should have no hand in the appointments.

Mr. WHITE. No, the Hoover-type permitted four members of the legislative branch, four from the executive branch and four from private life. Of those four from private life, I think one each was appointed by the Speaker and the President of the Senate. I don't know if I could give you finite detail as to who or how many should be appointed to something like that, but I certainly think the presence of some sitting legislators would be very useful.

I think the most important appointments are the key staff personnel. The important consideration will be who is at the head of that staff operation. All you can do there is exhort the Commission to come up with the best candidates.

This leads to one other point, and that is the quality of appointments to these agencies. I know of no way to legislate prudence on the part of the President in his selection process. It is his responsibility and I would not think it ought to be lodged anywhere else.

I do believe, however, that the Senate committees that have jurisdiction over these agencies have a heavier responsibility than they have exercised in the past in oversight and the confirmation of nominations. I gather, without being able to document this, things have improved a little bit. There was a major Senate vote on a regulatory appointee a year or two ago, and that I think has focused a little more attention on the part of the White House staff on the backgrounds and qualifications of appointees.

I don't want to burden this record too much, but I have one little personal crusade I have been waging and I can say with practically no success. That has to do with what happens to people who leave the regulatory world. Right now as the term of years comes to an end, the individual who occupies that seat has to begin to think of what is going to happen to him or her—will the President reappoint? Will the President disappoint them? In short, unless they happen to be wealthy, they have to figure out what will happen when that term ends and the paychecks stop. I have discovered that is a very unsatisfactory period of time. I think, although it is almost impossible to substantiate this, that there is a little subliminal change in the voting pattern of the member. Worst of all, you can hardly imagine a more inappropriate time for somebody to be looking for a job. I have proposed a half-way house for broken down regulators. As they leave the Government, I would propose, they ought to be assured of perhaps a year or a year and a half with continuous salary and with the opportunity to write on their favorite topic, their memoirs, matters they couldn't get to while at the Agency and also look for a job.

Senator ALLEN. Would you have any time limit on the time during which they could not be employed by business regulated——

Mr. WHITE. I have not woven that into the proposal but that is an extremely difficult issue. My own preference would be to put in some fixed statutory requirement for each of the agencies, keyed to the apparent needs for that particular area of regulatory action. It is very difficult to ask a person to spend some years acquiring expertise and say, "by the way, you may never use this as a means of earning a livelihood" and yet some of the apparent abuses are enough to warrant attention by the Congress.

I think I have used more than my 10 minutes and said more than I intended to but I will be glad to remain here and answer any questions.

Senator ALLEN. We will give you the opportunity to add additional views.

[The prepared statement of Mr. White follows:]

PREPARED STATEMENT OF LEE C. WHITE, ATTORNEY AT THE FIRM OF WHITE, FINE & AMBROGNE, WASHINGTON, D.C.

Mr. Chairman and members of the committee, my name is Lee C. White, and I am an attorney in Washington, D.C. and practice before various Federal regulatory bodies. Additionally, from March 1966 to July 1969, I served as Chairman of the Federal Power Commission. I welcome the opportunity to discuss the various proposals pending before the Committee which would create a national commission to examine the policies and procedures of regulatory agencies.

I share the almost universal reaction that such a review should be undertaken. There are a few points in connection with such a study that ought to be considered by the Committee and I will comment on them briefly.

THE SCOPE OF THE REVIEW

Certainly the regulatory policies followed by the agencies ought to be examined, and this includes not only the particular statutes implemented by them, but their interpretation of those statutes. There should, however, be no illusion about the ease of this particular assignment. Basically the Congress is the policy setting mechanism in our society and it has been my observation that Congress is far more responsive to procedural recommendations by special commissions than it is to policy recommendations. The first Hoover Commission in the late 1940's focused primarily on organization and procedure—its recommendations had a very high batting average in administrative and legislative actions taken to implement them. The second Hoover Commission in the mid-1950's moved into policy and program issues and, despite the fact that four out of the 12 Commission Members were from the Congress, very little policy change resulted from the ambitious work of the Commission.

Considerable attention should be given to the consolidation of responsibilities where the groupings seem logical and manageable. At the time the proposal to create a Department of Transportation was considered in the Johnson Administration, there was a twin recommendation that the transportation regulatory functions be considered into a single agency. As I recall, President Johnson's view was that the creation of the Department was the first priority and that the regulatory consolidation ought to wait until D.O.T. had been created and operating. My relatively uneducated view is that the time for such a move is long overdue.

All regulatory agencies are not involved in the same type of operation and thus it makes sense to examine each in light of its missions with a view to tailoring procedural plans to enable the agency to function efficiently. As one who participated in the process, I am not proud of the nearly interminable delays that characterized many of the Federal Power Commission's proceedings while I was a member. The trick, of course, is to achieve that balance between expeditious action on the one hand, and fair and equitable process on the other.

The phrase "regulatory agency" normally conjures up in my mind one of the independent federal regulatory agencies. It occurs to me that the regulatory bodies

or units operating within the Executive Departments, such as the Food and Drug Administration, should also be examined and included within the scope of the review. With regard to State and local regulatory agencies, my recommendation would be to encourage a review through the National Governors Conference or some other mechanism. Unquestionably in exploring federal agencies, their relationships with State and local regulatory bodies, will come in for some examination.

THE CHARACTER OF THE REVIEW COMMISSION

It makes some difference whether the Commission is of the Hoover Commission type; that is, with some Congressional members, some from the Executive Branch, and some from private life; or a special Congressional Committee; or a Presidentially appointed commission. But, far more significant in my view is the character of the key staff personnel who will assist the Commission or the Committee. Although I do not feel strongly about the matter, my preference would be for a Hoover Commission approach. As to the length of time to be given the Commission, I would tend to a shorter rather than a longer term; perhaps an 18 month life with the requirement of an interim report due at the end of 12 months. On the question of whether there should be representation on such a body from the sitting members of regulatory bodies, I think that, properly selected, such individuals could make a favorable contribution.

CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES

One of the frustrations I experienced as a regulator was the difficulty of competing for the time and attention of the appropriate Congressional Committees. The Committees with substantive jurisdiction over the FPC, the Senate Commerce Committee and the House Committee on Interstate and Foreign Commerce are extremely busy Committees with broad areas of jurisdiction and this made it very difficult in the past to secure hearings and actions on legislative recommendations. Perhaps the situation has improved in the past five years, but it is at least worth some examination, perhaps by the Committees themselves rather than any outside group. Quite obviously the consolidation of functions and perhaps the elimination of some agencies would make Congressional oversight easier to accomplish.

SELECTION OF AGENCY MEMBERS

There is nothing easy about inducing able, qualified people to undertake these important responsibilities. I know of no way to legislate care on the part of the President and his staff except through rigorous scrutiny by Senate Committees passing on nominations. Recent experience demonstrates that some progress is being made on this front.

There is one particular personal axe I would like to grind. Three years ago I suggested the establishment of a "half-way House" for Federal regulators. The idea would be to have a group of private educational and research institutions or, as a last resort, the Federal Government provide assurance to every member of regulatory agencies with a fixed term that at the end of that term, whether or not the President has reappointed the member, she or he would be given the same salary for a fixed period, for example 12 or 18 months, to engage in research, writing on matters related to their regulatory experience, and most importantly, looking for a job. It is my thesis that as the end of a regulator's term nears, that individual subliminally begins to shift gears in an understandable concern about "what will happen when the term ends". Those assignments are tough enough without the extra mental burden of wondering whether there will be a paycheck for those who are so unfortunate or unwise as not to be born rich, or to have married "money". It really would make no difference whether the option were ever exercised; my point is that it could provide a healthier attitude for the regulator who may be departing. It is fair to report that up to now, there has not been a great deal of support from the notion. If the Committee is interested, I would be glad to provide a copy of the full blown presentation for the transcript.

POLICY ISSUES

Earlier in this statement, I expressed reservations about farming out policy review to bodies other than Congressional Committees. I would not want that to be interpreted as saying it should not be done. I hope the Executive Branch is already engaged in such reviews, seeking the advice and guidance of the regulatory bodies, and that the appropriate Congressional committees are also hard at work on the substantive policy questions. Any contributions by outside organiza-

tions, especially if they are prestigious and well staffed, merit careful consideration and attention by the Congress.

[Additional material for the record follows:]

[From Public Power Weekly Newsletter, Nov. 1, 1974]

MISUSE OF UTILITY FUEL ADJUSTMENT CLAUSES CITED BY "CONSUMER REPORTS" MAGAZINE

An article titled "The Fuel-Adjustment Caper" in the November issue of *Consumer Reports*, published by Consumer Union, says that its review of how electric utilities are being allowed to add fuel adjustment clauses costs to their customers' bills "gives us reason to believe that consumers in many areas are indeed being overcharged." A number of municipally owned electric utilities have challenged the fuel charges of private utility wholesale power suppliers.

The magazine notes that 37 of the 47 states with statewide utility regulation allow fuel adjustment clause increases that by-pass formal rate hearings and permit utilities to impose such charges without state approval, public hearings "or in many cases, public scrutiny of any kind."

The magazine asks: "Does the state have a legal right to grant a private corporation a monopoly electricity franchise and then give up the power to regulate its rates?"

APPA had filed comments with the Federal Power Commission that express general support for the agency's proposed rulemaking (Docket No. R-479) to require power companies to provide more accurate accounting of fuel costs in fuel adjustment clauses written into wholesale power contracts. But the APPA statement strongly protested the FPC's proposed intention to postpone the mandatory effective date of the new regulations until two years after adoption, while permitting additional one-year delays on so-called "individual circumstances." The Association said this would result in unjustified and unwarranted "regulatory delay," emphasizing that the regulations "should be placed in effect and made obligatory in a matter of months. As we have pointed out earler," the APPA statement noted, "failure to use variable efficiency fuel clauses costs the consumer money and failure to account for nuclear fuel in a generation mix saddles the consumer with excess cost."

Comments filed earlier by the Northern California Power Agency, the Georgia Municipal Association Power Section, nine California municipals, 12 Florida municipals, two from Massachusetts and one from Kentucky, urged the FPC not to grant "blanket authorization" of fuel adjustment clauses but to continue to scrutinize each proposal as it is presented.

FPC DELAYS DECISION

Althought the FPC proposed the new rulemaking several months ago, the Commission still has not taken any action on it and has failed to disclose the reasons for the prolonged delay in coming to a decision. The proposed regulation is strongly opposed by many private utilities.

Consumer Reports warns about the possible consequences of demands for "automatic" pass-throughs of various other utility costs, as advocated by power companies and the Ford Administration in the persons of Secretary of the Treasury William E. Simon, Federal Energy Administration chief John A. Sawhill and others. Mr. Simon has been urging state regulatory commissions to grant private utilities immediate and sizable rate increases and along with FEA's Sawhill, has been trying to persuade the regulators to allow "automatic" flow-throughs of many of the IOU's other costs. Administration spokesmen also want the regulators to allow substantial rate-of-return increases, to authorize "normalized" accounting procedures and to adopt the "future test year" concept in ratemaking. Mr. Simon is also a leading exponent of raising the private utilities' Federal investment tax credit benefits from 4% to 10%.

Consumer Reports asserts that automatic pass-throughs of all costs without any regulatory hearings "perverts the theory underlying state regulation of utility monopolies. Such pass-throughs merely provide an economic incentive for inefficiency. Utilities could purchase expensive fuel or allow other operating expenses to increase without worrying about hurting profits. In effect, they would be operating on a cost-plus basis that would insulate them from any normal business risks. The consumer would bear all the risks of the utility business."

The magazine refers to a survey by Salomon Brothers, a brokerage firm, showing that one-third of the electric utilities polled "don't pass through fuel-efficiency savings to consumers. . . . Some fuel clauses assume a system's efficiency remains constant. A utility can install new, more efficient equipment but still base its fuel adjustment charge on the efficiency of the replaced equipment." The publication also points out that although nuclear fuel costs are from one-half to one-tenth less than the costs for a comparable amount of coal or fuel oil, the Salomon Brothers survey discovered that only seven of 45 large investor-owned utilities surveyed factored such savings into their fuel adjustment clauses. As a result, "when a nuclear power plant is in operation, the cheaper nuclear that replaces high-priced coal or oil doesn't enter into the calculations that determined fuel adjustment charges. But should a nuclear plant shut down for repairs, the high-priced replacement fuel is included in the charge."

OVERCHARGES CITED

Consumer Reports cites several specific examples of fuel clause-induced overcharges in various states:

In North Carolina, Duke Power Co.—confronted by a United Mine Workers strike at its coal mine in Harlan County, Ky., "simply replaced Brookside coal at its generating plants with much more expensive coal bought on the open market, passing the higher costs on to North Carolina ratepayers under the state's coal adjustment clause. Without that clause, Duke would have had to face the glare of unfavorable publicity from formal rate hearings and would have had to foot the increased coal bill until state approval for a rate hike was granted. . ." As a result, Duke customers helped the company "sit out its labor troubles by paying more for electricity."

In New York State, "millions of electricity users (including customers of Consolidated Edison and Orange & Rockland Utilities) pay a penalty for higher fuel oil prices when the company does not burn fuel oil" because the gas division of the utility sells gas to the electricity division at a profit, "pegged at half the difference between the price of gas that the electricity division does buy and the price of fuel oil it would buy if it burned oil instead of natural gas. When fuel oil prices rise much faster than natural gas prices, as has been the case this year, the gap widens, the profit rises, and the consumer pays the utility for a cost the utility never incurred . . . thanks to the fuel adjustment clause."

In Massachusetts, "where a consumer's electricity bills are computed for a two-month period, the cost of fuel during the second month is billed for the whole period. Thus if fuel costs in October are 10% higher than in September, consumers are billed at the higher rate for all of September as well as October." The magazine, in refuting claims by private utilities that such charges could "even out," cites the "unreal" prospect of declining fuel prices and the fact that some utilities got state permission to drop fuel adjustment charges in the mid and late 1960's when fuel prices "actually did decline . . . only to reinstate them later, when prices began to rise sharply in the early 70's."

ENERGY COMPANIES' MULTIMILLION-DOLLAR TAX WRITEOFFS ILLEGAL, SENATOR STEVENSON SAYS

Many of the nation's major oil companies and private utilities are making illegal Federal tax writeoffs worth millions of dollars on their political advertising "intended to influence public opinion" on legislation, Sen. Adlai Stevenson (D., Ill.), said this week. "Since the dawning of the energy crisis in 1973," he added, "the public has been bombarded daily" by the ads of energy companies, which have written them off as tax deductions.

Meanwhile, more major oil companies this week joined the list of those reporting multi-billion-dollar record-breaking net profits for the third quarter of 1974 (Newsletter 74–42, Oct. 25, p. 1). Atlantic Richfield's net income rose by 140% to $144-million and its profits for the first nine months of 1974 soared to $377.7-million, compared to $178.5-million in 1973; Mobil profits for the first nine months rose by 58% to $903.8-million compared to $571.2-million last year; Occidental Petroleum's net for the same period jumped by 360% from $53.7-million to $247.2-million; Texaco's profits increased by 70% from $838.9-million to $1.4-billion; Standard Oil of California had a profits gain of 57%, from $560.5-million to $877.7-million; Ashland's fiscal year net profits rose to $113-million from $84.3-million; and Marathon's were up by 50%.

FPC Order Bringing 17 Other Municipals into Elbow Lake Rate Case Criticized

Attorneys for a number of municipal electric systems this week deplored a Federal Power Commission order that expands a transmission rate proceeding involving only Otter Tail Power Co. and the Elbow Lake, Minn., Municipal Utility so that it will now include 17 other Minnesota and South Dakota municipals that receive power transmission service from the company.

Public power counsel pointed out that the original case was limited only to Otter Tail's tariff rate for wheeling 1470 kw of power to Elbow Lake, but now the Commission has apparently decided that the rate it eventually will set will also apply to all 18 municipalities; and will cover approximately 45,000 kw of wheeled power, "even though only one of the 18 towns is being represented in the proceeding before the FPC." The Commission issued its controversial expansion order on Oct. 21 and gave interested parties only 10 days to file protests, a minimal period for allowing affected municipalities to act. Hearings are tentatively scheduled to resume at the FPC on Nov. 18.

According to the Commission, its expanded proceeding ruling was made on the recommendation of administrative law judge William L. Ellis. This means that the 17 other municipalities—which now pay wheeling rates substantially less than the rate charged by Otter Tail to Elbow Lake—face the prospect of much higher rates as their contracts expire because the new FPC-fixed rate for Elbow Lake could become the "governing rate' for all 18 municipalities.

The 17 other municipalities are the 14 Minnesota communities of Alexandria, Barnesville, Benson, Breckenridge, Detroit Lakes, Henning, Lake Park, Newfolden, Nielsville, Ortonville, Shelly, Stephen, Tyler and Warren; and the South Dakota communities of Badger, Big Stone City and Estelline.

Elbow Lake has been waging a long-time running battle with Otter Tail. The village filed a supplemental claim in U.S. District Court in Minnesota last summer raising the amount of damages sought in its antitrust suit against the company from $375,000 to $3.7-million, contending that a Supreme Court decision upholding a landmark U.S. District Court ruling against Otter Tail provided "prima facie" evidence against the private utility. Elbow Lake filed the original civil suit in 1967, charging the company with violating the Sherman Antitrust Act by refusing to furnish wholesale power from 1963 to 1972 or to wheel Bureau of Reclamation power. Otter Tail has been compelled to supply wholesale power to the Minnesota village since February of 1972.

FPC Authorizes More "Instant" 1-Day Suspension Wholesale Power Rate Increases

The Federal Power Commission has authorized two more power companies to impose "instant" wholesale power rate increases on a total of 14 municipal utility customers in four states by invoking only one-day suspension orders and making them effective as of Oct. 21, prior to future hearings on whether they are legal, "just or reasonable" or refundable.

The Commission has issued a rash of one-day suspension orders in recent weeks that permit power companies in various sections of the country to start collecting immediate rate increases that will cost many municipal electric utilities additional annual wholesale power charges amounting to over $50-million.

APPA has strongly protested the new "instant" rate increase policy at the FPC but the Commission has refused to budge from its newly-adopted position of approving rate increases before analyzing their validity.

The newest one-day suspension orders allow the Interstate Power Co. of Iowa to raise its rates to 13 municipalities in Illinois, Iowa and Minnesota—which purchase wholesale power from the company on firm contracts—by $197,000 annually; and the Indiana & Michigan Electric Co. to increase its wholesale rates to the Auburn, Ind., Electric and Water Department by $114,375 annually.

Wilson New President of Michigan Municipal Electric Association

Bernard I. Wilson, superintendent of the Bay City, Mich., Electric Light Department, is the new president of the Michigan Municipal Electric Association, having been elected at the organization's annual meeting.

Wilbert W. Wiitala, director of the Marquette Department of Light and Power, was named vice-president. Clare Pincumbe of the Lansing Board of Water and Light continues as treasurer, Donald Potter of East Lansing as executive secretary and James Hayes of Lansing as legislative agent. Elected to four-year terms on the Board of Directors were James R. Endicott of Coldwater and Joseph Wolfe of Lansing.

The membership voted to hold two meetings annually, with the spring meeting in the southern part of the state and the fall meeting in the northern region.

Municipals Affected by Mississippi P. & L.'s $5.19-Million Wholesale Rate Hike Bid

Municipal electric Utilities and rural electric cooperatives will be affected by a filing at the Federal Power Commission in which the Mississippi Power & Light Co. proposes to increase its wholesale power rates by about $5,191,000 annually. The company says the increases are needed because of rising costs of service.

The Commission also disclosed that: Rockland Electric Co. of New Jersey has filed a proposed revised fuel clause affecting wholesale electric rates to the Borough of Park Ridge, N.J.; that Florida Power Corp. has filed a revision of its wholesale rates affecting municipal and cooperative customers in connection with a settlement pact; and that Tampa Electric Co. filed a supplement to an agreement for interchange service with the City of Lakeland, Fla., containing revisions to service schedules.

The FPC denied a petition filed by the Sunflower Electric Cooperative asking reconsideration of a Commission order that removed the burden of the Sierra test from an investigation of wholesale rates collected by the Central Kansas Power Co.

The agency also noted a filing by the Montaup Electric Co. and its affiliated companies in Eastern Utilities Associates for a "complete reorganization" of their wholesale power supply arrangements. Montaup said the filing would make it responsible for wholesale bulk power service to owner companies and non-affiliated wholesale customers now served by the latter, and would provide a single rate for such service. Affiliated companies are Blackstone Valley Electric, Brockton Edison and Fall River Electric Light.

Rising Costs, Energy Use Lag Cut Electric Utilities' Construction Budgets by 18 Percent

Construction budgets totaling about $88.1-billion originally planned through 1978 by the nation's electric utilities have been cut back by approximately $16.1-billion as of Oct. 1, according to a survey conducted by the National Economic Research Associates, Inc.

The study says that cancellations and postponements of construction affect facilities that would have provided about 132.5-million kw of capacity and that most of this total—or 89,326,000 kw—represents cutbacks in nuclear power plant construction. The utilities blame rising costs and lower energy consumption for the construction slowdown decisions.

Ohio Senator to Oppose Choice of Exxon Official to FEA Post

Sen. Howard Metzenbaum (D., Ohio), plans to oppose prospective nomination by President Ford of a former Exxon official as assistant administrator for international economic affairs in the Federal Energy Administration. Melvin A. Conant, who was originally nominated for the post by ex-President Nixon, received a $90,000 lump sum bonus from Exxon just before he left the oil firm to join the government in January. The Ohio legislator said that Mr. Conant "has failed to fully sever his ties to the industry he is supposed to regulate."

NEWS ABOUT APPA

A MONTHLY REPORT ON YOUR ASSOCIATION'S MEETINGS, PUBLICATIONS AND EDUCATION PROGRAMS

Engineering and Operations Planning Committee Sets Program for 1975 Seattle Workshop, To Be Jointly Sponsored by Northwest Public Power Association

The planning committee for the APPA Engineering and Operations Workshop has completed its preliminary program for the 1975 meeting, scheduled for February 25–26–27 at the Olympic Hotel in Seattle, Washington.

This year's workshop is being jointly sponsored by the Northwest Public Power Association, and the program planning committee was made up of leaders from the APPA and NWPPA engineering groups. Top executives of the APPA Engineering and Operations Section are George Usry of Athens, Tenn, chairman, and Edward Krause, Garland, Texas, vice chairman. The NWPPA Engineering and Operations Section is headed by David Deveney of Snohomish County PUD, Everett, Washington.

The Workshop's opening session on Tuesday morning, February 25, will feature a major address on the current energy situation, and presentations by expert panelists on operating issues and problems. Representatives of major materials suppliers, government, and the electrical industry will discuss a subject of increasing concern: "Materials Shortages: Outlook and Prices."

Tuesday afternoon's session will cover a wide range of technical concerns, including concurrent sessions on transmission and distribution; generation, communications and control, and safety. Important topics to be explored during this afternoon session include load forecasting and long-range studies; coal segregation and control of emissions and supervisory control for small utilities.

On Wednesday morning, February 26, the committee has scheduled additional concurrent sessions. The session on transmission and distribution will feature panelists who are expert in communications requirements, maps and record systems, and safety procedures for small utilities. A second session will cover fault, overload and lightning protection, and a third session will deal with line routing and R/W policies. The section on generation will focus on three main areas: experience and cost in cooling towers; plant discharge regulations and systems; and boiler feeder water treatment.

The communications and control groups will hear a speaker from the Bonneville Power Administration on "Advanced Communications via Micrometeorite" and presentations on digital pulse metering by representatives of major manufacturers of electric metering equipment. The safety section will offer a case study of one utility's program for meeting the Federal OSHA standards, and a panel discussion on safety committees and motivation.

The concluding concurrent sessions Wednesday afternoon will include several panels on underground transmission and distribution; a state-of-the-art presentation covering solid waste for generation; geothermal power; and a tour of Boeing Aircraft's supervisory control and production facilities.

APPA Director of Economics and Research Paul R. Fry will be a featured speaker at Thursday's general session. Mr. Fry will discuss the outlook for fuel supply and price.

Joining him on the morning's program will be an official of the U.S. Labor Department, who will discuss the Fair Labor Standards Act. Conferees will also hear the report of the nominating committee at this concluding general session. A highlight of the final session will the the presentation of the APPA Safety Awards. The afternoon will be devoted to informal, table talk sessions.

New APPA Safety Service Proves Popular

More than 30 local public power systems have purchased the new APPA safety service in the less than one month that it has been made available, according to W. E. "Trez" Lee, APPA director of membership services.

The comprehensive new safety service, "Action Program for Preventing Accidents," was designed specifically for use by local public power systems. With the enactment of the Federal Occupational Safety and Health Act (OSHA) and related state laws, effective safety practices have become an increasingly important part of a utility's daily operations.

"Action Program for Preventing Accidents" is a series of sixteen one-hour slide and script presentations on selected areas of utility safety. Each program package is self-contained, and includes a series of approximately 40 color slides picturing utility safety practices under actual operating conditions. An accompanying instructor's manual contains a brief, suggested lecture and discussion topics for each slide to encourage participation by the training groups. The guide also cites the pertinent portions of the Federal OSHA regulations for the specific safety practice illustrated.

Each of the one-hour presentations covers a different area of safety concern, including substations, under ground, hand tools and power plant operation. The pre-packaged material is designed for use by those without prior professional teaching experience.

The slide-script programs are available in two different packages. Non-generating utilities will want to purchase the "A" series; consisting of twelve, one-hour training programs covering electric distribution safety and general utility safety. Generating utilities will need the "B" series, which includes all of the programs in the "A" series and four additional programs on power plant safety.

Among the subject areas covered in Safety Series "A" are: utility safety practices related to health and hygiene; fire prevention and protection; general utility personnel protective equipment; grounding and tagging; substation activities; underground electric; overhead electric transmission; and motor vehicles, maintenance, and traffic control.

Safety Series "B", which deals exclusively with power plant safety, consists of the following titles: "Fuel Handling, Storage and Use;" "Power Production Protective Devices;" "Power Production Miscellaneous Hazards;" and "Power Production Coal and Oil Operations."

Middle West Service Company, a consulting firm of utility safety specialists with several decades of experience in electric utility safety, prepared the new program expressly for APPA. The Company has also prepared extensive safety training material for the U.S. Department of Labor Occupational Safety and Health Administration, and for the Edison Electric Institute, which represents the nation's private power companies.

The new Action Program is part of the Association's continuing efforts to serve the growing needs of its members in the area of utility safety. The Association began its expansion of utility safety services to member systems with an extensive program of one-day safety seminars which were offered nationwide.

This year, APPA recognized an even greater need for more programs on local utility safety with an expanded program of two-day seminars on good utility safety practice. Safety specialists for Middle West Service Company have been conducting these courses. In addition, APPA has revised and updated its widely-used Safety Manual.

The new safety slide-script service offers a small utility a convenient and effective way to conduct a comprehensive education program covering all areas of utility safety. For a larger utility, the Action Program can serve as an important and valuable supplement to an established training program, at minimal cost.

APPA members may purchase the new safety service at a cost averaging less than $30 for each of the one-hour slide-script programs. Safety Series "A", including twelve one-hour programs on electric distribution and general utility safety, is available to APPA member systems for $350. Price to non-members is $500. Safety Series "B" which includes all of the twelve one-hour programs in Series "A" and an additional four programs on power plant safety, is available to APPA members for $450 for the 16-program series. Price to non-members is $600.

Each program is pre-packaged, with separate storage boxes for each series of approximately 40 slides. All material will be shipped postpaid.

To order, write Publications Department, American Public Power Association, Suite 212, 2600 Virginia Avenue, N.W., Washington, D.C. 20037 or telephone 202/333-9200.

APPA Utility Education Program Achieves Record Highs During 1974

1974 HAS BEEN A LANDMARK YEAR FOR THE APPA UTILITY EDUCATION PROGRAM, ACCORDING TO A REPORT ON THE PROGRAM SUBMITTED LAST WEEK TO THE APPA BOARD OF DIRECTORS.

"The year 1974 will be the most productive and useful in the history of the APPA Utility Education Program," the report said.

Among the report's findings: More than 1,300 employees of local public power systems will have attended 41 UEC courses in different locations by the end of 1974.

Current attendance projections exceed the original projections by almost one-third.

The Personnel and Training Department was able to offer seven additional Utility Education courses beyond the originally scheduled program.

Average course attendance was 32, up more than 6% from the original projected estimate of 30.

During 1974 the Association created a new staff position of Personnel and Training Director—a position filled by Robert S. Gregory.

Mr. Gregory said this week that preliminary plans are now being made for the 1975 APPA utility education series. He will discuss 1975 plans with the APPA Personnel and Administration Committee at its November 11 meeting in San Francisco. Suggestions for next year's education courses have already been obtained from the APPA Advisory Committee, and the Training Committee of the Board of Directors.

Mr. Gregory urged APPA member utilities to send him ideas on utility education courses that might be offered in the coming year.

APPA Schedules Final UEC Courses

November 11–12–13. San Francisco, California. PUBLIC POWER PERSONNEL POLICIES AND PRACTICES. Course leaders are *James Morrison*, vice president, Lawrence-Leiter & Company, Kansas City, Missouri, and *James Vortenberry*, director of administration for the Jacksonville, Florida Electric Authority. Room reservations: Holiday Inn, Fisherman's Wharf, San Francisco, California 94133.

November 18–19. Jacksonville, Florida. UTILITY SAFETY PRACTICES. Conducted by experts from the Bureau of Safety of Middle West Service Company. Room reservations: Jacksonville Hilton Hotel, 565 South Main Street, Jacksonville, Florida 32207.

November 20–21–22. New Orleans, Louisiana. Accounting and Finance for Public Power Supervisors. Course leaders are *Professor Lloyd Seaton* of the University of Arkansas, and *Charles Kinnamon*, assistant superintendent of accounts, Knoxville, Tennessee Utilities Board. Room reservations: Royal Orleans Hotel, 612 St. Louis Street, New Orleans, Louisiana 70140.

November 21–22. Alexandria, Louisiana. Utility Safety Practices. Emphasizes the day-to-day operations of the public power system. Room reservations: Bentley Hotel, 200 DeSota ,Alexandria, Louisiana 71301.

One-Day Seminar on Managing Time To Be Offered on February 24

A special one-day seminar on "Effective management of time"—a topic of universal concern—will be offered on Monday, February 24, the day prior to the opening of the 1975 APPA–NWPPA Engineering and Operations Workshop at the Olympic Hotel in Seattle. This course on making effective use of your time will be conducted by an official of Lawrence-Leiter & Co., Kansas City, Mo. There is a separate fee for the course.

Winter Bill Insert Feature Heating, Insulation

With the onslaught of cold weather and higher heating bills, member and non-member systems may wish to have information on hand to help their customers fight the high cost of keeping warm this winter. "How Insulation Can Save You Money," and "How to Save Money by Heating Your Home Efficiently," available for the first time this year, are part of APPA's energy conservation bill insert series. Both offer simple and valuable conservation tips which involve minimal cost to the electric customer.

The six-page primer on heating offers tips on heating system selection, installation, and maintenance.

"How Insulation Can Save You Money" explains the savings offered by proper insulation, advises on what type of insulation to buy and how to figure individual insulation needs; and contains a keyed diagram which shows proper installation.

These bill inserts are available from the APPA Publications Department, 2600 Virginia Ave., N.W., Washington, D.C. 20037.

TOP PUBLIC POWER EXECUTIVES EXCHANGE VIEWS WITH NATIONAL EXPERTS AT APPA ADVANCED MANAGEMENT SEMINAR

APPA's top-level policy meeting for public power executives—the 1974 Advanced Management Seminar—attracted a large number of management officials for the three-day sessions last week at the Washington, D.C. Hilton.

Topics covered included the changing economic picture—Dr. Gary Seevers of the President's Council of Economic Advisers; tomorrow capital for public power systems—Herman Roseman, vice president, National Economic Research Associates; electric rate policies—Robert Bathen, R. W. Beck & Associates, and Laurence Moss, past president, Sierra Club; future energy growth, and conservation—David Freeman, past director, Ford Foundation Energy Policy Project, and Roger Sant, assistant administrator, Federal Energy Administration; energy research—Dr. Alvin Weinberg, director of FEA's office of energy research and development; nuclear power—Thomas Nemzek, U.S. Atomic Energy Commission, and Dr. Thomas Cochran, Natural Resources Defense Council; effective public communications—Stanley Hancock, Salt River Project, Phoenix; and labor's outlook on wage settlements—Vincent O'Reilly, IBEW director of utility operations.

The Seminar will be held again in the fall of 1975.

[From the Wall Street Journal, Nov. 26, 1974]

POWER PLAY—FLORIDIANS, SHOCKED BY HIGH ELECTRICITY BILLS, FIGHT UTILITIES' EFFORT TO PASS ON FUEL COSTS

(By Jim Montgomery)

When a Florida public-service commissioner, William T. Mayo, entered his favorite Miami restaurant recently, a waitress who had served him there for years shouted angrily across a roomful of startled diners: "Mayo, get out!"

The once-friendly waitress' change of heart came about as the result of an explosive controversy simmering over the state's runaway electricity bills. Florida's utilities, with the implicit sanction of the public-service commission, have been passing on to customers the higher cost of the fuel they burn to generate electricity. Largely because of these "fuel-adjustment charges," the average monthly bill sent out by the state's largest utility, Florida Power & Light Co., for example, rose about 36% in the past year.

The public-service commission has always allowed utilities to pass on fuel costs to their customers in Florida. But these charges rarely amounted to more than a few cents a month per customer until 18 months ago, when the fuel shortage suddenly pushed costs dramatically upward. And it wasn't until last January that the utilities—upon orders from the commission—began itemizing the charges on bills, showing customers for the first time what a big chunk of their payments went for fuel. The utilities contend, that without the extra charges they can't continue to operate profitably or offer satisfactory service. Consumers argue that the extra charges are not only excessive, but also illegal because they were imposed without prior public hearings. And, like the Miami waitress, they have reacted with frustration and an unprecedented outpouring of public rage.

Besides jamming protest rallies around the state, many Floridians are threatening not to pay the fuel-adjustment portion of their electric bills. Some customers reportedly have even tried "stealing electricity" by using magnets to slow down their electric meters while leaving the flow of current undisturbed. Over 15% of the state's population consists of retirees on fixed incomes, adding to the pressure for relief.

A PREVIEW OF THINGS TO COME?

"Working folks can't live with the automatic fuel-adjustment charge the utilities claim they can't live without," asserts Sandra Brunet of Titusville, a $2.47-an-hour

deputy voting registrar and the organizer of a protest group called the Florida Tea Party.

The three-member public-service commission has permitted the utilities to continue collecting fuel-adjustment charges but has frozen them at the October level until it decides—probably this week—on the procedure for leveling any future increases. The agency is expected to forbid automatic adjustments and require instead that periodic public hearings be held on any fuel-charge increases. Whatever its decision, it is almost certain to be contested in court.

The darkening storm of public wrath in Florida is particularly ominous, for it promises to foreshadow similar confrontations in some of the other 42 states where electricity bills include surcharges for fuel. (Already, a Cleveland utility faces three class-action suits that would bar it from passing on such charges to customers.) The effect of last year's more than 200% rise in coal, oil and gas costs hit first in Florida, where electricity bills tend to be highest during the summer months, when air conditioning is heavily used. Other areas of the nation, where electricity use peaks during the winter heating months, are just beginning to feel the fuel-charge crunch.

NO MORE CHEAP ENERGY

The Florida controversy is also significant because it illustrates the intense reluctance of Americans to accept the fact that the times of bountiful, cheap natural resources are over. Few seem able—or willing—to recognize that, barring unforeseen technological breakthroughs, basic commodities such as power will claim a significantly larger portion of their paychecks than in the past.

Florida Power & Light says its residential customers use an average of 1,000 kilowatt-hours of electricity a month. In October 1973, the bill for this much power was $23.81, including a fuel-adjustment charge of 87 cents. Last month the cost for the same amount of electricity had risen to $32.34. The difference was due to a tenfold spurt in the fuel-adjustment charge. Typical bills were substantially higher during the recent summer months.

Sentiment against Florida's rate rises intensified in October, when Robert L. Shevin, the state attorney general, issued a highly controversial opinion on the matter. Mr. Shevin found the automatic fuel-adjustment charges illegal, on the ground that they allowed utilities to raise rates without public hearings or regulatory review by the Public Service Commission.

During nine heated days of testimony before the commission last month, the utilities warned that an adverse ruling by the regulatory agency would drive them into insolvency and disrupt service. A spokesman for Gulf Power Co. of Pensacola, a unit of Southern Co., melodramatically introduced a hearing witness as "our vice president in charge of bankruptcy."

The fuel-adjustment flap has already prompted the cancellation of an offering of $125 million of mortgage bonds that Florida Power & Light had planned. In place of this offering, the utility last week floated $125 million of seven-year notes, but because the notes have a lower rating, it will have to pay $625,000 additional interest each year.

Even with fuel-adjustment charges, Florida Power & Light's earnings fell 6% in the 12 months ended Oct. 31 to $102.5 million, or $2.69 a share, from $109.1 million, or $3.15 a share, in the year-earlier period. The company says that if it hadn't been able to pass increased fuel costs along to customers, earnings in the past 12 months would have plummeted to about $20 million.

CUTTING OFF POWER

Next month the public-service commission is expected to lift the temporary freeze on fuel-adjustment charges, and most officials on both sides of the furor predict continued high electricity bills until fuel prices themselves fall—an admittedly remote prospect.

A ruling by the commission upholding the charge is apt to encounter stiff consumer resistance, warns Frederick B. Karl, that state's first public counsel and, as such, the consumer advocate at public-service commission proceedings. "There's a real crisis out there in the field," he told the commissioners at the hearings. "If in fact large numbers of customers do decline to pay their bills, you're faced with a decision whether you're going to permit wholesale termination of service."

Firm figures on how many customers have had their electricity cut off for nonpayment aren't available. But Mrs. Brunet, the Florida Tea Party founder, says her

power was cut off for four days and restored only when she paid "under protest" the $40 in fuel charges she had deducted from her $156 electricity bill for September and October, as well as a $5 penalty. She says she had already paid the other $116 with "every cent" she could muster and, as a result, "had to quit buying milk" for her four teen-agers. Still unpaid is a $57 electricity bill for November, which includes a $16 assessment for fuel. Mrs. Brunet's husband, Gerald, recently lost his job as a $214-a-week construction superintendent, and she says she isn't sure when the latest bill will be paid.

Consumer groups have already filed five lawsuits in state circuit courts seeking to bar Florida's utilities from collecting fuel-adjustment charges and from disconnecting the service of customers who refuse to pay. At least one of the suits demands refunds of previously collected fuel charges, which by some estimates total over $200 million for the state's four big investor-owned utilities alone. The state supreme court will probably make the final ruling in these cases and is currently considering arguments on whether it can assert original jurisdiction over the lower courts. In two of the cases, the circuit courts had ruled against the utilities, but these judgments were set aside pending supreme-court action.

TESTIMONY OF WILLIAM O. DOUB, FORMER COMMISSIONER, U.S. ATOMIC ENERGY COMMISSION

Senator ALLEN. Mr. Doub.

Mr. DOUB. Mr. Chairman, thank you very much. I was very interested in Lee White's comments about half-way houses for former regulators since I just left the AEC just 3 months ago.

I am delighted to appear before you and discuss the need for regulatory reform. It has been a major concern of mine that regulation is not viewed as a general subject the way it should be. The fact is that the regulatory system in the United States beginning with the creation of the ICC and the State regulatory commissions has developed in response to narrow issues of the moment—crisis of the moment—which have long since passed, and yet the regulatory machinery still exists.

The fact of the matter is the Nation's regulatory machinery has become so complex, overlegalized, overproceduralized as to effectively inhibit the agencies in meeting their public interest responsibilities. This fact became all too clear at the time of the Arab oil embargo a year ago when we found, particularly in the energy regulatory area, the regulatory system was unresponsive until the Federal Energy Office was established—followed by the FEA.

I think we have to recognize we are talking about different kinds of things when we are talking about regulation. First of all, we have seen the development of something new and different in regulation, namely, technological regulation as opposed to economic regulation, that is the granting of permits, setting of rates, establishment of tariffs—which we know as historical and conventional regulation.

In the technological regulatory area: namely, the protection of the health and safety of the public, it is a totally different kind of regulation and it is going to become more pervasive and important in the future; especially as new energy technologies enter the commercial field such as coal gasification and liquification, solar energy, what have you. They will probably have to be regulated. We will have to define the limits of technological regulation consistent again with the public interest.

I support this study. There have been many studies in the past; one which I have carried out myself at the request of the President

and submitted to the administration in April. It was restricted to the question of energy regulation and the organization of our energy regulatory bodies. That study was not well received by the bureaucracies because its proposals directly impacted on the bureaucracies and suggested far-reaching changes. It laid out for the first time the gymnastic regulatory course that has to be followed for each of the fuel cycles—coal, nuclear, oil and the generation of electrical power. We had to know what we were talking about before we could come to any conclusions with regard to the organizational system. What we found was there were more than 40 agencies at the Federal level engaged in some form or another of regulation. Not all of them have that as their primary responsibility. But many have regulatory responsibilities as collateral legislative mandates.

I noted Senator Taft spoke this morning about the need for coordination. We need some coordinative mechanism, probably within the executive branch, where the regulatory schedules of energy projects are laid out for the benefit of all. The regulating bodies, of course, would propose decisional dates, but then a so-called perk chart would provide an accountability which would enable the Congress, public and administration and others to make a judgment as to whether or not the agencies are meeting their responsibilities in a timely fashion. Right now it is very hard to evaluate a regulatory body. It is very hard to determine if they are efficient, if they should be more efficient, what their problem is.

But, if the agencies lay out in advance schedules for when they will make regulatory decisions for the whole world to see, then an accountability factor is introduced for the benefit of all.

There were other recommendations [1] in the study and I would like to have the study attached as an appendix to my prepared testimony.

Senator ALLEN. Without objection.

Mr. DOUB. I think the study will be of benefit to this new commission as it takes on its responsibilities, including the make up of commisions, the question of merger and consolidation, as you mentioned.

I would like to make two more comments. It seems to me what has happened in this country in regulation is that it is becoming overproceduralized; that it has been shaped by lawyers too much akin to our judicial process. The decisionalmaking process has been structured with too much concern for precedent and historical conventions. Regulation in our country has lost its historical dynamics which characterized it in the beginning. It was intended originally, when these bodies first came into being, that they would not be another judicial system. It would be something different. They would be quasijudicial bodies at best. Because they now too much track the judicial system of the country, all parties are feeling frustration with it. They are frustrated that they can't keep up with it, the fact of continually increasing multiplicity of forms and procedures between different agencies.

Regulatory agencies have gotten in trouble because they fail to track changing social values and current national ethics. For instance, when the environmental movement became well established in the

[1] See p. 656.

1960's it was the failure of the AEC to broadly interpret its responsibilities under NEPA that lead to the *Calvert Cliffs* case which resulted in a 17-month hiatus in licensing of nuclear power plants. The agency assumed it was not responsible for the total environmental effect of a plant but only the radiological aspect and it wasn't until the courts interpreted the NEPA law that the regulatory commission was able once again to function.

Today within the utility system we find frustration. They find, with double digit inflation and high interest rates, that the arcane conventional procedures of regulatory bodies prevent them from raising money and getting adequate rate relief to carry out their responsibilities to the public.

Now, I think the proposed new Commission will have to give attention to restoring the dynamics of the regulatory process, the fact that it does have to track new social issues and values as they emerge and become important to the public. We see that now with the issue of conservation. Regulatory agencies have to consider conservation more than in the past. But the inflexibility—the institutional inflexibility, and overlegalization—has rendered the system almost moribund. For these reasons, and others, I do support the work of the proposed Commission. I also share Lee White's observation that 3 or 5 years is too long, because the Commission as contemplated will just become another regulatory body. I think 1 year 9 months, would be sufficient.

Thank you.

[The prepared statement of Mr. Doub, with attachment, follows:]

PREPARED STATEMENT OF WILLIAM O. DOUB, PARTNER, LE BOEUF, LAMB, LEIBY & MACRAE, WASHINGTON, D.C.; FORMER COMMISSIONER, U.S. ATOMIC ENERGY COMMISSION, FORMER PEOPLES COUNSEL AND CHAIRMAN, MARYLAND PUBLIC SERVICE COMMISSION

Mr. Chairman and members of the Committee, I am very pleased, indeed, to have been given this opportunity to appear before you today on an extremely important issue; namely, the impact of regulation on the U.S. economy. For the better part of a decade, I have been actively engaged in regulation, both as Peoples Counsel representing the public generally before the Maryland Public Service Commission and the Washington Metropolitan Area Transit Commission, and as Chairman and Vice Chairman and member of various regulatory bodies including the Atomic Energy Commission from which I have recently resigned to return to the practice of law. It has been a matter of serious concern to me for some years that little attention has been given the subject of regulation, despite its direct impact on not only the regulated entities but also on our national economy. The plain fact is that the regulatory processes at both Federal and State levels have become so increasingly complex as to effectively deter and inhibit government and the regulated industries from fully meeting their respective responsibilities to the public. This fact became all too clear about a year ago during the selective Arab oil embargo when the regulatory mechanisms within the Government were found to be so deficient and unresponsive to the crisis that the Executive Department created the Federal Energy Office. This action was taken in an ambience of desperation to quickly develop a concentrated Federal strategy to deal with the then current energy crisis.

The very fact that this action was taken so precipitously constitutes not only an indictment of the federal energy regulatory system, but also a clear recognition of the penalties of not having a national energy policy. Almost every major agency of government at the Federal level engages in some regulatory activity or another, despite the fact that many of their programatic responsibilities are primarily in areas other than energy. For example, there are more than 40 Federal agencies, bureaus, and commissions that have a role in regulatory decision-making, ten of these have major roles.

Much of the regulation at the Federal level in the past has been what might be termed economic regulation. There has developed, however, a new concept in regulation that can be best described as technological regulation. This concept has been most clearly demonstrated in the regulatory responsibilities of the Atomic Energy Commission, which is now being replaced by the new Nuclear Regulatory Commission. Such technological regulation is, of course, primarily directed to the protection of health and safety of the general public and not economics.

In my judgment, technological regulation will become increasingly pervasive and important as future energy technologies are introduced to the commercial energy sector of our economy. Many of these efforts are already going forward, such as offshore nuclear power plants, liquified natural gas facilities, coal gasification and liquification and oil shale conversion.

As a result of the recent fundamental shift in the Nation's energy situation from years of abundance to times of energy shortages and with the sharp escalation in energy prices coupled with advanced energy technologies, it is patently clear that the effective functioning of the Federal and State energy regulatory systems is crucial to not only the economic health of the Nation, but also, to the very preservation of our standard of living.

In this context, I wholeheartedly support the concepts embodied in the proposal to establish a National Commission on Regulatory Reform. As I understand the proposal, it would require the Commission to assess in detail not only the purposes, objectives and performance of regulatory activities of the independent regulatory agencies, but also, to review the underlying statutory authorities of the agencies and their overall goals and procedures.

Earlier this year at the request of the President, I prepared and submitted an organizational study of Federal energy regulation. That study, which was specifically limited to a review of the organizational structure of energy regulation, resulted in several recommendations and proposed alternatives that are pertinent to regulatory reform and that can serve as a predicate to the more expansive review of regulation contemplated.

The study I chaired was focused on an analysis of the organizational structure of federal energy regulation, the interrelationships among the various department, agencies, and bureaus within that structure and their inter-action with various State energy regulatory bodies. It was, therefore, necessary to first examine and understand the full scope of regulatory activities in the energy area. No other study had ever attempted to unravel and clearly delineate these activities for the several unique fuel cycles associated with energy production and consumption in this country. These regulatory activities for each of the major fuel cycles, including coal, oil, natural gas, uranium, thorium and the generation of electric power were reduced to appendices to the report. After the general base case of regulation was established in as replete a fashion as possible, the study led to the unavoidable conclusion that the disparity in regulatory activities and the over-proceduralization of the regulatory process was so overlaid with institutional inflexibility that any opportunity for affirmative regulation, which would be responsive to evolving national energy objectives and new energy problems and difficulties, is virtually precluded.

This study, which is attached as an appendix to my testimony, was in all frankness not well received by the regulatory bureaucracies. The deficiencies uncovered and exposed and the recommendations made cut deeply into long and well established fiefdoms and proprietary interests. It became clearly obvious that no matter how well documented the case, a substantive organizational revision of the existing Federal regulatory system could not be accomplished at that time. Nonetheless, the study did recommend essentially four major changes, which I feel are definitely worthy of consideration by the proposed National Commission on Regulatory Reform once it is established and begins to proceed with its broader objective of examining government regulation.

The first of these recommendations related to the need for a National Energy Council is to formulate national objectives and to provide general policy guidance to energy regulatory agencies in the administration of their specific charters. It was patently obvious that the lack of such energy policy guidance had resulted in several Federal agencies adopting narrow decision-making perspectives. These agencies through the years had become so entrenched in their institutional approach to regulatory issues that they were, in many instances, considering only narrow specific issues within their separate charters, rather than viewing energy projects as an integrated whole.

I am glad to see that the concept of this recommendation has, in essence, been adopted by the Congress in the legislative formation of the Energy Resources Council. I am also pleased to note that one of the major thrusts of the proposed National Commission on Regulatory Reform is to examine the possibilities for enunciating such broad policy guidelines for regulatory agencies, instead of permitting further unclear—and even contradictory—regulatory decision-making by the lack of any overall policy. The continuation of ad hoc approaches to regulation is clearly not in the public interest.

A second recommendation of the Federal Energy Regulation Study proposed the establishment of a new "Licensing Coordination Office" to streamline Federal licensing and other permit-issuing functions by introducing effective overall management. In most cases, several Federal agencies are involved in the approval process for specific energy projects; and, these multi-agency activities require a coordinative and integrative mechanism. This will minimize at least one source of the decisional delay and confusion that exists now and exhibits evidence of becoming worse.

The proposed Licensing Coordination Office could be expected to prepare and make available to the agencies and the public schedules clearly defining expected decision dates on issues that are under consideration by various regulatory agencies. This kind of a PERT chart approach would, for the first time, provide a standard of performance for the benefit of the Congress and the public in evaluating the efficiencies of regulatory agencies in meeting their decisional responsibilities. The schedule dates for regulatory actions on energy projects, of course, would be submitted by the agencies themselves to the coordination office, but an accountability factor would be introduced into regulation that is presently lacking.

A third recommendation of the study aimed at the obvious and critical need for an expanded data base to permit effective energy planning and decision-making. The study proposed a permanent energy data office, and recommended that the data-gathering and verification capabilities of individual regulatory agencies be upgraded and made available to the energy data office on a timely basis.

The final recommendation sought to improve Federal-State local relationships in the siting and licensing of energy facilities. At present, Federal-State coordination—so vital to resolving this Nation's energy problem—is hampered by legal, political and philosophical difficulties. The study recommended specific new structural mechanisms, to be established at both the Federal and State levels, to improve overall energy planning and to coordinate actions on specific energy projects.

I have noted that S. 4145 and S. 4167 include, within the scope of the National Commission's study, consideration of regulation at both the Federal and State level. I feel it is imperative, especially in the area of energy matters, that the National Commission does incorporate a review of both of these regulatory entities within its scope.

The disparity among local, regional and national interests in energy facility siting and licensing is among the most serious issues facing energy regulation today. Unless some way is devised to resolve resulting conflicts, they will hinder the Nation's ability to achieve energy self-sufficiency.

Local and State governments, like the Federal Government, are deeply involved in the evaluation of proposed energy sites and facilities. The regulatory functions exercised by State and local jurisdictions occur at all stages of a proposed project. They embrace a variety of actions, such as utility rate-making, zoning approvals, construction permits, safety inspections, air and water pollution controls, and water rights. Indeed, virtually all energy projects require more State and local authorizations than Federal permits.

Having stated my support for this long overdue study of regulation, I should like to take this opportunity to make a few general comments. As a result of having been actively engaged in the regulatory field for many years, I have reluctantly concluded that one of the fundamental problems of regulation, particularly at the Federal level, is the fact that it has evolved and been shaped in a manner all too similar to our judicial process. Regulatory decisions, to an extreme degree, have been made with too much concern for precedent and historical conventions. One reason that regulation has become the subject of much criticism is because the philosophical dynamics of regulation have been sacrificed. Regulation as a both practical and philosophical concept must track to a large degree, changing societal values and conditions. When it fails to adequately consider, evaluate

and react to new social values, regulation becomes essentially unresponsive to the public interest. Many examples exist that demonstrate this point, whether it be the emergence of the environmental movement of the second half of the 1960's or in the new concept of conservation of energy which is attracting so much public support today. It is in the overly structured fabric of regulation and its over-proceduralization that public frustration with the process occurs.

Ironically, today, the wide frustration which the general public has perceived in the failure of some regulatory agencies to take into account changing social values is also being experienced by the regulated entities. The American electric utility industry, for example, finds the regulatory process extremely unresponsive to the financial demands of an economy characterized by double-digit inflation and spiraling interest rates.

I commend the Administration and the Congress for their decision to examine what may very well be one of the most significant issues facing this country.

[Additional material supplied for the record follows:]

FEDERAL ENERGY REGULATION:

An Organizational Study

Prepared for public, Congressional, and agency comment by the Federal Energy Regulation Study Team

William O. Doub, Chairman

April, 1974

Alternatives and Recommendations

- **Consolidating current Federal energy regulatory functions (whether into a super-agency or a lesser unit) promises no substantial benefits.**

- **A preferable alternative is to establish mechanisms that effectively coordinate Federal energy-related regulatory activities. These should include:**

  A National Energy Council to provide energy policy guidance to the regulatory agencies.
  A new licensing coordination office to assure that the Federal licensing process is functioning effectively and efficiently.
  A new energy data office to provide energy regulatory agencies with a base of complete and reliable information, plus steps to produce a unified retrieval system for energy data compiled by all regulatory agencies.
  A new Federal office and a new State-level organization to work together intensively and continually on coordinating Federal and State energy regulation.

Having responded to the question "Is there a need to improve Federal agency regulatory organization?" in the affirmative, the Study Team addressed the second question: "What are the organizational alternatives?"

One set of alternatives involves a fundamental restructuring of the present regulatory system by merging or consolidating functions currently performed by several agencies. One such possibility is the creation of a super energy regulatory agency; another involves one or more structural consolidations of a less sweeping nature. Both are discussed below. A broad theoretical approach to reshaping the basic form of Federal energy regulation is described in Appendix D. This was not developed as a concrete alternative, but as a model to assist the Study Team in generating ideas. That appendix also lists criteria with which to evaluate various organizational possibilities.

A second set of alternatives, which constitutes the Study Team's choice, involves some organizational modifications designed to improve the system by enhancing its policy making and coordination capacities. These improvements build upon the strengths of the present system and directly address the five deficiencies identified in the previous section.

The Structural Consolidation Approach

A SUPER REGULATORY AGENCY

A super regulatory agency, which consolidates all energy regulatory activities currently exercised by the various Federal agencies, is not a satisfactory or feasible organizational alternative at this time.

43-362 O - 75 - pt. 2 - 8

One alternative to the present regulatory system is the consolidation of all regulatory functions into a "super regulatory agency" for energy. Such a super-agency might:

develop a comprehensive policy framework to promote regulatory decisions that consider and balance competing interests;

provide a centralized planning and scheduling mechanism to assure expeditious, one-stop consideration of applications for energy facility licenses and permits;

institute a data gathering and analysis capability that covers all energy regulatory data needs;

provide a single point for reconciling energy regulatory conflicts among Federal, State, and local interests.

This alternative was carefully evaluated by the Study Team, and several organizing themes were explored. For example, would a super-agency be best organized around the commodities regulated, the regulatory functions exercised, phases of the fuel cycle, or policy objectives? We concluded that a major consolidation around any of these themes would offer benefits that are more apparent than real, and that it would generate new regulatory problems–perhaps even more serious than now exist.

In the first place, a super-agency with jurisdiction over only regulatory matters would have neither the expertise nor perspective to develop a comprehensive energy policy framework by itself. Federal regulation of energy matters is only one facet of the government's overall responsibility in energy. There is also Federal involvement in research and development, conservation, import policy, and resource development. The formulation of a national energy policy, therefore, belongs in an entity with a broad perspective encompassing all these elements, not in an agency limited to regulatory concerns. Thus, one of the chief deficiencies in the present system would still exist.

Second, of the major agencies involved now in energy regulation, only the Federal Power Commission is a "free-standing" unit, in the sense that its sole responsibility is energy regulation.* Most energy regulatory activities are performed by agencies primarily engaged in non-regulatory functions, and these activities are vitally embedded in the broader programs of the agencies. Extracting these regulatory functions would cause dislocations which would impair the ability of the agencies to carry out their basic missions.

For example, the ICC's regulation of the interstate movement of energy source materials and energy commodities is incidental to its broader mission of regulating interstate transportation. If the ICC's charter were altered to remove these regulatory powers, the agency's mission would be seriously compromised. The Interior Department's Bureau of Land Management is another example. It is charged with managing a program of balanced use of the public lands. Among other things, BLM regulates the exploration and extraction of such energy resources as oil shale and offshore petroleum deposits on public lands. If this responsibility were removed from BLM's purview, the Bureau would lose direct and important influence over land use in the Federal domain. Similar examples follow from an analysis of the other departments and agencies with incidental energy regulatory authority.

* The creation of the proposed Nuclear Energy Commission would establish another free-standing agency. The FEO/FEA is also concerned with energy, but, as stated earlier, its activities are not within the scope of this study.

Third, whether a super energy regulatory agency were set up as an Executive agency or an independent commission, difficult practical problems would ensue in the transfer of existing regulatory programs to or from independent commission status. The former might be unpalatable to the Executive; the latter to the Congress.

Finally, a single super-agency exercising all Federal energy regulatory powers might inhibit the effective public presentation of dissenting viewpoints.

We believe that major consolidations of current energy regulatory functions do not make sense unless they are coupled to a comprehensive restructuring of the executive branch. If most energy development and management programs were already centralized in a single Department (e.g., the Department of Energy and Natural Resources), or if comprehensive new Federal energy initiatives were instituted and structured around novel new departments and organizational concepts (e.g., economics, land use management, environmental quality, technological innovation, and so on) it might be necessary or desirable to make fundamental changes in the organization of energy regulatory activities as well. However, to make sweeping consolidations of regulatory functions in advance and in isolation would be disruptive and counterproductive.

PARTIAL CONSOLIDATION

There are no compelling benefits to be gained from consolidating any of the existing energy regulatory agencies.

The Study Team also considered several lesser consolidations among energy regulatory agencies and dismissed most of them for similar reasons. One that deserves further treatment is the possible consolidation of the Federal Power Commission and the proposed Nuclear Energy Commission.* The chief advantage of such a merger would be to integrate the functions of the only two independent Federal commissions concerned exclusively with energy. It has been argued that this would create a broader regulatory perspective and more balanced decisions.

Upon analysis, it was concluded that an FPC-NEC merger would not be warranted because the root regulatory functions exercised by these agencies are basically unrelated in purpose and required expertise. The NEC will be charged with technological regulation in the nuclear field. Insofar as it is relevant here, its statutory mandate will be to assure that nuclear power plants are sited, constructed, and operated safely and with adequate protection of the environment.** The Federal Power Commission, on the other hand, is concerned primarily with economic regulation. It fixes wholesale rates of electric power in interstate commerce, licenses hydroelectric projects, and comprehensively regulates the interstate natural gas industry. Other than the NEC's responsibility to consider antitrust provisions in evaluating proposed nuclear power plants, its expertise has no bearing on

* On June 29, 1973, the President proposed that the functions of the AEC be divided between two separate new agencies: the operational and developmental activities of the agency would be joined with certain energy research and development programs of other agencies into an Energy Research and Development Administration (ERDA); the regulatory functions of the agency would be transferred to an independent regulatory commission, the Nuclear Energy Commission (NEC).

** The NEC will have additional regulatory functions, some related to other aspects of the nuclear fuel cycle and some (e.g., industrial and medical use of radioisotopes) wholly unrelated to the generation of electric power. In the main, these regulatory responsibilities and the competence for their achievement are so closely integrated that a workable separation would be difficult.

issues considered by the FPC. Similarly, the FPC has no capabilities in the high-technology sciences required to perform the NEC's functions.

In view of these basic dissimilarities, an FPC-NEC merger can more aptly be described as a welding together of two disparate parts. Some administrative benefits might accrue, but they would not be without major offsetting costs. Currently, the issue of nuclear safety is being debated widely and is constantly before the AEC. Public confidence is strengthened by the fact that an agency such as NEC—with its attention concentrated sharply on nuclear power safety—is evaluating this matter. This would hardly seem an opportune time to merge the functions of that agency with another.

Another possible transfer, proposed in the past, would shift the Security and Exchange Commission's activities under the Public Utility Holding Company Act of 1935 to the Federal Power Commission. Under that Act, the SEC has jurisdiction over the financing of electric and natural gas holding companies. The SEC specifies the type and amount of securities that may be issued by a holding company and its subsidiaries and the purpose for which such securities may be issued. The SEC's general objective is to assure the financial integrity and stability of holding companies. Its principal concern is to protect investors by insuring that companies are prudently capitalized. These regulatory functions are performed by a group of 15 professionals and five support personnel.

In reviewing the Federal organization of electric power regulation in 1971, the Ash Council recommended that the SEC's public utility holding company functions and resources be transferred to the FPC. From the standpoint of the questions addressed by this study, however, it would appear that the public utility holding company functions could be performed equally well in either agency. The transfer of these functions would not have an impact on the effectiveness of the Federal energy regulation system, so the Study Team makes no further comment. Nevertheless, the recommendation of the Ash Council (which approached this issue from a different perspective) still stands; and it may deserve additional consideration.

Although not strictly a structural consolidation in the sense of the mergers just discussed, another restructuring that requires consideration is the possible consolidation of antitrust authority. Promoting the economic and political benefits of competition is a long-standing fundamental national policy. Several energy regulatory agencies are involved in this pro-competitive program: the Antitrust Division of the Department of Justice, the Federal Trade Commission, the Atomic Energy Commission, the Federal Power Commission, and the Securities and Exchange Commission. There have been proposals to simplify this situation by granting exclusive antitrust authority to fewer agencies or consolidating these functions. For example, the Federal Power Commission might be designated to make all antitrust decisions in the industries over which it has jurisdiction without being subject to challenges in other forums.

On the other hand, it can be persuasively argued that having each agency consider the antitrust implications of its decisions strengthens the Federal Government's ability to promote competition in the market place. It assures that this fundamental issue will receive a thorough evaluation from a diversity of perspectives. It also means that antitrust questions will be raised and explored early—during the time when the overall feasibility of an energy project is being examined—and that these questions will be handled by agencies that are positioned to understand the specific antitrust implications of the project and to gain prompt compliance.

The goals of regulation and antitrust policy are compatible. Where cooperation between an energy regulatory agency and the Department of Justice is necessary to avoid conflict or to implement a particular antitrust remedy a means usually exists for the agencies to make satisfactory interagency arrangements.

The Coordinative Approach

As an alternative to consolidating energy regulatory functions, we propose a program of organizational actions that enhance coordination among the energy regulatory agencies. Such a program would involve creating:

a comprehensive national energy policy framework;

a steamlined management capability to oversee the scheduling and evaluation of license applications;

a reliable and broad data base;

coherent relationships between Federal, State and local agencies.

A NEW ENERGY POLICY ENTITY

A National Energy Council should be created to provide policy guidance on national energy objectives to all Federal agencies, including energy regulatory agencies.

Government leaders, business spokesmen, environmentalists, consumer groups, and other members of the public continually emphasize the need for more coherence in energy policy. The establishment of an institutional mechanism to provide policy guidance to the Federal energy regulatory agencies would be the single most significant contribution to correcting the deficiencies in the existing system of regulation.

The specific objectives of such an entity would be to:

Formulate national energy objectives;

Systematically monitor and review the performance of Federal energy regulatory agencies to eliminate redundancies and encourage agency responsiveness to legitimate public needs and interests;

Highlight existing and potential interagency conflicts at the Federal level;

Monitor State and local energy activities and recommend steps to improve Federal-State cooperation in energy matters;

Prepare a comprehensive annual energy report to the President and Congress that includes an up-to-date assessment of the Federal energy regulatory system;

Develop and propose executive and legislative solutions to emerging energy policy problems.

The regulatory system needs guidance and information on fundamental national energy objectives, such as the timetable for national self-sufficiency, the extent of reliance on foreign sources of supply, and energy conservation goals. The system also needs agreement on basic planning parameters, such as the amount of Federal lands to be opened for leases, anticipated energy capacity requirements, and the like. Decisions of various agencies could then be made on the basis of consistent assumptions.

The object in establishing an entity for formulating policy guidance should not be to force regulatory agencies to act in unison. We are aware of the well-founded tradition of regulatory independence and do not believe that this concept should be suspended or weakened. It is our conviction, however, that establishing a mechanism to provide a policy framework and information on the likely impact of pending decisions on the attainment of national energy goals is quite compatible with the exercise of free and independent judgment by government regulators. Indeed, we believe that the quality of decisionmaking will be enhanced if regulatory officials are alert to the impact of their decisions on other matters of critical national concern. This conclusion assumes two conditions:

1. Policy guidance should be conveyed openly in accordance with established procedure, including perhaps the submission of position papers on the formal record or appearances at public hearings. Where a specific case or rulemaking proceeding is involved, this guidance should relate exclusively to its effect on national energy objectives.

2. Regulators should recognize that national energy policy is just one important element to be considered in formulating agency positions. In no case should such policy information be allowed to substitute for the regulators' obligation to consider each case on its merits and to make reasoned, independent judgments within the framework of their statutory responsibilities.

There are many forms that a policy entity could take. We believe that creating a National Energy Council is the *best* solution. An augmented executive agency is, however, another alternative.

A NATIONAL ENERGY COUNCIL

This alternative would establish a high-level Council devoted to energy policy matters and lodged in the executive branch. Its chief function would be to formulate fundamental national energy objectives, to provide overall guidance to Federal agencies engaged in energy matters, to resolve differences in interpretation of policy, and to monitor the performance of these agencies on a continuing basis. It would require staff support. The Council, unlike FEO/FEA, would have no operational responsibilities; implementing national energy policy would remain the function of the agencies (including FEO/FEA) that currently regulate the energy sector.

There are several instructive and varied precedents for such action. The National Security Council (NSC), for example, was established to provide an organizational forum where diverse national security interests could be weighed and broad policy formulated. The Council of Economic Advisers (CEA) was created to provide the executive branch with a comprehensive overview of the many factors that affect the national economy.

More recently, the Council on Environmental Quality (CEQ) was established to assist the President in balancing and monitoring the diversity of Federal activities affecting the quality of the Nation's environment.

Two basic council models would appear to deserve consideration: (1) an interagency council; and (2) an independent council.

1. A National Energy Council based on the interagency concept would be composed of heads of departments, agencies, and commissions directly involved in implementing and regulating energy matters, with a Chairman chosen from among its members. It would be supported by a full-time permanent staff, continually assessing and seeking to improve national energy policy implementation.

A looser organization is also possible. An interagency council meeting infrequently, perhaps with necessary staff work done at the FEO/FEA, would function intensively only when specific, serious policy issues were brought to its attention through normal channels. This concept assumes, of course, that most policy conflicts among the agencies can be resolved without resort to higher-level authorities.

The principal strength of an interagency council lies in bringing together policy-making and implementation responsibilities. Goals are likely to be practical and attainable. Participation of agency heads enhances the likelihood of agency commitments to the policy objectives developed. On the other hand, the interagency council also has several weaknesses. Members might tend to operate as representatives of their agency's narrow interests and be reluctant to take actions that threaten existing programs. Another disadvantage is that policy decisions made on an interagency basis must be products of consensus, so that they tend to be bland or too fuzzy to provide clear guidance.

2. A National Energy Council built on the independent concept would be led by individuals without agency affiliations, appointed by the President and serving him directly. The CEA and the CEQ are examples. The strengths and weaknesses of the independent Council are essentially the converse of the interagency concept; an independent Council enhances the likelihood that policy will be made on a timely basis, be based on objective surveys of the Nation's energy needs, and be innovative. On the other hand, it could become a mere ornament, removed from the practical realities of program responsibility, and—in the face of agency resistance—unable to translate ideas into action. It would depend heavily on Presidential or Congressional support for influence.

Since any council would be concerned with energy issues broader than regulation, it would be inappropriate to discuss here the detailed mechanics of how the council would function in relation to other major departments and agencies. An analysis of these matters can be made only in the larger context of the Government's overall energy program and organization.

AUGMENTED EXECUTIVE AGENCY

Another possible organizational option would be to assign responsibility for developing national energy policy to an Executive agency. Two organizations are logical possibilities now: the Office of Management and Budget (OMB), because of its Government-wide

influence and the broad sweep of its mandate; or the Federal Energy Office (FEO/FEA), because it is the only Executive agency exclusively concerned with energy. A third possibility, assuming that Congress enacts the President's proposed enabling legislation, will be the Department of Energy and Natural Resources.

This approach offers several possible advantages. It would avoid the establishment of a new bureaucratic entity, and it would retain a strong relationship between energy policy development and regulatory program concerns. It would expedite policy-making by placing this responsibility in a hierarchial agency framework, with clear lines of authority and accountability.

There are, of course, potential disadvantages to such an approach. An augmented agency, such as OMB, that is enmeshed in day-to-day operational and budgetary matters might find it difficult to sustain the broad perspective and level of detachment necessary to formulate comprehensive energy policy. We do not see a way around this problem.

Similarly, FEO/FEA is an energy advocate with important programmatic duties. Its concern with its program activities might impair public confidence in its objectivity, and even foster resistance in other agencies and departments that consider themselves co-equal.

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The urgent need for a national energy policy requires that an institutional mechanism be empowered with authority to develop comprehensive policy objectives; and we recommend that this responsibility be given to a newly created independent National Energy Council. Details of the form and powers of such a Council will require further development; but it is important that the powers and functions of the Council be carefully elucidated to avoid duplication of effort and jurisdictional quarreling among Federal agencies, and that this Council be given a strong statutory mandate that will permit it to gain the interagency support required to carry out its functions effectively.

COORDINATION OF FEDERAL LICENSING ACTIVITIES

A new office should be established to coordinate Federal energy licensing activities.

Licensing and other permit issuing processes of Federal regulatory agencies need to be made more efficient by effective management and coordination; and any of the following three organizational alternatives would work to this end:

1. A separate licensing agency which consolidates all Federal licensing and other permit issuing functions.

2. A new office, located within an existing agency, with the mission of coordinating Federal interagency licensing activities for all energy facilities.

3. *Ad hoc* task forces established on a project-by-project basis to coordinate licensing activities on specific energy facilities.

A SEPARATE LICENSING AGENCY

A separate licensing agency which performed all the licensing functions currently exercised by the FPC, AEC, EPA, Corps of Engineers, and other agencies in respect to energy facilities (but not the standards setting and enforcement functions) would offer two major management advantages. First, a license applicant would deal with only one Federal licensing agency; and second, that agency would not have to seek concurrences from other agencies. These assets, however, would be more than offset by two major disadvantages:

a) It would have to interpret standards established by other regulatory agencies (e.g., AEC, EPA, Corps of Engineers, and Coast Guard). Because standards in many cases must be developed on a case-by-case basis, or are ill-defined or even non-existent, there can be serious conflicts or gaps on critical issues. This situation might be avoided by extensive and continual coordination between the licensing and standards-setting agencies, but the freedom of the licensing agency to act unilaterally would then be more apparent than real.

b) It would tend to weaken a basic purpose of regulating energy facilities, which is to control the impact of the facility upon its surroundings. Regulatory agencies normally concentrate on the effects each new facility might have on its surrounding environment. A separate licensing agency, on the other hand, might be less interested in a careful determination of the collateral effects of the facility than in expediting the licensing process.

A NEW ENERGY LICENSING COORDINATION OFFICE

Under this alternative, an office would be established within the executive branch to oversee the Federal energy licensing process and assure that it is functioning without undue delays or other administrative bottlenecks. Its responsibilities would be to:

Receive from the applicants a copy of license or permit applications for facilities that require the action of more than one Federal agency;

Establish a timetable for each application to guide all agencies concerned in setting their internal processes and priorities;

Assign lead-agency responsibility for coordinating environmental impact statements. Agencies would be assigned portions of such statements in accordance with their special concerns.

Convene periodic meetings during the interagency review process on specific projects to assure that the agencies are coordinating their actions and are adhering to the established timetables.

Grant extensions of time for good cause when a licensing agency so requires.

Respond to particular interagency problems as they develop by proposing recommendations for executive and Congressional action to improve the licensing process.

537-115 O - 74 - 3

An advantage of a licensing coordination office is that it would create a continuing group with responsibility for and expertise in coordinating licensing matters. Its coordinating efforts could also yield environmental impact statements of higher and more uniform quality. At the same time, though only a coordinating mechanism, it would insert another administrative layer into the bureauracy.

AD HOC TASK FORCES

In effect, this alternative would institutionalize the lead-agency concept, under which a single lead agency is designated to coordinate all necessary permits and related interagency reviews on a project-by-project basis. The lead agency for a given project could be designated by the FEO/FEA or OMB.

The lead agency would assure that an individual from each affected agency is identified to serve on the project task force. It would establish timetables for review by the agencies, and take steps to assure that the timetables are adhered to. It would also assume responsibility for assuring that environmental impact statements are prepared on schedule, and grant extensions of timetable deadlines when necessary.

The *ad hoc* task force alternative could be established more readily than a licensing coordination office, and it would give greater influence to agencies concerned with particular aspects of a proposed facility. However, *ad hoc* task forces would do little towards the development of a permanent pool of individuals with experience in coordinating the licensing process.

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The study team has concluded that a separate licensing agency is not a viable organizational option at this time. The comparative merits of a licensing coordination office and *ad hoc* task forces convened to consider specific projects appear relatively equal. Either, operating to its full potential, would alleviate the regulatory system's deficiencies in coordination. The licensing coordination office, however, has the compelling advantage of offering a sustained management presence that would transcend the regulatory lifetime of a single project. Thus, it offers the best mechanism for meeting the overall management needs of the Federal energy regulation structure.

A COORDINATED DATA SYSTEM

A new Federal energy data office and upgraded agency data systems are needed.

Each energy regulatory agency presently compiles data only for the specific forms of energy it regulates. The quantity and quality of the data varies, and the analysis of the data is generally pertinent only to the special concerns of each agency. The deficiencies of this situation are widely acknowledged, as is the need for data that are comprehensive, statistically valid, publicly credible and decision-relevant. The issue is how to organize an effort to obtain such data.

There are three generalized alternatives for providing the type of data support required: (1) establish an Office of Energy Data within an existing executive department

or agency; (2) create an independent, free-standing Energy Data Agency; or (3) retain the pattern of current energy data collection responsibilities, but establish a unified retrieval system.

A CENTRALIZED ENERGY DATA ORGANIZATION

Under either an integrated or independent approach the functions of a centralized energy data organization would be essentially the same with respect to regulatory matters:

to compile comprehensive energy-related data for all Federal energy regulatory agencies requiring them.* This would not preclude individual energy regulatory agencies from compiling additional information necessary to implement their statutory mandates;

to perform analytical studies of problems and trends in the consumption and supply of energy, both domestic and foreign;

to prepare an annual overview and forecast of existing and planned energy facilities and sites, identifying specific facility needs and regions where energy demand and supply projections indicate potential shortfalls of sites or facilities.

An essential ingredient of a centralized data agency, wherever located, should be a mandate to issue regular reports to the public and to energy regulatory agencies at the State, regional and local levels. These public reports should identify dynamic trends in fuel supply and energy consumption and provide a factual base for decisionmaking in the public and private sectors. The activities of this agency would not infringe upon the statutory authority of other agencies to collect and disseminate energy-related data.

Certain questions arise with respect to whether a centralized data organization should be free-standing or integrated within an existing agency:

An Independent Agency

The creation of a free-standing Energy Data Agency, independent of any other department or agency, has the advantage of giving maximum visibility to data gathering and assurance that this critical function would not be lost in the shuffle of other agency priorities. It would insure a free flow of objective information about energy resources, and reflect a broad view of supply and demand information on all energy and fuels.

This contrasts with the narrow fragmented views taken by the disparate agencies now collecting energy-related data. The independence of an energy agency from operating and regulatory programs would permit it to take a scientific approach to the inherent statistical problems involved in estimating energy resources and consumption trends. A free-standing agency, however, would mean establishing a new organization under a narrow mandate with its own administrative and support requirements. This process requires time and might even contribute to, rather than alleviate, the compartmentalization of the current energy regulatory system.

* These functions, of course, would be qualified by legal doctrines designed to protect confidential and proprietary information.

An Integrated Office

On the other hand, placing primary responsibility for collecting, analyzing and disseminating energy data in an Office of Energy Data located within an existing Federal agency would follow a well-established pattern. The Bureau of Labor Statistics (Department of Labor) and the Census Bureau (Department of Commerce) are relevant examples. One conceivable objection to this approach is that it would not assure public confidence in the objectivity of the data, since the department or agency could arguably attempt to use its data capability to defend its own decisions. These misgivings might be diminished by the reputation for integrity of the two examples given; nevertheless, energy regulatory agencies might be reluctant to rely upon information supplied by an organization that has interests in functions other than data collection. This could cause the regulatory agencies to react defensively by expanding their own data systems and thus add inefficiency to the overall regulatory structure.

A Unified Retrieval System

A possible alternative to creating or designating a centralized energy data organization would be to retain the current multi-agency collection structure and to upgrade it. This would include establishing standardized definitions, formats and coding procedures for key information elements. This standardization would help agencies to validate information gathered elsewhere and should increase public confidence in the data used as a basis for regulatory decisions. The individual data bases of each regulatory agency could also be joined together by a unified, computerized retrieval system that would be properly safeguarded to protect proprietary and other properly confidential data.

Concurrently, the data acquisition and analysis programs of each regulatory agency would have to be improved. Authority would be needed to collect additional data, and additional resources would have to be provided for auditing, validating, and analyzing the data.

This approach would not require a new organization, but would retain basic data collection responsibilities in the agencies that make energy-related decisions. Industry would tend to remain the primary source of much energy-related information. The difficulty with this approach is that inevitably there will be substantial data gaps in areas where Federal involvement is limited or minor.

* * * * *

No single alternative by itself appears to offer an adequate solution to the critical energy data problem. Rather, an approach combining the advantages of a centralized data office and an upgraded agency system seems warranted and feasible.

A free-standing data agency appears neither practical nor necessary. Rather, an Office of Energy Data should be created within an existing agency or department with a mandate to gather energy data necessary to the formulation of broad supply, demand, price and cost decisions. This would include essential data that have not been gathered previously by the Federal Government.

President Nixon in his message to Congress of January 23, 1974 adopted such an approach. He directed the Federal Energy Office to establish an Energy Information Center to coordinate energy data within the Government and provide reports to Congress, Government agencies, and the public.

Simultaneously, we urge that the current data systems of individual regulatory agencies be coordinated and rationalized as described above. They should be linked with one another and with the information base of the new Energy Data Office. This office could then assume responsibility for monitoring the overall operation of the energy data gathering and retrieval systems within the Federal Government and act as lead agency in developing the necessary standardized formats and codes.

COORDINATION BETWEEN FEDERAL AND STATE LEVELS

A mechanism should be created to integrate and coordinate energy regulation between the Federal and State levels.

The lack of a mechanism to integrate and coordinate the schedules and procedures of Federal, State, and local agencies concerned with the siting and licensing of proposed energy facilities has resulted in a multi-layered regulatory framework which is prone to conflict, delay and uncertainty.

Two basic ways to alleviate these difficulties suggest themselves. One involves outright Federal preemption of the siting and licensing of major energy facilities; the other is the establishment of a mechanism to strengthen and harmonize working relationships between Federal and State agencies. The first approach seeks to remedy the situation by eliminating conflict, the second by managing it.

FEDERAL PREEMPTION

The most direct method of dealing with the problem is for the Congress to enact a Federal preemption statute. Such a law would grant exclusive authority for siting and licensing major energy facilities to the Federal Government. Federal preemption of hydroelectric power plant siting and licensing, which is exercised by the Federal Power Commission, is a precedent for such action.

A lesser form of preemption, of course, is also possible. Under this approach, the Federal Government would assume jurisdiction over only specific categories of facilities that were deemed to be of critical national concern. Thus, for example, the preemption law might apply to oil refineries and other petroleum facilities, but not to electric power plants or other facilities.

The practical, administrative and political weaknesses of Federal preemption, however, are severe. Recent Federal legislation seeks to strengthen the role of State and regional bodies in land-use planning and decisionmaking. The Coastal Zone Management Act and the proposed Land Use Act, for example, both seek to insure that State, local and regional jurisdictions–which bear the direct burden of misguided land use–are empowered to take action to plan and enforce wise use of their resources. Preemption would run counter to the general direction of such Federal legislation, and also to long-standing State prerogatives.

Historically, State and local governments have been responsible for regulating land use within their jurisdictions. This includes siting as well as other aspects of energy facilities. The body of expertise and familiarity with siting matters unique to individual localities would be difficult, if not impossible, to recreate at the Federal level.

Federal preemption of energy facility siting and licensing at this time would raise difficult administrative questions. A number of regulatory activities now being carried out by State and local officials are not unique to energy facilities but are part of total programs that include regulatory requirements with respect to such items as local ecology, aesthetic standards, and compatibility with surrounding land uses. If State and local jurisdictions were divested of regulatory powers over energy facilities, their ability to carry out comprehensive planning would be diminished and their efforts to impose and enforce related standards eroded.

A possible compromise would reserve the development of such standards to the State and local agencies. Federal jurisdiction in this case would be confined to applying these standards in specific facility decisions. But this approach might tend to produce intergovernmental conflicts over interpretation of the standards and probably would not serve as an incentive to the States to produce plans and standards that are any more supportive of regional and national energy objectives than is now the case.

On the other hand, Federal preemption may become necessary in the future if the Nation is unable to resolve standoffs between State and Federal levels. Such an approach would require legislation preempting siting jurisdiction over specific categories of critical energy facilities. Indeed, this would be a drastic measure, but one which may become necessary if measures such as those recommended herein are insufficient to integrate and coordinate State and Federal objectives.

COORDINATING FEDERAL AND STATE REGULATION

A more promising approach for the immediate future to alleviating the problems inherent in the existing Federal-State relationship assumes the validity of the current division of regulatory powers among Federal, State and local governments and seeks to coordinate the exercise of those powers. The regulation of energy projects would thus be treated as an integrated whole, rather than as a series of loosely connected actions.

Our recommendation for accomplishing this involves a three-part program:

1. Establishment of a Federal office in an executive branch agency devoted exclusively to improving the operational relationships between Federal and State energy regulatory agencies;
2. Establishment of a permanent organization of State representatives to work intensively and continually with this Federal office;
3. Development of an extensive energy-related information exchange system between the Federal and State levels.

A New Federal Office. This office would foster an awareness on the part of the States of their roles in meeting regional and national energy needs. It would assist State officials in identifying alternative ways for meeting such needs. It would inform States of the schedule and timetable for Federal review of proposed energy facilities in their

jurisdictions. Assistance in establishing State schedules and timetables that satisfy regional and national needs for energy facilities would be made available. If a proposed facility were disapproved by a Federal or State agency, the coordinating office would offer assistance to the State in locating a more satisfactory site. Should delay become a factor in approving or disapproving a critical energy facility, the new office could mediate regulatory stalemates at State or local levels. It could also assist State –and, where appropriate, local–officials to apply improved management and organizational techniques to their energy regulatory systems, and it would be active in drafting model legislation and other uniform State guidelines.

The Organization of State Representatives. An essential ingredient in this program of coordination is the creation of a new organization of State representatives, with permanent staff, to work intensively with the new Federal office. While the new organization would require a broad representative base, it must be capable of prompt and authoritative reaction to critical Federal-State issues. It would have a strong working relationship with, and require the support of, such groups as the National Governors Conference, the National Association of Regulatory Utility Commissioners, and the Council of State Governments.

Since energy problems are frequently regional in scope, consideration must be given to how such an organization could also embrace a strong regional influence. One possibility for a regional approach is set forth in Appendix E.

An Information System. A special information system is needed to disseminate essential energy-related information between the States and Federal government. Such a system would probably have to be Federally funded. If the present void is filled, it will go a long way towards alleviating current Federal-State disagreements and confusion.

The Federal office would provide data relating to national and regional patterns of energy availability and price. Forecasts and trend analyses for each geographic area would be included, as would the status of facilities currently being reviewed at the Federal level. Each State, in turn, would provide information on the regulatory status of on-going and proposed energy projects within its jurisdiction (including site planning activities). Special attention would be given to projects deemed critical to energy requirements.

* * * * *

The issue of Federal-State-local relationships in the siting and licensing of energy facilities is the most difficult to resolve in the entire regulatory picture. The difficulties are legal, political, and philosophical. It is nevertheless clear that a new structural mechanism and concentrated effort are needed at both the Federal and State levels if current and future conflicts are to be resolved.

A minimum outline of the new mechanisms should follow these guidelines:

1. New entities should be established at the Federal and State levels to work intensively and continually to resolve conflicts and other problems between Federal and State energy regulatory agencies.

2. Land use and siting issues should remain under State authority, with early agreement on the need for and location of an energy facility as the goal. Decisions should embrace as much consultation with the Federal Government as possible.
3. Licensing schedules and procedures of Federal and State regulatory agencies should be integrated so that energy facilities are treated as a whole rather than piecemeal.
4. Federal preemption of siting and licensing is not advisable at this time, but might become necessary for critical energy facilities if the measures recommended here fail to solve the problems.

TESTIMONY OF HERBERT S. DENENBERG, SPECIAL ADVISER TO THE GOVERNOR OF PENNSYLVANIA ON CONSUMER AFFAIRS

Mr. DENENBERG. Mr. Chairman, I also testified on the Consumer Protection Agency.

I would like to congratulate you on those hearings because I think they have lead to the renewed interest in the performance of regulatory agencies.

I have submitted a full statement for the record and I have a condensed statement.

As someone about to go on the Pennsylvania PUC, I was pleased to hear of the halfway house for broken down regulators. I would hope they would segregate the lawyers from the nonlawyers for everyone's protection.

You don't have to study State regulatory commissions. You can smell them—all the way from up there in Harrisburg, Pa., or Dover, Del., for example.

Take the Delaware Public Service Commission. One member resigned a few months ago saying the agency is understaffed and incapable of making informed decisions.

Another member admits to holding stock in Delmarva Power & Light, the utility which recently received a 16-percent increase from that same Delaware Public Service Commission. Another member of the commission, it was reported, sold 30 acres of land to Delmarva for $96,000 and a tidy profit. Both men saw no conflict of interest but the Governor of Delaware said he would ask the legislature to forbid such entanglements in the future.

Now you might conclude that the Delaware commission—which granted that 16 percent Delmarva increase without deliberating in public, after secret meetings, and without even a vote at an official meeting—is just an example of an undermanned commission of a small State.

So it becomes necessary to take a trip to Harrisburg for a look at the Pennsylvania Public Utility Commission, which can be charitably described as the worst regulatory agency in Pennsylvania—if not the United States—if not the world—if not the universe.

This Commission may be proof that State public utility commissions, aided and abetted by what happens in Washington, may have done a lot more to create an energy crisis than the Arabs.

The Pennsylvania Public Utility Commission is an independent regulatory commission with jurisdiction over electrical, gas, water, taxis, trucks, railroads, and other utilities that produce regulated revenue of over $4 billion a year.

The chairman of the Pennsylvania Public Utility Commission—also referred to as the PUC—and pronounced "Puke"—holds oil stock even though the Commission passed favorable judgment on the fuel adjustment allowance that gives utilities the right to automatically pass onto customers any increase in the cost of oil or other fuels. Under this kind of leadership, the PUC rejected a code of ethics and requirements for financial disclosure.

This same chairman holds secret meetings with utilities, fails to give all members of the Commission important correspondence, and arbitrarily excludes from certain commission meetings the one member who does not rubberstamp his views.

43-362 O - 75 - pt. 2 - 9

This same Commission made all of its key decisions at closed executive sessions until forced to hold public meetings by the State's recently passed Sunshine Law.

It has granted rate increases without public hearings, does not issue annual reports or other consumer publications, and all too often simply serves as the cheering section for utility rate increases.

Its research capability seems to be mainly directed at justifying utility rate increases and this PUC even refuses to allow its counsel to present arguments or briefs on behalf of the consumer in rate cases.

This same PUC refuses to comprehensively analyze or effectively act on consumer complaints. It not only rubberstamps rate increases, but even goes out of its way to expedite them. For instance, it set up a special department—at a cost of $100,000 a year—to make it easier for small water companies to get rate increases.

That is just a small sample to give you some flavor of the Pennsylvania Public Utility Commission. Although a lousy regulatory agency, it is not unique, it is not an exception that proves the rule, it is, unfortunately, all too typical of State public utility commissions that too often serve the utilities without protecting the public.

There is little consumer-oriented regulatory leadership even at the national level. The National Association of Regulatory Utility Commissions, which is, as the name implies, the national organization of utility commissioners, is an undemocratic clique, with self-perpetuating rather than democratically selected leadership. This association was instrumental in defeating Senator Metcalf's proposal for a utility consumer counsel, and has been a spokesman for utility rather than consumer interests.

Because of this kind of performance, utility commissions have not solved our energy, ecology, or utility problems. They have aggravated them.

The typical State utility commission, like the Federal Government, doesn't have the foggiest idea of what our energy needs are, what the economy can afford, and what the environment can take. Utility commissions, almost without exception, have been sleeping on the question of the safety, efficiency, or economy of nuclear power, although this most hazardous of technologies may prove to be as dangerous to the financial health of utilities as it is to the physical well-being of their consumers.

Not content with sleeping on matters of life and death to the public and the utilities, the State agencies tend to move slowly and ineptly—what might be called regulatory lag and regulatory sag; and actually inflame the public—causing the utilities to lose their credibility with the consumer. One example: the chairman of the Pennsylvania Public Utility Commission recently gave a speech in which he said it might be a good idea to cut electricity off for 48 hours so the public could better appreciate its importance. Fortunately, his kindly remarks were taken out of context, for the same speech also suggested that public opinion is usually wrong; that the public cannot fairly and rationally evaluate evidence; and, that the utilities should declare war on their enemies, and should court and finance their political friends.

So the PUC's are as dangerous to the health of their friends, the utilities, as they are to the tormented consumer. This proves the need to save State commissions and the utilities from their own stupidity.

We might ask who gets credit for these regulatory agencies, which, like their counterparts in other regulated fields, have become the handmaidens of consumer fraud, if not consumer frauds themselves.

So rather than catalog more regulatory horror stories, an easy task, we might try to assign credit for the incredible performance of State regulatory agencies.

Here in a nutshell are some of the reasons as exemplified by the Pennsylvania PUC. We have to start by asking one key question: Where is the countervailing power to deflect the stream of unrestrained power—and stupidity—on the part of the utilities and their regulators?

One source of countervailing power is legislative oversight. But that is almost absent at the State level. The last new member to go on the Pennsylvania PUC was not even subjected to a confirmation hearing. Some legislative oversight! The PUC is so bad that the public is on the fringe of rebellion and the Governor has asked that the chairman of the Pennsylvania PUC be impeached. Yet the legislature has not conducted an investigation of the PUC.

Another source of countervailing power is the media. Unfortunately, the press corps is so thin it spends most of its time rewriting press releases, covering press conferences, or in straight reporting of regulatory hearings, opinions, and other events. What should be a bonanza for muckraking and investigative reporting is largely ignored or subjected to the most superficial and erratic coverage.

Still another source of countervailing power are consumer groups. They have been aggravated, as never before, into getting informed, organized and tough. Yet, up to now, they lack the financial resources to effectively participate in regulatory proceedings. They have managed to demonstrate and protest, but not to meet the utilities and the PUC in the arena of administrative and judicial proceedings. The public has not yet found a way to finance the protection of its rights—while utilities spend what they want on lawyers and legal proceedings and add the cost onto the consumers' utility bills.

An important source of countervailing power might be a consumer protection agency at the State level, with general responsibility, or a specialized utility consumer counsel. In Pennsylvania, the consumer protection agency went down the legislative tubes along with campaign reform, lobbying legislation, and a code of ethics for government officials. In my view, this kind of basic governmental reform would do more for the regulatory agencies than a thousand Presidential commissions. Such basic reforms would automatically move regulatory agencies in the right direction. Failure to act on such legislation will assure regulation. Improving the regulatory structure in isolation of the overall governmental and political structure is like trying to improve the driving habits of a drunken, blind and otherwise incompetent driver by substituting a new Rolls Royce for his 1954 Chevie.

This does not mean that a regulatory commission and certain regulatory reforms would not be of immense value.

One of the most important influences on the improvement of State insurance regulation has been the investigations of the U.S. Senate Antitrust and Monopoly Subcommittee under the leadership of Senator O'Mahoney and more recently that of Senator Hart. One of the many advantages of State regulation is that it can be subjected to the discipline of a congressional investigation. So, even though you may wish to retain utility and insurance regulation at the

State level, your investigation of their regulatory systems can have a profound influence on their improvement.

In the course of your investigation and that of any commission you might create, I would urge you to include State agencies not only because of their direct relationship to Federal regulatory counterparts, but also because of their overall importance, their need for legislative oversight, and for the insights they can offer in improving Federal regulation.

I would also urge you to concentrate on certain questions which have been neglected by other investigations, and which have high promise for substantial payoff. Here are a few such questions:

How can regulatory agencies better obtain consumer input, participation, and control?

How can successful regulatory efforts in one agency be transmitted and implemented by other agencies and in other jurisdictions?

How can the complaint handling capabilities of regulatory agencies be improved and how can consumer education programs be more effective?

These and other questions, if answered, can help make regulatory agencies work in the public interest. Now they all too often create burdens for taxpayers and barriers to innovation and efficiency. Good regulation can help make the marketplace work, can do something about the 30 percent or more of the consumer dollar which now goes up in smoke because of price fixing and consumer fraud, and can push and prod regulated industries to improve their performance.

Thank you very much.

Senator ALLEN. Thank you, Mr. Denenburg.

[The prepared statement of Mr. Denenburg with attachment follow:]

PREPARED STATEMENT OF HERBERT S. DENENBERG, SPECIAL ADVISOR ON CONSUMER AFFAIRS TO THE GOVERNOR OF PENNSYLVANIA; FORMER INSURANCE COMMISSIONER OF PENNSYLVANIA; FORMER CHIEF COUNSEL OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; PRESENTLY A NOMINEE TO THAT COMMISSION; FORMER PROFESSOR OF INSURANCE AT THE WHARTON SCHOOL; AND PRESENTLY VISITING PROFESSOR OF LAW AT TEMPLE UNIVERSITY

The Pennsylvania Public Utility Commission has to be considered one of the worst regulatory agencies in the state, if not the nation, if not the world. Yet it has heavy competition for this dubious distinction.

For example, in our neighboring state of Delaware, it was recently discovered that one member of the state's Public Service Commission owned 700 shares of stock in Delmarva Power and Light Company, a recent recipient of a 16 percent rate increase. The Chairman of the Commission, it was also reported, sold 30 acres of land to Delmarva for $96, 000 and a tidy profit.

Both men said they saw no conflict of interest, but the Governor of Delaware said he would ask the legislature to forbid such entanglements in the future.

In awarding the 16 percent increase to Delmarva, the Commission held secret meetings and never deliberated or voted in public. After the four-to-one vote was announced, a Commission spokesman said the order granting the increase was sent out by courier for the members' signatures.

As a result of this action, one member of the Commission resigned in protest. He said the rate increase was unfair and unjustified. Earlier this year, in August, another member of the Commission resigned, saying that the Commission was understaffed and incapable of making informed decisions on the complex issues facing it.

(See the reports of this incident in *The Philadelphia Inquirer:* November 14, 1974, p. 2–B; November 16, 1974, p. 2–B; and November 17, 1974, p. 3–D.)

No wonder state public utility commissions generally don't have the foggiest idea of what our energy needs are, what the public can afford for energy and what

the environment can take in terms of utility expansion. No wonder typical state public utility commissions have paid little or no attention to the safety, efficiency or economy of nuclear power.

For further proof that public utility commissions are doing more to create an energy crisis than the Arabs, let's take a look at the Pennsylvania Public Utility Commission, pronounced "Puke," and hereafter also referred to as the P.U.C.

What would this Committee say if I told you that the Chairman of the Pennsylvania Public Utility Commission holds oil stocks, even though the P.U.C. has passed favorable judgment on the fuel adjustment allowance that gives utilities the right to automatically pass onto consumers any increase in the cost of oil or other fuels? That this same Chairman of the P.U.C. holds secret meetings with the utilities and refuses to circulate important correspondence to other members of the Commission, even though the subject matter involves general business of the regulatory agency?

What would this Committee say if I told you that this same Chairman has retained counsel for the P.U.C. that also represents utilities before the Commission, thus not only tolerating but also embracing conflicts of interest? Further, that the Chairman and a majority of the members of the Pennsylvania Utility Commission have affirmatively rejected the adoption of a code of ethics to prohibit improper dealing between the regulators and the regulated?

What would you say if I told you that the Chairman and a majority of the Commission, on more than one occasion, have arbitrarily excluded from meetings the one member known to dissent from the majority's viewpoint?

What would you say if the Chairman of the Public Utility Commission suggested in a speech that it might be a good idea to cut electricity off for 48 hours so the public would better appreciate the importance of electricity? And to take this kindly suggestion in context, the same speech also suggests that public opinion is usually wrong—that the public cannot fairly and rationally evaluate evidence, and that the utilities should declare war on their enemies.

What would this Committee say if I told you that this same Commission Chairman started a public meeting of the Commission by telling a group of about 400 senior citizens and other consumers who travelled 90 miles to attend and whose backs were being pushed to the wall by skyrocketing utility rates, that if they disturbed the meeting they would be in violation of three different sections of the criminal law and would be arrested?

This same Commission set up a special $100,000-a-year unit to make it easier for small water companies to get rate increases, yet refuses to let its staff counsel file briefs or present arguments on behalf of consumers in rate cases. When called on to interpret the state's recently passed Sunshine Law at the P.U.C.'s first public meeting, one member explained the new law permits the public to attend meetings but "it is not required that the Commission listen to the people." The Pennsylvania P.U.C. does not issue annual reports and, as far as I know, the "Shopper's Guide to the Public Utility Law," which I issued during my brief tenure as Chief Counsel to the P.U.C., has been the only consumer publication issued by the P.U.C. in its modern history.

The same P.U.C. Chairman has admitted reliance on a utility lawyer to write some of his opinions and speeches. And this P.U.C. grants major increases without a hearing, and fails to effectively or systematically analyze consumer complaints.

If a writer of fiction told such a tale, the critics might admire his imagination, but would give him low marks for straining the credibility of his readers. But truth, unfortunately, in this case, is stranger than fiction—and the brief introduction which I just gave you is only the tip of the iceberg of the Pennsylvania Public Utility Commission. That Commission symbolizes the shocking deficiencies of regulatory agencies in general, utility commissions in particular, and the need to bring about not only basic changes in regulation but basic changes in governmental processes that can tolerate and permit such outrages.

Most of the documentation of my comments is a matter of public record and I will now introduce you to the cast of characters. The Chairman of the Pennsylvania PUC is George I. Bloom. He has long been a power in NARUC, the National Association of Regulatory Utility Commissions, thus casting credit for his accomplishments beyond our state alone. Through NARUC, he has projected his viewpoint into Congress and passed off his ideas as representing 50 state commissions. The leadership of NARUC was instrumental in defeating Senator Metcalf's proposal for a utility consumer counsel. This should not surprise you as NARUC is a self-perpetuating, undemocratic clique that does not represent its membership. There is now a proposal before NARUC to provide for democratic elections rather than a self-perpetuating pro-utility leadership. The Pennsylvania Chairman will complete his ten-year term—appropriately

enough on April Fool's Day of 1975—if he is not sooner impeached. Governor Milton J. Shapp of Pennsyalvania is asking that Chairman Bloom be removed from office, and he has been joined in this request by numerous consumer groups. Incidentally, Chairman Bloom was four time elected Chairman of the Republican State Committee, has been a member of that committee since 1939 and is reputed to be one of the leading fund raisers of the Republican Party in Pennsylvania. As you might imagine, it is easy to raise political money when you control an agency that regulates over $4 billion of annual utility revenue, and have power to determine who pays for and finances the repairs to such structures as bridges and railroad crossings.

There are two other members of the P.U.C. who usually follow the Chairman's lead, and one lonely and isolated dissenter, Commissioner Louis J. Carter. He alone on the Commission seems to have real concern for the problems of the consumer and real appreciation of the demands of due process of law. For example, he proposed the code of ethics, which was rejected by a majority of the Commission. In contrast, the rest of the Commission behaves like a cheering section for the utilities.

To round out the cast, the Governor has nominated me to be the fifth member of the Commission. If I am not confirmed by a two-thirds vote of the State Senate by the time it adjourns this month, I will be given an interim appointment.

This little introduction was not designed to present an extreme case for dramatic impact. It was just a little homey example to show how easy it is to catalogue horror stories when it comes to regulatory agencies. The two areas of my special interest—utilities and insurance—are not unique. They are all too typical. They represent regulated revenue of well over $150 billion a year nationally, and are one of the most notable areas of state regulation (as opposed to Federal) left within our governmental structure.

These examples and that one statistic demonstrate the validity of Senator Lee Metcalf's observation—that state agencies must be studied too if Congress is to obtain an adequate picture of the performance of regulatory agencies.

Although the state regulation has fallen far short of even the least demanding standards, it has much to commend it. It is closer to the people, more conversant with local problems and more quickly responsive to local needs. I can testify from first-hand experience that the Federal Government behaves like a senile dinosaur. You kick it in the tail and it takes two years for the message to reach the brain.

The failing of state and Federal regulatory agencies has become part of the conventional wisdom. It is so bad that the outgoing Chairman of the Atomic Energy Commission can, with a straight face, point with pride to the fact that the AEC has for decades misled the public, but in recent years has started to tell the truth for a change.

The New York Times reported outgoing AEC Chairman Ray said it was demonstrably "not true" that the A.E.C. suppresses information on the safety of nuclear plants. She added that "while there may be some validity for such accusations in the past, the situation has changed today." (November 16, 1974, p. 24.) L. Manning Muntzing, AEC's director of regulation, also concedes "bad examples" of secrecy in the past, but now claims revolutionary openness.

Most of the studies I have seen catalogue the deficiencies of these regulatory agencies beyond the capacity of almost anyone to absorb. The only difficulty in the analysis is realizing how bad the regulatory agencies are.

When I studied them as a professor at the Wharton School of Finance and Commerce, I knew they were bad. When I observed them first-hand as a government consultant, I soon learned that they were 100 times worse than I originally thought. When I actually had the advantage of responsibility for a regulatory agency, as Insurance Commissioner for over three years, I could obtain additional insights that led me to believe they were 1,000 times worse than I thought. My brief first-hand experience with the P.U.C. had the same effect. Finally, when I was able to put the operations of these agencies in better political perspective as a candidate for the U.S. Senate in the 1974 primary, I realized the agencies were 10,000 times worse than I thought. Fortunately, I was not elected or that geometric progression might have gone forward one more notch.

But I am led to believe that the deficiencies of our regulatory agencies are merely symptoms of a more fundamental disease. Regulatory agencies reflect the political system, the deficiencies of the legislative process and the power of special interests that is strong enough to make puppets of too many of our regulators, our legislators, our executive branch and our judges.

It is indisputable that our regulatory agencies have massive power for good or evil, that their structure may be vastly improved and that legislative oversight

can be easily and dramatically improved. Nonetheless, it is far easier to proceed with attention to fundamental causes rather than remote consequences, to treat basic pathology rather than resulting symptoms.

The questions your Committee raises are excellent but they relate to regulatory failure caused by fundamental deficiencies in our political and governmental processes. And the problems they suggest will be sooner solved by fundamental reforms than by tinkering or even streamlining the regulatory process.

In other words, I suggest that statutes relating to legislative, executive and judicial ethics and conflict of interest will do more for the regulatory process than more specific regulatory manipulations. Required financial disclosure in all branches of government, campaign financing and election reform, effective freedom of information legislation, lobbying controls and a program of legislative oversight would create a system in which the regulatory agencies would function in the public interest.

Failure to bring about these fundamental reforms will merely perpetuate regulation largely as we now have it despite any manipulation of structure or revision of legislative mandate.

One good campaign financing law would do more for regulatory reform than a thousand presidential commissions studying government regulation. So a comprehensive freedom of information act, disclosure legislation for lobbyists, a mandatory code of governmental ethics, real prohibition of conflict of interests—these and other fundamental reforms—would automatically move regulatory agencies in the right direction.

Improving the regulatory framework in isolation of the overall governmental and political structure is like trying to improve the driving habits of a drunken, blind and otherwise incompetent driver by substituting a new Rolls Royce for his 1954 Chevie. Of course, like all analogies, that one suggests meaning beyond its intent. In any event, I would urge this Committee to advocate a further study of the regulatory process. Rather than pinpoint specific problem areas or abuses, it may be more helpful to you if I suggest priority areas and techniques of investigation and oversight that might yield the highest returns.

There are carloads of studies on most regulatory topics, but one critically important but neglected area is that of consumer participation in the regulatory process and in the regulated industry itself. My experience suggests that the public has been left out of the picture and that the system will only work with adequate public input, participation and control. As Insurance Commissioner, I cultivated consumer organizations, held highly publicized hearings, organized various consumer advisory councils and task forces, and pressured Blue Cross and other insurers to put consumers on their boards and appoint ombudsmen and advisory units. In addition, I published "Shopper's Guide" and put heavy emphasis on consumer education and response to consumer complaints. The matter of public control is also of critical importance in current attempts to reform the health delivery system and improve the performance of our troubled utilities. In a real sense, what has been described as consumer control, input and participation is the central issue in making our institutions responsive to the public and making our government function as it should.

A key area to study is how to make the utilities responsive to the public. One suggestion is public ownership. Another is mutualization, a conspicuous failure in insurance, but perhaps more promising in the utility field.

Another high-priority area of activity and investigation should involve methods to assume effective and comprehensive legislative oversight. This seems to be virtually non-existent at the state level, due to the sad state of our legislatures, manned with inadequate staffs and bogged down in a maze of conflict of interest and incompetence. If state legislators were as effective in solving the financial problems of constituents as they are in protecting their own pension rights and other compensation, we would have a vastly improved society. One of the significant factors toward improving state insurance regulation has been the oversight function carried on by the Senate Antitrust and Monopoly Subcommittee under the leadership of the late Senator O'Mahoney and, more recently, Senator Hart. The same kind of surveillance carried out over state public utility commissions would have saved the public many billions of dollars and might have averted the current energy crisis. State public utility commissions have been slumbering, and Congress should have awakened them long ago.

Congress should monitor state regulatory agencies closely and consider basic standards to which these agencies must conform. This approach has been followed in recent federal bills on no-fault.

Another high priority area of study should be how to transmit regulatory improvements and innovations more quickly from one agency to another—and

from one jurisdiction to another. As Insurance Commissioner, I was astounded at how slowly a sound regulatory idea moved from one jurisdiction to another. For example, the "Shopper's Guide" series which I pioneered as Insurance Commissioner was an instant success, at providing the public with needed information and pressuring insurance companies and health care providers to lower costs and improve service. Despite over a million of these guides now being in circulation and a great deal of national publicity, the "Shopper's Guide" idea was only slowly and inadequately copied. Methods of more effectively assuring transmission and implementation of sound regulatory ideas should be studied.

There have been many reports on horrendous regulatory failures and the contribution that they make to inflation. There should also be detailed reports on regulatory successes and their contribution to saving money for the public. Senator Hart has estimated that 30 to 40 percent of the consumer dollar buys no value because of consumer fraud, monopoly, price-fixing and other abuses of the marketing place. That is one measure of the potential cost-savings of regulatory agencies.

While I was Insurance Commissioner of Pennsylvania, it was estimated that activities of the Department saved the consumers of Pennsylvania hundreds of millions of dollars each year. Our approach to rate regulation, consumer education through "Shopper's Guide," the readability of policies, Blue Cross reforms and other regulatory innovations improved the quality of insurance service and brought about unprecedented consumer savings. Thus, the power of regulatory agencies to lower costs is just as dramatic as its ability to raise costs.

A closely related and equally important area of consideration should be methods of educating the public about the availability of help from regulatory agencies. The public still lacks the most elementary sense of where to go for help with particular problems. Your Committee, or the study it may authorize, should investigate and implement methods of giving the consumer information about the services offered by regulatory agencies. Perhaps Howard Cosell should give advice on consumer complaints during the Monday night professional football game.

There are other basic regulatory questions on which legislative bodies should take action. One is how to assume competence and professionalism in the regulator. For example, about 40 percent of insurance commissioners come out of the insurance industry and go back in when their term is over. They only function for two or three years and depart for greener pastures about the time when they are starting to understand their jobs. Many of the independent commissions have members of such short tenure that they soon focus on their next job rather than their present one. Pay scales are often so low that the commission member must be a part-timer, a millionaire—or a thief. This suggests that pay scales should be higher and tenure longer if independence, professionalism and judicial approach are desired from an independent, regulatory commission.

I have attached various documents to this statement, which expand on or illustrate some of the views expressed in my testimony. Thank you for the invitation to be here today, and good luck in your deliberations.

APPENDIX

1. "The Pennsylvania Insurance Department's Report to the People," March 1974. Major activity of the Department, cataloging techniques for saving the consumer money.

2. "Insurance Regulation: The Search for Countervailing Power and Consumer Protection" by Herbert S. Denenberg. The Insurance Law Journal, May 1969. A discussion of directions of insurance regulation, stressing the need for a consumer voice to serve as a countervailing power to the influence of the industry.

3. "A New Approach to Regulation" by Herbert S. Denenberg. Progressive, December 1972. A description of the regulatory impact of the "Shopper's Guide" series.

4. "The Shopper's Guidebook." A collection of the shopper's guides published by the Pennsylvania Insurance Department.

5. "A Shopper's Guide to the Public Utility Law" by Herbert S. Denenberg. The "Shopper's Guide" approach in utility regulation.

6. "Meeting the Insurance Crisis of Our Cities" by Herbert S. Denenberg. Insurance Law Journal April 1970. Some comments on regulation and new forces of social change.

7. "The Consumer Protection Agency: on the Merits of Governmental Cat Fights, Administrative Guerilla Warfare, Bureaucratic Barbells, A Federal Circus Maximus, Foxes in the Federal Henhouse, Adversary Advocate, Wave Making

and Boat Rocking" by Herbert S. Denenberg. The Consumer Protection Agency Analyzed from the Viewpoint of Insurance Regulation.

PRESS RELEASE FROM HERBERT S. DENENBERG, SPECIAL ADVISOR TO THE GOVERNOR ON CONSUMER AFFAIRS, HARRISBURG, PA.

PUBLIC UTILITY COMMISSIONS HAVE DONE MORE TO CREATE ENERGY CRISIS THAN THE ARABS

FUNDAMENTAL REFORM SUCH AS CAMPAIGN FINANCE MIGHT DO MORE FOR REGULATORY AGENCIES THAN 1000 PRESIDENTIAL COMMISSIONS ON REGULATION

State public utility commissions have done more to create an energy crisis than the Arabs, according to testimony of Herbert S. Denenberg, former Pennsylvania Insurance Commissioner, before the U.S. Senate's Committee on Government Operations which is investigating the operations of regulatory agencies.

Denenberg described the Pennsylvania Public Utility Commission, one of the worst regulatory agencies in the world, as being so busy acting as a cheer leader for the utilities that it doesn't have time to protect the public. Unfortunately, there are too many agencies too much like the Pennsylvania P.U.C.

It is no wonder that the typical state public utility doesn't have the foggiest idea of how much energy our economy needs, how much the economy can afford to pay for it, and whether the environment can survive with it.

"Thirty to forty percent of the consumer dollar buys no value because of price-fixing, monopolies, consumer fraud and other abuses of the market place. And it is alreay part of the conventional wisdom that regulatory agencies have become the handmaiden of consumer fraud if not consumer frauds themselves," Denenberg said.

"Good regulation could save the public billions of dollars every year. Instead, the costs of regulation are merely one more burden on the taxpayer's back."

Denenberg said the regulatory agencies merely reflect the basic corruption of our political system.

"One good campaign reform law would do more for regulatory reform than a thousand presidential commissions studying regulation. So a comprehensive freedom of information act, campaign finance legislation, disclosure legislation for lobbyists, a mandatory code of government ethics, real prohibition of conflict of interests—these and other fundamental reforms—would automatically move regulatory agencies in the right direction."

"Improving the regulatory framework in isolation of the overall governmental and political structure is like trying to improve the driving habits of a drunken, blind and otherwise incompetent driver by substituting a new Rolls Royce for his 1954 Chevie."

Denenberg proposed specific priority areas for study by any commission. These include methods of obtaining consumer input, participation and control of regulatory decisions; better methods of transmitting and implementing regulatory successes of one agency elsewhere; and more effective methods of consumer education about the services of regulatory agencies.

TESTIMONY OF A. EVERETTE MacINTYRE, PRACTICING ATTORNEY AND FORMER MEMBER OF FEDERAL TRADE COMMISSION

Mr. MACINTYRE. Mr. Chairman, I welcome this opportunity to appear before you and discuss this subject.

If I may, I would like to have my statement included in the record and I will only present portions of it orally here this morning.

Senator ALLEN. Your statement and the other witnesses statements will be included in the record.

Mr. MACINTYRE. Until June 30, 1973, I was a member of the Federal Trade Commission. I am now in the private practice of law.

My interest in the administrative law processes is long and continuing.

I regard the administrative law processes as the vehicle through which these regulatory agencies perform their task.

Mr. Chairman, I strongly support proposals for the creation of a National Commission of Regulatory Reform. Therefore, I support the objective of S. 4145. The objective to which I make reference is the creation of a National Commission on Regulatory Reform for the purpose of studying and reporting on the structure of the so-called independent regulatory agencies.

Now, as I said, I strongly support the proposals in S. 4145 for the establishment of such a commission. I want to stress that I am talking there first about structure and control over these agencies. I have not in my statement and I shall not at this time discuss proposals for revisions in substantive law. That is a complex and very complicated subject and one that I think the National Commission should study but after there is a report to Congress on the matter of structure and control.

I urge the Congress to study substantial amendments for the establishment of this Commission. I would urge the Congress consider the establishment of a commission of 15 members as you propose in Senate Joint Resolution 256.

I would, however, suggest that 10 of those members come from the Senate and the House so that it becomes something close to what Senator Javits was suggesting here the other day, a joint congressional committee. It, of course, cannot be technically a joint congressional committee if it has members not from the Congress, and I do think it should have members not from the Congress. The President should appoint some of these 15 members and the Congress in its wisdom should direct this be done.

Therefore, the question is, are these so called independent regulatory agencies to be made responsible to the Congress or the executive branch? As you know, the Constitution empowers the Congress to regulate interstate commerce. In its effort to do so it has delegated some of that authority and power to these independent regulatory agencies, mindful when it was doing so it was not delegating it to the executive branch. So, therefore, when Congress is to make a decision on what to do about these independent regulatory agencies it seems to me it has reached the point to where it must again study where its delegation is to go. Is it to go to the executive branch or to some agency subservient to the Congress.

Senator ALLEN. How do you regard the regulatory agencies at the present, as subject to Congress or the Executive or a mixture?

Mr. MACINTYRE. They were created as arms of the Congress and to be made subject to the Congress. However, the Congress through amendments to all of these laws has in effect placed many of their operations under the influence of the executive branch. This has been done by the appointment of the chairman at the pleasure of the President through the reorganization plans in the Truman administration. Moreover, to have that chairman thus named to appoint all the members of the staff except for the very highest four or five or six members. Therefore, through the act of the executive branch, all members of the operating staffs of these agencies are appointed. Of course, as we all know, they do participate in policy functions, although they don't make decisions but they lay the ground work so the decisions are practically made thereby. So, consequently, Congress

has despite the concept passed to the executive branch effective control over the agencies in a large measure.

In view of the fact that the National Commission would be studying and reporting on not only the structure and control and operations of the independent regulatory agencies but also on proposals for revisions in substantive laws entrusted to them to administer and enforce, it would appear to me that the matters involved would encompass issues within the jurisdiction of not only the Committees on Government Operations in both the Senate and the House, but also the Committees on Commerce in the Senate and the House. Consequently, it should be provided that whatever action by the Congress in this regard that the National Commission on Regulatory Reform should prepare and send to each of the committees periodic reports with full information of its work and progress of the task assigned to it by Congress. That is particularly true of recommendations for changes in substantive laws. I think this committee, the Government Operations Committee, has primary jurisdiction over the interrelationships of agencies, the creation, the control of them in a sense.

In June 1973, I appeared before the Subcommittee on Commerce and Finance of the Interstate and Foreign Commerce Committee of the House of Representatives and testified at length concerning my views about the appointments and staffs of the various regulatory agencies. If you wish you may include a copy of that statement in the record.

Senator ALLEN. It will be included at the end of your full prepared statement which we will also insert.

Mr. MACINTYRE. I am convinced that if it is the determination of the Congress, once it has the views of the National Commission on Regulatory Reform that Congress and not the executive branch should exercise control and oversight of the so called independent regulatory agencies, then changes should be made in the appointment and the length of term of office of each member in each of these agencies, and in the appointment of the chairman of each of the agencies and the appointment of the members of the staff of each such agency. When I am talking about oversight I suggest continuous, intense, tight oversight by the committees having jurisdiction over the agencies. I don't think that's been done, except just occasionally.

Coming back to my suggestion about the appointment of members. The FTC, consists of five members I believe the Congress should consider reducing the term of such members from 7 to 5 years. That would provide for at least one member to be up for reconsideration and appointment each year and a majority of all of the five members would be up for appointment and confirmation within 3 years. In that way Congress would be exercising closer oversight concerning conduct and performance of each of the members and Congress would have greater control over the members of the agencies. In other words, it would be confirming the appointment of a majority of the members within 3 years, and that would constitute, of course—if it is exercising its proper oversight—a measure of control over the agencies.

I do not believe these agencies should be without oversight and go unbridled. If they are not in the executive branch they are not under the control and shouldn't be under the influence of the executive branch, but they shouldn't be left free to do their will. It should be

the will of the people as expressed through the Congress in the national laws of the country and the policies that Congress has spelled out in those laws for these agencies to follow.

If Congress thus has control over the members then I suggest that the members of each of the agencies should have control over the appointment of the members of the staff. This should not be the sole prerogative of the chairman of the agency. This does not mean it would be necessary for the members of the agencies in assembled meetings to decide on the details of the appointment of each and every member of the staff. The members could delegate the appointment of each member to an executive officer who by appointment by a majority of the members would be subject to recall by a majority vote of the agency itself if he abused that authority. In following a course like this, Congress and not the executive branch would be exercising a more effective control and oversight over each member of the staff.

There have been suggestions, for example, that the term not be reduced but increased to 15 years. I think that would be bad. Perhaps if you were to create an administrative court and move from these agencies some judicial function, then the appointment of persons to such judicial court should either be for life or 15 years or more without reappointment. But that would be the judiciary, not under the Congress and not subject to any control or policymaking from the Executive. It would leave the policymaking matters to the agencies, and still, as I say, under the control of the Congress by virtue of the oversight which I have suggested.

Through the years there have been proposals from the executive branch or from agencies established by the executive branch dismember and remove portions of certain independent regulatory agencies. In one of the proposals it was urged that much of the oversight and direction be removed from the independent regulatory controls of the collegiate type of commissions to that of a single administrator to be appointed by and subject to the control and direction of the Chief Executive and not the Congress. Such was included in the Ash report.

Recently the Congress has seriously considered surrendering a large measure of its oversight of independent regulatory agencies to an administrator to be appointed by the Chief Executive. This was provided for by the establishment of a department, office, or agency, ostensibly to ride herd on independent regulatory agencies in the interest of complaints from the public and particularly consumers, note S. 707.

Quite frankly, I feel I should suggest to you that in my view such proposal however well intentioned would result in bad administration of the public's business and operate against the public interest. I say that not only because Congress would thereby be legislating for the others to exercise the measure of oversight it should exercise, but also because on the basis of my experience of approximately 40 years in this field of antitrust and trade regulations activity I am convinced that this building of a large Federal bureaucracy to oversee the operations of other Federal agencies would bring the present slow operations of the so-called independent regulatory agencies to a virtual halt. For these reasons I urge the Congress on regulatory reform study carefully this aspect of the reform and report to the Congress.

Let me suggest that I was informed late yesterday that the Senate has not yet asked for a conference on S. 782. Now, I suggest what I

have as to both of these bills because both provide for private persons to inject themselves as third parties in U.S. Government proceedings before regulatory agencies and in courts in cases arising under trade regulations and antitrust laws. The public interest encompasses the interest of consumers, but it includes more. A member of the public as a consumer at the dinner table, but as Senator Taft observed here this morning, he is a producer, a farmer, a worker, a businessman during early hours of the day before that dinner arrives.

A couple of days ago a witness before you suggested that consumers are interested in high quality of goods and low prices, not merely low prices. I would agree with him. They are interested in one other factor, availability. Until the goods are available, and this was witnessed in gasoline and other petroleum products a few months ago, the consumer has less interest in price. He wants the goods.

The national policy for free and fair competition involves the concept of protecting a member of the public in all aspects of his interest as a consumer. The independent regulatory agencies are obligated to serve that concept of our national policies; hence, the National Commission on Regulatory Reform should consider the entire problem relating to the independent regulatory agencies in all the aspects involved respecting any member of the public. They should be considered and acted upon as a whole and not by fragments. For these and other reasons I recommend that the consumer and antitrust aspects of the regulatory problem as embodied in S. 707 and S. 782 and other related bills be committed to the National Commission on Regulatory Reform for study and report for recommendation.

I repeat, Congress should establish a National Commission on Regulatory Reform.

Senator ALLEN. Thank you very much, Mr. MacIntyre.

[The full prepared statement and the statement before the House Subcommittee on Commerce and Finance presented in June 1973 by Mr. MacIntyre referred to follow:]

PREPARED STATEMENT OF A. EVERETTE MACINTYRE, PRACTICING ATTORNEY, AND FORMER MEMBER OF THE FEDERAL TRADE COMMISSION

Mr. Chairman and members of the committee, I welcome this opportunity to appear before you and discuss the important subject of the need for the creation of a National Commission on Regulatory Reform.

My name is A. Everette MacIntyre. Until June 30, 1973, I was a member of the Federal Trade Commission. Since that date, I have been engaged in the practice of law in Washington, D.C. I served approximately 12 years as a member of the Federal Trade Commission and prior to that time, I served as a member of the staff of the Federal Trade Commission for a period of more than 25 years. The last 9 years of that period, I served as Chief Counsel of the staff of the Commission engaged in the investigation and trial of antitrust cases. On one occasion during a period from 1955 through 1960, I served as counsel to a committee of the Congress and in that connection, helped conduct an investigation of the regulatory agencies, their organization and operations for the purpose of determining the effect of such organizations and operations on small business enterprises. My interest in the administrative law process is a long and continuing interest.

Mr. Chairman, I strongly support proposals for the creation of a National Commission on Regulatory Reform. Therefore, I support an objective of S. 4145. The objective to which I make reference is the creation of a National Commission on Regulatory Reform for the purpose of study and reporting on the structure, control and operations of the so-called independent regulatory agencies. This provides for focusing on the last two or three questions in the list you sent with your invitation to me to appear here as a witness today. I wish to study further the additional proposals contained in S. 704, S. 770 and S. 3604, as well as some of the provisions contained in S. 4145. I say that because I believe they are matters which should be given further study, particularly by the National Commission on

Regulatory Reform before we and the Congress should firm up our views and positions. In other words, I believe the investigation and study should be made and a report thereon considered before we draw our final conclusions.

Involved in the various proposals which I have suggested should be carefully studied by the National Commission on Regulatory Reform, are those for changes in the substantive laws entrusted to each of a number of the independent regulatory agencies to administer and enforce. Those proposals are so numerous and involve such complex issues that I would not think it feasible to have the National Commission on Regulatory Reform to study and report on some of those proposals within a period of two years. I think differently about issues surrounding the creation, structure, control and operations of these independent regulatory agencies. I believe the National Commission should be directed by the Congress to expedite its consideration, study and report with its recommendations concerning creation, continuation, structure and operation of the independent regulatory agencies as promptly as possible, but not later than the end of a six-month period following the establishment of a National Commission. I say that because this would involve a report on only the inter-relationships of different agencies and departments of government and the nature and degree of the control by the Executive Branch, as against the Legislative Branch of government over each of these so-called independent regulatory agencies. Thus, from the first report from the National Commission on Regulatory Reform, there would be involved only the issues relating to structure and to questions relating to the nature and degree of control of each of these independent regulatory agencies which the Congress should consider recapturing and retaining for the purpose of overseeing its constitutional responsibility regarding the regulation of interstate and foreign commerce.

The National Commission on Regulatory Reform should be given a longer period of time within which to submit its report on other related matters, such as those involving proposals for revisions of substantive laws entrusted to these agencies for administration and enforcement.

Earlier I stated that I strongly support the proposal in S. 4145 for the establishment of a National Commission on Regulatory Reform. However, I would urge the Congress to consider substantial amendments to the provision for the establishment of such Commission. I would recommend that Congress consider the establishment of a Commission of 15 members; 5 to be appointed by the President and confirmed by the Senate, 3 of whom would be senior officials from the Executive Branch and 2 from the private sector; 5 Senators to be appointed by the President of the Senate; and 5 Members of the House of Representatives to be appointed by the Speaker of the House.

In view of the fact that the National Commission on Regulatory Reform would be studying and reporting on not only the structure, control and operations of the independent regulatory agencies, but also on proposals for revisions in substantive laws entrusted to them to administer and enforce, it would appear to me that the matters involved would encompass issues within the jurisdiction of not only the Committees on Government Operations in both the Senate and the House, but also the Committees on Commerce in the Senate and the House. Consequently, it should be provided in whatever action by the Congress in this regard, that the National Commission on Regulatory Reform should prepare and forward to each of the mentioned committees, periodic reports with full information concerning the conduct of its work and the progress on the tasks assigned to it by the Congress.

In June of 1973, I appeared before the Subcommittee on Commerce and Finance of the Interstate and Foreign Commerce Committee of the House of Representatives and testified at length concerning my views about the appointment of the members and the staffs of various independent regulatory agencies (see pages 333 through 360, Part 1, Hearings before the Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce, House of Representatives, Regarding H.R. 5050 and H.R. 340, June 7, 1973). I suggest that if you wish, you may include in the record of this hearing, a copy of that record of my testimony on this subject. I am convinced that if it is the determination of the Congress, once it has the views of the National Commission on Regulatory Reform, that Congress and not the Executive Branch should exercise control and oversight of the so-called independent regulatory agencies, then changes should be made in the appointment and the length of term of office of each member and in the appointment of the chairman of each of the agencies and the appointment of the members of the staff of each such agency.

For example, for an agency such as the Federal Trade Commission consisting of 5 members, I believe that Congress should consider reducing the term of each member from 7 to 5 years. That would provide for at least one member who would be up for consideration for reappointment and confirmation each year, and a

majority of all the 5 members would be up for reappointment and confirmation within 3 years. In that way, with Congress exercising closer oversight concerning the conduct and performance of each of the members, Congress would have greater control over the members of each of the agencies. Also, the appointment of the members of the staff of each of these agencies is a vitally important matter. Therefore, the members of each of the agencies (who, as I have suggested, would in a large measure be subject to direction from Congress on policy) should have control over the appointment of the members of the staff. This should not be the sole prerogative, of the chairman of the agency. This would not mean it would be necessary for the members of the agency to decide on the details of each and every appointment of each member of the staff. The members could delegate the handling of the appointment of each such staff member to an Executive Officer, who under appointment by a majority of the members of the agency would be subject to recall by a majority vote of the agency itself. In following a course like this, Congress and not the Executive Branch would be exercising a more effective control and oversight over the agency and the members of the staff of each of the independent regulatory agencies.

Moreover, the Congress should undertake to exercise a more intense and continuing oversight through its oversight committees with primary jurisdiction in both the House and the Senate over the work of these independent regulatory agencies.

My views on that point are prompted by and based in large part upon the history of the performance (when Congress failed to exercise its prerogative, of oversight and control to the extent warranted) of the so-called independent regulatory agencies. For example when Congress failed to exercise its authority and power of oversight and direction, the Executive Branch acted instead of the Congress (see House Report 2967, 2nd Session, 84th Congress. Also, see statement entitled Executive Branch Control over Regulatory Agencies appearing in the Congressional Record for the Senate, November 29, 1973, commencing at page S. 21405).

Moreover, since early in the history of the Federal Antitrust Policy and Interstate Trade Regulation, there has existed disagreement between the Congress and the Executive Branch over which should exercise oversight and direction over questions and issues of broad policy of antitrust and trade regulation matters. For example, it is reported that President Theodore Roosevelt defied the Congress in its effort to ascertain the facts, the evidence of which was held by the Department of Justice (see Executive Privilege by Raoul Berger, 1974, commencing at page 228).

More recently, as you know, Congress has experienced considerable difficulty in securing from the Securities and Exchange Commission, certain documentary materials relating to the settlement of a very important antitrust case and the responsibility of the Securities and Exchange Commission concerning the matter. Congress faced difficulties in getting at the facts, because at the request of the Executive Branch, the SEC had turned the materials over to the Executive Branch.

In addition, through the years there have been proposals from the Executive Branch or from agencies established by the Executive Branch to dis-member and remove to the Executive Branch, portions of certain independent regulatory agencies. (For example, during the mid 20's the Secretary of Commerce proposed to the Chairman of the Federal Trade Commission, that a part of that agency be transferred to the Department of Commerce, he asked that the members of the Commission support him in that which, of course, was not done. Also, in more recent years similar proposals have been made by the so-called Ash Committee Report and by Reports on Antitrust Enforcement by the Neal Committee and the Stigler Committee.)

In one of the proposals, it was urged that oversight and direction of much of the Federal Trade Regulation for free and fair competition provided for from the various statutes of the United States, be removed from the independent regulatory agency controls of the collegian type of commissions to that of a single administrator to be appointed by and subject to the control and direction of the Chief Executive and not the Congress (see Ash Committee Report).

Recently the Congress has seriously considered surrendering a large measure of its oversight of independent regulatory agencies to an administrator to be appointed by the Chief Executive. This was provided for in recent proposals for the establishment of a department, office or agency, ostensibly to ride herd on independent regulatory agencies in the interest of complaints from the public and particularly from consumers (see S. 707 and other related proposed legislation).

Quite frankly I feel I should suggest to you that in my view, such proposals, however well-intentioned, would result in bad administration of the public's business and operate against the public interest. I say that not only because Congress would thereby be legislating for others to exercise a measure of oversight it should exercise, but also because, on the basis of my experience of approximately 40 years in this field of antitrust and trade regulation activity, I am convinced that thus building a large federal bureaucracy to oversee the operations of other federal agencies would bring the present slow operations of the so-called independent regulatory agencies to a virtual halt. For these reasons, I urge that the Congress direct the National Commission on Regulatory Reform to study carefully, this aspect of the problem and to report with its recommendations to the Congress. Such report should detail how the provisions of S. 707—The Consumer Protection Agency Bill, as well as the provisions of S. 782—The Antitrust Revision Bill would affect the operations of the independent regulatory agencies and what impact they would have upon the implementation of our national policy to promote free and fair competition and to enhance all aspects of the public interest. I suggest that because both of these bills provide for private persons to inject themselves as third parties in U.S. Government proceedings before regulatory agencies and the courts in cases arising under trade regulations and antitrust laws.

The public interest encompasses the interest of consumers, but includes more. A member of the public is a consumer at the dinner table but he is a producer as a farmer, worker or businessman during the other hours of the day before dinner.

The national policy for free and fair competition involves the concept of the public in all aspects of his interest, including his interest as a consumer. The independent regulatory agencies are obligated to serve that concept of our national policy. Hence, the National Commission on Regulatory Reform should consider the entire problem relating to the independent regulatory agencies in all of the aspects involved. They should be considered and acted on as a whole not fragment by fragment.

For these and other reasons, I recommend that the consumer and antitrust aspects of the regulatory problem as embodied in S. 707 and S. 782 be committed to the National Commission on Regulatory Reform for study and report with recommendations. In conclusion, I repeat my recommendation that Congress establish a National Commission on Regulatory Reform.

EXCERPT FROM "SECURITIES EXCHANGE ACT AMENDMENTS OF 1973 – PART 1," HEARINGS BEFORE HOUSE SUBCOMMITTEE ON COMMERCE AND FINANCE, SERIAL NO. 93-50, 1973, PP 333-360

STATEMENT OF HON. A. EVERETTE MacINTYRE, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. MACINTYRE. Thank you, Mr. Chairman. It is an honor to be here before you and the other members of the committee today and I trust that what little I am able to present to you will be found of some benefit and some use to you.

I appreciate your interest in my views regarding the provisions of certain legislative proposals now pending before you for your consideration.

Specifically you have invited me to testify concerning certain provisions of title I of H.R. 5050 and H.R. 340. In that connection, you noted title I of H.R. 5050 attempts to do for the Securities and Exchange Commission what H.R. 6962 and H.R. 4036 attempt to do for all of the independent regulatory agencies, that is, to make those agencies more independent of the executive branch. Also, you have stated that the introduction of title I was greatly influenced by an article I wrote and which appeared in the Federal Bar Journal, and which is reprinted at pages 1811–1830 of part 3 of your hearings regarding the securities industry.[1]

First, let me say that my law review article to which you referred, dealt generally with the status of the independence of various regulatory agencies and more particularly with the status of independence of the Federal Trade Commission. There was little reference therein to the status of the Securities and Exchange Commission. I have no experience and little information regarding the day-to-day operations of the Securities and Exchange Commission.

[1] Study of the Securities Industry, Parts 1–9, Hearings Before the Subcommittee on Commerce and Finance, Committee on Interstate and Foreign Commerce, House of Representatives, 92d Cong., 1st and 2d sessions, serial Nos. 92–37 through 92–37g.

43-362 O - 75 - pt. 2 - 10

Although I can say this, I was a member of the staff of the Federal Trade Commission when the Securities Act passed in 1933. I knew most of the people assigned to that division at that time from the other portions of the staff of the Federal Trade Commission. I also well recall that the following year when the Exchange Act passed and the SEC was set up, we lost some very good men not only out of that division but our General Counsel and two members of the Commission went over to become three of the first five members of the SEC. They were Robert Haley, Commissioner Matthews, and Commissioner Landis.

Since it appears you think my experience and study regarding the status of the independence of the various so-called regulatory agencies will enable me to be of benefit to you in discussing certain provisions of H.R. 5050, that is what I shall undertake to do.

Title I of H.R. 5050 is an attempt by Congress to eliminate a variety of controls or leverage that the executive branch exercises with regard to the Securities and Exchange Commission. The bill is one of a number of bills in both the House and the Senate, for example, H.R. 4036, H.R. 3255, S. 704, et cetera, that would apply similar provisions to all the independent regulatory commissions.

The basic provisions in title I are:

1. The chairman is given tenure and his appointment as chairman will be subject to Senate approval.

2. The Commission would be authorized to conduct its own litigation.

3. Budget estimates or requests that are sent to OMB are to be concurrently transmitted to Congress.

4. Legislative recommendations, testimony, and comments would no longer be required to be cleared by OMB before being transmitted to Congress.

5. When the relevant congressional committee requests an SEC document, it shall be transmitted in 2 days.

H.R. 340 would require the SEC to return to the Commerce Committee every 3 years for legislation authorizing its appropriations. This would increase congressional scrutiny of the SEC's operations, without a doubt.

The root controversy in the provisions of both bills is to what degree should the regulatory commissions be independent of the executive branch and subject to congressional scrutiny. Advocates of the changes argue that the independent commissions must be free from the restraining supervision and influence of the executive branch because:

1. The wisdom of the separation of powers doctrine dictates avoidance of centralized power over regulation.

2. The regulatory agencies are essentially creatures of Congress under the commerce clause and should be returned to their scrutiny.

3. The Commission's quasi-judicial powers require substantial independence from the executive branch for impartial decisions.

4. The theory of agency expertise requires a Commission able to determine its own policies and programs with a minimum of interference.

On the other hand, others have asserted with considerable force that a modicum of overriding power in executive agencies is necessary and proper for the administration to coordinate its economic programs and to maintain consistency and efficiency in the operation of Government.

Whatever the relative merits of these arguments concerning the proper constitutional status of regulatory commissions, they have over the years through congressional statutes, congressional abdication, and mere routinized practice become increasingly subject to executive influence. It remains for us to analyze the various provisions.

If I may, I would like to ask that the statement I have circulated to you be placed in the record and I would like to be permitted, if I may to avoid reading to you a great many of the provisions regarding the analysis of the various provisions of your bill, H.R. 5050, because I am sure you are as well acquainted as I am.

Mr. Moss. The entire statement will be entered in the record and you may summarize.

Mr. MacIntyre. I will just read some of them.

Section 3 of Reorganization Plan No. 10 of 1950 transferred the power to choose a chairman from the SEC members to the President. The Chairman serves in that capacity at the pleasure of the President, although he has tenure in his capacity as a commissioner. As a result the Senate only examines the appointment of the Chairman, if a commissioner is designated as chairman, at the time he is appointed to the Commission. H.R. 5050 repeals section 3 and requires that the Senate advise and consent to the appointment of the Chairman.

Thus the tenure provision should reduce executive influence over the agency. In addition, tenure might increase the continuity and stability of the personnel and the administrative management of the Commission. The Federal Trade Commission, for example, has had four chairmen in the last 4 years. However, while continuity and stability of tenure are important factors the power to be exercised by the Chairman should not escape attention and consideration.

For example, Reorganization Plan No. 8, of 1950, that is the one that relates to the Federal Trade Commission, transferred from the members of the Commission the authority to appoint practically all members of the staff—a staff that has now grown to a total of more than 1,500 personnel. Of course, there are a few exceptions such as, for example, the General Counsel, the Executive Director and the Directors of the principal bureaus, who are appointed by the Chairman with the concurrence of the majority of the Commission.

In addition, there was transferred to the Chairman from the Commission other executive and administrative functions. These major changes over the control of the functions and work of the Federal Trade Commission and other regulatory agencies were effected in large part upon the basis of recommendations made by the Commission on Organization of the Executive Branch of the Government. That Commission received a name commonly used as the Hoover Commission because it was chaired by ex-President Hoover. Its report on the organization of the independent regulatory commissions was made March 3, 1949, and President Truman, on the basis of those recommendations, submitted to the Congress the above-mentioned Reorganization Plan No. 8 of 1950.

It appears from a statement made by the Hoover Commission's task force on regulatory commissions that it was necessary in the interest of efficiency in government to transfer the authority and power above

mentioned from the members of the Federal Trade Commission to its Chairman because of the inordinate amount of time and effort required on the part of the Commission in the course of its conferences and meetings in considering and making appointments of personnel, including attorneys, economists, accountants, and investigators. It is my view, based upon my knowledge and experience, that the members of the Commission should have been relieved of the duty and responsibility of considering the details involved in the appointment of each attorney, economist, accountant, investigator, or clerk.

That problem could have been solved through a delegation by the Commission to an executive officer, perhaps without the need for legislation. It wasn't done, however. Certainly such change as that could have been effected through a reorganization plan submitted to the Congress by the President. However, that wasn't done. This would have reserved to the Commission the authority and power to appoint the executive officer. Moreover, the Commission could have taken steps to correct any abuse of the authority or power delegated to the executive officer in appointment and management of staff personnel. Apparently those making recommendations to the President of the United States and to the Congress regarding such matters did not think of recommending that course of action to remedy the situation and yet preserve the authority and powers of members of the Commission.

In addition to the arguments which were made in 1949 and 1950, about the need for relieving members of these independent regulatory agencies and particularly the members of the Federal Trade Commission of the details in the appointment and management of staff personnel, there appeared also arguments which seemed to contradict the concept for independence of the regulatory agencies such as the Federal Trade Commission.

Arguments have been made for Presidential influence over the Chairman, and through him over the activities of the agency he heads, because of a need for the President to have some control over activities involved in pursuit of the national goals. This argument has been advanced in addition to the argument for efficient management of Government agencies in general. Also, it is pointed out that the President has a constitutional mandate to "take care that the laws are faithfully executed."

All of these arguments and those made in the late 1940's and early 1950's regarding the need for reorganizing the Government to effect greater efficiency and greater unity in purpose and objective appear to ignore the underlying reasons why the independent regulatory agencies were established outside the executive branch in the first instance. Among these reasons of course, was the fact that the independent regulatory agencies would be performing quasi-legislative and quasi-judicial functions. It was thought at the time they were established that a substantial amount of independence would be necessary for the proper performance of such functions.

Congress in 1913 and 1914, when it was considering the establishment of the Federal Trade Commission appeared determined to maintain oversight and a degree of control over the Federal Trade Commission. It appears that is the principal reason why the Federal Trade Commission was established as an agency outside the executive branch.

The record shows that the Federal Trade Commission has conducted many quasi-legislative investigations at the direction of the Congress. Out of some of those investigations it developed recommendations to the Congress for important legislation.

In fact, before the establishment of the SEC, the Commission conducted over a period of 5 or 6 years the public utilities investigation and it was out of the recommendations concerning that investigation that the SEC was established, first by the Securities Act in 1933 and the Exchange Act in 1934, as well as certain provisions which are administered now by the Federal Power Commission. For example, the National Gas Act.

It should not be overlooked that such investigations are carried on and managed by a professional staff of lawyers, economists, and investigators. Since 1950, for all intents and purposes, the management and work of the professional staff of the Federal Trade Commission in the performance of such quasi-legislative functions has been under the direction of a chairman serving at the pleasure of the President and not under the direction of the Commission itself. In outlining these facts, I am not saying that the result would have been different if the direction of the staff had been under the management of the Commission. I have known pleasantly and have worked with all of the Chairmen of the Federal Trade Commission who have been appointed by the President. I have found them all capable and no one has charged any of them with wrongdoing.

Let me go back for a moment to these quasi-investigations. I was not a member in 1928 of the Commission. I was a law student at that time. However, I was a roommate of a personal secretary to a Senator of the United States and he was quite a prominent Senator. About that time there had been—this was with respect to this public utilities investigation—there had been an urging in the Senate for a resolution for a Senate investigation of this industry and of the securities market.

Of course, there were a lot of people in the country that did not want such an investigation made by the Senate. The hassle went on for several days and one evening—I believe I am free to repeat this because all the characters are now dead, including my roommate, I am sorry to say—he said:

> We had a rather tough day up there today. My boss was busy all day with conferences and there was an agreement reached that the resolution for the Senate to make the investigation into the public utilities industry has been sidetracked and it will be sent to the Federal Trade Commission.

I learned through him that a member of the Federal Trade Commission, who I believe was Chairman at the time, had been in that conference and he had assured the Senators involved that the long haired—as they were called at that time—wild-eyed economists at the Federal Trade Commission would not conduct that investigation but some sound lawyers would, under his urging, be given control of the investigation if the Senate cared to send it down there.

And in the next day or so the Senate adopted such a resolution and sent it down.

Sure enough, a lawyer was placed in charge of that investigation. He happened to be Robert Haley, who had only recently come to the Federal Trade Commission to assume the position as Chief Counsel.

He had been a judge in Vermont or New Hampshire, I believe. A very fine gentleman and a fine lawyer.

The Commissioner had not been at the Commission very long and didn't know Judge Haley very well so he didn't know what sort of delivery he could make concerning the investigation. When Judge Haley took charge of that investigation he made it a real investigation—I am not saying it was with the pleasure of the particular Commissioner involved.

Incidentally, I will mention that Commissioner, since he has long been dead, it was Commissioner Humphrey, who was removed from the Commission in 1933 and he is the only regulatory Commissioner that I can recall who was removed by order of the President of the United States.

Anyway this particular investigation as a quasi-legislative investigation was conducted by the Commission under the supervision of the head of that legal staff and it was a good job. It resulted in a lot of legislation that has proved to be very important, including the establishment of the SEC.

I merely refer back to it not because of those personalities but because of what Congress thought was the importance of a quasi-legislative investigation in the aid of enactment of legislation.

In that connection, I would like to refer back to your section 4(c) on page 3 of the bill, H.R. 5050, before I go on to further discussions of further sections.

There you write in 4(c) these words:

> The Commissioner is authorized to appoint and fix the compensation of attorneys and examiners and other experts as may be necessary for the carrying out of its functions under this act.

That seems to be inconsistent with section I of Reorganization Plan 10. I am not an expert on legislative drafting, on how this is to be interpreted, but I just raise this question for your considerating. Does 4(c) as it is written supersede this provision of section I of Reorganization Plan 10 of 1950 so as to transfer back to the members of the Commission this authority?

If that is the intent, then I think it should be made clear in the report of the committee. If it is not the intent, then perhaps the intent should be made clear otherwise. But, however, as I have said later in my statement, I recommend this course of action as legislation, to transfer back to the members of these independent regulatory agencies the authority to appoint an executive officer who would, in turn, make these appointments of these attorneys rather than leaving it up to a chairman, a single member of the Commission.

Mr. Moss. If I could at that point interrupt for clarification, the section of the bill to which you have referred is existing law, adopted in 1934. In the period of time since the original adoption of that language, Reorganization Plan No. 10 has taken effect and the probability is that if the committee reenacts this bill, that it may well supersede Reorganization Plan No. 10.

Mr. MacIntyre. Section 1.

Mr. Moss. And the committee will, therefore, address itself to the probable result and determine precisely what it intends to achieve. Although it is my understanding under Reorganization Plan No. 10 the Commission is supposed to concur in the designation of all principal officers.

Mr. MacIntyre. Oh, yes, and that occurs under Reorganization Plan 8 regarding the Federal Trade Commission, and I assume, in other agencies.

Mr. McCollister. Would you yield?

Mr. Moss. Yes.

Mr. McCollister. It is perhaps not more accurate to say that section 4(c) does not supersede but qualifies the provisions of section I.

Mr. Moss. It may well supersede if it is reenacted. It is a matter we will have to give thought to as to how we want to write it.

Mr. MacIntyre. The question I was raising is this, I think there are some inconsistencies in the law that would need to be noted in whatever report this committee would make on this bill so the intent of Congress would clearly be spelled out in this regard.

Mr. Moss. We would indeed do that.

Mr. MacIntyre. That is the reason I raised the question at this time.

Lastly, H.R. 5050 provides that any Commissioner may be removed by the President only for neglect of duty or malfeasance in office. There is no provision in existing legislation that provides for removal. The CAB, FTC, ICC and NLRB Acts have provisions limiting the grounds for removal.

Of course I refer to the *Humphrey* case, there the President did not state any grounds for removal as was stated in the law. I believe in the letter that he wrote Commissioner Humphrey at the time he simply told him he was asking him to step aside because he and the Commissioner didn't see eye to eye. Of course the Supreme Court felt that this was illegal. I believe it was unanimous, a 9-to-0 decision.

I do believe these grounds ought to be clearly stated in the law. I am not sure whether to just limit it to neglect of duty or malfeasance in office will be found to be sufficient. I would go further and say that removal ought not to be limited to action by the President. It seems to me if an arm of the Congress is involved, that perhaps it ought to be made clear in the law that action by the Congress could also be taken.

Mr. Moss. Action by the Congress through impeachment would be totally appropriate.

Mr. MacIntyre. It could be but the law isn't clear even on that.

Mr. Moss. I think the precedence of the impeachment power of the House would clearly sustain the House in voting impeachment against any officer of the Government.

Mr. MacIntyre. If it meets the standards required for impeachment as now written.

Mr. Moss. Of the House. And the House makes the judgment as to whether the standard is met.

Mr. Eckhardt. Will the chairman yield?

Mr. Moss. Yes.

Mr. Eckhardt. I agree with the chairman. I think any officer of trust is subject to impeachment and the grounds as stated, including high crimes and misdemeanors, I think have been construed to mean what Congress determines it means at the time of the impeachment.

Mr. MacIntyre. Would that include neglect of duty?

Mr. Moss. It would include conduct which while impeachable, might not be indictable and would be solely within the judgment of the House. The Senate, of course, would have to confirm that judgment

through a subsequent finding of guilt by two-thirds of its Members. Nevertheless, the Congress has the means of removing these members of the Commissions.

Mr. ECKHARDT. Would the chairman yield further?

Mr. MOSS. Yes, I yield further.

Mr. ECKHARDT. I think the term "high crimes and misdemeanors" has clearly been interpreted to include that which is not only illegal but acts which Congress feels constitute acts of misdemeanor or malfeasance within an area that is not strictly in violation of law.

Mr. MACINTYRE. I am not an expert on impeachment, so I will have to pass that subject back to the committee.

Mr. ECKHARDT. Thank you, I yield back.

Mr. MACINTYRE. Now with respect to H.R. 5050, it would amend the law to authorize the SEC to conduct its own litigation and appeals and grants in broad terms the authority for the Commission to enforce its subpenas and orders in court, argue its cases on appeal to the circuit courts, and apparently prepare its own requests for writs of certiorari and argue its own cases before the Supreme Court.

Presently, the Justice Department has the power to exercise substantial influence over the litigation of the independent agencies. For example, at the Federal Trade Commission it is necessary in order for the Commission to enforce one of its orders, to forward the case to the Department of Justice and thereafter depend upon that department to file and prosecute the case in the courts. Frequently, this not only results in significant delays in the handling of litigation, but in some instances has led to less than desirable results. I am informed that recently a survey was made of some of the experiences of the Federal Trade Commission arising from such requirements that the cases be sent to the Department of Justice for litigation. The results of that survey, I am told, are reflected in a memorandum that was written by an assistant to the Director in the Federal Trade Commission's Bureau of Competition, Mr. Ernest Barnes, now Administrative Law Judge Barnes. Also, I am told that in that memorandum it is shown that this requirement for forwarding the cases to the Department of Justice results on the average in a 6-month delay in the handling of a case. In some instances the Department of Justice is said to have refused to file the case in court because it disagreed with the Commission decision that the case should be filed.

In addition to control over litigation through the requirement that cases be forwarded to the Department of Justice for filing and handling there are now the requirements that the Federal Trade Commission must secure approval of the Attorney General before it can move to enforce subpenas to have witnesses appear before the Commission and its subordinate officials to testify in Commission proceedings.

The requirements in this respect have arisen in part from a decision in the U.S. Circuit Court of Appeals for the Eighth Circuit in 1968, which held that the Commission may not without the aid and consent of the Attorney General of the United States seek enforcement of its own subpenas in Federal district courts.

When Attorney General Ramsey Clark took that position, all the Federal Trade Commissioners were in strong opposition to the position he took but the aides in the Department of Justice secured the results to which I referred.

It must be remembered that this requirement must be met irrespective of the type of proceeding the Commission is carrying on and attempting to secure testimony from witnesses. It matters not whether there is involved a quasi-legislative investigation or an adjudicative case where subpenas are issued to necessary witnesses. I am informed that the Federal Trade Commission is encountering difficulties in that respect in a current investigation. I am not conversant with the facts in that situation.

However, I have noted a lengthy discussion of the matter in the Washington Post of Sunday, May 27, 1973, on page K–1, regarding that point under the headline "Federal Trade Commission Continues To Ask * * *" questions about the Attorney General's delay in approving subpena enforcement proceeding. According to that newspaper account the comment at the Department of Justice is "I don't think the time delay means anything."

Well, I want to say this, as I understand it this morning, there has been filed now a petition in the court, the district court, here in the District of Columbia and Judge Sirica yesterday noted that he would assign those matters to a judge to be heard next week. But this had been pending over there for several months before this move was made to the court just the day before yesterday.

The requirement to seek and secure the aid and consent of the Attorney General of the United States in the enforcement of the Commission's subpenas has been compounded by a requirement which was included in the Organized Crime Act of 1970—Public Law 91–452, immunity provision. Before that legislative enactment a decision rested with the Federal Trade Commission and the members of the other independent regulatory agencies to decide whether a particular witness should be subpenaed and required to testify. If a question should arise concerning the need to avoid granting such a witness immunity the Commission of course sought advice, counsel, and information from all possible sources, including the officials of the Department of Justice, but on the basis of all such information it remained for the Commission to decide whether it needed the testimony and whether in receiving the testimony there was an undue risk in the granting of immunity to such witness.

Now the authority and power to make such a determination regarding their own witnesses has been transferred from the members of these independent regulatory agencies to the Attorney General of the United States. Some recent incidents in pending cases have highlighted difficulties presented to the Federal Trade Commission in the handling of its functions because of this requirement.

Passage of the Federal Reports Act of 1942 accorded to the Bureau of the Budget an important right of review and control over the activities of regulatory agencies, although the act was passed under circumstances and for reasons considerably different from those in which it would be used.

I have some recollection about those circumstances. Throughout 1942, after war was declared at the end of 1941, of course, there was need for rationing, petroleum was in short supply and heating oil, as well as oil for illumination purposes was rationed.

Now, somebody in Washington, and they had an exploding bureaucracy, had written a form which would require one who wanted

a ration of oil for whatever purpose to fill out this long form. I personally, in visiting some locations where I had some property in the Shenandoah Valley of Virginia at the time, saw farmers lined up at the U.S. courthouse on Saturday evening with these long forms and some only wanted a gallon or so of oil for their lamps. But it was necessary, if they were to get it, to fill out these long forms.

As a result of that, Congress rebelled against that sort of bureaucracy and passed, in the fall of 1942, the Federal Reports Act. But in doing so with haste it did not differentiate between the need of these regulatory agencies to carry on law enforcement activities and quasi-legislative investigations from all of the formmaking that was being carried on in OPA and other places.

I suggest perhaps what is provided for in the bills go in the right direction but perhaps not far enough. These agencies at least ought to have the authority without what is now required in the Reports Act of 1942 to secure information in their law enforcement activities and in the conduct of quasi-legislative investigation.

As to any other activities, I don't see any reason why the shouldn't accommodate themselves to the same rules as any other agency of the Government.

Mr. Cohen has covered rather thoroughly the provisions about the request for documents and, of course, that is not one that has bothered the Trade Commission or some of the other regulatory agencies. I will not go into any details concerning what H.R. 5050 does in that respect except to make reference to a historical fact that has come to my attention.

It was shortly after the turn of the century. There had been a big consolidation in the steel industry and Congress was concerned about it. At the urging of the Congress, the Attorney General of the United States undertook an investigation of that consolidation for the purpose of determining whether it violated the Sherman Antitrust Act, that is, the consolidation.

The investigation was made and nothing further happened. A Senate committee did call the Attorney General for a report on his investigation and he reported to them that he concluded he wasn't justified in taking any further action and that he saw no reason for further action.

The Senate then, according to the information I have read, asked him to present some of the documentary evidence he had accumulated. The Senators wanted to review it for themselves to satisfy themselves whether his judgment was sound in deciding not to take action. He refused.

He was informed that they would subpena the documents. He went back downtown and told the President, who happened to be Theodore Roosevelt at the time, and, according to the information I read, President Roosevelt said, "Send the documents over to the White House."

The Attorney General did transmit the documents to the White House and President Roosevelt, in rather characteristic fashion said, "You just try to come up here and get them." And the Senate didn't get them.

But the Congress apparently did not forget that incident when in 1913 and 1914 it was considering legislation for the further regulation of commerce in this country. The bills that had been introduced for

the establishment of the Federal Trade Commission provided that it not be placed within the executive branch.

I remember back in 1955 I was conducting an investigation for a committee of the Congress at the Federal Trade Commission. I had several people with me. In looking at one of the files that had been given me at the request of the committee for my examination there—this was at the offices of the Commission—I came to the conclusion that a good many of the pages of the file were missing.

I pushed it aside until the close of the day and when I had concluded the other investigation I asked the Assistant Director, who was with me there watching me, if something had been taken out of that file and he rather truthfully acknowledged it had been. I said, "Why did did you do it?"

He said, "The General Counsel asked me to."

I said, "What did you do with the documents?"

He said, "I gave them to the General Counsel."

I knew the General Counsel very well and I went across to his office at the close of day and told him I had been informed that some documents had been removed from this file and I was told they had been handed to him. I said, "Where are they?"

He said, "They are right here."

I said, "Well, I would like to get them."

He said, "You will not get them."

I said, "Why?"

He said, "These are documents which are passed between the Department of Justice and the Federal Trade Commission and they are the property of the Department of Justice."

Well, I think I must have smiled but at least I told him, "I think you are wrong. This is an independent regulatory agency, it is not in the Department of Justice and what you have in your files that came to you in the regular course of business is the Federal Trade Commission property and not the Department of Justice files."

The next morning the committee made a further demand for the documents and the Commission promptly submitted them.

So what you provided in that bill in that respect, I think, fits in with the experience that I have had. Our agency is responsive to the Congress in making available that which would be helpful to the Congress. Of course, as the Chairman said here day before yesterday, when an agency provides information to Congress it depends upon the responsibility of the Congress to see that something is not done off color, in leaking or otherwise publishing documents or other information that should not be published.

In conclusion, I would like to say that I have referred to the arguments concerning the proper constitutional and legal status of the so-called independent regulatory commissions. In that connection, I have noted the legislative history leading to the establishment of such agencies and the expressed determination of the Congress that they be established outside and independent of the executive branch. Also, I have noted that over the years following the establishment of such agencies, congressional enactments, congressional abdication, and mere routinized practices, step-by-step and from time-to-time, have changed the status of these agencies from that of independence to that of considerable and increasing influence and control of these agencies by the executive branch.

What for the future? Is it the will and determination of Congress to reverse this trend and restore these agencies to the status of independence originally conceived for them? It would seem from the pending legislative proposals, many of which are now under consideration by you, the answer to that question is in the affirmative.

It is my conclusion that H.R. 5050 would go a long way in that direction with respect to the Securities and Exchange Commission, so would H.R. 4036, H.R. 5965, and H.R. 6962 with respect to various other regulatory agencies. Previously, in this statement I have discussed in detail how some of these legislative proposals would do much of that.

With some minor changes in the pending legislative proposals Congress can make its objective clearer and its achievement more complete and effective. First, I refer to the provision in the various bills which would remove from the President the authority and power to appoint chairmen of these agencies to serve at his pleasure. I do not think that the provision as written would achieve and make effective the purpose and objectives you have stated.

True, while the provision would be effective in removing from the President the power and authority to appoint chairmen to serve at his pleasure, it would merely transfer over to such chairmen, without recourse for recall by either the President or the Congress, the authority and power over personnel patronage and the day-to-day operations of the agency including the conduct of quasi-legislative investigations without consultation or an agreement with other members of such agencies.

A simple amendment which would provide that appointment of personnel and management of the day-to-day operations of the agencies be under the control and in the hands of an executive officer in each agency and that appointment and recall of him be placed within the authority, power, and control of the members of the agencies, would seem to me to be the preferable course to accomplish the independence of the agencies you suggest you want.

Let me explain something there, if I may. If you have five members of an agency, and in those members you have the authority to effectively make policy, including the appointment of the staff that helps make the policy, and you, either at the Office of the President or in the Congress, want to make changes there, you can do so by changing the members of the agency.

Just about every year you make a change. But if you turn all of that over to a chairman who cannot be changed for a period of 5 years, then both the President and the Congress will have abdicated to a chairman the authority for the control over the agency. I don't know that that is so good.

I do, therefore, suggest a change in the bill that would provide for the President and the Congress to have some larger degree of control over such policies by having more control in the members and with opportunity for change in membership about every year. Congress and the President would gain more control of the agency each year much more effectively than you would through a chairman who could be removed only for illegal acts. In my opinion this is the most important suggestion I am making to you here today.

Some of the bills we have been discussing would provide, as I have indicated earlier, for reducing the impact of the Federal Reports Act

of 1942 on the operations of the various agencies. However, as I have said, I do not believe that the proposed changes are anywhere near sufficient to accomplish the objectives you have stated. It is my view the Federal Reports Act of 1942 should be amended to make it clear it has no application to the operation of these independent agencies in the conduct of their law or enforcement activities or the conduct of their quasi-legislative investigation which would serve as the basis for information to be submitted to the Congress.

I trust these comments and suggestions will prove to be of some interest to you and of value to the country in your important consideration of this very important problem. In closing, allow me to repeat that I appreciate very much your interest in having my views regarding the provisions of these legislature proposals.

Thank you.

[Testimony resumes on p. 352.]

[Commissioner MacIntyre's prepared statement follows:]

STATEMENT OF A. EVERETTE MACINTYRE, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. Chairman and Members of the Subcommittee, I appreciate your interest in my views regarding the provisions of certain legislative proposals now pending before you for your consideration.

Specifically you have invited me to testify concerning certain provisions of Title I of H.R. 5050 and H.R. 340. In that connection, you noted Title I of H.R. 5050 attempts to do for the Securities and Exchange Commission what H.R. 6962 and H.R. 4036 attempt to do for all of the independent regulatory agencies—that is, to make those agencies more independent of the Executive Branch. Also you have stated that the introduction of Title I was greatly influenced by an article I wrote and which appeared in the Federal Bar Journal, and is reprinted at pages 1811–1830 of Part 3 of your hearings regarding the Securities Industry.

First, let me say that my law review article to which you referred, dealt generally with the status of the independence of various regulatory agencies and more particularly with the status of independence of the Federal Trade Commission. There was little reference there in to the status of the Securities and Exchange Commission. I have no experience and little information regarding the day-to-day operations of the Securities and Exchange Commission. However, since it appears you think my experience and study regarding the status of the independence of the various so-called regulatory agencies will enable me to be of benefit to you in discussing certain provisions of H.R. 5050, that is what I shall undertake to do.

Title I of H.R. 5050 is an attempt by Congress to eliminate a variety of controls or leverage that the Executive Branch exercises with regard to the Securities and Exchange Commission. The bill is one of a number of bills in both the House and the Senate, e.g., H.R. 4036, H.R. 3255, S. 704, etc., that would apply similar provisions to all the independent regulatory commissions.

The basic provisions in Title I are: (1) The Chairman is given tenure and his appointment as Chairman will be subject to Senate approval; (2) The Commission would be authorized to conduct its own litigation; (3) Budget estimates or requests that are sent to OMB are to be concurrently transmitted to Congress; (4) Legislative recommendations, testimony and comments would no longer be required to be cleared by OMB before being transmitted to Congress; and (5) When the relevant Congressional Committee requests an SEC document, it shall be transmitted in two days.

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The root controversy in the provisions of both bills is to what degree should the regulatory commissions be independent of the Executive Branch and subject to Congressional scrutiny. Advocates of the changes argue that the independent commissions must be free from the restraining supervision and influence of the Executive Branch because: (1) The wisdom of the separation of powers doctrine

dictates avoidance of centralized power over regulation; (2) The regulatory agencies are essentially creatures of Congress under the Commerce Clause and should be returned to their scrutiny; (3) The Commission's quasi-judicial powers require substantial independence from the Executive Branch for impartial decisions; and (4) The theory of agency expertise requires a commission able to determine its own policies and programs with a minimum of interference.

On the other hand, others have exerted with considerable force that a modicum of overriding power in executive agencies is necessary and proper for the administration to coordinate its economic programs and to maintain consistency and efficiency in the operation of Government.

Whatever the relative merits of these arguments concerning the proper Constitutional status of regulatory commissions, they have over the years through Congressional statutes, Congressional abdication, and mere routinized practice become increasingly subject to executive influence. It remains for us to analyze the various provisions.

I. APPOINTMENT AND TENURE OF CHAIRMAN (H.R. 5050)

H.R. 5050 would amend Section 4 of the SEC Act of 1934 to: (1) Require Senate consent to the designation of the Chairman; (2) Provide that once appointed the Chairman could serve out his term as Chairman and not serve at the pleasure of the President; and (3) Provide that a Commissioner may be removed only for neglect of duty or malfeasance.

Section 3 of Reorganization Plan No. 10 of 1950 transferred the power to choose a Chairman from the SEC members to the President. The Chairman serves in that capacity at the pleasure of the President, although he has tenure in his capacity as a Commissioner. As a result the Senate only examines the appointment of the Chairman, if a Commissioner is designated as Chairman at the time he is appointed to the Commission. H.R. 5050 repeals Section 3 and requires that the Senate advise and consent to the appointment of the Chairman. This would eliminate the possibility of a new Chairman being appointed without Senate approval because he was chosen from among the existing Commissioners.

With regard to the tenure of the Chairman, H.R. 5050 provides that the Chairman will serve as Chairman until the expiration of his term as Commissioner.

The present provision[1] for the designation of the Chairman grew out of a Hoover Commission's recommendation to give the President this authority. The purpose was to "enable the President to obtain a sympathetic hearing for broader considerations of national policy which he feels the Commission should take account." President Truman's message to Congress introducing the plan indicated a different purpose: "the designation of all Chairmen by the President follows out the general concept of the Commission on Organization for providing clearer lines of management responsibility in the executive branch. The plans are aimed at achieving more fully these management objectives and are not intended to affect the independent exercise of the Commission's regulatory functions."

There was no mention in the message of a purpose to influence policy in line with national priorities. I have assessed that situation in the following words: "Inasmuch as the Chairman now holds his position at the pleasure of the President, it is unlikely that he will pursue policies contrary to those of the Chief Executive. The power to appoint the Chairman, together with the latter's administrative control, which was expanded in 1961, provides the potential for significant presidential influence over the agency."[2]

Thus the tenure provision should reduce executive influence over the agency. In addition, tenure might increase the continuity and stability of the personnel and the administrative management of the Commission. The Federal Trade Commission, for example, has had four Chairmen in the last four years. However, while continuity and stability of tenure are important factors the power to be exercised by the Chairman should not escape attention and consideration.

For example, Reorganization Plan No. 8 of 1950, transferred from the Members of the Federal Trade Commission to the Chairman of that agency, the authority and power to appoint, without consultation with other Members of the Commission, practically all members of the staff—a staff that has now grown to a total of more than 1,500 personnel. Of course, there are a few exceptions such as for

[1] Section 3 of Reorganization Plan No. 10 of 1950.
[2] MacIntyre, *The Status of Regulatory Independence*, The Federal Bar Association Journal, vol. 29, No. 1.

example the General Counsel, the Executive Director and the Directors of the principal Bureaus, who are appointed by the Chairman with the concurrence of the majority of the Commission.

In addition, there was transferred to the Chairman from the Commission other executive and administrative functions. These major changes over the control of the functions and work of the Federal Trade Commission and other regulatory agencies were effected in large part upon the basis of recommendations made by the Commission on Organization of the Executive Branch of the Government. That Commission received a name commonly used as the "Hoover Commission" because it was chaired by Ex-President Hoover. Its report on the organization of the independent regulatory commissions was made March 3, 1949, and President Truman on the basis of those recommendations submitted to the Congress the above-mentioned Reorganization Plan No. 8 of 1950.

It appears from a statement made by the "Hoover Commission's" Task Force on regulatory commissions that it was necessary in the interest of efficiency in Government to transfer the authority and power above-mentioned from the Members of the Federal Trade Commission to its Chairman because of the inordinate amount of time and effort required on the part of the Commission in the course of its conferences and meetings in considering and making appointments of personnel including attorneys, economists, accountants and investigators. It is my view, based upon my knowledge and experience, that the Members of the Commission should have been relieved of the duty and responsibility of considering the details involved in the appointment of each attorney, economist, accountant, investigator or clerk.

That problem could have been solved through a delegation by the Commission to an executive officer perhaps without the need for legislation. It wasn't done, however. Certainly such change as that could have been effected through a reorganization plan submitted to the Congress by the President. However, that wasn't done. This would have reserved to the Commission the authority and power to appoint the executive officer. Moreover, the Commission could have taken steps to correct any abuse of the authority or power delegated to the executive officer in appointment and management of staff personnel. Apparently those making recommendations to the President of the United States and to the Congress regarding such matters did not think of recommending that course of action to remedy the situation and yet preserve the authority and powers of Members of the Commission.

In addition to the arguments which were made in 1949 and 1950, about the need for relieving members of these independent regulatory agencies and particularly the Members of the Federal Trade Commission of the details in the appointment and management of staff personnel there appeared also arguments which seemed to contradict the concept for independence of the regulatory agencies such as the Federal Trade Commission.

Arguments have been made for Presidential influence over the Chairman and through him over the activities of the agency he heads because of a need for the President to have some control over activities involved in pursuit of the national goals. This argument has been advanced in addition to the argument for efficient management of Government agencies in general. Also, it is pointed out that the President has a Constitutional mandate to "take care that the laws are faithfully executed."

All of these arguments and those made in the late 1940's and early 1950's regarding the need for reorganizing the Government to effect greater efficiency and greater unity in purpose and objective appear to ignore the underlying reasons why the independent regulatory agencies were established outside the Executive Branch in the first instance outside the Executive Branch of the Government. Among these reasons, of course, was the fact that the independent regulatory agencies would be performing quasi-legislative and quasi-judicial functions. It was thought at the time they were established that a substantial amount of independence would be necessary for the proper performance of such functions.

Congress in 1913 and 1914, when it was considering the establishment of the Federal Trade Commission appeared determined to maintain oversight and a degree of control over the Federal Trade Commission. It appears that is the principal reason why the Federal Trade Commission was established as an agency outside the Executive Branch.

The record shows that the Federal Trade Commission has conducted many quasi-legislative investigations at the direction of the Congress. Out of some of those investigations it developed recommendations to the Congress for important legislation.

It should not be overlooked that such investigations are carried on and managed by a professional staff of lawyers, economists and investigators. Since 1950, for all intents and purposes, the management and work of the professional staff of the Federal Trade Commission in the performance of such quasi-legislative functions has been under the direction of a Chairman serving at the pleasure of the President and not under the direction of the Commission itself. In outlining these facts, I am not saying that the result would have been different if the direction of the staff had been under the management of the Commission. I have known pleasantly and have worked with all of the Chairmen of the Federal Trade Commission who have been appointed by the President. I have found them all capable and no one has charged any of them with wrongdoing.

Lastly, H.R. 5050 provides that any Commissioner may be removed by the President only for neglect of duty or malfeasance in office. There is no provision in existing legislation that provides for removal. The CAB, FTC, ICC and NLRB have provisions limiting the grounds for removal. The SEC, FCC and FPC do not have provisions protecting against removal without cause. This omission is apparently because the SEC, FCC and FPC were created between the Myers decision in 1925 and the Humphrey decision in 1935.[3] The Myers case led Congress to believe that it could not limit the President's removal power. These three Commissions nevertheless are treated as independent and any attempt to remove members arbitrarily would stir up serious controversy. H.R. 5050 would clarify the grounds for removal and thereby protect against removal of a Commissioner because of a difference in policy.

II. CONTROL OVER LITIGATION (H.R. 5050)

Section 4 of the SEC Act of 1934, would be amended to authorize the SEC to conduct its own litigation and appeals. H.R. 5050 grants in broad terms the authority for the Commission to enforce its subpoenas and orders in court, argue its cases on appeal to the Circuit Courts, and apparently prepare its own requests for writs of certiorari and argue its own cases before the Supreme Court.

Presently, the Justice Department has the power to exercise substantial influence over the litigation of the independent agencies.

For example, at the Federal Trade Commission it is necessary, in order for the Commission to enforce one of its orders, to forward the case to the Department of Justice and thereafter depend upon that department to file and prosecute the case in the courts. Frequently, this not only results in significant delays in the handling of litigation, but in some instances has led to less than desirable results. I am informed that recently a survey was made of some of the experiences of the Federal Trade Commission arising from such requirements that the cases be sent to the Department of Justice for litigation. The results of that survey, I am told, are reflected in a memorandum that was written by an Assistant to the Director in the Federal Trade Commission's Bureau of Competition, Mr. Ernest Barnes, now Administratve Law Judge Barnes. Also, I am told that in that memorandum it is shown that this requirement for forwarding the cases to the Department of Justice results on the average in a six month delay in the handling of a case. In some instances the Department of Justice is said to have refused to file the case in court because it disagreed with the Commission decision that the case should be filed.

In addition to control over litigation through the requirement that cases be forwarded to the Department of Justice for filing and handling there are now the requirements that the Federal Trade Commission must secure approval of the Attorney General before it can move to enforce subpoenas to have witnesses appear before the Commission and its subordinate officials to testify in Commission proceedings.

The requirements in this respect have arisen in part from a decision in the United States Circuit Court of Appeals for the Eighth Circuit in 1968, which held that the Commission may not without the aid and consent of the Attorney General of the United States seek enforcement of its own subpoenas in Federal District Courts.[4] It must be remembered that this requirement must be met irrespective of the type of proceeding the Commission is carrying on and attempting to secure testimony from witnesses. It matters not whether there is involved a quasi-legislative investigation or an adjudicative case where subpoenas are issued to necessary witnesses. I am informed that the Federal Trade Commission

[3] Davis, *Administrative Law Treaties*, § 1.03.
[4] 390 F. 2d 323 (8th Cir. 1968).

is encountering difficulties in that respect in a current investigation. I am not conversant with the facts in that situation.

However, I have noted a lengthy discussion of the matter in the Washington Post of Sunday, May 27, 1973, on page K–1, regarding that point under the headline "Federal Trade Commission continues to ask . . ." questions about the factual situation in an industry and is concerned about the Attorney General's delay in approving subpoena enforcement proceeding. According to that newspaper account the comment at the Department of Justice is "I don't think the time delay means anything."

The requirement to seek and secure the aid and consent of the Attorney General of the United States in the enforcement of the Commission's subpoenas has been compounded by a requirement which was included in the Organized Crime Act of 1970—P.L. 91–452—Immunity Provision. Before that legislative enactment a decision rested with the Federal Trade Commission and the members of other independent regulatory agencies to decide whether a particular witness should be subpoenaed and required to testify. If a question should arise concerning the need to avoid granting such a witness immunity the Commission of course sought advice, counsel and information from all possible sources, including the officials of the Department of Justice, but on the basis of all such information it remained for the Commission to decide whether it needed the testimony and whether in receiving the testimony there was an undue risk in the granting of immunity to such witness.

Now the authority and power to make such a determination regarding their own witnesses has been transferred from the members of these independent regulatory agencies to the Attorney General of the United States. Some recent incidents in pending cases have highlighted difficulties presented to the Federal Trade Commission in the handling of its functions because of this requirement.

Passage of the Federal Reports Act of 1942 accorded to the Bureau of the Budget an important right of review and control over the activities of regulatory agencies, although the Act was passed under circumstances and for reasons considerably different from those in which it would be used.

Perhaps the most serious substantive influence over the litigation of independent agencies is the present requirement that Commissions with the exception of the ICC channel their requests for writs of certiorari through the Attorney General. Judgments as to when certiorari is to be requested and how the case is to be argued are made by the Solicitor General. To the extent the Solicitor substitutes his own judgment on the law or facts the agency has diminished its control over policy.

The effect that H.R. 5050 has on the present practice is unclear. However, it grants authority to conduct litigation in the Supreme Court in any civil action in which the Commission is participating or chooses to participate. Does this grant the authority both to request writs of certiorari and to argue cases in the Supreme Court? The authority of the ICC to conduct its litigation rests on very general language in the Judges Act of 1925 providing for direct review by the Supreme Court of district court decisions concerning the ICC. Since the language on which ICC authority to appeal and argue cases is less broad than H.R. 5050, it can be assumed that authority to both request the writ and argue cases is intended.

III. SUBMISSION TO CONGRESS OF COMMISSION BUDGET REQUESTS

H.R. 5050 would require the SEC when submitted a budget estimate or request to the executive to concurrently transmit a copy to Congress. The effect of the bill would be to create an exception to the Budget and Accounting Act of 1921 that prohibits any agency to submit a budget estimate or request to Congress unless requested by a vote of the House or the Senate, a nearly prohibitive procedure.[5]

The Budget and Accounting Act presently requires the Commission to submit an estimated budget together with proposed plans, programs and their costs to OMB. OMB is authorized ". . . to assemble, correlate, revise, reduce or increase"[6] the Commission's budget requests. Each Commission item must be extensively justified. OMB reviews the proposed appropriation according to policies and priorities established by the executive. This review includes the actual establishment of priorities of regulation. When this is applied to the operation of the

[5] 31 U.S.C. § 15.
[6] 31 U.S.C. § 16.

Federal Trade Commission it includes the establishment of priorities such as the determination of the amounts to be used on anti-merger work as against amounts to be used on direct consumer protection work including such items for example as consumer education.

This process at least to some degree interferes with the Commission's policy-making function and its use of its acquired expertise. The present practice conceals from Congress the Commission's original statement of needs and justifications. In fact the appropriations committees have no practicable way of knowing whether the Commission itself or OMB is responsible for a particular program request. On the other hand, the executive is the only branch presently capable of coordinating budgetary resources and allocating them in a comprehensive way. The level of the overall budget has a significant effect on inflation, unemployment and other measures of economic well-being; the relative level affects the attainment of Presidential priorities. However, H.R. 5050 will not interfere with the executive's submittal of a unified budget. The transmittal of estimates and requests to Congress is in addition to the present procedures. The proposal thus permits Congress to understand what resources the SEC believes are necessary to carry out its own duties so that they can be weighed along with the executive view of overall budgetary needs and priorities.

IV. AGENCY CONTROL OF LEGISLATIVE RECOMMENDATIONS, TESTIMONY AND COMMENTS

H.R. 5050 would make clear that the Executive Branch has no authority to require the SEC to submit legislative recommendations, testimony or legislative comments for approval, comment or review. If the SEC voluntarily chooses to obtain comments, then a copy of the SEC document shall be transmitted to Congress.

The present practice of obtaining prior clearance of comments on matters transmitted to Congress apparently arose sometime during the Roosevelt era and has continued to this day, although there does not appear to be any statutory authority for it. The procedure for coordination and clearance by OMB has been regularized by OMB circular A–19 which by its terms applies to all executive departments and establishments. Not only is there no direct statutory authority for this practice, but also some have argued it is contrary to direct statutory authority in the legislation creating many independent regulatory agencies. Section 23 of the SEC Act of 1934 directs the Commission to "include in their annual reports to Congress such information, data and recommendation for further legislation as they may deem advisable with regard to matters within their respective jurisdictions under this chapter."[7] Prior clearance or review of such recommendations would seem to conflict with the Congressional purpose of creating a body of experts to exercise judgment and recommend new changes.

In addition the present practice causes long delays in commenting on a bill, often resulting in the report or recommendation not going forward.

The counter argument is that the Executive Branch must be able to present to Congress a coordinated and consistent administrative program. If many separate agencies sent conflicting recommendations to Congress it might greatly weaken every recommendation.

H.R. 5050 would make the soliciting of comments purely voluntary on the part of the SEC and thereby reduce the leverage OMB may have in shaping an agency position. This change is reinforced by the requirement that if comments are solicited, a copy of the original version must be sent to Congress. This is probably an attempt to prevent OMB from using its financial leverage to encourage voluntary submittal and the result being a managed product rather than the agencies' views. The bill further provides that a description of any actions with OMB or other executive officials shall be transmitted to Congress when the SEC voluntarily comments.

V. CONGRESSIONAL REQUESTS FOR DOCUMENTS (H.R. 5050)

The bill provides whenever the relevant House and Senate Committees make a written request for Commission documents, the Commission shall submit them within two days. Further, if the Commission transfers any document it shall retain copies or if not feasible, conditions the transfer on prompt return if Congress makes a written request.

[7] 15 U.S.C. § 78w. To like effect see § 6(f) of FTC Act.

The purpose of the provision is to "clarify the right of the duly authorized committees of Congress to obtain access to information in the possession of these agencies." [8] There have been some recent incidents in which Congress has been unable to get documents from Commissions because they have been transferred to the Executive Branch.

Under the Freedom of Information Act Members of Congress have all the rights of "any person." Most importantly, Subsection (c) provides that nothing in the Act is authority to withhold information from Congress.[9] Any withholding of documents from Congress in the carrying out of their functions must be justified under the doctrine of executive privilege. Since the regulatory Commissions are creatures of Congress it is highly questionable whether the privilege could be used by a Commission to withhold documents from Congress. Thus the effect of the bill on documents under the control of a Commission is to require submission in two days. In certain situations that may be burdensome.

If the Commission were to transfer a document, it is required, if feasible, to copy it. What is feasible is unclear. Does it refer only to a quantity of documents that would be prohibitively expensive? The real problem is how this provision for conditional transfers meshes with the doctrine of executive privilege. Executive privilege is an undefined doctrine that is partly constitutional and partly common law. Presidents have often withheld information from Congress and have always prevailed although no situation has been judicially determined. A presidential finding of public interest is generally not even questioned by courts. Yet executive privilege asserted by Department heads as claimed by the Department of Justice is a different matter. The courts have jurisdiction to determine the scope of the executive privilege doctrine.[10] The legislation thus would provide a Congressional definition of executive privilege which would only be limited by its constitutional dimensions. It would thus provide the Congress with significant leverage in obtaining documents.

VI. AUTHORIZATION OF APPROPRIATIONS (H.R. 340)

H.R. 340 authorizes maximum appropriation amounts for fiscal years 1973, 1974 and 1975. For future years, the agency must return for further authorization of appropriations. The intent of the legislation [11] is to spawn a three-year cycle of authorization of funds. After fiscal year 1975 SEC would have to return for new authority and the relevant Committee could hold hearings to study the SEC every three years. Representative Broyhill sees this process as enabling Congress to assess the performance of the agency, the way their authority is exercised, and the directions they are moving in issuing regulations.

Under present procedures these agencies present their budget requests directly to the House Appropriations Committee. The Committees with legislative authority and assumed expertise seldom take the opportunity to review their operations unless they seek new legislation.

VII. CONCLUSION

Earlier I have referred to arguments concerning the proper Constitutional and legal status of the so-called independent regulatory commissions. In that connection, I have noted the legislative history leading to the establishment of such agencies and the expressed determination of the Congress that they be established outside and independent of the Executive Branch. Also, I have noted that over the years following the establishment of such agencies, Congressional enactments, Congressional abdication and mere routinized practices, step-by-step and from time-to-time, have changed the status of these agencies from that of independence to that of considerable and increasing influence and control of these agencies by the Executive Branch.

What for the future? Is it the will and determination of Congress to reverse this trend and restore these agencies to the status of independence originally conceived for them? It would seem from the pending legislative proposals, many of which are now under consideration by you, the answer to that question is in the affirmative.

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[8] Letter of Senator Moss introducing H.R. 4036.
[9] 5 U.S.C. § 552(c).
[10] *U.S. v. Reynolds*, 345 U.S. 1 (1953).
[11] See Broyhill's remarks in introducing H.R. 17134, 92d Cong., 2d sess., which would apply to all the independent regulatory agencies, Congressional Record, H10018, Oct. 13, 1972).

It is my conclusion that H.R. 5050 would go a long way in that direction with respect to the Securities and Exchange Commission, so would H.R. 4036, H.R. 5965 and H.R. 6962 with respect to various other regulatory agencies. Previously in this statement I have discussed in detail how some of these legislative proposals would do much of that.

With some minor changes in the pending legislative proposals Congress can make its objective clearer and its achievement more complete and effective. First, I refer to the provision in the various bills which would remove from the President the authority and power to appoint Chairmen of these agencies to serve at his pleasure. I do not think that the provision as written would achieve and make effective the purpose and objectives you have stated.

True, while the provision would be effective in removing from the President the power and authority to appoint Chairmen to serve at his pleasure, it would merely transfer over to such Chairmen, without recourse for recall by either the President or the Congress, the authority and power over personnel patronage and the day-to-day operations of the agency including the conduct of quasi-legislative investigations without consultation or an agreement with other members of such agencies.

A simple amendment which would provide that appointment of personnel and management of the day-to-day operations of the agencies be under the control and in the hands of an executive officer in each agency and that appointment and recall of him be placed within the authority, power and control of the members of the agencies would seem to me to be the preferable course to accomplish the independence of the agencies you suggest you want.

Also, it is suggested that the bills should be amended to restore to the members of these various agencies the authority and power, once exercised by them, in compelling witnesses to attend and testify in their proceedings. You will recall I noted that the Crime Control Act of 1970 stripped these agencies of that unqualified authority and power and transferred it to the Attorney General. This is included in the authority and power to determine whether to approve the appearance of witnesses on the basis of a further determination as to whether immunity should be granted reluctant witnesses. Previously, a Section of the Federal Trade Commission Act (a similar provision appeared in acts creating other regulatory agencies) provided :

"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

Some of the bills we have been discussing would provide for reducing the restrictive impact of the Federal Reports Act of 1942 on the operations of various independent agencies. However, I do not believe that the proposed provisions are anyway near sufficient to accomplish the objective you have stated. It is my view that the Federal Reports Act of 1942 should be amended to make it clear that it has no application to the operation of these independent agencies in the conduct of their law enforcement activities or in the conduct of quasi-legislative investigations which would serve as the bases for gathering information to be submitted to the Congress.

I trust that these comments and suggestions will prove to be of some interest and of value to you and the Country in your consideration of this very important problem. In closing, allow me to repeat that I appreciate very much your interest in having my views regarding the provisions of these legislative proposals now pending before you for your consideration.

Thank you.

Mr. Moss. Commissioner MacIntyre, as always, I find your testimony to be most constructive and highly instructive to me, and I think it has been to the other members of the committee.

In H.R. 4036, there is the language:

Clearance by Office of Management and Budget of reports and forms not required.

Section 3509 of title 44, U.S. Code, is amended (1) by striking out "a Federal agency" and inserting in lieu thereof "(a) A Federal agency (other than an independent regulatory agency)"; and (2) by adding at the end thereof the following new subsection:

(b) an independent regulatory agency may not conduct or sponsor the collection of information upon identical items, from ten or more persons, other than Federal employees, unless in advance of adoption or revision of any forms to be used in such collection the agency invites comment from the Director of the Office of Management and Budget. For purposes of this section, the term "independent regulatory agency" has the same meaning as such term has under section 2 of the Independent Regulatory Agencies Act."

In your opinion would that correct the Federal Reports Act of 1942, which is the section referred to there, in the manner you feel necessary?

Mr. MACINTYRE. I think it goes a long ways. I would, however, suggest that it be made clear that you need not even get comment or consultation for enforcement activities or, for that matter, for the conduct of quasi-legislative investigations with an idea of gathering information to be submitted to the Congress.

If you are going to make an economic investigation for the information of the Commission, yes, I would depend on the section you have for the purpose you indicate.

Mr. Moss. Mr. Eckhardt?

Mr. ECKHARDT. Mr. Commissioner, only yesterday the Solicitor General referred to some cases in which certiorari was sought by the Federal Trade Commission. He stated there that in the case of the Federal Trade Commission the Solicitor General was requested to file petitions in 28 cases.

He did so in 18 and declined to do so in 10. The Court granted 14 of the 18 petitions and the Commission prevailed in all of those. I think this is over a 10-year period. I wonder how difficult it would be for you to supply us with references to those cases?

Mr. MACINTYRE. Well, I am sure the Federal Trade Commission would be happy to supply those to you. I can't, but a simple written request either to the Federal Trade Commission——

Mr. Moss. If the gentleman would like, the Chair will be happy to forward such a request for you and would you like to have the record held at this point to receive it?

Mr. ECKHARDT. I would, Mr. Chairman, and I would like to amplify just a bit.

Mr. Moss. May I first get unanimous approval for the request?

Mr. MCCOLLISTER. May we hear the amplification?

Mr. Moss. You may now amplify.

Mr. ECKHARDT. The Solicitor General, in describing the reasons for the criteria for seeking certiorari, stated several points. I won't state them all, I don't know that I can state comprehensively in a short time what he described as those standards.

But one of them was those cases that are appropriate for review; that is, his screening responsibility related to protecting the docket of the Court. Another had to do with the appropriateness of that particular case as a test case from the interest of the agency iself.

Another was the question of determining, or acting to a certain extent as an umpire between various agencies of Government where the position of the Government might not be a single one.

What I am particularly interested in is this third area and which cases have to do with this area.

Mr. MACINTYRE. The last you mentioned?

Mr. ECKHARDT. That is right. It seems to me that by the very nature of an independent agency, that agency, that agency must be permitted, like an individual or like one of the departments of Government, to express its position and to have authority to make a determination with respect to the expression of that position, or else the executive department through the Attorney General is, in effect, exercising the judicial function of deciding whether or not your position should be presented to the Supreme Court.

Now I don't mean here to argue, I don't mean in your reply to this information necessarily to argue one way or another but I am interested in those cases that go to that question.

Mr. Moss. If I may first, for the purpose of the record, I think the Commissioner has indicated that the request would have to be addressed to the Commission, the resource of the Commission would have to be sought. I think the amplification would have to be included in the request for transfer to the Commission because it is not presently within the jurisdiction of Commissioner MacIntyre to supply the requested material. It would come through a formal transmittal to the Commission.

Mr. MACINTYRE. I am sure the Commission would be cooperative and give you the information you have asked for in that respect.

Mr. ECKHARDT. May I say this——

Mr. Moss. Is there objection to the request?

If not, the record will be held at this point.

[The following information was received for the record:]

LIST OF CASES IN WHICH THE DEPARTMENT OF JUSTICE GRANTED THE FEDERAL TRADE COMMISSION'S REQUEST TO PETITION THE SUPREME COURT FOR CERTIORARI

	Docket number	Date of FTC request
American Oil [1]	8183	Jan. 21, 1964
Ted Bates & Colgate Palmolive	7736	Feb. 19, 1964
Consolidated foods	7000	Apr. 2, 1964
Mary Carter Paint	8290	July 24, 1964
Texaco/Goodrich	6485	Aug. 13, 1964
Borden	7129	Jan. 25, 1965
Brown Shoe	7606	Feb. 8, 1965
Dean Foods	8674	
Universal-Rundle	8070	Feb. 4, 1966
Procter & Gamble	6901	Mar. 24, 1966
Jantzen	7247	Apr. 13, 1966
Fred Meyer	7492	July 29, 1966
Flotill Products	7226	Aug. 29, 1966
Texaco/Goodrich	6485	Oct. 4, 1967
American Motors [1]	7357	Oct. 31, 1967
Textile & Apparel [1]	204-12-1	Apr. 25, 1969
Columbia Broadcasting [1]	8512	July 31, 1969
Sperry & Hutchinson Co	8671	Oct. 28, 1970

[1] Supreme Court denied petition.

LIST OF CASES IN WHICH THE DEPARTMENT OF JUSTICE DENIED THE FEDERAL TRADE COMMISSION'S REQUEST TO PETITION THE SUPREME COURT FOR CERTIORARI

	Docket number	Date of FTC request
Borden	7474	Feb. 17, 1965
Sandura	7042	Do.
Richard S. Marcus (Stanton Blanket)	8610	Feb. 11, 1966
Callaway Mills	7634	
Cabin Crafts	7639	Aug. 11, 1966
Emile Lapeyre (Grand Caillou)	7887	Nov. 2, 1966
Borden	7129	Aug. 31, 1967
Standard Motor	5721	Mar. 13, 1967
Knoll Associates	8549	July 12, 1968
Community Blood	8519	Feb. 27, 1969
Cinderella Career	8729	May 12, 1970

Mr. MacIntyre. I can tell you something of what my personal experience is regarding the position of the Solicitor General.

Mr. Eckhardt. I would very much like to hear it.

Mr. MacIntyre. I don't have any objection to a Solicitor General doing the briefs and presenting the arguments to the Supreme Court in Trade Commission cases.

This problem arose as a result of the Judges Act of 1925. Until that date, each of these agencies—there weren't many then, the ICC and FTC I believe were about the only two regulatory agencies—made determinations as to whether to go to the Supreme Court and, once their petitions were accepted, they presented their cases and argued them. But so did a lot of other agencies of the executive branch of the Government, independent of the Solicitor General.

Well, Chief Justice Taft was somewhat incensed over this. He felt that all of these agencies coming in, making petitions, filing appeals, and presenting cases not only resulted in overloading the Court but, as was suggested here earlier this morning, conflicts sometimes arose in two or three different departments of the Government on the same point of law in the executive branch before the Supreme Court.

So, he had some justification for urging upon the Congress the passing of the Judges Act to restrict this. But, again, it is like the Reports Act. He didn't have in mind so much the regulatory agencies, of which a number have been created since. In effect he was shutting all of them out of the Supreme Court if the Solicitor General so wished.

The fault I find with it is this. It amounted to giving the Solicitor General veto power, to substitute his judgment for the judgment of the membership of an agency as to whether or not a petition ought to be filed in the Supreme Court.

The FTC is not an executive branch agency. If it were an executive branch agency, I think, of course, the President, the Attorney General, and the Solicitor General rightly ought to make the decision, policy-wise, as to whether or not the Commerce Department, for example, is to go to the Supreme Court on an issue, because they have the responsibility for the Commerce Department.

But neither of them has the responsibility for the implementation of the public policy by the Federal Trade Commission, that is the Federal Trade Commission, or in the case of Securities, the SEC.

I will give you a little example—this occurred back a few years ago—we had a Solicitor General by the name of Archibald Cox, and there was a Federal Trade Commission case that had been in the lower courts and we had won part of it and lost part of it. It involved a subpena for a copy of a census report, which, of course, under the law the original is confidential if it is in the Census Bureau.

The Commission didn't move to get it out of the Census Bureau, but subpenaed it from the St. Regis Paper Co.—that is the copy which wasn't covered by the laws as then written. And, of course, when it was before the Court to enforce that subpena, as I say, we won part of it and seemed to lose part of it, but the part we won, St. Regis wanted the Supreme Court to review.

They went up, but the view they took was the same view as the Department of Commerce against the Commission. When we saw that, all five of us at the FTC went to Mr. Cox's office and had a conference with him and told him we wanted him to file a cross petition in the interest of the Commission to have our part of the case we have lost reversed and for that matter, we wanted, of course, the part we had won sustained.

He said, "I can't do that, I am the lawyer for the Department of Commerce in this matter and I am obligated, of course, to present its case."

Well, of course, we recognized that but we told him under the law, as were facing it, he was also our lawyer and we wanted him to present the petition. Finally, Mr. Cox did agree to file the cross petition for us. Then before we left his office, we said, "We would also like for you to argue our point."

He said, "I would rather not do that since I am going to have to argue the case for the Department of Commerce."

Nevertheless, being the lawyer we considered him to be, we did prevail and he did agree to argue our viewpoint.

Well, at the conclusion of the case, he lost for the Department of Commerce and won for us.

Mr. ECKHARDT. Was he required to make his first argument and then say, "But on the other hand?"

Mr. MACINTYRE. Yes, he presented it somewhat that way. I was in court that day and thought he did a good job.

Mr. MCCOLLISTER. That is because you won.

Mr. MACINTYRE. But I think I would have said so even if we had lost.

I am not arguing so much the Solicitor General's appearance, I agree with Mr. Cohen, I think it is one of the best law shops in the country, but I object to anyone in that department or office making the determination for the FTC as to whether a paper should be filed in the Supreme Court to get an issue before it.

Then, too, aside from the Solicitor General, I don't think it is any secret that occasionally he must depend upon a staff member to make a recommendation to him. This staff member is not always in the Solicitor's office. I have known such members to be in other divisions of the Department of Justice. A present member of the Supreme Court told me when he was Solicitor General, "I cannot make a determination on my own, I have to take what is recommended to me by a staff member. I can't go through all these things." He is a prominent member of the Supreme Court today.

So, I come back to what I was saying, aside from the Solicitor having the veto power, I think, in effect, he perhaps gives it to some staff member in some division of the Department of Justice. Thus a staff member is empowered to set aside the determination made by the majority of the members of one of these regulatory agencies.

Mr. Moss. As a matter of fact, you are giving to a staff person, unidentified and really unaccountable to anyone, a power greater than the Commission when acting with the unanimous backing of the members.

Mr. MacIntyre. I think that is correct.

Mr. Moss. It is as equally true in the consideration of policies inherent in budgeting that far too frequently those policies are made by relatively low-level staff persons in the Office of Management and Budget.

Mr. MacIntyre. Of course your bills here take care of that. I think the President does have a responsibility to be able to advise Congress what the budget should be and he ought to have these estimates handed to him from the agencies as they are now doing.

Mr. Moss. Mr. Commissioner, you have focused attention on a fact that there is great power exercised routinely by faceless persons in a bureaucracy and that that power sometimes is greater than the power of the members of the independent Commissions acting collectively and unanimously.

Mr. MacIntyre. I think there are instances of that.

Mr. Eckhardt. Mr. Commissioner, I think I agree entirely with you on the proposition that the Solicitor General, as your lawyer, is an effective and dependable agent of the Government, but I think you have also stated, and I certainly would agree, that because of that, he should not have the authority to make what amounts to a judicial determination as to whether or not, say, your agency, or a department of the executive branch, should be preferred with respect to the position taken before the court.

Maybe I can give you an example. Suppose, for instance, you have a question involving section 5 of the Federal Trade Commission Act with respect to what constitutes an unfair, deceptive practice. The question is whether or not some action by the Commission should be taken or whether the matter should be treated strictly and without Commission interference under the Antitrust Act.

It would be my understanding there that, if the matter were totally handled under the Antitrust Act, the determination and enforcement would be totally within the Justice Department.

It would seem to me when the Commission elects to take action in a court case and enforce its action, and to perhaps seek certiorari if it has not won below, that it should be the Commission that makes the determination of its position before the Supreme Court and not the Solicitor General or the Attorney General.

Mr. MacIntyre. Well, I think I am in agreement with that. I would like to refer to a very recent case in which I think that sort of problem arose. It was the *S & H* case. Now there were two concepts in that case, one was the unfairness under section 5, aside from antitrust considerations, and another was the unfairness by virtue of contravention of antitrust laws.

The Commission found violations in both respects and entered its order. The respondent petitioned the fifth circuit court of appeals

for reversal and it secured reversal all the way along the line and it did it this way, first it said: "You just don't have a record here that supports any antitrust violation at all." Almost all the record was built on that.

Second: "You don't have any authority under the law to proceed against the practices unless they are deceptive or a violation of the antitrust laws." Of course, the court was wrong there because the Federal Trade Commission, under section 5, does have some authority beyond the antitrust laws if unfairness is involved.

Now the matter had to be considered by the Solicitor General on request by the Commission to determine whether it was to go to the Supreme Court. The Solicitor General made a determination that he didn't think the antitrust issue ought to be carried to the Supreme Court at all. And so it wasn't.

Mr. ECKHARDT. So that prevented you from getting a determination from the Supreme Court favorable to your position with respect to section 5 of the act.

Mr. MACINTYRE. As to whether or not this case was erroneously decided by the fifth circuit. However, on the second issue, the issue of unfairness, whether it was a matter of unfair activity—this was Solicitor General Griswold—he did agree to carry it up and filed a petition on that. Well, he won the case on that issue. It is being hailed all over the country as a great victory for the Federal Trade Commission.

There the Solicitor General, I respectfully submit, made a determination contrary to the determination by the Commission that the Supreme Court ought to have been given the opportunity of determining the other point as well. I have known this to happen in a number of cases in years past.

Mr. ECKHARDT. In that case, the Attorney General permitted your particular issue to go up?

Mr. MACINTYRE. One of the two.

Mr. ECKHARDT. But under existing law, he at least had the power to deny your seeking certiorari on any issue.

Mr. MACINTYRE. That is right, he could have.

Mr. MCCOLLISTER. Would the gentleman yield?

Mr. ECKHARDT. Yes.

Mr. MCCOLLISTER. I am grateful that, as matters stand, perhaps it is not too bad.

Mr. ECKHARDT. I am not asserting matters are as bad as they stand, nor the Solicitor General has not done his duty. Of course, we had testimony yesterday from the Solicitor General that the ultimate decision is made by the Attorney General, and we have had Attorneys General who have been indicted, like Attorney General Daugherty about the time of the Teapot Dome era, and it troubles me that this much power ultimately may be exercised by the Solicitor General.

Mr. MCCOLLISTER. I understand.

Mr. ECKHARDT [presiding]. Mr. McCollister?

Mr. MCCOLLISTER. I have no questions and yield to my colleague for whatever questions he might have.

Mr. YOUNG. Commissioner MacIntyre, I appreciate very much your long expertise and your experience in this administrative area. I would like to ask you one question based upon that experience.

Do you feel an administrative court might solve some of the problems that we have been discussing with respect to certiorari and the

Solicitor General's representation of the agencies because, if you had an administrative court, you wouldn't have to go through the Solicitor General and this might solve some of the problems of the Supreme Court in its workload and, further, an administrative court might give decisions on a much more timely basis which might be helpful to the administrative structure.

What is your comment on that basis in your administrative experience? Do you favor, do you oppose, or what are your views of an administrative court which would act with respect to administrative determination?

Mr. MacIntyre. In many years past I have publicly stated opposition to that.

Mr. Young. The administrative court?

Mr. MacIntyre. Yes.

Mr. Young. What is that based on?

Mr. MacIntyre. Well, in appearance before the District Bar Association here a few years ago, I explained it this way, that in the Federal Trade Commission Act, section 5, there is a grant by the Congress, that is aside from its quasi-legislative investigations, a quasi-legislative grant which maybe could raise a serious question as to its constitutionality if it were granted to the judiciary.

Mr. Young. Did you mean quasi-judicial instead of quasi-legislative the second time? You said quasi-legislative twice and I believe in the latter instance you meant quasi-judicial.

Mr. MacIntyre. I meant quasi-legislative. Let me explain that. I think ordinarily you would think I misstated it, section 5, as the courts held from time to time and have recognized, is so broad that the definition of what is the meaning of "unfair" is to be determined by this quasi-legislative quasi-judicial agency. It is somewhat of a quasi-legislative function as in rulemaking, even though it is in a proceeding of a quasi-judicial nature.

There is some doubt in my mind—as I say, I am not a constitutional lawyer—as to whether under the Constitution you can grant such broad based quasi-legislative authority and such quasi-judicial authority to the judiciary.

In an independent agency, perhaps you can do it. It has been held by the Supreme Court that you can do it. If you were to put it in the judiciary, I think you would have to rewrite section 5.

The agency has been going along making these determinations, and I repeat, quasi-legislatively in quasi-judicial proceedings. There is some thought that maybe it ought to be doing it quasi-legislative by rulemaking proceedings as well. That is another story for another day. We are not talking about that today.

But because of that broad grant, to answer your question, I did state opposition to it. Now as I have come along these last 4, 5, or 6 years, I have come reluctantly to the conclusion there are a great many things to be gained from an operation of a trade court, if you please, just to handle cases that arise through the Trade Commission.

Mr. Young. The proposal is, Commissioner, as you know, at least the Ash report proposed an administrative court which would handle not only FTC but FCC, FPC, and most of the agencies. The idea would be you would have a better judiciary if you had a more broad expertise required to attract higher and better quality of personnel and, further you wouldn't get the stultifying narrow approach if you had a judge who dealt with only one agency.

Mr. MacIntyre. If that were to be a court of appeals on administrative law.

Mr. Young. A final court.

Mr. MacIntyre. It would be for administrative law, in other words. I wouldn't see any objection to making it an appellate court, but to make it a court of first instance to make the determination——

Mr. Young. It wouldn't be.

Mr. MacIntyre. I feel—well, the Ash report does something else in that regard, it does remove from the independent agencies the power and authority to decide the case in the first instance and put it in the hands of what are now administrative law judges. If you had administrative law judges all over the States making determinations in all cases, you would have a Pandora's box turned loose, in my opinion, and I think it would be bad for the country.

Mr. Young. The court provided you would have your hearing through your trial examiner, the Commission would present its view through its staff and the agency would have a review of the decision by the hearing examiner only for the purpose of determining whether or not that determination of the Hearing Examiner was in line with Commission policy of the FTC.

Other than that, that would be a short time so it wouldn't kick around for a long time, then it would go to the administrative court with what ideas the FTC has with respect to that decision and its own policies.

Mr. MacIntyre. That would be for the purpose of appeal, not for making a decision.

Mr. Eckhardt. We have a vote on the floor at this moment and we have until approximately 20 minutes of 1 to make that. I would suggest that we take a brief recess, make the vote and return here and resume at 20 minutes of 1.

Mr. Young. I would waive further questioning so this witness could be excused.

Mr. Eckhardt. Are there further questions?

Mr. McCollister. I have a question.

Mr. Eckhardt. We won't make our rollcall if we don't start.

Mr. McCollister. I would only like to make the comment, the same comment that the Commissioner made in regard to having that Pandora's box open all over the country by administrative law judges making these determinations would perhaps pertain also to having each of the individual regulatory agencies making those same kinds of determinations rather than the Solicitor General.

Mr. MacIntyre. That is only the question of getting to the Court now, that is the Supreme Court. The administrative court of appeals, I think, would help in that regard.

Mr. Eckhardt. Commissioner MacIntyre, we are indebted to you and apologize for having found it necessary to have you come back several times.

Mr. MacIntyre. I am pleased to be here and honored to be able to appear before you.

Mr. Eckhardt. Thank you.

Senator ALLEN. Now, gentlemen, as you have heard each other testify, I wonder if any of you would like to have any comment on the statements that any of the other witnesses have made.

Mr. Doub.

Mr. DOUB. Thank you, I don't know whether Mr. Denenberg is testifying for the benefit of the committee or the press here this morning, but there were a couple of nuggets that may be found in his hyperbolic muckraking of regulatory commissioners. I think they should be focused on.

I would agree with him that the Federal-State relationship problem is one that should be looked at and I notice both S. 4145 and 4167 do contemplate a review of that important problem. I think that it has become more important because of the increasing emphasis being placed on sighting problems, et cetera.

Let me however state my disagreement. I think the State commissioners on the whole are trying desperately to accommodate to the kind of inflationary pressures we have in this country. The problem is one requiring more innovation, more use of rate design experiments, and new regulatory procedures. Some of this may require statutory changes by States, that is allowing putting the construction work in progress in the rate base and such as that. State commissioners can be an influence in achieving that kind of statutory relief. As a group, State regulators, I think, during a highly inflationary period, are acting extremely well. I think the National Association of Regulatory Utility Commissioners in their efforts to bring uniformity into State regulation by putting out for the benefit of State regulators proposed uniform regulatory rules and policy papers is rendering a real service and it is a very effective organization.

I would disagree with Mr. Denenberg with regard to State Commissions and the N.A.R.U.C.

Mr. DENENBERG. I guess that shows one man's hyperbole is another man's truth. I don't think you can give the State agencies much credit when their own members are resigning in disgust when their decisions are unfair and unjustified and they don't have the staff needed to do their job. I have been observing them up close. I was legal counsel for the Pennsylvania Public Utility Commission.

As to your second comment, whether I am talking to the committee or the press, I think I made it very clear in my remarks that I am talking to both of them, that many of the important reforms that come to pass do come about because the Senate investigates and the press reports. In fact that is one reason the Senate ought to look at these committees, because you can get the focus of the media like we can't get it up in Harrisburg. There, you almost have to walk across the Susquehana to get your message out, whereas down here all you have to do is fall in the Tidal Basin.

I think I have been very low key. If I want to hear a hyperbole I will be gald to talk about the Atomic Energy Commission.

Mr. DOUB. I wasn't arguing about these specific facts but your indictment of the total State regulatory system.

Senator ALLEN. Any further comments from any members of the panel?

Would any of you have any idea as to the economic impact of the various regulatory agencies of the Federal Government and of State regulatory agencies on the consumer, the economic impact resulting from mismanagement, the delays in decisions, the overregulation,

the underregulation, various aspects of the deficiencies in the regulatory bodies? Would any of you give a ballpark estimate as to what that is costing consumers?

Mr. MACINTYRE. I would make a suggestion about some things that happen. I don't know if there is a figure I can give as to the cost of it.

It is a matter of overjudicialization of the administrative law process. I think that an effort to make it more judicial has resulted in exhorted delays by each of these independent regulatory agencies in the conduct of its work. This occurred back in 1946, of course, when the Administrative Procedure Act was passed and with respect to an adjudicative matter each of these agencies is treated more or less as a court. Well, that in and of itself has resulted in delays in the purely administrative work of the agencies. So if it must be, in order to have due process in fairness of the Administrative Procedure Act for these agencies to utilize those procedures when they get into adjudicative matters this is to be distinguished from their rulemaking or policymaking activities, then I would suggest that that be transferred to an administrative court and all of the other activities relieved of the burdens of these delays and get on with policymaking. Congress would leave it up to the judiciary to do the decisions in administrative court as suggested here earlier, but the policymaking ought to remain with the Congress, and I believe if that were done that way you would find years cut off of some of the regulatory activities.

Senator ALLEN. I notice Senator Taft spoke of the Federal Trade Commission's *Carter's Little Liver Pill* case as taking 16 years for disposition. Are you familiar with the delays in that case?

Mr. MACINTYRE. I have some knowledge concerning it.

Senator ALLEN. Yes.

Mr. MACINTYRE. The major part of that 16 years occurred while the case was traveling through court. One appeal after another. It took too long in the administrative process because before it was concluded procedures were utilized such as are now required under the Administrative Procedure Act.

I myself participated in the trial of one case where of course 100 corporations were involved as defendants, where the taking of evidence consumed 3 years. I don't know whether a court could have done it in less time or not. It took 10 years for that case to be concluded before the Supreme Court could study it, but the last 6 years out of the 10 were used in court appeals.

So I don't know whether it is very helpful when we talk about one case, such as the *Carter's Little Liver Pill* case and the long amount of time.

Mr. WHITE. In response to your specific question about what might be the dollar amount, I have a hunch that even the boldest and most wild of us would not be able to hazard a guess. But it seems to me the question ought to be broadened a little bit and that is to try to comprehend what might have happened had some of these agencies not been in operation, imperfect and deficient as they may be. For example, I have a hunch that within the next 2 weeks the Senate will be voting on a bill to deregulate natural gas prices. I hope the Senate will take into account the information that has been put together as an analysis of what this will cost the consumer. It is variously estimated between

$5 and $8 billion annually and that will be on top of what is now being paid. That is a first year figure and it will accelerate as "old" gas becomes "new" gas. Those are very monumental decisions.

I have no problem at all with the concept of Congress itself setting some of these rates. As Mr. MacIntyre said, it is the Constitution that vests the control of interstate commerce in the Congress. The Congress has concluded it can't do all these things so that it in essence delegated chunks of this authority to its handy little helpers, the various independent regulatory agencies. Sometimes these problems get too big and complex. We are really talking in some of these issues not so much interpretation of a statute as basic national policy, and certainly a five or seven person agency is not the best way to make those policies, which comes to a point in my statement that I didn't get to but was alluded to by others. That is the absence of congressional oversight. It is really too bad, because the committees that have substantive jurisdiction are simply so darned busy that it is very nearly impossible for them to give the time and attention that these agencies require. I have a hunch had there been closer observations by the congressional committees with responsibility many problems could have been avoided and headed off. I don't know exactly how to solve the problem as well as I know how to identify it, but perhaps the creation of additional subcommittees or some other mechanism. These agencies do need some place to go.

I remember sitting at the Federal Power Commission with a very massive problem dealing with handling of natural gas imported from Canada into the United States. In our own awkward way, we were making a decision and the Canadian National Energy Board was making a decision and we couldn't quite talk to each other. I suggested this is something we couldn't do and suggested to the White House that it ought to get the State Department involved in it because that was not our field. I don't think anything came of that suggestion, but I think it illustrates, at least as I saw it, the failure of having adequate congressional guidance and oversight.

It worked the other way, too. Whenever we came to Congress and requested legislative changes, we had a terrible time competing for the attention of the committees. Finally there is the question of budgets. The first crack out of the box when I got to the FPC, the Chairman of the Securities and Exchange Commission called me and said, we will propose the Public Utilities Holding Company Act function be transferred to the FPC, and being uncharacteristic in my modesty, I said no, I will tell you what, you keep it; the only way we would be willing to entertain a transfer is to have your part of the budget because I know full well we won't get any more money than what the Commission has. I don't know that this committee or the Commission you are about to create will be able to emphasize that point, but these functions can't be done for nothing. It will take some money if it is to be done well.

Senator ALLEN. Mr. DOUB.

Mr. DOUB. Yes, I think in answer to your question, the consumer has paid a cost by virtue of the fact we haven't had a national energy policy in this country and the regulatory agencies are making regulatory decisions without guidance as to national goals and objectives.

We need a policy that not only tells us, as the President did on

October 8, that we are going to use 1 million barrels less of oil per month, but we need a policy that also tells us what new energy sources we are going to use to make up that differential; how much offshore drilling is going to be permitted; what use of Government lands is going to be permitted for energy resources—really, where is the energy coming from? With that kind of guidance at the national level, then the agencies like the FPC and others can make the regulatory decisions with some knowledge they are implementing a national energy program. Otherwise it is helter-skelter and the decisions are often contradictory to what later turns out to be in the best interests of the country.

Now, this doesn't mean this would impact on the independent nature of the agency by giving them general guidance. It would simply be a backdrop against which the more narrow regulatory decisions can be made with full recognition by the regulatory commissions of their full implications. We found this at the AEC in regard to our foreign activities; that is, taking contracts for uranium to be delivered overseas—enriched uranium. This impacted on the State Department and we had to know their policies.

So they need guidance.

Senator ALLEN. I might state in response to a comment by Mr. MacIntyre and Mr. White that I believe this Congress is flexing its muscles a little bit more and is wanting to assume its role as a coequal branch of Government. I do appreciate, Mr. MacIntyre, and Mr. White, you speaking up for the role of the Congress in this area. Certainly we recognize that these agencies are the creatures of the Congress and, in effect, carry out supposedly congressional policy.

I feel that we have overlooked the oversight responsibility that they have to a great extent. I think we are trying to set the scales right in that connection. I think that is the purpose of this legislation. I feel that there is well nigh, if not entirely unanimous, thought on the committee that we must proceed in the direction of setting up this commission. I feel that we are late in doing it, and I think that the information and the expertise that you have shared with us today will be most helpful in the legislative history of this legislation.

We appreciate your sharing your views with us.

Mr. White, you spoke of how much had been saved by the regulation of natural gas. I feel sure that is correct.

I am just wondering if Congress had stepped in that area and regulated prices itself, what do you feel should have been done in this area?

Mr. WHITE. I am not certain I followed that question, Mr. Chairman. If the Congress had itself regulated rates? On the setting of the price at the wellhead, it is an extraordinary thing for Congress to do. I have been around here for about 20 years and the only time I know Congress has fixed a specific price was in the $7.09 per barrel of oil established earlier this year. In my view, it was unfortunate President Nixon vetoed it and it was impossible—even though the bill was passed by 67 to 32 in the Senate; they were eight votes shy in the effort to override. But it is a tough job for 535 people to come up with a single price or a range of prices. I have no objection to the concept of delegating that responsibility, but I also would have no objection if the Congress, through its committee process, were to hold hearings and conclude what it thought ought to be a reasonable price.

The worst of all in my judgment would be to let today's market fix those prices because we have a pretty good idea what they will be fixed at, the rate which the international oil cartel has fixed for oil, a commodity with characteristics similar to natural gas. I simply don't believe it is prudent to take people who are captives at the end of a great interstate pipeline network and say to them, you have now made your investment of $30 billion to $50 billion and tough luck, we are just going to have to take the lid off and prices will go up. Even worse is the fact there is no assurance at all that with those prices removed that we will get the supplies we need.

Project Independence, out earlier this month, suggests that complete decontrol would increase production from about 22 trillion cubic feet this year to about 24 trillion cubic feet by about 1985. That is really not good enough, and I don't think that increasing supply will be accomplished by the influence of price alone. All we do know is that the price will go high, perhaps $2 per thousand cubic feet—perhaps $1.75. But the estimates range about $5.3 trillion in the Library of Congress study, $5.3 billion additional burden on the consumer the first year of deregulation going up to $11 billion a year. That ought to be in the minds of Congress as it considers whether it wants to deregulate natural gas.

I have requested from the administration an impact statement. President Ford mentioned to Congress that he would not make any recommendations without an inflation impact statement accompanying it. So far, we have not seen one. This is something I would think Congress would want to have in mind.

Senator ALLEN. Do you have any estimate as to what the impact would be?

Mr. WHITE. Yes, two different sources: one a study by the Library of Congress, made available through Congressman John Moss, and the other, information submitted to the Senate Commerce Committee by the assistant chief economist of the Federal Power Commission. In the Library of Congress study, it is $5.3 billion the first year and, in the case of the FPC economist, it is a range of $9 billion to $11 billion annual increase.

Also, it includes propane and other products that—not the gas act itself, but that is an impact on the price of propane and other middle distillates.

Mr. TURNER. Mr. White, these studies you are referring to relate to gas?

Mr. WHITE. That is correct.

Mr. TURNER. When we get to State regulatory responsibility, consumers' electric bills are in fact controlled by State regulatory agencies?

Mr. WHITE. Almost exclusively. The FPC has jurisdiction over sales for resale of power that move, in interstate commerce, estimated at about 10 percent. So basically it is the State regulatory agencies that are sitting in those terribly difficult spots trying to figure out how to handle application after application for rate increases.

Mr. TURNER. On rate increases this year, this committee has received information that State agencies have received $5 billion in

43-362 O - 75 - pt. 2 - 12

requests and already 2½ billion has been approved. Does your organization have any additional figures to show the magnitude of State regulatory agencies relative to electric bills and its potential impact on inflation?

Mr. WHITE. No, but those figures sound within the ballpark. Just so the record will be clear, a good chunk of that is due to the quadrupling of oil prices in the world. Another good chunk is due to the failure of the administration to exercise the responsibility mandated to it by the Congress to fix equitable prices for crude oil produced in the United States.

A weird thing happened, the Cost of Living Council said in carrying out the congressional mandate "we hereby find with respect to new oil in the United States the equitable price is whatever the market fixes it at." They are presently being sued in the District of Columbia. But those increased prices in domestic crude are passed right on to the users of electricity.

Mr. TURNER. We have limited time. May I refer to the fuel adjustment. Would that be a factor that might be of interest to a commission studying State regulatory impact on the inflation?

Mr. WHITE. Yes. The short answer is yes and the slightly longer answer is it is already being looked at by some State commissions and some State legislatures. The concept is to give kind of an instantaneous passthrough if either an increase or decrease in the cost of something as basic as fuel, but unfortunately what that has led to is something that could have been predicted. That is, there isn't a great deal of enthusiasm or stomach on the part of utilities for bargaining for fuel so long as price increases can be passed on automatically. Indeed, the California commission is being sued for its failure to press Pacific Gas and Electric in a situation in which it renegotiated a contract that was fairly favorable under the threat of duress by the petroleum company. I don't know the facts but it is being examined.

One idea offered is that you don't have to have only the devices of fuel adjustment or no fuel adjustment. Some States are considering passing on 60 percent and letting the other 40 percent being fought over in hearings.

Mr. TURNER. Let's pass from gas and electricity to telephones. You may not have the answers. But isn't it a fact that about 75 percent of the telephone bills that consumers get in this country are in fact regulated by State agencies?

Mr. WHITE. I think the answer is yes, but Mr. Denenberg can help.

Mr. TURNER. So that we now have to get gas, electricity and telephone bills that come into the home to the average consumer. Are we not in fact reaching over $10 billion in impact on the economy just roughly over the last 2 years with respect to those areas?

Mr. DENENBERG. We are reaching a lot more than that. If you take all the State regulated utilities including insurance, well over $125 to $150 billion a year in revenue.

Mr. TURNER. Well, one of the parts of the bill that was recommended by the administration was to look into the interrelationship of the regulations at the State level with respect to the economy and what impact that has on the inflation and on the recession. What I am trying to do, and we haven't done it before. Unfortunately,

most of our witnesses have directed themselves to the Federal regulatory area. What I am trying to do is to inquire of you former regulatory commissioners as to the substantial importance of the State regulatory area with respect to the national economy. Would you like to address yourselves to that, Mr. Denenberg?

Mr. DENENBERG. If you take just utilities and insurance you have massive impact. Of course, regulations far beyond the area you are talking about. If you talk about insurance regulations along, a profound impact on health care, legal services, the rebuilding of urban core areas and other implications that are overwhelming. I don't see how you can get facts on Federal regulation without looking at State regulation, too. Furthermore, there are complicated relationships between State and Federal agencies and they are fighting for jurisdiction. You have all kinds of battles between the SEC and State insurance departments as to the new investment development. One of the great improvements in State insurance regulation has come about due to the oversight function of the Senate Antitrust and Monopoly Subcommittee. I would urge you to take a look at all State agencies. Certainly, we have no more difficult problem in this country than the whole energy question. You have the worst problems of the utilities, the worst problems of economy, of the environment, all coming into focus in State public utility commissions. The States really need help with their PUC's. When you get the situation that I described in Delaware and Pennsylvania and I don't think that is necessarily unique, I think it is time Congress took a look at what these agencies are doing.

Mr. TURNER. Well, I think that what Director Ash was saying and what I am hearing from representatives of the administration is that they are as a priority matter interested in identifying those matters having an impact on inflation or stag inflation.

Mr. DENENBERG. Certainly no area needs more help than the utility and energy area and Congress is in a position to provide needed help.

You have outrageous and obvious conflict of interest in Delaware. It is not only an issue of conflict of interest, but credibility of State government itself. People feel they are sold down the river by public utility commissions. You get senior citizens who say: "We can't afford to turn on the TV set, we need help." The public is crying out in protest. They are actually coming together. I remember in 1971 there was a massive increase in Blue Cross in Pennsylvania right after I became insurance commissioner and there was a tremendous public outcry but basically on an individual basis. Now people are so desperate and pressed to the wall that you see all kinds of organizations coming into being. I get stacks of petitions and protests and when the public is crying out for help that way somebody better give them an answer and I don't see too much hope at the State level. It may be that many State legislatures are not competent enough to handle this type problem.

Mr. TURNER. Senator Metcalf has a request of counsel to seek from all of you a reaction of S. 770 to establish a consumer counsel to represent the public before the State regulatory agencies, and it would also require that regulated companies report specific information regarding their capitalization control, management, opera-

tions, and, in particular, provide for matching grants to State and local government for representation of interested consumers for regulated services. I believe this bill is a packet in the letter which invited you here.

In the interest of time I will ask perhaps you might furnish your responses to this bill for the record, because it was of considerable interest. It is being considered by this committee at the present time, but in very brief comment, since we may not be able to get your written comments by the time we take up the commission bill or perhaps some of these other pieces of legislation—Mr. White, what is your reaction to S. 770?

Mr. WHITE. I have not read it in its entirety, but just listening to you describe it I am already on record about 14 times in favor of those points.

Mr. TURNER. It is similar to 707.

Mr. DOUB. I testified in favor of Senator Metcalf's proposal 6 or 7 years ago. I should think this would be an issue that the Commission on Regulatory Reform would want to consider. I would reserve judgment.

Mr. TURNER. The other bill that Senator Metcalf wanted me to mention was S. 704—Mr. MacIntyre, I left you and Mr. Denenberg without a copy, but I believe we know the substance of the legislation.

Mr. DENENBERG. Despite the title, this indicates I am enthusiastically in favor of that type of proposal.

Mr. TURNER. Mr. MacIntyre.

Mr. MACINTYRE. I think S. 770 raises a question that ought to be considered by this national commission. I would have included it in my recommendations for committing it to the national commission for report as I did S. 707.

Mr. TURNER. The other bill I was requested to bring up was S. 704, permits commissions in their discretion to conduct their own litigations. This committee print No. 1 of 704 to be considered at this hearing has been modified to reflect recommendations and enactment of other sections of 704. But in any event, this is a bill which may be considered by the full Government Operations Committee perhaps at the time we mark up the bill on the regulatory commission study.

So I would like on the record if I could some of your responses to 704 which was also included in the packet and the letter for your invitation.

Mr. MacIntyre, would you like to start off on your reactions to S. 704?

Mr. MACINTYRE. Well, of course, I would be in favor of the provisions that are in 704 as it was amended on October 24, 1974. What was provided in that first draft as of February 1, 1973, commencing with section 6 I would not favor.

Mr. TURNER. You have seen the latest draft, right?

Mr. MACINTYRE. I have one that was revised as of October 24, 1974. I assume that is the last one.

Mr. TURNER. What do you feel about that? You don't favor that?

Mr. MACINTYRE. I see no objection to the provisions that are left in it, on that draft. As to some of these agencies some of those pro-

visions have been made effective by other legislation but not as to all agencies.

Mr. TURNER. Did you get a chance to look at that bill, Mr. Denenberg?

Mr. DENENBERG. No, I haven't. I will submit comments.

[The information requested and subsequently supplied follows:]

COMMONWEALTH OF PENNSYLVANIA,
OFFICE OF THE GOVERNOR,
Harrisburg, Pa., December 9, 1974.

Hon. JAMES B. ALLEN,
U. S. Senator,
6205 Dirksen Senate Office Building,
Washington, D.C.

DEAR SIR: Here are my comments on S. 704, the Regulatory Commissions' Independence Act.

After reviewing the Act, I find I can enthusiastically support it.

S. 704 would help assure the "independence" of the independent commissions by permitting them to directly transmit budget estimates and requests and legislative recommendations to Congress.

The present practice of submitting these documents only to OMB directly strikes at the independence of the commissions and creates an irrational and somewhat irresponsible division of authority.

It may be that Congress may want to reconsider whether regulatory power should be in independent commissions or in the executive branch. However, there seems to be no justification for the present laws' derogation of the independence of the commission. It prevents them from effectively and efficiently carrying out their function and provides no useful check on their authority.

Legislative oversight, not arbitrary division of power, would seem to be the appropriate check on an independent commission.

Sincerely,

HERBERT S. DENENBERG,
Special Advisor to the Governor
on Consumer Affairs.

Mr. TURNER. Mr. Doub.

Mr. DOUB. I didn't have a chance to look at that.

Mr. WHITE. I heard you say in that bill is a provision that would require the independent agencies to send their budgets concurrently to the executive branch and to Congress. That part I have already supported previously and I think it is an important thing, and I believe—too, that they ought to be permitted and encouraged to send their own legislative recommendations.

I think there should be some opportunity for the executive branch to have some say about the budget and legislative recommendations, but certainly the appropriate congressional committees are entitled to have directly from the agencies their best thinking on legislative issues.

Note for the record, Mr. Chairman, sort of an interesting sociological conclusion here. Mr. Denenberg and I are almost peas out of the same pod, having been born in Omaha and attended the University of Nebraska together, and isn't it interesting I turned out to be such a mild, sweet boy and he is so flamboyant.

Mr. DOUB. I was the sweet one.

Mr. TURNER. We did receive responses from 15 Governors relative to the basic concept of S. 770 and I would request the letter with responses be placed in the record.

Senator ALLEN. Without objection.

[The information referred to follows:]

LETTER TO GOVERNOR WALLACE OF ALABAMA [1] BY SENATOR LEE METCALF DATED JULY 7, 1972, WITH RESPONSE

Hon. GEORGE C. WALLACE,
Governor, State of Alabama,
State Capitol, Montgomery, Ala.

DEAR GOVERNOR WALLACE: Shortly after Congress returns on 17 July from the recess, the Senate Committee on Government Operations will resume mark-up of S. 1177, the Consumer Protection Agency bill. At the Committee's initial session, on 29 June, it adopted my enclosed Amendment Number One, which will I believe be of considerable interest to you.

This amendment permits the head of the Consumer Protection Agency, which would be established under the legislation, to intervene in State or local agency or court proceedings, subject to these conditions:

(1) his finding of substantial consumer interests, and

(2) the request in writing of a Governor, his designee, the State agency or official authorized to represent consumers, or the State or local agency conducting the proceedings.

Prior to acceptance of my amendment the only State or local body which could obtain Federal assistance under this section was the agency conducting the proceeding. The House-passed version of the bill, H.R. 10835, prohibits even that narrowly limited State authority.

I believe that my amendment would strengthen the rights and powers of the States and their chief executives. I anticipate opposition to the amendment, both on the Senate floor and, if the amendment is retained, in conference with the House.

Enclosed is a copy of the committee print of S. 1177 which we are considering, along with my amendment. If my amendment would be in the interests of your State I hope that you will so advise me and other members of the Senate and House Committees on Government Operations.

Very truly yours,

LEE METCALF.

STATE OF ALABAMA,
GOVERNOR'S OFFICE,
Montgomery Ala., July 19, 1972.

Hon. LEE METCALF,
U.S. Senator, State of Montana,
U.S. Senate Building,
Washington, D.C.

DEAR SENATOR METCALF: Thank you for your letter of July 7, 1972 and for the copy of S. 1177 with your proposed amendment number one (1). The Consumer Protection Agency bill has been reviewed thoroughly by me and my appointed Consumer Protection Officer, Mrs. Annie Laurie Gunter, with great enthusiasm.

We are jointly resolved that this bill will greatly enhance the protection afforded the citizens of this state upon enactment. We support this bill and wholeheartedly endorse your amendment number one (1) which provides legal assistance to this state upon request.

Again, thank you for your correspondence, interest, and support in this most vital program to the citizenry of our state. I am this date dispatching a personal letter to each committee member asking that they support the Consumer Protection Agency bill and your amendment.

With kind regards and best wishes,

Sincerely,

GEORGE C. WALLACE, *Governor.*

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[1] Similar letter sent to all Governors.

EXECUTIVE DEPARTMENT,
Atlanta, Ga., July 17, 1972.

Hon. LEE METCALF,
U.S. Senator,
427 Old Senate Office Building,
Washington, D.C.

DEAR SENATOR METCALF: The creation of a federal agency, acting as an advocate of consumer interests in a non-regulatory manner, is both provocative and timely. Consumer protection is of primary interest to me, and I believe that such an agency at the Federal level could be of benefit to the interests of Georgia consumers and of benefit to the efforts of my Administration in developing and strengthening State programs and legislation. An active consumer protection agency can do much to restore the people's confidence in our business community.

The Senate Committee on Government Operations is well aware of the complicated aspects of the relationship between such an agency and other Federal agencies authorized and responsible for regulatory activities. Likewise, the powers and responsibilities of the States should be respected, and I am pleased to see it proposed that this Federal Consumer Protection Agency would be permitted to intervene in State court and State agency proceedings upon request. Your judicious expansion of the definition of those authorized to request such intervention provides adequate and welcome discretion to the duly constituted authorities of the States, and thus I support your amendment. This is needed if Federal and State cooperation is to be meaningful and will provide a valuable check on the administrator's responsiveness to local needs.

Sincerely,

JIMMY CARTER.

COMMONWEALTH OF PENNSYLVANIA,
OFFICE OF THE GOVERNOR,
Harrisburg, Pa., August 7, 1972.

Hon. LEE METCALF,
Committee on Government Operations,
U.S. Senate,
Washington, D.C.

DEAR SENATOR METCALF: Thank you for your letter of July 7, 1972, concerning your proposed amendment to Senate Bill 1177, the Consumer Protection Agency Bill.

I am in complete agreement with the objective of Amendment No. 1 to provide governors and those designated by them with the responsibilities in the area of consumer protection with greater powers to request assistance of the federal government under this bill. Your proposed amendment should serve to further these ends without unfairly restricting the right of state and local authorities to control the course of their own litigation.

Thank you for bringing this matter to my attention and offering me this opportunity to state my views.

Sincerely,

MILTON J. SHAPP, *Governor.*

OFFICE OF THE GOVERNOR,
Frankfort, Ky., August 10, 1972.

Hon. LEE METCALF,
Senator from Montana,
Committee on Government Operations,
The U.S. Senate, Washington, D.C.

DEAR SENATOR METCALF: I was pleased to receive your letter concerning S. 1177, the Consumer Protection Agency Bill. I share with you concern for consumer protection, not only on the state level, but also nationally.

I agree with your proposed amendment which would permit the head of the Consumer Protection Agency to intervene in state or local agency or court proceedings when he finds that there is substantial consumer interest and is requested

to do so by a Governor, State agency or the State or local agency conducting the proceedings.

If I can be of further help in promoting the consumer's interests in Washington, please do not hesitate to contact me.

Sincerely,

WENDELL FORD.

EXECUTIVE CHAMBERS,
Honolulu, July 25, 1972.

Hon. LEE METCALF,
U.S. Senate,
Committee on Government Operations,
Washington, D.C.

DEAR SENATOR METCALF: Thank you very much for your letter of July 7, 1972, asking the possible effect in Hawaii of S. 1177 Federal Consumer Protection Agency and your proposed amendment to the bill and our attitude about this bill and your amendment.

It is our view that both the bill and the amendment as proposed by you would be in the best interests of the consumers of Hawaii, and accordingly, we support S. 1177 and your amendment.

Again, thank you very much for bringing this matter to our attention.

Aloha, and may the Almighty be with you and yours always.

Sincerely,

JOHN A. BURNS.

STATE OF WISCONSIN,
OFFICE OF THE GOVERNOR,
Madison, Wis., July 27, 1972.

Re Amendment No. 1 to S. 1177.

Hon. LEE METCALF,
U.S. Senator,
Senate Office Building,
Washington, D.C.

DEAR SENATOR METCALF: I have examined your proposed amendment to S. 1177 with a great deal of interest. It is my personal feeling that your suggested addition to the Consumer Protection Agency bill would be of great benefit to the citizens of the State of Wisconsin.

I have asked the Wisconsin Council for Consumer Affairs to examine the question more fully and to take appropriate action. In addition, I have requested that they advise you and the other members of Senate and House Committees on Government Operations of their position.

Thank you for your efforts on behalf of consumers and State government.

Sincerely,

PATRICK J. LUCEY, *Governor.*

STATE OF WASHINGTON,
OFFICE OF THE GOVERNOR,
Olympia, July 19, 1972.

Hon. LEE METCALF,
U.S. Senate,
427 Old Senate Office Building,
Washington, D.C.

DEAR SENATOR METCALF: Thank you for your letter of July 7th and for your invitation to comment on your attached amendment to S. 1177, the Consumer Protection Agency bill.

While I recognize that there are reasonable grounds to be concerned regarding the scope of any Federal agency's authorization to intervene in state or local agency or court proceedings, I believe that, within the context of the present bill, your amendment No. 1 is sufficiently circumscribed and defined to be acceptable and is so directed as to provide consumers with a potentially useful advocative voice. Even so, the intervention of the administrator will not be above

challenge in so far as his intervention is based upon the *substantial* effect of the proceeding on the interests of consumers.

Given these considerations, I do not believe that the authority to intervene is likely to be abused. And particularly to those states in which state and local consumer protection mechanisms are relatively weak, such authority should be a positive asset to the interests of consumers.

Again thank you for your letter and for your consideration in providing me the material on the Consumer Protection Agency bill. I appreciate the opportunity to comment on your amendment.

Sincerely,

DANIEL J. EVANS, *Governor.*

WYOMING,
EXECUTIVE DEPARTMENT,
Cheyenne, July 11, 1972.

Hon. LEE METCALF,
U.S. Senator,
Committee on Government Operations,
Washington, D.C.

DEAR SENATOR METCALF: Thank you for your letter of July 7, 1972, relative to S. 1177, the Consumer Protection Agency bill.

It appears that your amendment to S. 1177 would be beneficial to Wyoming's consumers and it also appears to have the safeguards which would prevent the filing of lawsuits in state courts by a federal agency where there was no legitimate federal interest.

Thank you for furnishing me with this information.

With best wishes, I am

Sincerely,

STAN HATHAWAY.

STATE OF ARKANSAS,
OFFICE OF THE GOVERNOR,
Little Rock, August 14, 1972.

Re S. 1177, Consumer protection agency bill.

Hon. LEE METCALF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR METCALF: Your enclosure of the Consumer Protection Agency Bill and your proposed amendment to the bill are of great interest to me. I am a strong proponent of consumer protection and appreciate your efforts in this area.

Arkansas has recently implemented a Consumer Protection Agency of its own. I am confident that this state agency will continue to improve and expand as time passes, and consequently I plan to direct my attention toward improving it.

Thank you for sharing your views with me on this important matter. I will watch with great interest the progress of S. 1177.

Kindest regards.

Sincerely,

DALE BUMPERS.

THE STATE OF NEVADA,
EXECUTIVE CHAMBER,
Carson City, Nev., July 27, 1972.

Senator LEE METCALF,
U.S. Senate,
Washington, D.C.

DEAR SENATOR METCALF: Thank you for giving me the opportunity to comment on your amendment to S. 1177, which would impose certain conditions upon the intervention of the proposed Consumer Protection Agency into State proceedings.

While your amendment clarifies wording in Paragraph 203(g), I would suggest that any federal intervention should be within the accepted limits of federal jurisdiction. Therefore, Paragraph 203(g) might be further amended to the effect that the administrator must determine not only that, "the result of such proceeding may substantially affect the interests of consumers", but also that, "there are involved matters otherwise within the scope of federal authority".

I believe this suggested change is clearly consistent with the remainder of S. 1177 which clearly recognizes the need for effective consumer action at all levels of government. This change also frees the bill from objections by those in Congress who, although willing to act on behalf of the consumer, are not willing to disturb the historically established division of authority between federal and state governments in an area as broad as consumerism.

I hope my comments will be of assistance to you and your colleagues in your efforts to pass this legislation.

Sincerely,

MIKE O'CALLAGHAN,
Governor of Nevada.

STATE OF KANSAS,
OFFICE OF THE GOVERNOR,
STATE CAPITOL BUILDING,
Topeka, Kans., September 7, 1972.

Hon. LEE METCALF,
U.S. Senator,
Washington, D.C.

DEAR SENATOR METCALF: Thank you for your letter concerning your amendment to the Consumer Protection Agency bill. I am in favor of your amendment because I can foresee situations which would require affirmative action on the part of the Governor in order to protect the consumers of his state.

Thank you again for keeping me informed of this pending legislation and I want to wish you success with your amendment.

With every good wish.

Yours sincerely,

ROBERT DOCKING,
Governor of Kansas.

STATE OF NORTH DAKOTA,
EXECUTIVE OFFICE,
Bismarck, July 17, 1972.

Hon. LEE METCALF,
U.S. Senate, Washington, D.C.

DEAR SENATOR METCALF: I have reviewed the proposed Amendment No. 1 to S. 1177 (consumer protection legislation) and find that it would make consumer protection stronger at the state and local level.

We always appreciate the strengthening of state and local government within the federal system. I believe your amendment contributes to this goal.

Sincerely yours,

WILLIAM L. GUY, *Governor.*

STATE OF MONTANA,
OFFICE OF THE GOVERNOR,
Helena, July 20, 1972.

Hon. JOHN L. MCCLELLAN,
Chairman, Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: I wish to express my support for Senator Metcalf's Amendment No. 1 for S. 1177 (Consumer Protection Legislation).

I believe this amendment to be a relevant and necessary clause in order to effect absolute cooperation between the state and federal governments in carrying out the intended goals of S. 1177.

In my judgment, S. 1177 is very worthwhile and badly needed legislation and I encourage you and your committee to do your utmost to insure the passage of S. 1177 along with Senator Metcalf's amendment.

Best regards.

Sincerely,

FORREST H. ANDERSON, *Governor.*

STATE OF SOUTH CAROLINA,
OFFICE OF THE GOVERNOR,
Columbia, July 19, 1972.

Hon. LEE METCALF,
427 Old Senate Office Building,
Washington, D.C.

DEAR SENATOR METCALF: Pursuant to my letter of July 12, I have had the opportunity of evaluating your amendment to the Consumer Protection Agency bill and I find it to be quite meritorious.

I am particularly pleased by the inclusion of provisions which would strengthen the role of the states in dealing with problems relating to consumer protection. As one of the first acts of my administration, I created the Office of Citizen Service, empowered to deal with any type of problem which might be brought to my attention by the public in general. It has been our experience during the eighteen months of operation of this office that a substantial number of inquiries fall into the area of consumerism. For that reason, I now have under consideration the possibility of strengthening our consumer assistance service, and I will certainly support any legislation at the national level which would be compatible with these efforts.

Thank you for your interest.

Sincerely,

JOHN C. WEST.

STATE OF CALIFORNIA,
GOVERNOR'S OFFICE,
Sacramento, August 8, 1972.

Hon. LEE METCALF,
Member of the Senate,
Washington, D.C.

DEAR SENATOR METCALF: Thank you for your recent letter concerning your proposed amendments to S. 1177, the Consumer Protection Agency bill.

Frankly, I find the House-passed version of this legislation, HR 10835, more in accordance with the needs of consumers and compatible with our State goals. For example, HR 10835 gives the Federal Advocate amicus curiae rights with respect to state due process proceedings without specifically granting certain rights and privileges that would set undesirable precedents. Your amendments would have the effect of permitting the Federal Advocate more powers to enter into the governmental activities of states than might be necessary or desirable.

You and your colleagues are to be congratulated for taking an interest in legislation of this nature. However, I would hope that Congress carefully considers the fact that the delicate relations between federal and state agencies are already being stressed to the utmost. Furthermore, I think a new venture of this kind needs all of the recognition it can receive with respect to approaching mutual problems in a team fashion rather than permitting an overriding power to accrue to the federal team player.

Sincerely,

RONALD REAGAN, *Governor.*

Senator ALLEN. Mr. Statler.

Mr. STATLER. No further questions.

Senator ALLEN. Thank you very much, gentlemen.

[Whereupon, at 1:05 p.m. the subcommittee recessed subject to the call of the Chair.]

AFTERNOON SESSION

Senator ALLEN. Mr. Seevers, I apologize for being late. I was interested in matters on the floor. I was delayed a few minutes.

I appreciate you coming before the subcommittee and I appreciate your intelligence in the order of calling the witnesses. We appreciate you being here so far as your testimony and you may proceed in any way you see fit.

TESTIMONY OF GARY L. SEEVERS, COUNCIL OF ECONOMIC ADVISERS

Mr. SEEVERS. Thank you, Senator. I am happy to be here. I am glad I turned out to be a budget deferral instead of a budget recision.

I would characterize mine as a medium-sized statement, and I think I will go through it. It will take about 10 minutes.

Senator ALLEN. Go ahead.

Mr. SEEVERS. Mr. Chairman, it is a great pleasure to appear before you today to comment on S. 4145, a bill to establish a National Commission on Regulatory Reform. This effort would involve the Congress as well as the executive branch, and I note with approval that the Joint Economic Committee recommended a similar undertaking in its interim report published last September.[1]

For many years, the Council of Economic Advisers, through its annual reports and by other means, has highlighted the adverse impact that regulation has on the economy and has emphasized the need for regulatory reform. Consequently, we wholeheartedly endorse the President's proposal to establish a commission whose mandate will be to make detailed review of the problem and to chart the future course for regulatory reform.

Before proceeding further, I want to address a question that you may have about how the proposal to establish this Commission relates to the administration's ongoing effort to obtain regulatory changes in particular areas, such as transportation. Some have suggested that by making this proposal, the President intended to shift this effort into neutral and that they believe all proposals to obtain regulatory reform should therefore be held in abeyance pending the report of the Commission.

Let me assure you that this was not the President's purpose. In several areas, the need is so clear and the evidence is so overwhelming that no further study is required in my judgment. Furthermore, the public cannot and should not be asked to shoulder the cost of inefficiency any longer than is absolutely necessary.

For example, the administration does not propose to relax in its efforts to obtain legislation aimed at removing the heavy burden of excessive regulation from the railroad industry so that this sector can begin the long-overdue task of restoring its economic health. Likewise, we intend to introduce a bill aimed at reforming motor carrier regulation. The inefficiencies embodied in the current system

[1] Joint Economic Committee, Interim Report: An Action Program To Reduce Inflation and Restore Economic Growth, 93d Congress, 2d sess. (Washington: U.S. Government Printing Office, Sept. 21, 1974), pp. 10-12.

of trucking regulations are unmistakable. They contribute to inflationary pressures and result in a waste of scarce fuel.[1]

This point alone demands that we move ahead with reform as swiftly as possible.

There are likely to be other areas where the case for reform is so strong that we should not ask the public to bear the associated costs while they wait for the Commission to conclude its work. The administration intends to continue its work. The administration intends to continue its efforts to identify such areas and work toward reform.

Along these lines, as I'm sure you are aware the President has directed the Council on Wage and Price Stability to investigate Government actions of a regulatory nature which tend to raise costs and impede competition, and to make recommendations for needed changes. Dr. George Eads, who is a specialist in this area, will be in charge of this effort.

Mr. TURNER. Is that in the area of transportation that you are referring to?

Mr. SEEVERS. Well, no, the Council on Wage and Price Stability will be investigating all aspects of restrictive practices and Dr. Eads is a specialist in a number of areas, including transportation.

Even though the administration will continue its efforts toward regulatory reform in certain areas, there are many other aspects of regulation that warrant thorough review by the proposed Commission.

The Commission can serve a useful role in proposing initiatives where problems have been identified but where the best strategy for implementation is uncertain. For example, it is clear that some form of competition is possible in areas of telecommunications previously considered to be "natural monopolies." However, it is also clear that the strategy chosen with regard to competition in this area may have a major impact upon the cost and quality of basic telephone service. This regulatory problem is aggravated by the fragmentation of regulatory jurisdictions between the Federal Communications Commission and the State public utility commissions. The proposed National Commission on Regulatory Reform can provide valuable service by focusing on this problem, by sorting out the various options open to the Nation, and by evaluating their relative costs and benefits.

The Commission can perform another valuable service by focusing on regulation-related questions where either knowledge is sparse or where the issues are very complex. For example, in the area of State regulatory activities, their impact on efficiency and their interaction with Federal regulatory activities needs further examination. And on this topic I support some recent efforts by the Justice Department and the Federal Trade Commission to investigate the economic costs of occupational licensure and other such State and local regulations.

During the last decade or so, we have learned much about regulation and its effects on the economy. But our knowledge is by no means

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[1] For example, in a recent study based on a sample consisting of over 270,000 observations, Edward Miller found that because of ICC regulation, private trucks (which are limited to shipments of the owner's business and may not take on other traffic) experienced load factors lower than those experienced by the ICC-regulated, for-hire carriers. As an example, Miller concluded that private tractor-trailer combinations return empty 62.4 percent of the time versus 38 percent for ICC-regulated common carriers. (Others have pointed out that ICC restrictions on common carriers result in their load factors' being much lower than would be the case under free competition.) See Edward Miller, "Effects of Regulation on Truck Utilization," Tranportation Journal (fall 1973) pp. 5-14.

complete. The proposed Commission can make a major contribution by crystalizing what we do know, identifying promising areas for change, and highlighting other areas where more knowledge is necessary before concrete recommendations are made.

Most of the rest of my testimony discusses regulatory problems in the transportation area, and rather than reading that I think I would like to just summarize it.

Senator ALLEN. Your full statement will go in the record.

[The prepared statement of Mr. Seevers follows:]

PREPARED STATEMENT OF GARY L. SEEVERS, MEMBER, COUNCIL OF ECONOMIC ADVISERS, EXECUTIVE OFFICE OF THE PRESIDENT

Mr. Chairman, members of the committee, it gives me great pleasure to appear before you today to comment on S. 4145, a bill to establish a National Commission on Regulatory Reform. This effort would involve the Congress as well as the Executive branch, and I note with approval that the Joint Economic Committee recommended a similar undertaking in its interim report published last September.[1]

For many years, the Council of Economic Advisers, through its *Annual Reports* and by other means, has highlighted the adverse impact that regulation has on the economy and has emphasized the need for regulatory reform. Consequently, we wholeheartedly endorse the President's proposal to establish a Commission whose mandate will be to make a detailed review of the problem and to chart the future course for regulatory reform.

Before proceeding further, I want to address a question that some of you may have about how the proposal to establish this Commission relates to the Administration's ongoing effort to obtain regulatory changes in particular areas, such as transportation. Some have suggested that by making this proposal, the President intended to shift this effort into "neutral" and that they believe all proposals to obtain regulatory reform should be held in abeyance pending the report of the Commission.

Let me assure you that this was not the President's purpose. In several areas, the need is so clear and the evidence is so overwhelming that no further study is required. Furthermore, the public cannot and should not be asked to shoulder the cost of inefficiency any longer than is absolutely necessary.

For example, the Administration does not propose to relax one bit in its efforts to obtain legislation aimed at removing the heavy burden of excessive regulation from the railroad industry so that this sector can begin the long-overdue task of restoring its economic health. Likewise, the Administration intends to introduce a bill aimed at reforming motor carrier regulation. The inefficiencies embodied in the current system of trucking regulation are unmistakable. They contribute to inflationary pressures and result in a waste of scarce fuel.[2] This latter point alone demands that we move ahead with reform as swiftly as is possible.

There are likely to be other areas where the case for reform is so strong that we should not ask the public to bear the associated costs while they wait for the Commission to conclude its work. The Administration intends to continue its efforts to identify such areas and work toward reform.

Along these lines, the President has directed the Council on Wage and Price Stability to investigate government actions of a regulatory nature which tend to raise costs and impede competition, and to make recommendations for needed changes. The Council now has an Assistant Director for Government Operations and Research, Dr. George Eads, who will be responsible for this undertaking.

Even though the Administration will continue its efforts toward regulatory reform in certain areas, there are many other aspects of regulation that warrant thorough review by the proposed Commission.

The Commission can serve a useful role in proposing initiatives where problems have been identified but where the best strategy for implementation is uncertain.

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[1] Joint Economic Committee, Interim Report: An Action Program to Reduce Inflation and Restore Economic Growth, 93rd Congress, 2d Session (Washington: U.S. Government Printing Office, September 21, 1974), pp. 10-12.

[2] For example, in a recent study based on a sample consisting of over 270,000 observations, Edward Miller found that because of ICC regulation, private trucks (which are limited to shipments of the owner's business and may not take on other traffic) experience load factors lower than those experienced by the ICC-regulated, for-hire carriers. As an example, Miller concluded that private tractor-trailer combinations return empty 62.4 percent of the time versus 38 percent for ICC-regulated common carriers. [Others have pointed out that ICC restrictions on common carriers result in *their* load factors being much lower than would be the case under free competition.] See Edward Miller, "Effects of Regulation on Truck Utilization," Transportation Journal (fall 1973), pp. 5-14.

For example, it is increasingly clear that some form of competiton is possible in areas of telecommunications previously considered to be "natural monopolies." However, it is also clear that the strategy chosen with regard to competiton in this area may have a major impact upon the cost and quality of basic telephone service. This regulatory problem is aggravated by the fragmentation of regulatory jurisdictions between the Federal Communications Commission and the State Public Utility Commissions. The proposed National Commission on Regulatory Reform can perform a valuable service by focusing on this problem, by sorting out the various options open to the Nation, and by evaluating their relative costs and benefits.

The Commission can perform a valuable service by focusing on regulation-related questions where either knowledge is sparse or where the issues are complex. For example, in the area of state regulatory activities, their impact on efficiency and their interaction with Federal regulatory activities needs further examination. And on this topic I support some recent efforts by the Justice Department and the Federal Trade Commission to investigate the economic costs of occupational licensure and other such State and local regulations.

During the last decade or so, we have learned much about regulation and its effects on the economy. But our knowledge is by no means complete. The proposed National Commission on Regulatory Reform can make a major contribution by crystalizing what we do know, identifying promising areas for change, and highlighting other areas where more knowledge is necessary before concrete recommendations are made.

In the time remaining, I would like to discuss the nature of regulation and its economic costs. Since I feel the greatest inefficiencies lie in the area of transportation, I shall focus on that sector.

Regulation, as practiced today by the independent regulatory agencies, serves largely to protect the interests of the producer, not the consumer. This is especially true in those industries where the regulator is interposed between producers and consumers in what otherwise would be a competitive market. In such regulated "competitive" industries the regulator maintains strong barriers to the entry of new firms which propose to provide better service and/or to lower prices. The regulator also maintains strong sanctions against pricecutting and service innovations by those already in the industry. Whatever the reason for such activity, the net result is to protect the economic health of the overall industry at the expense of consumers and those producers which are more efficient. In such situations the consumer would be much better "protected" by greater reliance on market incentives to organize economic activity, and more efficient firms would also find new opportunities, unencumbered by artificial restraints.

It should come as no surprise that regulation serves principally the producer, not the consumer. There is considerable evidence that regulation was initially brought on and is now maintained by those it is meant to regulate.[3] For example, many argue that the Interstate Commerce Commission was established not so much to protect shippers as to enforce railroad cartel rate-making.[4] Likewise, regulation of the airlines was established not so much to protect the traveller but to satisfy the industry and to "rationalize" an inefficient scheme of government mail subsidy.[5] In short, regulation tends to be producer-oriented and anti-consumer.

To test this proposition, we could ask representatives of the regulated industries whether they would like to have regulation abolished. If, as some would argue, regulation is constraining the economic power of the producer for the benefit of the consumer, then one might expect the industry to be in favor of dismantling regulation. But I am confident that if we asked this question the answer would be that regulation is essential to the industry's prosperity. With few exceptions those under regulation would object to less regulation, and especially to proposals for complete deregulation.

It has been argued that economic regulation is necessary in order to maintain safety of operations, particularly in transportation. However, a study made by the U.S. Department of Transportation shows that there is no statistical difference between the safety records of regulated truckers and those of unregulated truckers.[6] Moreover, I understand that the Interstate Commerce Commission has never

[3] See, for example, George J. Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science* (spring 1971), pp. 3–21.

[4] See, for example, Paul W. MacAvoy, *The Economic Effects of Regulation: The Trunk-Line Railroad Cartels and the Interstate Commerce Commission before 1900* (Cambridge: The MIT Press, 1965.)

[5] See, for example, Richard E. Caves, *Air Transport and Its Regulators: An Industry Study* (Cambridge: Harvard University Press, 1962), Part II.

[6] See *Report of Controlled Sampling Survey from Roadside Inspections on Units of Property Motor Carriers* (Washington: Bureau of Motor Carrier Safety, Federal Highway Administration, U.S. Department of Transportation, December 1971.)

withdrawn the operating certificate of an unsafe operator—despite numerous documented violations—so it would appear that this is an empty threat.

In the case of aviation, it is maintained that high profits mean good safety records and that low profits lead to unsafe operations, as carriers "economize" on safety. Let me relate to you an interesting result which my staff obtained when asked to look into this issue. For the period 1939 through 1953, over which there were sufficient variations to make a test, they found that fatality rates were actually *positively* related to industry profit rates.[7] That is, higher fatality rates were associated with higher profits, not lower profits. Of course, as one might anticipate, the effect of profits on fatality rates were not statistically significant but it does serve to point out that safety does not need the protection of economic regulation.

As has been widely reported by a great many economists and other independent researchers, economic regulation leads to numerous inefficiencies and resource misallocations. Since researchers use different techniques, different data bases, and different time periods, their estimates of regulation-induced costs tend to vary. But one thing is certain: the inefficiency costs of regulation are indeed significant.

In a recent study of railroad productivity sponsored jointly by the National Commission on Productivity and the Council of Economic Advisers, a task force of outstanding transportation authorities reported that ICC regulation imposes large costs on the economy.[8] They noted, for example Professor Moore's estimates ranging from $3.8 billion per year up to $8.8 billion, with a best estimate of $5.6 billion.[9] Let me emphasize: these are not excess costs that are borne by consumers to benefit the profits of the industry. These are costs that society pays in the form of wasted resources. In other words, they are a pure eceonomic loss that makes no one better off.

In the case of the airlines, one recent study reports that for the year 1969, domestic air passengers paid "excess fares" ranging between $366 million and $538 million, for which they received service quality improvements valued at between $118 million and $182 million. Thus, the difference, ranging between $248 million and $356 million, represents another dead-weight loss to society.[10]

I think the point is clear that regulation is costly, and, as a general rule, its costs to society far exceed the benefits it may bestow on the industry it regulates.

Now the costs I have just described are primarily allocative efficiency costs. Regulation also contributes to maintaining high industry costs. It does this in two ways. First, it protects members of the regulated-industry from new competition. The history of Interstate Commerce Commission (ICC) and Civil Aeronautics Board (CAB) actions in preventing entry in order to protect incumbent carriers attests to the severity of this effect. Various studies report that there would be dramatic decreases in industry costs and increases in productivity if free competition in the market place were to replace present government regulation.[11]

Regulation may also result in inflated costs when subsidy is present. Let me illustrate this point with an example taken from the files of the CAB. As you know, the CAB regulates and subsidizes the local service carriers. A recent study suggests that such subsidy is ineffective and inefficient.[12] On the other hand, the "commuter" airlines escape CAB regulation by flying aircraft with less than 7,500 pounds net load, outfitted with 30 seats or less.

In 1973 Texas International Airways, a local service carrier, applied to the CAB to delete service at College Station, Texas. Reason? Texas International was losing its market to a small College Station-based commuter, Davis Airlines. Both were offering service to Dallas and to Houston. Both charged $27 to Dallas,

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[7] Data sources: U.S. Civil Aeronautics Board, *Handbook of Airline Statistics, 1971 Edition* (Washington: U.S. Government Printing Office, 1972), p. 554, and Caves, ibid. p. 392.

[8] John R. Meyer et al. *Improving Railroad Productivity: Final Report* (Washington: National Commission on Productivity and Council of Economic Advisers, 1973.) Chapter VI of that report, which describes some of the costs of ICC regulation, is included as an appendix to this testimony.

[9] Thomas Gale Moore, "The Feasibility of Deregulating Surface Freight Transportation," in Almarin Phillips (ed.), *Competition and Regulation* (Washington: The Brookings Institution, forthcoming 1975), Table 2.

[10] See George W. Douglas and James C. Miller III, *Economic Regulation of Domestic Air Transport:* Theory and Policy (Washington: The Brookings Institution, 1974), p. 172.

[11] See, for example, James Sloss, "Regulation of Motor Freight Transportation: A Quantitative Evaluation of Policy," *Bell Journal of Economics and Management Science* (Autumn 1970), pp. 327-66; Thomas Gale Moore, *Freight Transportation Regulation: Surface Freight and the Interstate Commerce Commission* (Washington: American Enterprise Institute for Public Policy Research, 1972); William A. Jordan, *Airline Regulation in America: Effects and Imperfections* (Baltimore: Johns Hopkins Press, 1970); and Theodore E. Keeler, "Airline Regulation and Market Performance," *Bell Journal of Economics and Management Science* (Autumn 1972), pp. 399-424.

[12] See George C. Eads, *The Local Service Airline Experiment* (Washington: The Brookings Institution, 1972).

while Davis' $20 rate to Houston was a dollar less than Texas International's. But while Davis was making money at these rates, the Board was forced to conclude that Texas International was losing $41 per enplaned passenger.[13] In short, while Davis' cost per passenger was in the neighborhood of $20–$27, Texas International's cost was in the neighborhood of $42–$68. Fortunately, in this instance, the CAB approved Texas International's deletion of College Station service.

Regulation also serves to impede innovation and technological change. Most of us are familiar with the celebrated "Big John" hopper car case. But that was no isolated instance. I can give you a much more recent example. Three companies have proposed entering "Auto-Bus" service in the Northeast.[14] In a service similar to that of Auto-Train, they would transport vacationers' cars to Florida on truck trailers and would carry the traveller on a bus. Now I do not know how important this innovation might be, potentially, but that is not the point. Although one of the companies[15] has been granted permission to operate, its authorization is very limited. The other two cases are now pending ICC action, but the proponents are encountering strong opposition from the two major bus lines, neither of which provides such a service. How long will these cases last? How much money will these entrepreneurs be forced to spend in combatting these regulated companies? More importantly, when will the consumer realize the full potential of this new opportunity?

To sum up, regulation imposes enormous costs on the economy. Accordingly, I think regulation should be reformed, and where possible eliminated. However, in all candor, I am not all that optimistic. The reason is that regulation is strongly supported by a highly organized constituency that has been most effective in blocking reform initiatives. Those who would benefit from regulatory reform—the consuming public primarily—are much less organized and are less efficient in expressing their views. Notably, a recent nationwide survey of transportation and distribution managers reported that over two-thirds of those responding maintain that ICC regulation discourages efficiency in rail and truck transportation. When asked, 87 percent expressed a preference for less regulation. However, 57 percent expected *more* regulation rather than less.[16]

Although I believe the process of regulatory reform will be difficult, it is essential that the Nation begin to take a more critical look at the benefits relative to the significant economic costs of current regulation. The President's proposed Commission can make a major contribution in meeting this need.

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[13] See CAB Order 73-4-49 (April 10, 1973).
[14] Central Florida Coach Lines (ICC MC #138297), Ken L. Pollack Auto Bus, Inc. (ICC MC #138798), and Auto-Bus Corp. (ICC MC #139677).
[15] Central Florida Coach Lines.
[16] "Survey: The Regulators," *Transportation Distribution and Management* (March/April 1974), p. 39.

APPENDIX

[from John R. Meyer et al., Improving Railroad Productivity: Final Report (Washington: National Commission on Productivity and Council of Economic Advisers, 1973)]

Chapter VI

Regulatory Modernization

Whatever benefits regulation of the transportation industries may bestow, these are almost certainly heavily outweighed by the costs. Various features of regulation cause a massive amount of waste--in such forms as inefficiency and idle resources--throughout the transport industry. Such waste is presently estimated to cost shippers and consumers in the range of $4-10 billion per year. Detailed regulatory controls have also constrained railroad managements from adapting to changing markets and, over time, have dulled initiative and the incentive to innovate within the industry. Regulatory modernization--including in particular substantially greater latitude to adjust freight rates and freer entry into for-hire trucking--have been tried in several countries (including Canada, Great Britain, and Australia) and in isolated instances within the United States. The relaxation of regulatory controls in these cases has not led to chaos as its opponents predicted, but has tended to heighten competition, to improve transport service and to reduce costs by eliminating idleness and inefficiency in transport.

I. Historical Origins of Regulation

American surface freight transportation came under legal regulation with the establishment of the Interstate Commerce Commission in 1887. The Commission, which was once thought to have been established solely to restrain the monopolistic practices of an inherently non-competitive industry, was also established in part to stabilize railroad cartels that had proved to be unstable.[1] The instability manifested itself in

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[1] Gabriel Kolko, Railroads and Regulation 1877-1916 (Princeton: Princeton University Press, 1965); Paul W. MacAvoy, The Economic Effects of Regulation (Cambridge: M.I.T. Press, 1965); George W. Hilton, "The Consistency of the Interstate Commerce Act," The Journal of Law & Economics, IX, 1966, pp. 87-113.

price wars in the 1870s and 1880s which were considered intolerable by railroads, shippers, and Congress generally. Indeed, the common practice of American railroads in the years immediately after the Civil War was to price collusively and to engage in pooling either of traffic or profits. The purpose was to establish tariffs based on the principle of monopolistic price discrimination (with respect to commodities), which is to say, charging as much as the traffic would bear. There was enough monopoly power of railroads at individual points that they were widely able to do this with ease at points which they served singly; to do so between points which they served in rivalry with one another, they were forced to act collusively, usually through various pooling arrangements.

The railroads in 1887 were characterized by excessive investment, taking the form both of redundant mainlines duplicating one another between major points and of overly-extended branch lines. What railroads originated was not pooled; only what they received from connections was subject to pooling. Accordingly, they had an incentive to originate as much as possible relative to what they received from connections. For this reason the railroads which owned the most conspicuous redundant mainlines, as for example between Chicago and Omaha, were motivated to extend branch lines into agricultural areas of only marginal potential as revenue producers.

The proliferation of railroads resulted in each railroad between major points having a successively lower percentage quota in the pool; the discrepancy between the marginal cost of carriage and the rate became successively greater and the incentive to break out of the collusion into what was called a rate war also became successively greater. The industry, in general, recognized that the instability of the pooling arrangements was

unavoidable within the framework of the common law and that some Federal enforcement or stabilization was required.

The Interstate Commerce Commission was established in response to these and other pressures, from shippers as well as the carriers. The Interstate Commerce Act of 1887 provided for publication and adherence to published tariffs, required notice of increases in fares, and greatly curtailed the practice of charging more for a short haul than for a longer haul. The compromise between the House and Senate versions of the bill resulted in a prohibition of pooling, which was inconsistent with the rest of the statute. Thus, the regulation established was a non-pooling cartelization.[2] Many of the most undesirable aspects of American freight transport regulation are a consequence of the non-pooling nature of the cartel.

The original statute of 1887 was an inadequate one in a variety of respects but it was amended between 1903 and 1910 in a series of three enactments to the point that the Interstate Commerce Commission was made effective by the eve of World War I. Thus, by 1914 the Interstate Commerce Commission, aided and abetted by a declining growth rate and more stable conditions in the industry, had more or less succeeded in stabilizing the railroad cartels; by that time they were known, as at present, as rate bureaus. Specifically, a set of administered rates was in force in the railroad industry by the eve of World War I. This rate structure was

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[2] I.e., the cartelizing body is unable to issue quotas to the members of the cartel, nor are the members, with minor exceptions allowed to issue quotas to one another privately.

generally intended to set prices in direct proportion to the ratio of value to weight of individual commodities; this, in turn, provided an incentive to the economy to develop transport alternatives for moving cargo which was high in value relative to weight, or which had to be moved in a hurry, or which was perishable or subject to breakage. The chief device which the economy adopted for this purpose was, of course, the truck, which had developed step by step with the automobile.

The railroads reached their peak in mileage and employment about 1915-20 and began to decline in those respects, and most others, thereafter. That decline has not been monotonic but, rather, subject to severe cyclical fluctuations ever since, declining either absolutely or relative to other forms of transportation for well over 50 years. Congress responded to this decline of the railroads by extending regulation in 1935 to trucks, in 1940 to water carriers, and in 1942 to freight forwarders. The consequence of this was that the Interstate Commerce Commission increasingly found among its principal activities the necessity of allocating traffic among the different modes. This, for absence of power to issue quotas, it did through exercise of its powers over rates. When the Interstate Commerce Commission is confronted by a controversy between carriers of two or all three of the major modes which it regulates, the Commission typically sets rates at levels which will approximately compensate for the difference in the quality of the service.[3] That is, if railroads and truck lines are contending for traffic, the Commission

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[3]Ernest W. Williams, The Regulation of Rail-Motor Rate Competition (New York: Harpers, 1958), pp. 213-214.

will set the rates so the truck rates are high enough relative to railroad rates that some shippers will prefer the higher-quality service at a higher rate--that is, truck--and some will prefer the lower-quality service at a lower rate--that is, rail. The consequences are extremely undesirable. To begin, the price system is prevented from allocating traffic among the modes on the basis of their speed, damage experience, and other characteristics; this, in turn, means that the various modes cannot achieve their comparative advantage for shipments of various distances, perishability, and damage proneness. The policy also causes a retention of railroad facilities to serve traffic for which the rails have lost their comparative advantage, contributing thereby to underutilization of capital.

The Interstate Commerce Commission implements its decision-making in cases of this character with calculations concerning cost which have been subject to fairly universal denunciation.[4] The Commission, in comparing the costs of regulated carriers, tends to do so on the basis of fully distributed costs, which is to say, the variable costs attributed to the movement plus some prorated share of fixed costs. Such rates are said by the ICC to be fully compensatory. This method of rate comparison is usually felt to work to the disadvantage of the railroads, owing to their higher percentage of fixed costs relative to their rivals. When regulated carriers are contending for traffic with unregulated carriers, the Commission is in general willing to approve rates which merely cover

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[4]See, for example, Meyer, Peck, Stenason and Zwick, The Economics of Competition in the Transportation Industries (Cambridge: Harvard University Press, 1959), Appendix A.

variable costs; such rates in the Commission's lexicon are "reasonably compensatory" as distinct from "fully compensatory." The railroads were of the opinion that they could re-attract traffic from rival carriers, especially from barge lines, if they were allowed to go below levels of fully distributed cost in rates for bulk commodities. They claimed that the ICC was engaging in a practice known as "umbrella rate-making," by which they meant holding up the level of railroad rates to shield the traffic of their rivals, mainly barge lines but occasionally truck lines as well.

"Umbrella ratemaking" is one of several policies of the Commission that prevent prices from allocating traffic among carriers in accordance with their comparative advantage. The policy is also one of several which tend to produce idleness in the railroad plant. For example, direct controls over abandonment, initiated in 1920, make abandonment the subject of political resource allocation as well.[5] Similarly, in merger actions, the Commission characteristically attempts to protect weak carriers by securing their sources of interchange traffic, rather than allowing the traffic to be diverted. Thus, the Milwaukee Road was given trackage rights into Portland and Louisville as conditions of the Burlington Northern and Louisville & Nashville-Monon mergers. Currently, the Commission is seeking methods of preserving the Lehigh Valley in the face of the decision of the trustees of the bankrupt carrier to abandon--

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[5] For a more complete discussion of these abandonment difficulties, see Chapter V.

this in spite of the fact that all New York-Buffalo main lines currently operate at an estimated 21% of capacity. Obviously, such policies tend to distribute traffic more widely about the railroad system, increasing the mileage which is barely viable, and reducing the incentives for disinvestment in weak railroads.

Another Commission policy of similar consequences is prohibition of rates by regulated truckers which merely cover the incremental costs of filling otherwise empty backhauls. The Commission's dilemma is that if it allows truckers to initiate rates which merely cover the variable costs of filling up an otherwise empty backhaul, it is allowing something in the nature of a nationwide system of competitive trucking which would erode the existing structure of discriminatory rates. The Commission thus finds itself under the necessity of preventing such rates. It does so without any specific statutory authority; indeed, it has no specific statutory authority for its prohibition of less-than-fully-compensatory rates or for prohibition of rates lower than necessary to meet competition, or for use of fully-distributed costs as the basis for determination of relative costs. It justifies all these policies on the basis of a prohibition of destructive competitive practices found in the most nebulous part of its statutory authority--the National Transportation Policy, a preamble to the Interstate Commerce Act added by the Transportation Act of 1940. This prohibition (on rates which would cover only the variable costs of filling an otherwise empty movement) causes common-carrier truckers to make a large number of empty backhauls.

The empty-backhaul problem is further complicated by exemptions found in the original legislation extending regulation to trucking and barges; specifically all agricultural traffic and private and contract carriers are exempted. This amounts to about two-thirds of trucking and over 90% of barge traffic. The nature of the exemptions from ICC regulations makes it necessary for many exempt and private carriers to incur excessive empty backhauls also. There are some private carriage operators who are able to fill movements in both directions; breweries, for example, may carry empty bottles in a backhaul. Many or most private carriers, however, are not able to make such convenient arrangements. Thus, the roads are cluttered with numerous unnecessary truck movements. Once again regulation tends to cause the idleness and waste of resources. In 1942, as the initial regulation of trucking on the basis of "grandfather rights" neared completion, 40% of motor carriers were limited to one commodity, and 88% to six commodities or less. About 70% were restricted in their rights to serve intermediate points, and 10% had no intermediate authority whatever. Apart from the direct consequence of inducing idleness in trucking, this pattern of partial operating rights had the incidental effect of providing an incentive to merge (in order to broaden operating authorities) in an industry otherwise generally believed to be without significant economies of scale. The issuance of route authorizations upon re-regulation of frozen food movements in 1958 indicates that the pattern of partial authority stemming from "grandfather rights" is substantially unchanged.[6]

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[6]James C. Nelson, "The Effects of Entry Control in Surface Transport," Transportation Economics (New York: National Bureau of Economic Research, Special Conference 17, 1965, p. 390; George W. Hilton, The Transportation Act of 1958 (Bloomington: Indiana University Press, 1969), Chapter 5.

II. The Current Status and Social Costs of Transport Regulation

Today, both trucking and railroading may be characterized as industries operating at about 50% capacity relative to the generally accepted meaning of capacity in manufacturing industry.[7] The costs to society are mainly of two types. First are the direct costs from idleness of resources. The cost of excess capacity in the rail industry is estimated to be between $2.4 billion and $3.8 billion per year (as of 1969).[8] The analogous cost of unused capacity in trucking is estimated to be $1.4 to $1.9 billion per year.[9] In barge operations, restrictions on mixing of regulated and unregulated commodities and a limit of three bulk commodities that may be handled under exemption from ICC regulations result in an underutilization of towboats, the cost of which has not been well quantified.

The second general category of cost to society of the present organization of transportation is the misallocation of traffic among modes. The present organization of intercity transportation favors the use of trucks rather than rail service even on long hauls. The survival of discriminatory rate structures in railroading causes the trucks to be used for movements

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[7]Meyer, Peck, Stenason, and Zwick, The Economics of Competition in the Transportation Industries, p. 409; George W. Hilton, "The Costs to the Economy of the Interstate Commerce Commission," The Economics of Federal Subsidy Programs, Part 6, Transportation Subsidies, Joint Economic Committee, U.S. Congress (1973), p. 713.

[8]Ann F. Friedlaender, "The Social Cost of Regulating the Railroads," American Economic Review, Vol. LXI, 1971, proceedings number 234.

[9]Thomas G. Moore, "The Feasibility of Deregulating Surface Freight Transportation," paper presented at a conference on antitrust in the regulated industries at the Brookings Institution, Washington, D.C., November 1971. The estimates are tentative, subject to change before publication.

which could be made at a lower cost by railroad. One critic of current regulatory practices argues that many freight movements beyond 200 miles could be moved more economically by rail and estimates a cost to society of about $500 million per year from this misallocation.[10] The movements by truck, in addition, are more expensive than they would otherwise be because of empty backhauls, inability to secure full loads, and unnecessary circuity. In still another totally independent study of these same issues, the excess costs (from moving freight overly long distances by truck rather than rail) were estimated to be in a range from $1.0 billion to $2.8 billion per year.[11]

No one to date has estimated the misallocation of freight between railroads and barges. The amount is probably not overly large, as barge rates tend to be substantially lower than rail rates. Though barge movement may be slower, most traffic presently moving by barge is not shipped under great urgency nor prone to damage from exposure.[12]

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[10] Ann F. Friedlaender, The Dilemma of Freight Transport Regulation (Washington, D.C.: The Brookings Institution, 1969), p. 78.

[11] Robert W. Harbeson, "Toward Better Resource Allocation in Transport," The Journal of Law & Economics, Vol. XII, 1969, p. 332.

[12] The railroads have at times acted as though, with present technology, they have a better prospect of re-attracting traffic lost to barges than traffic lost to trucks. This may owe, as it has been argued by some economists, to costing procedures so poor that the carriers do not know the relative costs of what they handle and therefore make erroneous judgments as to what they may reasonably re-attract. It seems more likely, however, that their effort to re-attract barge traffic reflects recognition that railroad inferiority of service relative to trucks is considerable.

An attempt has recently been undertaken to make a net evaluation of the cost to society of ICC regulation.[13] These total costs, as shown in Table VI-1, are placed in a range between $3.8 billion and $8.9 billion. An intermediate estimate, which may be taken as the best single "guess," is $5.6 billion per year. The estimates, incidentally, include nothing for the misallocation of traffic between railroads and barges. Accordingly, if the estimates err, they probably err on the side of understatement. Indeed, simply the idleness in railroad plant and in trucking might justify an estimate almost as high as $5.6 billion. The author of the estimates, recognizing their incomplete character, has suggested that including costs which he was unable to quantify, the actual total excess cost was probably between $4 billion and $10 billion per year.[14]

In sum, the present organization of intercity transportation creates an implicit tax on consumers and shippers of perhaps some $4 to $10 billion per year. The Federal government should attempt to relieve society of this tax. The question necessarily arises whether it is institutionally feasible to do so as distinct from the question whether the political interests which the present organization engenders can be overcome.

III. The Feasibility of Transport Competition

Historically, it has usually been argued that railroads are incapable of competitive organization because of the indivisibility of their rights-of-way. That is to say, it has usually been accepted by economists and

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[13] Moore, op. cit., Table 2, p. 22.

[14] Ibid., pp. 22-23.

Table VI-1

Estimates of the Economic Loss
From ICC Regulation in 1968
($ millions)

Type of Loss	Low	Medium	High
Inefficient use of:			
Common carrier trucks	1,400	1,690	1,890
Private trucks	100	200	1,000
Rails	1,700	2,000	2,400
Water carriers	200	300	300+
Subtotal	3,400	4,190	5,590
Loss from traffic carried by:			
Trucks instead of rails	200	1,100	2,900
Water carriers instead of rails	*	*	*
Loss from traffic not carried	175	300	400
Total estimated	3,775	5,590	8,790

*Not estimated.

Source: Moore, The Feasibility of Deregulating Surface Freight Transportation (Washington, D.C.: Brookings Institution, forthcoming), Table 2, p. 22.

historians that even the minimal investment in grading a right-of-way for a railroad represents such a large fixed cost (which enters into the average cost of railroad operation) that an effort to make railroads operate competitively will be ineffective. That is, the large fixed costs result in average cost being greater than marginal cost at most levels of output. Therefore, if railroads operate competitively, the argument runs, they will tend like other competitive firms to equate marginal cost with price, but this will fail to cover average costs and individual firms will lose money. This argument achieved all but universal acceptance, such that every government thought it necessary to organize railways non-competitively either under state monopolies, or as in the United States, through government-enforced cartelization.

Two questions are involved in the current applicability of this argument: (1) whether it represented an actually correct historical judgment in the 19th century when it was developed; (2) whether changes in the industry since that time have ended such applicability as it may ever have had. Two recent writers have questioned whether the argument was ever appropriate to American railroads. By studying the cost functions of railroads in the 19th century, they have concluded that the industry was in a mature state of cartelization rather than in a condition such as the argument supposes of comprehensive economies of scale.[15] From this one may conclude that a competitive organization of the industry may

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[15]Robert M. Spann and Edward M. Erickson, "The Economics of Railroading: The Beginning of Cartelization and Regulation," The Bell Journal of Economics and Management Science, Vol. I, 1970, pp. 227-244.

have been possible even in the 19th century. Even if these writers are wrong, it now appears that such validity as the argument of the inherently non-competitive nature of railroads (owing to their economies of scale) may have had in the 19th century is no longer applicable. The high fixed costs which the indivisibility of railroad right-of-way created in the 19th century have been scaled down by protracted inflation and by widespread bankruptcies within the industry. The current literature concerning economies of scale of railroads indicates that the economies of scale are minor, no greater than those of heavy manufacturing industry or metal processing of various sorts, or alternatively, that the industry has actual diseconomies of scale in formation of the largest railroads.[16]

The remaining anti-competitive characteristics of the railroad industry appear to derive not from economies of scale but rather from the tradition of a century of non-competitive organization and from the consequences of the present technology of individual cars coupled into trains. Freight cars are necessarily owned by the railroads individually, and by a variety of private car owners. The nature of railroad pricing is integral with this technology: rates are quoted mainly on carload lots; the shipper in most circumstances may specify the route which a car shall travel; divisions of rates are made among railroads on the basis of joint agreements. In half or more of rail freight shipments,

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[16]George H. Borts, "Increasing Returns in the Railway Industry," Journal of Political Economy, Vol. LXII, 1954, pp. 316-333; "Production Relations in the Railway Industry," Econometrica, Vol. XX, 1952, pp. 71-79; "The Estimation of Rail Cost Functions," Ibid., Vol. XXVIII, 1960, pp. 108-131; Zvi Griliches, "Notes on Railroad Cost Studies," Center for Mathematical Studies in Business and Economics, University of Chicago, Report 6918; Kent T. Healy, The Effects of Scale in the Railroad Industry (New Haven: Yale University Press, 1961); Moore, op. cit.

railroads are joint venturers in providing the movement, and must set rates jointly. Doing so may be conceptually distinct from setting rates collusively for shipments on which railroads are rivals to one another, but in the present organization of the industry both are accomplished through rate bureaus. Railroad executives who are eager to retain their antitrust exemption characteristically argue that the two are inseparable.

Thus, in addition to the objections made to the railroading technology of separate cars mentioned elsewhere in this report--the high incidence of damage claims, the low rate of utilization of the equipment, the low rate of return, the waste of an excessive amount of the investment in the center sill so that any car may run at the head of a train--there is the further objection that the technology is integral with the non-competitive organization of the industry.

Given the objections to this technology, there is abundant reason to believe that the market processes would sweep it away, but the present institutional arrangements of car supply protect the technology to some extent from facing a market test. Railroad cars used in interchange are priced, not through a bidding process, but rather through an administrative arrangement known as the Per Diem Agreement. Originally, railroads charged one another for the use of cars on the simplest possible arrangement: whatever railroad had a car on its property at midnight paid the owning railroad a flat fee, undifferentiated by type of car, through a mechanism similar to a clearing house of banks. Currently, the arrangement is somewhat more complicated: the fee is differentiated by type of car and consists of a daily charge plus a mileage component. It is customarily argued

that the mileage charge is too high relative to the daily fee, so that railroads have an incentive to hoard cars of other companies, but inadequate incentive to keep them moving. Further, the per diem charge does not fluctuate in response to changes in demand, seasonally or cyclically, so as to ration supply in the short run. Thus, the pricing of cars contributes to their low rate of utilization. The present arrangement also gives rise to a political demand for a Federal program to provide a boxcar supply large enough for peak demands.

The alternative technology recommended in this report of containerization of all traffic except for bulk cargo is consistent with a competitive organization of the industry. The precise nature of the industry under a competitive framework cannot be stated with absolute assurance, nor should it be expected to be known before market forces reorganize the industry. Presumably, the industry under competition would assume one of two alternative forms. One would result in the railroad companies becoming integrated transportation companies moving merchandise freight mainly in containers by whatever mode was least costly. The other alternative would be to have the railroads move containers for any shipper or any truck operator on a specialized or "wholesaling" basis.

Presumably, some railroads would attempt to become integrated transportation companies; perhaps all would. Whether they would succeed or whether they would simply adopt the specialized function of moving containers for truck lines, private carriers, or indeed for anyone who wished to ship, is something which the market would determine. Existing efforts at integration of transportation functions have been done within the framework of a regulated industry and thus do not provide us with information

on which to make this determination a priori. If integrated transportation companies had some degree of monopoly power, their efforts to exercise it would expand the economic range of trucking. Indeed, freedom of entry into trucking would be a very effective protection against exercise of monopoly power on the part of integrated transportation companies.

IV. The Foreign Experience with De-regulation

Those who receive some degree of benefit from the present organization of American intercity freight transportation are inclined to characterize a competitive organization of the industry as chaos, the law of the jungle, or something else described in pejorative terms. The fact that the comparison is between something which is known and something which is to some degree uncertain gives their views some degree of credibility. Foreign experience with de-regulation, however, provides us information on almost all aspects of how a competitively organized transportation system would behave and perform. Specifically, Canada, Australia, and Great Britain have all switched to a more competitive organization of transportation.

Canada, in the National Transportation Act of 1967, established a partially de-regulated transport system. In pursuit of many of the objectives which underlie this report, the Act of 1967 made a statement of national transportation policy in which the Canadian government sought to establish an economic, efficient, and adequate transportation system to make best use of all the available modes of transportation at lowest cost. These objectives are to be achieved by free competition among modes under the terms of the law; each mode is to bear a fair proportion of the

cost of resources provided at public expense and is to be fairly compensated for services which it is required to provide for the public good. Each mode is to carry traffic at rates which do not unfairly discriminate among shippers and which do not unfairly discourage industrial development. The Canadian Transportation Commission is charged with coordinating and harmonizing the operations of all the carriers engaged in transport by rail, water, air, interprovincial motor transport, and pipeline. The Commission is entrusted with licensing, rate control, and also with administration of subsidies voted to Canadian carriers by Parliament. It is also entrusted with investigation and reporting to Parliament, including economic standards for investment of government funds in transport projects. In addition, the Commission has the power to disallow acquisition of carriers by other carriers and has powers over abandonment of railway branch lines. The Commission inquires into the actual losses of branch lines proposed for abandonment, studies the alternative modes of transport which are available in the area, and considers the feasibility of operation of the line by alternative operators or alternative methods on the part of the railway applying for the abandonment. If the Commission determines that the operation of the line is uneconomic, it sanctions abandonment. If the Commission orders continuance of the line, it authorizes reimbursement of the railway for its actual losses beginning 90 days after the date of application for abandonment.[17]

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[17]Similar considerations apply to the discontinuance of passenger trains in Canada. If the Commission requires continuance of a demonstrably unprofitable passenger train, the Commission authorizes the reimbursement of the company for sums up to 80% of the actual loss, again commencing 90 days after the date of application for discontinuance.

The Act of 1967 is notable for establishing a great deal of rate-making freedom for the Canadian railways, even though the Act continues traditional requirements that the railways publish classifications and tariffs and retains the requirement that rates be just and reasonable and nondiscriminatory among persons. The Act provides that railways are free to set rates within a fairly wide zone of reasonableness; rates are required at minimum to cover the variable cost of shipping, and the maximum is established at 250% of variable costs. A shipper who considers himself captive to rail transport and who is dissatisfied with the quoted rates of the company may apply to the Commission to fix a rate. The Commission will do so by determining the variable cost of the shipment moving at a weight of 30,000 pounds per carload and adding to this 150% of that variable cost. In accepting this fixed rate the shipper is obligated to ship by rail for a period of one year. In a similar provision for shipments weighing less than 5,000 pounds, the Commission may review the tariff to ensure that it does not take advantage of a railway monopoly. It should be obvious that shipments of such a small volume have mainly gone to trucks in Canada, as in the United States and most other highly developed countries.

In general, the experience under the Act is considered satisfactory by the majority of Canadians. The railways have, in general, been pleased with their additional rail ratemaking freedom and also with the opportunity to have the Federal government assume up to 100% of losses on branch lines and 80% of losses on passenger trains. Only a small number of shippers have seen fit to declare themselves captives

of the railway without adequate alternatives, and thus, to request maximum rate regulations.[18] This is consistent with what one would expect on the basis of existing American experience. Maximum rate regulation is not an important part of the American regulatory framework with regard to individual shipper actions. Rather, the most important rate actions are controversies among carriers as to the appropriate level of minimum rates for carriage. Maximum rate regulation is mainly important in determining the size of general rate increases.

Canadian trucking is regulated, if at all, on a provincial level, ranging between provinces from strict to negligible. A study of rates in the various provinces found that rates were lower by about 0.87 cents per ton-mile in the relatively unregulated provinces than in the more strictly regulated.[19]

Australian de-regulation was of a different character. In 1954 the Federal Supreme Court held that the protection of the state-owned railways from rivalry of trucks was unconstitutional, when the truck movements in question were interstate. Australia previously, like many British Commonwealth countries, had pursued a policy of virtual prohibition of intercity trucking for the protection of state railways. (After 1954, the protection of state railways applied only to intrastate movements, which were a minority of all cargo.) This decision immediately gave rise to a competitive, unregulated intercity trucking industry. The unregulated trucking

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[18] On the Act and early experience under it, see H. L. Purdy, Transport Competition and Public Policy in Canada (Vancouver: University of British Columbia Press, 1972).

[19] James Sloss, "Regulation of Motor Freight Transportation: A Quantification Evaluation of Policy," Bell Journal of Economics & Management Science, Vol. I, 1970, p. 347.

industry which came into being proved to be an ordinarily competitive industry characterized by flexibility of rates, adaptability to changes in demand and supply conditions, but not an industry particularly characterized by instability of rates over time. The experience has been considered a favorable one and at present, several Australian states are moving to provide similar de-regulation of intrastate trucking movements.

By about 1958, the Australian trucking industry had stabilized with a fairly large number of major trucking companies providing comprehensive nationwide service, plus a larger number of middle-sized firms providing specialized service on individual routes, and finally a much larger number of small firms providing service locally. Many of these latter are owner-operators of individual trucks, as would be expected in America. The initial impact was, of course, to divert a considerable amount of freight from the state railways, but the railways even in the 1950s had freedom of rate determination. Being newly confronted with a competitive rival, the railways reduced the amount of discrimination in their tariffs and re-attracted the freight which they had lost. The net loss of rail traffic was limited to the years 1954-1956, since which time traffic has climbed steadily. The provision of a nationwide standard gauge rail system, dealing with the famous problem of different gauges in the various Australian states, was prompted by the heightened truck competition. The two forms of transport, rail and truck, have settled into freely competitive relations, with each achieving its comparative advantage for movements of various lengths and different commodities. There has been no significant pressure in Australia to move back to a regulated system. A leading

authority on the Australian experience estimates that de-regulation at the state level will have been completed by 1977 or 1978; thereafter the nation will have an entirely unregulated intercity freight transport system.[20]

The British de-regulation was of a still different character. Britain has a nationwide state railway, a product of nationalization shortly after World War II. Unlike the Australian railways before 1954, British railways were never granted protection from motor carriers. The small average length of British freight movements results in motor carriers having a comparative advantage for the majority of British shipments.

A parliamentary inquiry was begun in 1964 into the regulation of road haulage, and under a Labor government it was concluded that it would be wise to eliminate all regulation of road haulage. This policy was inaugurated in 1968, and Britain has had an unregulated road haulage industry since. Once again, the experience does not confirm expectations of chaos. On the contrary, the number and frequency of bankruptcies in the road-haulage industry has not been changed by the end of regulation. There has been an increase in the number of firms in the industry; much of this increase is the result of conversion from private carriage to common carriage. In general, this represents an effort to fill what were previously empty backhauls.

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[20]Stewart C. Joy, "Unregulated Road Haulage: The Australian Experience," Oxford Economic Papers, N.S., Vol. XVI, 1964, pp. 275-285; testimony of Stewart C. Joy, Transportation Act of 1972, Hearings before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives, 92nd Congress, 2nd Session, on H.R. 11824 (1972), p. 1387.

In Britain, as in Canada and Australia, the change is considered successful and there are negligible political pressures for a return to regulation. Once again de-regulation has prompted a reallocation of traffic between rail and motor carriage in accordance with the comparative advantage of each. British Rail, it should be noted, has increasingly containerized cargo and in particular, it has inaugurated the so-called "Freight-liner" trains which move containers on flatcars of semi-articulated design between distant points such as London and Glasgow overnight. The experience suggests that containerization is consistent with a competitive organization of the industry, and with a realization of the comparative advantages of rival carriers for different traffics.

In America, adoption of a competitive organization of transport would undoubtedly dissipate some monopoly rents. But the experience in other English-speaking countries is such as to indicate that the transitional problems would be no more difficult than the problems involved in de-cartelization of any industry.[21] The lessons of Canada, Australia and Great Britain provide strong evidence that a freer, more competitive organization of American surface freight transportation can reduce or eliminate the tremendous burden, on the order of $4-10 billion per year, that existing regulation places on American consumers and shippers.

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[21]See testimony of Stewart C. Joy and Robert Bandeen, Transportation Act of 1972. Hearings before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives, 92nd Congress, 2nd Session, on H.R. 11824 (1972), pp. 1375-1395.
For additional discussion of the experience with de-regulation abroad see "De-regulation of Surface Freight Transport in Three Commonwealth Countries," a paper prepared for the Task Force on Railroad Productivity by Jeffrey J. McCaig, August 1972.

Mr. SEEVERS. Incidentally, I have appended to my statement another statement which I consider to be a comprehensive one and I would like to ask that be included in the record at the end of my prepared statement.

Senator ALLEN. Without objection, that will be included.[1]

Mr. SEEVERS. There have been quite a few studies of the economic costs in the transportation sector and particularly in the surface sector. I think one of the most recent studies estimates these costs run from $4 to $9 billion. Although I would say in 1974 dollars it would probably be the larger figure, but the point is they run into several billions of dollars.

This morning, Senator, you referred to a witness' statement that these were estimated to be $7 billion. This was Senator Taft. I think he was referring to essentially the same studies I am talking about, those done by Dr. Tom Moore.

Senator ALLEN. Weren't they greatly in excess of real potential saving?

Mr. SEEVERS. I think not, because those costs are of two types, one, economic waste, because regulation prevents the transportation industry from operating at full capacity and in effect because of the regulations the industry is not able to operate at full capacity. That is a pure economic waste. Resources are simply going to waste.

The second major cost included in those $7 billion are costs of putting our resources in the wrong place, or to put it in concrete terms, I think the regulations have caused the trucking industry to get into the wholesaling industry too much and has prevented the railroad industry from getting out of the retail industry.

Senator ALLEN. They had a program on national television here a few weeks ago about a trucker that carried a load a long distance, several hundred miles, and he had opportunities to carry cargo back to the point of origin of his original shipment but he was precluded from doing that by regulations. That is something that ought to be looked into, is it not?

Mr. SEEVERS. Yes, I think that is a leading example. It is one that is easier to understand too.

But this other thing I am talking about, truckers are doing what railroads should be doing and railroads are doing what truckers should be doing. The costs associated with that are significant, too. If you put those two kinds of costs together I think a reasonable estimate is around $7 billion.

Senator ALLEN. I notice in your statement, regulators also maintain strong sanctions against price cutting and service innovations, by those already in the industry, whatever the reasons for such activity the net result is to protect the economic health of the overall industry at the expense of consumers and those producers which are more efficient.

If the purpose has been to protect the overall health of the industry certainly the economic health, certainly the rail carriers by and large is not good. So apparently there has been a failure there.

Second, I don't see how the transportation industry could get by if their revenues were reduced $7 billion per year. I don't see how that would work out. I am not arguing with the fact that I think industry is over regulated. I concede that. What I do question, what

[1] See p. 738.

I am skeptical of if there is any such saving as $7 billion. I think maybe 10 percent of that would be a fine saving.

Mr. SEEVERS. I would say if it is even a billion dollars it is worthwhile.

Senator ALLEN. Of course.

Mr. SEEVERS. The thing to keep in mind is there are a lot of cost reductions that could be made and really the $7 billion would not come out of the profits of the industry. I think we could find that with less regulation the industry would end up being prosperous, more efficient, and that the railroads—I think really their only chance of achieving prosperity is less regulations.

Senator ALLEN. Do you have in mind fabricating practices as one instance?

Mr. SEEVERS. I think that turns out to be fairly minor. I am thinking of the backhaul problem and the excess number of freight cars and that sort of thing, which are operating at less than full capacity. If they could operate at full capacity it would be possible to reduce their costs.

Senator ALLEN. Thank you. Excuse me for interrupting.

Mr. SEEVERS. Regulation, as practiced today by the independent regulatory agencies, serves largely to protect the interests of the producer, not the consumer. This is especially true in those industries where the regulator is interposed between producers and consumers in what otherwise would be a competitive market. In such regulated "competitive" industries the regulator maintains strong barriers to the entry of new firms which propose to provide better service and/or to lower prices. The regulator also maintains strong sanctions against price cutting and service innovations by those already in the industry. Whatever the reason for such activity, the net result is to protect the economic health of the overall industry at the expense of consumers and those producers which are more efficient.

Despite that statement, or despite maintaining the overall health of the industry there can be some segments of the industry, for example, railroads, that are extremely unhealthy as you have observed.

In such situations the consumer would be much better "protected" by greater reliance on market incentives to organize economic activity, and more efficient firms would also find new opportunities, unencumbered by artificial restraints.

It should come as no surprise that regulation serves principally the producer, not the consumer. There is considerable evidence that regulation was initially brought on and is now maintained by those it is meant to regulate.[1] For example, many argue that the Interstate Commerce Commission was established not so much to protect shippers as to enforce railroad cartel ratemaking.[2] Likewise, regulation of the airlines was established not so much to protect the traveler but to satisfy the industry and to "rationalize" an inefficient scheme of Government mail subsidy.[3] In short, regulation tends to be producer-oriented and anticonsumer.

Here is a point where I do give some examples of economic costs associated with regulation and I also try to document that so there are

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[1] See, for example, George J. Stigler, "The Theory of Economic Regulation," Bell Journal of Economics and Management Science (Spring 1971), pp. 3-21.

[2] See, for example, Paul W. MacAvoy, "The Economic Effects of Regulation: The Trunk-Line Railroad Cartels and the Interstate Commerce Commission before 1900" (Cambridge: the MIT Press, 1965).

[3] See, for example, Richard E. Caves, "Air Transport and Its Regulators: An Industry Study" (Cambridge: Harvard University Press, 1962), Part II.

quite a few references for your staff to refer to if they care to. Rather than going through that let me just turn back and finish up the last two pages in my statement.

As I indicated, I think there are ample studies in some areas, particularly surface freight transportation, to document the large economic costs associated with regulation, but there is one class of costs that is very hard to measure, and those are costs associated with innovation and technological change that does not occur because of the regulation.

Most of us are familiar with the celebrated *Big John Hopper Car* case, but that was not isolated instance. I can give you a much more recent example. Three companies have proposed entering "Auto-Bus" service in the Northeast.[1] In a service similar to that of Auto-Train, they would transport vacationers' cars to Florida on truck trailers and would carry the traveler on a bus. Now I do not know how important this innovation might be, potentially, but that is not the point. Although one of the companies [2] has been granted permission to operate, its authorization is very limited. The other two cases are now pending ICC action, but the proponents are encountering strong opposition from the two major bus lines, neither of which provides such a service, How long will these cases last? How much money will these smaller firms be forced to spend in combating these regulated companies? More importantly, when will the consumer realize the full potential of this new opportunity?

To sum up, regulation imposes enormous costs on the economy. Accordingly, I think regulation should be reformed, and where possible eliminated. However, in all candor, I am not all that optimistic. The reason is that regulation is strongly supported by a highly organized constituency that has been most effective in blocking reform initiatives. Those who would benefit from regulatory reform—the consuming public primarily—are much less organized and are less efficient in expressing their views. Notably, a recent nationwide survey of transportation and distribution managers reported that over two-thirds of those responding maintain that ICC regulation discourages efficiency in rail and truck transportation. When asked, 87 percent expressed a preference for less regulation. However, 57 percent expected they would end up getting more regulation rather than less.[3]

Although I believe the process of regulatory reform will be difficult, it is essential that the Nation begin to take a more critical look at the benefits relative to the significant economic costs of current regulation. The President's proposed Commission can make a major contribution in meeting this need. Moreover, the Commission can bring to bear needed skepticism of the regulatory approach to organizing the economy and can, I believe, give a more positive case to the merits of competitive markets in situations where those can feasibly operate and I think that includes almost all aspects of the economy, including many that are now regulated.

With that I will conclude.

I have with me Dr. James Miller, a member of the council staff who works in this area. I will be glad to try to answer any question you may have.

Thank you.

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[1] Central Florida Coach Lines (ICC MC No. 138297), Ken L. Pollack Auto Bus, Inc. (ICC MC No. 138798), and Auto-Buss Corp. (ICC MC No. 139677).

[2] Central Florida Coach Lines.

[3] "Survey: The Regulators," Transportation Distribution and Management (March/April 1974), p. 39.

Senator ALLEN. Thank you, Mr. Seevers.

Mr. Miller, would you like to make a statement or comment on Mr. Seevers' testimony?

Mr. MILLER. No, thank you.

Senator ALLEN. Mr. Seevers, this effort at regulatory reform is long overdue; it is not?

Mr. SEEVERS. I think it is long overdue.

Senator ALLEN. Some of these agencies that are designed to protect the public health and the interest of consumers; are their efforts becoming counterproductive in some instances?

Mr. SEEVERS. I think they are counterproductive and wasteful from an economic standpoint, yes.

Senator ALLEN. Would that indicate, then, it might be well to consider—of course, this is something that the Commission would study—would it be well to consider the possible abolition of some of the regulatory agencies, or do you think drastic revision is the answer?

Mr. SEEVERS. Well, I hesitate to recommend abolition, because that is the sort of thing that raises a lot of flags. I prefer your words, "drastic revision". I think that is the better approach. There may be regulatory agencies, surely there are, that are doing good things and worthwhile things. But I do think for a number of them drastic revision is called for and I really think that will require legislative changes. I think it is something that is difficult to accomplish given the current legislative mandate.

Senator ALLEN. Do you think the suggestions should come in the form of changes in the Administrative Procedures Act or would it be changes as to each regulatory body?

Mr. SEEVERS. Well, I think it should be—I am not an expert in this area, but it seems to me it ought to be a matter of making changes in the legislation that supports each regulatory body as well as changes in the administrative practices area.

Senator ALLEN. What should be the scope of the Commission as to what agencies should be studied and investigated? Would you limit scope of the Commission to independent agencies or nonindependent agencies as well?

Mr. SEEVERS. Well, I do think the scope of the Commission has to be limited, otherwise we are just generating a gigantic review that will go on a long time and I think we will be passing up an opportunity to make important changes. So I do think that it has to be limited.

It seems to me it made sense to limit it to the independent regulatory agencies, and that is what the administration has proposed.

In saying that, I don't think the executive regulatory agencies should in any way be exempt from the same kind of critical thinking and review. I do think we have in process a number of things that will force that critical thinking to take place. For example, the Council on Wage and Price Stability, as I mentioned, is going to be working in this particular area for executive branch agencies. The President is now requiring these agencies to submit inflationary impact statements, that will be reviewed by OMB and other agencies, including the Council of Economic Advisers.

So it seems to me that a useful way of limiting the scope of the Commission so that it is not given an impossible task is to limit it to independent regulatory agencies.

Senator ALLEN. Do you feel that the tendency of these measures, and there has not been complete agreement on the exact mechanics—

do you feel the tendency of these measures before the Congress will cause some of the agencies to institute reforms of their own?

Mr. SEEVERS. Yes.

Senator ALLEN. All right. Then constructive results may well be in sight?

Mr. SEEVERS. I think so, but I am a little bit skeptical of, in a sense, just threatening the regulatory agencies in this way. I think they may go a ways but not voluntarily go far enough.

Senator ALLEN. Of course they will, but I anticipate that a measure of this sort is going to receive, very, very strong backing in the committee and in Congress.

The matter of the members of the Commission, what would be your thought as to the presence or the lack of those connected with agencies, regulatory agencies? Do you feel they should be barred, people from the regulatory agencies, or should they have eligibility for membership on the Commission?

Mr. SEEVERS. I would have no objections to their being eligible to be members of the Commission as one of the four executive branch nominees.

I would have strong reservations about mandating that at least two or three members of regulatory commissions be put on this particular Commission. I think that——

Senator ALLEN. In other words, leave it to the President to choose them or not as he sees fit, by his discretion?

Mr. SEEVERS. That would be my strong recommendation; yes.

I think frankly what we are doing is attempting to take a critical look at regulatory agencies, and they have to be an important part of that process but I don't think they should be the final judgment of that process. What we want is an independent evaluation of where regulation should be deemphasized or changed and it seems to me to get that independent judgment we should not have the regulatory agencies directly on the Commission.

Senator ALLEN. What do you think should be the life of the Commission?

Mr. SEEVERS. Well, I certainly favor the President's proposal that it be limited, that it be short. I believe 1 year is what is specified in the bill, and I fully support that. The difficulty with that is obviously there are many aspects to regulation. Unless the task is defined and aimed in a fairly concise way it becomes very difficult to do something within 1 year. But I think it is desirable to limit it to 1 year and say what are the most important aspects of the regulation that we can look at in a period of 1 year.

I do not think we should set up a commission that farms out long studies to research institutions that will be coming in years from now. I think that is deferring the facing of the issues that we should be facing promptly.

Senator ALLEN. Do you think the Commission should move simultaneously on all fronts as to the agencies it chose to investigate or should it take them singly in order of their importance as they deem their importance to be?

Mr. SEEVERS. Well, I believe that whatever the final legislation says, I assume it will list a number of agencies that the Commission is supposed to look at. It seems to me it therefore has a responsibility to look at each of those agencies to some degree. In a year's time it

can look at only a few. So I think it does have to start examining each of the agencies specified in whatever bill Congress passes.

But it seems to me it should be flexible. In some agencies it should approach the question one way and in other agencies quite a different way. I do think there are a few agencies, particularly the ICC and the CAB and the Federal Maritime Commission that should have high priority. They should do a more thorough job there and perhaps one of the other agencies.

Senator ALLEN. As to the Presidential appointees, what type of person or official would you recommend for one of these positions—somebody at the staff level, somebody at the Cabinet level, some outstanding businessman, some labor leader? What would be your thoughts?

Mr. SEEVERS. Well, I think of the four representatives of the executive branch, I think they should be Cabinet level individuals. This is an important job.

In the private sector I don't know if I have firm views. I certainly think a labor leader would be desirable because labor is much affected by the subject matter of the Commission. I think a businessman, possibly a former member of a regulatory agency, would be suitable, perhaps even an economist.

Senator ALLEN. Should they be full-time positions or do you think they could do a satisfactory job serving part-time and more or less directing an executive director of the Commission; what would be your thoughts?

Mr. SEEVERS. I am not that familiar personally with the operation of commissions. I believe we favor having part-time commissioners that would have an executive director and his staff would be full-time. That seems like a reasonable way to approach it to me.

Senator ALLEN. I might say I feel the President is acting wisely in letting this be a Presidential-type commission rather than merely setting up a Presidential commission. I believe the recommendations will have a whole lot more weight with Congress if Congress does participate in the choice and in the legislation.

Mr. Turner.

Mr. TURNER. Mr. Seevers, is it a fair statement to say that the thrust and intent of the administration in recommending this study commission would be to seek out those areas for deregulation within the regulatory network?

Mr. SEEVERS. Yes.

Mr. TURNER. And going from that, it would be to reestablish free markets in those areas; is that not correct?

Mr. SEEVERS. Yes. I think our view is that we are now regulating a number of parts of the economy where much more free markets would function very well. So I do think that your statement is correct. I agree with it.

Mr. TURNER. Is it not also anticipated that the commission would comment on or evaluate those areas where regulation should remain?

Mr. SEEVERS. I think it would have to do that. If it indicated areas where there ought to be less regulation, by default it is proving that there are other areas where regulation does make sense.

Mr. TURNER. In both areas, areas for deregulation and existing regulations, there would be some quantification of this inflationary impact or economic impact on the Nation's economic situation?

Mr. SEEVERS. Yes; I think the commission does have to come up with estimates of what the economic impact and the inflationary impacts are. I think they would have to rely on previous studies.

Mr. TURNER. Now, therefore, wouldn't it be consistent that the study commission would also look into areas for additional regulation?

Mr. SEEVERS. Well, that does complete the list of possibilities. I would not oppose that. They may accidentally run across something in some area where there ought to be more regulation. I am skeptical as to whether that is the case, personally. Indeed, it seems to me the trend of our economy has been to try to regulate more and more things, and it is really that underlying trend that concerns me as much as it does areas that are already now regulated.

Mr. TURNER. What concerned Senator Metcalf when he chaired the hearings on Tuesday were certain free markets that did not appear to be free. They were the concentrated markets, and one that was mentioned was automobiles where we find in the newspaper this morning that mid-November sales seem to be off by 34.7 percent, yet there have been substantial price increases consequent with the dropping off of the sales during the year, which would appear to be something which is not a characteristic of a free market; would you agree with that?

Mr. SEEVERS. Well, I am not very impressed with the organization of the automobile industry, and in that sense I agree with you. It seems to operate by a different set of economic results than some other markets. That may be due to the underlying economic characteristics. And therefore I would certainly not want to give any kind of blessing to the current market organization of the automobile industry. My own view is that the availability of imports and a free import policy is the best way to keep our automobile prices reasonably down and keep automobile costs honest.

But even though one might be dissatisfied with the way things are now, I guess I would be even more suspect of the idea of trying to apply public utility principles or some form of regulation to the automobile industry. I think we could end up finding ourselves much worse off.

I think as a general proposition we find that deregulation tends to lead to more competition and less concentration in individual industry. So obviously that doesn't apply to the automobile industry since it is not regulated in any special way. But it seems to me if one is concerned about concentration then you would in general be in favor of less regulation, not more.

Mr. TURNER. Well, in the automobile market and in the energy market prices have continually risen in the face of a declining demand, and now we have in the newspaper today more layoffs and higher unemployment. Now, these three factors together are operating in what has been referred to as free market, free enterprise, free economy market. They are operating in markets where there is no regulation. My only suggestion is do you not see some merit in the question raised by Senator Metcalf that perhaps we should be looking at certain other markets which are not regulated at this time but are not operating in the manner of a free market; that is, price meeting demand, the supply-demand approach of Adam Smith to free markets? We have identified two, and there are others: Steel, chemicals, but two were identified—automobiles and energy. The newspaper report shows that

the characteristics of those markets are not in keeping with what we know as free markets.

Now, should there not be some evaluation, either by this Commission or by some other Commission as to what should be the administration's position and what should be the Congress's position with respect to these monopoly/oligopoly/concentrated markets?

Mr. SEEVERS. Well, I think you are really talking about the impossibility of price controls.

Mr. TURNER. That would be an alternative.

Do you have an alternative more in keeping with the administration's philosophy in promoting a free market?

Mr. SEEVERS. I think it would be the appropriate application and enforcement of the antitrust laws, the job of the Justice Department and the FTC. On the whole this is a better way of dealing with administered prices and monopoly behavior in the kind of industries you are talking about.

If one wanted to review this it seems this might become something, at least with respect to steel, that could be reviewed in the National Commission on Supplies and Shortages, which has been passed by the Congress, which is in the process of being set up. There are certain aspects of what you are talking about that might logically fall under that Commission which is already set up, the supplies and shortages Commission.

I would be concerned about this Commission's going that route. For one thing, it conflicts with the idea that what we want to do is to limit the scope of investigation of this committee so that it can act promptly.

Second, I guess I would be concerned about a witch hunt, that we would just be going out and looking at any industry where somebody says performance is bad and we would be looking at those industries really in a way that is tilted toward more regulation, more price controls. I think that kind of tilting from Washington is unhealthy for the economy.

Mr. TURNER. But you would admit that the volume of production and sales in the automotive industry and the volume and production of sales in the energy industry and the volume and production of sales in the steel industry taken together are very large and substantial and do impact on our economic situation or condition, shall we say? They do present very strong phases or factors in our present economic situation?

Mr. SEEVERS. Those are big industries, they are very visible, they are heavily watched.

Mr. TURNER. Now, if they are concentrated and if the prices in those industries have been maintained by a few sellers at the expense of the consumer as well as the worker there is indeed monopoly or oligopoly power in those markets, is there not?

Mr. SEEVERS. No, I don't believe so. The steel industry is reasonably competitive. I think it was a fairly archaic industry up until a few years ago, but under current exchange rates and competitive conditions our steel industry is prospering but its prices are below the price of imported steel. In other words, you cannot argue, really, that our steel industry is somehow gouging the consumer by raising prices. Steel prices are up but we have to remember they were held down substantially by price controls. World steel prices and imported

prices got way above our own prices and they are still above our own steel prices.

So I don't view anything other than the market operating in the steel industry. The fact is that there is a shortage of steel, a very tight situation. They have been operating flat out for about a year and a half or 2 years. Demand is very heavy, and I think that the prices, while they have increased a lot, are not out of line with what is necessary to get the investment going in the steel industry so that we don't have shortages 2, 3, or 4 years down the road.

Mr. TURNER. With respect to automobiles and energy, certainly there we have concentrated power in the hands of a few companies, and there is administrated pricing in those industries; isn't that so?

Mr. SEEVERS. Well, the auto industry, as I said, I am somewhat unhappy with the way things have unfolded there. But we do have to recognize that the costs of the automobile companies have gone up substantially. However, I don't want to defend them and I think their large price increases have had a very large effect.

Mr. TURNER. Let me read what Mr. Henry Houthhakker had to say on November 22 before the committee. He was on the Council of Economic Advisers for some period of time.

> The automobile industry is highly concentrated. Apart from the importers who mostly provide a somewhat different product, there are only four suppliers, one of which acts for about half of domestic production. Perhaps antitrust action would be effective in bringing better price and output performance to this industry, but that has not been attempted so far. Presumably the antitrust laws are inadequate to deal with such abuses which are by no means uncommon in American industry generally.

Now, I am not going to ask you the $64,000 question, and that is, Does the administration intend to pursue the antitrust laws with respect to the automobile industry? I am not going to ask you that question. At this stage all Senator Metcalf's concern is: What is the administration doing not only to monitor the imbalanced so-called free market in automobiles but to come up with some way in which that market can be made freer, more competitive and prices can be brought to the level where consumers can afford them?

Mr. SEEVERS. Well, you give me an out in saying I didn't have to answer or at least I didn't have to answer the antitrust part of it.

Mr. TURNER. Well, I think it would be unfair for me to ask you that.

Mr. SEEVERS. You have raised a question to which I am not certain what the answer is. You are probably aware that in a number of regulated industries, particularly in the transportation, there are exceptions granted from the antitrust laws, and that possibly is a question that the Commission should be looking at, is the rationale that led to the exemptions from antitrust laws in a number of regulated industries still valid or is not valid, and if we deregulate should that policy be changed.

Let me make one quick comment on petroleum and oil, because you have mentioned that several times.

I think we should be aware that we are regulating the domestic oil industry now. We pay around $8 a barrel for domestic crude oil and the imported crude oil is something like $12.50 a barrel. So that we are controlling this industry at present. I happen to think these controls are counterproductive, but nevertheless we are doing it.

43-362 O - 75 - pt. 2 - 15

Mr. TURNER. On that point we had a hearing right in this room last week where we had at least 10 independent refineries of varying degrees, of size, come in and claim to this committee that they were being unfairly treated by the two price oil system and they felt a very great need for equalization on oil prices, for them as refineries, particularly in the northern territory, particularly Canada where there was an export tax.

Here we have a free market, nonregulated industry, which is in some way regulated in certain areas. That is what we have. It isn't the traditional regulated industry. It is a sort of quasi-regulated industry. I am merely suggesting perhaps we should look at this in terms of its regulations just as importantly as we would look at some transportation lines which are more regulated.

Mr. SEEVERS. Well, I agree with the point that we need to start looking critically at that particular form of regulation. Whether this Commission is the right one to do it, is, I think, debatable.

We do have a situation where world wide we need to do something to reduce the importation of oil from OPEC countries. At the same time we are holding down our own prices. The price of gasoline is 50 cents a gallon and declining in this country. It is probably three times that in Europe. So then one can really—I guess the point I am making is there is already a lot of regulation in the petroleum industry, and that is worth looking at. I do think it would be better to look at it in a different context than through this Commission.

Mr. TURNER. I have no further questions, Mr. Chairman.

Senator ALLEN. Thank you very much, Mr. Seevers, Mr. Miller. I appreciate your coming before the committee and giving us the benefit of your views and expertise and knowledge. You made a fine contribution.

Thank you.

[Additional information referred to and subsequently supplied for the record follows:]

[From the Washington Post, November 26, 1974]

MID-NOVEMBER AUTO SALES OFF 34.7 PERCENT—LOSSES RANGE FROM 31.3 PERCENT AT FORD TO 41.7 PERCENT AT CHRYSLER

DETROIT, Nov. 25 (AP)—The Big Four auto makers today reported that U.S. auto sales in mid-November dropped 34.7 percent from the same period a year ago.

Nov. 11–20 sales crawled in at 190,093 compared with 258,818 in the same 1973 period, when deliveries already had begun to slow in the face of the energy crisis.

The percentage decline is based on the daily selling rate. There was one less selling day in mid-November 1973.

Henry Ford II, chairman of Ford Motor Co., predicted the worst was yet to come.

"I don't see any sign of it [the auto market] getting better," he said at an impromptu news conference today. "We've got a period we've got to live through, but it can get worse. I don't think it's bottomed out yet.

"This country's in a recession, and we're in trouble," the auto maker said.

"I think the leadership in Washington has to take some substantive stands, I think the problem is that there's no consumer confidence," he added.

Ford, the only top auto executive to favor a gasoline tax increase, said revenues from the added levy are needed to help pay for extended unemployment benefits.

Chrysler Corp., with sales off 41.7 per cent, posted the sharpest drop. General Motors was off 34.3 per cent, Ford Motor Co. reported a 31.3 per cent decline and American Motors was down 34.7 per cent.

The daily selling rate of 21,121 cars was the poorest mid-November performance by the faltering industry in 14 years, excluding 1970 when GM was crippled by a lengthy national strike.

But industry analysis pointed out with modest cheer that the daily rate in the latest period was up 23.4 per cent from the preceding 10 days. Mid-month sales normally are higher than the early month's.

Nov. 1–10 sales were down 38.4 per cent, and October sales were off 27.4 per cent from 1973 to their lowest levels in a decade.

For the calendar year to date, auto sales were down 22.5 percent to 6,841,226, from 8,827,500 in the same 1973 span.

GM was down 27.4 per cent for the year, Ford was off 16.3 per cent, Chrysler was down 19.7 per cent and AMC was off 11 per cent.

Ford said its mid-November sales were 54,707, compared with 70,752 in 1973. For the year, Ford said sales were at 2,039,039, down form 2,437,004.

GM said its deliveries for the period totaled 102,989 compared with 139,302 a year ago.

GM, whose sales were off 43 per cent in the first 10 days of the month, said deliveries this year totaled 3,373,152, compared with 4,648,896 a year ago.

The auto giant said the latest period sales were up 28.6 per cent from the preceding 10-day period.

Chrysler said sales during Nov. 11–20 totaled 25,226 compared with 38,479 in the same 1973 span.

For the calendar year to date, Chrysler sales were 1,115,366 compared with 1,389,032 the year before.

Chrysler sales in early November were 17,530.

Senator ALLEN. Mr. Joseph A. Califano was invited to be a witness today. He could not appear due to other matters. However, he submitted a letter which we shall enter into the record, without objection, at this point.

[The letter follows:]

WILLIAMS, CONNOLLY & CALIFANO,
Washington, D.C., November 23, 1974.

Hon. SAM J. ERVIN, Jr.
Chairman, Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I deeply appreciate your invitation to testify before the Senate Government Operations Committee on Tuesday, November 26, on the Regulatory Agencies and the impact of their regulation on the economy. The questions you have propounded are unusually penetrating; they go to the heart of our problems with the regulatory process and the assessment of the future of that process.

Unfortunately, as I have indicated to Mr. Win Turner, a critical matter has come up which makes it impossible for me to accept your distinguished invitation.

For what assistance it might be to you and the Committee, I would offer one comment. The greatest regret I harbor about the use of my time during the years I was privileged to serve on the White House staff of President Lyndon Johnson is that we did not pay more attention to the regulatory agencies. In retrospect we should have subjected them to searching scrutiny to determine whether they were indeed functioning in the public interest and serving the economic needs of our people. As a private practitioner, I have come to experience inordinate delays of several agencies, their failure to think through carefully economic policies they have undertaken, their inadequate staffing and their difficulty in attracting the finest talent available. Some of the actions of government with the broadest ramifications for our people are taken by the regulatory agencies, and often by the staffs of those agencies with only passing consideration by the members of the agencies themselves. I believe that the kind of inquiry this Committee is now undertaking and the kind of study proposed by President Ford are very much and very urgently in the national interest.

While I deeply regret being unable to accept your invitation, I hope this comment out of my personal experience may be of some help to you.

Sincerely,

JOSEPH A. CALIFANO, Jr.

Senator ALLEN. The record will be held open for an additional 7 days for any additional testimonies to be offered by statement to be introduced into the record.

The committee stands in adjournment.

[Whereupon at 3 p.m. the subcommittee was adjourned.]

[From the Washington Star-News, November 26, 1974]

MORE LAYOFFS, HIGHER PRICES

New government reports signal more layoffs and higher food prices, and the chairman of Ford Motor Co. has charged Washington with sitting idly by in the middle of a recession.

"We're in the middle of a recession and we just can't sit there," said Henry Ford II. "I don't see anything specific being done in Washington."

Ford spoke out in the wake of a mid-November sales period that showed auto sales dropped 35 percent from the depressed levels of a year ago. It was the worst mid-November sales period since 1970.

Treasury Secretary William E. Simon, meanwhile, told the Associated Press in an interview that the recession isn't much worse than the administration anticipated when it drew up its economic program in October—but that it's being complicated by the coal strike.

"The economy is * * * in the lower end of the zone of what we expected, but still within the zone," he said. The forecast is still for an upturn by the summer of 1975, he added.

He said the unemployment rate, now 6 percent, would hit 7 percent by late spring and indicated he wouldn't be surprised if it went higher. The worst postwar unemployment rate was 7.9 percent, in late 1948–49.

The overall decline in the value of the nation's economic output, as measured by the gross national product, will exceed the decline of 1.5 percent during the 12-month 1969–70 recession, Simon said.

But he said it would be "too early to tell" whether it will plunge below the 3.9 percent record postwar decline of the 1953–54 recession—at 13 months the longest in the postwar era.

In another interview, Leon H. Keyserling, a former top economic adviser to former President Harry S Truman, yesterday told the Associate Press that he believes the Ford administration's economic policies could lead the nation to a depression. "if present policies are not drastically changed."

And Board Chairman Reginal Jones at the General Electric Co. criticized President Ford for calling on consumers to spend less money as an anti-inflationary measure, saying "the admonition was really unnecessary" as consumers already had begun increasing their savings rates.

He said in a Detroit speech that GE is finding it difficult to increase prices because high costs are driving customers away, AP reported.

The agriculture Department, meanwhile, said yesterday that the cost of feeding a theoretical family of 3.2 persons for a year rose $4 to a record $1,779 based on October prices. This is 9.8 percent higher than a year ago.

And economists estimated food costs by the end of the year will average 20 percent above 1973, the biggest one-year increase on record.

And a Commerce Department survey indicated that although fourth quarter sales would rise 1 percent, inventories would outstrip sales and unsold product would continue to pile up in warehouses.

The department said manufacturers hold an average $1.77 in inventory for every $1 in sales.

Huge stockpiles of inventories is a major factor leading businesses to lay off workers to slow or stop production sales catch up.

Mid-November sales in the auto industry, which already have temporarily or indefinitely terminated the employment of 200,000 were the second worst in 15 years. This year's figure is compared to November 1973, when the effects of the Arab oil embargo were beginning to be felt in dropping car sales.

There was an encouraging note for home-buyers however. The Federal Home Loan Bank Board said mortgage interest rates on new homes dropped to 9.17 percent in October for the first decline in 17 months. "Interest rates might flatten ten out over the next three months," a spokesman said.

The board reported that slightly lower interest rates and purchase prices helped trim $4 off the monthly cost of buying a new home in October but that the average

down payment jumped $317—to $12,021. The average cost is $43,200. The cost of buying an older home, meanwhile, rose $1,200, to $36,000, after a one month decline.

In other economic developments:

Prices on the stock market dropped slightly. The Dow Jones industrial average of 30 blue chip stocks dropped 3.36 points to 611.94. The New York Stock Exchange said member firms lost $34.1 million in the third quarter of 1974.

The dollar continued a general decline on all world money markets, with the exception of Italy and Japan. The price of gold increased.

Senate Republicans accused Democrats of delaying President Ford's economic program, but 12 Democrats said they would seek approval of tax relief going beyond that proposed by Ford.

More major banks lowered their prime interest-rates to between 10 and 10½ percent, and an economist with the First National Bank of Chicago predicted the prime interest rate could drop to 8 percent by mid-1975.

General Electric announced the layoff of 6,800 workers at a major applicance facility at Louisville, Ky. They will be idle for at least a week next month, GE said. This will bring the total laid off there to 11,000.

Four hundred employes at the Salisbury, N.C., plant of Fiber Industries Inc. are to be laid off starting Saturday because of decreased demand for polyester yarn. George Pounds, plant manager, said they will be out of work for an indefinite period. The firm earlier laid off 440 employes at its Greenville, S.C., plant and has laid off 725 workers at its Shelby plant.

The American Hospital Association board of trustees wrote its 7,000 members asking for a nationwide moratorium on new hospital construction as a major move to fight inflation, the Chicago Tribune reported.

APPENDIXES

APPENDIX 1

93D CONGRESS
1ST SESSION

S. 704

IN THE SENATE OF THE UNITED STATES

FEBRUARY 1, 1973

Mr. METCALF introduced the following bill; which was read twice and referred to the Committee on Government Operations

A BILL

To restore the independence of certain regulatory agencies of the Federal Government.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Regulatory Agencies Independence Act."

SUBMISSION OF BUDGET ESTIMATES DIRECTLY TO CONGRESS

SEC. 2. (a) Section 206 of the Budget and Accounting Act, 1921 (31 U.S.C. 15), is amended—

(1) by striking out "No" and inserting in lieu thereof the following: "(a) Except as provided in subsection (b) of this section, no"; and

(2) by adding at the end thereof the following new subsection:

"(b) Each of the following agencies shall transmit its estimates and requests for regular, supplemental, and deficiency appropriations directly to the Senate and House of Representatives: the Civil Aeronautics Board, the Federal Communications Commission, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission. Such estimates and requests shall reflect the judgment of the agency concerned and shall not be changed at the direction of any other agency of the Government. Estimates and requests transmitted pursuant to this section shall be in addition to, and not in lieu of, estimates, requests, and proposals transmitted pursuant to any other provision of this title."

(b) The last sentence of section 207 of such Act (31 U.S.C. 16) is amended by inserting after "shall have authority" a comma and the following: "except as otherwise provided in section 206 (b),".

(c) The amendments made by this section shall apply with respect to budgets and requests for fiscal year 1975 and thereafter.

LEGISLATIVE RECOMMENDATIONS NOT SUBJECT TO CLEARANCE

SEC. 3. Any communication to Congress respecting legislation, made by the Civil Aeronautics Board, the Federal Communications Commission, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, or the Securities and Exchange Commission, shall not be submitted to, or be subject to change by, the Office of Management and Budget or any other authority.

CLEARANCE TO OBTAIN INFORMATION NOT REQUIRED

SEC. 4. (a) Chapter 35 of title 44, United States Code, is amended—

(1) by inserting in the first paragraph of section 3502, immediately after "General Accounting Office", a comma and the following: "the Civil Aeronautics Board, the Federal Communications Commission, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Securities and Exchange Commission,"; and

(2) by adding at the end thereof the following new section:

"§ 3512. Exemption of regulatory agencies

"Any determination to collect information, any plan or form to be used in the collection of information, and the collection of information, by the Civil Aeronautics Board, the Federal Communications Commission, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, or the Securities and Exchange Commission shall not be submitted, or subject to the approval of, the Office of Management and Budget or any other authority."

(b) The analysis of such chapter 35, immediately preceding section 3501, is amended by adding at the end thereof the following new item:

"3512. Exemption of regulatory agencies.".

CONTROL OF LITIGATION

SEC. 5. (a) (1) Section 201 of the Federal Aviation Act of 1958 (49 U.S.C. 1321) is amended by adding at the end thereof the following new subsection:

"(d) Notwithstanding any other provision of law—

"(1) in any civil action, the Board is authorized to act in its own name and through its own attorneys; and

"(2) attorneys for the Board shall supervise, and may in the discretion of the Board conduct, all litigation in any civil action to which the Board is a party."

(2) Section 1008 of such Act (49 U.S.C. 1488) is amended by striking out "Board or the Administrator, as the case may be," and inserting in lieu thereof "the Administrator".

(b) Section 4 of the Communications Act of 1934 (47 U.S.C. 154) is amended by adding at the end thereof the following new subsection:

"(p) Notwithstanding any other provision of law—

"(1) in any civil action the Commission is authorized to act in its own name and through its own attorneys; and

"(2) attorneys for the Commission shall supervise, and may in the discretion of the Commission conduct, litigation in any civil action to which the Commission is a party."

(c) Notwithstanding any other provision of law—

(1) in any civil action the Federal Maritime Commission is authorized to act in its own name and through its own attorneys; and

(2) attorneys for the Commission shall supervise, and may in the discretion of the Commission conduct, litigation in any civil action to which the Commission is a party.

(d) Section 5 of the Federal Trade Commission Act

(15 U.S.C. 45) is amended by adding at the end thereof the following new subsection:

"(m) Notwithstanding any other provision of law—

(1) in any civil action the Commission is authorized to act in its own name and through its own attorneys; and

"(2) attorneys for the Commission shall supervise, and may in the discretion of the Commission conduct, litigation in any civil action to which the Commission is a party."

(e) Section 4 of the Securities Exchange Act of 1934 (15 U.S.C. 78d) is amended by adding at the end thereof the following new subsection:

"(c) Notwithstanding any other provision of law—

"(1) in any civil action the Commission is authorized to act in its own name and through its own attorneys; and

"(2) attorneys for the Commission shall supervise, and may in the discretion of the Commission conduct, litigation in any civil action to which the Commission is a party."

(f) (1) Section 17 of the Interstate Commerce Act (49 U.S.C. 17) is amended by adding at the end thereof the following new paragraph:

"(13) Notwithstanding any other provision of law—

"(A) in any civil action the Commission is authorized to act in its own name and through its own attorneys; and

"(B) attorneys for the Commission shall supervise, and may in the discretion of the Commission conduct, litigation in any civil action to which the Commission is a party."

(2) Section 2323 of title 28, United States Code, is amended by striking out the first and fourth paragraph; by striking out "The Interstate Commerce Commission and any" in the second paragraph and inserting in lieu thereof "Any"; and by inserting "Interstate Commerce" before "Commission, in which" in such second paragraph.

(g) Section 310 of the Federal Power Act (16 U.S.C. 825i) is amended—

(1) by inserting "; LITIGATION" immediately after "EMPLOYEES" in the section heading;

(2) by inserting "(a)" immediately after "SEC. 310."; and

(3) by adding at the end thereof the following new subsection:

"(b) Notwithstanding any other provision of law—

"(1) in any civil action the Commission is authorized to act in its own name and through its own attorneys; and

"(2) attorneys for the Commission shall supervise, and may in the discretion of the Commission conduct, litigation in any civil action to which the Commission is a party."

(h) Section 2348 of title 28, United States Code, is amended—

(1) by inserting ", other than proceedings to review orders of the Federal Communications Commission or the Federal Maritime Commission" before the period at the end of the first sentence; and

(2) by inserting "(other than such Commisisons)" after "The agency" where it first appears in the second sentence.

(i) Subsection (c) of this section and the amendments made by this section shall not apply to any civil action commenced before the date of enactment of this Act, but, in any civil action commenced before such date in which the Board or any commission referred to in such amendments or such subsection has an interest, attorneys for that Board or such commission (as the case may be) may, by leave of the court, appear as a friend of the court.

APPOINTMENT AND TENURE OF AGENCY CHAIRMAN AND VICE CHAIRMAN

SEC. 6. (a) Section 201(a)(2) of the Federal Aviation Act of 1958 (49 U.S.C. 1321(a)(2)) is amended by striking out "designate annually" in the last sentence and in-

serting in lieu thereof "appoint, by and with the advice and consent of the Senate,"; and by adding at the end thereof the following: "Any member appointed as Chairman or Vice Chairman shall serve as such until the expiration of his term as a member of the Board (except that he may continue to serve as Chairman or Vice Chairman, as the case may be, for so long as he remains a member and his successor as Chairman or Vice Chairman has not taken office). In considering any nomination to the office of Chairman or Vice Chairman the Senate shall give careful consideration to the qualifications of the nominee. An individual may be appointed as a member at the same time he is appointed Chairman or Vice Chairman."

(b) Section 4(a) of the Communications Act of 1934 (47 U.S.C. 154(a)) is amended by striking out "one of whom the President shall designate as chairman" and inserting in lieu thereof "one of whom shall be appointed Chairman by the President by and with the advice and consent of the Senate. A Commissioner appointed as Chairman shall serve as such until the expiration of his term as a Commissioner of the Commission (except that he may continue to serve as Chairman for so long as he remains a Commissioner and his successor as Chairman has not taken office). In considering any nomination to the office of Chairman the Senate shall give careful consideration to the qualifications of the

nominee. An individual may be appointed as a Commissioner at the same time he is appointed Chairman.".

(c) (1) One of the Commissioners of the Federal Maritime Commission appointed under section 102 of Reorganization Plan Numbered 7 of 1961 (75 Stat. 840) by the President, by and with the advice and consent of the Senate, shall be appointed Chairman by the President, by and with the advice and consent of the Senate. A Commissioner appointed as Chairman shall serve as such until the expiration of his term as a Commissioner of the Commission (except that he may continue to serve as Chairman for so long as he remains a Commissioner and his successor as Chairman has not taken office). In considering any nomination to the office of Chairman the Senate shall give careful consideration to the qualifications of the nominee. An individual may be appointed as a Commissioner at the same time he is appointed Chairman.

(2) Subsection (b) of such section 102 is no longer effective.

(d) (1) The first sentence of the first section of the Federal Power Act (16 U.S.C. 792) is amended by striking out all that follows "consent of the Senate," and inserting in lieu thereof "one of whom shall be appointed as Chairman by the President, by and with the advice and consent of the Senate. The Commissioner so appointed

shall serve as Chairman until the expiration of his term as a Commissioner of the Commission (except that he may continue to serve as Chairman for so long as he remains a Commissioner and his successor as Chairman has not taken office). In considering any nomination to the office of Chairman the Senate shall give careful consideration to the qualifications of the nominee. An individual may be appointed as a Commissioner at the same time he is appointed chairman.".

(2) Section 3 of Reorganization Plan Numbered 9 of 1950 (64 Stat. 1265) is no longer effective.

(c) (1) The fourth sentence of the first section of the Federal Trade Commission Act (15 U.S.C. 41) is amended to read as follows: "The President shall appoint a chairman from the Commission's membership, by and with the advice and consent of the Senate; and the Commissioner so appointed shall serve as Chairman until the expiration of his term as Commissioner (except that he may continue to serve as Chairman for so long as he remains a Commissioner and his successor as Chairman has not taken office). In considering any nomination to the office of Chairman the Senate shall give careful consideration to the qualifications of the nominee. An individual may be appointed as a Commissioner at the same time he is appointed as Chairman."

(2) Section 3 of Reorganization Plan Numbered 8 of 1950 (64 Stat. 1264) is no longer effective.

43-362 O - 75 - pt. 2 - 16

(f) (1) Section 4 (a) of the Securities Exchange Act of 1934 (15 U.S.C. 78d) is amended by adding at the end thereof the following new sentence: "The President shall appoint a Chairman from the Commission's membership, by and with the advice and consent of the Senate; and the Commissioner so appointed shall serve as Chairman until the expiration of his term as Commissioner (except that he may continue to serve as Chairman for so long as he remains a Commissioner and his successor as Chairman has not taken office). In considering any nomination to the office of Chairman, the Senate shall give careful consideration to the qualifications of the nominee. An individual may be appointed as a Commissioner at the same time he is appointed as Chairman."

(2) Section 3 of Reorganization Plan Numbered 10 of 1950 (64 Stat. 1205) is no longer effective.

(g) (1) Section 11 of the Interstate Commerce Act (49 U.S.C. 11) is amended by adding at the end thereof the following: "The President shall appoint a Chairman from the Commission's membership, by and with the advice and consent of the Senate; and the Commissioner so appointed shall serve as Chairman until the expiration of his term as Commissioner (except that he may continue to serve as Chairman for so long as he remains a Commissioner and his successor as Chairman has not taken office). In

considering any nomination to the office of Chairman, the Senate shall give careful consideration to the qualifications of the nominee. An individual may be appointed as a Commissioner at the same time he is appointed as chairman."

(2) Section 3(a) of Reorganization Plan Numbered 1 of 1969 (83 Stat. 859) is no longer effective.

(h) Subsection (c) of this section and the amendments made by this section shall not apply to the service as Chairman or Vice Chairman of the Board or any commission referred to in such subsection or amendments, of any person who was serving as Chairman or Vice Chairman of that Board or commission on the date of enactment of this Act, except that in the case of a person serving as Chairman or Vice Chairman for a fixed term, such amendments and subsection shall apply at the end of such term.

INDEPENDENCE IN APPORTIONING APPROPRIATIONS

SEC. 7. (a) Section 3679 of the Revised Statutes of the United States (31 U.S.C. 665) is amended as follows:

(1) In the first sentence of subsection (d)(1), immediately after "the judiciary,", insert the following: "an independent regulatory agency,".

(2) The fifth sentence of subsection (d)(2) is amended by inserting immediately before the period at the end thereof a comma and the following: "but does not include an independent regulatory agency".

(3) In subsection (g), immediately after "the judiciary,", insert "an independent regulatory agency,".

(4) Add the following new subsection at the end thereof:

"(j) (1) The Comptroller General of the United States shall review from time to time actions taken by each independent regulatory agency under this section. The Comptroller General shall make such recommendations as he considers appropriate to such agency whenever he determines that such agency is not complying with the provisions of this section, or is able to improve its administration of this section. Any such determination or recommendation shall be promptly reported to Congress.

"(2) When used in this section, the term 'independent regulatory agency' means the Civil Aeronautics Board, the Federal Communications Commission, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, or the Securities and Exchange Commission."

(b) The amendments made by this section shall apply with respect to appropriations made for fiscal year 1975 and thereafter.

93D CONGRESS
1ST SESSION

S. 770

IN THE SENATE OF THE UNITED STATES

FEBRUARY 6, 1973

Mr. METCALF introduced the following bill; which was read twice and referred to the Committee on Government Operations

A BILL

To establish an independent agency to be known as the Intergovernmental Office of Consumers' Counsel to represent the consumers of the Nation before Federal and State regulatory agencies with respect to matters pertaining to certain regulated services; to provide grants and other Federal assistance to State and local governments for the establishment and operation of such consumers' counsels; to improve methods for obtaining and disseminating information with respect to the operations of regulated companies of interest to the Federal Government and other consumers; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Consumers' Information and Counsel Act of 1973".

DEFINITIONS

SEC. 2. As used in this Act—

(a) The term "Federal agency" means any department, agency, or instrumentality, including any wholly owned Government corporation, of the executive branch of Government.

(b) The term "State" means any State of the United States, any territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or political subdivision department, agency, or instrumentality of any of them, but does not include the Panama Canal Zone.

(c) The term "regulated company" means any company which is subject to regulation by (i) the Federal Power Commission; (ii) the Federal Communications Commission; (iii) the Interstate Commerce Commission; (iv) the Civil Aeronautics Board; (v) the Federal Maritime Commission; and (vi) the Securities and Exchange Commission under the Public Utility Holding Act (15 U.S.C. 79 et seq.).

(d) The term "Company" means a corporation, a partnership, an association, a joint-stock company, a business trust, or an organized group of persons, whether incorporated or not; or any receiver, trustee, or other liquidating agent of any of the foregoing in his capacity as such; having an annual gross operating revenue in excess of $10,000,000;

but not including any cooperatively, federally, municipally, or other publicly owned person, company, or organization.

(e) The term "control" means possession of the power to direct or cause the direction of or substantially influence the management and policies of a company, whether through ownership of voting or nonvoting securities, ownership of debt issues, by contract, or otherwise, unless such power is the result of an official position with the company. Control is presumed to exist if any person or company directly or indirectly owns controls, holds with the power to vote, or holds proxies representing 10 per centum or more of the voting securities of any company. The Counsel may, after furnishing all persons in interest notice of opportunity to be heard, determine that control in fact exists notwithstanding the absence of a presumption to that effect.

(f) The terms "affiliate" of a company or "affiliate company" mean a person that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with, such company.

(g) The terms "parent of a company" or "parent company" mean a person who directly or indirectly through one or more intermediaries holds control over a regulated company.

(h) The term "long-term debt" means any indebtedness of a company having a maturity of one year or more

from the date of issuance. The term "short-term debt" means any indebtedness of a company other than long-term debt.

(i) The term "regulated services" means any service provided for the public by a regulated company.

(j) The term "interests of consumers of regulated services" means any matter relating to rates, charges, methods of service, adequacy of service, and safety measures which directly affect the consumer of regulated services.

TITLE I—CONSUMERS' COUNSEL FOR REGULATED SERVICES

ESTABLISHMENT OF OFFICE

SEC. 101. (a) There is hereby established within the executive branch of the Government an independent agency to be known as the Office of Consumers' Counsel for Regulated Services (referred to hereinafter as the "Office"). The Office shall be headed by a Consumers' Counsel (referred to hereinafter as the "Counsel"), who shall be appointed for a term of five years by the President, by and with the advice and consent of the Senate, and who shall receive compensation at the rate provided for level 2 of the Executive Schedule. In appointing the Counsel, the President shall solicit the views and recommendations of consumer organizations and groups representing consumer interests, including State and local bodies.

(b) The Counsel shall, subject to the provisions of title 5 of the United States Code, appoint and fix the compensation of such personnel as he determines to be required for the performance of the functions of the Office.

(c) No person appointed as Counsel or employed by the Counsel shall, at any time during his tenure, have any financial interest, direct or indirect, in any regulated company or affiliate; nor shall any such person be employed or retained by, or accept employment with, a regulated company or an affiliate of a regulated company for a period of three years following termination of his employment in the Office.

POWERS OF THE OFFICE

SEC. 102. (a) In the performance of the functions of the Office, the Counsel is authorized—

(1) to promulgate such rules and regulations as may be required to carry out the functions of the Office, including the establishment of uniform rules of accounting for any class or classes of companies about which information is required to be obtained pursuant to this Act, but the exercise of such powers and the performance of the functions of the Office and the Counsel under title II of this Act shall not be subject to the provisions of sections 3501–3511 of title 44 of the United States Code;

(2) to delegate to any other officer or employee of the Office authority for the performance of any duty imposed, or the exercise of any power conferred, upon the Counsel by this Act, and any reference herein to the Counsel shall include his duly authorized delegate or delegates;

(3) to obtain the service of experts and consultants in accordance with section 3109 of title 5 of the United States Code; and

(4) to use the services, equipment, personnel, and facilities of other Federal agencies, with their consent, with or without reimbursement therefor as determined mutually by the Counsel and such other agencies.

(b) Upon request made by the Counsel, each Federal agency is authorized and directed—

(1) to make its services, personnel, and facilities available to the greatest practicable extent to the Office in the performance of its functions; and

(2) subject to provisions of law and regulations relating to the classification of information in the interest of national security, to furnish to the Office such information, suggestions, estimates, and statistics as the Counsel may determine to be necessary or desirable for the performance of the functions of the Office.

REPRESENTATION OF PUBLIC INTEREST

SEC. 103. (a) Notwithstanding any other provision of law, the Counsel is authorized to petition for, initiate, appear or intervene in, any investigation, complaint, action, appeal, or other proceeding except a criminal proceeding, before any Federal, State, or local agency, or Federal or State court, in accordance with the rules of practice and procedure of such agency or court, where, in the opinion of the Counsel, there is a matter or controversy affecting substantially the interests of consumers of regulated services within the United States: *Provided*, That such action by Counsel before any State or local agency or State court shall be authorized only when—

(1) it is requested by the Governor of a State or any official designated by him for such purpose; or

(2) it is requested by an agency or official duly authorized by a State to represent the interests of such consumers before any State or local agency or court; or

(3) it is requested by a State or local agency or court conducting the proceeding; or

(4) it is requested by a duly certified petition signed by the consumers of services of a regulated company within any State as follows: if the total of such consumers equals one thousand or less, petition must be

signed by 20 per centum of such consumers; if the total of such consumers equals an amount over one thousand but less than ten thousand, petition must be signed by 10 per centum of such consumers; or if total of such consumers equals ten thousand or more, petition must be signed by 5 per centum of such consumers.

(b) With respect to any such proceeding, the Counsel shall present to the agency or court, subject to the rules of practice and procedure thereof, such evidence, briefs, and arguments as he shall determine to be necessary for the effective representation of the interests of such consumers. The Counsel or any other officer or employee of the Office designated by the Counsel for such purpose, shall be entitled to enter an appearance before any Federal agency or Federal court without other compliance with any requirement for admission to practice before such agency for the purpose of representing the Office in any proceeding.

(c) Notwithstanding any other provision of law, the Counsel is entitled as a matter of right to appear as a party before any Federal agency or Federal court, but not including the Supreme Court of the United States, with respect to any matter or proceeding described in subsection (a), and coming within the jurisdiction of such Federal agency or court.

(d) This Act shall not operate to exclude any other

individual, consumer organization, or group representing the public interest from intervening or otherwise participating in such proceedings, nor shall it affect the decision of any Federal agency to assign its own staff personnel to intercede or assist in developing any part of the record of proceedings in which the Counsel or other groups shall appear; nor shall the participation by Counsel affect the right of any person to appear in such proceedings in forma pauperis.

(c) The Counsel is authorized to attend and represent the interests of consumers of regulated services at any meeting of any advisory committee or other private or public organization with any Federal agency.

PUBLIC INFORMATION AND REPORTS

SEC. 104. (a) The Counsel from time to time shall compile and disseminate to the public, through such publications and other means as he determines to be appropriate, such information as he considers to be necessary or desirable for the protection of the interests of consumers of regulated services.

(b) In January of each year, the Counsel shall transmit to the Congress a report containing (1) a full and complete description of the activities of the Office during the preceding calendar year, (2) a discussion of matters currently affecting the interests of such consumers, and (3)

his recommendations for the solution of any problems adversely affecting those interests.

(c) The Counsel shall transmit to the President from time to time such recommendations for proposed legislation as the Counsel may consider to be necessary or desirable for the adequate protection of the interests of such consumers.

GRANTS TO STATE AND LOCAL GOVERNMENTS

SEC. 105. (a) (1) The Counsel is authorized to make grants to any State or local government, or combination of such governments, that serve a population of one hundred thousand or more persons, for up to 75 per centum of the cost of performing any of the following functions:

(A) representing the interests of consumers of regulated services before Federal, State, or local agencies and Federal or State courts including but not limited to the initiation, appearance, or intervention, with respect to any investigation, complaint, action, appeal, or other proceeding, and the preparation and presentation of evidence, briefs, and arguments in connection therewith;

(B) compiling and making available to the public information which is necessary or desirable for the protection of the interests of consumers of regulated services; or

(C) making available, to the extent possible, technical assistance, statistics, information, and personnel for

consultation and assistance to Federal, State, and local governments and agencies, and to nongovernmental organizations having a special interest in matters affecting the interest of consumers of regulated services.

(2) No grant under this subsection shall be made to any State or local agency authorized by law to regulate one or more regulated companies.

(b) (1) The Counsel is authorized to make grants to any State or local agency authorized by law to regulate one or more regulated companies for the following purposes—

(A) increasing the number and quality of professional staff personnel assigned to matters affecting the interests of consumers of regulated services;

(B) developing personnel, systems, and facilities, including automatic data processing equipment, for obtaining essential information, making studies and other evaluation of data, and assisting in the making of decisions with respect to matters affecting the interests of consumers of regulated services; or

(C) providing for training and education programs, including internship, work-study, fellowship, and similar programs for professional staff positions relating to matters affecting the interests of consumers of regulated services.

(c) A grant authorized by this section may be made

on application to the Counsel at such time or times and containing such information as the Counsel may prescribe.

(d) The non-Federal contribution may be in cash or in kind, including but not limited to plant, equipment, and services, or as otherwise determined by the Counsel. If, in any fiscal year, a recipient under this section provides non-Federal contributions exceeding its requirements, such excess may be used to meet its non-Federal requirements for the next fiscal year.

(e) The Counsel shall allocate grants under this Act in such manner as will most nearly provide an equitable distribution of grants among States and local governments, taking into consideration such facts as size of population, extent of regulated services, the urgency of programs or projects, and the need for funds to carry out the purposes of this Act.

TECHNICAL ASSISTANCE TO STATE AND LOCAL GOVERNMENTS

SEC. 106. The Counsel may furnish technical advice and assistance, including information, on request to any State or local regulatory agency for the purpose of establishing and carrying out any program of consumer interest within the general purposes of this Act. The Counsel may accept payments, in whole or in part, for the costs of furnishing such assistance. All such payments shall be credited to the appropriation made for the purposes of this section.

REPORTING REQUIREMENTS

SEC. 107. A State, or local government office receiving a grant under this Act shall make reports and evaluations in such form, at such times, and containing such information concerning the status and application of Federal funds and the operation of the approved program or project as the Counsel may require, and shall keep and make available such records as may be required by the Counsel for the verification of such reports and evaluations.

REVIEW AND AUDIT

SEC. 108. The Counsel and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access, for the purpose of audit and examination, to any books, documents, papers, and records of a grant recipient that are pertinent to the grant received.

TERMINATION OF GRANTS

SEC. 109. (a) Whenever the Counsel, after giving reasonable notice and opportunity for hearing to a grant recipient under this Act, finds—

(1) that the program or project for which such grant was made has been so changed that it no longer complies with the provisions of this Act; or

(2) that in the operation of the program or project there is failure to comply substantially with any such provision;

43-362 O - 75 - pt. 2 - 17

the Counsel shall notify such recipient of his findings and no further payments may be made to such recipient by the Counsel until he is satisfied that such noncompliance has been, or will promptly be, corrected. However, the Counsel may authorize the continuance of payments to any projects pursuant to this Act which are being carried out by such recipient and which are not involved in the noncompliance.

(b) (1) If the recipient of a grant under section 105 is dissatisfied with the Counsel's final action under subsection (a) of this section, such recipient may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such recipient is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Counsel. The Counsel thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code.

(2) The findings of fact by the Counsel, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Counsel to take further evidence, and the Counsel may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(3) The court shall have jurisdiction to affirm the action of the Counsel or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

MODEL LAWS

SEC. 110. The Counsel shall make a full and complete investigation and study for the purpose of—

(1) preparing a comparison and analysis of State and Federal laws covering regulated services to consumers; and

(2) preparing model laws and recommendations for regulation of such services.

The results of such investigation and study shall be reported to the President, the Congress, and the Governor of each State as soon as practicable.

TITLE II—PUBLIC INFORMATION AND REPORTS

INFORMATION WITH RESPECT TO REGULATED COMPANIES

SEC. 201. Each regulated company and each parent of a regulated company shall furnish to the Counsel, under such rules and regulations as the Counsel shall establish, at least annually or at such other times as may be determined by the Counsel, the following information:

(a) As to the capitalization and control—

(1) the name, address, and description of the business of each parent, subsidiary, or affiliate company, including a full description of the relationship between such companies;

(2) a description of all classes of common stock, preferred stock, long-term debt, bonds, and debentures, including information as to voting rights, redemption and conversion features, dividends, premiums, and interest payable, maturity dates, provision for security, and any other terms and conditions that are material or that may confer control or management powers upon the holder of the security or the debt;

(3) percentages of capitalization obtained from common stock, preferred stock, long-term debt, and earned surplus, respectively;

(4) the amount of dividends and interest paid on each class of stock and debt, and—

(i) average rate of interest on long-term debt;

(ii) average rate of interest of short-term debt;

(iii) rate of return on average common stock equity.

(5) the name and address of:

(i) each person who directly or indirectly or acting through one or more persons has the power to vote 1 per centum or more of the common stock;

or 1 per centum or more of the preferred stock, if such stock has voting rights, together with the number and percentage of such voting securities.

(ii) each person who directly or indirectly or acting through one or more persons has the power to vote 1 per centum or more of the preferred stock in the company, together with the number and percentage of such voting securities.

(iii) each holder of 1 per centum or more of any issue of outstanding long-term debt of the company, together with the dollar amount of such holdings, and its percentage of the issue.

(iv) each holder of 5 per centum or more of the outstanding short-term debt of the company, together with the dollar amount of such holdings, and its percentage of the total short-term debt.

(b) As to management—

(1) the name and address of each officer and director and his compensation from the company and its affiliates, including pension and retirement plans and the amounts paid, accrued, or reserved for such plans, stock options, deferred compensation plans, indemnification, and insurance, together with a complete description of the duties of such director or officer and the approximate

amount of time, stated in hours per week, spent in the performance of such duties;

(2) the names and addresses of all other companies in which such officers and directors also serve as officers or directors, and a description of any position which such officer or director holds, or has held within the preceding ten years, in any Federal agency;

(3) the names of directors, if any, who were not nominated by the management of the company;

(4) terms of restricted stock option plans available to officers ,directors, and employees and, except for plans available to all employees on equal terms, including name, title, salary, and retirement benefits of each person to whom stock options have been granted, number of options each has exercised, date on which options were exercised, option price of the stock and market price of the stock when option was exercised;

(5) amounts, terms, and conditions, including simple annual interest rates, of all loans and extension of credit to directors, officers, affiliates, customers, and others, and the total amounts of interest collected on each class of such loans or credit during the year, together with the terms or conditions of arrangements between financial institutions and the company with respect to compensating balances;

(6) details of any transactions with affiliates, banks, finance companies, holders of any class of stock or long-term debt, and customers concerning the purchase, sale, or lease of any real or personal property, indicating as to each the identity of the other party, terms of the purchase, sale, or lease contract, including any provision for security, the assessed value of the property and the method by which such transaction was negotiated, including a description of any opportunity given to other parties to enter competitive bids and details of any such bids received.

(c) As to operations—

(1) summaries of all licenses, franchises, and certificates of convenience and necessity issued to or applied for by the company, if any, and the amount expended for and in procuring each such certificate;

(2) a summary of the terms of any rate, bureau, pooling or mutual aid agreements or arrangements, including a complete breakdown of joint rates attendant thereto;

(3) assets and liabilities of the company, including a brief description of each asset subject to a mortgage, lien, or other claim, indicating the terms thereof:

(i) in dollars;

(ii) as percentage of depreciated average original cost;

(iii) as a percentage of operating revenues;

(5) sources and application of all funds, including all revenues, income, borrowings, and sale of equity;

(6) information as to all direct or indirect expenditures, whether in payment of money, provision of goods or services, use of officers or employees on company time or otherwise, including specific details of the exact amounts, purposes, and tax treatment of each item, included in any account for:

(i) dues, expenses, or assessments of trade associations or rate bureaus of any kind;

(ii) any legal, professional, or consultant services;

(iii) advertising, public relations, and promotion of any kind;

(iv) contributions, gifts, donations, honoraiums, and gratuities, including travel, entertainment, or other personal expenses of individuals paid for, in whole or in part, by the company;

(v) protesting the granting of any certificate, franchise, or authority of any other party, or intervening in any proceeding in which such certificate, franchise, or rights are at issue;

(vi) promoting or opposing (1) the candidacy, nomination, election, or appointment of any person for any Federal, State, or local legislative or administrative office; (2) any other issue for which an official vote of the people has been authorized, or (3) any lobbying with respect to Federal, State, or local legislative or administrative bodies;

(7) a list of all goods, services, rights, or privileges extended free, below cost, or below normal charges, to any actual or potential customer or class of customers including credit extension, concessions, and rebates of any kind, and the extent to which such goods, services, rights, or privileges are paid for by charges to such customers or class of customers;

(8) a description of the policy with respect to deposits of customers and service connection charges, if required;

(9) the rate of interest charged customers by the regulated company, stated as simple annual interest;

(10) the rate base valuation and components of the regulated company's rate base, as determined by the commission or commissions having jurisdiction, expressed in dollar amounts, and including amount permitted in rate base in each of the following categories: equipment no longer used in service, goodwill, accu-

mulated tax deferrals, allowance for working capital, construction work in progress, customers' advances, bank deposits, materials and supplies, plant acquisition adjustment, and plant held for future use.

(d) Such other information as the Counsel may deem necessary to obtain, compile, publish, and disseminate to inform consumers of regulated companies.

PENALTIES AND ENFORCEMENT POWERS

SEC. 202. (a) It shall be a violation of this title to fail to provide any information required by section 201 of this title. Any person who violates this section, or who violates any rule, regulation, or order issued by the Counsel under this title, shall be subject to a civil penalty not greater than $1,000 for each violation. Any person who knowingly and willfully violates this title or any rule, regulation, or order issued by the Counsel under this title, or who provides false information to the Counsel, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $2,500 for the first offense and not greater than $5,000 for each subsequent offense. If any such violation is a continuing one, each day of such violation shall constitute a separate offense.

(b) The Federal Power Commission, the Civil Aeronautics Board, the Federal Communications Commission, the Interstate Commerce Commission, the Federal Maritime

Commission, and the Securities and Exchange Commission are hereby authorized and directed to coordinate and assist in carrying out the provisions of this Act and to conduct investigations and promulgate such regulations as are necessary to implement this Act each in accordance with its own rules of procedure.

(c) Notwithstanding any other provision of law, the Counsel is authorized to appear before any Federal, State, or local agency, or Federal or State court, in accordance with the rules of practice and procedure of such agency or court, and seek an order for the production of information required to be furnished under section 201 of this Act. The Counsel, or any other officer or employee of the Office designated by the Counsel for such purpose, shall be entitled to enter such appearance as a matter of right before any Federal agency or Federal court without other compliance with any requirement for admission to practice before such agency or court for the purpose of representing the Office in such proceeding.

REPORTS

SEC. 203. The information to be obtained by the Counsel pursuant to section 201 of this title shall, at least annually and at such other times as the Counsel may deem appropriate, be published in reports prepared for and made readily available to the public. Such reports shall be issued as soon as possible after the end of the annual accounting period.

Supplementary reports may be issued at any time to reflect any changes that materially affect the ownership, financial condition, or operation of regulated companies or affiliates. To the degree practicable, the reports provided for in this section shall be presented in readily comprehensible style and format and shall contain pertinent national averages and comparative historical data.

TITLE III—MISCELLANEOUS PROVISIONS

AUTOMATIC DATA PROCESSING

SEC. 301. (a) Federal agencies are hereby authorized and directed to make full use of automatic data processing in preparing the information required under this Act and other Acts to which they are subject, to the end that the Counsel, the Congress, and the public shall receive information in a timely and understandable manner. Federal agencies are hereby directed to include, in their annual reports, accounts of their progress toward full use of automatic data processing.

(b) The Comptroller General of the United States shall review the activities of the Federal agencies in compliance with this section, and shall report to the Congress the results of such compliance, and where full use of automatic data processing is not being made in the preparation of such information, he shall recommend those actions which should be taken to achieve such full use of automatic data processing techniques and equipment.

SAVING PROVISION

SEC. 302. Nothing contained in the Act shall be construed to alter, modify, or impair any other provision of law, or to prevent or impair the administration or enforcement of any other provision of law, except as specifically amended or to the extent that it is inconsistent with this Act.

APPROPRIATIONS

SEC. 303. There is authorized to be appropriated annually for the purposes of this Act an amount equal to one-tenth of 1 per centum of the aggregate annual gross operating revenues of all regulated companies.

93D CONGRESS
2D SESSION

S. 3604

IN THE SENATE OF THE UNITED STATES

JUNE 7, 1974

Mr. PROXMIRE introduced the following bill; which was read twice and referred to the Committee on Government Operations

A BILL

To abolish certain Federal agencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Agency Efficiency Act".

SEC. 2. The Interstate Commerce Commission is abolished.

SEC. 3. The Selective Service System is abolished.

SEC. 4. The Overseas Private Investment Corporation is abolished.

SEC. 5. Section 102 of the National Security Act of 1947, as amended (50 U.S.C. 403), is amended by adding at the end thereof a new subsection as follows:

"(g) (1) Nothing in this or any other Act shall be construed as authorizing the Central Intelligence Agency to—

"(A) carry out directly or indirectly, within the United States, either on its own or in cooperation or conjunction with any other department, agency, organization, or individual any police or police-type operation or activity, any law enforcement operation or activity, or any internal security operation or activity;

"(B) provide assistance of any kind, directly or indirectly, to any other department or agency of the Federal Government, to any department or agency of any State or local government, or to any officer or employee of any such department or agency engaged in police or police-type operations or activities, law enforcement operations or activities, or internal security operations or activities within the United States unless such assistance is provided with the prior, specific written approval of the Central Intelligence Agency oversight subcommittees of the Committees on Appropriations and the Committees on Armed Services of the Senate and the House of Representatives;

"(C) participate, directly or indirectly, in any illegal activity within the United States; or

"(D) engage in any covert action in any foreign country unless such action has been specifically ap-

proved in writing by the Central Intelligence Agency oversight subcommittees of the Committees on Appropriations and the Committees on Armed Services of the Senate and the House of Representatives.

"(2) As used in paragraph (1) (D) of this subsection, the term 'covert action' means covert action as defined by the National Security Council based on the commonly accepted understanding of that term within the intelligence community of the Federal Government and the practices of the intelligence community of the Federal Government during the period 1950 through 1970.".

SEC. 6. (a) The disaster loan functions of the Small Business Administration under section 7(b) of the Small Business Act are transferred to the Secretary of Commerce.

(b) The Small Business Administration is abolished.

SEC. 7. Except for—

(1) the functions of the Secretary of Defense relating to alerting the public against an enemy attack, and

(2) the functions of any Federal agency relating to a warning system for impending natural disaster, as determined pursuant to regulations of the Office of Management and Budget,

all offices of the Department of Defense relating to civil defense are abolished.

SEC. 8. The Renegotiation Board is abolished.

SEC. 9. The President's Council on Physical Fitness and Sports is abolished.

SEC. 10. The President is authorized to take whatever action is necessary to carry out the provisions of this Act except that the President may not by Executive order or otherwise reestablish any office or agency abolished by this Act.

SEC. 11. All personnel, property, records, obligations, commitments, and unexpended balances of appropriations, allocations, and other funds which the Director of the Office of Management and Budget determines are used primarily in the administration of the disaster loan program under section 7 (b) of the Small Business Act are transferred to the Department of Commerce.

SEC. 12. The provisions of this Act shall take effect thirty days after the date of its enactment.

43-362 O - 75 - pt. 2 - 18

93D CONGRESS
2D SESSION

S. 4145

IN THE SENATE OF THE UNITED STATES

OCTOBER 16, 1974

Mr. METCALF (for himself and Mr. ERVIN) (by request) introduced the following bill; which was read twice and referred to the Committee on Government Operations

A BILL

To establish a National Commission on Regulatory Reform.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Commission on Regulatory Reform Act of 1974".

ESTABLISHMENT OF COMMISSION

SEC. 2. (a) There is established, as an independent instrumentality in the executive branch of the Federal Government, a National Commission on Regulatory Reform (hereinafter referred to as the "Commission") which shall be comprised of twelve members selected as follows—

(1) four members from the private sector appointed by the President,

(2) four senior officials of the executive branch appointed by the President,

(3) two Senators appointed by the President of the Senate,

(4) two members of the House of Representatives appointed by the Speaker of the House.

(b) The President shall designate from the membership, one member to serve as Chairman and one member to serve as Vice Chairman of the Commission.

(c) Vacancies on the Commission shall not affect the authority of the remaining members to continue with the Commission's activities, and shall be filled in the same manner as the original appointments.

(d) Members of the Commission who are appointed from the private sector shall receive as compensation the daily equivalent of the annual rate of basic pay in effect for grade GS–18 for each day during which they are engaged in the actual performance of the duties of the Commission. All members of the Commission shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties of the Commission.

FUNCTIONS

SEC. 3. (a) The Commission shall identify regulatory activities of the Independent Regulatory Agencies for detailed review, and conduct such review which shall include, but shall not be limited to—

(i) an analysis of the purposes and objectives of the regulatory activities;

(ii) an assessment of actual performance in achieving the purposes and objectives;

(iii) an analysis of the costs and benefits of each activity; and

(iv) an examination of State and local governmental regulatory activities which interact with the Federal independent regulatory system.

(b) The Commission may prepare and publish such periodic reports as it deems appropriate, but shall prepare and transmit a report to the President and Congress not later than one year following the appointment of the full Commission. That report shall include—

(i) the results of the detailed review conducted pursuant to subsection (a);

(ii) appropriate revisions to overall goals and procedures of specific Federal regulatory authorities;

(iii) specific recommendations for legislative actions

which would improve the effectiveness or the efficiency of the Federal independent regulatory agencies reviewed;

(iv) an assessment of the costs, including transition costs, of any modifications recommended or suggested; and

(v) recommendations for a means of continuing review of the economic costs of Federal independent regulatory activities.

POWERS

SEC. 4. (a) The Commission is authorized to hold such hearings, sit and act at such times and places as it may deem desirable.

(b) Subpenas for the attendance and testimony of witnesses or the production of written or other matter may be issued on the authority of the Commission and shall be served by anyone designated by the Chairman.

(c) If the Commission receives of any witness or any Government agency materials which have been submitted on a confidential basis, and the confidentiality is protected by statute, the material shall be held in confidence by the Commission.

(d) The Commission is authorized to establish such advisory committees as may be necessary or appropriate to carry out any specific analytical or investigative undertakings on behalf of the Commission. Any such committee shall

be subject to the relevant provisions of the Federal Advisory Committee Act (Public Law 92–463).

SEC. 5. (a) Subject to such rules and regulations as it may adopt, the Commission, through its Chairman, shall appoint and fix the compensation of an Executive Director not to exceed the rate provided for level V of the Executive Schedule under section 5316 of title 5, United States Code, and such additional staff as is deemed necessary without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, but at rates for individuals not to exceed the rate authorized for GS–18 under the General Schedule.

(b) The Commission is authorized to negotiate and enter into contracts and agreements as the Commission determines are necessary in order to carry out its duties.

ASSISTANCE OF GOVERNMENT AGENCIES

SEC. 6. Each department, agency, and instrumentality of the Federal Government, including the Congress and independent agencies, and State and local agencies, consistent with the laws and the Constitution of the United States, shall furnish to the Commission, upon request of the Chairman, such data, reports, and such other information as the Commission deems necessary to carry out its functions under this Act.

TERMINATION

SEC. 7. Ninety days after the submission of the final report provided for in section 3 (b), the Commission shall cease to exist.

AUTHORIZATION

SEC. 8. There is authorized to be appropriated $500,000 to carry out the provisions of this Act.

93D CONGRESS
2D SESSION

S. 4167

IN THE SENATE OF THE UNITED STATES

NOVEMBER 19, 1974

Mr. PERCY (for himself and Mr. ERVIN) introduced the following bill; which was read twice and referred to the Committee on Government Operations

A BILL

To establish a National Commission on Regulatory Reform to evaluate and report on the effectiveness of Government regulation at the Federal and State level and its impact on inflation, competition, and the public interest.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Public Interest Regulatory Review Act of 1974".

ESTABLISHMENT OF COMMISSION

SEC. 2. (a) There is established for a period of one year, as an independent instrumentality in the executive branch of the Federal Government, a National Commission on Regulatory Reform (hereinafter referred to as the

"Commission") which shall be comprised of ten members selected as follows—

(1) three distinguished representatives from the private sector appointed by the President, at least one of whom shall be especially well qualified to represent the interests of American consumers,

(2) three senior officials of the executive branch appointed by the President,

(3) two Senators appointed by the President of the Senate, each representing one of the two major political parties, and

(4) two Members of the House of Representatives appointed by the Speaker of the House, each representing one of the two major political parties.

(b) The President shall nominate, from the private sector membership, one member to serve as Chairman and one member to serve as Vice Chairman of the Commission. The designee for the position of Chairman, shall be appointed with the advice and consent of the Senate.

(c) Vacancies on the Commission shall not affect the authority of the remaining members to continue with the Commission's activities, and shall be filled in the same manner as the original appointments.

(d) Five members of the Commission shall constitute a quorum for the purpose of conducting meetings, except that

any two members of the Commission shall constitute a quorum for the administering of oaths and the taking of testimony.

(e) Members of the Commission who are appointed from the private sector shall receive as compensation the daily equivalent of the annual rate of basic pay in effect for grade GS–18 for each day during which they are engaged in the actual performance of the duties of the Commission. All members of the Commission shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties of the Commission.

DUTIES

SEC. 3. (a) Within nine months after the appointment of Commissioners, the Commission shall prepare a comprehensive report to the President and to the Congress containing its findings, conclusions, and recommendations concerning activities within the Federal regulatory agencies with respect to—

(1) the most serious deficiencies within the regulatory process which tend to contribute to inflation, lessen competition, or which adversely affect the public and regulated companies,

(2) the extent to which certain areas of the national economy are over-regulated or under-regulated,

with special emphasis on overlapping regulatory jurisdictions, conflicting mandates, and actual implementation of existing laws and regulations,

(3) the economic costs and benefits of regulation, or the lack thereof, with special emphasis on the inflationary impact of regulation on the cost to the consumer of goods and services, the added costs to manufacturers and suppliers in providing goods and services, the anticompetitive effects of some regulation, the degree of market concentration in regulated as opposed to nonregulated industries, and productivity factors affected by regulation,

(4) the continued appropriateness or applicability of original regulatory purposes and objectives as mandated by statute, and an evaluation of the purposes and objectives which regulation should now serve,

(5) the consequences to the Nation of selective deregulation in specified areas or selective modification of regulatory purposes, operations, and procedures in specific areas,

(6) the need for, and specific recommendations concerning increased or more stringent antitrust enforcement as a higher order national priority, including proposals for any new legislation which may be needed or for restructuring of the Federal antitrust effort,

(7) specific recommendations for legislative actions to improve the effectiveness, efficiency, and responsiveness to the public of Federal regulatory agencies, including but not limited to the following—

(A) selective elimination of specific regulatory functions, procedures, activities, or practices;

(B) selective elimination, merger, or transfer of overlapping or related regulatory jurisdictions, mandates, or functions;

(C) revisions in the laws, regulations, structure, operation, procedures, activities, or mechanisms of the regulatory agencies;

(D) elimination, transfer, or separation out of the subsidy-granting or other forms of promotional activities performed by regulatory agencies which adversely affect or interfere with their principal regulatory responsibilities;

(8) an evaluation of other proposals for improving the effectiveness, efficiency, and responsiveness to the public of the regulatory agencies including, but not limited to an evaluation of proposals for—

(A) encouraging the enunciation of broad policy guidelines by the regulatory agencies instead of continuing to permit unclear policies to develop

impliedly through a series of case-by-case decisions or adjudications involving differing facts and circumstances;

(B) making the regulatory responsibilities of selected or all regulatory agencies more independent of the executive branch by requiring simultaneous submission of budget and legislative requests to the President and the Congress, and by permitting each regulatory agency to independently control and supervise its own litigation in the Federal courts;

(C) eliminating collegial commissions altogether or selectively, and replacing the commission form with a single administrator;

(D) revising procedures for selecting commissioners and reviewing their qualifications, including the designation or establishment of a distinguished Board of Regulatory Review to provide its recommendations or guidance on names submitted by the President as possible appointees for regulatory agency positions;

(E) revamping the conflict-of-interest statutes, or their applicability to regulatory agency officials, so as to limit the movement of persons from a regulated industry or a related industry to the agency which regulates that industry, and the movement of

persons from the agency back to the regulated industry;

(F) limiting the removal of regulatory agency officials to reasons relating to their inefficiency, neglect of duty, or malfeasance in office;

(G) making regulatory agency officials, in their personal capacity, civilly or criminally responsible for intentional misuse or abuse of their office for reasons relating to (i) their disclosure of trade secrets or other confidential or privileged information; (ii) their failure to make information available to the public pursuant to the Freedom of Information Act; (iii) their failure to open up agency meetings, sessions, and agency advisory committee meetings and sessions to the public; or (iv) their neglect or failure to carry out the provisions of the laws administered by them;

(H) providing for the payment of reasonable costs and expenses in agency proceedings of intervenors on behalf of the public or consumer interests and an assessment of the manner by which such a proposal might be implemented across the board including the anticipated costs therefor;

(I) creating a new Administrative Court of the United States as an expert judicial unit to handle

appeals from final decisions of the regulatory agencies;

(J) amending the Administrative Procedure Act and modifying agency rules to expedite regulatory agency proceedings as a means of facilitating more timely decisionmaking and preventing wasteful costs attendant to agency delays;

(K) substituting direct subsidies, where appropriate, for complicated and cumbersome regulatory schemes, with hidden taxes and costs, which aim at achieving a particular economic or social purpose;

(L) improving the information-gathering, analysis, storage, and retrieval systems within the regulatory agencies while lessening the paperwork burden both within the agencies and within the regulated industries by avoiding needless duplication;

(M) providing for more effective means of informing the public of the activities within the regulatory agencies and their specific or general impact on the public interest in matters of particular importance or impact;

(9) recommendations for assuring an ongoing review and assessment of the economic costs and benefits, and the deficiencies of Federal regulatory activities, including proposals for limiting the growth of bureauc-

racy, and phasing out selected agencies or establishing a time certain within which they would expire unless Congress specifically renews their mandates by legislative enactment,

(10) a realistic and detailed assessment of the costs or savings, transitional, interim, and long-term, of Commission proposals and recommendations for regulatory reform.

(b) Within twelve months after the appointment of Commissioners, the Commission shall prepare a comprehensive report to the President and to the Congress containing its findings, conclusions, and recommendations concerning activities within State, regional, and local regulatory agencies which tend to contribute to inflation, lessen competition, or which adversely affect the public and the regulated companies. The report shall give special emphasis to areas where Federal regulatory activities interact with or are affected by the activities of State, regional, or local regulatory units, and where the latter activities, or the absence or misdirection thereof, have an important inflationary impact.

(c) In carrying out its responsibilities under this section, the Commission shall utilize, wherever appropriate, all existing studies, investigations, reports, and other existing material relevant to its responsibilities.

POWERS

SEC. 4. (a) The Commission is authorized to hold such hearings, sit and act at such times and places as it may deem desirable.

(b) Subpenas for the attendance and testimony of witnesses or the production of written or other matter may be issued on the authority of the Commission and shall be served by anyone designated by the Chairman.

(c) If the Commission receives of any witness or any Government agency materials which have been submitted on a confidential basis, and the confidentiality is protected by statute, the material shall be held in confidence by the Commission.

(d) The Commission is authorized to establish such advisory committees as may be necessary or appropriate to carry out any specific analytical or investigative undertakings on behalf of the Commission. Any such committee shall be subject to the relevant provisions of the Federal Advisory Committee Act (Public Law 92–463).

SEC. 5. (a) Subject to such rules and regulations as it may adopt, the Commission, through its Chairman, shall appoint and fix the compensation of an Executive Director not to exceed the rate provided for level V of the Executive Schedule under section 5316 of title 5, United States Code, and such additional staff as is deemed necessary without

43-362 O - 75 - pt. 2 - 19

regard to the provisions of title 5, United States Code, governing appointments in the competitive service, but at rates for individuals not to exceed the rate authorized for GS–18 under the General Schedule.

(b) The Chairman may procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code, but at rates not to exceed $150 per day for persons performing such services.

(c) The Chairman is authorized to negotiate and enter into contracts and agreements as the Commission determines are necessary in order to carry out its duties.

ASSISTANCE OF GOVERNMENT AGENCIES

SEC. 6. Each department, agency, and instrumentality of the Federal Government, including the Congress and independent agencies, and State and local agencies, consistent with the laws and the Constitution of the United States, shall furnish to the Commission, upon request of the Chairman, such data, reports, and such other information as the Commission deems necessary to carry out its functions under this Act.

DEFINITIONS

SEC. 7. As used in this Act, "Federal regulatory agency" includes any existing independent Federal agency which, as one of its principal responsibilities, exercises regulatory functions affecting one or more segments of American in-

dustry, as well as any agency or governmental unit within an agency or department of the Federal Government which exercises such regulatory functions as one of its principal activities. The term is meant to include but not be limited to such independent regulatory agencies as the Interstate Commerce Commission, the Securities and Exchange Commission, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, the Federal Energy Administration, the Federal Power Commission, the Federal Trade Commission, the Federal Communications Commission, the Federal Maritime Commission, the Civil Aeronautics Board, the Consumer Product Safety Commission, the Commodity Futures Trading Commission, the National Labor Relations Board, the Farm Credit Administration, the Tariff Commission, the Equal Employment Opportunity Commission, the Small Business Administration, the Nuclear Regulatory Commission, the Environmental Protection Agency, and others. The term is also meant to include but not be limited to such agencies or units within an agency or department as the Food and Drug Administration, the National Highway Traffic Safety Administration, the Occupational Safety and Health Administration, the Federal Aviation Administration, the Antitrust Division of the Justice Department, the Office of the Comptroller of the Currency, the Agricultural Market-

ing Service, the Commodity Credit Corporation, the Packers and Stockyards Administration, and others.

TERMINATION

SEC. 8. Sixty days after the submission of the final report provided for in section 3(b), the Commission shall cease to exist.

AUTHORIZATION

SEC. 9. There is authorized to be appropriated $1,500,000 to carry out the provisions of this Act.

93D CONGRESS
2D SESSION

S. J. RES. 256

IN THE SENATE OF THE UNITED STATES

NOVEMBER 18, 1974

Mr. ALLEN introduced the following joint resolution; which was read twice and referred to the Committee on Government Operations

JOINT RESOLUTION

To establish a national commission to study and report on the impact of certain regulatory agencies upon commerce, and for other purposes.

Whereas the American consumer has a right to be protected against inefficient or otherwise unreasonable regulation of commerce which results in increased costs of products and services purchased for personal, family, or household use;

Whereas those persons whose products and services are marketed to consumers are entitled to compete for profit on their investments free of such inefficient or otherwise unreasonable regulation of commerce;

Whereas the Congress, in order to regulate commerce with foreign nations and among the several States, has created and continues to create regulatory agencies as arms of the Congress with authority to act within a broad framework of congressionally established standards and policies;

Whereas such regulatory agencies may be imposing unnecessary or unreasonable burdens upon commerce by legitimizing restrictive and anticompetitive trade practices or by otherwise acting contrary to the purposes of establishing such agencies;

Whereas any such burdens would unnecessarily or reasonably increase the cost to the consumer of goods and services made available in commerce;

Whereas the President of the United States, in an address to a joint session of the Congress, has called for "a joint effort by the Congress, the executive branch, and the private sector to identify and eliminate existing Federal rules and regulations that increase costs to the consumer without any good reason in today's economic climate"; and

Whereas the President's recognition of the need for the establishment of a national commission to examine the operation of the regulatory agencies and to examine the premises upon which some or all of them were created is supported by testimony received by committees of the Congress, the efficacy of these agencies, the accountability of these agencies to the public interest, and the public policy justification of these agencies should be studied and reviewed by qualified and impartial individuals on a bipartisan basis: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

(a) ESTABLISHMENT.—There is established for a term of three years a National Commission on Regulatory Reform (hereinafter referred to as the "Commission").

(b) STRUCTURE.—(1) The Commission shall consist of fifteen members, as follows:

(A) three who shall be appointed by the President pro tempore of the Senate, of whom not more than two shall be affiliated with the same political party;

(B) three who shall be appointed by the Speaker of the House of Representatives, of whom not more than two shall be affiliated with the same political party;

(C) three who shall be appointed by the President, with the advice and consent of the Senate, from the personnel of Federal agencies other than regulatory agencies;

(d) six who shall be appointed by the President, with the advice and consent of the Senate, from individuals who, because of their education, training, or experience shall, respectively, be two qualified representatives of the interests of (i) the labor community, (ii) the business community, and (iii) the ultimate consumer of goods and services, of whom not more than four shall be affiliated with the same political party.

(2) Members of the Commission shall be appointed for a term of three years, except that any individual appointed to fill a vacancy occuring prior to the expiration of the term for which his predecessor was appointed shall be ap-

pointed for the remainder of such term and in the same manner in which such predecessor was appointed.

(3) The members of the Commission shall elect one of their number to serve as Chairman thereof.

(4) Twelve members of the Commission shall constitute a quorum for the purpose of electing a Chairman or approving any final reports required by this resolution, and eight members of the Commission shall constitute a quorum at any meeting for the performance of any other function of the Commission: *Provided,* That notice in writing of the dates, time, and location of any meeting of the Commission is given or sent by certified mail to each of the members of the Commission at least fifteen days prior to the date thereof.

(c) DUTIES.—The Commission shall—

(1) within twelve months after its establishment, prepare a comprehensive report to the Congress and the President containing its conclusions and recommendations, together with the criteria, standards, data, and findings upon which such conclusions and recommendations are based, with respect to—

(A) the consequences to the Nation of regulation by regulatory agencies;

(B) the economic costs, including any inflationary impact upon the price of goods and services

resulting from such regulation, and any economic benefits of regulation by the regulatory agencies, including an analysis of the relationship, if any, between such regulation and the degree of market concentration, the amount of competition, and the performance characteristics of industries subject thereto, of regulation by the regulatory agencies, considered collectively and individually;

(C) any noneconomic costs and benefits of such regulation, taking into account reliability of service, protection of the environment, protection of low- and middle-income consumers, demographic impact, quality of life, and other relevant factors and national goals and purposes as set forth in Acts of Congress;

(D) evaluation of the benefits to the Nation of continuing regulation by regulatory agencies, considered collectively and individually, and costs thereof in comparison with the benefits to the Nation of discontinuing such regulation in whole or in part, and costs thereof;

(E) the consequences to the Nation of discontinuing regulation by regulatory agencies, on the same bases as set forth in subparagraphs (B) and (C) hereof;

(F) the extent to which regulation by such agencies should be continued, discontinued, or modified to attain the maximum economic and other benefits to the Nation at the minimum economic and other costs to the Nation and its citizens, including identification of regulation which should be continued and regulation which should be discontinued and on what basis; and

(G) the economic costs and benefits to consumers, to those who produce or sell goods or services in commerce and to taxpayers, of the collection of information by regulatory agencies from those who produce or sell goods or services in commerce;

(2) within eighteen months after its establishment, prepare a second such comprehensive report to the Congress and the President, with respect to—

(A) adequacy of representation of the interests of consumers within the decisionmaking process of the regulatory agencies;

(B) alternative methods for improving such representation, evaluating the anticipated economic and noneconomic costs and benefits of each in relation to consumers, taxpayers, and efficient regulation of commerce, including specifically as one of these alternatives the establishment of a nonregula-

tory agency to so represent the interests of consumers and an exaluation of the jurisdiction, functions, duties, powers, personnel, and authorization of funds anticipated as being necessary to make such a non-regulatory agency a viable alternative;

(3) within twenty-four months after its establishment prepare a third such comprehensive report to the Congress and the President, with respect to—

(A) changes in the structure, operations, procedures, mechanisms, and philosophy of the regulatory agencies, considered collectively and individually, which would decrease any negative consequences of regulation to the Nation without impairing the affirmative consequences thereof;

(B) the extent to which such changes and any other modifications (by statute, regulation, rule, or practice) could improve the effectuation by such agencies, considered collectively and individually, of their statutory purposes and duties;

(C) all reasonable proposals for administering the regulatory agencies and for improving the efficiency, effectiveness, responsiveness, and accountability of such agencies, considered collectively and individually, including, but not limited to an evaluation of proposals for—

(i) merging or otherwise restructuring existing independent regulatory agencies;

(ii) providing for tenure in the office of the chairman of each independent regulatory agency;

(iii) providing for some form of merit selection recommendation prior to nomination of members of such agencies;

(iv) reducing the number of members or commissioners of such agencies and defining areas of responsibility for each;

(v) authorizing each agency to appoint a certain number of employees without regard to the provisions of the civil service laws applicable to officers and employees of the United States for the transaction of business which involves policy or other special responsibilities and who may be removed at the discretion of the agency;

(vi) authorizing the Senate to withdraw its advice and consent to an appointment of a member of such an agency;

(vii) limiting the authority of the President to remove a member of such an agency or establishing an impartial procedure for investigation and hearing prior to mandatory removal

by the President, such as that established in some States for the removal of unfit judges upon a finding by an independent removal commission;

(viii) prohibiting members of such agencies and employees thereof of grade GS–14 and above from accepting employment or direct or indirect compensation from any person subject to regulation by their agency for a fixed period of time after they leave the employ of such agency;

(ix) granting each such agency independent control of its litigation in the Federal courts;

(x) directing that each such agency transmit legislative recommendations and budget requests directly to the appropriate committees of the Congress simultaneously with any submission to any official in the executive branch and without prior approval by any person outside such agency;

(xi) better means of enforcement of determinations by such agencies and faster ways of investigating and reaching such determinations, including the establishing of semiautonomous regional and district offices; and

(xii) expanding the responsibility of the Comptroller General of the United States, on behalf of Congress, for regular performance auditing of each such agency, authorizing the duly authorized committees of the Congress to appoint hearing examiners to conduct regular hearings into the actions and inactions of each such agency, and other ways of making such agencies more accountable to the Congress;

(4) within thirty-six months after the date of its establishment, prepare a fourth such comprehensive report to the Congress and the President detailing steps taken or underway to carry out the recommendations set forth in the first, second, and third comprehensive report together with any additions, modifications, or further refinements of such earlier conclusions and recommendations.

(d) DEFINITIONS.—As used in this joint resolution—

(A) "independent regulatory agency" means the Civil Aeronautics Board, the Consumer Product Safety Commission, the Environmental Protection Agency, the Federal Communications Commission, the Federal Maritime Commission, the Federal Power Commission, the Federal Reserve System, the Federal Trade Commission, the Interstate Commerce Commission, the National

Labor Relations Board, the Postal Rate Commission, the Securities and Exchange Commission, and the United States Postal Service;

(B) "regulatory agency" means any independent regulatory agency, the Food and Drug Administration (being an agency of the Public Health Service in the Department of Health, Education, and Welfare), the National Highway Traffic Safety Administration (being an agency of the Department of Transportation), the Occupational Safety and Health Administration (being an agency of the Department of Labor) and any agency" as defined in section 551 of title 5, United States Code, authorized to regulate commerce by rulemaking or adjudication, the actions of which, as determined by the Commission, are of substantial importance to the protection of the public's health, safety, or economic interests.

(e) ADVISORY COMMITTEES.—To assist it in carrying out its duties, the Commission is authorized to appoint such advisory committees as it deems necessary or appropriate, consisting of qualified administrative law experts, political scientists, economists, management specialists, consumer representatives, environmentalists, social scientists, and other individuals, pursuant to the Federal Advisory Committee Act (5 U.S.C. App. I).

(f) POWERS.—(1) The Commission or any member thereof may, for the purpose of carrying out the provisions of this section, hold such hearings, sit and act at such times and places, administer such oaths, and require by subpena or other order the attendance and testimony of such witnesses and the production of such evidence as the Commission or member deems advisable. Subpenas may be issued under the signature of the Chairman or any duly designated member of the Commission, and may be served by any person designated for such purpose by the Chairman. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Such attendance of witnesses and production may be required from any place in the United States to any place designated for such hearing.

(2) In case of refusal to obey a subpena or other order issued under paragraph (1) of this subsection, by any person who resides, is found, or transacts business within any judicial district of the United States, the district court of the United States or any such district shall have jurisdiction and shall upon the request of the Chairman of the Commission issue to such person an order to appear and produce evidence. Any failure to obey such an order shall be punishable by such court as a contempt of court.

(3) The Administrator of General Services shall furnish

the Commission with such offices, equipment, supplies, and services as he is authorized to furnish to any other agency or instrumentality of the United States.

(4) Each Federal agency is authorized and directed to furnish to the Commission, upon written request by the Chairman thereof, on a reimbursable basis or otherwise, such assistance as the Commission deems necessary to carry out his duties.

(5) The Commission may enter into such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its duties, with any person.

(6) If the Commission receives of any person or agency any material or other information which was, or had been, submitted on a confidential basis, protected as such by statute, such material or other information shall be held in confidence by the Commission.

(g) COMPENSATION AND PERSONNEL.—(1) A member of the Commission shall receive compensation only if not otherwise employed in any capacity by the Federal Government. Such member shall receive $300 per diem when engaged in the actual performance of duties vested in the Commission. All members of the Commission shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of such duties.

(2) Subject to such rules and regulations as the Com-

43-362 O - 75 - pt. 2 - 20

mission may adopt, the Chairman of the Commission shall have the power to (A) appoint, fix the compensation, and assign the duties of an Executive Director and such additional staff personnel as are deemed necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, classification, and General Schedule pay rates, except that no individual shall be paid at rates in excess of the maximum rate for GS–18 of the General Schedule as set forth under section 5332 of such title; and (B) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code, but at rates not to exceed $150 a day for persons performing such services.

(h) AUTHORIZATION FOR APPROPRIATIONS.—There are authorized to be appropriated to the Commission such sums as are necessary, not to exceed $1,000,000 for each of the years of its establishment, such sums to remain available until expended.

(i) TERMINATION.—Ninety days after the submission of the final report provided for in subsection (c) (4), the Commission shall cease to exist.

APPENDIX 2

AGENCY COMMENTS

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., November 7, 1974.

Hon. SAM J. ERVIN, Jr.,
Chairman, Committee on Government Operations, U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on S. 4145, "To establish a National Commission on Regulatory Reform."

The President, in his message of October 8, 1974 on proposals to fight inflation, asked the Congress to establish a National Commission on Regulatory Reform "to undertake a long-overdue total re-examination of the independent regulatory agencies."

The proposed legislation incorporates the President's proposal. The Department therefore recommends enactment of S. 4145.

The Department has been advised by the Office of Management and Budget that there is no objection to the submission of this report to your Committee and that enactment of the proposed legislation would be in accord with the program of the President.

Sincerely yours,

RICHARD R. ALBRECHT,
General Counsel.

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., December 3, 1974.

Re bill S. 4145.

Hon. SAM J. ERVIN, Jr.,
Chairman, Committee on Government Operations,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: This is in response to your request regarding this Agency's views concerning the above-captioned bill.

We have reviewed bill S. 4145, and we have concluded that this proposed bill is a policy matter for Congress and we have no objections to its enactment.

The Office of Management and Budget has advised us that it has no objection to this response concerning the above bill.

Sincerely,

EDWARD B. MILLER, *Chairman.*

U.S. CONSUMER PRODUCT SAFETY COMMISSION,
Washington, D.C., November 22, 1974.

Hon. SAM J. ERVIN,
Chairman, Government Operations Committee. U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This letter is in response to your request for the Commission's views on S. 4145, a bill "to establish a National Commission on Regulatory Reform."

The bill would establish an independent commission to review and make recommendations upon regulatory goals and activties of independent regulatory agencies.

The Consumer Product Safety Commission supports the objectives of this legislation, feeling that such review is not only timely and desirable, but necessary.

However, with respect to specific legislative provisions to achieve meaningful review and reform, the Commission has voted to submit individual views for consideration rather than a consensus statement. We trust, however, that

the Committee will accept the thoughtfully considered comments of the Commissioners for consideration during the deliberations on this important legislative initiative.

Sincerely,

RICHARD O. SIMPSON,
Chairman.

U.S. CONSUMER PRODUCT SAFETY COMMISSION,
Washington, D.C., November 26, 1974.

Hon. SAM J. ERVIN, JR.,
Chairman, Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: I appreciate the opportunity to comment on S. 4145 calling for the creation of a National Commission on Regulatory Reform.

In my opinion there is need for a Commission on regulatory reform to study the nature and extent of the impact of regulatory agencies on the economy and more importantly to review the broader issue of the future role of independent regulatory agencies. My reading of previous studies of the regulatory process convinces me that it is now time to take a long hard look at a series of issues, among which are:

Are independent agencies the best vehicle for regulating the marktplace? If so, should they be made more independent and how so?

How can regulatory agencies be made more accountable to the public?

What methods of meaningful coordination can be established as between regulatory and other agencies intervening in the marketplace?

How can regulatory agencies gain credibility with the public so necessary to be effective?

By better organizational structure?

By greater public participation in decisionmaking?

By more guidelines from Congress?

I am certain that these are all issues you have considered and are aware have been considered by others before now. I would hope that Congress in establishing the Commission will insist upon an analysis of previous regulatory reform efforts in order to determine why they failed and which previous recommendations should be reconsidered. My one concern that study Commissions' recommendations do not get implemented was dispelled. Comprehensive reviews of Presidentially-appointed study Commissions have shown that their recommendations are very often a substantial input into proposed or actually implemented changes in federal policy. (Reference: T. R. Wolanin, *Presidential Advisory Commission, 1945–1968* (Doctoral Thesis, 1972 Harvard University)). Further I do feel that the contemplated composition of the Commission will go a long way toward ensuring implementation of their recommendations. Because of the unique role of regulatory agencies, Congress must play a key role in studying and bringing about any necessary regulatory reform. In order to ensure a fair-minded appraisal of the regulatory system it is important also that the Commission be structured to insure consideration of the views of small business, consumers, regulated industries and non-reguated industries.

I would endorse the Commission's studying all of the points outlined in the bill, S. 4145. I would add the following observations:

It will be important for attention to be paid not only to the inflationary ramifications of regulations but also to the offsetting benefits (e.g., greater protection from hazards, greater access to information to make possible intelligent purchasing choices, greater possibility of successful small business enterprises, etc.) which accrue to the public. The need exists for such a study, I believe, which makes reference to both individual agencies and the regulatory process as a whole. Any equations or criteria used by the Commission to evaluate the impact of regulatory action on the economy should be part of the final report.

Particular attention should be paid to Section 3(a) of the bill, with the additional requirement that possible ways for ensuring efficient coordination of regulatory decisions with other regulatory agencies be recommended as a result of this review.

One final observation:

Among the criticisms that have been levelled at regulatory agencies in the recent past is the quality of the Commissioners and the cosiness of the agencies

with the industries which they regulate. Therefore, I would personally welcome as a result of the process of general regulatory reform, any mechanism that could be created that would (a) institutionalize the independence of the agencies from the particular policies of the administration in office, (b) limit employment of Commissioners and other high ranking staff by the regulated industry subsequent to serving the term of office, and (c) provide for consistent and coordinated oversight by Congress.

Sincerely,

CONSTANCE B. NEWMAN,
Commissioner.

U.S. CONSUMER PRODUCT SAFETY COMMISSION,
Washington, D.C., December 3, 1974.

Re S. 4145.

Hon. SAM J. ERVIN, Jr.
Chairman, Committee on Government Operations,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: As set forth in Chairman Simpson's letter of November 22, 1974, to you, the Commissioners of the Consumer Product Safety Commission voted recently to submit their individual views regarding S. 4145 to your Committee. I am delighted to do so in this letter.

I wholeheartedly endorse the establishment of an independent commission to review and make recommendations upon regulatory goals and activities of independent regulatory agencies.

I have carefully reviewed the provisions of S. 4145 and am in general agreement with them. I do have several comments about them:

(a) *Method of Selection of Commission Members.*—Section 2(a) and 2(b) vest most of the appointment power for members of the Commission in the President of the United States (Sec. 2(a)(3) gives the power of appointment of Senators to the President of the *Senate.* If and when a Vice-President is chosen by the Congress, it seems inescapable that his appointments will be made by the President of the United States). In addition, the President is given the power to designate both the Chairman and the Vice-Chairman of the Commission. Unfortunately, the potential for uncritical similarity of thought between the President and most of the members of the Commission is quite great under such a method of selection. To insure greater heterogeneity and independence of members on the Commission, I would suggest that the Majority Leader of the Senate be given the right to choose three representatives of whom not more than two shall be affiliated with the same political party. I would suggest the same arrangement for the Speaker of the House of Representatives. I would, furthermore, not limit selection by the Majority Leader or the Speaker to members of their houses. They should be free to choose congressional staff members or private citizens if they wish. Such a method of selection would, I believe, guarantee a much needed diversity of thought so necessary for a government study commission such as envisioned by S. 4145.

(b) *Makeup of the Commission.*—Although I applaud the concept of appointing one-third of the Commission members from the "private sector," I am concerned that no specific provision has been made to specifically include consumers among these members. In particular, I would urge you to make specific provision to include at least one (and hopefully several) member from a voluntary citizen group on the Commission. I say this because consumer groups have been in the forefront of the movement to publicize and counter those regulatory decisions by administrative agencies which appear not to promote the public interest. The inclusion of a representative (or representatives) from a consumer group would go far to provide the opportunity for the input of a unique point of view and to promote the legitimacy of the Commission with the American public.

(c) *Time Frame for Commission Report.*—Section 3(b) requires the Commission to submit an exhaustive and detailed report to the President and Congress not later than one year following the appointment of the full Commission. I doubt that this time frame is adequate to achieve as truly monumental a task as the full study of Independent Regulatory Agencies envisioned in this Bill. I would suggest that the time for a final report be extended to two years with provision made for an earlier preliminary report after one year.

(d) *Definition of "Independent Regulatory Agency."*—No clear definition of the term "independent regulatory agency "is included in the proposed Bill. Although it is clear that an agency such as the Consumer Product Safety Commission would be included for study, it is not clear that an agency such as the Food and Drug

Administration, which is part of the Department of Health, Education, and Welfare, would also be included. Certainly such an agency ought to be studied by the Commission.

(e) *Areas for Review by the Commission.*—Perhaps my major problem with S. 4145 stems from the lack of direction given to the Commission by the Congress. Section 3(a) is too general in language to enable the Commission to insure that the Commission will explore as many areas as it might otherwise do. I would recommend that you scrutinize section (C) of S.J. Res. 253 to see an approach which could be highly fruitful. While you might decide that such detail is unnecessary, I would, at a minimum, suggest that you specifically direct the Commission to study the problem of industries "capturing" or co-opting the agencies which relate them and solutions to this problem. Clearer direction to the Commission, given the time frame envisioned by you, seems essential.

Thank you for considering my comments on this Bill. I would be glad to be of further assistance if you desire as I have a considerable interest in this area.

Sincerely,

R. David Pittle, Ph. D.,
Commissioner.

U.S. Consumer Product Safety Commission,
Washington, D.C., December 6, 1974.

Hon. Sam J. Ervin, Jr.,
Chairman, Committee on Government Operations,
U.S. Senate, Washington, D.C.

Dear Mr. Chairman: In a November 22 letter, Chairman Simpson indicated that members of the Consumer Product Safety Commission would submit individual comments on S. 4145.

Attached are my comments which seek, not to respond to each section of the bill, but rather to lay out some of the important issues which I believe should be addressed.

The issue of regulatory reform is critical. Critical because clear accountability of regulatory agencies to consumers is obscured. Critical, especially at this time, because of the impact of inflation, risks of recession and the demand of the American people for open, responsive government.

I support the idea of a Commission on Regulatory Reform and welcome future opportunities to support the process which seeks to create it. If enacted, the Commission has the potential to bring abut needed changes similar in impact to those stemming from the earlier Brownlow and Hoover Commissions.

Sincerely,

Barbara Hackman Franklin,
Commissioner.

Attachment.

Comments on S. 4145 Submitted to Committee on Government Operations
U.S. Senate

The following comments on S. 4145 address the need for a National Commission on Regulatory Reform, the scope of its investigations, and its structure, including membership and staffing.

Need for a National Commission on Regulatory Reform

The proposed comprehensive study of federal regulatory functions is timely in view of inflationary pressures, risks of recession and the public's increased demand for open and responsive government.

Regulatory agencies pose a dilemma. They exist to protect the public interest; yet their accountability and responsiveness to that public are not directly assured. The central questions raised are:

When and why is a regulatory function clearly in the public interest?

How can a regulatory function be accountable to the public while at the same time be objective and insulated from political pressures (the way in which other public officials are usually held accountable)?

Specifically, the following are problems which make the need for the study essential.

There appears to be no commonly-accepted way to determine and assess what constitutes the "public interest" over a period of time. When, for example, does the "public interest" clearly dictate the need to create a regulatory function? If during the time a regulatory body is in existence, the "public interest" changes,

how do we make the function readily and responsibly reflect those changes? And, finally, if and when could the "public interest" dictate the need to end a regulatory function?

Regulatory bodies are often not obligated to weigh all of the benefits and costs of their actions. Measuring the effectiveness of a regulatory body is difficult. Measuring the effectiveness of the regulatory body's uses of its resources (dollars and people) is even more difficult. In other words, it is hard to tell whether a regulatory body is doing the right things for the public—and even harder to tell whether it is doing them as efficiently as possible.

Regulatory bodies often exercise quasi-executive, quasi-legislative, and quasi-judicial functions; however, it is not completely clear to which branch of government, if any, they are or should be accountable in the exercise of these functions.

Each regulatory body was created to deal with a specific problem, but there is usually no provision that this problem be addressed within the context of other problems affecting the public.

Therefore, it is possible that a regulation promulgated by one regulatory body conflicts with a regulation promulgated by another. For example, regulations now require detergents to be low in phosphates in order to combat pollution. At the same time, low phosphate detergents have characteristics that may destroy the flame retardancy of children's sleepwear. The mandatory requirement for flame retardancy enforced by CPSC, is for the purpose of protecting young children from severe burns. The difficulty is that there is no mechanism in this case to make the trade-off between pollution control and child safety.

It is also possible that more than one regulatory body could be spending money to research the same problem. Perhaps a single study, satisfying the needs of several agencies, would be a better use of scarce taxpayers' dollars. There is currently no clear mechanism to achieve that kind of coordination.

Regulatory bodies have been generally susceptible to domination or "capture" by the industries they regulate.

Regulatory bodies, their activities, proceedings and records are often closed to the public—the very people who foot the bill and whose interests are at the heart of regulatory functions.

In summary, the need for a National Commission on Regulatory Reform is clear if we are to prevent needless waste of taxpayers' dollars and make government more responsive to the needs of the public.

SCOPE OF THE COMMISSION'S INVESTIGATION

In my judgment, the Commission should produce for the Congress and the President one major report which should include the following findings:

1. *Development of criteria to assess the need for and the effectiveness of regulatory functions.* One section of the report should set forth the criteria and methodology to determine when and why a regulatory function is in the "public interest." The criteria should also address the measurement of costs and benefits (both tangible and intangible) which accrue as a result of the exercise of regulatory powers. While "economic analysis" is much discussed, the cost/benefit impact of regulatory functions has been underemphasized, and the techniques for such assessments are remarkably unsophisticated. Hopefully, through the Commission's work, new and better assessment techniques will be developed.

2. *Evaluation of Regulatory Functions.* A second section of the report should apply the Commission's criteria to existing federal regulatory bodies to determine the effectiveness, strengths and weaknesses of each. Specifically, these questions should be answered:

Are the goals of each regulatory body in the public interest? If not, why not?

How effectively is each regulatory body achieving its goals?

What makes the regulatory body perform "effectively?" The scope of its statutory authority? Its techniques for setting priorities? Its decision-making process? Its use of its statutory powers? Its enforcement authority? Its organizational structure? Its ability to use funds and people to the best advantage?

What mechanisms exist to assure the regulatory body's accountability and responsiveness to the public? Are they adequate?

Are there conflicting or overlapping goals and functions among federal regulatory bodies which are confusing and/or wasteful? In what specific areas? Do the goals and functions of federal regulatory bodies conflict or overlap with those of state and local regulatory bodies? In what areas and with what results?

3. *Recommendations for Improvements.*—The final section of the report should make recommendations to the Congress and President which would:

Suggest ways to alter or eliminate regulatory functions which are not in the public interest as defined by the Commission's criteria.

Suggest ways to strengthen, improve and/or make more efficient those regulatory functions which are clearly in the public interest as defined by the Commission's criteria.

Suggest ways to make regulatory bodies more accountable and responsive to the public.

Suggest ways to prevent and remedy regulatory overlap, conflict and confusion.

While I suggest one comprehensive report, I believe the Commission should be required to make interim reports (concurrently to the Congress and the President) to assure that it is going about its job in the proper way and addressing all of the crucial issues.

In addition, I wish to make two other comments affecting the scope of the investigation.

First, the term "independent regulatory agency" should be defined in S. 4145. The bill should specify each of those agencies which is to be the subject of the Commission's investigations. Included should be the independent regulatory bodies, e.g., ICC, FCC and CPSC, as well as the regulatory bodies which are included within the Cabinet departments, e.g., FDA.

1. *Membership of the Commission*

The Commission should be manageable in size (certainly no larger than the 12 members specified in the bill). It should also be representative of a broad cross-section of the American public. Among those interests outside the federal government which should be considered are: a state or local government official; a representative of a large business; a representative of a small business; a representative of organized labor; a representative of a recognized consumer group; a person (unaffiliated with a recognized consumer group) who represents another large segment of the population, e.g., a women's group; a representative of low income consumers.

I think the President, House of Representatives and Senate should be involved in the selection of Commissioners, and that the Executive and Legislative Branches (and perhaps the Judiciary, too) should be represented on the Commission.

The President should appoint the Commission's Chairman, subject to the advice and consent of the Senate.

S. 4145 provides that the Commission has four members who are officials of the executive branch. I have a concern about people currently employed in Federal regulatory bodies serving as members (or staff, for that matter) of the Commission because their direct and close involvement with regulatory matters may inhibit and jeopardize their objectivity.

2. *Role of the Commissioners.*—The legislation should:

State that each Commissioner has the power to cast one vote: voting power should not be delegated.

Specify what actions of the Commission require the Commission's approval. The Commission's final report and any interim status reports should require Commission approval.

Specify the number of votes that shall be necessary to constitute "approval by the Commission."

3. *Openness of Commission operations.*—The legislation should require that the Commission's activities be open to the public, insofar as is practicable.

* * * * * * *

In summary, I believe creation of a National Commission on Regulatory Reform is necessary, important, and timely. This Commission should go about its work as quickly, professionally, and openly as possible. The Congress, President, and public need an answer to the basic questions: When and why is a regulatory function clearly in the public interest? How much is the consumer paying for regulation? Is it too much—and is it worth it?

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., December 17, 1974.

Hon. CHARLES H. PERCY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR PERCY: This is in response to your request for comments on S. 4167, the bill which you and Senator Ervin have introduced to establish a National Commission on Regulatory Reform.

As stated in my testimony on similar legislative measures before the Surface Transportation Subcommittee of the Senate Committee on Commerce (Novem-

ber 20, 1974; S.J. Res. 253) and the Senate Committee on Government Operations (November 22, 1974; S. 4145), the FCC supports the concept of establishing a National Commission on Regulatory Reform to study and to report to the President and the Congress, with recommendations, on the impact of government regulation. The scope of the inquiry proposed by S. 4167 for such a Reform Commission would appear sufficiently broad and detailed to mandate a thorough review of Federal, State and local regulation in terms of its effects on the economy, inflation, and the public interest. To the extent that any Commission established would undertake such a thorough review and, more importantly, also make specific recommendations for possible congressional or administrative action, its creation would be eminently justified.

We would observe that in view of the breadth of the mandate and inquiry proposed by S. 4167, the task of the Reform Commission would be considerable and perhaps a one-year time frame for completion of its work may prove to be overly optimistic. Similarly, the $1,500,000 appropriation proposed by S. 4167 may be too conservative in terms of adquately covering the Commission's legitimate manpower and resource needs.

With respect to the basic structure of the Reform Commission, either a twelve-member commission as proposed by S.J. Res. 253 and S. 4145 or a ten-member body as proposed by S. 4167 appears appropriate. As to the particular interests to be represented on the Commission, the appointment provisions of S. 4167 would appear to ensure a representative cross-section of political and economic viewpoints and a joint effort between the Executive and Legislative branches of government.

In conclusion, the FCC believes that a National Commission on Regulatory Reform could provide a needed evaluation of the performance and impact of government regulation and, through specific recommendations, could also make a needed contribution to the improved substance, effectiveness, and efficiency of that regulation. We therefore support the concept embodied in S. 4167.

Sincerely,

RICHARD E. WILEY, *Chairman.*

CONSUMER PRODUCT SAFETY COMMISSION,
Washington, D.C., December 16, 1974.

Hon. CHARLES H. PERCY,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR PERCY: This letter is in response to your request for my comments on S. 4167, a bill to establish a National Commission on Regulatory Reform to evaluate and report on the effectiveness of Government regulation at the Federal and State level and its impact on inflation, competition, and the public interest.

I believe that the comprehensive review of government regulation as envisioned by the bill is warranted in view of the significant impact of regulatory action on the economy. Further, I believe such review to be highly desirable since the public interest can only be well served by a continuous examination and awareness of government services and activities.

A favorable aspect of the bill, in my opinion, is that provision is made for review of all regulatory bodies, independent or otherwise, whose actions affect one or more segments of American industry. This is particularly appropriate because, in addition to "independent regulatory commissions," which have been established and defined as such, there also exist, within the broad framework of the Executive Branch, other "regulators" whose regulatory actions can have significant impact on industry and the economy.

All regulatory bodies whose actions have more than minimal impact on industry and the economy should be reviewed with emphasis on providing a total assessment of those actions; the appropriateness of establishing or extending the independence of the bodies; and, most importantly, a clear definition of the chain of accountability to be followed.

The motivating factor in the introduction of S. 4167 and similar legislation is today's need for assessing the inflationary impact of regulatory bodies upon the economy. Of particular concern is the possibility that such agencies may be inadvertently legitimatizing restrictive and anticompetitive trade practices that ultimately cause increase in prices to the consumer. A review of the economics of regulatory actions is, I believe, a valid and needed one. I suggest that such review should, however, encompass the cost and benefits of regulatory actions, i.e., the

measurement of the positive effects of regulation, as well as the assessment of the negative impact. I note that S. 4167 addresses this concept on a current and ongoing basis and I am pleased to note such attention given to that area.

I am further pleased to note that the legislation sets forth a number of specific areas for consideration by the proposed Commission. One of these involves the concurrent submission of budget and legislative requests by a regulatory body to the President and the Congress. Such provision is already in operation for this Commission through section 27(k) of the Consumer Product Safety Act (P.L. 92–573). The Commission has had only one full year of experience with the provisions of that section and I believe that it is too early to draw any rational conclusion as to the merits of the process or the appropriateness of imposing a similar requirement on other agencies. The process does warrant review and analysis with special consideration to be given to the effect of extending the application.

A key question to be analyzed and defined by the proposed Commission, in my opinion, is that of from whom, and of what, independent regulatory commissions are considered to be "independent." It has been variously stated that such commissions bear direct allegiance to neither the executive branch nor to the Congress; or, alternatively, that such commissions are within the executive branch and therefore are expected to reflect the Administration's views and advance the Administration's policies; or, thirdly, that they are arms of the Congress and are expected to be totally responsive to and vigorously overseen by the Congress. At the present time there is no widely agreed upon definition of an independent commission nor clear guidelines as to whom such commissions are reasonable. Perhaps the answer is that they should continue to exist as they are and to report, as in the case of this Commission, concurrently on activities to the executive and the legislative branches; act in a quasi-judicial capacity; and, stand alone within the Government with narrow support from outside.

An "openness" policy as adopted and, I believe, effectively implemented by this Commission would appear to be an appropriate area for study by the proposed Commission. I am proud of this Commission for adopting such a direction and I am especially pleased that it has been successfully implemented. I believe that regulatory bodies charged with serving the public interest are fully accountable to the public and should be subject to continuous scrutiny by the public with respect to priority setting and resource allocation. Openness can be an effective check against the extraordinary powers vested in regulatory bodies for the continuous scrutiny of every facet of their activity by the public, the communications media, affected industries, Congress, and by other Federal agencies, leaves few if any areas unexamined and opens to discussion even the most minor of activities. Along these lines, I believe that certain policies of regulatory bodies should be subject to review and possible input by the public. Basic policy decisions which are made by this Commission are generally proposed for public comment prior to final adoption, e.g., the Commission's policies on public meetings; Freedom of Information disclosures; proposed sampling plan use in standards; and staff participation in standards development. This Commission has recognized that in all too many cases regulatory bodies have relied upon nonpublicized guidelines or policies in decisions that have resulted in significant impact on the general public and the regulated segments of the economy.

Another appropriate subject for examination by the proposed Commission, in my opinion, concerns the appointment of policy-oriented supergrade positions within regulatory bodies. While the subject is not specifically indicated in section 3 of the bill, it appears that it would be within the intended scope of the proposed inquiry. The matter is of particular concern since this Commission has, for more than a year, deliberated, without resolution, with the Civil Service Commission and the Office of Management and Budget with respect to the appointment of five supergrade positions within this agency as non-career employees. This Commission has maintained that the positions should be designated as non-career positions since the services involved are largely advisory and oriented to the Chairman who serves for a limited term. Further, because this Commission is an independent regulatory body, the positions should not require the political clearance, actual or pro forma, of the White House. Hearings have been held in the Senate on this question, and I understand that, at the request of the Senate Commerce, Post Office and Civil Service, and Government Operations Committees, the Office of Management and Budget is studying the issue. This subject would no doubt be an appropriate area for examination by the proposed Commission.

I would like to re-emphasize my sincere conviction that consistent and vigorous oversight is not only appropriate but necessary in our system of Government.

The need for such review having been established, the question arises as to the

appropriate process or vehicle for such effort. In addition to the proposed "review" Commission, I would urge that consideration be given to the alternative of Congressional Committees intensifying their oversight of regulatory bodies. Undoubtedly, the creation of a new Commission, as proposed, would involve personnel and expenses of some magnitude. I would respectfully suggest that the Congress should seriously consider the option of making those moneys available instead to the appropriate Committees of the Congress, with a specific requirement that the Committees and their augmented staffs pursue this responsibility vigorously, with a specific set of criteria and direction, and file within a prescribed period of time (perhaps 2 years) reports of their findings and recommendations. At that point, or perhaps before, a Joint Committee of the Congress specifically created to address regulatory reform would accept the reports and pursue through to legislative accomplishment such changes as may be needed.

Sincerely,

RICHARD O. SIMPSON, *Chairman.*

DEPARTMENT OF THE TREASURY,
Washington, D.C., November 29, 1974.

HON. CHARLES PERCY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR PERCY: The Treasury Department has taken a keen interest in the Congressional response to the President's call for a review of regulatory activity with the objective of reforming those rules and regulations which result in inefficient industry operations and artificially high prices charged to consumers. On November 19th I addressed Senator Hartke's subcommittee on this issue, but unfortunately I was not able to testify before your committee concerning proposed legislation in this area. For that reason I would like to indicate to you our thinking on this issue.

I believe it necessary that any law creating a National Commission on Regulatory Reform be drafted so that the Commission will have the flexibility to focus in on problems in regulated industries and overlapping jurisdictions of independent federal regulatory agencies without having the duty to analyze each and every independent regulatory agency. Along these lines, I believe that the Commission should not be required to analyze and evaluate the operations of agencies and governmental units which operate within an agency or department of the Federal government. It certainly should have access to these other regulatory bodies for purposes of evaluating how their regulations interact with those of major independent Federal regulatory agencies.

However, as a first step in the regulatory reform process, the National Commission should concentrate on the reform of federal independent regulatory agencies that play a major role in the regulation of American industry. Primarily, the Commission should focus in on those agencies that set rate schedules, establish route limitations, limit the number of users of airwave frequencies, and in other ways directly affect the prices eventually paid by the American consumer for those services provided by regulated industries. It might also accomplish this goal by taking an industry by industry approach to regulatory reform and concentrate on the various key agencies that together affect the rates and operations charged by, for example, such industries as airlines, trucking, vessel shipping, communications, and public utilities.

If we view the National Commission's operations as a first step in regulatory reform then we cannot expect it to successfully handle each and every agency, whether on a Federal or State level, that has any regulatory responsibilities. I firmly believe that these other agencies can and will be effectively reviewed as the Commission steps toward reform of major independent Federal regulatory agencies. The approach taken by the National Commission in its work might even become the catalyst for future Federal and State reviews of regulatory operations. While I recognize that the review of existing regulatory operations has the potential for becoming a very large undertaking, we must not let this result in the Commission generating only broad conclusions with little or no effect on future operations of the agencies under consideration or the industries which they regulate. To give this Commission a chance to come up with some meaningful recommendations we should not have it spread itself too thin and yet we must not lock it into a fixed approach to these issues.

With the above considerations in mind, I would suggest that the following language be incorporated in any legislation to create a National Commission on Regulatory Reform at this time:

> As used in this act "Federal Independent Regulatory Agency" should include any existing independent Federal agency which, as its principal responsibility, exercises regulatory functions affecting one or more segments of American industry. This term is meant to include but not be limited to such Federal independent regulatory agencies as the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Power Commission, the Federal Maritime Commission and others. While this term does not include the examination of the operations of non-independent regulatory agencies, this should in no way be read as prohibiting the Commission from identifying the rules or regulations promulgated by these agencies as they reinforce, modify or conflict with the rules and regulations promulgated by Federal independent regulatory agencies. Also, the use of the term "federal independent regulatory agency" in the act should not be read as requiring the Commission to analyze any one particular agency, group of agencies or all agencies that fall within the term's definition. Nothing in the act should be read as requiring the Commission to accomplish the duties set forth in the act by means of any particular method or manner of Commission study or operation.

Additionally, the duties section of any act should not overload the Commission with required studies or consideration of new regulatory agencies or permanent administrative bodies to handle presently unregulated industries. The duties section should focus the Commission's work on reviewing the regulation of industries currently regulated by one or more federal independent regulatory agencies. The Commission's primary purpose of reviewing the effect of rules and regulations promulgated by the Federal independent agencies as these rules result in inefficient operation in American industry and artificially high prices for consumers. While this goal should not preclude Commission consideration of the benefits of certain types of regulation, we are most concerned with those rules and regulations which artificially raise prices and promote inefficient industry operations without having redeeming features that more than outweigh the costs to the American public.

Along these lines we must not require the Commission to initiate broad studies or surveys or assume the impossible task of evaluating each and every effect of modifying or eliminating undesirable regulations. It should recommend specific legislative action to implement its findings, but it should not be expected to handle every aspect of review in this area. The Commission might also highlight certain rules, regulations and agency policies. To so require it would undercut any chance of the Commission's generating really useful initial recommendations for specific regulatory reform. I am sure that a detailed examination of all the effects of particular regulatory reforms will be identified when specific reform legislation is specific reform legislation is proposed to the Congress by the Commission or as a result of the Commission's work.

Finally, I believe it imperative that the Commission members themselves not be selected from federal independent regulatory agencies or their regulated industries. The Commission will, of course, be expected to consult with such agencies and industries as its work is underweigh. However, the method by which the Commission analyzes an agency or industry, or the selection of an agency or industry for Commission consideration should not be decided by employees of these concerned parties. I believe, this limitation should be made clear in any act to create the Commission.

I hope that the above points can be of some help to you and your staff as you review the various bills on this subject not before the Senate.

My staff and I look forward to working with the Congress in the creation of successful legislation in this area.

Sincerely yours,

GERALD L. PARSKY, *Assistant Secretary.*

FEDERAL HOME LOAN BANK BOARD,
Washington, D.C., November 25, 1974.

Hon. SAM J. ERVIN, Jr.,
Chairman, Committee on Government Operations, U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request of October 23, 1974 for a report of the Board's views on S. 4145 of the present Congress, a bill to

establish a "National Commission on Regulatory Reform." The bill was submitted to Congress by the President on October 8, 1974, the day he made his economic address to Congress. In his address, the President referred to the need "to identify and eliminate existing Federal rules and regulations that increase costs to the consumer without any good reason in today's economic climate."

Section 3 of the bill provides that the Commission shall, with respect to "the Independent Regulatory Agencies," identify regulatory activities for detailed review including but not limited to:

(1) Analysis of the purposes and objectives of the activities;
(2) Assessment of actual achievement of the purposes and objectives;
(3) Cost/benefit analysis of the activities; and
(4) Examination of State and local regulatory activities which interact with the activities.

The Commission would report its findings to the Congress and the President within one year, together with its recommendations for revisions of overall goals and procedures of specific Federal regulatory authorities, for legislation to improve the efficiency or effectiveness of the agencies reviewed, and for means to continue the review of the economic costs of Federal independent regulatory activities. The report would also include an assessment of the costs of implementing its recommendations.

The Board views the proposed reexamination of the Federal regulatory structure to be a salutary endeavor and supports the purposes of the bill. The Board in its regulatory activities attempts constantly to be aware that any cost increase it imposes on its regulatees will be passed on to the consumers of their services. In addition, we are continually reexamining existing regulations and subjecting them to the types of analysis contemplated by S. 4145.

The term "Independent Regulatory Agencies," is not defined for purposes of the bill, but it presumably includes this Board. A definition would, perhaps, be an appropriate addition to the bill. The term presumably excludes agencies within cabinet departments—such as the Federal Highway Administration, the Federal Aviation Administration, and the Federal Housing Administration—although their regulatory activities are similar in their impact to the activities of the independent agencies. Section 3 also appears to authorize the Commission to focus on particular activities of the agencies included within the definition while disregarding other activities of those agencies which produce costs to consumers. Given the massive nature of the Commission's task, such discretion and the limitation of the Commission's scope to the independent agencies appear to be appropriate.

The views expressed herein do not necessarily reflect the views of the President. We are supplying a copy of this report to the Office of Management and Budget and will notify you of any advice we might receive regarding its relationship to the program of the President.

Sincerely,

CHARLES E. ALLEN,
General Counsel,

FEDERAL POWER COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., December 13, 1974.

Hon. SAM J. ERVIN,
Hon. CHARLES H. PERCY,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SIRS: This is in response to Senator Percy's letter of December 6, 1974, requesting comments on S. 4167, the "Public Interest Regulatory Review Act of 1974." As you know, I testified at a hearing on November 22, 1974, before your Committee, chaired by Senator Metcalf, regarding related legislation. Minority Counsel for the Committee requested my views on S. 4167 at that hearing and I indicated they would be supplied for the record.[1]

As I stated at these recent hearings, I regard the work of a National Commission on Regulatory Reform as a potential source of valuable help in our national efforts

[1] Similar hearings were held on another related proposal, S.J. Res. 253, by the Senate Commerce Committee, on Nov. 10, 1974. For your information, the statement I presented at that hearing is enclosed.

to deal with our very serious economic difficulties and the interrelated problems of resource scarcity and the effectiveness of government regulatory policy.

I am, however, of the belief that certain safeguards must be built into the structure and mandate of a National Commission to prevent its potentially valuable contribution from being eroded by inordinate delay and needless duplication of effort.

I prefer a short, intensive work schedule for the National Commission such as that proposed in S. 4167 and the Administration's proposal, S. 4145. I also believe that a provision, such as § 3(c) of your bill which requires reliance, where appropriate, on existing studies is an important concept that can serve to guarantee the expedition and efficiency that should characterize the National Commission's efforts.

In this respect, I would repeat what I have stressed at my two recent hearings on related proposals. The creation of a National Commission on Regulatory Reform should not be used as justification for further delay in the formulation of a national energy policy. Specifically, I am concerned that the opponents of the Administration's proposed deregulation of new natural gas supplies may use the National Commission's investigation as an excuse for further delay on this proposal. I would recommend that § 3(a)(5) of S. 4167 be amended to make it clear that the evaluation it directs is not authority for such delay. Any such delay on those grounds would be contrary to the President's priorities, severely destructive to our energy independence goals, and unwarranted on the merits because the arguments for and against deregulation of new gas supplies have been thoroughly aired for the last several years. The President made it clear in the same message in which he proposed the National Commission that deregulation is his number one legislative priority in the energy sector. Therefore, he obviously did not intend his proposal for a National Commission to conflict in any way with Congressional action on his substantive energy proposals.

As for the membership of the National Commission, I have no difficulty with the structure proposed in S. 4167. I agree that the President should designate the Chairman and the Senate should review and approve that selection. I would suggest, however, that the bill be modified to permit representatives of the independent regulatory agencies to serve on the National Commission. This approach has been followed in S.J. Res. 253 and I believe it has merit. The expertise of those who serve in the current regulatory system and are familiar with the day-to-day operations and problems of regulation and long-term policy options within the limitations of their statutory authority should be part of the National Commission's effort.

I support § 3(b) of S. 4167 which requires the National Commission to study and report on state, local and regional regulatory efforts and their interaction with Federal regulatory policies. As I detailed in my testimony before your Committee on November 22nd, such interaction in the public utility sector is particularly important because of the significant jurisdictional powers retained by the states and the importance of the interface between Federal and state policies in utility regulation.

S. 4167 provides extensive detail on the scope of the National Commission's assigned areas of study. Except with respect to deregulation of new natural gas supplies and § 3(a)(5) of the bill, I have no problem with the list of items to be studied in S. 4167. Although stated differently, I believe they comport with the areas of study I suggested in my testimony before your Committee on November 22nd.

I am in agreement with respect to the particular areas of study involving regulatory agencies specified in § 3(a)(8)(A)–(M). Many of these topics of study are specifically discussed in my November 22nd testimony and in the Commission's comments on the Ash Council Report which we submitted on April 16, 1971 (copy enclosed).

I agree with § 4(c) where it is specified that materials will be given confidential treatment when they are provided to the National Commission on a confidential basis, and their confidentiality is protected by statute. However, confidentiality itself and the extent it should be accorded in the regulatory sector are important policy considerations which I would hope the National Commission will review. In the absence of overriding reasons compelling the protection of proprietary information, public policy should support the fullest disclosure of information secured in the course of the regulatory process.

In addition, I support the broad definition given to a "Federal regulatory agency" in § 7. It is important that all aspects of the regulatory system of government be given a thorough evaluation by the National Commission.

Finally, I would like to suggest that the National Commission be given an additional assignment. The National Environmental Policy Act (NEPA) has been in

effect for five years and it has had a significant impact on all agencies of government, including the regulatory sector. While our Commission supports the objectives of NEPA and has followed its mandate in our regulatory responsibilities we do believe that Congress should periodically review its implementation to be sure that its broad criteria are operating effectively in the national interest. I believe, therefore, that as part of the evaluation of NEPA's implementation the Congress should assign the National Commission on Regulatory Reform the responsibility of analyzing the impact of NEPA on the regulatory process as part of its investigation.

Sincerely,

JOHN N. NASSIKAS, *Chairman.*

Enclosures.

STATEMENT OF JOHN N. NASSIKAS, CHAIRMAN, FEDERAL POWER COMMISSION

Mr. Chairman, as requested in the Committee's invitation of October 25, 1974, my testimony will address the need for the creation of a National Commission on Regulatory Reform and the structure and the scope of the work of such a commission. The Resolution under consideration today, Senate Joint Resolution 253, was sponsored by Chairman Magnuson in response to President Ford's call for a "total re-examination of the independent regulatory agencies" and the identification and elimination of "existing Federal rules and regulations that increase costs to the consumer without any good reason in today's economic climate." [1]

In addition to S.J. Res. 253, an essentially identical proposal, H.J. Res. 1166, has been introduced in the House and the Administration has offered its own proposal for establishing a National Commission on Regulatory Reform (S. 4145 and H.R. 17417).

I believe the policies and institutions of government must be given ongoing supervision and periodic re-evaluation if they are to avoid stagnation and stay responsive to the needs of the American people. Therefore, I support the creation of a National Commission on Regulatory Reform. Current economic conditions, including the serious energy supply problems which are intimately related to our economic difficulties, make the creation of such a Commission particularly appropriate at this time.

However, at the outset I would like to stress a consideration that I believe should carry great weight in your deliberations on this proposal. From the point of view of energy regulation, further unnecessary delay in the adoption of a national energy policy cannot be tolerated on the grounds that further studies are needed. We have been studying our problems long enough; we are long overdue in taking action. Therefore, the timeframe for a National Commission on Regulatory Reform with respect to its impact on energy policymaking should be carefully limited to what is absolutely essential. I realize, of course, that the mandate of a National Commission on Regulatory Reform would be considerably broader than the problems of the energy regulatory sector but at the same time I would not want the work of such a Commission to delay imperative action on substantive energy policy matters. For example, in the President's October 8th address to Congress, in addition to asking for the creation of a National Commission on Regulatory Reform, he repeated as his number one energy legislation priority, the deregulation of new natural gas supplies.

I am concerned that opponents of deregulation of natural gas producers might try to persuade the Congress to delay action on that proposal pending the outcome of the studies proposed in S.J. Res. 253. Any such delay on those grounds would be contrary to the President's priorities, severely destructive to our energy independence goals, and unwarranted on the merits because the arguments for and against deregulation of new gas supplies have been thoroughly aired for the last several years. I testified before this Committee on October 11, 1973, in favor of deregulation of new gas supplies with protective covenants for the public interest.[2] The work of a National Commission on Regulatory Reform should not be used as an excuse for further inaction on this proposal.

Therefore, to help avoid any such conflict the National Commission on Regulatory Reform (National Commission) should be required to complete its work as

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[1] "Address of the President to the Joint Session of Congress," Oct. 8, 1974, p. 6.

[2] Hearings before the Committee on Commerce, U.S. Senate, on S. Con. Res. 31, et al., 93d Cong., 1st sess., Oct. 11, 1973, pt. 1, p. 171 ff.; see also my statement before this committee on Aug. 20, 1974, concerning natural gas curtailments and the Commission's letter of Aug. 20, 1974, to Chairman Magnuson on S. 3904. I have also testified before this committee in support of the application of sanctity of contract principles to producer regulation. See my statement before the Committee on Commerce, U.S. Senate, Mar. 22, 1972.

expeditiously as possible. I do not believe a three year study, such as that provided in S.J. Res. 253, is essential to a thorough examination of the policies and performance of the regulatory agencies. I would prefer the one year timeframe provided in S. 4145 but I recognize that that is a very ambitious schedule. In any event, whatever timeframe is chosen should reflect the need for expedition and the urgency of the problems that the National Commission's investigation is designed to help resolve.

Furthermore, wherever possible the National Commission should utilize existing data and studies on the problems and effectiveness of the regulatory system. For example, the Hoover Commission reports, the Landis Report and the recent study by the President's Advisory Council on Executive Organization (Ash Council) are all relevant to the proposed mandate of the National Commission and together with the many more specialized studies, such as those done in recent years in the energy sector, should provide the National Commission with a substantial base of information with which to begin its investigation. Time should not be spent in needlessly duplicating those aspects of earlier studies that are relevant to the problems of today.

With respect to the membership of the National Commission, agree that it should be drawn from the executive and legislative branches of government as well as the private sector and I favor including representation from the independent regulatory agencies themselves as provided in S.J. Res. 253. I am a firm believer that those with practical experience and working knowledge in an area are best suited to evaluate necessary reforms and modifications in procedure. The expertise of those who serve in the current regulatory system and are familiar with the day-to-day operations and problems of regulation and long-term policy options within the limitations of their statutory authority should be part of the National Commission's effort.

The Chairman of the National Commission will have an important responsibility to shape and direct much of the Commission's work and will have the bulk of important administrative responsibility, including the selection of the staff personnel that will have the all important daily responsibilities of the work of the Commission. For these reasons, I believe the President should designate a Chairman with the advice and consent of the Senate rather than the Commission electing its own Chairman as provided in S.J. Res. 253. At the same time, the Vice-Chairman could be chosen by the members of the National Commission. This is essentially the procedure followed at the Federal Power Commission. Section 1 of the Federal Power Act provides that "[t]he Commission shall annually elect a vice chairman to act in case of the absence or disability of the chairman or in case of a vacancy in the office of chairman."

As for the scope of the National Commission's proposed investigation, I believe the principal concerns of the Commission should be (1) an evaluation of the purposes for which the regulatory agencies were established and their relevancy today, (2) the effectiveness of the regulatory agencies in discharging the duties they have been assigned, (3) the economic costs ahd impact of regulation, (4) the need for regulation in the future, and (5) the structural and procedural needs of the regulatory process now and in the future, including the qualifications, tenure and number of regulators needed to serve the public interest and the industries or economic activities which should be regulated.

While both S.J. Res. 253 and the Administration's bill, S. 4145, would provide the kind of review that is needed, there are some important provisions in the Administration's proposal that are not included in S.J. Res. 253. First, § 3(a)(iv) of S. 4145 provides that the National Commission shall include in its investigation "an examination of State and local government regulatory activities which interact with the Federal independent regulatory system." The importance of this interaction cannot be overemphasized, especially in the public utility sector, where state public service commissions control the bulk of electric power rates and services nationwise. State regulatory commissions regulate approximately 85 percent of the kilowatt hours generated in this country and over 90 percent of the electric power revenues. In addition, natural gas distributors and intrastate pipelines are also regulated by state agencies while the interstate natural gas pipeline system is under FPC jurisdiction. In the natural gas production sector of the industry, two-thirds of production is dedicated to the interstate market and is subject to our regulation while one-third of production is essentially unregulated as to price in the intrastate market. It is essential, therefore, that the National Commission evaluate the interaction of these aspects of the regulatory process in its investigation.

In addition, §4(c) of S. 4145 provides that "[i]f the Commission receives of any witness or any Government agency materials which have been submitted on a

confidential basis, and the confidentiality is protected by statute, the material shall be held in confidence by the Commission." I favor this provision; it quite properly reflects current public policy precluding the disclosure of confidential information. However, confidentiality itself and the extent it should be accorded in the regulatory sector are important policy considerations which I would hope the National Commission will review. In the absence of overriding reasons compelling the protection of proprietary information, public policy should support the fullest disclosure of information secured in the course of the regulatory process.

Another provision of S. 4145 should, in my opinion, be included in any legislation establishing a National Commission on Regulatory Reform. Section 6 of the Administration bill specifies that all agencies and instrumentalities of the Federal Government, "*including the Congress* * * * shall furnish to the Commission, upon request of the Chairman, such data, reports, and other such information as the Commission deems necessary to carry out its functions * * * (emphasis added).

Both S.J. Res. 253 and the Administration bill place heavy emphasis on the cooperative nature of the legislative and executive branches' input in the work of the National Commission. The Commission will be composed of representative of both branches of government as well as the private sector. Also, as Chairman Magnuson stated when introducing S.J. Res. 253, "[i]t is of the highest importance that this Commission approach its tasks with care and the highest standards of accuracy and thoroughness." To help assure that these standards are realized, I would hope that the National Commission would have access to the data and studies of the Congress as well as the independent and executive agencies of government.

In concluding my comments, I would like to offer one suggestion not included in either S.J. Res. 253 or the Administration's proposal. The National Environmental Policy Act (NEPA) has been in effect for five years and it has had a significant impact on all agencies of government, including the regulatory sector. While our Commission supports the objectives of NEPA and has followed it mandate in our regulatory responsibilities, we do believe that Congress should periodically review its implementation to be sure that its broad criteria are operating effectively in the national interest. I would suggest that as part of the evaluation of NEPA's implementation that the Congress assign the National Commission on Regulatory Reform the responsibility of analyzing the impact of NEPA on the regulatory process as part of its investigation.

Thank you for the opportunity to offer my views on this important proposal.

COMMENTS OF THE FEDERAL POWER COMMISSION ON "A NEW REGULATORY FRAMEWORK"—REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES BY THE PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION (ASH COUNCIL), APRIL 16, 1971

THE ASH COUNCIL RECOMMENDATIONS AND THE FEDERAL POWER COMMISSION

In the spring of 1969 President Nixon commissioned the Advisory Council on Executive Organization (Ash Council) to undertake a sweeping examination of the organizational structure of the executive branch of government and recommend needed revisions. The independent regulatory agencies were selected for a separate study with an "overall focus * * * to apply organizational principles which would enable the regulatory process to become an integral part of the development, expression, and carrying out of national economic and public objectives." [1]

The January 1971 Report of the Council details at some length what the Council found to be the specific failings of the various regulatory commissions as well as general weaknesses of the independent regulatory system. With respect to the structure of the regulatory commissions, the Council's criticisms can be summarized as follows:

(1) Lack of sufficient accountability to the President or the Congress results in a failure to coordinate with national policy goals.

(2) The collegial structure of the commissions prevents effective, timely regulation in response to changes in industry, technology, economics, and public needs. The report concludes that this problem is compounded by the inability of commissioners to effectively serve as coequals in the exercise of regulatory responsibility with a resulting difficulty in attracting well-qualified regulatory personnel.

[1] "A New Regulatory Framework," report on selected independent regulatory agencies, January 1971, p. 124.

(3) The judicial responsibilities of the independent commissions conflict with their policymaking responsibilities. There is excessive case-by-case adjudication and overemphasis on legal as opposed to economic, financial, technical and social perspectives. The end product is an overjudicialized system with built-in delays.

(4) The commissions are improperly structured as to function. A realignment of responsibilities is necessary.

In addition to these rather general criticisms of the regulatory structure, specific findings were made concerning the organizational failings of each of the regulatory commissions.

The Report quite properly concludes that the supply and deliverability of power and natural gas are among the Nation's foremost energy problems. After recognizing that rapid, flexible, comprehensive, and anticipatory responses are required in the regulatory sphere to meet these problems, the Report questions the ability of Federal regulation, as administered by the Federal Power Commission in its present form, to provide this kind of response. The key criticism raised in this context appears to be that the Commission, as now constituted, cannot produce and implement the long-range policy essential to the efficient operation of the electric and gas industries with their reliance on lengthy leadtimes for investment decisions and construction programs. A new Federal Power Agency headed by a single Administrator is, the Report finds, an essential first step in solving these problems. It is concluded that a single Administrator would result in increased accountability to the Congress and the President, the recruitment of more highly qualified regulatory personnel, and expedited administration and policymaking.[2]

At the operational level the Report's criticisms of the Commission are broadly summarized. Specifically, it is stated that the FPC:

> Formulates policy through a case-by-case approach that results in formidable docket backlogs;
>
> Decides critical issues only after unnecessarily protracted procedures and extensive delays;
>
> Experiences difficulty in coordinating broad policy directions with executive departments and agencies; and
>
> Lacks accountability to, and adequate support from the executive branch and Congress.[3]

To remedy these deficiencies the Ash Council makes several recommendations in addition to the replacement of the five member Commission by a single Administrator. It is urged that internal agency review of proceedings should be limited in time and focused primarily on the consistency of decisions with agency policy. Appeals from final agency decisions should be heard by a new Administrative Court of the United States composed of Presidentially appointed judges serving 15-year staggered terms. Finally, jurisdiction of the regulatory responsibilities arising under the Public Utility Holding Company Act, now vested in the Securities and Exchange Commission, should be transferred to the new Federal Power Agency.

Further details of these proposals are explained in the following pages which are devoted to the Commission's analysis of these recommendations.

THE COMMISSION: AN OUTLINE OF ITS HISTORY AND FUNCTIONS

In order to place in perspective the Ash Council's recommendation that the five member Commission be replaced by a Federal Power Agency administered by a single appointee, it is useful to briefly review the history and regulatory functions of the Commission. The Federal Water Power Act of 1920 [4] established a Commission composed of the Secretaries of War, Interior, and Agriculture for the purpose of regulating the licensing and development of non-Federal hydroelectric projects. For ten years these Cabinet officers administered the licensing of hydro projects. By 1930 it had become apparent that a full-time Commission was needed to handle the highly specialized workload of the agency. A reorganization was implemented that year creating an independent body of five full-time Commissioners appointed by the President with the advice and consent of the Senate. The need for a full-time, bipartisan commission with the specialized expertise necessary to effectively regulate important segments of the electric and gas industries was highlighted by the enactment of Parts II and III of the Federal Power Act in 1935 and the Natural Gas Act in 1938.

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[2] *Ibid.* p. 6 and pp. 107-108.
[3] *Ibid.*, p. 109.
[4] 41 Stat. 1063 (1920), incorporated in the Federal Power Act, 16 U.S.C. § 791-825r (1964).

The 1935 amendments to the Federal Power Act, which were accomplished by the passage of the Public Utility Holding Company Act, vested authority in the Commission over the interstate transmission of electric energy and the rates for the sale of such electricity at wholesale in interstate commerce. The Commission's jurisdiction was extended in this manner "[f]or the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources . . . ." (§ 202(a), 16 U.S.C. 824a(a)). For those purposes the Commission was empowered and directed to encourage the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy. The 1935 amendments also made the Commission responsible for the regulation of the accounting practices, the purchase or sale of utility assets, the merger or consolidation, and the issuance of securities of companies under its jurisdiction.

The Natural Gas Act of 1938 (15 U.S.C. §§ 717–717w (1964)) extended the Commission's jurisdiction to the interstate transportation and sale for resale of natural gas and the rates and accounts of natural gas companies engaged in these jurisdictional activities. In the 1954 landmark decision, *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, the rates and sales of independent producers selling natural gas for resale in interstate commerce were brought within the Commission's jurisdiction. This added responsibility eventually resulted in the adoption of the area rate method of regulating the price of producer gas after efforts to apply the traditional, individual company cost-of-service method were found to be unworkable. This major policy change was sustained by the Supreme Court in *Wisconsin* v. *FPC*, 373 U.S. 254 (1963) and *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

Size and growth of the electric power and natural gas industries

The significance of the Commission's responsibilities is illustrated by the magnitude of the two industries it regulates and by the relation of these industries to the national commitment to economic growth and improved standards of living. The electric power industry has a total capital investment in excess of $100 billion and ranks first in investment among all of the Nation's industries. About one-fourth of the energy now being consumed in this country is in the form of electricity and we are projecting that this porportion will increase to one-third by 1980. The investment in the natural gas industry is already approaching $40 billion, excluding the capital committed to gas production. The gas industry is the sixth largest industry in terms of capital invested and provides about one-third of the Nation's requirements for primary fuels and energy. The Nation's electric utilities served more than 70 million customers in 1970 and the gas industry served over 40 million customers.

Another aspect of the economic impact of the two industries under the Commission's jurisdiction can be illustrated by referring to their exceptional rates of growth. The historical trend of electricity demand has been about twice as fast as the long-term growth rate of GNP measured in real terms. This relationship is unlikely to be altered significantly during the decade of the 1970's. The natural gas industry has been growing for many years at about the same annual rate as has the electric industry, although the near-term growth prospects of the gas industry have become clouded by the uncertain availability of new supplies to satisfy increased market demand.

There are about 3,600 electric utilities in the United States. The number of companies in Classes A and B ($1 million or more of annual revenues) is 211. On the gas side the Commission regulates 107 interstate pipelines and over 3,700 independent gas producers.

Not only is the Commission involved to an unprecedented degree in the regulation of these two vital industries and of the hundreds of giant companies in each industry, but the Commission is also committed to programs related to the Nation's energy problems as a whole. The substitutability of one fuel source for another in various uses, as well as the inseparability of the problems of one energy industry from the problems of the others, requires the Commission to determine its policies in a "total energy" context. This aspect of the Commission's responsibilities is a necessary consideration in an evaluation of the Ash Council's recommendations.

THE COMMISSION'S VIEWS ON THE ASH REPORT IN THE CONTEXT OF THE ABSENCE OF A DEFINITIVE NATIONAL ENERGY POLICY

In the opening pages of its Report the Ash Council states that:

"Regulatory activities * * * are not adequately supported and are not effectively coordinated with national policy goals.

"Inherent deficiencies in the Commission form of organization prevent the commissions from responding effectively to changes in industry structure, technology, economic trends, and public needs." [5]

While recognizing that the Ash Council's mandate was to study and evaluate the need for change in the organizational structure of the Government, we respectfully suggest that many of its conclusions, as illustrated in the language quoted above, are focused on the wrong aspect of the problem—at least insofar as the Nation's energy problems are concerned.

The crux of the problem with respect to the regulation of energy is not that regulatory activities are not coordinated with "national policy goals." Nor is the problem that the Commission form of regulation prevents effective response to industrial, technological and economic change. The Nation's policy goals concerning the development and utilization of energy and the structural, technological and economic problems of the energy industries are in a state of upheaval and crisis; national policy goals concerning the uses and need for energy are obscured by a panoply of conflicting problems ranging from intense environmental pressures to sensitive questions of our national security needs. It is to these much more basic and profound concerns that initial attention must be drawn rather than to the secondary issue of the best organizational structure to implement an as yet imprecisely defined national energy policy.

It would serve no purpose to do more than highlight in this report the key aspects of the Nation's energy problems. The President and members of the Administration as well as many Senators and Congressmen have joined the affected industries and members of this and other regulatory bodies in publicly recognizing the dimensions of the energy crisis. Much has been written outlining the specifics of the problems confronting every key ingredient of our energy mix—oil, coal, natural gas, water, and nuclear energy.

Perhaps the best way to illustrate the Federal Power Commission's evaluation of some of our more pressing energy problems is to reiterate part of our statement on March 23, 1971 to the Joint Committee on Atomic Energy. The Commission's statement was submitted in response to a request for our views on the nuclear stimulation of natural gas reserves. In summarizing our evaluation of the overall energy situation we indicated the following significant problems that require immediate attention:

1. Present demands for clean burning fuels exceeds the supply of such fuel resources, reducing our capacity to meet expected changes in the availability of particular fuels.

2. Our use and consumption of fuel resources under current technologies has produced greater environmental effects than the Nation is willing to tolerate.

3. We have been pursuing patterns of use of mineral fuels which may not be sustainable to the end of the century. In order to meet anticipated demands certain actions must be taken:

(*a*) We must increase the rate of exploration and development of oil and gas reserves;

(*b*) We must create new technologies for developing both existing and supplementary energy resources;

(*c*) We must exert efforts to make our long-term fossil fuels adequately usable without unacceptable environmental effects, *e.g.*, to gasify coal and/or shale and to desulfurize oil;

(*d*) We must develop a fast breeder reactor in time to assure the availability of equipment for commercial application in the early 1980's.

This list is certainly not exhaustive; for example, it does not indicate the critical need for technological improvements in the efficiency of energy use. It does, however, serve to impart an appreciation of the extent and complexity of our energy problems. The real focus of Government activity in the next several years must be the reconciliation of existing conflicts. The type of Government framework needed to administer and regulate a national energy policy cannot be properly developed prior to a clear formulation of the nature of that policy. Structure cannot substitute for policy deficiencies. Whatever the merits of the Ash Council's recommendations with respect to this Commission, implementing them before a national energy policy has been more clearly defined would be a self-defeating error. In this respect, we concur in the criticism voiced by others that the Ash Council's recommendation that structural changes in the regulatory process precede changes in substantive law is the complete reverse of what is needed.

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[5] "A New Regulatory Framework," *op. cit.*, p. 4.

If anything, the Ash Council's recommendations should serve to reinforce the need for an official articulation of our energy goals. This need has been recognized and acted upon by the President on several occasions. In the summer of 1970, for example, with a fuel crisis for the 1970–71 winter season looming on the horizon the President designated several agency heads,[6] including Chairman Nassikas, to form an Energy Subcommittee of the Domestic Council in order to recommend actions needed to alleviate the acute shortage of clean fuels for the winter season and recommend methods of ensuring an adequate fuel supply in the years ahead. The Subcommittee's recommendations were made in due course and materially aided the fuel situation this past winter. This same Subcommittee is continuing its evaluation of our long-range energy needs. Other significant energy studies undertaken by this Administration in which the Chairman of this Commission has participated are discussed at a later point in this paper.

The Congress, it should be noted, has also taken significant action to initiate a review of our energy needs. Notably, the Senate Committee on Interior and Insular Affairs on April 5, 1971, unanimously recommended the adoption of S. Res. 45, to authorize a study of national fuels and energy policy to be completed with recommendations for legislation by September 1, 1972. (S. Report No. 92–53) The need for a study of this nature was voiced by a wide variety of industry, labor, and consumer interests at a hearing held in February of this year.

The imminence of significant Administration and Congressional developments clearly underscores the inadvisability of any precipitous change in the structure of the regulatory process. The proper emphasis on policy has been recognized by the Administration and the Congress.

In defense of collegiality

The primary recommendation of the Report with respect to the structure of this Commission is the proposal that the bipartisan five-man membership be replaced by a single Presidentially appointed Administrator. The substitution of an Administrator for the Commission is intended to increase efficiency and expedite the policymaking responsibilities of the agency. As stated in the Report the purpose of the substitution is—

"[t]o assure coordination of regulatory matters with national policy goals, to improve the management efficiency of regulatory functions, to improve accountability to the Congress and the executive branch, and to increase the probability of superior leadership for regulatory activities * * * ." [7]

The assumption that a single Administrator, with the sole authority to set policy for the entire Federal Power Agency, could frequently place policy changes in effect at a much faster rate than through the deliberative and consultative processes presently required by the collegial form of regulation would not necessarily result in superior administration of regulatory policy in the public interest. Deliberation and consultation are usually helpful in achieving a result better suited to the public interest even when a delay in implementation results. Under the Report's proposal, a newly appointed Administrator would be required to reach decisions without the benefit of the ideas and viewpoints which the present Commissioners have gained as the result of years of service on the Commission.

As the report correctly points out, the lengthy lead time required to implement industry investment decisions makes determination of long-range policy essential. Perhaps a single Administrator, free of the limitations of majority rule, could more clearly articulate policy. However, when that single Administrator is serving at the pleasure of the President, industry and the consumer have no assurance that agency policy will not be radically and abruptly changed within a short period of time. The present bipartisan Commission, with five Commissioners serving fixed, staggered terms, would appear to provide greater stability and continuity of the regulatory process which is fundamentally the most important basis for long-range industry planning.

The degree of independence which the Federal Power Commission has from Executive and Congressional control is criticized as a detriment to the regulatory process. Whether more or less independence from political control would assist the Commission in performing its statutory mandate is subject to debate. However, even if less independence would be beneficial, the Report does not suggest how Congress would have any greater degree of control over a single Administrator

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[6] Secretary of the Interior; Secretary of State; Secretary of Commerce; Secretary of HEW; Secretary, Department of the Treasury; Secretary, Department of Transportation; Director of the Office of Science and Technology; Chairman, Council on Environmental Quality; Director, Office of Emergency Preparedness; Chairman, Federal Power Commission; Chairman, Atomic Energy Commission; Special Assistant to the President for Consumer Affairs; Director, Office of Management and Budget; Chairman, Council of Economic Advisers; and Administrator, Environmental Protection Agency.

[7] "New Regulatory Framework," *op. cit.*, p. 5.

beyond being able to "look to an identifiable person to whom it could delegate responsibilities and direct its oversight inquiries." [8] However, the Chairman, as the Presidentially designated head of the Commission, regularly reports to the Executive and the Congress on the role and activities of the Commission. There is very little practical difference between the posture of the Chairman and the role envisioned for a single Administrator with respect to accountability to the executive and legislative branches. Nor does the point that the Administrator would service at the will of the President substantially differ from current conditions. The President now has statutory authority to designate a Chairman of his choice. Moreover, in every change of political administration since 1953, the incoming President has been able to change the partisan balance of the Commission within six months of his inauguration.

One of the virtues of the collegial arrangement is that it permits representation on the Commission of a broad variety of interests, disciplines, and expertise. At present, for example, two lawyers, an accountant, and a legislative specialist occupy the four filled positions on the FPC. The nominee for the fifth position is a professional economist. No single Administrator could bring to bear such different viewpoints and approaches to the Commission's business. Its work would inevitably suffer from the narrower focus that one man would necessarily possess.

Due at least in part of this factor, the Congress and the courts have been willing to concede to collegial bodies a wide latitude of expert judgment and discretion. This tradition of comity has served the public interest well by permitting extensive delegation of legislative power and by limiting judicial review to questions of law and procedure. We doubt seriously that the legislative and judicial branches would be willing to rely so readily on the universal expertise of a single Administrator, especially if incumbency tended to conform to the average of Presidential appointees—something less than three years.

This factor of relative inexperience through turnover, coupled, with the limited time available to a single Administrator, would tend to concentrate agency expertise in its permanent staff. In the most aggravated situations, he would become the prisoner of that staff. The real power of policy formulation and decision-making would then be submerged to a level where the concept of political accountability would have little reality. The continuity and variety of talent provided by a multi-member body does, in the experience of this agency, contribute to effective staff supervision and more intimate Commission control.

The Report also criticizes the collegial regulatory body as being an inefficient form for managing operations and possessing an absence of authoritative and adaptable management, able on its own to exercise each management function in such a way as to carry out broad policy. Multiheaded management is charged with the defect of misallocating agency resources due to the absence of agreement on well-defined priorities.

In response, we would like to point out that the Federal Power Act provides that the President shall designate the Chairman of the Commission who "shall be the principal executive officer of the Commission." Furthermore, Reorganization Plan No. 9 of 1950, which adopted most of the significant recommendations of the First Hoover Commission Report (1949) respecting regulatory agencies, grants to the Chairman of the Federal Power Commission "the executive and administrative functions of the Commission, including functions of the Commission with respect to (1) the appointment and supervision of personnel employed under the Commission, (2) the distribution of business among such personnel and among administrative units of the Commission, and (3) the use and expenditure of funds". This Reorganization Plan centralizes management and administration of the Commission in the Chairman, although the Commissioners participate in approval of budgetary and policy matters affecting the staffing and organization of major administrative units of the Commission. It has been our experience that this system works very effectively. Day to day administrative problems are handled by the Chairman and the Executive Director with major budgetary ahd policy matters agreed upon by the Commission. If anything, the continuity of experience represented by five Commissioners serving staggered five-year terms enhances the stability required for the formulation of ongoing policy and budgetary priorities.

The Report is critical of the Commission's coordination with other agencies and executive departments. Although there is presently a considerable amount of coordination being achieved, further areas of contact and cooperation would certainly be valuable. Fragmentation of essential energy policy is one situation that certainly requires correction. However, in this regard it should be noted that

[8] *Ibid.*, p. 41.

the President's Reorganization Plan submitted to the Congress proposes to restructure the executive agencies to facilitate improved coordination of related functions.

The Chairman of this Commission has personally participated in coordinated governmental activities in the following important areas of national energy policy:

1. Water Resources Council (Vice Chairman)
2. Cabinet Task Force on Oil Import Control
3. Interagency Task Force on Electric Power and the Environment
4. Energy Subcommittee of the Domestic Council
5. Joint Board on Fuel Supply and Fuel Transport

These coordinated activities have significantly assisted the Administration in formulating national energy policies. Furthermore, the National Power Survey and the newly initiated National Gas Survey utilize a coordinated Federal approach to the examination and analysis of critical energy questions. The National Power Survey includes representatives of the Department of Interior, the Office of Science and Technology, the Environmental Protection Agency, the Atomic Energy Commission, and State Commissions. The National Gas Survey includes representatives of the Council on Environmental Quality, the Department of Interior, the Special Assistant to the President for Consumer Affairs, and State Commissions.

In addition, pursuant to the requirements of the National Environmental Policy Act (NEPA) and the guidelines of the Council on Environmental Quality, the Commission is coordinating the review and resolution of essential environmental issues with other Federal and State agencies. This coordination includes consultation with other agencies in the preparation of our environmental statements and comment to other agencies on the environmental and energy issues involved in matters within their jusridiction. In this latter respect, we have to date submitted comments to the Atomic Energy Commission, the Tennessee Valley Authority, the Corps of Engineers, the Coast Guard, and the Department of Agriculture. Also, in cooperation with the Water Quality Office and the Air Pollution Control Office of the Environmental Protection Agency, we have initiated the collection of information that will make it possible to measure and evaluate the environmental effects of waste products from electric power generating stations.

The Report points out that the budgetary and legislative requests of the Federal Power Commission receive fairly low priority before Congress and that more active support should be received. Both the President and the Congress have substantially supported the budgetary and legislative requests of the Federal Power Commission. However, as the scope and detailed structure of a national energy policy take shape it may well become apparent that the Commission's role in that picture will require significant reinforcement of staff and budget.

We do not concur with the conclusion of the Ash Council that the substitution of an Administrator will assure that superior executive talent will be recruited. In the first place, to lead an agency effectively requires more than executive talent. It also requires an expert knowledge of the specific regulated industry economics and an extensive knowledge and experience in administrative legal procedures, appellate procedures and the law. By subordinating the judicial function to the administrative function, the position of Administrator would be unattractive to an experienced lawyer, law professor, judge, or other members of the legal profession who consider the judicial function as equally, or perhaps more, important than the administrative. Thus, a considerable reservoir of available talent to serve on regulatory commissions—particularly as Chairmen—would be cut off by eliminating the Commission concept. Also, while the Commission form of regulation can at times be more cumbersome than a single Administrator with respect to expedited decision-making, a collegial body has the distinct advantage of offering diverse experience and philosophy in the formulation of policy. Furthermore, with five Commissioners sharing the responsibility for the preparation and drafting of the Commission's opinions, the whole burden of opinion writing does not fall on one individual. The single Administrator proposed by the Ash Council might well have less time than the Commission for the formulation of and implementation of long-range policy in view of the exclusive responsibility he would bear for the final disposition of adjudicatory matters. We do not believe that the greater finality of examiners' decisions proposed by the Council would relieve the Administrator of many current Commission responsibilities.

As this discussion indicates we are not persuaded that the single Administrator can achieve the goals that have been set or that the adoption of the single Administrator form of regulation will not lead to more serious problems than now faced by the Commission. While in no way endorsing the proposal, at the very least, the concept of a single Administrator should be revised to clearly provide for Senate

confirmation of the appointee and the designation and confirmation of a Deputy and Assistant Administrators. One individual cannot adequately supervise all facets of this Commission's jurisdiction with the full degree of attention and expertise required. Therefore, the President and the Congress should play the decisive role in the selection of the top policymakers in addition to the Administrator. Furthermore, the Administrator concept, if worthy of consideration, should be limited in its application to one regulatory agency as a prototype for this experiment in public administration. While we believe our suggestions would improve the workability of the single Administrator concept, we strongly believe that the collegial form of regulation, recognizing its limitation, is a superior, proven and effective means of protecting the public interest.

The Use of Rulemaking

Collegial bodies are criticized in the Report as being inefficient mechanisms for formulating and implementing specific policy in a timely manner. Procedures for formulating policy in the context of individual cases brought before the Commission for review are said to fail to provide sufficient, timely, and constructive guidance for interested parties. The Report calls for added attention to formulating anticipatory policies of wider applicability through informal procedures and the issuance of rules and regulations. It is claimed that a single Administrator would be more likely than the Commission to anticipate problems and develop solutions through the use of rulemaking and informal policy statements.

The Commission agrees that its primary function should be legislative and that overjudicialization should be avoided. As Appendix A shows, during the past ten years the Commission has issued over 200 rulemaking orders and policy statements pursuant to its legislative powers. As this clearly indicates, the Commission can and does set future policy by rulemaking and the issuance of policy statements.

Many of these actions resulted in the adoption of significant, long-range regulatory policies. For example, shortly after the decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), in which the Supreme Court held that FPC jurisdiction and regulation extended to sales for resale in interstate commerce of natural gas by independent producers, the Commission was confronted with the problem of indefinite escalation clauses which existed in many of the contracts under which producers sold their natural gas to interstate pipeline companies. Under one prevalent type of clause, known as a "favored nation clause," a producer was entitled to receive a price for his gas equivalent to the highest price received by any producer for gas sales in the same field. The result was a chain reaction in a wide area whenever one producer in the area negotiated a contract at a new, higher price level. In addition to the need to protect the public against waves of price increases which had no apparent relationship to the economic requirements of the producers who filed them, the Commission was placed under a tremendous administrative burden by the numerous filings made under these and other types of indefinite escalation clauses.

As a solution to this predicament, the Commission turned to its rulemaking powers. On March 3, 1961, in Order No. 232 (25 FPC 379), as modified by Order No. 232–A issued March 31, 1961 (25 FPC 609), the Commission amended its Regulations under the Natural Gas Act to provide that in all contracts executed on or after April 3, 1961 for the sale or transportation of natural gas subject to the jurisdiction of the Commission, indefinite escalation clauses, except for tax reimbursement or periodic price redetermination provisions, would be inoperative and of no effect at law. Subsequently, by Order No. 242, issued February 8, 1962 (27 FPC 339), the Commission issued a further rulemaking amending its regulations to provide that any contract executed on or after April 2, 1962 containing such provisions would be rejected. Upon appeal, the Supreme Court ruled that it was within the Commission's rulemaking authority to set forth definite policy provisions in a single order rather than in a vast proliferation of case by case orders. *FPC* v. *Texaco, Inc.*, 377 U.S. 33 (1964).

In the last two years the Commission has made extensive and significant use of its rulemaking powers. For example, the Commission recently made advances in the regulation of natural gas producers by two important rulemaking decisions. On October 2, 1970, in Order No. 411, the Commission established area rates for the Appalachian and Illinois Basin Areas based upon the written and oral comments of the parties but without the necessity for a "full-blown" evidentiary hearing, including the presentation of witnesses and cross-examination which had characterized the earlier area rate proceedings. While all parties were afforded due process and an opportunity to be heard, and the public interest was protected, the Commission was able to establish these rates within one year. No appeal was

taken. These procedures represent a marked improvement over the early area rate proceedings which required more than eight years to become final, including the time spent on appeals.

Also utilizing rulemaking, the Commission on March 18, 1971, made a further important contribution to effective and efficient regulation of natural gas producers. In Order No. 428, the Commission further eased the administrative burden on itself and small producers of natural gas by prescribing different requirements for different classes of persons. Under the new regulations, small producers who obtain an initial blanket certificate are relieved from the duty of filing their sales contract with the Commission and need only report annually on the volume of their sales. This action is also intended to encourage small producers to increase their exploratory efforts for the discovery of new sources of gas.

During 1970 the Commission completed several rulemakings designed to protect and enhance environmental values while assuring reliable and reasonably priced utility services. For example, by Order No. 407, issued July 10, 1970, the Commission established guidelines which are to be followed by pipeline companies in the planning, locating, clearing and maintenance of rights-of-way and the construction of above ground facilities. Similar guidelines for the protection of natural, historic, scenic and recreational values in the design and location of rights-of-way and transmission facilities were promulgated in the electric power area by rulemaking issued November 27, 1970 in Order No. 414.

One other particularly timely policy statement that should be noted is Order No. 383–2, April 10, 1970, concerning the reliability and adequacy of electric service. That policy statement established a system of voluntary reporting by all segments of the electric power industry on coordinated regional bulk power supply programs. In addition to supporting various power plant siting legislative proposals, several of which are now pending before the Congress, each member of this Commission participated in this reliability policy statement. We believe the voluntary cooperation of all regions and segments of the power industry that is stated as Commission policy in Order No. 383–2 is a necessary ingredient in any solution to our current power supply problems.

There are many other actions which might be taken to improve the procedures through which the Commission handles its business. One area would be the elimination of many minor matters which are presently required by statute to come before the Commission for hearing. These probelms could be resolved by a delegation of authority to the Commission's staff under appropriate legislation. A change of this nature should be carefully considered. It could enhance the Commission's current effectiveness without sacrificing proven regulatory procedures.

On a related matter, the Report correctly suggests that the Commission should strive to write broader guidelines and policy formulation into its opinions. Consistency among written opinions is also imperative. Unlike the Ash Council, we believe these objectives are more likely to be achieved if a reasonable amount of Commission review is exercised over the decisions of hearing examiners rather than allowing for only limited review within the agency. Furthermore, many "policy" questions arise initially in the context of a litigated proceeding. In deciding such questions the hearing examiner is setting policy in the first instance and not merely applying established Commission policy. Under these circumstances the agency should have the benefit of a full evidentiary record upon which to review the examiner's decision and make a determination of policy.

Also, the Report suggests in several places that the Commission could better handle policy formulation through "informal" rulemakings, conferences and guidelines. The Report does not specify how these "informal" procedures would be structured, but it appears that they may fall short of the procedural requirements under the Administrative Procedure Act. Such "informal" meetings with industry may be contrary to the decision in *Moss* v. *Civil Aeronautics Goard*, 430 F. 2d 891 (D.C. 1970), in which the U.S. Court of Appeals held invalid airline passenger rates which the CAB set without statutory hearing following closed sessions with carrier representatives which non-industry members were refused permission to attend.

It should be appreciated that the opportunities for general policy formulation in the highly complex areas in which the Federal Power Commission operates are limited. There is a widespread diversity both among the utilities which are regulated and the regions of the country which are affected. Virtually every rate case presents unique problems of cost allocation, rate base definition, and appropriate rate of return. Many cases must be decided from the standpoint of the individual company involved. Therefore, establishing policy for an entire industry by a single rulemaking proceeding is only possible in a limited number of situations.

The Council's Report appears to accept uncritically and without qualification the familiar nostrums that regulatory effectiveness is negated by the tendency to "overjudicialize" the process. The proposed solution is to relegate the adjudicative function to a secondary role by assigning it to the hearing examiner corps with a presumption of finality. We think this misconceives the essential nature of economic regulation by confusing it with line administration of operating programs. In so doing, it ignores a century's experience in the development of a concept of fairness and due process as a mandatory ingredient of administrative justice.

Rulemaking and general policy enunciations can and do establish basic groundrules and principles and a procedural framework to govern all cases. But the ultimate impact of regulation as performed by this agency occurs when general rules are applied to a particular application for a license or certificate or in the establishment of just and reasonable rates for bulk sales of electric power or natural gas in interstate commerce. Regulation has no real meaning until it is applied to the individual circumstances of a particular company, to the needs of a particular locality or customer, or to the environmental values of a region.

Increasingly, these matters are contested or challenged and are therefore adversary in character. Well established rules, evolved out of judicial review and now codified in statute law, demand full and fair hearing for all interested parties, compilation of substantial evidence, weighing of the broadest possible public interest factors, ratemaking that is at once non-discriminatory and non-confiscatory, and a decision that reflects full deliberation of the entire record in good faith.

To the extent that the underlying philosophy and tone of the Council Report advocate or imply that these principles can be minimized or evaded through the device of reorganization, it is in serious conflict with basic constitutional philosophy. The ultimate regulatory act is and must continue to be deliverative and judicial in character. We think that the pervading atmosphere of the Council's observations in this area cast doubt on the validity of its conclusion.

Adjudication, as well as rulemaking, has generally well served regulatory goals. Contrary to the implications of the Report, FPC decisions, adjudicative and legislative, are generally not "after the fact" since they involve such forward-looking types of regulation as rates, certificates and licenses which are to become effective in the future. Such matters as advances in technology, economic trends, and changes in industry structure can be brought out in proceedings before the Commission and fully developed on the record. This may prevent action being taken with too little information and without all sides being heard. The "judicial" environment which the Report criticizes assures that all sides may have their case presented, thus preserving public and industry confidence in the regulatory process. Although economic, environmental, technical and similar aspects of issues are important, there likely will be differing opinions as to the correct application of each. Rather than adopting a procedural change which would restrict the forum in which such opinions may be heard, we believe better results can be reached by continuing the present judicial environment which permits conflicting approaches to be aired in a public proceeding. The "legalistic solutions" which, according to the Report, frequently preoccupy the Commission staff usually involve efforts to assure that parties will receive due process and that the Comission's actions will not go beyond its statutory mandates.

Internal Review of Decisions

The Ash Report proposes that the Commission streamline its administrative review procedures by reviewing only selected decisions of hearing examiners primarily for consistency with agency policy, rather than engaging in the systematic review of initial decisions. It is proposed that action be required to either modify or remand an examiner's decision within 30 days of its issuance. Although this proposal speaks in terms of a single Administrator, it is in general equally applicable to the present Commission system, and therefore we shall assume the continuing existence of the five-member Commission in making our comments on this proposed change.

For the reasons set forth below, we do not believe that the Report's suggestions with respect to the handling of hearing examiners' decisions are practical. As an alternative, we would suggest the possibility of discretionary review procedures under which the Commission would have a limited period of time within which to determine whether to accept a moving party's request for review of the examiner's decision. Before the Commission would agree to review an application, a majority of the Commissioners should be required to vote affirmatively for such review. If such a vote were not forthcoming within a specified period of time after the examiner's decision is entered, then his decision would become final. However,

if the Commission determined to review the examiner's decision, then there should be no arbitrary time limit upon the period within which the Commission must render its opinion since proceedings vary widely as to complexity.

The Report criticizes the high percentage of appeals which are taken to the Commission from decisions of hearing examiners and suggests that this percentage would be greatly reduced if the Commission articulated its policies by means other than adjudicatory proceedings. If parties are entitled to seek an appeal and substantial interests are involved, logic dictates that the decisions of hearing examiners are going to be appealed. The number of these appeals will not be lessened by an articulation of policy prior to the initial proceeding. If this were so, there would have been no necessity for the institution of the initial proceeding. Furthermore, there is still the question of applying policy to the facts of a particular case.

A further question should be raised as to how much limitation should be placed upon the latitude of Presidentially appointed Commissioners to review decisions of civil service hearing examiners, particularly when these examiners are as a minimum applying Commission policy and frequently are creating that policy. Although the Report is not specific as to whether review of a hearing examiner's decision should be limited to policy questions, we definitely believe it should not be. Furthermore, we would oppose a requirement that the Commission can review a proceeding only subsequent to the decision of the hearing examiner. There is sometimes need for the Commission to waive the examiner's decision in order that a final decision may be expeditiously issued. It should be noted, furthermore, that approximately 2000 uncontested cases each year are decided initially by the Commission with no action being taken by a hearing examiner.

We believe the Commission's present internal review structure is preferable to the Ash Council recommendations. The current system offers the best assurance that all aspects of the public interest will be evaluated and that a procedural context will be provided affording all interested parties access to the decision-makers. As we have suggested, however careful study should be given to the possibility of limiting Commission review of examiners' decisions to those situations where at least three Commissioners affirmatively vote to review. A change to this extent in current internal appellate procedures may well merit adoption.

The Administrative Court

Taking the issue of review of Commission decisions beyond internal review procedures, the Report recommends the establishment of an Administrative Court for judicial review of decisions of this Commission as well as the securities and transportation regulatory agencies. In this respect, considerable interpretation of the Report is necessary as a result of its failure to specify clearly what functions are to be transferred to the Administrative Court and what functions are to be retained by the Commission. Assuming that the Commission would retain initial jurisdiction of all ratemaking, licensing, securities, merger and other economic regulatory responsibilities, there would be considerable merit in the establishment of an Administrative Court. We believe that a court which has the background to understand complex technical and economic issues would be well suited to review decisions of regulatory agencies. Furthermore, with respect to establishing a consistent body of case law, the decisions of an Administrative Court would be an improvement over the present system in which reviews are conducted by eleven separate Courts of Appeals. On the issue of consistency, we agree with the Report's suggestion that procedural law should be as uniform as possible among the regulatory agencies.

The Administrative Court—even apart from changing the structure of the Federal Power Commission or other regulatory agencies—should be considered on its merits as an important adjunct to our present judicial system. Appellate review of extremely complex, technical, involved regulatory cases requires the same expertise and comprehension of regulatory impact and capacity for administrative action as a Commission sitting in equity discharging its judicial function or in its current appellate role ruling on appeals from decisions of independent examiners.

The complexity of issues regulated by the independent commissions should prompt serious consideration of the establishment of a separate administrative appellate court at the United States Court of Appeals level in order to free these latter courts for the determination of controversies involving human rights and civil and criminal liabilities under the Federal Code and the common law. We recommend that an Administrative Court established as an independent part of our judicial structure, rather than as an adjunct to reform of the regulatory system, should be constituted as a constitutional court under Article 3 of United

States Constitution. If, on the other hand, an Administrative Court is established as a necessary part of any modification of the regulatory structure, then it would appear that initially a 15-year term of office would be desirable with conversion at a later date—if the experiment works—to a constitutional court.

We are also of the opinion that the effectiveness of an Administrative Court would be increased if its appellate review authority were extended to all regulatory agencies, rather than only to the few which the Report suggests. Since the court would develop expertise in administrative procedural and substantive law, we perceive no valid reason for not extending its jurisdiction to cover review of all regulatory agencies. This extension of jurisdiction would further relieve the other appellate courts *pro tanto* from the burden of complex appeals from regulatory decisions.

In connection with the procedures of the new Administrative Court, the Report is unclear as to whether it would take evidence beyond the record adduced before the regulatory agency. We believe that the taking of such evidence by the court should be limited to injunction proceedings and, possibly, other extraordinary remedies. We believe that an Administrative Court should not be empowered to substitute its own findings of fact for the findings of the Commission or of a hearing examiner. The Court should not have the authority to set policy, as this is the responsibility of the regulatory agency, nor should it be established to replace Commission review of hearing examiners' decisions.

The Public Utility Holding Company Act

The Report recommends the transfer of the responsibilities for regulation under the Public Utility Holding Company Act of 1935 from the Securities and Exchange Commission to the FPC. We are already on record in support of this recommendation, but urge that such a transfer be accompanied by sufficient staff additions and funds with which to administer these responsibilities.

On July 13, 1970, the Commission transmitted to the House Committee on Interstate and Foreign Commerce a report on H.R. 15516 (Staggers), "a bill to provide for the transfer to the Federal Power Commission of all functions and administrative authority now vested in the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935." This bill, which was sponsored by the SEC, received the Commission's endorsement and the report we transmitted to Congress was cleared by the Office of Management and Budget. A copy of the letter of transmittal and the report are attached as Appendix B.

CONCLUSIONS

Our evaluation of the Ash Report with respect to the impact of its recommendations on the independent regulatory system and national energy policy raises many serious questions and prompts the following conclusions:

(1) The formulation of a definitive national energy policy, including a clear identification of priorities and goals, is an essential prerequisite to the adoption of any significant changes in current regulatory structure and procedures.

(2) There is no demonstrable evidence to support the alleged superiority of a single Administrator form of regulation. The deliberative nature of the collegial form of regulation, enhanced by the diversity of experience and philosophy of the individual commissioners, has proven to be a faithful and, in view of the complexity of the regulatory workload, a reasonably expeditious guardian of the public interest.

(3) The Federal Power Commission, as an arm of the Congress and appointees of the President subject to executive budgetary restraints, is accountable for its record and regulatory policies. The Chairman of the Commission regularly reviews the priorities, policies and needs of the Commission with both the executive and legislative branches.

(4) Internal management and administrative functions are carried on efficiently under the current system which places primary authority in the Chairman with day to day implementation supervised by the Executive Director. The participation of the full Commission in key management and budgetary decisions contributes to the continuity and stability necessary to keep an organization functioning smoothly.

(5) The Commission regularly coordinates its activities with other Federal and State agencies. Energy policy and environmental concerns are the most frequent areas of cooperation and consultation. Chairman Nassikas has been regularly participating in several multiagency energy and environmental committees assigned by the President to the task of formulating basic national policy objectives.

(6) The Commission believes that the Congress and the Executive have been substantially responsive to budgetary and legislative recommendations of the Commission. There is no evidence that a single Administrator would generate greater concern or cooperation.

(7) The adoption of the single Administrator form of regulation, in conjunction with the recommended decrease in judicial responsibilities, would not enhance the appeal of regulation to well-qualified members of the legal profession. Abandoning the collegial form would also obviously deprive the regulatory structure of its current diverse and expert membership.

(8) The Federal Power Commission has utilized rulemaking and policy statements extensively for the purpose of directing and influencing necessary trends in the electric and gas industries. Rulemaking is recognized as an essential tool of regulation coequal in importance to the adjudicatory process.

(9) Hearing examiners regularly set policy in the decision of adjudicated issues. The Commission must retain full opportunity to review these decisions, although selective appeals granted only after a majority vote deserves careful consideration as a means of limiting unnecessary Commission review of examiners' decisions. No arbitrary time limit should be placed on the Commission's review and decision of appealed cases.

(10) So-called "informal" procedures for the settlement of contested issues and the formulation of policy must be carefully insulated by strict adherence to the requirements of due process and the Administrative Procedure Act.

(11) We endorse the formation of an Administrative Court to complement the existing regulatory framework. Preferably such a court should be constituted as a constitutional court with jurisdiction over the decisions of all the independent regulatory agencies. Review of regulatory decisions by a specialized, full-time Administrative Court in lieu of eleven different Courts of Appeals would contribute to regulatory stability and mitigate the severe burden on the current judicial system.

(12) As a policy matter the Commission has already expressed its agreement with the transfer of the SEC's responsibilities pursuant to the Public Utility Holding Company Act to our jurisdiction. Accordingly, we concur in the Council's recommendation on this subject.

APPENDIX A

Docket No.	Order No.[1]	Issuance date	Subject
R-173	218	June 7, 1960	Uniform system of accounts prescribed for class A and class B public utilities and licensees.
R-174	219	June 21, 1960	Uniform system of accounts for natural gas companies.
R-183	220	Mar. 15, 1960	Natural gas companies—exempt facilities and temporary authorization.
R-188	221	June 9, 1960	Amendment of part 157 of subchapter E, regulations under the Natural Gas Act, applications for certificates of public convenience and necessity under section 7 of the Natural Gas Act.
R-190	222	July 22, 1960	Changes in rates reflecting continuance of Louisiana gas severance tax.
R-189	224	Sept. 15, 1960	Amendment of forms and regulations, power system statements.
R-184	225	Dec. 13, 1960	Uniform system of accounts for class C public utilities and licensees.
R-185	226	Dec. 17, 1960	Uniform system of accounts for class D public utilities and licensees.
R-186	227	Dec. 21, 1960	Uniform system of accounts for class C natural gas companies.
R-187	228	Dec. 23, 1960	Uniform system of accounts for class D natural gas companies.
R-192	229	Nov. 9, 1960	Adjournments and continuances during hearings.
R-193	230	Dec. 5, 1960	Making producer rates effective at the end of the suspension period.
R-191	231	Dec. 21, 1960	Statement of sales and revenues of independent producers.
R-153*	232	Mar. 3, 1961	Nonacceptability of contracts between producers and interstate natural-gas companies containing certain types of automatic escalation and favored nation clauses.
R-153*	232-A	Mar. 31, 1961	Nonacceptability of contracts between producers and interstate natural-gas companies containing certain types of automatic escalation and favored nation clauses.
R-197	233	May 16, 1961	FPC Form No. 6, Initial Cost Statement for Licensed Projects—Technical Amendments.
R-178	234	May 25, 1961	Applications for orders under section 7 (a) of the Natural Gas Act.
R-194	235	Oct. 16, 1961	Units of property for use in accounting for additions and retirements of electric plant.
R-196	236	....do....	Units of property for use in accounting for additions to and retirements of gas plant.
R-202*	237	Nov. 14, 1961	Settlement agreements relating to annual payments to licensees and permittees for headwater benefits.
R-198	238	Dec. 7, 1961	Revisions of annual report form prescribed for class A and class B electric utilities, licensees and others subject to the Federal Power Act, FPC Form No. 1.
R-198	238-A	Jan. 26, 1972	Revisions of annual report form prescribed for class A and class B electric utilities, licensees and others subject to the Federal Power Act, F.P.C. Form No. 1.

Appendix A—Continued

Docket No.	Order No.[1]	Issuance date	Subject
R-201	239	Dec. 7, 1961	Revision of annual report form prescribed for class A and class B natural gas companies subject to the Natural Gas Act, FPC Form No. 2.
R-201	239-A	Jan. 26, 1962	Revision of annual report form prescribed for class A and class B natural gas companies subject to the Natural Gas Act, FPC Form No. 2.
R-204	240	Jan. 4, 1962	Independent producers of natural gas form of filing for rate increase.
R-205	241	Jan. 12, 1962	Natural gas companies—exempt facilities.
R-203*	242	Feb. 8, 1962	Rejection of sales contracts containing indefinite escalation clauses and of applications relying upon such contracts for gas supply.
R-206	243	do	Independent producers of natural gas, definition of—temporary authorizations, procedure.
R-210	244	Mar. 13, 1962	Ex parte communications.
R-214	245	Apr. 30, 1962	Organization of commission—delegation of authority.
R-208	246	May 21, 1962	Amendment of part 45 of regulations under the Federal Power Act—prescribing the form for interlocking directorate applications.
R-216	247	June 7, 1962	Gas purchase facilities—budget-type certificate applications—pipeline companies.
R-217	248	do	Custody, authentication, and certification of documents.
R-211	249	June 6, 1962	Revision of annual report form prescribed for class C and class D natural gas companies subject to the Natural Gas Act, F.P.C. Form No. 2-A.
R-213	250	June 1, 1962	Revision of annual report form prescribed for class C and class D public utilities and licensees subject to the Federal Power Act, FPC Form No. 1-F.
R-219	251	June 18, 1962	Amendment of part 1, rules of practice and procedure, relating to intervention and applications for rehearing, and part 157, regulations under the Natural Gas Act, relating to temporary service by producers.
R-212	252	Aug. 7, 1962	Promulgation of a new annual report form prescribed for all licensees of privately owned major projects (utility and industrial) subject to the Federal Power Act, FPC Form No. 9.
R-212	252-A	Feb. 20, 1963	Revision of annual report form prescribed for all licensees of privately owned major projects (utility and industrial) subject to the Federal Power Act, FPC Form No. 9.
R-215	253	Aug. 7, 1962	Amendment to part 11 of subchapter B of the regulations relating to annual charges of licensees—penalty for delinquency.
R-207*	254	Sept. 20, 1972	Changes in rate schedules and tariffs-filings by pipeline companies—revisions of sec. 154.63.
R-222*	255	do	Filing requirements—request for waiver—delegation of authority—appeals therefrom—rate filings (18 CFR 1.7 (b), (d), 1.14(c)(2), 3.5(a)).
R-222*	255	Nov. 6, 1962	Filing requirements—request for waiver—delegation of authority—appeals therefrom—rate filings (18 CFR 1.7(b)).
R-209	256	Oct. 24, 1962	Promulgation of annual report form prescribed for municipal electric utilities having annual electric operating revenues of $250,000 or more subject to the requirements of the Federal Power Act, FPC Form No. 1-M.
R-224*	257	Nov. 6, 1962	Natural gas pipeline companies—expedition of rate proceedings.
R-195	258	Dec. 12, 1962	Preservation of records of public utilities and licensees and natural gas companies.
R-229	259	Dec. 21, 1962	Order specifying plan of Commission organization and operation effective during emergency conditions.
R-223	260	Jan. 8, 1963	License applications—revision of regulations.
R-223	260-A	Apr. 18, 1963	Do.
R-231	261	Jan. 9, 1963	Interim accounting treatment of investment tax credit under 1962 amendments to Internal Revenue Code by public utilities, licensees, and natural gas pipeline companies.
R-225	262	Feb. 14, 1963	Amendment of part 34 of regulations under the Federal Power Act—prescribing the contents of applications for the issuance of securities.
R-233	263	Feb. 28, 1963	Exceptions to intermediate decisions—replies—statements in support.
R-234	264	Mar. 27, 1963	Area price levels for sales of natural gas by producers—amendment.
R-235	265	Mar. 20, 1963	Ex parte communications.
R-236*	266	do	Applications for sale, lease or other disposition, merger or consolidation of facilities or for purchase or acquisition of securities of a public utility.
R-237	267	Mar. 27, 1963	Area price levels for sales of natural gas by producers.
R-221	268	Apr. 23, 1963	Revision of regulations relating to computation of annual charges for headwater benefits to owners of non-Federal hydroelectric projects.
R-238	269	Aug. 1, 1963	Revision of annual report form prescribed for class A and class B electric utilities, licensees and others subject to the Federal Power Act, FPC Form No. 1.
R-245	270	Aug. 6, 1963	Appeals from staff action under delegated authority.
R-227	271	Sept. 20, 1963	Amending regulations to govern the filing of rate schedules by public utilities and licensees.
R-228	272	Nov. 20, 1963	Annual charges prescribed for licensees under the Federal Power Act.
R-228	272-A	June 18, 1964	Annual charges prescribed for licensees under the Federal Power Act.
R-251	273	Nov. 27, 1963	Area price levels for sales of natural gas by producers.
R-247	274	do	Natural gas companies—emergency planning—interconnections and defense-related expenditures.

Appendix A—Continued

Docket No.	Order No.[1]	Issuance date	Subject
R-252*	275	Dec. 9, 1963	Area price levels for sales of natural gas by producers.
R-226*	276	Dec. 18, 1963	Expenditures for political purposes—amendment of account 426, other income deductions, uniform system of accounts, and report forms prescribed for electric utilities and licensees and natural gas companies—FPC Forms Nos. 1 and 2.
R-226*	276-A	Feb. 11, 1964	Expenditures for political purposes—amendment of account 426, other income deductions, uniform system of accounts, and report forms prescribed for electric utilities and licensees and natural gas companies—FPC Forms Nos. 1 and 2.
R-232	([2])	Jan. 23, 1964	Investment tax credit under 1962 amendment to Internal Revenue Code; accounting treatment by public utilities, licensees, and natural gas companies.
R-258	277	Mar. 18, 1964	Exceptions to intermediate decisions—briefs—oral argument.
R-241 and R-244	278	do	Applications by independent producers pursuant to section 7 of the Natural Gas Act—miscellaneous amendments and rate filings and certificate applications by independent producers—miscellaneous amendments.
R-239*	279	Mar. 31, 1964	Total gas supply of pipeline companies—annual report form.
R-240	280	do	Applications by pipeline companies pursuant to sec. 7 of the Natural Gas Act—miscellaneous amendments.
R-259	281	Apr. 21, 1964	Gas-purchase facilities—budget-type applications—Pipeline companies—waiver of cast requirements.
R-260	282	do	Rate schedules of public utilities.
R-261	283	Apr. 23, 1964	Delegation of authority acceptance or rejection of journal entry filings.
R-265	284	July 28, 1964	Area price levels for sales of natural gas by producers-amendment.
R-254	285	Aug. 12, 1964	Natural gas pipeline companies—budget-type certificate applications for gas-sales transportation and underground gas storage facilities.
R-254	285-A	Oct. 21, 1964	Natural gas pipeline companies—budget-type certificate applications for gas-sales transportation and underground gas storage facilities.
R-266	286	Sept. 4, 1964	Revenue data on wholesale sales of "Firm Power" by electric utilities—amendment of annual report Form No. 1.
R-267	287	Sept. 14, 1964	Certificate of service.
R-250*	288	Oct. 6, 1964	Hydroelectric project licenses—expiration—recapture and relicensing.
R-232 and R-231	289	Nov. 2, 1964	Investment tax credit under 1962 and 1964 amendments to Internal Revenue Code; accounting treatment by natural gas companies and interim accounting treatment of investment tax credit under 1962 amendments to Internal Revenue Code by public utilities, licensees, and natural gas pipeline companies.
R-232	289-A	Dec. 17, 1964	Investment tax credit under 1962 and 1964 amendments to Internal Revenue Code; accounting treatment by natural gas companies.
R-232 and R-231	290	do	Investment tax credit under 1962 and 1964 amendments to Internal Revenue Code; accounting treatment by public utilities and licensees and interim accounting treatment of investment tax credit under 1962 amendments to Internal Revenue Code by public utilities, licensees, and natural gas companies.
R-262	291	Dec. 23, 1964	Monthly statement of natural gas pipeline companies—revision of FPC Form No. 11.
R-269*	292	Jan. 8, 1965	Hydroelectric licenses—applications—recreation plan exhibits.
R-263*	293	Jan. 11, 1965	Expenditures for political purposes—report forms prescribed for electric utilities, licensees and natural gas pipeline companies—FPC Forms Nos. 1-F, 1-M, and 2-A.
R-270	294	Mar. 16, 1965	Public utilities and licensees—transmission line statistics in annual report, FPC Form No. —.
R-270	294-A	Apr. 6, 1965	Public utilities and licensees—transmission line statistics in annual report, FPC Form No. —.
R-271	295	Mar. 24, 1965	Applications of natural gas pipeline companies to abandon facilities or service; exhibits.
R-273*	296	Apr. 5, 1965	Independent producers of natural gas—antitriggering conditions in certificates of public convenience and necessity.
R-274	297	May 4, 1965	Applications of independent producers for certificates of public convenience and necessity and for abandonment—number of copies.
R-275	298	May 25, 1965	Natural gas pipeline companies—budget applications—direct sales.
R-255*	299	May 27, 1965	Publicizing license conditions relating to recreational opportunities at hydroelectric projects.
R-243	300	June 24, 1965	Annual report form prescribed for natural gas companies—main direct industrial sales.
R-243	300-A	Mar. 30, 1966	Annual report form prescribed for natural gas companies—main line direct industrial sales.
R-253	301	July 19, 1965	Annual report form No. 2—natural gas companies—take or pay gas purchase prepayments and delivery obligations schedules.
R-277	302	July 20, 1965	Responses by natural gas pipeline companies to applications for orders under section 7(a) of the Natural Gas Act.
R-257	303	Aug. 19, 1965	Natural gas companies—emergency planning—annual reports of system flow diagrams.
R-257	303-A	May 10, 1966	Natural gas companies—emergency planning—annual reports of system flow diagrams.
R-281	304	Sept. 15, 1965	Changes by natural gas pipeline companies in a tariff.
R-285	305	Sept. 29, 1965	Annual report forms prescribed for classes A and B electric utilities, licensees, and others and for classes A and B natural gas companies.

Appendix A—Continued

Docket No.	Order No.[1]	Issuance date	Subject
R-286	306	Sept. 30, 1965	Application for exemption from the provisions of the Natural Gas Act pursuant to section 1(c).
R-287	307	Oct. 20, 1965	Organization of the Commission.
R-279*	308	Oct. 29, 1965	Rate and certificate filings by small independent producers.
R-272	309	Nov. 30, 1965	Annual charges prescribed for licensed projects under the Federal Power Act.
R-283	310	Dec. 8, 1965	Annual reports of classes A, B, C, and D natural gas companies subject to the Natural Gas Act—miscellaneous amendments to FPC Forms No. 2 and No. 2-A.
R-283	310-A	June 24, 1966	Do.
R-283	310-B	Dec. 22, 1966	Do.
R-284	311	Dec. 8, 1965	Miscellaneous amendments to FPC Form No. 1 report form prescribed for class A and class B electric utilities and others subject to the Federal Power Act.
R-284	311-A	Sept. 8, 1966	Miscellaneous amendments to FPC Form No. 1; report form prescribed for class A and class B electric utilities and others subject to the Federal Power Act.
R-284	311-B	Oct. 13, 1966	Miscellaneous amendments to FPC Form No. 1; report prescribed for class A and class B electric utilities and others subject to the Federal Power Act.
R-289	312	Dec. 20, 1965	Power system statements—miscellaneous amendments to FPC Forms Nos. 12, 12-A, 12-D.
R-289	312-A	Sept. 9, 1966	Power system statements—miscellaneous amendments to FPC Forms Nos. 12, 12-A, 12-D.
R-294	313	Dec. 27, 1965	Recreational development at licensed projects.
R-295	314	....do....	Hydroelectric licenses—applications—exhibit K.
R-268	315	....do....	Hydroelectric licensed projects—inspections to insure safe operation.
R-296	316	Dec. 30, 1965	Budget-type certificate applications.
R-282*	317	Jan. 5, 1966	Establishment of fees to be paid by applicants for natural gas pipeline company certificates and other authorizations.
R-282*	317-A	Nov. 16, 1966	Establishment of fees to be paid by applicants for natural gas pipeline company certificates and other authorizations.
R-288	318	Feb. 28, 1966	Work order and property record system in uniform system of accounts prescribed for class C public utilities, licensees and natural gas companies.
R-299	319	Mar. 9, 1966	Standards of conduct for employees.
R-292	320	Apr. 6, 1966	Accounting for measuring and regulating stations—uniform system of accounts prescribed for classes A, B, and C natural gas companies.
R-300	321	Apr. 11, 1966	Requirement that the title to a pleading include the name of the party making the filing.
R-256	322	May 26, 1966	Annual reporting of research and development activities by electric utilities and natural gas companies.
R-303*	323	June 17, 1966	Hydroelectric license applications—exhibit relating to protection and enhancement of fish and wildlife resources.
R-290	324	June 30, 1966	Operation of natural gas pipeline facilities at pressures in excess of design pressures specified in certificate applications—general conditions applicable to certificates issued to pipeline companies.
R-307	325	Aug. 2, 1966	Accounting for fees paid pursuant to part 159 by natural gas pipeline companies in connection with certificate and other applications.
R-280	326	Sept. 6, 1966	Natural gas companies—interest on refunds of portion of increased rates of independent producers relating to royalties and taxes to Federal and State governmental authorities.
R-283 and R-291	327	Sept. 8, 1966	Annual reports of classes A, B, C, and D natural gas companies subject to the Natural Gas Act—miscellaneous amendments to FPC Forms 2 and 2-A and telegraphic reporting of accidents involving certificated facilities of natural gas pipeline companies.
R-301*	328	Oct. 19, 1966	Statement of lateral line policy in rate schedules led by natural gas pipeline companies.
R-298*	329	Dec. 1, 1966	Permissible provisions for price changes in independent producer rate schedules—liberalization.
R-276	330	Dec. 12, 1966	Inventory of recreational facilities at licensed hydroelectric projects.
R-302*	331	Dec. 20, 1966	Reporting of major electric power interruptions by all entities engaged in generation and transmission.
R-361*	331-1	May 21, 1970	Amendment of order No. 331 report of events affecting bulk power supply.
R-313	332	Dec. 22, 1966	Annual reports of electric utilities and licensees—schedules of reporting pumped storage data—other miscellaneous modifications.
R-314	333	....do....	Annual reports of natural gas companies—uniform pressure base—other miscellaneous modifications.
R-199*	334-A	Mar. 21, 1967	Nonacceptability of contracts between independent producers and interstate natural gas companies containing certain provisions in daily-contract-quantity and take-or-pay-for clauses.
R-315	335	Feb. 9, 1967	Public utilities and licensees—transmission line statistics in annual report FPC Form No. 1.
R-316*	336	Feb. 9, 1967	Refund conditions in temporary certificates of public convenience and necessity issued to independent producers of natural gas.
R-308	337	Feb. 16, 1967	Total gas supply of natural gas pipeline companies—annual report FPC Form No. 15.
R-310	338	Mar. 7, 1967	Annual reports of municipal electric utilities—FPC Form No. 1-M.
R-318	339	Mar. 31, 1967	Official notice of facts.
R-319	340	Apr. 6, 1967	Independent producers—transfer of producing acreage—procedure.

Appendix A—Continued

Docket No.	Order No.[1]	Issuance date	Subject
*R-304	341	Apr. 19, 1967	Prohibition of discrimination at recreational facilities at licensed hydroelectric projects.
R-320	342	Apr. 21, 1967	Multiple copies of applications required to be filed by public utilities.
R-305	343	Apr. 26, 1967	Accounting and reporting by hydroelectric licensees for expenditures relating to fish, recreation, and wildlife.
R-321	344	May 2, 1967	Reports by natural gas companies of curtailments of service to industrial customers.
R-321	344-A	June 7, 1967	Do.
R-322	345	May 9, 1967	Natural gas companies—annual reports of system flow diagrams.
R-323	346	May 12, 1967	Applications for vacation of power site withdrawals and for determinations under sec. 24 of the Federal Power Act.
R-324	347	May 15, 1967	Rate schedules of public utilities.
R-325	348	June 7, 1967	Public information—standardized conditions as to preliminary permits or licenses for hydroelectric developments.
R-326	349	June 22, 1967	Public information.
R-306	350	June 26, 1967	Minor project license applications—exhibit relating to fish and wildlife resources.
R-328	351	July 3, 1967	Implementation of Freedom of Information Act.
R-329*	352	June 30, 1967	Independent procedures of natural gas—antitriggering conditions in certificates of public convenience and necessity.
R-333	353	Nov. 3, 1967	Responsibilities and conduct of the members and employees of the Commission.
R-327	354	Nov. 7, 1967	Annual reports of class A and B public utilities and licensees—amendments to FPC Form No. 1 and to the uniform system of accounts for licensees relating to pumped storage projects.
R-278*	355	Dec. 21, 1967	Reporting of expenditures for donations by public utilities, licensees, and natural gas pipeline companies—annual report forms Nos. 1 and 2.
R-309*	356	Dec. 29, 1967	Independent certification of compliance with accounting requirements—annual reports of public utilities, licensees and natural gas companies—FPC Form Nos. 1 and 2.
R-336	357	do	Standardized conditions in preliminary permits and licenses for hydroelectric developments.
R-331*	358	Jan. 24, 1968	Constructed major and minor project license applications—exhibit relating to fish and wildlife resources.
R-337	359	Feb. 5, 1968	Practice with regard to complaints and protests.
R-335	360	Mar. 6, 1968	Annual reports to the commission of class A and B natural gas companies.
R-335	360-A	Mar. 6, 1969	Annual reports to the commission of class A and B natural gas companies.
R-335	360-B	Mar. 11, 1970	Annual reports to the commission of class A and B natural gas companies.
R-339	361	Mar. 13, 1968	Fees for applications filed pursuant to the natural gas act.
R-340	362	Apr. 2, 1968	Rates of natural gas companies in effect at end of suspension period—interest on refunds.
R-341*	363	June 4, 1968	Policy with respect to the issuance of certificates of public convenience and necessity to pipeline companies in the southern Louisiana offshore area.
R-342	364	June 11, 1968	Practice with regard to adjournment or continuance of hearings.
R-330*	365	July 8, 1968	Statement of lateral line policy in rate schedules filed by natural gas pipeline companies.
R-334	366	do	Uniform system of accounts for public utilities, licensees, and natural gas companies (classes A, B, C, and D)—FPC Report Forms Nos. 1 and 6.
R-346	367	Sept. 17, 1968	Independent producers of natural gas—approving the 14.73 p.s.i.a. pressure base standard of measurement and amending tables of area rate price levels.
R-347	368	Sept. 20, 1968	Responsibilities and conduct of the members and employees of the Commission.
R-348	369	do	Inventory of recreation facilities at licensed hydroelectric projects.
R-297	370	Sept. 27, 1968	Hydroelectric project licenses: Calculation of "net investment" under sec. 3(13) of the Federal Power Act.
R-297*	370-A	Nov. 22, 1968	Do.
R-349	371	Oct. 11, 1968	Uniform system of accounts for class A and class B natural gas companies.
R-350	372	Oct. 17, 1968	Power system statements amendments to Report Forms Nos. 12, 12E, 12F.
R-351	373	Nov. 12, 1968	Prehearing conference procedures: Appeals to the Commission.
R-352	374	Nov. 18, 1968	Independent producers of natural gas—amending the second and seventh amendments to the Statement of General Policy 61-1.
R-294*	375	Nov. 20, 1968	Recreational development at licensed project.
R-294*	375-A	Feb. 19, 1970	Recreational development at licensed project.
R-353	376	Dec. 5, 1968	Preparation and presentation of prepared written testimony.
R-354	377	Dec. 10, 1968	Suspended rates of independent producers—procedures to make effective.
R-332	378	Jan. 7, 1969	Annual reports of class A and B public utilities, licensees, and natural gas companies—amendment of FPC Forms Nos. 1 and 2.
R-332	378-A	Feb. 3, 1969	Annual reports of class A and B public utilities, licensees, and natural gas companies—amendment of FPC Forms Nos. 1 and 2.
R-343	379	Jan. 13, 1969	Requests for authority under sections 19, 20, 203, and 204, Federal Power Act—18 CFR 33.2, 34.2—contents of application amendment requiring applicants to furnish information in form of notice suitable for Federal Register publication.

43-362 O - 75 - pt. 2 - 22

Appendix A—Continued

Docket No.	Order No.[1]	Issuance date	Subject
R-356	380	Apr. 10, 1969	Revision of FPC Form No. 1–M annual report form for municipal electric utilities—revision of instruction to schedule titled "Sales of Electricity for Resale".
R-358	381	May 12, 1969	Independent producers of natural gas—amending tables of area rate levels.
R-359	382	May 16, 1969	Delegation of authority, acceptance or rejection of all requests for extension of time for filing safety inspection reports.
R-362	383	Oct. 21, 1969	Reliability and adequacy of electric service—reporting of data—participation of regulatory personnel in regional councils.
R-362*	383–1	Jan. 13, 1970	Reliability and adequacy of electric service—reporting of data—participation of regulatory personnel in regional councils.
R-362*	383–2	Apr. 10, 1970	Reliability and adequacy of electric service—reporting of data—participation of regulatory personnel in regional councils.
R-355*	384	July 17, 1969	Takeover or relicensing of licensed projects—new application requirements relating to Federal development, electric coordination, water quality, historical and archeological properties—procedural changes.
R-357	385	July 23, 1969	Sales measuring station and related minor facilities—budget-type abandonment applications.
R-345*	386	July 31, 1969	Procurement—competition.
R-297*	387	Aug. 4, 1969	Hydroelectric project licences: Calculation of "net investment" under sec. 3(13) of the Federal Power Act.
R-297*	387–A	Dec. 30, 1969	Do.
R-368	388	Sept. 25, 1969	Revision in annual report, FPC Form No. 2.
R-344	389	Oct. 9, 1969	Revisions in uniform systems of accounts, and annual reports, FPC Form No. 1 and FPC Form No. 2, for reporting year 1970.
R-344	389–A	Jan. 14, 1970	Do.
R-370	390	Oct. 10, 1969	State of Texas production tax—increased rate filings.
R-372	391	Oct. 20, 1969	Direct natural gas service for drilling or testing—annual reporting requirement.
R-366	392	Dec. 18, 1969	Revisions in annual reports, FPC Form No. 1 and FPC Form No. 2, for reporting year 1969.
R-363	393	do	Revisions in uniform system of accounts for public utilities and licensees (classes A and B) and FPC Form No. 1 re nuclear fuel.
R-363	393–A	Apr. 2, 1970	Revisions in uniform system of accounts for public utilities and licensees (classes A and B) and FPC Form No. 1 re nuclear fuel.
R-374*	394	Jan. 6, 1970	Area rates for small producers (permian basin area)—increased rate filings.
R-373	395	Feb. 25, 1970	Gas purchase facilities budget-type applications.
R-367*	396	Mar. 23, 1970	Amendment of section 157.28 regulations under the Natural Gas Act, relating to temporary service by producers.
R-385*	397	Mar. 25, 1970	Amendment of part 33 of regulations under the Federal Power Act—prescribing applications for sale, lease or other disposition, merger or consolidation of facilities or for purchase or acquisition of securities of a public utility.
R-364	398	Apr. 3, 1970	Reporting of retail rate changes by electric utilities.
R-308*	399	Apr. 27, 1970	Total gas supply of natural gas pipeline companies—annual report, FPC Form 15.
R-376	400	Apr. 28, 1970	Form of escrow agreement—part 250, approved forms, regulations under the Natural Gas Act.
R-378	401	May 6, 1970	Reporting of pipeline failures and interruptions to service, miscellaneous amendments to FPC Forms 2 and 2–A.
R-386*	402	do	Policy with respect to sales and deliveries of natural gas for resale in interstate commerce, by companies with exemptions under sec. 1(c) of the Natural Gas Act to alleviate temporary emergencies.
R-386*	402–A	June 3, 1970	Policy with respect to sales and deliveries of natural gas for resale in interstate commerce, by companies with exemptions under sec. 1(c) and certain companies exempt under sec. 1(b) of the Natural Gas Act to alleviate temporary emergencies.
R-375	403	May 13, 1970	Amendment of section 157.7(c)(i)(ii), regulations under the Natural Gas Act, relating to budget-type certificate.
R-387*	404	May 15, 1970	Calculation of taxes for property of public utilities, licensees, and natural gas pipeline companies constructed or acquired after Jan. 1, 1970.
R-387*	404–A	July 9, 1970	Calculation of taxes for property of public utilities, licensees, and natural gas pipeline companies constructed or acquired after Jan. 1, 1970.
R-369	405	May 27, 1970	Interest on refunds—rates of independent gas producers and pipelines in effect at end of suspension period.
R-369	405–A	July 27, 1970	Interest on refunds—rates of independent gas producers and pipelines in effect at end of suspension period.
R-383	406	May 28, 1970	Annual report of municipal electric utilities—FPC Form 1–M, revision of condensed income statement.
R-360*	407	July 10, 1970	Selection, clearing, and maintenance of rights-of-way routes and construction and maintenance of above ground facilities by natural gas companies.
R-381*	408	Aug. 26, 1970	Accounting treatment for expenditures for research and development.
R-402	409	Sept. 30, 1970	Delegations of final authority—changes in name of persons and municipalities subject to or invoking commission jurisdiction under the Federal Power Act and the Natural Gas Act.
R-380*	410	Oct. 2, 1970	Accounting and rate treatment of advance payments to suppliers for gas and amending FPC Form No. 2.
R-380*	410–A	Jan. 8, 1971	Accounting and rate treatment of advance payments to suppliers for gas and amending FPC Form No. 2.

Appendix A—Continued

Docket No.	Order No.[1]	Issuance date	Subject
R-371*	411	Oct. 2, 1970	Area rates for the Appalachian and Illinois Basin areas.
R-371*	411-B	Nov. 27, 1970	Area rates for the Appalachian and Illinois Basin areas.
R-382*	412	Oct. 22, 1970	Collection of steam-electric generating plant pollution control data—FPC Form No. 67.
R-394*	413	Oct. 27, 1970	Termination of moratorium provisions in southern Louisiana.
R-365*	414	Nov. 27, 1970	Protection and enhancement of natural, historic, and scenic values in the design, location, construction, and operation of project works.
R-396	416	Dec. 7, 1970	Amendment to annual report forms No. 1 and No. 2, to adopt a statement of source and application of funds.
R-399*	417	Dec. 8, 1970	Report of gas stored underground (FPC Form No. 8).
R-404*	418	Dec. 10, 1970	Amendment of sec. 157.22(d) and 157.29 of the regulations under the Natural Gas Act, relating to exemption of emergency sales by independent producers of natural gas in interstate commerce.
R-390	419	Jan. 6, 1971	Revisions in uniform systems of accounts, and forms 1-F and 2-A, to make the income statement more inclusive.
R-379*	420	Jan. 7, 1971	Accounting treatment for land held for future utility use and for profits or losses realized through sales of those lands.
R-379*	420-A	Feb. 23, 1971	Do.
R-391	421	Feb. 8, 1971	Transportation costs for operation of utility-owned carriers—revisions to the uniform system of accounts (classes A and B) limitation on application of the fuel adjustment—revision of sec. 35.14 (a) (3) of the regulations.
R-413	422	Feb. 12, 1971	Inventory of recreational facilities at licensed hydroelectric projects.
R-407*	423	Feb. 18, 1971	One day suspension period.
R-414	424	Feb. 23, 1971	Practice with regard to appearance and service.
R-392	425	Feb. 25, 1971	Revisions to FPC Form No. 1, annual report for electric utilities and licensees (class A and B).
R-384	426	Mar. 10, 1971	Accounting for natural gas stored underground and liquified natural gas storage facilities.
R-408*	427	Mar. 18, 1971	Revision of existing and establishment of new schedules of fees to be paid by electric public utility companies and natural gas companies and for miscellaneous services rendered by the Federal Power Commission.
R-393*	428	do	Exemption of small producers from regulation.
RP66-24*	568	Oct. 7, 1969	Pricing of new gas produced by pipelines and pipeline affiliates.
RP66-24*	568-A	Dec. 5, 1969	Do.
R-398*	415	Dec. 4, 1970	Implementation of the National Environmental Policy Act.
R-418*	431	Apr. 15, 1971	Policy with respect to establishment of measures to be taken for the protection of as reliable and adequate service as present natural gas supplies and capacities will permit.
Statement of General Policy 61-1, 24 FPC 818.*		Sept. 28, 1960	Area price levels for natural gas sales by independent producers.
Statement of General Policy 62-1, 26 FPC 596.*		Oct. 19, 1961	The issuance of temporary certificates of public convenience and necessity to pipeline companies.

[1] These rulemaking orders represent Commission implementation of necessary changes in regulatory procedure. Orders of broad significance from a policy standpoint are marked with an asterisk (*).
[2] Interim order.

Appendix B

Federal Power Commission,
Washington, D.C.

H.R. 15516—91st Congress, To transfer Public Utility Holding Company Act to Federal Power Commission.

Hon. Harley O. Staggers,
Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

Dear Mr. Chairman: In response to your request of January 26, 1970, we enclose three copies of the report of the Federal Power Commission on the subject bill.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

John N. Nassikas, *Chairman.*

Enclosure.

Federal Power Commission Report on H.R. 15516—91st Congress

A bill to provide for the transfer to the Federal Power Commission of all functions and administrative authority now vested in the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935.

H.R. 15516 would transfer all the functions and administrative authority vested in the Securities and Exchange Commission under the provisions of the Public

Utility Holding Company Act of 1935 to the Federal Power Commission. The bill would retain in the SEC with respect to public utility holding companies, the responsibility which it now exercises with respect to publicly owned corporations generally, e.g., proxy solicitations, insider trading restrictions, and reports to investors (Securities Act of 1933 and the Securities Exchange Act of 1934).

In 1935, in response to the considerable concern over the growth of public utility holding companies, Congress enacted the Public Utility Holding Company Act and directed the Securities and Exchange Commission to undertake the task of simplifying electric and gas holding company systems. To assist it in the discharge of this responsibility the SEC was given broad authority over the operations of registered holding companies, including their subsidiaries. To prevent the possibility of duplicative regulation, the Federal Power Act was amended in 1935 to provide (in section 318) that if any person would be subject both to a requirement of the Public Utility Holding Company Act or one promulgated thereunder and a requirement of the Federal Power Act, the former alone shall apply.

As early as 1949, the first Hoover Commission's task force report on the Independent Regulatory Commissions anticipated the desirability of a reassignment of functions once the SEC had completed "the integration and corporate simplification functions which lie outside the areas paralleled by the Federal Power Commission. That work is self-liquidating, and will be completed at some foreseeable time in the future. . . ." *Task Force Report on Regulatory Commissions (Appendix N) prepared for the Commission on Organization of the Executive Branch of the Government* (January 1949), p. 149. The task force concluded:

Upon substantial completion of the integration and corporate simplification program under section 11, the remaining powers and functions of the Securities and Exchange Commission under the Holding Company Act will then largely overlap and parallel these functions of the Federal Power Commission. At that time, the functions of both agencies in this field should be reexamined, integrated and placed in a single agency. The manner of such combination of functions should not be settled now, but should be left for determination in the light of the circumstances existing when the rearrangement is made. (id., at p. 150)

We concur in the SEC's judgment, as expressed in the letter of Commissioner Owens dated December 2, 1969, to the Speaker of the House of Representatives, that the contemplated change in the nature of the principal problems arising in administration of the Public Utility Holding Company Act has taken place, so that transfer of functions is now timely. The Federal Power Commission, therefore, supports enactment of H.R. 15516.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

JOHN N. NASSIKAS, *Chairman.*

APPENDIX 3

LETTERS, STATEMENTS, AND OTHER MATERIALS

BAPTIST MEMORIAL HOSPITAL SYSTEM,
SAN ANTONIO, TEX., *November 12, 1974.*

COMMITTEE ON GOVERNMENT OPERATIONS,
U.S. Senate,
Washington, D.C.

DEAR SIRS: I understand your Committee is asking for feelings regarding Governmental Agency Regulations and other operating policies that restrict growth and increase cost of operation. There is no question that the way in which Government is operating today is extremely costly to the business community. Just like two years ago we were not aware of the Federal Registry. Today, businesses and people are being fined for violations of regulations printed in the Federal Registry unbeknown to themselves. We believe that the Congress has given excessive power and control to agencies when they allow them to write regulations and control procedures that are not clearly understood, that are written in an obscure periodical and at the same time have so much weight and power upon business and individuals. Congress has given too much authority to governmental agencies and they are requiring excessive documentation which runs into literally millions of dollars in order to document to the satisfaction of the agencies. In order to keep up with Government and its bureaucracy, many businesses, including hospitals, have added additional accountants and personnel

in order to document and to provide reports as required by Governmental agencies. Many of the regulations are uncalled for and do not really protect the public nor their safety.

One good example is that of Medicare—the requirements of some five separate audits is unnecessary. Why not authorize certain audit firms and have only one set of audits, at most, maybe two—one of the hospital and one Governmental, and this would save millions of dollars and billions in the long haul for governmental Medicare programs. You can say that from our standpoint the regulating agencies have overcontrolled the industry and now we have zero growth, production and initiative all the way from the FDA, the FAA to the FCC, HEW, and SSA, you name it, we have been over-controlled and have had to increase cost to adjust for the reporting and controls that they have set up and yet can show no more safety to the public as a result.

We say everything that has been regulated at this point should be reviewed in the light of its necessity. We were overjoyed to see the bureaucrats do one thing—remove the requirements of the interlocking seatbelt which gave some of us encouragement that maybe some relief is on the way. We know of three people in our own personal life who would have been killed if they would have had seatbelts on. We know of a number of other patients brought to the hospital that did not have seatbelts on, they were knocked out of their car through the other door and they were not killed.

I have a feeling that we can do without big brother's protection in a number of other areas just like the seatbelts. After all, our forefathers did not have any federal registry watching over them when they landed on our eastern shores.

Yours truly,

DAVID GARRETT,
Executive Director.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
Washington, D.C., December 6, 1974.

Hon. SAM J. ERVIN, Jr.,
Chairman, Senate Government Operations Committee,
Washington, D.C.

DEAR SENATOR ERVIN: Laudably, the Government Operations Committee has taken a keen interest in regulatory reform (as demonstrated by its recent hearings) and will make that one of its key issues during the 94th Congress. I am calling to your attention the current experience of the National Citizens Committee for Broadcasting with regard to one aspect ripe for reform: secrecy.

As you may know, the television industry and the FCC are under great pressure from the public and the Congress to reduce the level of "sex and violence" in programing. NCCB shares the national concern over the use of gratuitous sex and violence as instruments of shock value for commercial purposes, but we do not believe that the appropriate way for the Commission to address these concerns is to meet behind closed doors with television network executives. But that is precisely what is happening.

After battles almost yearly with Congress over the issue, the FCC is now under congressional mandate to submit by year's end a report on its activities designed to control television violence. Because of that approaching deadline and because of growing concern over sexual themes of certain programs, Chairman Wiley met in his office—in closed session—with the presidents of the three television networks on Friday, November 22. According to press reports, the purpose of the meeting was to encourage the networks informally to reduce the levels of "sex and violence" so that the Commission would not be forced to take more serious action. Again according to press reports, further secret meetings—top-level and staff-level—would be held in December.

Recognizing the perils of closed meetings in general and of these closed meetings in particular, NCCB requested by letter of November 29 to Chairman Wiley that representatives of the public be permitted to attend these further meetings. (A copy of that letter is attached.) Specifically, NCCB requested that it or other representatives of the public be allowed to observe the staff-level meetings (subsequently scheduled for Tuesday, December 10), as well as any follow-up meeting between Chairman Wiley and the network presidents. We requested an answer from Chairman Wiley by Tuesday, December 3.

Chairman Wiley did not answer on December 3, nor on December 4. On December 5, NCCB was told informally by a member of his staff that the request would "probably" be denied, but no reason was given, and indeed no official answer has yet been offered.

The events If the past few years have left no doubt that closed meetings are seldom in the public interest. In this case the potential for malevolence is obvious.

For example, still pending before the Congress is the Broadcast License Renewal Act (H.R. 12993), which must yet undergo a conference fight on some key sections providing substantial license renewal relief for broadcasters at the expense of the public and its private attorneys general. We would applaud the networks' sensitivity in providing for the legitimate protection of children and in reducing the levels of unwarranted sex and violence, but we are concerned that in their zeal to please the Congress and push through their legislation, the networks may also remove from the air other controversial programing that is constitutionally-protected.

A further problem with secret sessions was emphasized in Secretary of State Kissinger's recent meetings with television industry executives (including some of the very executives with whom Chairman Wiley met). There are now several different versions of the Kissinger meeting, some of them suggesting government intimidation of the networks on news coverage. Because the meeting was closed, the only information we have consists of a series of self-serving statements by the participants.

As a nation, we have learned that closed-door agreements between industry and government often bode ill for the public.

We would hope that you would intervene to assure that these meetings will be open to public observation.

Sincerely,

NICHOLAS JOHNSON.

Enclosure.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
Washington, D.C., November 29, 1974.

Hon. RICHARD E. WILEY,
Chairman, Federal Communications Commission,
Washington, D.C.

DEAR DICK: I am writing to request that you afford the National Citizens Committee for Broadcasting or other representatives of the public the right to observe any further negotiations between the Commission and the television networks with respect to so-called "sex and violence" in programing.

On Friday, November 22, 1974, you met with the Presidents of the ABC, CBS, and NBC television networks, in closed session, to negotiate what may become a massive network-wide agreement to remove certain types of controversial programing from American television screens. According to trade press reports, e.g., *Television Digest*, November 25, 1974, the Commission (through its staff working on the Congressionally-requested "violence" report) and the network "programs standards" chiefs will try to construct just such an agreement—again in closed meetings. After that, according to the reports, you and the Presidents will reconvene (perhaps again in closed session) to ratify the agreement worked out at the lower level.

The National Citizens Committee for Broadcasting believes that such vital decisions involving possible self-censorship of national television programing should not be made behind closed doors. NCCB asks that subsequent meetings between the FCC and industry representatives be opened to representatives of the public.

Press reports indicate that both the Commission and the Congress are under pressure to "crack down" on "sex and violence"; at the same time, the broadcast industry is actively lobbying for legislation in Congress that will give it greater economic protection against broadcast competition and citizen groups at renewal time.

As a result, the broadcast industry has a clear incentive to self-censor programing otherwise protected by the First Amendment in order to gain economic protection through license renewal legislation. Given this incentive toward self-censorship, it is essential that members of the public be present to prevent a potential back-room deal that might stifle the diversity of programing available to the American public.

I would like to make it clear that NCCB takes no position here on whether the amount of "sex and violence" in programing should be increased, decreased, or left alone. Whatever the viewers, local stations, networks, and FCC conclude, the decisions ought to be made *openly*, by those charged with making them.

In *Twin States Broadcasting*, FCC 73-850 (August 9, 1973), you wrote a separate statement in which you observed:

> In my opinion, the public is ill-served if those who are licensed to serve their communities and held accountable for their stewardship, relinquish, for purely private reasons, the obligation to make independent judgments that affect the public interest . . . . I am sufficiently concerned by these few instances, isolated though they may be, to note my individual intention not to contenance agreements that may result in an abandonment of public obligations to private interests.

We agree. Yet your closed meeting with the three network Presidents on November 22 and rumored future closed meetings may result in precisely such an "abandonment of public obligation to private interests."

If "negotiations" are to be conducted by the Presidents of the networks and the Chairman of the FCC, and those negotiations are designed to eliminate or self-censor programing from American television screens, then it is essential that representatives of the public be present.

I should also note that your November 22 meeting and any subsequent similar meetings pose serious antitrust problems—of which you are no doubt aware. Were the three netowrk Presidents to meet under other circumstances to reach industry-wide programing agreements, the resultant "accords" would be subject to close scrutiny by the Justice Department. We therefore again submit that members of the public should be present to observe and report on any programing decision reached.

The National Citizens Committee for Broadcasting will be happy to send a representative to sit in on any such meetings. Moreover, we believe other public interest groups involved in broadcast reform may also want to observe, and we suggest that you open the meeting to them as well, e.g., civil liberties groups, minority groups, feminist groups, consumer groups, church groups, parents' grpus.

The events of the past few years have underscored the importance of openness in government decision-making. As a nation, we have learned that closed-door agreements made between industry and government representatives often bode ill for the public. When such agreements potentially affect the public's First Amendments rights of access to a full range of diverse and controversial programing, we believe that the *process* of decision-making should be open to public observation. The continued vitality of broadcast speech that communicates to our nation is too important to be diminshed in secret and closed meetings.

We are making this request informally and hope that it can be resolved informally. Please notify Chuck Shepherd, Executive Secretary of NCCB, of your answer to this request for open meetings. He will be happy to sit in on the meetings himself or secure other representatives for the views of the public.

We hope you will be able to respond to this request by Tuesday, December 3.

Sincerely,

NICHOLAS JOHNSON, *Chairman.*

SOUTHERN FURNITURE MANUFACTURERS ASSOCIATION,
Washington, D.C., November 27, 1974.

SAM J. ERVIN, Jr.,
Chairman, Senate Committee on Government Operations,
Washington, D.C.

DEAR SENATOR ERVIN: This is to advise you that we support the concept of S. 4145 which would create a National Commission on Regulatory Reform.

Without endorsing each specific provision of the bill, the Southern Furniture Manufacturers Association is in general agreement that enactment of this proposal could eventually bring about needed changes in regulatory actions and procedures of the federal agencies.

I hope that you will feel free to insert these comments in the hearing record.

Sincerely,

DONALD E. CHANNELL.

TRAFFIC SERVICE BUREAU,
FREIGHT TRAFFIC MANAGEMENT,
Pittsburgh, Pa., November 19, 1974.

Senator LEE METCALF,
U.S. Senate,
Washington, D.C.

DEAR SENATOR METCALF: I hereby wish to offer my support for your bill to create a Consumer Counsel to represent the public before state and federal agencies.

Attached is a copy of a one-sided Informal Opinion which was rendered by the Interstate Commerce Commission, by and through private communications between the I.C.C. and the carrier. This is a most dastardly act and Chairman Stafford of the I.C.C. upholds it. This man should be removed from office at once as private communications with a carrier are prohibited and highly unethical. Also, one-sided Informal Opinions are in violation of the I.C.C. Rules of Practice. Will you please take proper Senate action and have Mr. Stafford removed from office for malfeasance, together with all those involved in this case.

Further, in Case No. 34582, the I.C.C. had the audacity to rule that one regulation size pool table is a "Game or Toy" while another regulation size pool table is "Sporting Goods." Any Commissioner on the I.C.C. that doesn't know the difference between a child's toy pool table and a regulation size pool table has no business on the Commission. Saner people are in the nut house.

Why are these things done? Because our Interstate Commerce Commission is for the carriers, in behalf of the carriers and the public be damned, and it is too expensive to take these matters to court and they know it. Ask the I.C.C. why toy pool tables were conveniently removed from the Index of the National Motor Freight Classification.

We need your consumer counsel without any delay as our entire economy is in the hands of these people. You may use this letter to support your bill and if further information is desired, please advise. Kindly acknowledge. Thank you.

Sincerely.

R. E. WITZELL, *Owner.*

INTERSTATE COMMERCE COMMISSION,
BUREAU OF TRAFFIC,
Washington, D.C.

Mr. DAVID D. JONES,
Supervisor, Traffic Transcon Lines,
Los Angeles, Calif.

DEAR MR. JONES: This further replies to your letters of July 25 and August 30, 1973, concerning an import shipment with regards to the correct rates and charges assessed.

It is your contention that the class rates are applicable on the involved shipment whereas the consignee, C. A. McDade Company, Inc. contends that the Freight, all kinds commodity rate published in Item 5500 of Rocky Mountain Motor Tariff Bureau, Inc., Agent, Tariff MF-I.C.C. No. 206 applies.

Item 5500 requires that mixed shipments on Freight, all kinds must be of three or more articles. Since only two articles were shipped, it is our view that Item 5500 would have no application on the considered shipment.

Therefore, the rates assessed appear to be in accordance with those published in the tariffs on file with this Commission for the Carrier's account and in effect at time of movement.

The view, of course, is informal without prejudice to any different conclusion the Commission might reach in any formal proceeding.

Yours truly,

JOHN R. KUEHN,
Chief, Section of Rates and Informal Cases.

UNIVERSITY OF CHICAGO,
GRADUATE SCHOOL OF BUSINESS,
Chicago, Ill., December 12, 1974.

Senator SAM ERVIN,
Chairman, Government Operations Committee,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Your recent hearings on the President's proposed review of the performance of regulatory agencies have included discussion of the appropriate boundaries of such a study. The specific question of whether executive branch agencies ought to be included has been raised. While I am not competent to comment on the legal or administrative issues involved, I believe that the findings of economic analyses suggest that it would be a serious mistake to limit such a study to the independent regulatory commissions.

There is now a fairly substantial body of evidence which indicates that at least some of the independent agencies have thwarted rather than promoted competition, most notably where the agency can regulate the number of competitors as well as prices. However, ability to keep prospective competitors out of a market is not unique to the independent agencies. Whatever the original intent of Congress, it is clear that some executive agency rulings can have as powerful an effect on the extent of competition as those of the independent agencies. For example, my research on the Food and Drug Administration indicates that the regulatory process for approval of new drugs has led to a substantial reduction of competition among producers of new drugs with attendant costs for consumers. These effects are not substantively different from, for example, those arising from Interstate Commerce Commission policy on licensing of motor carriers. Agencies like the Environmental Protection Agency and the National Highway Traffic Safety Administration also have what are in effect licensing powers, and the way these are used can affect the degree of competition importantly. If the proposed study is to be concerned at all with the effect of regulation on competition, it would be seriously compromised by arbitrary exclusion of the executive agencies. Such exclusion could not be justified by the putatively "non-economic" concerns of agencies like the FDA or EPA; indeed the lack of formal concern with competition and costs in their charters renders an independent evaluation of their effects on competition all the more urgent. When there is already evidence, as in the case of the FDA, that competition is being curtailed and consumer costs inflated by acts of these agencies, I think that the case for including them in any review of regulatory agency behavior becomes compelling.

Sincerely yours,

SAM PELTZMAN,
Professor of Business Economics.

GULF OIL CO.-U.S.,
Houston, Tex., November 22, 1974.

Hon. SAM J. ERVIN, Jr.,
U.S. Senate, Washington, D.C., Chairman, Government Operations Committee,

DEAR MR. CHAIRMAN: As your Subcommittee takes up consideration of S. 4145, I am writing to express my full and complete support of this legislation.

In view of the nation's present economic problems, I think it has become apparent that the natural laws of supply and demand must be allowed to function in order for us to establish economic equilibrium. Neither consumers nor producers are benefited in the long run by regulatory policies designed to give short-range advantages first to one group and then to another.

A National Commission on Regulatory Reform, as proposed by President Ford, could serve a multiple purpose by identifying those areas of the economy where increased competition would lead to more efficient utilization of national resources, by providing legislative direction to achieve greater competition, and by informing consumers of additional product costs occasioned by over-regulation.

Enclosed is a copy of some remarks on this subject which I delivered on November 19 to Town Hall of California in Los Angeles. Perhaps some of the suggestions I made at that time might be of interest to you during your deliberations.

Sincerely,

Z. D. BONNER.

REMARKS OF Z. D. BONNER

Ladies and Gentlemen:

It is indeed good to be with you today to discuss what I think is a subject of vital importance not only to those within the business community but to virtually every American. That subject is the increasing stranglehold of octupus-like government regulatory agencies which are hamstringing the efficiency of business, cutting down the productivity of industry, increasing prices to the consumer and fueling our current double-digit inflation.

Today I would like to discuss briefly with you how this bureaucratic tangle has evolved over the years and how it is detrimental to the consumer. Then I will touch on what I see as some encouraging signs that the government is finally waking up to this problem area. And finally, I will suggest some actions which I think could help untie the hands of America and deliver us from this regulatory bondage.

Federal regulation nowadays touches nearly every aspect of business activity. From the quality of telephone service in Bangor, Maine, to the prices of frozen fruit pies in Salt Lake City, including, as Justice Byron White once observed in a Supreme Court decision, the flavors "apple, cherry, boysenberry, peach, pumpkin, and mince."

The regulatory experiment, which began in 1887 when Congress established the Interstate Commerce Commission to regulate the railroad industry, has continued and expanded. One by one, other industries and whole horizontal areas of business activity have become increasingly subject to regulatory control.

Those advocating establishment of the commissions, agencies and boards which now control the activities of a vast segment of American industry believed that independent regulation would temper business practices which they judged as antisocial.

The commissions, they assumed, would be composed of knowledgeable, disinterested individuals—isolated from political pressure—who would guide the activities of the regulated industries in broad channels consistent with "the public interest." The independent commission approach, they hoped, would provide the advantages of continuity of policy, expertise, impartiality, and flexibility in procedures. Combining legislative, executive and judicial functions, the commissions were to be isolated from political influence to the greatest extent possible: a kind of new fourth branch of government dedicated to the greatest public good.

Eighty-seven years after the establishment of the first independent regulatory agency, the concept, structure and performance of governmental regulation is under intense review and increasing pressures.

The problems of rampant inflation are prompting a critical assessment of the role the agencies may have played in stifling competition, escalating product costs and fueling inflation.

The criticisms of Dr. Paul McCracken, former Chairman of the President's Council of Economic Advisors, in a recent article in *The Wall Street Journal*, are indicative of the charges:

"There is substantial scope for loosening up the economy through all kinds of de-regulation. To anyone willing to look it is clear that with distressing monotony regulation has produced sick and arthritic industries. The ICC's stranglehold on the surface freight transportation industry is social irresponsibility of cosmic proportions."

I believe Dr. McCracken is 100 percent on target. The optimistic hopes of the *original* advocates of regulatory control have not been accomplished. I think many of them would agree—were they here to view the evidence today—that the end result has been counter to the interests of consumers as well as to the interests of producers. Like the descendents of Noah who build a mighty tower in the Land of Shinar, we have constructed our own Tower of Babel through overlapping, inefficient and confusing regulations from a myriad of Government agencies.

There is increasing agreement among students of regulatory activity that a great deal of what has been done by the agencies in the name of the public interest has backfired, prompting inefficiencies, waste and higher production costs which have been passed along to the consumer.

Let me give you some examples of current regulatory policies which are costing the consumer millions—even billions—of extra dollars annually.

For instance, in the trucking industry, certain Interstate Commerce Commission regulations force many trucks to return empty, after making delivery. The National Commission on Productivity has estimated that this regulation costs $250 million a year. Eliminating it could also save a quarter of a billion gallons of gasoline a year.

Another example: The President's Council of Economic Advisors has estimated that ICC regulation of freight shipped by rail costs the public more than $400 million annually.

Other observers have estimated that ICC regulation has inflated truck and railroad freight rates by 20 percent or more. Removing regulations which restrict competition in surface freight transport might reduce prices in general by point-5 percent (.5).

Airline passengers are also very much affected by anti-competitive regulatory policies. The Civil Aeronautics Board several weeks ago rejected an application by a privately-owned British airline to fly scheduled New York to London flights for $125 each way, a price which is a little more than one-third the current economy fare.

Consumer prices are being affected by regulatory activities *throughout* government. The effects are not confined to anti-competitive decisions originating in the traditional independent regulatory agencies.

A buyer of a 1975 automobile must pay $500 for Federally mandated safety and emission equipment. McGraw-Hill Publications has estimated that Government-required pollution controls and occupational safety equipment will cost industry $10.4 billion in 1974 alone.

These costs will ultimately reach the consumer in the form of higher prices, producing—according to Brookings Institution economist Charles Shultz—an inflationary impact of about point-4 percent (.4) each year for the next ten years. That sounds like a small amount, but like a snowball rolling downhill, over a period of 10 years it becomes substantial.

Restrictive labor practices, made possible by anti-competitive Federal labor policies originating in the National Labor Relations Board and other agencies, are also costing billions.

The Bureau of Domestic Commerce estimated that in 1971 such practices as featherbedding and rules barring more efficient labor methods added extra costs of:

$1 billion to $3 billion in construction;
$700 million to $1.2 billion in railroading;
$400 million to $600 million in printing;
$250 million to $400 million in supermarkets;
and $275 to $400 million in trucking.

This situation is deplorable. It is also ironic as governmental intervention and regulation of business activity is always rationalized by the objective of protecting "the public interest."

I have cited some examples of regulatory excesses in other industries without, so far, mentioning my own industry: oil and gas production.

So let me give you an example of regulatory activities which have proved anti-productive and led to inefficiencies.

As I do so, evaluate whether these so-called 'public interest' policies have benefited or have harmed the public in the long run.

In 1954, the Supreme Court ruled in the famous *Phillips* case that the Federal Power Commission had the legal responsibility to regulate field market prices for natural gas.

Initially, the FPC proposed a traditional utility type rate formula, but later abandoned this approach. Interestingly, as applied to the *Phillips* case, the formula would have required Phillips to *raise*, not lower, its rates.

Another approach, called area rate regulation, was adopted. The initial test case finally reached the Supreme Court and the Court gave its approval in 1968—14 years after the Court's original mandate to the FPC.

This delay was important, because natural gas prices were frozen between 1961 and 1968 pending the judicial outcome. The rate ceiling for new natural gas was set 3.2 percent below the ceiling rate established for the test case area eight years earlier in 1960.

We can assume these rates were below the level of free market rates. The evidence is in the fact that producers lost interest in exploration and drilling. For the first time, in 1968, proved reserves of natural gas declined.

But consumption leaped forward. Natural gas was a bargain energy commodity in relation to other fuels. Utilities and other users converted to gas-fired plants. Thus, demand was stimulated while supply was depressed. By 1971, the FPC realized that it had erred and that it was not fulfilling its mandate to assure consumers a cheap, abundant and reliable supply of natural gas.

Finally, this year the FPC publicly admitted that its low pricing policies for natural gas had led to shortages of that commodity.

Other fuels were also affected.

Since gas and oil are often found together, less natural gas development meant less domestic exploration and drilling for oil. This was also the era when foreign crude oil was cheap, and much of the country—especially residents of the northeast—wanted the cheaper foreign supplies. Proved reserves of domestic crude oil began dropping in 1967 and have cotinued to drop by nearly one billion barrels per year since then.

Coal was also affected. In addition to environmental restrictions, the coal industry suffered in the rush to convert to use of cheap natural gas.

In April of this year, electric utilities could buy natural gas for 44 cents per million BTU, as compared to 64 cents for coal and $1.89 for oil. Obviously, this price imbalance is still stimulating natural gas consumption.

All in all, it is a scenario that might have been dreamed up by Lewis Carroll.

Similar market distortions are also occurring due to crude oil price controls.

There is presently a regulated two-tier system of crude oil prices. Oil being produced in an amount equivalent to that produced in an area prior to 1972 is price controlled at $5.25 per barrel. New and imported crude is selling for $10 or $11 per barrel.

This "two-tier" policy was adopted to serve two purposes. First, controlling the old oil is supposed to combat inflation. Second, the free market price of $10 per barrel for new crude is supposed to encourage development of oil supplies. However, more than 60 percent of our domestic production is old oil. The artificially low price on this large volume of old oil encourages an artificially high consumption rate, just as happened with natural gas. The most effective control on consumption is a free market price. The consumer—by his demands—should determine the price. Regulations inevitably create more problems than they solve. When the market mechanism is tampered with, the consumer is going to pay—sooner or later.

The Administration now seems to realize that price controls are counterproductive and need to be removed. But like excess weight, removing controls is considerably more difficult than putting them on. In order to move in the direction of market pricing, the FEA has announced a plan to add even more controls by issuing so-called "Entitlements" to refiners and importers for old domestic crude. And so on and on it goes.

The process has been described by the late economist Ludwig Von Mises (Me-says) in his classic study entitled *Human Action:*

"All varieties of (government) interference with the market phenomena not only fail to achieve the ends aimed at by their authors and supporters, but bring about a state of affairs which—from the point of view of the authors and advocates valuations—is less desirable than the previous state of affairs which they were designed to alter.

"If one wants to correct their manifest unsuitableness and preposterousness by supplementing the first acts of intervention by more and more of such acts, one must go farther and farther until the market economy has been entirely destroyed and socialism has been substituted for it."

This description applies to more than oil and gas. Regulation begets regulation. . . . To the detriment of the consumer.

What happened between 1887 and 1974 to turn the concept of the public interest upside down so that the public has become the victim rather than the beneficiary of regulation?

Two things, I think.

First, by attempting to repeal the law of supply and demand and replace it with artificial controls, orders, special privileges and compulsory arrangements, the Federal government has disrupted normal, efficient market relationships and trade patterns. Thus, production has become more costly and these costs have been passed along to the consumer in the form of higher prices. Had competition been allowed to flourish, the high-cost, inefficient producer would have succumbed to the challenge of the lower-cost more efficient producers. Thus, competition was forbidden and even higher prices were the result.

Second, it has been pointed out that regulatory agencies have a very pronounced "life cycle". According to the cycle theory, the agencies in their youth are energetic, ambitious, crusading and perhaps even intolerant. In their middle years they mellow and become a part of the status quo, protective of their own power and opposed to change.

In the final phase of old age the original objectives of a commission become unclear if not totally obscured. The commissions become lethargic, sluggish, protective of their self-interests and insensitive.

Yet the regulatory experiment which commenced eighty-seven years ago—in a world which, technologically, and competitively, was light-years distant from our own—continues in the same mold.

There have been attempts to reform the commissions. Although the New Deal enlarged Federal regulation greatly, a Presidential commission in 1937 told President Roosevelt that the regulatory agencies "constitute a headless 'fourth branch' of government, a haphazard deposit of irresponsible agencies and uncoordinated powers."

In 1961, Professor James Landis severely criticized the agencies and recommended to President Kennedy a sweeping overhaul of regulations.

Similarly, in 1971, a Presidential Commission headed by Roy Ash found that the commissions were not sufficiently accountable for their actions, were deficient in organization and performance, were slow, costly, cumbersome and uncoordinated.

Yet the regulatory process continued in the same mold. The question becomes, "Why then hasn't something been done?"

Author Louis M. Kohlmeier, Jr., who has observed the agencies for a number of years as reporter for *The Wall Street Journal* and later as a columnist on regulatory matters for the *National Journal*, commented on this question recently in the latter publication:

". . . Very little has happened since 1937 because change would disturb the politically sensitive status quo of arrangements such as airlines' subsidies and labor's anti-trust exemptions, because the critics have not agreed on what changes should be made and because change has not seemed imperative."
End of quote.

However, relief may be on the way.

There are prospects now for a reevaluation and overhaul of the regulatory apparatus at the Federal level and, possibly, at the state level also.

President Ford has sent to Congress legislation which would establish a National Commission on regulatory reform, with the aim of determining the inflationary impact of outdated and counter productive rules and controls.

The magnitude of the Nation's economic problems has prompted the Administration to take this action.

The President's bill, S. 4145, would direct the proposed Commission to focus its attention on six of the independent Federal regulatory agencies, and the Consumer Product Safety Commission, which falls under Congressional control.

The independent agencies are: the Interstate Commerce Commission, the Federal Trade Commission, the Federal Power Commission, the Federal Communications Commission, the Civil Aeronautics Board and the Federal Maritime Commission.

I understand that the chances are good for passage of the bill this session or next. We all should be aware, however, that special interest industry groups will lobby hard *against* the bill. These are industries and groups who are protected and served by regulatory agencies. Personally, I wish for quick and affirmative action on this bill.

We have seen similar commissions come and we have seen them go, often with little, if anything, accomplished. Too often their scope has been limited to rearranging regulatory powers without any serious attempt to evaluate the concepts, costs and goals of the regulations themselves.

If Congress and the Administration are serious about regulatory reform, they will appoint men to the Commission who are equally serious. If the Commission is stacked with administrators or congressmen who have vested interests in maintaining the status quo, then they might as well drop the idea and save the public millions of dollars. The same goes for appointments from the business community. If businessmen are to be appointed, they must be concerned and sincerely interested in meaningful reform.

What should be the goals of the commission? There are several recommendations I would make:

First, within the scope of its mandate, the Commission members must determine those areas of the economy where competition can take the place of regulation. It is no secret that there are some within the business community who would rather deal with Washington than with potential competitors. Regulation has worked profitably for them on an assured 'cost-plus' basis.

Doubtless there are areas where regulations and controls are necessary. Certain social goals, such as product and worker safety and air and water pollution control, can seemingly only be accomplished through regulation. Perhaps someday methods or procedures will be developed whereby these goals can be accomplished through regular market channels.

Until that day, there is need for regulation in these areas. And certainly the government should pursue a firm anti-trust policy to assure that American industries remain competitive.

Second, the Commission should recognize within its proposals that meaningful reform is going to be politically difficult. Therefore, I would suggest that—to the extent possible—its recommendations be built around the concept of removing regulations in pairs.

Let me explain.

The market acts as a stabilizer between supply and demand. Disrupt that balance with regulation and a see-saw effect is created. So further regulation is necessary to counteract the imbalance. This is not always the case, but it holds true in a good many instances.

Therefore, in order to achieve deregulation with a minimum of adverse economic impact, and to achieve political support for the various proposals involved, the controls should be removed in pairs.

Several economists have suggested this approach and I believe it is a sound one. Additionally, in some instances deregulation should be phased in over a period of, say six months to two years, depending upon the particular situation involved.

The courts have not proved to be a source of relief because the judiciary has assumed that the agencies have the *expertise*, as well as the authority, to regulate.

Unless regulated industries can prove that the agencies have acted beyond their authority, or have acted in a discriminatory manner, the courts will not overturn an agency's regulations.

The problem of lack of expertise in dealing with complex economic matters is one of the *chief* faults of regulatory agencies. Another problem has been delay. Cases brought before the agencies can, and have, run as long as a decade before final decisions have been made. Not only are these delays costly, they also stifle economic development and preclude sensible business planning.

Third, I would propose that the Commission develop reliable and comprehensive cost figures relating to the impact of regulations and controls on consumer prices. I have already mentioned some random cost figures developed for particular regulatory situations.

I do not know the total cost of inefficient and wasteful practices occasioned by outmoded controls, but the appropriate cost figures must be developed and they must be communicated to the public.

Which brings me to my fourth point.

Serious reform—really fundamental and beneficial reform—will not be achieved without a massive groundswell of public indignation at the effects of regulation. This is crucial.

Yet, at the present time, many Americans believe that regulation is designed to "keep big business in its place." I submit that the place of big business is to serve the consumer. And furthermore, I suggest that if the mass of American consumers realized the results of the regulatory function, as practiced today, there would be such an outcry from every congressional district in the land that we would not have to wait for the recommendations of a reform commission. There would be some loud voices and fast action on Capitol Hill.

Since that is not yet the case, it will be up to the Commission to get the full story across to the public.

Those active in the consumer movement have already made some progress in educating other Americans to the problem. I hope they would continue their efforts.

Fifth, I wish that provisions would eventually be made for either a continuing review, or a periodic review of regulatory practices. The velocity of change in the later half of the 20th Century makes it imperative that we frequently review the regulatory apparatus. Where competition was imperfect yesterday, it may not be tomorrow. Where competition is viable, it must be allowed to operate.

I suggest that some official body be impaneled at least every three years to evaluate regulatory processes in relation to changing economic conditions.

My sixth, and final, recommendation is directed to those from the business community who may be asked to serve on the President's proposed Commission.

I believe it is incumbent upon them to establish their own sincerity and credibility by proposing public policies which might cut waste and inefficiency within their own industries.

Obviously, business representatives will not be permitted to engage in deliberations or frame recommendations relating to their own industries. Therefore, their recommendations must be made outside of official sessions. Commission appointees from the business community, as well as others within the business community, must be flexible and willing to consider trade-offs in order to achieve greater competition, increased efficiency and more responsiveness to innovation.

Confronted as this country now is with a staggering rate of inflation and an energy problem of extraordinary proportions, it is imperative that our nation's economic policies be brought up to date with the 20th Century and with this decade's problems.

The time is ideal now if anything is ever going to be done about it. We are, however, fast approaching the point of no return when it will be politically impossible to get rid of the controls or humanly possible to manage the economic monstrosity which has been created.

The business community and the consuming public must unite to do something about it.

Thank you.

STATEMENT OF DAVID F. LINOWES

My name is David F. Linowes. I am a certified public accountant, partner in the worldwide auditing and consulting firm of Laventhol, Krekstein, Horwath & Horwath, and member of the Boards of Directors of Piper Aircraft Corporation,

The Horn & Hardardt Company, Inc., Chris-Craft Industries, Inc., and Saturday Review/World Magazine, Inc. In the past I served as a Consultant to John W. Gardner during his tenure as Secretary of the Department of Health, Education, and Welfare, and undertook missions to several countries in Asia and Europe under the auspices of the U.S. Department of State.

I appreciate the opportunity to present my observations on the proposed Bill S. 4145, to establish a National Commission on Regulatory Reform.

Based on my experiences over a number of years with various industries subject to most of the independent regulatory agencies, I strongly support the need for an overall review of the workings of these organizations.

As we know, all organizations tend to perpetuate themselves, growing bigger and bigger into intricate bureaucracies, without consideration whether they are accomplishing their purposes. This is especially true in the public sector because no one monitors the activities of government programs to determine that the funds spent and activities performed are directed towards accomplishing the legislated objectives. The creation of the proposed National Commission on Regulatory Reform would establish the vehicle to accomplish that kind of needed monitoring of the independent regulatory agencies at this time.

There are a few elements of the proposed bill and its subject matter which I would like to comment on.

I understand there are some 50 or more independent regulatory bodies, which include such well-known and pervasive agencies as the Interstate Commerce Commission, Federal Communication Commission, Federal Maritime Commission, among others. In addition to these, the bill provides for the proposed Commission to make "an examination of State and local governmental regulatory activities which interact with the Federal independent regulatory system" and requires it to complete its work within one year. It authorizes the appropriation of $500,000 to carry out its provisions. While I do not doubt that much can be accomplished within the time and financial limitations set forth, based on my experiences with extensive reviews and studies of various kinds, I am concerned that the limitations imposed for this mammoth undertaking might be too restrictive. In order to complete the work on time with the funding provided, the limitations could result in many of the dozens of examinations of regulatory bodies being in insufficient depth and scope to produce maximum benefits. I understand and endorse the desire to limit expenditures during this troubled period in our economy, but a thorough review in depth could readily result in savings many times the added cost.

As an alternative, consideration might be given to limiting the scope for review under this proposed bill to the 6 or 8 more important independent regulatory agencies. These could be identified by name in the bill itself for in-depth study.

Although Section 3 of the proposed bill, which sets forth the functions of the Commission, makes no reference to it, it would appear that in order for the Commission to fully carry out the contemplated review, it also would have to look into the regulatory functions presently carried on by the Executive Branch. Some of these overlap with the independent regulatory agencies.

Executive Branch regulatory procedures are generally administered at the highest levels, and their actions can and often do have as great an impact on the economy and society as do independent regulatory agency procedures. Would it be feasible to broaden the scope of this legislation to encompass consideration of the regulatory procedures and rules which are promulgated by the Executive Branch of Government?

In my opinion, the whole concept of regulation in our free enterprise, democratic society requires reexamination at this time. During the past two or three decades, the business corporation has been passing through what might be considered a socio-economic revolution. The corporation itself has evolved into a new kind of entity, one which is being required to consider and plan for the social consequences of its actions. Not that profit has become less important, but today the consumer-voter is demanding an important secondary function be added to the profit-making function—that of corporate social responsiveness. This development essentially had taken hold after most of the independent regulatory agencies were established. Also, competition, especially foreign competition, has taken on a new complexion in recent times. Could provisions be made for a long-term, broad examination of the need and/or purpose of government regulation today, and the changed nature of the corporation as it relates to the people and to government? This scope does not appear to be contemplated in this bill, but could it be? If not, could such an effort be mounted soon?

Thank you for your attention to this matter which is of such great concern to all of us at this time.

STATEMENT OF GENERAL MOTORS CORPORATION SUBMITTED TO THE SENATE GOVERNMENT OPERATIONS COMMITTEE

This statement is respectfully submitted to the Senate Committee on Government Operations by General Motors Corporation, and is for consideration by the Committee in its deliberations on regulatory reform.

We welcome the opportunity to provide this statement and to expand upon the proposed reappraisal of motor vehicle standards that we and others have been urging.

There is an urgent need today to reexamine the cost/benefit relationships of federally-mandated equipment or regulations. They have burdened the car-buying consumer with costs that appear, in some cases, well beyond whatever benefits are provided.

General Motors emphasizes that it does not wish to go backward and undo the significant progress and accomplishments it has made in auto safety, emissions control, and impact protection. Nor do we wish to stop future progress. But, we do question whether today's problems do not make all the more necessary a complete review of federal laws and regulations that disproportionately affect car and truck costs and energy use by adding equipment which does not "pay its own way" in value to the consumer.

GENERAL MOTORS PROPOSAL

Specifically, for the automobile industry, we propose a two-step approach: a three-year stretchout in new regulation and postponement of impending standards; also, a cost/benefit review of what has already been mandated.

In proposing this stretchout, General Motors does not suggest in any way that any existing safety equipment or emission controls now on the car be removed without an appropriate reappraisal. What we specifically propose is:

First, starting now, no additional design or engineering standards that add weight or cost beyond those in effect on 1975 model cars should be imposed for at least a three-year period beginning with the date of enactment by Congress of legislation authorizing this reappraisal. (Any new standards scheduled or proposed to become effective would be indefinitely suspended.)

Second, this three-year pause will permit the next step, namely, an immediate joint government-industry review of the cost/benefit relationship of equipment already on our cars and those requirements now proposed or suggested for future automobiles.

On the basis of this review, the government could make a determination of which equipment on present cars could be eliminated, because cost burdens placed on the car-buying public would exceed the benefits to them and society generally.

A similar evaluation could be made for proposed future standards, including those suspended. The study, in its consideration of cost-benefit, should take fuel economy into account. This should begin immediately, so that it will be completed at an early date to give the auto manufacturers adequate lead time to concentrate on how to meet those future standards found to be cost beneficial and to produce any additional needed equipment.

Examples of current or contemplated equipment or regulations affecting the design and performance of cars and trucks that should be examined are: bumper system modifications, side-guard beams, head restraints, the passive restraint system (air cushion), and the overly stringent requirement for the reduction of oxides of nitrogen emissions.

In support of this two-step approach, we will discuss the scope of regulations presently in effect and proposed, and the need to determine the benefits, if any, each of these standards yield.

The prospect that legislation may be enacted to provide for a comprehensive study of regulatory activities is encouraging. We urge that the madate provided by such legislation be broad enough to permit a comprehensive review of all motor vehicle regulatory activities.

Bearing in mind the national goals to slow the rate of inflation, to ensure that value is given for cost, and to reduce the consumption of fuel, such an examination may also reveal—as we expect it will—that certain existing and proposed standards are counterproductive in this respect.

The review we have described should provide the car-buying public, and society generally, with a net benefit in relation to the costs that would be incurred.

SAFETY AND DAMAGEABILITY

Since enactment of the Motor Vehicle Safety Act in 1966, 58 safety standards and regulations have been put into effect. Today, nearly 900 separate points must be tested or checked on a typical full-size model in order to certify compliance.

The average cost to the consumer on a cumulative basis just to meet the presently applicable safety standards is estimated to be approximately $400 per car. This includes approximately $155 for added bumper protection for the car's safety systems.

Looking ahead to the 1976 models, brake and bumper performance will have to be increased to meet existing standards. Moreover, there is the prospect that bumpers will have to be even further strengthened to meet the stringent damageability requirements that have been proposed under the Information and Cost Savings Act.

For the 1977 model year, a further escalation of safety standards may occur. It has been proposed that seats be strengthened, and that occupants be protected by means of passive restraints such as air cushions.

While the cost to the consumer of the current air cushion system option offered by General Motors is $300 over the current safety belt system (based on limited production), our estimates indicate that this could be reduced to $200 if it were made standard equipment on all GM cars. However, the *absolute* cost to the consumer of this system in full production would be more than three times the cost of a presently-installed safety belt system, yet provide essentially the same protection.

We estimate that the safety and damageability standards that have been proposed, or are scheduled to go into effect during the next two model years, could result in an additional cost to the consumer of approximately $350 at current economic levels. This would bring the total consumer cost for these standards alone to approximately $750 by 1977.

Beyond this, the government is considering increasing the requirements for occupant protection in the early 1980's by raising the barrier test speeds from the present 30 mph to the 45–50 mph range. While no specific designs have been developed upon which to base a cost estimate, the cost to meet such a requirement would be substantial.

EMISSIONS

As with motor vehicle safety, the events that have occurred in the control of emissions show a similar pattern of increasingly costly equipment on the vehicle and extensive test procedures for compliance.

The first emission control standard became effective in California and required a reduction in hydrocarbons. This resulted in the crankcase ventilation control system which was first installed in 1961 on all new cars sold in that state. This was followed by standards for exhaust controls and finally evaporative controls in 1970.

Federal emission requirements have generally followed those implemented in California. Thus, by 1971, all sources of vehicle emissions—crankcase, exhaust and evaporation—were being controlled nationally under the Air Pollution Control Act. In 1970, the Clean Air Amendments were enacted thereby increasing the stringency of emission control requirements. These amendments called for a further 90 percent reduction in emissions over the levels already achieved.

While there has been some postponement in the schedule to reach this ultimate reduction, the 1975 emission levels have resulted in equipment on the vehicle costing the consumer an estimated $215 on a cumulative basis.

To meet the certification requirements for our 1975 models, 284 test cars were driven over five million miles, and required that 2,734 separate emission tests be conducted with each taking over 14 hours to complete. Nearly a half-million gallons of gasoline were consumed in running our 1975 certification tests. This testing procedure required the equivalent of 600 persons working an eight-hour day for a full year.

If a way can be found to meet the 1977 and 1978 emission standards on production vehicles, our current projection is that this could result in additional consumer costs of approximately $110 in 1977 and $150 additionally in 1978.

While we have been able to meet the 1977 emission levels on an experimental test basis, we are not confident that these levels can be maintained in production volumes and for the required durability period. Additionally, the 1978 emission levels have been achieved only experimentally at very low mileage.

These additional costs would bring the total cost to the consumer for emissions equipment to approximately $475 by 1978. Moreover, it is conceivable that a fuel injection system may be required on 1978 models to meet the standards in which case the costs would be considerably higher.

To summarize, the cost on a cumulative basis to consumers for safety and emission control equipment on our cars through the current 1975 models totals approximately $615 per car—consisting of $400 for safety and $215 for emission controls.

Looking to 1978, and the prospect of more stringent safety and emissions standards as well as the imposition of federal damageability requirements, consumer costs can be expected to increase by approximately another $610. Thus by 1978, consumers would have to pay about $1,225 per car just for the equipment to meet federal motor vehicle standards.

Noise

Noise control is another aspect of vehicle regulation for which legislation has been enacted and for which consumers can be expected to bear a cost burden in the future. Under the Noise Control Act of 1972, federal authority has been granted to establish noise reduction standards for cars and trucks. Presently, federal standards applicable only to medium and heavy duty trucks have been proposed for 1977, 1981 and 1983.

While federal noise standards have yet to be implemented, a number of state and local regulations have already been imposed.

When lower noise level standards become effective on January 1, 1975, in California, Florida, and Chicago—to name only three locations—GM plans to offer a special "quiet package" for application on several truck models.

This extra cost equipment is the same as would be required to meet the 1977 proposed federal standard and may provide a satisfactory benefit in relation to the costs involved. The federal proposals for 1981 and 1983 can only be achieved at costs which must be regarded as excessive in relation to expected benefits. The EPA, for example, has estimated equipment cost increases to consumers over current truck costs. These range from $125–$1,000 for 1981 to $300–$1,600 for 1983. In our judgment, these estimates appear to be low.

As with trucks, some state and local noise standards are in effect for 1975 automobiles. All GM cars sold nationally now meet these standards. We believe these standards are satisfactory and should not be made more stringent.

FUEL CONSERVATION

Today, the nation is confronted with the need to conserve energy, including fuel used for automotive transportation. Therefore, an evaluation of existing and proposed standards, as we are suggesting, should also take into account the effect of these standards on vehicle fuel economy.

Vehicle weight has a major effect on fuel consumption, and some safety and damageability standards carry sizable weight penalties. The safety standards applicable to 1975 cars directly account for about 133 pounds of a Vega's 2,400 pounds and approximately 223 pounds of a Catalina's total of 4,400 pounds. Thus, about five to six percent of the existing vehicle's weight is *directly* attributable to safety standards.

The bumper system required to meet the exterior protection safety standard represents the single largest component of direct weight increase. The weight increase attributable to this standard on a 1974 Pontiac Catalina is 150 pounds. And, it is projected that another 75–100 pounds would have to be added to the bumper system to meet the damageabliity requirements proposed for the 1976 model year.

By 1977, if all existing and proposed safety and damageability standards are in effect, it is estimated that approximately 430 pounds will have been added directly to the weight of a current model typical full-size car. As weight is added to meet mandated requirements, each 100 pounds of direct weight can easily generate another 100 pounds in added structure and larger components to maintain necessary function and durability, for example.

Thus, in the early 1980's, if the industry is required to provide occupant protection in a 45–50 mph impact, as now contemplated by the government, an additional 600 to 1,000 pounds total weight may have to be added.

Emissions standards now mandated by Congress for 1977 also appear to impose a fuel economy penalty. At present, cars equipped with experimental hardware and tuned to meet the 1977 standards are showing fuel economy losses of 15 to 20 percent, compared to identically equipped cars tuned to meet the 1975 requirements.

Because suitable production technology does not exist to meet the 1978 statutory standard relating to oxides of nitrogen, the effect of this standard on fuel economy has yet to be determined.

Each one of the changes we made in our cars as a result of government mandate is for the purpose of achieving desirable social objectives: cleaner air, improved safety and lower repair cost. Many of the changes, however, affect fuel economy adversely. General Motors, among others, is concerned about safety, protecting health and improving air quality. We have demonstrated this concern in the cars we build.

However, as a nation, we have come to the point in regulatory requirements where we can no longer consider each regulation in isolation from its effects on fuel economy and the economic health of the country.

We do not believe it is necessary or desirable to impose additional standards for vehicle fuel economy at this time.

Manufacturers have ample motivation to make every effort to improve fuel economy in their vehicles—especially in these inflationary times when consumers can be counted on to protect their financial resources. And can we sell a future car at higher prices for safety and emissions while offering our customers poorer fuel economy than they get on 1975 models?

Conclusion

We believe the information presented here clearly supports our proposal for a pause in regulation and a reappraisal of any further standards at this time for a period of three years.

Already, the mandated safety and emissions equipment added to our cars is costing consumers approximately $615 per vehicle. Now we foresee additional consumer costs amounting to some $610 more to meet additional regulatory objectives through the 1978 model year. This $1,225 excludes anything that might have to be done to respond to noise regulation.

To develop the ability to meet the wide range of mandated government requirements, GM expenditures for automotive safety work in the United States alone in 1973 totaled $653 million. These costs were for research and engineering development, reliability, testing, facilities and tools. GM work on automotive emissions control during 1973 resulted in expenditures of some $310 million for research and engineering development, testing, tools and facilities.

The automobile has been burdened by increased regulatory and other costs. We have been able to recover only part of these increased costs through price increases. However, even these increases have apparently contributed to deterring many consumers from buying—resulting in diminished new car sales and, in turn, substantial unemployment in the automobile industry.

Moreover, we are approaching a point in expenditures of capital disproportionate to the incremental improvements in safety and emissions control. General Motors cannot continue to afford to spend indefinitely the kinds of dollars we have been committing to facilities, tools and development work for regulatory programs of questionable value.

Moreover, the tremendous engineering effort we are making to achieve environmental standards is diverting our engineers from working on other product and manufacturing improvements and efforts which could result in increased productivity in our operations. Inevitably, unproductive use of capital and personnel leads to lower productivity and inflationary pressures.

It is in the interest of consumers, the auto industry and the nation that we stop now to take stock of what has been accomplished through a wide range of standards before moving on. Do the expected benefits really exist? Does the price being paid to achieve the benefits provide good value? Can the standards be met in more efficient, less costly ways? Do the standards contribute to increased fuel consumption?

These are but a few of the questions to which answers are needed if a course is to be charted for the future that assures protection for people, property and the environment while preserving a vigorous and economically healthy industry and the jobs of many thousands of persons.

The current distressed state of the automobile industry—encompassing our dealers, suppliers, employes and all others dependent on the industry—today provides ample warning. Every possible step must be taken to keep the cost of our products within the range people can afford.

Regardless of the benefit a standard may provide, it is in the consumer's and the nation's best interest that the benefit be provided at the lowest possible cost. A productive pause in regulation will allow us, as manufacturers, to concentrate

manpower and physical resources on meeting desirable standards in the most efficient manner.

General Motors remains committed to manufacturing cars that are safe, fuel efficient, clean, quite and are damage-resistant. The reappraisal we have proposed will help provide the opportunity to pursue these goals on a more rational basis.

As we noted at the beginning of this statement, we believe the Committee's concern for regulatory reform is in keeping with the concept of a reappraisal of further motor vehicle regulations at this time. We need and would welcome your support.

PREPARED STATEMENT OF STANLEY T. KALECZYC, JR.[1] ON NATIONAL COMMISSION ON REGULATORY REFORM FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES

The Chamber of Commerce of the United States supports legislation to create a National Commission on Regulatory Reform with duties, powers and responsibilities similar to those articulated in S. 4145, S. 4167 and S.J. Res. 256. The time is indeed ripe for the "total re-examination of the independent regulatory agencies" which President Ford urged in his October 8, 1974 Economic Address to the Congress.

Criticisms of the regulatory process have been forthcoming from all sectors of the economy—public and private, producer and supplier, wholesaler and retailer, seller and buyer. It is no secret that oftentimes the policies of federal regulatory agencies breed inflationary pressures, higher costs and decreased productivity. The present economic plight of the Nation is exacerbated by the eroding economic effects independent government agencies cause in the private sector. Agencies require an inordinately long period of time to make decisions affecting commercial operations and the regulated firms must suffer the economic consequences until such action is taken. In addition, the steadily increasing amount of paperwork required by agencies adds to the expense of conducting business and, in the end, to consumer prices.

The creation of a regulatory reform commission, with specific authority to review the practices, procedures and impact of the regulatory agencies upon the economy, and to make recommendations for the modernization of federal regulatory activities, is an important step in combatting the twin evils of recession and inflation. Accordingly, the National Chamber urges swift congressional action to establish this Commission in the public interest.

Although this Committee has held its hearings on six bills (S. 4145, S. 3604, S. 704, S. 770, S. 4167, and S.J. Res. 256), only three of them, S. 4145, S. 4167, and S.J. Res. 256, would establish a commission to investigate the need for and make recommendations concerning regulatory reform. The others, S. 704, S. 770, and S. 3604, offer various solutions to problems with the regulatory process which their authors identify as in need of reform. Without passing upon the merits of any of these suggestions, it is our opinion that further consideration of these bills at this time is premature in light of the intent of other legislation and the President's own call to review the entire regulatory process. Accordingly, this statement is limited to a discussion of S. 4145, S. 4167, and S.J. Res. 256.

The National Chamber recommends that legislation establishing this Commission—regardless of the bill considered—incorporate the following concepts:

1. *The jurisdiction of the Commission should include all regulatory agencies.*

Although President Ford, quoted at the outset, called for a reviewing of the "independent" regulatory agencies, we suggest that the time is auspicious for subjecting all regulatory activities to the careful scrutiny of the Commission. While the phenomenon of the independent regulator is as old as the Interstate Commerce Commission itself, there exists a plethora of *de facto* semiautonomous agencies, bureaus and departments which have a profound impact upon the industries which they regulate and the public those industries serve. For example, the Food and Drug Administration (FDA), as part of the Department of Health, Education and Welfare, is not an independent regulatory agency. One would be hard pressed to deny, however, that the FDA does have a significant effect upon the lives and livelihoods of the public.

S.J. Res. 256 meets this criterion by incorporating the definition of "agency" contained in § 551 of the Administrative Procedure Act. This precision is preferable to the more vague definition contained in S. 4167 which would permit the review of law enforcement agencies and their divisions. This legislation should appropriately be confined to the review of agencies with a regulatory mission, not those

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[1] Assistant General Counsel.

charged with enforcing the criminal code. We would, of course, urge the Congress to reject the limited jurisdictional grant embodied in S. 4145.

2. *The Commission should catalogue the statutory objectives of existing regulatory agencies.*

An initial point of departure for the proposed study should be a definitive statement of the objectives of the regulatory activities of each agency. Indeed, the Commission should not begin its task with a mere intuitive knowledge of the purpose of each entity to be reviewed. Rather, the Commission should review the findings and purposes recited in the enabling legislation and legislative history of each regulatory agency. Although such a threshhold study need not be exhaustive, it would provide a convenient yardstick for measuring the performance of the regulatory agencies. S. 4145 incorporates this suggestion in § 3(a)(i) and it should be retained in any legislation supported by this Committee.

3. *The Commission should analyze the impact of the regulatory process upon all segments of the economy.*

Three related issues should be resolved by the Commission in the course of its evaluation of the regulatory process. First, has the performance of the regulatory agencies been commensurate with the statutory objectives mandated by Congress? Second, is the purpose or function of each regulatory agency obsolete or outdated in view of contemporary economic realities? Third, at what cost have the benefits of government regulation been achieved?

To resolve these issues, the Commission should weigh both the economic impact and the social cost of government regulation. As the prefatory remarks contained in this statement noted, policies and practices of the regulatory agencies have had a deleterious effect upon the economy, contributing to our present economic malaise. The results have included not only an economic dislocation quantifiable in dollars and cents, but also a social cost reflected in the scarcity of essential goods and services as well as the amentities which the majority of Americans have come to enjoy and expect. S.J. Res. 256 clearly reflects these broad concerns; S. 4145 and S. 4167, however, ostensibly restrict their consideration to quantifiable economic indices.

4. *The Commission should undertake review of the impact of federal regulatory activities upon the operations of the state and local governments.*

Although the economic impact of federal regulation has been the catalyst for this legislative proposal, relatively scant attention has been given to the impact of the federal regulatory process upon state and local governments. On a day-to-day basis, the operations of state and local governments have a direct and immediate impact upon the lives of citizens which broad federal regulatory policies lack.

S. 4145 addresses this issue of interaction directly, in § 3(a)(iv). S. 4167, however, in § 3(b), suggests a more comprehensive study of state and local regulatory activities themselves, as well as their interaction with the federal regulatory process. A Commission which concentrated its efforts upon studying the intergovernmental nexus is certainly preferable.

5. *Recommendations of the proposed Commission should meet the core criticisms of the regulatory process, with due regard for the integrity, effectiveness and statutory purpose of the regulatory agencies.*

It is essential that the proposed Commission make positive recommendations concerning regulatory reform. These recommendations should not, however, propose mere cosmetic changes. Bold initiatives may, in some instances, be required to achieve the goal of more effective, productive and positive regulation where such is needed. In other instances, a more restrained solution to regulatory problems may be in order. Each recommendation should, however, address itself to the underlying problems of the regulatory framework.

Such recommendations should, nevertheless, be forthcoming only after a thorough cost-benefit analysis has been completed. S.J. Res. 256 incorporates all these factors in its provisions contained in § (c).

6. *The impact of any recommendations upon the economy, the social environment, and the states and localities should be set forth in detail.*

Bold initiatives and original recommendations will inevitably have a profound effect upon the economy, our social fabric and intergovernmental relations. Thus, it is essential that the Commission carefully study and, to the greatest degree possible, anticipate the impact of its recommendations. The Commission should not only determine that a particular course of action will enhance competition, for example, but also examine the specific manifestations of such a result and their spin-off effects. Comprehensive analysis is the watchword here.

S.J. Res. 256 suggests such a broad perspective for assessing any recommendations. Section (c)(1)(E) of S.J. Res. 256 makes reference to both economic and non-

economic costs articulated in other provisions. Similarly, § (c)(1)(F) refers to "economic and other costs."

The final legislation should specifically state the considerations mentioned previously; namely, economic, socioeconomic and intergovernmental cost-benefit analyses.

7. *The proposed Commission should study the impact of its recommendations and suggest any additional proposals necessary to meet the objectives of the recommendations.*

It is not sufficient for the Commission merely to suggest statutory and administrative changes to the regulatory process. Rather, continuing review of the recommendations, as they are implemented, is essential to the success of this endeavor. While the life span of the Commission may be open to question (and is discussed below), the Commission must have the opportunity to evaluate its own work.

In furtherance of this recommendation, it would be entirely appropriate to charge the Commission with considering whether an existing entity, such as the GAO, or a new commission be given the responsibility of continuing the effort undertaken by the Commission. The Commission should not, however, be mandated to propose such a bureaucratic structure.

8. *Guidelines should be provided to define the breadth and depth of the inquiry to be undertaken by the proposed Commission.*

As the foregoing comments demonstrate, the proposed Commission requires a broad jurisdictional grant in order to complete its task—and all three proposals give such powers to the Commission. But, no proposal fully and adequately provides specific guidelines to the Commission concerning the nature, scope or standards for the inquiry. This is a serious deficiency which should be corrected.

Specifically, the guidelines should clarify the standards to be employed in the critical cost-benefit analyses. Although precise measures of cost versus benefit cannot be legislated, every possible step must be taken to insure that the Commission receives all appropriate guidance from the Congress as the Commission undertakes its necessarily subjective critique of the regulatory agencies.

Guidelines also are important in assisting the Commission to determine the scope of its powers of inquiry. By establishing the permissible boundaries of investigation in advance, the work of the Commission will be greatly facilitated.

A clear statement of purpose, drafted with attention to the particulars, is needed to establish the proper tone for this most important inquiry. The Commission should have as its goal an unbiased evaluation of the regulatory processes of the federal government.

9. *The Commission should represent a cross-section of views, beliefs, experiences and perspectives.*

To provide maximum credibility to the Commission and in order to assure that a cross-section of views shall be represented, the Commission should be bipartisan. All three proposals insure that minority political representation shall be maintained on the basis of political party affiliation.

Furthermore, the legislation should require that the views of business, labor and consumers be reflected in the selection of the private citizens who will serve as Commissioners. The concept embodied in § (b)(1)(D) of S.J. Res. 256 should be incorporated into any legislation approved by this Committee. In addition, although it would be helpful to include as Commissioners individuals who, by virtue of their present positions, are aware of the problems and pressures besetting the regulatory agencies, it is not necessary that agency personnel constitute as much as potentially one third of the Commission's membership as provided in S. 4145, or 30% as provided in S. 4167.

10. *The investigatory authority of the Commission should reflect due concern for the ongoing efforts of the regulatory agencies and the confidentiality of business information provided to these agencies.*

It is well understood that the Commission cannot complete its assigned task unless it receives the cooperation of the regulatory agencies themselves.

More importantly, however, the legislation should acknowledge that the Commission is under a statutory obligation to protect confidential information received from any agency. Both the Freedom of Information Act, 5 U.S.C. § 552, and the criminal sanctions attendant to 18 U.S.C. § 1905, governing the release of trade secrets and certain other proprietary information, should be specifically incorporated into this legislation.

In addition, certain proprietary information, not protected by statute, is regularly given to regulatory agencies when assurances of confidential treatment by that agency are forthcoming. The new Commission should be bound by such agreements and, indeed, there is no compelling reason to the contrary. The Commission is not meant to study specific policies in detail and make recommendations

concerning specific agency action. Rather, the Commission must view the regulatory agencies from the broad perspective of their efficiency and effectiveness in promoting the public good. Even if the Commission determines that agencies should limit their agreements to information clearly protected by law—a most unfortunate alternative—there is no reason for the Commission to violate existing agreements.

Finally, hearings should be held and subpoenas issued under the aegis of the full Commission. The provision in S.J. Res. 256 that permits individual members to conduct such activities seems to be at odds with the spirit of this legislation which commends a *committee* approach to analyzing the problems of regulatory reform.

11. *Ample time and adequate funds should be provided for the Commission to complete its assigned task.*

S.J. Res. 256 provides a three-year life span for the Commission; S. 4145 and S. 4167 require that all Commission reports be filed within one year. Since other recent studies, such as the President's Advisory Council on Executive Reorganization, were conducted over a two-year period, we suggest that this Commission be given two years in which to complete its work. At that time, if the Congress determines that the Commission, or some other entity, is needed for a further period, appropriate steps can then be taken.

We also suggest that the authorization of funds be carefully reviewed. S. 4145 would authorize $500,000; S.J. Res. 256, one million dollars; S. 4167, one and one half million dollars. The authorization in S.J. Res. 256 may be more appropriate and realistic in view of the importance and scope of the Commission's work and the magnitude of potential benefits.

In summary, the Chamber supports the principal concepts embodied in S. 4145, S. 4167, and S.J. Res. 256, while suggesting recommendations that will improve the legislation. We urge passage of a bill reflecting these recommendations in the 93rd Congress.

NATIONAL ASSOCIATION OF
WHOLESALER-DISTRIBUTORS,
Washington, D.C., December 6, 1974.

Hon. SAM J. ERVIN,
Chairman, Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: The National Association of Wholesaler-Distributors, a federation of 90 wholesale distributor trade associations, believes firmly that federal and state policies and regulations which interfere with the workings of a free market should be identified and eliminated. We also believe that the economic impact of a vast number of federal regulations is one of the prime causes of our present economic crisis, and that the establishment of a National Commission on Regulatory Reform would be in the best interest of our government and the nation.

Therefore, we respectfully request that the attached statement expressing the views of the more than 30,000 wholesale distributors which we represent, be entered as part of the record of your committee's recent hearings on legislation to establish a National Commission on Regulatory Reform.

Your comments would be welcome.

Sincerely yours,

W. LEE GOSNELL.

Enclosure.

STATEMENT OF JOHN M. WALTERSDORF, PRESIDENT, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS

My name is John M. Waltersdorf. I submit these views in my capacity as President of the National Association of Wholesaler-Distributors (NAW). You should also know that I am President of Tristate Electrical Supply Company of Hagerstown, Maryland, a wholesale firm which distributes electrical supplies and equipment.

The National Association of Wholesaler-Distributors is recognized as the "National Voice of the Wholesale-Distribution Industry." It is a federation of 90 wholesale-distributor trade associations representing the interests of all wholesale-distribution commodity lines. These organizations collectively have a membership of approximately 30,000 wholesale firms. Today, the wholesale distribution sector

of the economy is privileged to market over four hundred billion dollars a year of the products of our farms and factories.

According to Small Business Administration statistics, 97% of the merchant wholesalers in the United States are classified as small businesses. The industry consists of nearly 218,000 establishments providing employment for approximately 2.8 million Americans.

We are encouraged by the fact that Congress has so rapidly heeded President Ford's call for a "total reexamination of the independent agencies" and to identify and eliminate where possible "existing federal rules and regulations that increase costs to the consumer without any good reason in today's economic climate." We believe that hearings leading to affirmative reform are long overdue.

It is our conviction that federal policies and regulations which interfere with the workings of a free market should be identified and eliminated.

It is not our intent in this testimony to oppose any proposal which is presently being debated before this Committee. We agree with the concept of each of the different proposals that have been introduced and their overall objectives.

We endorse the creation of a National Commission on Regulatory Reform. The very proposition of a commission in the first place suggests that inefficient, unnecessary, and/or over-regulation exists. The purpose of the commission as we see it, should not be to study these matters to death, but to concentrate its efforts towards finding solutions to the problems, and implementation of the solutions at the earliest possible time.

The question may be asked "why another commission?". We believe it is very important that one over-all commission identify the many regulatory agencies which do impact on the productivity of the nation. We believe that it is good for the Congress to establish an independent body to objectively examine all the regulatory agencies and make a summary of the many regulations which create inflation—result in the loss of the dollar's purchasing power, and perhaps increase unemployment, or prevent the formation of new jobs, or inhibit competition.

Some years ago we supported the establishment of the Commission on Government Procurement. That commission made some very excellent studies and findings which have been presented to the Congress and the Executive Departments.

After two and one-half years of extensive an careful study of the whole procurement process, including examination of procurement laws on the statute books, the commission found no less than 4,000 statutory provisions which bear upon federal procurement in one way or another. They found agencies with complicated and conflicting regulations and needless differences. They decided that the Executive branch needed some unifying element to bring about government-wide exchange of successful ideas and to increase efficiency and economy in government procurement operations (involving 80,000 personnel and some $50 billion in annual expenditures).

In many areas, sound progress is being made. The Congress enacted a major recommendation, that is, the establishment of an Office of Federal Procurement Policy in the Executive Office of the President. We believe that this was a wise move which came as a result of the establishment of the study commission. We believe that similar benefits could be derived if the Congress enacted legislation establishing a commission to study the regulatory agencies.

Various findings and recommendations of the commission would come under the cognizance of many different committees of the House and Senate. Thus, each committee would have an understanding of the comprehensiveness of the federal government's program to revise regulations which may impede efficiency and produce inflation. This should be a valuable tool not only to the members of the committees, but to each member of the Congress as an individual so he can understand the full range of the impact of the federal government on the increase in prices and the decreased value of the dollar.

Over and over we have heard stories of outdated rules and regulations currently being imposed upon American business by federal regulatory agencies. Many of these rules and regulations have resulted in major cost increases to the consumer, while at the same time restricting industries from competition on one hand and from modernization on the other. Problems arising out of regulations are insurmountable by our nation's smaller businesses. The long list of these problems has been documented in depth over the past 35 years by various commissions, councils, and groups who have studied the problems of the effectiveness of the regulatory system. Hundreds of law review articles and lengthy books comprise an enormous amount of information on the subject. Most recent of these studies was produced by the President's Advisory Council on Executive Organizations.

It is of utmost importance that a responsible body be appointed to investigate the problems that have been set forth in these studies and to identify the regulatory agencies responsible for over-regulation, as a means of easing the impact economically upon the nation. We do not feel that time should be spent in duplicating those aspects of earlier studies that are relevant to the problems of today.

We therefore support the concept of a one year commission because we believe that a one year term would emphasize the concern of the Congress for speed and dispatch in identifying the regulations which have an impact on inflation.

Regulatory reform should not be limited only to the independent regulatory agencies, but should also include investigation of the regulatory activities of Cabinet-level departments of the government such as the Occupational Safety and Health Administration, the National Highway Traffic Safety Administration and the Food and Drug Administration. These governmental units have recently been criticized for failure to act responsibly, or for acting in a manner which tends to promote unnecessary costs.

We are encouraged to note that President Ford has already directed the Secretaries of the Executive Departments to examine how their regulations have an impact on inflation and to make appropriate changes where necessary.

We are equally encouraged to know that the President has asked state and local governments to undertake similar reviews of their laws to ensure that they do not have detrimental economic effects.

Without a doubt there are numerous regulatory statutes which contribute significantly to inflation by restricting competition and artificially maintaining prices.

Barriers to entry, restrictive practices, the preservation of inefficient operations, reduction in service to the public, maintenance of artificially high prices, are often the product of government regulations.

It is of importance to note that during the recent Economic Summit, virtually every segment of the economy represented placed tremendous emphasis on the economic impact of government regulations.

Federal regulation encourages second guessing by the regulator in Washington and in the State Capitols. It substitutes bureaucratic judgement for consumer choices and the skills and judgement of the entrepreneur.

The transportation industry is an example. One analysis (presented at the Economic Summit Conference on Inflation) of the extra cost to society are the protective aspects of national transportation policy—the restriction upon competition in transportation of goods—concluded that the cost of these practices amounted to between four and nine billion in 1968 alone.

It would be impossible to estimate the total cost of over-regulation or poor regulation, but available statistics are astounding. The Office of Management and Budget, estimates that independent regulatory agencies' regulations cost the consumer from a low of $8 billion to a high of $16 billion per year. Prof. Thomas Gales of the Hoover Institution stated in a recent study that outmoded ICC regulations cause yearly loss of from $4 to $10 billion in agricultural and other trucking operations. Additionally, transportation economists estimate that rate fixing and waste allowed under the ICC, CAB, and FMC regulations cost the consumer between $8 and $16 billion yearly.

It is interesting to note that since the creation of the Interstate Commerce Commission in 1887, the nation has experienced an enormous proliferation of regulation. Since that time our national objectives and economic structure have gone through dramatic changes and in many instances the objectives of our regulatory agencies have remained unchanged.

We believe that many of the rules and regulations issued by the Environmental Protection Agency have been issued before any economic impact study has been made. We agree with President Ford when he recently stated that the inflationary impact of proposed regulations should be considered. This does not mean that the nation need abandon its determined goals for clean air and clean water and a safer environment for all our people, but it does mean that it should be programed for the total good of the community and not just for a limited goal.

It is our contention therefore, that all regulations originating in Executive Departments as well as independent regulatory agencies should be accompanied by a statement which certifies that the inflationary impact of the proposal has been evaluated prior to promulgation.

The wholesale distribution industry markets over $400 billion of goods and commodities each year. We are operating in all states of the nation, bringing the products from around the world to local communities. Eighty-five percent of our products arrive at our warehouses by motor carrier, and the other 15% arrive by railroad. Therefore, as users of the trucklines and the railroads, we are vitally

concerned by any federal regulations which might have the tendency to increase costs. We estimate that our freight bills would exceed $12 billion a year. In addition, wholesale distributors operate thousands of trucks, primarily to deliver merchandise to their customers. These also come under federal regulations even though they are private trucks carrying merchandise owned by the wholesaler to the customers.

Because many wholesalers operate across state lines, they have to comply with many regulations of the Bureau of Motor Carriers Safety. We believe that even though they operate across state lines, they are local in nature and the general rules which apply to local delivery should apply to these kinds of operations. Therefore, the activities of the BMCS are of vital concern to us. Any regulation that increases the cost of the carrier or increases the costs of our delivery operations eventually must be passed on in higher prices to our customers and to the consuming public.

Generally, all wholesalers are engaged in interstate commerce or engaged in business activities which affect interstate commerce. Therefore, they come under the Federal Trade Commission and the several acts which it administers. There needs to be an objective study as to whether the regulations of the FTC actually do increase competition—price competition, and other types of competition, and thus reduce the cost to the consumer.

The following questions should be asked of the Federal Trade Commission:

Are regulations regarding packaging and labeling actually performing the job they are intended to do, or are they a costly burden on the part of the manufacturer or packer and provide no real service to the consumer for whom it was intended to serve?

Has the change in emphasis in the FTC from competition to consumer protection reduced its efforts to maintain fair competition and therefore contributing to inflation?

What actually happens to prices when the FTC requires industry to adopt new practices? Do prices fall or are they increased?

What is the relationship between the FTC actions and prices in the marketplace?

RECOMMENDATIONS

We recommend that final legislation to establish a Commission on Regulatory Reform specify:

1. The Chairman be appointed by the President with the advice and consent of the Senate;
2. The Commission be authorized sufficient funds to allow it to perform its duties adequately;
3. That each federal agency be authorized and directed to furnish to the Commission, upon written request by the Chairman thereof, on a reimbursable basis or otherwise, such assistance as the Commission deems necessary to carry out its duties.

Further, we believe that the major objectives of the proposed Commission should be:

1. An evaluation of the purposes for which the regulatory agencies were established and their relevancy today.
2. Evaluation of the economic consequences to the nation of regulations by regulatory agencies.
3. Evaluation of the consequences to the nation of discontinuing regulations by certain regulatory agencies where found to be appropriate.
4. Evaluation of the benefits of continuing regulations by regulatory agencies collectively and individually, and costs thereof in comparison with the benefits of discontinuing such regulations, where found appropriate, in whole or in part.
5. Establishment of guidelines for regulatory agencies to measure the inflationary impact of proposed regulations, including an opportunity for the public to submit pertinent information.
6. Recommendations in the form of corrective legislative proposals to appropriate committees of the U.S. Congress for their consideration based upon the findings of the Commission.

CONCLUSION

In cinclusion, we express the hope that Congress will treat the issue of "regulatory reform" as a matter of extreme urgency and will act accordingly.

In the event the Congress establishes a National Commission on Regulatory Reform, the wholesale distribution industry will develop meaningful information for presentation to the Commission. We are the main channel of distribution between producers and users, and therefore, believe we can provide substantial

information based upon our experience which could be helpful to the Commission in formulating their recommendations to the Congress.

I thank you and your Committee, Mr. Chairman, for your interest in this vital matter and for the privilege of presenting the views of the wholesale distribution industry.

PEARCE & BRAND,
ATTORNEYS AT LAW,
Washington, D.C., November 13, 1974.

MR. VICTOR REINEMER,
Staff Director, Senate Subcommittee on Budgeting, Management and Expenditures, Washington, D.C.

DEAR MR. REINEMER: You suggested I write you concerning the federal government's total and complete failure to enforce its claims for expropriation or recapture of excessive profits or so called "economic rent" from the development of water power, a primary purpose of the 1920 Water Power Act. These are claims of the United States that arise under Sections 10(e), 3(13) and 14 of the Federal Water Power Act of 1920. I believe you will find this pertienent to your inquiry on regu latory reform. Allow me first to give you some historical background.

In the first decade of the twentieth century, when it became technologically feasible to develop and sell hydroelectric power, there was growing concern by conservationists and others that the benefits of the technology would not be channeled into the public interest. Water power sites were naturally limited in supply. A report of the then Bureau of Corporations of the Department of Commerce focused attention on the growing monopoly of water power: U.S. Bureau of Corporations, Report of the Commissioner of Corporations on Water Power Development in the United States, U.S. G.P.O., Washington, D.C., 1912, pp. 7–31, 95–189.

The history of the struggle of the conservationists, Pinchot and others, for comprehensive development of our country's limited water power sites, and to ensure that the public's "property" in the running water of navigable streams was preserved, is best recorded in Kerwin, *Federal Water Power Legislation*, Columbia University Press, New York, 1926, which has been repeatedly cited by the Supreme Court as an authoritative source of legislative history of the 1920 Water Power Act.

"Economic rent" is a term applied by economists to factors, of production naturally limited in supply. For such factors, the value depends entirely on the demand as the supply is relatively fixed. Land is typically used to illustrate "economic rent". For example, land in the middle of the Sahara Desert isn't worth very much. Land in downtown Manhattan is worth a lot.

Water power sites are also worth a lot if they are capable of producing power cheaper than fossil fuel (and today, nuclear) steam generation. A measurement of the "rent" can be computed by determining the difference between the costof power developed at the hydroelectric site and the value of such power in the marketplace. Where large quantities of power are required, since hydroelectric power is usually limited in supply, the value of the power is ordinarily the cost of producing equivalent power from steam generation (factors for which are ordinarily unlimited in supply). For example, if after developing a hydroelectric site I can market power which costs four mills and people are willing to pay ten mills for power from steam generation, I can usually sell both hydro and steam generation at ten mills. The economic rent on the water power site can be computed by multiplying the number of kwh output by six mills. If the cost of coal and oil goes up so that steam power costs more, my hydroelectric power becomes worth more.

Assuming this amount (x kwh times 6 mills/kwh) is $2 million per year, one can determine the value of the water power site by taking the present worth of a stream of payments of $2 million annually to the indefinite future. Mathematically this can be computed by dividing the annual amount by a percentage representing an appropriate interest rate. $2 million divided by 6% equals about $33.3 million.

The conservationists and many in government thought this value belonged to the people and that private developers should not have it. The conservationists also insisted on limited term licenses with the right of "recapture" of the water power sites by the United States after a reasonable period. These were the reasons expressed in President Theodore Roosevelt's famous Rainey River veto[1] of legislation which would have granted rights for an indefinite term and did not provide for a charge for economic rent. (See Kerwin, p. 82, 116, 117, supra.) One

[1] Prior to the 1920 Water Power Act, each hydroelectric license was granted by special act of Congress.

way to assure the people would receive their economic rent would have been to sell or lease the sites to private developers at annual rentals equivalent to their worth for generating power. This was considered, but Congress deemed it more desirable to get the sites developed and the power generated and sold to the public at the *cost* of generation, rather than at the higher *value* of the power. Moreover, opponents of a rental charge suggested that state regulatory commissions through retail rate regulation would ensure that no excess profits were made by hydroelectric developers and, failing state commission regulation, the Federal Power Commission could regulate the retail rates. The conservationists pointed out in response, certain instances in which retail rate regulations wouldn't be sufficient to preclude economic rents from arising and insisted that any economic rent in fact developed, should be returned to the public in some way.

Initial proposals as discussed in Kerwin were to provide for a charge or rental. The bill as enacted, 41 Stat 1063 (June 10, 1920), was based on the hope that hydroelectric power would be sold at cost plus a reasonable return. But if it wasn't, the bill provided for Federal expropriation of excessive profits for the first twenty years. On the objection of New York State, Congress permitted it, and other states, to have a prior claim on the "rent" for projects in their states. For the remaining thirty years of the license the law set up a program in which the government is supposed to subtract these annual amounts of excessive profits from the price paid for a licensed project on "recapture" [2] of the public's hydroelectric site, Sections 3(13), 14, having set most of them aside in an amortization reserve over the 30-year period (Sec. 10(d)). It could net these against investment for ratemaking purposes. It took twenty years for the conservationists to win this legislation. The concept of limited term licenses, and a charge to take away the economic rent was fought bitterly by the rapidly emerging electric power monopolies, from 1900 to 1920. The sad thing about it all is that although the conservationists won, the act has never been implemented.

The reasons are varied. In the first place it is difficult to compute economic rent although in concept it is simple. A hydroelectric project is usually operated interconnected by high voltage transmission lines as part of a system containing hydroelectric and steam electric generating plants, transmission lines and distribution systems. One must therefore, out of the total systems revenues, separate out excess profits attributable to the use of the hydro site. This is particularly difficult to do if the underlying purpose of the law has been forgotten.

At one time the FPC developed a method of computing excessive profits attributable to hydroelectric plants based on allocating revenues to plant investment on the theory that in a regulated industry, percentage return permitted by a Commission on plant is the "real" cause of earnings.

Economists have known for many years that profits cannot be attributed to a single factor of production. The French physiocrats made the error of attributing all earnings to land; Karl Marx was equally in error in assuming that all earnings are attributable to labor. The management of the Penn Central learned to their great sorrow that you don't automatically have a percentage earnings on plant investment even though it is allowed by a regulatory commission.

Profit and rent can be separated from other returns. Two generally accepted theories of true "profit" are those of Schumpeter and Frank Knight based on innovation and risk-taking. Neither of these are applicable to the electric power industry as there has neither been great innovation nor risk-taking (or risk-taking of a specialized nature) resulting in "profits" in that industry. Any accounting profit (aside from "implicit interest" or return on equity capital) arising in the electric power industry can either be attributed to return on factors naturally limited in supply, i.e., "rent" or to factors artificially limited in supply resulting in monopoly power, the use of which is prohibited by Section 10(h) of the Federal Power Act.

Accordingly, any excess profits which are lawfully developed in the electric power industry where a hydroelectric project is used, must necessarily be economic rent due to the use of running water belonging to the people of the United States. *U.S. v. Chandler Dunbar*, 229 U.S. 53 (1913)

All the foregoing principles are strikingly demonstrated by what happened at Niagara Falls. There, the developers valued the economic rent at $32,000,000. During, and near the end of the first *20 years* of project operation under license, the FPC was still attempting to secure the books and records of the licensee.

[2] A very clever lawyer for one of the largest private power corporations suggested in the late 1960's, shortly before "recapture" would have been available on the first licensed projects (licensed in 1920 with a statutory maximum term of 50 years) that the appropriate term was "takeover." He thus focused attention on the private developer's project and away from the public's water power site. The Federal Power Commission, since then, has to my knowledge invariably used the term "take over" in preference to "recapture", making it easier to lose sight of a major original purpose of the Act.

It is my recollection from research many years ago that the executive director of the FPC, a very smart man, later became a vice president of the Niagara Falls Power Company and when the *Washington Post* tried to make something of it, he sued them for libel and won!

It is also my recollection that Niagara Falls Power Company (using the term to refer both to the "Adams" tunnel development and the "Schoelkopf" canal development which were merged in 1918) were licensed to use approximately 20,000 cubic feet per second of water, almost all the water available to the United States under an early treaty with Canada. After World War II in about 1950 a new treaty was signed with Canada which permitted the United States to develop more water power based on project works which would permit it and Canada to do so and still not ruin the scenic beauty of the Falls.

A contest ensued between Niagara Mohawk, successor to Niagara Falls Power Company, and the Power Authority of the State of New York as to which could develop the additional water power. But in about 1956, part of the turbines and generators Niagara Mohawk had at its Schoelkopf site fell into the river due to faults in the rock structure on which the generating plant was constructed. The Adams generation which was, by that time, mostly a museum piece was pressed into service and some temporary reconstruction ensued at Schoelkopf without FPC permission as was required. It became in Niagara Mohawk's interest to agree to a deal with PASNY and the deal was incorporated in the Ives Bill, P.L. 85–159, in which Niagara Mohawk gave up any claim of right to a property interest in the water power and took instead, low cost power from PASNY under a rather complicated contract. The end result was really quite a good deal for Mohawk.

But the point of it all is that Mohawk then amortized over a short period approximately $32,000,000 of claimed right to the "value of the water power", as of March 1, 1913, based on an "engineering study" prepared by Stone and Webster and claimed a deduction on this amount in its taxes. The Internal Revenue Service denied the claim, in part I hope on my recommendation. On August 8, 1973, Mohawk filed suit in the Court of Claims (Docket No. 248–73) for some $27,000,000 based on $17 million "overpayment" in taxes and approximately $10,000,000 in interest.

A statute of limitations would normally have precluded the government's assertion of its claim for the 1920–1940 period but the statute of limitations would not, in my opinion, bar a counter-claim for amounts due the government under Section 10(e) of the Federal Power Act plus interest which would probably amount to $40,000,000 or even much more.

Nevertheless, while the government has assigned very capable counsel to the matter who is defending as best he can against Mohawk's $27,000,000 claim under conventional principles of tax law, no effort is being made to go after the economic rent from 1920 to 1940 which has been asserted by Mohawk's own engineers. Stone and Webster showed a March 1913 value of $32,000,000 based on a stream of excess profits indefinitely in the future (including, of course, 1920–1940) attributable to the use of the water power of the Niagara. (For income tax purposes I am advised that in the absence of other factors the basis used is cost to taxpayer or value as of March 1913 whichever is higher.)

Mohawk has thrown some dust on the whole question of just who the economic rent belongs to by claiming its rights to the value of the waterpower were vindicated in a 1954 Supreme Court opinion infra which held it need not set aside in an amortization account a relatively small sum paid as rent to others for water rights (which is economic rent to the others but simply expenses to Mohawk.)

The subjective nature of economic rent was one of the problems with the theories of Henry George, the single taxer who proposed taxing away all land values. If I get land for nothing in an area where demand later develops, and after appreciation in value I sell or lease the land, my return is economic rent. But to the person who buys the land for say $100 or rents it for $6 per year, the return on the land (to him) is either respectively "interest" or simply a return of expense, assuming there is no further increase in value. It would be unfair to tax away as economic rent the life savings of a widow whose husband had invested in land which had not thereafter appreciated in value.

A majority of the Supreme Court said in effect in *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954), that economic rent which would be set up in an amortization reserve and ultimately subtracted from the profits of a licensee had to be rent that came to the licensee, not rent that he simply passed on to others as expenses for use of water power.

Although the Niagara Mohawk situation is the most striking illustration of the lack of enforcement of a principal purpose of the 1920 Waterpower Act, the fact

of real importance is, that to my knowledge, there has not been a single instance of economic rent being collected for the account of the people of the United States.

This was to have been a two step process. First, the FPC was to have determined the actual cost of the developments so it could determine what was normal profit. It did a wonderful job on the accounting. Then it was supposed to take away the excessive profit.

It has never taken the second step.

The rules of the FPC presently ignore the very existence of Section 10(e); there is no valid method for setting up amortization reserves under Section 10(d), determining "net investment" under Section 3(13) and for recapture of projects under Section 14 in a way that will ensure that the public gets the benefit of its valuable waterpower. And waterpower is much more valuable in these days of high fuel costs.

If Congress wants to lower electric power costs drastically a federal system based on recaptured hydroelectric sites seems to me the way to do it.

I believe that if the economic rent of those projects accrued over the years on the many licensed projects was accurately measured and recaptured was properly enforced, a federal network of hydrodams could be established at almost zero cost for generation, making the courage and foresight of Theodore Roosevelt and Gifford Pinchot really pay off. I know of many public and cooperatively owned electric power systems that would like nothing better than to sell such low cost power to their customers, passing on the savings.

Based on my 15 years of practicing law before or in regulatory agencies, I can assure you what I have told you is only one small part of the need for regulatory reform.

Sincerely,

WALLACE EDWARD BRAND.

FEDERAL POWER COMMISSION,
Washington, D.C., December 19, 1974.

WALLACE BRAND, Esquire,
PEARCE & BRAND,
1000 Connecticut Avenue NW.,
Washington, D.C.

DEAR MR. BRAND: It has come to my attention that you have directed a letter dated November 13, 1974, to Mr. Victor Reinemer. Your letter states in part:

DEAR MR. REINEMER: You suggested I write you concerning the federal government's total and complete failure to enforce its claims for expropriation or recapture of excessive profits or so called "economic rent" from the development of water power, a primary purpose of the 1920 Water Power Act. These are claims of the United States that arise under Sections 10(e), 3(13) and 14 of the Federal Water Power Act of 1920. I believe you will find this pertinent to your inquiry on regulatory reform. Allow me first to give you some historical background.

Your assertions are without foundation and misleading.

1. You believe that notwithstanding the creation of State regulatory bodies, that Section 10(e) of the Federal Power Act is a baiss for earnings control regulation by the F.P.C. during the first 20 years of the license period.

The creation of a State regulatory commission in effect ousts the F.P.C. from any such concern during the first 20 years.[1]

2. You believe earnings regulation should be calculated annually rather than at the end of the license period for project takeover or relicense.

As pointed out below, the Commission considered which of these alternatives was better in the total regulation picture and decided to follow the latter.

3. You object to the use of the word "takeover" instead of "recapture".

The word "takeover" is the language of the Statute as enacted by the Congress. The term "recapture" does not appear in the Statute.

4. You believe that annual allocation of the earnings of individual utility facilities is required.

As you will note from the discussion in the Commission rulemaking where the theory you espouse was considered, this would be complicated.

On January 20, 1966 (31 F.R. 1079) this Commission issued a Notice of Rulemaking Docket No. R-297 in order to address itself to these problems and develop, under the provisions of the Federal Power Act, general policy thereon.

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[1] See First Annual Report of the Federal Power Commission at page 54 for an explanation of the relation of Federal to State authority (1921). See also Order No. 387, 42 FPC 329, 333 (Appendix B hereto).

In its first order [2] under the rulemaking in Docket No. R–297 (Order No. 370, 40 FPC 938), there appears an extensive discussion of both the legilative history and the administrative history of the pertinent sections of the F.P.A. (40 FPC 942–952) Order No. 370 proceeded on the basis that Section 3(13) of the FPA was a regulatory section to be read separately and independently of Section 10(d) and other sections of the Act. As was later recognized, in its Order No. 387 issued after receipt of 33 applications for rehearing [3] and further consideration thereon, (42 FPC 329, 330):

"In this reconsideration our conclusion is that Section 3(13) should not be so read. Section 10(d), in *pari materia* with the other operative provisions of the Act shows that the qualifying limitation (i.e." as the phrase is defined in Section 3(13') (sic) of the notice is misleading. In short, *the notice of rulemaking initiating that proceeding adopted as a legal premise the proposition in issue.*" (emphasis added)[4]

The Commission, in Order No. 387 (four members of which had participated in the original order) with two commissioners concurring in part and dissenting in part, recognized that the firm basis upon which all regulation must proceed is the implementation of the entire statute.

The Order issued August 4, 1969, (42 FPC 327) also took into account further action of the Congress in stating at page 330:

"The language of the statute itself must be looked to as a reference point governing the scope of these proceedings. Since the date of the notice of rulemaking in Docket No. R–297, the Congress has said that '(F) or any new license issued under Section 15, the amortization reserves (under subsection 10(d) shall be maintained.' In this connection, Public Law 90–451, August 3, 1968, 82 Stat. 616, et seq., amends both of the referenced sections, as well as Section 10(d), of the Federal Power Act. Our present consideration takes this amendment into account, naturally. Paragraph two of the notice of January 20, 1966 paraphrased Sections 14 and 15 of the Power Act as they were then worded.

"We have determined not to issue new regulations, but rather to issue this as a statement of general policy. This statement is consistent with our Uniform System of Accounts Prescribed for Public Utilities and Licensees, and prior decisions and precedents of the Commission. We will estimate for Congress the 'net investment' component of a takeover price as equal to the project original cost, less the amount accumulated in the project depreciation reserve, subject to a maximum potential further deduction of the balance accumulated in the project Section 10(d) amortization reserve account, Account 264, Amortization Reserve-Federal, and as reported in FPC Form No. 9, Licensed Project Annual Report.

"We contemplate that a final determination of 'net investment' may be made only after opportunity has been given for a hearing as provided in Section 14 of the Federal Power Act."

Two cases currently in progress which are examples of the Commission's ongoing programs consistent with the Commission's policy enunciated in Order No. 387 are proceedings on applications for new licenses [5] in Project No. 176. The former proceeding is in the briefing stage and the latter is in hearing. The public record of these proceedings is available to you in our Office of Public Information. See also Opinion No. 596, *Alabama Power Company*, Project No. 82, 45 FPC 1068, 482 F2d 1208 (1973).[6]

The history of Docket No. R–297 and the four Commission Orders (Nos. 370, 370–A, 387 and 387–A) relating thereto reveal that many theories and views

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[2] In all there were four orders issued in this rulemaking procedure. The first, Order No. 370, issued September 27, 1968, 40 FPC 938; the second, Order No. 370–A, issued November 22, 1968, 40 FPC 1351; the third, Order No. 387, issued August 4, 1969, 42 FPC 329; and, the fourth, Order No. 387–A, issued December 30, 1969, 42 FPC 1300. The second and fourth orders were, respectively, an order granting rehearing for the purpose of further consideration and extending time for compliance, and an order deleting Section 2.10 and Part 14 of the General Rules and Regulations.

[3] Those petitioning for rehearing included several state utility commissions, utility companies and others. A complete list appears in Appendix A hereto.

[4] A copy of Orders No. 370 and 387 is attached hereto as Appendix B.

[5] The complete text of Sections 14 and 15 of the Federal Power Act relating to new licenses after the expiration of a license (sometimes referred to as "relicensing") is attached hereto as Appendix C.

[6] This case arose as a result of a staff audit before the inception of Docket No. R–297 and was held on abeyance pending the issuance of a final order in that proceeding. After the issuance of Order No. 384 the proceeding on Project No. 82 was resumed. Since Order No. 387 in accordance with finding Paragraph No. 4 each licensee is required to:

Report *** the balance at the beginning of the year, increase during the year, the balance at the end of the year *** tabulations showing the computation of the annual project earnings and the effect on the project amortization reserve.

Finding Paragraph 6 states that at the time of the issuance of Order No. 387:

*** the amortization reserves balances on various dates have been determined by the Commission for 25 hydroelectric projects licensed by the Commission under Part I of the Federal Power Act, including the determinations made in *Florida Power Corporation*, 22 FPC 740 (1959), *Kentucky Utilities Company*, 23 FPC (1960), *Idaho Power Company*, 27 FPC 349 (1962), *Southern California Edison Company*, 27 FPC 360 (1962), *California Electric Power Company*, 27 FPC 658 (1962), and *Utah Power and Light Company*, 30 FPC 63 (1963).

were considered in adoption of the final orders and that ample opportunity for proponents of these views was afforded by written submissions and oral argument before the Commission. The Commission cannot be said to have ignored the Act as you allege in your letter.

As to the matter of the claims and cross-claims relating to Niagara-Mohawk, please be advised that during the period of 1920–1940 the State of New York had a regulatory commission. Please refer to numbered paragraph one of this letter. See also *FPC* v. *Niagara-Mohawk Power Corporation* where the Commission was reversed in its attempt to include payments the licensee made for water rights in the amortization reserve under Section 10(d).

Copies of this letter are being sent to all persons to whom your original letter was distributed.

Sincerely,

DREXEL D. JOURNEY,
Acting General Counsel.

Enclosure No. 032097.

Appendix A—List of applicants for rehearing.
Appendix B—Copies of orders No. 370 [7] and 387.
Appendix C—Copies of sections 14 and 15, Federal Power Act.[7]

COPIES SENT TO

Mr. Victor Reinemer, Russell Senate Office Bldg., Room 161, Washington, D.C. 20510.
The Honorable Daniel Haley, Member of the Assembly, 110th District, St. Lawrence County, Waddington, New York 13694.
Mr. William A. McClellan, Chief, Special Services Branch, Appellate Division, Room 3619, Internal Revenue Service, Washington, D.C. 20224.
Mr. Mark Perlgut, Electric Week, McGraw-Hill, 1221 Avenue of the Americas New York, New York 10020.
Mr. Ted Peyser, Department of Justice, Tax Division, Washington, D.C. 20530.
Mr. Alex Radin, General Manager, American Public Power Association, 2600 Virginia Avenue, N.W., Washington, D.C. 20037.
Mr. A. Robinson, Jr., Staff Counsel to the General Manager, National Rural Electric Cooperative Assn., 2000 Florida Avenue, N.W., Washington, D.C. 20009.
Ms. Carole Shifren, c/o The Washington Post, 1050 Fifteenth Street, N.W., Washington, D.C. 20005.
Mr. James Vann, Manager, Dixie Electric Corporation, P.O. Box 30, Union Springs, Alabama 36089.

APPENDIX A

Applications for rehearing or modification were filed by regulatory agencies, utilities, and others:

The Public Service Commission of Wisconsin
The Idaho Public Utilities Commission
Pennsylvania Power & Light Company
Pacific Gas and Electric Company
Appalachian Power Company
Duke Power Company
The Montana Power Company
Southern California Edison Company
Alabama Power Company, et al.
Central Maine Power Company
Niagara Mohawk Power Company
The National Association of Regulatory Commissions
Louisville Gas and Electric Company
New England Power Company
Idaho Power Company
Minnesota Power & Light Company
Arkansas Power & Light Company
The Southern Company
The Washington Water Power Company
The Alabama Public Service Commission
Wisconsin Michigan Power Company

[7] Retained in committee files.

Western Massachusetts Electric Company
The People of California and the Public Utilities Commission of the State of California
General Public Utilities Corporation, et al.
The Washington Utilities and Transportation Commission
Investment Bankers Association
The Georgia Public Service Commission
Yadkin, Inc.
Virginia Electric & Power Company
Board of Railroad Commissioners of the State of Montana
Pacific Power and Light Company

PEARCE & BRAND,
ATTORNEYS AT LAW,
Washington, D.C., January 6, 1975.

Mr. VICTOR REINEMER,
Staff Director, Senate Subcommittee on Budgeting, Management, and Expenditures, Washington, D.C.

DEAR MR. REINEMER: This is in further regard to my letter to you of November 13, 1974.

Drexel Journey, Esq., has done a commendable job in collecting citations to Commission and Court decisions on the questions I raised in my letter but nowhere does Mr. Journey take a position on whether the 1920 Water Power Act was intended to preserve the "economic rent"—of water power sites for the public—and if so, whether the Commission's actions thus far have been effective in carrying out that objective. Anyone reading the cases cited by Mr. Journey can confirm this conclusion.

I would like to correct one point on which Mr. Journey did not comment. On page five of my letter based on my recollection from research many years ago, I mentioned for the purposes of adding some color to the history of the Commission's actions on water power, an event concerning the Commission's executive director. On further reflection, I believe I have merged two separate events concerning the Commission's former chief engineer and its former executive secretary.

Thank you for affording me the opportunity to set the matter straight.

Sincerely,

WALLACE EDWARD BRAND.

REVISED PROCEDURES AT FCC

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of Suggested Procedural Revisions Concerning the Ex Parte Rules, Record of Contacts, Open Commission Proceedings, and Avoidance of Undue Delay in Informal Rule Making Proceedings.

To: The Commission

PETITION FOR REVISION OF COMMISSION PROCEDURES

Petitioner, Henry Geller,[1] hereby petitions the Commission to revise its procedural rules in four respects: (1) to make the ex parte rules applicable to contested cable TV adjudicatory proceedings; (2) to require Commissioners and top staff members to maintain a public log of all outside contacts relating to pending matters; (3) to open to the public all special Commission meetings dealing with informal rulemaking matters; and (4) to adopt special procedures to avoid undue delay in informal rule making proceedings.[2] Petitioner believes

[1] The view expressed are those of petitioner as an individual, and are not attributable to either the Rand Corporation or any sponsoring organization.

[2] Informal rule making proceedings are those conducted pursuant to Section 553 of the Administrative Procedure Act (5 U.S.C. 553), with "* * * interested persons [afforded] an opportunity to participate in the rule making through submission of written data, views or arguments with or without opportunity for oral presentation." Formal rule making proceedings "* * * are required by statute to be made in the record after opportunity for an agency hearing". *Ibid.*; see Attorney General's Manual on the Administrative Procedure Act, pp. 31–32 (1947).

that these revisions will insure both greater fairness and the appearance of fairness in Commission proceedings, without interfering with the effective and expert dispatch of Commission business. The grounds for each of the revisions is set out within.

I. Application of the Ex Parte Rules to Contested Cable TV Adjudicatory Proceedings

The Commission rules have provided, since 1965, that application proceedings come within the *ex parte* restrictions as to interested persons from the day on which a petition to deny is filed. When the Commission adopted a procedure akin to this application processing in the cable field in 1966, the Commission stated: "Since petitions under ad hoc procedures may involve the resolution of controversial issues which in basic fairness should be determined on the pleadings of the parties, we shall amend the ex parte rules to make them applicable to proceedings under Sec. 74.1109, as well as proceedings under Sec. 74.1107 * * *."[3] And in the same year, the Commission applied the *ex parte* restrictions to cable TV processing in a number of decisions. Thus, in the *Multi-Vision Northwest, Inc.* case,[4] the Commission stated (at pp. 1153–1154): "* * * While we have not yet adopted specific rule revisions to implement the above statement in the second report, we regard the spirit of the rule as applicable to waiver requests under 74.1109, and have put the industries on notice of our intent to follow the rules in this respect * * * " The Commission held that the *ex parte* restriction had been violated and ordered appropriate relief.

In spite of this history, the Commission has never revised its *ex parte* rules to bring the contested cable TV adjudicatory proceedings within their scope. This is clearly inappropriate. The Administrative Procedure Act (APA) requires the Commission to publish in the Federal Register " * * * the nature and requirements of all formal or informal procedures available * * * ", and states that "No person shall in any manner be required to resort to organization or procedure not so published."

In short, the Commission has wisely decided to apply the ex parte rules to contested adjudicatory cable proceedings. Indeed, it would make no sense to make the ex parte restrictions applicable to the broadcast/common carrier area (petition to deny situations) and not the exactly comparable cable situation; in any event, the fairness principle derived by the Court from due process requirements in *Sangamon Valley*[5] would require that interested parties proceed on the record or upon due notice to other parties in contested cable adjudicatory proceedings where valuable privileges are at stake. Yet the Commission has failed for over nine years to implement its stated intention and thus to comply with the requirements of the APA. Petitioner urges that the Commission promptly remedy this omission and revise its ex parte rules to include the contested cable TV adjudicatory proceeding. Since this is a procedural revision and one required in the circumstances, notice is unnecessary.

II. Maintenance of Log of Outside Contacts by Commissioners and Top Staff

Petitioner suggests another innovation related to the *ex parte* area—the maintenance of a log of outside contacts concerning the merits of any pending rule making or adjudicatory proceeding by the Commissioners and top staff (i.e., branch chief or higher). This innovation does not seek to isolate the Commission from outside contacts. As the 1965 Report on the *ex parte* rules recognized, "* * * legitimate informal contact between the Commission and the industries it regulates * * * serves a useful purpose and should not be unnecessarily inhibited."[6] The proposal would not inhibit such informal contacts: Since they are perfectly legitimate, no reason exists why they should not be openly engaged in and logged. This logging process does, however, serve the valuable purpose of promoting *openness* in governmental process—a trend now much encouraged by both the Congress and the Executive Branch. It would also assist in enforcing important aspects of other Commission regulations. In short, it would make a significant contribution to maintenance of confidence in governmental process.

Congress has been moving to provide "Government in the Sunshine."[7] Several agencies have responded in this logging area. Thus, the Federal Trade Commis-

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[3] Second Report and Order, 1 FCC 2d 725, 764 (1966).
[4] 8 FCC 2d 1151 (1966). Cf. also *American Television Relay, Inc.*, 10 FCC 2d 1004 (1967); *Tele-Vue Systems, Inc.*, 1 FCC 2d 1134 (1967).
[5] *Sangamon Valley Television Corp.* v. *U.S.*, 269 F. 2d 221 (C.A.D.C. 1959).
[6] FCC 65–598, at par. 19; see also pars. 23–24.
[7] See Government in the Sunshine, Committee on Government Operations, Sen. Doc., Dec. 1973, 93rd Cong., 1st Sess., discussed within, pp. 13–14.

sion in March 1974 announced as a part of a policy of "increased openness" that staff members of the Commission will be required to keep records of all outside contacts relating to pending investigations or cases, with these records becoming part of the public record when the case becomes public. In addition, each Commissioner has agreed to maintain a log of all outside contacts relating to pending investigations or cases. The release, including the Administrative Bulletin and the form to be used to record the outside contact, is attached as Appendix A.

The Department of Justice has a similar logging requirement, issued by Attorney General Elliott Richardson on August 8, 1973. This release is attached as Appendix B. It requires each Department employee to "* * * record in memorandum form each oral communication (in person or by telephone) concerning a case or other matter pending before the department with a noninvolved party indicating an interest in the case or matter * * *. For purposes of this order, 'non involved party' means one with whom the employee would not in the routine handling of the case or matter normally have contact."

The Consumer Products Safety Commission (CPSC) has detailed and strict regulations regarding recordkeeping. See Appendix C attached hereto. At the least, there must be a meeting log ("* * * a brief record indicating the date, attendance, and general subject * * *") of all meetings between individual Commissioners or Commission staff and outside parties. A typical meeting log has the following: the date of the meeting, the place, who made the log, members of the Commission who were present, members of outside parties that were present, and a summary of the meeting.[8]

Further, CPSC also requires advance notice of most types of meetings, either in a public calendar[9] or the Federal Register:[10]

> Importantly, advance public notice will be given for all meetings of Commission personnel with representatives of organizations concerning a matter pending before the Commission.

The chart on the following page, taken from the Commission's rules, graphically shows the extensive nature of the CPSC's recordkeeping and prior notice process.[11]

Meeting category	Recordkeeping[1]				Prior notice		
	Meeting log	Meeting summary	Minutes	Transcript record	No prior notice	Public calendar	Federal Register notice
Hearings				X		X	X
Meetings of the Commission:							
Executive sessions			X[2]		X		
Closed sessions			X		X		
Open sessions			X			X	
Public sessions			X			X	X
Meetings of individual Commissioners and outside parties.	X	X[3]			X	X[3]	
Meetings of Commission staff and outside parties.	X	X[4]				X	X[3]
Meetings of the Commission's advisory committees.		X				X	X

[1] These are minimum requirements and do not preclude more detailed recordkeeping if appropriate in special cases.
[2] Required to substantiate official actions if taken.
[3] Required for all meetings (a) specified by any statute or act; (b) held with representatives of organizations concerning a matter pending before the Commission; or (c) concerned with any other matter of substantial interest.
[4] Required when prior notice of the meeting is given by publication in the Federal Register.

Petitioner urges that the Commission emulate the above agencies, and make a beginning in this important area. The Commission might, for example, require that its members and top policymaking staff (e.g., branch chiefs and above), log significant contacts with outside parties concerning the merits of pending adjudicatory or rule making matters other than those that would normally be made in the routine handling of an investigation or matter. Instead of the branch chief demarcation, the Commission might specify the staff that it believes is involved in policymaking. The logging requirement would not encompass the routine status inquiry or, say, the chance meeting conversation that

[8] See Appendix D for examples. See also 39 Fed. Reg. 32349.
[9] A public calendar "* * * is a passive means of public notification consisting of a listing maintained at the Commission offices and transmitted regionally on a routine basis to field offices by the Commission Secretary". See 16 C.F.R. 1001.60(c)(2). See App. E for an example.
[10] 16 C.F.R. 1001.60(c); App. C, hereto.
[11] See 38 Fed. Reg. 27215.

touches only insignificantly on some pending matter. As for the exception concerning routine handling, clearly the Commission's General Counsel or the Chiefs of the Hearing Division or of Complaints and Compliance, for example, need not log the contacts made in the routine handling of investigations or litigation.[12]

The logging form might parallel those used by the above noted agencies, and specify the date of the meeting, the place, who made the log, members of the Commission who were present, outside members present, and a very brief summary of the meeting. The forms could be kept in a public file in the appropriate Commission official's office, with a duplicate sent to the public reference file if the meeting involved specific pending proceedings.

Informal contact with the agencies who now log indicates that officials generally seem to welcome the logging process. While it presents some burden, it is not an undue one, and it does serve to emphasize the "openness" of the agency. No legitimate contact is cut off, and the officials appear to take comfort in the resulting "goldfish bowl" nature of the agency operation. Some indicated their belief that it inhibits the improper approach—the one that cannot stand publicity.[13]

The logging requirement, with its specificalities of time and place, would assist the Commission in enforcing several aspects of its rules or policies designed to protect the integrity of agency process. Thus, in the Report adopting the ex parte rules, the Commission stated: "* * * it should be clear that presentations should not be made if the person making the presentation has knowledge of matters which will warrant the classification of the proceeding as a restricted proceeding. Ex parte presentations should not be made, for example, by a person who is planning to file a petition to deny or a mutually exclusive application, if the same presentation would be prohibited after the petition or application has been filed * * *" [14] This provision has been the source of some controversy.[15] With logging requirements, the Commission would for the first time have a significant check on parties who might be tempted to make inappropriate advances. For example, a party who broke off negotiations in a potential petition to deny situation and rushed to Washington to advance his position to the Commissioners before the petition was filed, would know that a log of that meeting would be made part of the public record; such knowledge would inhibit this improper presentation and thus assist the Commission, which might well be unaware of the crucial background facts leading to the presentation.

The specification of location might prevent inappropriate meetings at vacation spots such as occurred in the previous history of the FCC or currently as to the CAB. Further, it would give the Commission its first enforcement tool as to Section 19.735 of the Rules (47 C.F.R. 19.735). This section prohibits the acceptance by Comissioners or staff of "* * * any gift, gratuity, favor, entertainment * * *" from those subject to any regulation. It contains an exception that "food and refreshments of nominal value may be accepted on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting or on an inspection tour where an employee may properly be in attendance".[16] The Civil Service Commission (CSC), which has primary jurisdiction over agency rules of this nature,[17] has indicated that an agency employee could not, for example, make a weekly practice of accepting industry hospitality at expensive restaurants—the rule means just what it says—meals of nominal value at infrequent occasions. But the Commission would not now know whether any of its employees were following such an improper practice. With logging requirements there would again be a salutary check and inhibition on inappropriate behavior.

Justice Brandeis stated: [18]

> Publicity is justly commended as a remedy for social and industrial disease. Sunlight is said to be the best disinfectant and electric light the most efficient policeman.

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[12] Of course, there may be gray areas where the Commission officials will have to exercise judgment. But this is true of every logging or *ex parte* rule. Indeed, the efficacy of such rules depend on their good faith implementation by the agency officials.

[13] These views were expressed in informal contacts made to Common Cause representatives. The Commission might wish to make its own, perhaps more intensive, survey of the agency experience.

[14] FCC 65–598, par. 9.

[15] In re Application of *KSAY Broadcasting Co.*, 45 FCC 2d 348 (1974); FCC 74–647.

[16] 47 C.F.R. 19.735–202(b)(2).

[17] All the agencies are required by the CSC to have certain basic regulations in this area; all have largely patterned their regulations on those of the Civil Service Commission. See, e.g.: 18 C.F.R. 3.735 (FPC); 14 C.F.R. 370.735 (CAB); 17 C.F.R. 200.735 (SEC).

[18] Op. cited at n. *, p. 4, p. VII.

The Commission would appear to have much to gain from experimenting with "sunlight" along the above lines and little to lose. In effect, it would be saying to those who urge positions upon it, "Our doors are open for all proper contacts, and because we and you have nothing to hide, there is no reason why the public we serve should not be aware of all the contacts."

III. Use of Open Proceedings on Informal Rule Making Matters

There has been a marked trend toward openness in Governmental process. In 1973, for example, the House of Representatives reversed its long-standing tradition of doing business in closed sessions and opened roughly 80% of its "mark-up" (bill-drafting) meetings to the public.[19] Of particular interest to the Commission are the findings of a January 1974 Common Cause Survey, concerning the House Interstate and Foreign Commerce Committee (Survey, p. 6):

A good open-meetings record was compiled by the busy and powerful House Interstate and Foreign Commerce Committee. This Committee handles many subjects, including health, communications, power, transportation and securities. During 1973, it held 13 closed sessions, about one-third of its total of 43 meetings. However, most of the closed sessions were on one proposal—the northeast railroad reorganization bill. The Committee held open sessions on many other bills, including the controversial petroleum allocation and emergency energy conservation bills near the end of the year. The petroleum bill directed the President to begin allocating oil and oil products among suppliers and users to prevent shortages. The energy bill was major legislation intended to give the President emergency powers including gas rationing, to deal with the fuel crisis.

House Commerce subcommittees compiled an even better record. They closed only one-quarter of their meetings. These closed sessions were all in one subcommittee, Transportation and Aeronautics, and—like the full committee—dealt mostly with the northeast rail bill.

	Overall 1973 (Mar. 7 to Dec. 21)	Percent	Full committees	Percent	Sub-committees	Percent
Bill-drafting meetings held	808		352		456	
Open meetings	640	79.2	245	69.6	395	86.6
Closed meetings	168	20.8	107	30.4	61	13.4

On May 22, 1974 Common Cause released a follow-up survey showing that through the third week in May, 88% of committee mark-up sessions in 1974 in the House have been open to the public.[20] Further, the January 1974 survey concluded that the open rule had not affected the efficiency of House legislative work (p. 3):

The anti-secrecy rule did not impede the activities of the House as opponents of the rule had contended it would. Many important and complicated pieces of legislation were drafted by committees in open session and brought to the House for votes with no more delay than in earlier years when secrecy prevailed. Statistics show no significant difference between the number of bills enacted, passed or reported by the House and its committes in the 1971 and 1973 sessions * * *

The Senate has not adopted the open-session rule, and therefore most sessions have been non-public. However, as the Commission knows, the Senate Commerce Committee has been employing open mark-up sessions, such as on the recent Broadcast Renewal License Bill. Other Senate Committees or subcommittees have also used the open mark-up session. In April of 1974, Common Cause surveyed these committees to obtain an "* * * evaluation of how openness has affected the work of [the] committee," and specifically on the following issues:[21]

* * * Some opponents of open mark-up sessions have argued that the presence of the press and public would impede a committee's work, that open and frank

[19] Thus, a Common Cause survey in January 1974 showed that from March 7, 1973, when the anti-secrecy rule took effect, through adjournment on December 21, 1973, 79.2% of all House Committee meetings held to draft legislation were open to the public. House subcommittees held 86.6% of their bill-drafting sessions in public compared to 69.8% for field committees. The following table sets forth the complete House figures:

[20] Through May 16, 1974, House committees and subcommittees held 281 bill drafting meetings of which 34 were closed and 247 open.

[21] Common Cause Letter to Senate, April 18, 1974.

NOTE.—Three committees, the Appropriations, Ways and Means and Armed Services Committees, closed their sessions from half to virtually all of the time. See Appendix F for a chart showing the record of all House Committees and Subcommittees.

discussion would cease, and the real business of the committee would be done elsewhere. Has that proved true in your experience?

It was also argued that meetings would become shams, characterized by grandstanding to win favorable publicity, and that the watchful eye of special interest lobbyists would make it difficult for the committee to legislate in behalf of the general public interest. Has that proved true in your experience?

Most members of the House, when surveyed on the impact of the new rule, shared the view that openness did not interfere with committee business. Do you agree with this?

Of thirteen responses, 12 supported the open session, and one stated that it was a stand-off between advantages and disadvantages (see response of Senator Fannin, Appendix G, attached hereto, containing all these responses). To give a few examples, Senator Fannin responded:

I believe the open mark-up sessions conducted by the Senate Committee on Banking, Housing and Urban Affairs have enabled the press and others to gain a greater appreciation of the legislative process. At the same time, I have detected no appreciable difference in the behavior of the Committee members during open mark-ups. It is my impression that our Committee members engage in the same free and open discussion in open sessions as they did previously during closed sessions. Moreover, none of the adverse consequences predicted by open mark-up opponents appear to have materialized. I have noticed no increase in "grandstanding" by Committee members, nor do I feel that open mark-ups have become shams to ratify decisions already made in private.

To the same effect, Senator McIntyre stated:

Frankly, I was quite skeptical and reluctant to support open mark-up last year but on the basis of my experience in the Senate Banking, Housing and Urban Affairs Committee, my own attitudes have changed in favor of the additional openness in the Committee and I am now persuaded that this is an appropriate and useful procedure.

On the other hand, Senator Hansen, like Senator Fannin, found that:

Frankly, at times the presence of press and public has impeded the Committee's work. It takes more time in an open session to conduct business. Some issues on occasion have been resolved before the mark-up sessions. However, this is rare.

There has been some grandstanding in the open sessions . . .[22]

Congressman Holifield recently stated his opposition to open sessions on the ground that it was difficult for committee members to vote against industry positions with industry representatives present.[23]

In this connection, the Commission might also consider the responses to a Senate Subcommittee Questionnaire on S. 260, a bill providing that meetings of Government agencies and of Congressional Committees shall be open to the public.[24] The concept of open proceedings received strong support from several responders.[25] Thus, Professor Kenneth Davis stated:[26]

Open meetings would at first cause consternation and opposition. But gradually open meetings would be accepted. Making more of the realities known to the public would facilitate criticism, and the principal result would be to improve the quality of what is done. Furthermore, the democratic influence would be stronger. The relation between agencies on one side and media and pressure groups on the other side would be improved, because misunderstanding resulting from partial information, as distinguished from full information, would be reduced.

On the other hand, Profesor Louis Jaffe stated that his "initial reaction . . . is skeptical":[27]

I can see the advantage of a public meeting in which when a rule is about to be voted up or down the members discuss the considerations which led them to their conclusions. But the idea that whenever the agency has on its agenda the consideration of an ongoing rule-making project, there must be a public meeting is questionable. It seems to me onerous for agencies already overworked to have

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[22] He concluded, however, that, "Despite the problems with the openness rule, I feel that the public and press should be entitled to know how the Committee conducts its business. I would generally recommend it to other Committees.".

[23] The Washington Post, September 15, 1974, p. B5.

[24] Government in the Sunshine, Senate Committee on Government Operations, 93rd Cong., 1st Sess. (Dec. 1973).

[25] See, e.g., responses of Seymour Berlin, Kenneth C. Davis, Gene LaRocque, Theodore Sorenson, and William H. Rodgers, Jr., pp. 63, 66, 78, 83, 95.

[26] *Id.* at p. 67.

[27] *Id.* at p. 78.

to prepare constantly for public meetings; and I think it is illusory to suppose that it will reveal the actual process of decision.

Professor Walter Gellhorn also observed: [28]

* * * as I think back upon my own experience in and out of government, many entirely honorable and useful solutions to disagreement have been reached through the confidential consideration of a form of words which would be face-saving. The process of negotiation and compromise, with which you as a legislator must be far more familiar than I, can hardly be conducted succesfully in front of a television camera.

Finally, it should be noted that most state legislatures now have open meeting requirements.[29] A recent Common Cause survey identified 17 states which have taken significant steps in this direction over the last 18 months.[30] The survey found that, "State legislators have repeatedly noted that open committee sessions are generally more orderly, well attended, responsive, and characterized by a higher level of debate." [31]

It would appear from the foregoing that there is a marked trend toward open proceedings dealing with legislative and quasi-legislative matters. While the open proceeding may have some initial drawbacks such as grandstanding, these would diminish as gradually the open nature was accepted. And there would be several benefits. The open proceeding would facilitate knowledge and criticism of what the agency has done, and would improve the quality of its work. The agency members would in all likelihood be better prepared for such meetings. The process of legitimate negotiation and compromise would still go forward. Above all, it would lead to greater public confidence concerning agency activities: It is a sound general principle that the public's business should be done in plain view of the public.

Petitioner therefore urges that the Commission follow the above noted trend and experiment in this area by opening its special sessions dealing with important informal rule making proceedings.[32] For example, both the House and Senate Committees hold open sessions on the broadcast renewal license bill. Why should not the Commission hold open meetings when dealing with similar renewal matters, such as Docket Nos. 19153, 19154, and 18110? The considerations militating for open sessions in the Congress appear equally applicable to the Commission when handling its quasi-legislative duties.

There is a further consideration militating for open Commission proceedings on informal rule making matters—namely, the pervasive "leaks" that normally accompany Commission meetings on such matters. As the Commission knows, it is customary for the trade press to report the essence of the meeting, including instructions for preparation of the report. To give two recent examples, the Commission's non-public meetings on Docket No. 18110 (co-located cross-ownership of TV and newspaper) and Docket No. 19142 (children's TV programming) were reported in the trade press, with considerable detail as to the direction that the Commission was moving.[33] This obviously is poor process: Why should only the industry representatives know of tentative Commission decisions during the period before trade press publication? And even after such publication, why should the public be dependent on the truncated version set out in the trade journals, which might be confusing to those not "in the know"? In the face of such a long established, persistent, and unsatisfactory pattern of "leaks", and the trend toward open "legislative sessions", Commission experimentation with public sessions seems particularly appropriate.

IV. Special Procedures to Avoid Undue Delay in Informal Rule Making Proceedings

There has been inordinate delay in resolving the informal rule making proceeding. Many of these proceedings involve complex issues requiring in-depth study and analysis. The comment phase can thus consume a considerable period of time; and the oral presentations, usually scheduled by the Commission as to important policy issues, requires additional time. *But after the conclusion of*

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[28] *Id.* at p. 71.

[29] See Appendix H for a chart prepared by Common Cause reviewing state open meeting statistics.

[30] See testimony of Mr. John W. Gardiner, before the Senate Subcommittee on Reorganization. May 22, 1974, p. 7.

[31] *Ibid.*

[32] The routine informal rule making matter would thus continue to be hand led on an *in camera* basis at the weekly agenda meeting. The formal rule making proceeding would also be resolved *in camera* and solely on the basis of the hearing record.

[33] See Broadcasting Magazine, September 16, 1974, p. 22; October 7, 1974, pp. 15–16. Television Digest, September 16, 1974, p. 3; October 7, 1974, pp. 1–2.

the oral or written phase, years have passed with no Commission action of any kind. Indeed, the Commission often focusses on the proceeding only after being prodded by the Congress, the Courts, or some unusual filing. Petitioner urges that the Commission devise procedures so that it can avoid this unnecessary delay—without reliance on outside stimuli that may not always be forthcoming.

There are a number of examples of proceedings plagued by unnecessary delay. Thus, the TV-radio-newspaper cross-ownership proceeding was begun on April 6, 1970.[34] The reply comments were filed on August 19, 1971. After that, nothing happened for two and a half years. Finally, the Department of Justice in early 1974 filed petitions to deny the renewals of several TV licenses, based on undue concentration because of co-located ownership of the TV station and newspaper.[35] After these filings, the Commission reactivated the proceeding—ordering immediate staff studies, supplemental written filings "* * * both for up-dating and elaboration * * *", and oral presentations.[36] The Courts and the Congress also entered the picture. The Court refused to call the delay illegal but did encourage expeditious resolution:[37]

While four years might be characterized as an excessive period for a rule-making, we realize that concentration of control is an extremely complex question. The Coalition does not allege bad faith or purposefully dilatory proceedings by the Commission. If we are to encourage the Commission to proceed by rule-making for basic policy changes [case citation omitted], we must necessarily be patient. We are not, at this time, prepared to say that the Commission has acted improperly by not terminating the rulemaking proceeding and announcing its new rules before now. We, of course, encourage the Commission to act expeditiously in this rulemaking, and reserve the question of at what point a continuing failure to act could be the basis for a different conclusion.

In the Broadcast Renewal license bill (H.R. 12993), the House bill directed that the Commission resolve the 18110 proceeding within six months of enactment and the Senate version by December 31, 1974.[38] The Commission can take little satisfaction from the above procedural history, and particularly the dormat nature of the proceeding from August 19, 1971 to March 7, 1974—a period of two and one-half years.

Another pending example involves the pay cable proceeding in Docket 19554. The Commission adopted the pay cable rules in its Memorandum Opinion and Order of July 1, 1970.[39] Within the 30 day statutory period, petitions for reconsiderations were filed raising substantial issues. *The Commission did nothing with respect to these petitions for two years.* Then, in July 1972, it commenced a new proceeding (Docket No. 19554) to deal *expeditionsly* with the issues raised by the petitions; but it did not modify or suspend the rules during the pendency of this new proceeding.[40] The Commission received final comments on Novem-

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[34] Further Notice of Proposed Rule Making, Multiple Ownership of Standard, FM and TV Broadcast Stations, 22 FCC 2d 339 (1970).

[35] See, e.g., Petition of the Department of Justice to Deny Renewal Applications in the Matter of Pulitzer Publishing Co., FCC BRCT–30, filed January 2, 1974; Petition of the Department of Justice to Deny Renewal Application in the Matter of Cowles Communications, Inc., Des Moines, Iowa, FCC File No. BR–515, January 2, 1974.

The Department's petition stated (pp. 26–27, St. Louis Pet.):

On principle as well as fact, it would be wrong to postpone deciding the concentration issue posed by the Newhouse-Pulitzer applications in deference to administrative orderliness. Docket No. 18110, insofar as it proposes a rule covering newspaper-broadcast cross-ownership, has been underway over three and one half years; no substantive pleading has been filed in it for two and one half years; as the Commission noted in April of 1970 (Further Notice of Proposed Rule-making, *supra*, 6), it might have addressed newspaper ownership then; and as of the beginning of 1974 the public still has no rule. We think that a reading of *Hale* v. *FCC*, 425 F. 2d 556 (D.C. Cir. 1970) gives fair notice that the Court assumed that, if it left the question with the Commission, the Commission would deal with it promptly. Indeed, not long after *Hale*, the same court held that prolonged failure to decide is itself a form of decision making. *Environmental Defense Fund* v. *Hardin*, 428 F. 2d 1093 (D.C. Cir. 1970).

[36] See FCC 74–222, par. 12.

[37] *Columbus Broadcasting Coalition* v. *FCC*, Case No. 73–1074, C.A.D.C., decided June 28, 1974, S. Op. p. 8.

[38] See H. Rept. No. 93–961, in Broadcast License Renewal Act, 93rd Cong., 2d Sess., pp. 3, 18–19; S. Rept. No. 93–1190, on H.R. 12993, 93rd Cong., 3d Sess., p. 14.

[39] 23 FCC 2d 825.

[40] Notice of Proposed Rule Making and Memorandum Opinion and Order, 35 FCC 2d 893, 899. And in order granting extensions of time for filing comments and reply comments, the Commission said:

"In issuing the *Notice* in this proceeding we indicated our intention to complete it expeditiously. Expedition was felt to be especially desirable because the existing rules were to be retained during the course of the proceeding although they had been subject to serious criticism on both procedural and other grounds."

ber 29, 1972. Almost a year later, on October 16, 1973, the Commission decided to hold an oral proceeding in November 1973.[41] Then in August 1974, the Commission issued a Further Notice, and called for new oral presentations in October of 1974, because of the change-over of Commissioners.[42] The Commission also has before it a petition for immediate relief, arguing that in the face of the above history and the substantial First Amendment issues raised by the pay cable rules, the rules should be suspended until Commission resolution of Docket 19554.[43] It is now over four years since the adoption of the rules—with no explanation for the two-year period of delay upon reconsideration: if a new proceeding or oral argument were deemed desirable, they clearly should have been instituted without such delay.

Another example in this area is the petition filed by the Stern Community Law Firm to make public the financial returns (Form 324) filed by broadcast licensees.[44] The Commission considered this petition for issuance of a notice of proposed rule making on March 2, 1973.[45] No definitive action was apparently taken at that time, and nothing more has been done since that time. Over three years have now passed.

A final example involves a rule making matter of lesser significance but nevertheless one that was to be expeditiously handled—the notice of inquiry and proposed rule making in Docket No. 19518.[46] This notice concerned the issues raised by agreements between local groups and the licensee whereby the former dismisses its petition to deny and is to be reimbursed for amounts legitimately and prudently expended for further services rendered under a consulting agreement. The Commission had deferred action on the propriety of this reimbursement agreement pending the initiation and resolution of the rule making proceeding. See *Letter to Combined Communications Corporation (CCC)*, 33 FCC 2d 625 (1972). In concurring in the deferral, Chairman Burch stated: "* * * But I do strongly believe that the parties are entitled to a definitive answer within a short period of time. I see no reason why a proceeding of this nature cannot be concluded within the six months period specified * * *" The notice in Docket No. 19518 was issued four months after the *CCC* decision, with final written comments due on July 24, 1972. Comments were received in October 1972. There has been no action to date in this Docket, and no indication as to when action might be forthcoming.

Examples could be multiplied, by examining the list of "Major Matter Before the Commission", submitted to the Congress.[47] See, for example, the Children's TV programming Docket 19142 (notice issued in January, 1971; last written comments in October, 1971; panel proceedings a year later in October 1972, and oral argument in January, 1973); carriage of radio station signals by cable systems—Docket No. 19418 (notice issued February 2, 1972; last written comments received in May 1972); Interconnection of Communications Equipment—Dockets No. 16942; 19528 (resolution of post-"Carterfone: issues, pending since 1968).[48]

Whatever the reasons for the above delay, the Commission clearly should take remedial steps. Its job is to decide these important policy issues. The public interest suffers when there is uncertainty for so long a period. Further, delay undermines the proceeding by rendering the record stale, and requiring "updating".[49] Indeed, inordinate delay can adversely affect the oral proceeding since

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[41] FCC 73–1072.
[42] FCC 74–878.
[43] See Petition for Immediate Relief, filed by Motion Picture Association of America, July 24, 1974.
[44] RM–1837, filed on July 21, 1971.
[45] Broadcasting Magazine, March 5, 1973, p. 9.
[46] FCC 72–433, adopted June 1, 1972.
[47] See Overview of the FCC, Hearing before Senate Subcommittee on Communications, 93rd Cong., 1st Sess., 1973, pp. 116–161.
[48] See also the recent Senate debate on H.R. 12993, where Senator Metcalf stated concerning the Commission's delay in resolving the Conglomerate Inquiry begun in February 1969 (Cong. Record, Oct. 8, 1974, S18512–13): "We are entitled to some information on this problem. Yet after 5 years, the FCC has yet to produce one single report or proposal for public comment. We have waited long enough. It is our duty to order the FCC to act and act expeditiously." Senator Pastore stated that "* * * this is a matter that should be discussed at the oversight hearings next year." (*Ibid.*)
[49] See, e.g., FCC 74–222, par. 12; FCC 74–263, in Docket No. 18891 (cable-newspaper cross-ownership), par. 3 ("* * * we believe it appropriate, in view of the time and the changes that have taken place in the industry since this proceeding was commenced, to reopen the docket for the filing of supplemental or new comments by all interested persons.")

often several who have heard the argument no longer serve at the time of decision.

Petitioner suggests the following self-imposed procedure as to informal rule making procedings or petitions to commence such proceedings.[50]

That within six months after the last written comment is filed the Commission determine whether oral presentations are desirable and if so schedule such presentations.

That within one year of such oral presentations (or the last written filing if no oral presentation is held), the Commission resolve the matter or consider at a Commission meeting and state why the matter is not resolved (and if necessary, that it repeat the latter process at six months intervals).

That the Commission equitably assign all pending informal rule making petitions or proceedings among its members [51]; make the assigned member responsible for *procedurally* sheparding the matter and preventing undue delay; and publicly announce the assignments by issuing notices at appropriate intervals.

The above procedure would thus supplement the McFarland report [52] and the major matter report submitted to the Congress.[53] It would make the *Commission focus* on each informal rule making matter and state why it was not resolved a year after the last procedural step had been taken. It would make individual Commissioners responsible and thus motivated to cut down the backlog. And it would facilitate yearly Congressional oversight of this important agency area.

CONCLUSION

For the foregoing reasons, petitioner urges the Commission to adopt rules or procedures along the suggested lines, so that "the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." [54]

Respectfully submitted,

HENRY GELLER.

WASHINGTON, D.C., *October 18, 1974.*

APPENDIX A

FEDERAL TRADE COMMISSION,
Washington, D.C., March 13, 1974.

COMMISSION ANNOUNCES INCREASED "OPENNESS"

Federal Trade Commission Chairman, Lewis A. Engman, announced today that the Commission has formally and unanimously adopted policies designed to make more information available to the public. The thrust of these policies was spelled out by Engman on February 19. Today the Commission has now formally instructed the staff to prepare changes in the Rules of Practice and has adopted certain directives to the staff. Under the new policies:

News releases will be issued at the outset announcing investigations that cover an entire industry or involve practices which pose substantial risks to public health or safety.

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[50] There are of course other steps that would expedite resolution of these proceedings. Thus, industry parties all too often wait until the end of the, say, 120-day filing period and then petition for a long extension in order to conduct a study. Further, the Commission can often focus the issues by specifying precisely the nature of the studies it desires on some matter, instead of simply leaving it to the parties to develop as they wish.

[51] The Commission should include in this category its own publicly initiated rule making proposals. For example, on March 2, 1971, the FCC issued a Memorandum Opinion and Order, modifying its cross-ownership rule to allow ownership of AM and FM broadcast stations in the same market. (28 FCC 2d 662, 671–2 (1971)). The FCC stated that instead it would institute a rule making "in the near future" to consider requiring "more non-duplicated programming" by commonly owned AM–FM stations in the same market. *Ibid. Three years later* in March of 1974, the Commission issued a Memorandum Opinion and Order raising again the question of amending the AM–FM non-duplication rules, and stating, "* * * we shall in the near future issue a Notice of Proposed Rule Making intended to explore various possibilities for amendments of the rule." FCC 74–222, par. 10. Finally, in April 1974, the Commission issued the Notice, FCC 74–381. An assigned Commissioner, with the responsibility of publicly reporting on the status of his rule making matter, would clearly have not tolerated such a delay.

[52] See Section 5(e), requiring a report to the Congress of adjudicatory cases delayed beyond a specified period.

[53] See, e.g., n. *, p. 20, *supra.*

[54] Section 4(j), 47 U.S.C. 154(j).

Disclosure will be made when investigations of individual firms are closed by placing on the public record the closing letter sent to the party under investigation.

An analysis of provisionally accepted consent orders will be made available upon request to give the public a better understanding of the order's terms, and the period for public comment on proposed settlements will be extended from 30 to 60 days.

A speeded-up method of handling requests for access under the Freedom of Information Act will be instituted.

Internal staff memoranda ordinarily will be disclosed to the public after a file has been closed for three years, and nearly all internal documents in closed files will be released after 10 years unless some specific reason makes disclosure contrary to the public interest.

Staff members of the Commission will be required to keep records of all outside contacts relating to pending investigations or cases, with these records becoming part of the public record when the case becomes public. In addition, each Commissioner has agreed to maintain a log of all outside contacts relating to pending investigations or cases.

Engman said that these new policies will be put into effect as soon as possible. Where necessary, revisions are being made in the Commission's Rules of Practice and Procedures.

Engman explained that, "the Commission believes these new steps strike a reasonable balance between conflicting interests—the American people's inherent right to know what their government is doing on the one hand, and legitimate rights of privacy, as well as the need for some degree of confidentiality if the Commission is to carry out effectively its law enforcement mission, on the other hand."

The requirement that staff members maintain records on outside contacts about pending law enforcement activities supplements the *ex parte* (one sided) prohibitions currently contained in the Commission's Rules. The Rules presently prohibit *ex parte* communications to Commissioners once a formal complaint has been issued. If such *ex parte* communications are received, they must be placed on the public record. Up until now, however, no requirements existed with respect to communications received by staff members, and no requirements addressed a situation where a formal complaint had not yet issued.

The directive to the staff on the recordings of contacts regarding cases or investigations by persons outside the Commission provides that such contacts need not be recorded when they involve "routine requests for information with respect to the status of a matter."

Such requests are defined as "inquiries regarding when public actions were taken or may be taken, identification of parties or staff personnel responsible for the matter, or availability of public information about the investigation or case."

The directive and form to be used by the staff are attached.

Administrative Bulletin

Subject: Contacts by Persons Outside the Commission Relating to Investigations or Cases

The purpose of this directive is to set forth procedures for making and keeping records of contacts made with Commission personnel by non-involved persons outside of the Commission concerning investigations or cases pending within the Commission. The requirements of this bulletin are in addition to the requirements of Section 4.7 of the Commission's Rules of Practice and Procedure as well as any requirements of the Administrative Procedure Act.

Each Commission employee shall record on a "Record of Outside Contact" form (see attached form) each oral communication (in person, by telephone, or otherwise) by a non-involved person indicating an interest in the matter.

The completed "Record of Outside Contact" form shall be placed in the file of the matter and shall thereafter be made part of the Commission's public records if and when a public record of the matter is established. If the communication concerns an adjudicative proceeding, the completed "Record of Outside Contact" form shall be transmitted to the Secretary who shall place it in the public record of the case, but separate from the record material upon which the Commission can rely in reaching its decision in the case.

For purposes of this directive, a "non-involved person" means one with whom contact would normally not be made in the routine handling of the investigation

or case and includes, but is not limited to, a Member of Congress or his staff, an official of another government agency or of the Executive Branch and any other person in public or private life not directly involved in the matter. It does not include an official or employee of the Commission or a person outside of the Commission with whom an employee would be expected routinely to communicate in the normal course of handling such a matter such as a person under investigation, an informant in an investigation, a party or witness to a proceeding or the attorney for such person, informant, party or witness.

This directive does not apply to communications of applicants or complaining parties in accordance with the policy set forth by § 2.2(d) of the Commission's Procedures and Rules of Practice.

This directive does not apply to routine requests for information solely with respect to the status of a matter. Such requests for status reports would include inquiries regarding when public actions were taken or may be taken, identification of parties or staff personnel responsible for the matter, or availability of public information about the investigation or case.

RECORD OF OUTSIDE CONTACT

Identity of Pending Commission Investigation or Case:
File No. or Docket No.:
Name, Title of Outside Person Who Made Contact:
Name, Position of Commission Employee Contacted:
Date/Time of Contact:
Brief description of subject(s) discussed:

APPENDIX B

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C.

DEPARTMENTAL RECORDS OF OUTSIDE CONTACTS

Order No. 532–73

The purpose of this order is to formalize and make uniform the Department's practice and procedure for making and keeping records of contacts made with departmental personnel by outside parties.

By virtue of the authority vested in me by 5 U.S.C. 301 and 28 U.S.C. 509, it is hereby ordered as follows:

Section 1. *Records of contacts.* (a) Each Department employee shall record in memorandum form each oral communication (in person or by telephone) concerning a case or other matter pending before the Department with a non-involved party indicating an interest in the case or matter.

(b) For purposes of this order, "non-involved party" means one with whom the employee would not in the routine handling of the case or matter normally have contact. Non-involved parties include, but are not limited to, members of Congress and their staffs, officials in other government agencies and other members of the Executive branch not directly involved in the case or matter, and private persons not directly involved in the case or matter. Non-involved parties do not include Department employees or persons outside the Department with whom an employee necessarily must communicate in the normal course of handling a case or matter, such as an attorney for a party in a case, or an official in another government agency directly involved in the case or matter.

Sec. 2. *Distribution and retention of records.* The employee shall keep a copy of the memorandum and shall furnish a copy for permanent inclusion in the case or other appropriate file, or, if there is no file established, shall furnish a copy to the head of the organizational unit responsible for the matter, who shall retain it at least until two years after the final disposition of the matter.

Sec. 3. This order does not apply to communications of an employee that are protected by law, such as the right to petition Congress (5 U.S.C. 7102), or to an employee's communication with non-involved persons in seeking to protect his or her rights as an employee of the Department.

Sec. 4. The head of each organizational unit is responsible for informing all employees under his or her supervision of the provisions of this order.

Date: August 8, 1973.

ELLIOT RICHARDSON,
Attorney General.

APPENDIX C

Title 16—Commercial Practices

CHAPTER II—CONSUMER PRODUCT SAFETY COMMISSION

SUBCHAPTER A—GENERAL

PART 1001—ADMINISTRATION, PRACTICES, AND PROCEDURES

Procedural Policy on Meetings, Prior Public Notice, and Records of Proceedings

Policy on public involvement. The mission of the Consumer Product Safety Commission is to protect the public from unreasonable risks of injury associated with consumer products distributed in commerce. To achieve its goals, the Commission requires the interest and participation of the public. Therefore, whenever practicable, the Commission will give all interested parties the opportunity to be heard and otherwise participate. At the same time, the confidentiality of trade secrets and internal discussions will be maintained.

The Commission believes that all manufacturers, importers, distributors, and retailers should be vitally concerned about the safety of the consumer products they make and sell. The Commission believes that all consumers should be vitally concerned about the safety of products they purchase and use. Through a constructive association of the Commission, industry, and the consuming public, the goal of significantly reducing the risk of injury associated with consumer products can be achieved.

Public notification procedures. The Consumer Product Safety Commission, in developing the procedures promulgated below regarding public notification and disclosure of meetings, has followed the principle that the public interest is best served when regulatory affairs are open to the fullest extent possible. To that end, the Commission staff is hereby directed to implement the following procedures whereby meetings and records will generally be open to the public unless reasons of propriety exist to the contrary.

Therefore, pursuant to provisions of the Consumer Product Safety Act (15 U.S.C. 2051–81), the Federal Hazardous Substances Act (15 U.S.C. 1261–74), the Flammable Fabrics Act (15 U.S.C. 1191–1204), the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471–76), and the Refrigerator Safety Act (15 U.S.C. 1211–14), Title 16 is amended by adding to Chapter II a new Part 1001 containing at this time only one section, as follows:

§ 1001.60 Procedural policy on meetings, prior public notice, and records of proceedings.

The following categories of meetings, recordkeeping of meetings, and prior notification of meetings are defined in order to set forth in detail (in the table at the end of this section) the Commission's policy regarding public notification and disclosure of meetings:

(a) *Meeting categories.* The following are five indentifiable levels or types of meetings that can occur within the Consumer Product Safety Commission or at the direction of its various offices:

(1) *Hearings.* Hearings are public and are used for fact finding and for increasing general awareness of need for product safety. Public hearings are also held to comply with certain statutory requirements.

(2) *Meetings of the Commission.* Meetings of the Commission are for the purpose of conducting the formal business of the Commission. Often at such meetings, oral and/or written briefings, recommendations, and reports are presented to inform the Commissioners of the deliberations carried on by the operational offices of the Commission or by other interested parties. Official decisions result from meetings of this category. The following are four variations of meetings of the Commission:

(i) *Executive sessions.* Executive sessions are attended by the Commissioners only. Responsibility for appropriate substantiating minutes for actions taken in executive session is delegated by the Chairman.

(ii) *Closed sessions.* Closed sessions are attended by the Commissioners, the Commission staff, when necessary, outside parties. The Commission Secretary is responsible for the minutes.

(iii) *Open sessions.* Open sessions are similar to closed sessions except that they are open to interested parties by prior arrangement. Deliberation on issues may be supplemented by question-answer periods and informal discussions. The Commission Secretary is responsible for the minutes.

(iv) *Public sessions.* Public sessions are similar to open sessions except that any interested party may attend and discuss matters about which the Commission desires to hear facts, opinions, and recommendations from the public. The Commission Secretary is responsible for the minutes.

(3) *Meetings between individual Commissioners and outside parties.* Meetings between individual Commissioners and outside parties are generally informal and may relate to any subject. The responsibility for recording or logging rests with the individual Commissioner.

(4) *Meetings between Commission staff and outside parties.* Meetings between Commission staff and outside parties may be organized or informal and may relate to any subject. The host is responsible for the recordkeeping.

(5) *Meetings of the Commission's advisory committees.* Meetings of the Commission's advisory committees are scheduled by the designated Chairman of each committee. Advisory committee meetings are open to interested observers and serve as a forum for discussion of matters relevant to the Commission's statutory responsibility with the objective of providing advice and recommendations to the Commission. The Commission's advisory committees are the National Advisory Committee for the Flammable Fabrics Act, the Product Safety Advisory Council, and the Technical Advisory Committee on Poison Prevention Packaging. The Commission Secretary is responsible for the recordkeeping.

(b) *Recordkeeping categories.* The following are four levels of recordkeeping defined for purposes of recording Consumer Product Safety Commission meetings:

(1) *Meeting logs.* A meeting log is a brief record indicating the date, attendance, and general subject. Further information regarding proceedings may be added at the option of the recorder. A meeting log is intended to serve the minimal requirements of section 27(j)(8) of the Consumer Product Safety Act (15 U.S.C. 2076(j)(8)).

(2) *Meeting summaries.* A meeting summary is a record indicating the issues leading to or resolved by the meeting. When appropriate to the public interest, the meeting summary describes the positions, responses, and initiatives displayed by the primary participants. The summary also indicates the date and attendance of the meeting.

(3) *Commission minutes.* Commission minutes are recorded routinely for all Commission meetings (see paragraph (a)(2) of this section), except that when the Commission meets in executive session minutes are recorded only in support of any official actions taken. Commission minutes document the subject of discussion, the points of discussion, and the action taken or planned on each subject. The minutes may be verbatim when necessary or desirable and may refer to attachments such as briefing papers or other documents presented at the meeting. Commission minutes are subject to the concurrence of attending Commissioners.

(4) *Transcript records.* A transcript record is a tape or hard copy of meeting proceedings that is verified by the Commission Secretary. A transcript record may be accompanied by exhibits clarifying or substantiating the record of the meeting.

(c) *Prior notice categories.* Except in certain instances, the public will receive prior notice of meetings. Importantly, advanced public notice will be given for all meetings of Commission personnel with representatives of organizations concerning a matter pending before the Commission. The following are the Commission's two types of prior notice regarding meetings.

(1) *Federal Register notice.* Publication of a notice in the Federal Register is the official form of notification for Federal initiatives. This may be supplemented by any general media coverage to gain wider distribution of the public notification.

(2) *Public calendar.* A public calendar is a passive means of public notification consisting of a listing maintained at the Commission offices and transmitted

regionally on a routine basis to field offices by the Commission Secretary. Members of the Commission and Commission staff report meeting arrangements to the Commission Secretary, including probable participants, subject, and date, as soon as possible after finalization of arrangements. In all cases, every effort will be made to place meetings on the public calendar at least 1 week before the meeting.

Upon request, any interested party will receive information on the probable participation and subject of Consumer Product Safety Commission meetings. Mailings to interested parties on a regular basis is the responsibility of the Office of Public Affairs. Prior notification via this means does not constitute prior arrangement for attendance or invitation. This is in effect a "prior" meeting log.

(d) *Specific policy.* Given the categories of meetings, recordkeeping of meetings, and prior notice of meetings set forth in paragraphs (a), (b), and (c) of this section, the Commission's policy regarding public notification and disclosure of meetings is as shown in the following table. Press and media meetings at any point within the Commission are excluded from this Commission policy due to the inherent public nature of those meetings.

Meeting category	Recordkeeping [1]				Prior notice		
	Meeting log	Meeting summary	Minutes	Transcript record	No prior notice	Public calendar	Federal Register notice
Hearings				X		X	X
Meetings of the Commission:							
Executive sessions			X [2]		X		
Closed sessions			X		X		
Open sessions			X			X	
Public sessions			X			X	X
Meetings of individual Commissioners	X	X [3]			X	X [3]	
Meetings of Commission staff and outside parties.	X	X [4]				X	X [3]
Meetings of the Commission's advisory committees.		X				X	X

[1] These are minimum requirements and do not preclude more detailed recordkeeping if appropriate in special cases.
[2] Required to substantiate official actions if taken.
[3] Required for all meetings (a) specified by any statute or act; (b) held with representatives of organizations concerning a matter pending before the Commission; or (c) concerned with any other matter of substantial interest.
[4] Required when prior notice of the meeting is given by publication in the Federal Register.

Notice and public procedure are not prerequisites to this promulgation because the regulation issued herein is a rule of agency procedures and practice.

Dated September 21, 1973.

SADYE E. DUNN,
Secretary, Consumer Safety Commission.

[FR Doc. 73-20705 Filed 9-28-73; 8:45 am]

APPENDIX D

CONSUMER PRODUCT SAFETY COMMISSION

PUBLIC PLAYGROUND EQUIPMENT

Notice of Meeting

This is to announce that on July 3, 1974, Ms. Elayne Butwinick, Washington, D.C., will meet with Mr. Bert Simson, Office of Standards Coordination and Appraisal, Consumer Product Safety Commission, to discuss the technical aspects of playground equipment and associated injury data. Ms. Butwinick petitioned the Commission on April 18, 1974, to initiate proceedings to develop mandatory safety standards for public playground equipment.

The meeting will be held in Room 828, Westwood Towers Building, 5401 Westbard Avenue, Bethesda, Maryland. Parties wishing to attend should notify Mr. Don Early, Office of Standards Coordination and Appraisal, Consumer Product

Safety Commission, Washington, D.C. 20207: telephone (301) 496-7197.
Dated: June 21, 1974.

SAYDE E. DUNN,
Secretary, Consumer Product Safety Commission.

[FR Doc. 74-14544 Filed 6-25-74; 8:45 am]

CONSUMER PRODUCT SAFETY COMMISSION,
Washington, D.C.

OFFICIAL MEETINGS LOG

Submitted by: R. E. Marcinkoski, June 27, 1974.
Date of Meeting: June 17, 1974.
Place of Meeting: Sears Tower, Chicago, Ill.
Commission Units Represented and Names of Participants: R. E. Marcinkoski, Stanley Parent, Judith Mermanson, Wayne Schiffelbein.

Noncommission Organizations or Groups Represented and Names of Participants: See attachment.

Issues Discussed, decisions made and action taken or planned: Visit was to observe and discuss experiences of Sears' in developing a system to deal with product safety problems and to exchange views on yet unresolved issues.

LOG OF MEETING

Subject: Discussion of testing facilities available for consumer product testing at McDonnell Aircraft Company, St. Louis, Missouri.

Date: July 11, 1974.

Place: Kansas City Area Office, 1125 Grand, Suite 1500, Kansas City, Missouri.

Log Entry Source: Allan R. Honer, Compliance Officer.

Commission Representatives: Mr. A'fred E. Lucas, Director; Mr. John Watkins, Section 15 Group, Office of the Executive Director; Mr. Harold E. Snyder, Supervisory Consumer Safety Officer; Mr. Allan R. Honer, Compliance Officer.

Non-Commission Representatives: Mr. Howard F. McKinney, Group Engineer, Laboratory, McDonnell Aircraft Company.

Summary of Meeting: Mr. McKinney visited the Kansas City Area Office to discuss the testing facilities available at the McDonnell Aircraft Company and how they could be used in the area of consumer product testing. The company is seeking to more fully utilize the facilities since the cut-back in space exploration. The company has conducted performance tests for manufacturers of commercial as well as consumer products, but until recently has not given a great deal of attention to the safety aspect of the products.

Mr. McKinney was advised to contact Mr. Richard Armstrong, Director of Engineering Services, to explore further the possibility of product testing for the Commission.

References: None.

APPENDIX E

CPSC PUBLIC CALENDAR

II. MEETINGS OF COMMISSION STAFF WITH OUTSIDE PARTIES

Week of July 22-28, 1974. (Updated July 17. Asterisks * indicate meetings for the week added since the previous calendar was published.)

July 22

* Stanley R. Parent, Special Assistant to the Chairman, meeting with Paul S. Jaffe, Special Assistant to Director of Consumer Affairs, Department of Transportation to discuss *the direction of future plans for consumer affairs.* (202) 634-7740.

Margaret Neily, Bureau of Engineering Sciences, meeting with William Clarke, of Galiher, Clarke, Martel and Donnelly, to discuss *clothing flammability standards.* (301) 496-7245.

July 23

Commissioner R. David Pittle meeting with Dennis Dix, Executive Director, Outdoor Power Equipment Institute (OPEI), to discuss sources of consumer *input into OPEI activities.* (202) 634–7726.

* Seth Kreimer, Assistant to Commissioner Pittle, meeting with Lester Lane, Committee on Economic Development to discuss the *economics of product regulation and CPSC in general.* (202) 634–7726.

Elizabeth Jones, Bureau of Compliance, and Al Castle and Ann Callahan, Bureau of Engineering Sciences, meeting with representatives of Carrousel Party Favors to discuss *banned toys.* (301) 496–7604.

George Anikis, William King, Bureau of Engineering Sciences, and other representatives of CPSC meeting with Delmont Thurber, National Chairman, National Conference of States Building Codes and Standards, to discuss *areas of cooperation between BES and NCSBCS.* (301) 496–7811.

* Michael Gidding, Bureau of Biomedical Science, meeting with Mario Bennett, Safety Packaging Corporation, to discuss *child resistant packaging.* (301) 496–7906.

* Bernard Schwartz, Office of Standards Coordination and Appraisal, meeting with Mrs. I. Lehman and Mr. E. H. Modlin, Spear and Hill, to discuss *the cap gun petition.* (301) 496–7606.

July 24

Commissioner R. David Pittle meeting at lunch with Emmett Hines, Armstrong Cork, to discuss *CPSC policy-making procedures.* (202) 634–7726.

Wayne Schiffelbein, Special Assistant to Commissioner Kushner, meeting at the Factory Mutual Research Laboratories in Norwood, Mass., with Raymond Friedman, Vice President, Director of Research, and Professor Howard Emmons, Harvard University to *observe an instrumented fire in a typical bedroom.*

William White, Director, Bureau of Information and Education, meeting with Fran Byrne and George Caples, 3M Company, to discuss the *bicycle safety information program.* (301) 496–7621

* John Thurber, Bureau of Engineering Sciences, Robert Frye and Floyd Oglesbay, Bureau of Epidemiology, Sidney Greenfeld, Office of Standards Cooperation and Appraisal, and John O'Connor and Carl Blechschmidt, Section 15 Team, meeting with Dannielle Prim, Henry Collins, and John Stevenson, Underwriters Laboratories, to discuss *curret leakage, accident data, 15b's, CPSC–UL relationships and investigation guide.*

* S. S. Morrow, Office of Standards Coordination and Appraisal, meeting with Robert Salzer, Attorney, to discuss *accidents associated with cigarette lighters.* (301) 496–7522.

*Charles Nicholls, Bureau of Epidemiology, meeting with Charles F. Williams Vice President—Product Safety Quality Assurance, Mattel Toys to discuss *in-depth studies of NEISS relating to aquariums and related equipment; costumes; sleeping bags, tents and tunnels (children's); and electric toys (ovens and irons)* (301) 496–7681.

July 25

*Carl Blechschmidt, Section 15 Team, and Elaine Besson, Office of the Executive Director, meeting with Norm Glickman, Childcraft, to discuss *new crib design.* (301) 496–7509.

*Irvin Weiss, Bureau of Biomedical Science, meeting with Dr. Peter Andrulis, Andrulis Research Corporation, to discuss *the needs and requirements of the Bureau in relation to the services his company can provide.* (301) 496–7766.

*William White and staff, Bureau of Information and Education, meeting with Jack Mauck, and Ken Stevens, Trans American Video, to *discuss transfer of film to video tape and new techniques.* (301) 496–7621.

*Donald Van Houten, Bureau of Engineering Sciences, will attend a meeting at the National Bureau of Standards, Lecture Room A, Building 101, Gaithersburg, Maryland, to discuss *format and content of data handbook being compiled by NBS and sponsored by CPSC.* The purpose of the handbook is to provide designers of consumer products with the available information regarding applicable standards, strength of children, anthropometrics, etc. (301) 496–7572.

*Bernard Schwartz, Office of Standards Coordination and Appraisal, meeting with Louis E. Ashley and Derek Till, Arthur D. Little, Inc., to discuss *safety standards for matches.* (301) 496–7606.

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*Bernard Schwartz, Office of Standards Coordination and Appraisal, meeting with Paul Oppelt, Canvas Products Association International, to discuss *flammability of tents petition.* (301) 496–7606.

*J. J. Donovan, Director, Boston Area Office, meeting with Messrs. Dodge, Bourgault and Wild, faculty at Worcester Polytechnical Institute, to discuss *product safety curriculum development at their university.*

July 26

*Walter Hobby, Bureau of Economic Analysis, meeting with George Kains and Mr. Lyman, Copper Development Association, to discuss *supply and demand for copper wiring for household branch circuits.* (301) 496–7934.

Week of July 29–August 4, 1974

July 29

Jo Simpson Whiteside, Consumer Affairs Specialist, New Orleans Area Office, meeting with Marica Marston of the Louisiana Conference of Social Welfare in Shreveport, Louisiana to discuss *planning for the regional product safety conference to be held in November.* (504) 527–6986.

July 31

William White and staff, Bureau of Information and Education, meeting with Phil Fisher and Bennie Dennis, Battelle Corporation, to discuss *their representation of a community research group responsible for preparation of training and education programming, film and video taping.* (301) 496–7621.

August 1

William Menza, Office of Standards Coordination and Appraisal, meeting with Hal Newell, Joseph Grife, and R. G. Waddell, Eaton Corporation, to discuss *safety and bicycle tire inflation.* (301) 496–7606.

PUBLIC CALENDAR, CONSUMER PRODUCT SAFETY COMMISSION

With this issue, the Public Calendar begins to implement the amended meetings policy which the Commission has proposed and adopted on an interim basis.

Under this amended policy, the Public Calendar becomes the primary means by which the Commission notifies the public of its day-to-day activities. The policy requires seven days advance notice for all meetings involving "substantial interest matters," between members of the Agency staff and outside parties. And exemption to this requirement is restricted to "extraordinary circumstances."

In addition, notices in the Calendar will now include information on the location of the meeting, and who requested the meeting. Meetings involving substantial interest matters will be divided from those at which non-substantial matters are discussed. Finally, unless noted, all meetings with outside parties are open, unless stated, and closed meetings are possible only under restricted conditions.

Notice of open meetings in the Calendar does not constitute prior arrangement for attendance or invitation. Arrangements for attendance at meetings held by Commission staff members may be made by calling the staff person whose number is listed. Arrangements for attendance at meetings of the Commission or Advisory Committee meetings may be made through the Office of the Secretary, telephone (202) 634–7700.

Copies of the Commission's proposed and interim amended meetings policy are available from the Bureau of Information and Education, Consumer Product Safety Commission, Washington, D.C. 20207.

Meeting of the Commission. November 22, 1974: 2:00 p.m., Sixth Floor Hearing Room, 1750 K Street, N.W., Washington, D.C. On the agenda is a briefing on motivational compliance. Further information is available from the Office of the Secretary, telephone (202) 634–7700.

Regular Monday Noon Meeting. Between Commissioners and interested members of the press, and informal, on-the-record discussion of CPSC matters; 6th floor hearing room, 1750 K Street, N.W., Washington, D.C. For information contact the Office of Public Affairs. This meeting is open to the public.

NEISS Briefing. 2:00 p.m., Thursday, Room 332, Westwood Towers Building, 5401 Westbard Avenue, Bethesda, Maryland; a slide-illustrated briefing on the National Injury Electronic Injury Surveillance System (NEISS), presented by

the Bureau of Epidemiology. Persons interested in attending should call in advance, (301) 496–7687.

Meeting of the Poison Prevention Packaging Technical Advisory Committee: November 12–13, 1974, Sixth Floor Hearing Room, 1750 K Street, N.W., Washington, D.C. The agenda for this meeting has not been established. Further information is available from the Office of the Secretary, (202) 634–7700.

Meeting of the Product Safety Advisory Council: December 9–10, 1974, Sixth Floor Hearing Room, 1750 K Street, N.W., Washington, D.C. No agenda has yet been set. Further information is available from the Office of the Secretary, (202) 634–7700.

MEETING OF STANDARDS DEVELOPMENT OFFERORS

Architectural glass.—The Consumer Safety Glazing Committee has set the following schedule of meetings. Further information is available from Jeff Keirns, Consumer Safety Glazing Committee, One Gateway Center, Pittsburgh, PA., 15222, telephone (412) 434–3315 or from Commission monitor Alan Ehrlich, (301) 496–7606. (Unless specified, all meetings are in Pittsburgh.)

Management Committee: November 21, December 5, December 9, January 21.

Risk of Injury Subcommittee: November 18–19 (CPSC Area Office, 1330 West Peachtree Street, Atlanta, Georgia), December 3, January 16.

Testing and Standards Subcommittee: November 12 (O'Hare Inn, Chicago), December 3, January 16.

Environmental and Economic Subcommittee: November 13 (O'Hare Inn, Chicago), December 3, January 16.

Power lawn mowers.—Information on Standards-development meetings is available from Bertram Strauss, Consumers Union, 256 Washington Street, Mount Vernon, N.Y. (914) 664–6400, or from Commission monitor Alan Ehrlich, (301) 496–7606.

Blade Contract Subcommittee: November 13 (O'Hare Airport's Seven Continents Restaurant, Chicago).

RECENT CONTRACT SOLICITATIONS

Vehicle Leasing.—November 8: In this solicitation, (CPSC–IFB–75–15), the Commission seeks bids for leasing of vehicles for six months under six (6) separate items. Solicitation closes 10:00 a.m. November 27, 1974. Further information is available from Jeffrey Nelson, Division of Contracts and Services, Consumer Product Safety Commission, Washington, D.C. 20027, telephone (301) 496–7353.

MEETINGS BETWEEN COMMISSION STAFF AND OUTSIDE PARTIES INVOLVING SUBSTANTIAL INTEREST MATTERS

(Updated November 6, 1974. Asterisks* indicate meetings for this week which appear for the first time in the Calendar)

November 11

Commission Chairman Richard O. Simpson, Executive Office and Bureau directors holding an open staff meeting to discuss rumors. No substantial interest matter is expected to be discussed. The meeting is at 9:00 a.m., Room 450 Westwood Towers Building, Westbard Avenue, Bethesda, Maryland.

November 12

*Robert Adler, Special Assistant to Commissioner Pittle, and Jerry Penno, Special Assistant to Commissioner Franklin, meeting with Dr. N. Greenberg, Chicago Lead Paint Poison Center. Dr. Greenberg requested the meeting, which is in Room 600, 1750 K Street, to present information developed about lead poisoning in children. (202) 634–7726.

Steve Joyce, Bureau of Compliance, meeting in the second floor conference room, Westwood Towers Building, with Gilbert Lessenco, attorney for Relco, Inc. for further discussion related to settlement in the matter of CPSC vs Relco, Inc. Mr. Lessenco requested the meeting. (301) 496–7611.

November 13

*Dr. Robert Hehir, Director, Bureau of Biomedical Science, meeting with Drs. Bruce Gorham and Mary Henry, IIT Research, at their request to discuss

IIT capabilities in studying toxicity of fumer from burning household products, and aerosol product toxicity. The meeting is at 4:00 p.m. in Room 712 Westwood Towers Building. (301) 496–7766.

*Donald R. MacKay, Office of Standards Coordination and Appraisal, meeting with the American National Standards Institute B71.3 Snow thrower Subcommittee, to discuss final revision of the ANSI standards. The meeting was called by the committee secretary, the Outdoor Power Equipment Institute, at O'Hare International Tower, Chicago.

November 14

Donald MacKay and Alan Ehrlich. Office of Standards Coordination and Appraisal, and Jon Shelton, Bureau of Engineering Sciences, meeting in Chicago with the Outdoor Power Equipment Institute (OPEI) to discuss development of the proposed standard for power lawn mowers under Section 7 of CPSA. OPEI requested the meeting.

*George Nichols, Office of Standards Coordination and Appraisal, meeting in Philadelphia, with representatives of the American Society for Testing and Materials, to discuss planning for ASTM's development of a book match standard under Section 7 of CPSA.

November 15

Commission Chairman Richard O. Simpson, Stan Parent, Special Assistant to the Chairman, General Counsel Michael A. Brown, Ron Aaron Esienberg, Director, Office of Public Affairs, Dr. Robert Hehir, Bureau of Biomedical Science, Richard Armstrong, Director, Bureau of Engineering Sciences, and repesentatives of the Office of Standards Coordination and Appraisal, meeting with Ellen Stern Harris, Los Angeles Times, at her request, to discuss why aerosol cans have not been banned. The meeting is at 1:00 p.m. in the 7th Floor Conference Room, 1750 K Street, N.W.

Elizabeth Jones, Bureau of Compliance, meeting with Steven Parker, an Attorney, to discuss a batteryless mechanism to be placed in toys. Mr. Parker requested the meeting, which is closed because proprietary information is to be discussed. (301) 496–7605.

*Joe H. Kim, Bureau of Engineering Sciences, meeting with Arnold Smoot and Arnold Martin at Underwriters Laboratories, Chicago, to discuss swimming pool electrical systems and standards. Mr. Kim requested the meeting.

November 18

Ron Aaron Eisenberg, Director, and Office of Public Affairs staff meeting with the Select Panel of the Advisory Committee Group on Product Hazard Warnings to discuss a draft policy on product hazard warnings. Mr. Eisenberg requested the meeting, which is in the Sixth Floor Hearing Rom, 1750 K Street, N.W. (202)

Julia Clones, Bureau of Economic Analysis, Bernard Schwartz, Office of Standards Coordination and Appraisal, and other operations staff, meeting in Room 801 Westwood Towers Building with Fred Shippee, American Apparel Manufacturers Association, Mr. Shippee requested the meeting to discuss data on apparel consumption. (301) 496–7934.

November 18–November 19

James Price, Robert Northedge, and Robert Yereance (consultant), Bureau of Engineering Sciences, and National Bureau of Standards personnel, meeting in Chicago with Steve Coen, Hank Collins, Harry Kuntzelmann, and Andy Farquhar, Underwriters' Laboratories, Inc., to view current test procedures and discuss UL's standards for television receivers. Mr. Northedge requested the meeting.

November 19

Richard W. Armstrong, Director, and Bureau of Engineering Sciences staff, meeting with Dr. Milton Gabrielsen, Nova University, F. Lauderdale, Fla., to discuss swimming pool hazards. The meeting, requested by Dr. Gabrielsen, is in Room 906, Westwood Towers Building, at 10:00 a.m. (301) 496–7051.

November 19–November 20

James Ryan, Office of Standards Coordination and Appraisal meeting with the National Materials Advisory Board, at the National Academy of Sciences, to

discuss fire safety aspects of polymeric materials. The meeting is closed at the Academy's request.

Walter Thomas Jr., Bureau of Engineering Sciences, attending a meeting of the American Association of Textile Chemists and Colorists, Belmont Hotel, New York.

November 20

Commissioner R. David Pittle meeting with Odonna Matthews, Giant Food, to discuss carpet quality and safety. The meeting, requested by Ms. Matthews is in Room 600 1750 K Street. (202) 634–7726.

Staff from the Office of Standards Coordination and Appraisal, Bureau of Engineering Sciences and Bureau of Epidemiology meeting with representatives of the American Gas Association and the Gas Appliance Manufacturers Association, to discuss space heaters. The meeting, requested by the Associations, is in room 450, Westwood Towers Building. Further information is available from Harvey Tzuker, (301) 496–7197.

SPEAKING ENGAGEMENTS, PARTICIPATION IN SEMINARS OR CONFERENCES, AND MEETINGS BETWEEN COMMISSION STAFF AND OUTSIDE PARTIES NOT INVOLVING SUBSTANTIAL INTEREST MATTERS

November 11

Commissioner R. David Pittle speaking on CPSC at a luncheon for Department of Agriculture Executives, in Washington.

William White, Director, Bureau of Information and Education, speaking in Milwaukee to students at Marquette University on product safety.

Robert W. Kilpatrick, Boston Area Office, speaking to a group of mothers at the Boston Public Library about CPSC.

November 12

Commission Chairman Richard O. Simpson addressing the Wisconsin Manufacturers Association, in Milwaukee.

Ron Aaron Eisenberg, Director, Office of Public Affairs, participating in a panel on "Public Relations and the CPSC" at the 27th National Conference of the Public Relations Society of America, Bal Harbour, Florida.

William White, Director, Bureau of Information and Education, speaking in Milwaukee to the Wisconsin Manufacturers Association on CPSC public announcements.

George P. Clarke, Philadelphia Area Office, videotaping a presentation for an Off-the Job Safety Program, at Dupont's Marshall Laboratory, Philadelphia, Pa.

Renea Anita Austin, Philadelphia Area Office, making a Toy Safety presentation to the Jackson Elementary School PTA, Bellvue, Pa.

Robert W. Kilpatrick, Boston Area Office, participating in "Consumer Day" in Burlington, Vermont with FDA and FTC.

Maria Juarique, Los Angeles Area Office, speaking at Monterey-Vista School, Monterey Park, Calif., on toy safety.

*Deputy Executive Director Albert S. Dimcoff; Roger Feldman, Acting Director, and Irv Greif, Office of Resource Utilization, meeting in New York with Ed Koralis, American Federation of Government Employees (AFGE) to discuss labor-management relations in the New York Area Office.

*Dr. Robert Verhalen, Director, Bureau of Epidemiology, speaking on CPSC at the Annual Ladies Night Meeting of the American Society for Quality Control, in Pittsburgh.

*Phyllis Buxbaum, Bureau of Compliance, meeting in Room 216 Westwood Towers Building with Meredith McCoy, George Washington University Law School, for a general discussiion of Flammable Fabrics Act enforcement, requested by Ms. McCoy. (301) 496–7641.

Dr. Robert Hehir, Director, Bureau of Biomedical Sciences, meeting in Room 712 Westwood Towers Building, with Drs. Nat Gordon and Ray Foscante, Midwest Research Institute (MRI) to discuss MRI capabilities in the polymer, plastics and fire-retardant chemicals field. MRI requested the meeting.

*Raymond Benson, Philadelphia Area Office, speaking on "Campground Dealer Responsibilities under the CPSA" before the Pennsylvania Recreation Vehicle and Camping Association, Host Inn, Harrisburg, Pa.

November 13

Commission Chairman Richard O. Simpson speaking on "openness" at the Federal Bar Association's General Counsel's Committee meeting, in Washington.

Commissioner Barbara Hackman Franklin will deliver the keynote speech at the first annual Washington Governor's Conference on Consumer Product Safety on November 13, 1974 in Seattle, Washington.

Joan L. Bergy, Director, Jerry M. Bjork and Irene M. Barrett, Seattle Area Office, participating in the Washington State Governor's Conference on Consumer Product Safety, Seattle.

Sidney F. Ascher, New York Area Office, delivering the keynote address at a seminar on bicycle safety at Fairleigh Dickinson University, sponsored by the NJ State Safety Council, the State Department of Health and the New York Area Office.

Anthony Merolla, New York Area Office, presenting an overview of CPSC at Fordham University School of Law, New York.

Robert W. Kilpatrick, Boston Area Office, speaking to a group from the Eastern Mass. Home Economics Teachers in Burlington, Mass., about CPSC in general.

William Brockman, Kansas City Area Office, speaking to representatives of the American Telephone and Telegraph Company, Kansas City, Missouri, on toys, household products, electrical appliances, and hand tools.

*William White, Director, Bureau of Information and Education, meeting in Room 738 Westwood Towers Building with Murray Sparks and Al Maxfield, United States Testing Co., who requested the meeting, to discuss consumer use and misuse of products. (301) 496–7621.

*Arthur D. McIntire, Bureau of Information and Education, meeting with Bill Gallagher, RHR Film Media, Inc., to discuss distribution of audio-visual materials for CPSC. The meeting, requested by Mr. Gallagher, is in Room 756, Westwood Towers Building, at 11:30 a.m. (301) 496–7621.

November 14

General Counsel Michael A. Brown addressing the Practicing Law Institute on Section 15—Substantial Product Hazards, at the forum on Developing Trends Under CPSA, in New York.

Samuel M. Hart, Director, Chicago Area Office, speaking to the Lake Michigan Group of the Paperboard Packaging Council.

Seattle Area Office hosts the CPSC Area Conference for CPSC State Designees, State officials, and other interested participants to be held in Conference Room, Seattle Area Office.

Judith E. Stone, Chicago Area Office, training consumer deputies, Bradley University, Peoria, Illinois.

William Brockman, Kansas City Area Office, speaking at the Northbound Preschool Mothers' Club, Parkville, Missouri on toy safety and CPSC in general.

Maria Juarique, Los Angeles Area Office, speaking on toy safety to the American Association of University Women, La Habra, California.

Jo Simpson Whiteside, New Orleans Area Office, speaking on CPSC at the Regional Meeting of the American Society for Quality Control, Little Rock, Arkansas.

*Walter R. Hobby, Acting Director, Bureau of Economic Analysis, meeting with Professor Blair C. Burgess, Hahnenan Medical College, Philadelphia, to discuss possible reliability, safety and cost benefit studies. Professor Burgess requested the meeting, which is in room 909, Westwood Towers Building, at 10:30 A.M. (301) 496–7934.

Dr. Robert Hehir, Director, and Dr. Joseph McLaughlin, Bureau of Biomedical Sciences, and Wayne Schiffelbein, Special Assistant to Commissioner Kushner, meeting at the National Bureau of Standards with Drs. Warner Dietrich and Brock Hagen, Bayer Co. (Germany), Bill Darr, Mobay Co., and Dr. Merritt Birky, NBS (who requested the meeting), to discuss flammability/toxicology studies. (301) 496–7766.

*Beveraly Puckett, Atlanta Area Office, training consumer deputies, at the Sandy Springs Junior Woman's Club, Atlanta, Georgia.

*Carol Young, Atlanta Area Office, speaking to the annual Atlanta Federal Safety Council Seminar on the Consumer Product Safety Commission, Atlanta, Georgia.

November 15

Commissioner Lawrence M. Kushner addressing the Practicing Law Institute Forum on eveloping rends Under CPSA, in New York.

Commissioner Constance Newman addressing Woodward and Lothrop's Executives Meeting in Washington on retailer responsibilities under CPSA and HSA, and an overview of the Commission.

Robert W. Kilpatrick, Boston Area Office, speaking to a home economics class at the University of Connecticut about CPSC.

*James Brodsky, Special Assistant to Commissioner Newman, meeting for lunch with Ed Cohen, Senate Commerce Committee staff, to discuss CPSC in general. Mr. Cohen requested the meeting. (202) 634–7790.

*William White, Director, Bureau of Information and Education, meeting in room 738, Westwood Towers Building, with Thomas Cook, Manoff International, at Mr. Cook's request, to discuss advertising ideas for the Commission. (301) 496–7621.

*Jesse C. Stanley, Boston Area Office, speaking on toy safety at a meeting of the IRS Federal Women's Program, J. F. Kennedy Federal Building, Boston.

November 18

Commissioner R. David Pittle, Robert Adler and Janne Gallagher, Special Assistants to the Commissioner, meeting for lunch with Michael Pertschuk and Ed Cohen, Senate Commerce Committee staff, to discuss CPSC in general. Commissioner Pittle requested the meeting. (301) 634–7726.

Dr. Robert Hehir, Director, Bureau of Biomedical Science, meeting with H. K. Raaschou Nielsen, Scandinavian Paint and Printing Ink Research Institute, Copenhagen, Denmark, to discuss CPSC activities in general. Mr. Nielsen requested the meeting, which is in room 712, Westwood Towers Building.

Sidney F. Ascher, New York Area Office, meeting with consumer information staff, J. C. Penney Co., New York, to discuss industry development of consumer education material. The firm requested the meeting.

Beverly Puckett, Atlanta Area Office, speaking on Holiday Safety to employees of American Telephone and Telegraph Co., Atlanta, Georgia.

Kenneth Thompson, Philadelphia Area Office, speaking on toy safety to the Tomorrow's Hope Chapter, Child Study Association of Maryland, in Baltimore.

Jesse C. Stanley, Boston Area Office, speaking on toy safety to the Globe Park School Guild, Woonsocket, Rhode Island.

November 18–23

Robert E. Frye, Bureau of Epidemiology, attending the National Fire Protection Association meeting in Seattle, Washington.

November 19

Commissioner Lawrence M. Kushner participating in a seminar on the CPSA at the Institute for Effective Management, O'Hare International Tower, Chicago.

Dr. Robert Verhalen, Director, Bureau of Epidemiology, meeting with Norman Pugh, Sears Roebuck Laboratories, to discuss NEISS data as it applies to Section 7 proceedings. Mr. Pugh requested the meeting, which is in room 332, Westwood Towers Building. (301) 496–7681.

Beverly Puckett, Atlanta Area Office, speaking on toy safety to the Forest Hills Elementary School PTA, Atlanta.

David Arthur, Atlanta Area Office, speaking on CPSA and the Flammable Fabrics Act to hospital administrators at the Hospital Research and Testing Institute, Charlotte, N.C.

Robert Kilpatrick, Boston Area Office, speaking on toy safety to students at Oxford, Mass., High School.

John Locke, Boston Area Office, speaking on flammable fabrics and burn prevention to students at the University of Rhode Island. The speech is sponsored by the Students Engineering Council and the American Association of Textile Chemists and Colorists.

Kathy Melcher, Kansas City Area Office, speaking on toy safety to the All Saints Women's Afternoon Guild, Kansas City, Mo.

November 20

Commissioner Barbara Hackman Franklin will deliver the luncheon address on Wednesday, November 20, 1974, during "The Woman as Consumer," a national conference at Louisiana State University in Baton Rouge. Commissioner Franklin's topic is "What Women Can Do for Safer Products".

Jerry Penno, Special Assistant to Commissioner Franklin, will speak on the Consumer Product Safety Act before a class at Temple University Law School in Philadelphia.

Alfred Lucas, Director, Kansas City Area Office, speaking on CPSC and NEISS at the Northwestern Bell's Annual Home Safety Show, Des Moines, Iowa.

Robert W. Kilpatrick, Boston Area Office, speaking on CPSC to the Fitzgearld School PTA, Cambridge, Mass.

Beverly Puckett, Atlanta Area Office, training Consumer Deputies in Pensacola, Florida.

James Knight, Los Angeles Area Office, speaking on toy safety to students at Taper Avenue School, San Pedro, California.

Kenneth Thompson, Philadelphia Area Office, speaking on toy safety to parents at York School, Baltimore, Md.

November 21

Maria Juarigue, Los Angeles Area Office, speaking on CPSC to the Credit Women's Club, Los Angeles.

Kenneth Rashid, Bureau of Information and Education, meeting with Mr. Howell, American Red Cross, to discuss consumer education programs.

November 22

Vincent J. Rocque, Special Assistant to Commissioner Franklin, will meet with Mr. Sam Addis, Aluminum Company of America, to discuss new technical developments regarding non-detachable openings on beverage cans, at Mr. Addis' request, in Room 600, 1750 K Street.

Bert Simson, Office of Standards Coordination and Appraisal, attending the American Swimming Pool Association swimming pool exhibit at the Americana Hotel, New York.

Robert Kilpatrick, Boston Area Office, speaking on toy safety at the Jamaica Plain Branch, Boston Public Library.

* * * * * * *

ADDENDUM

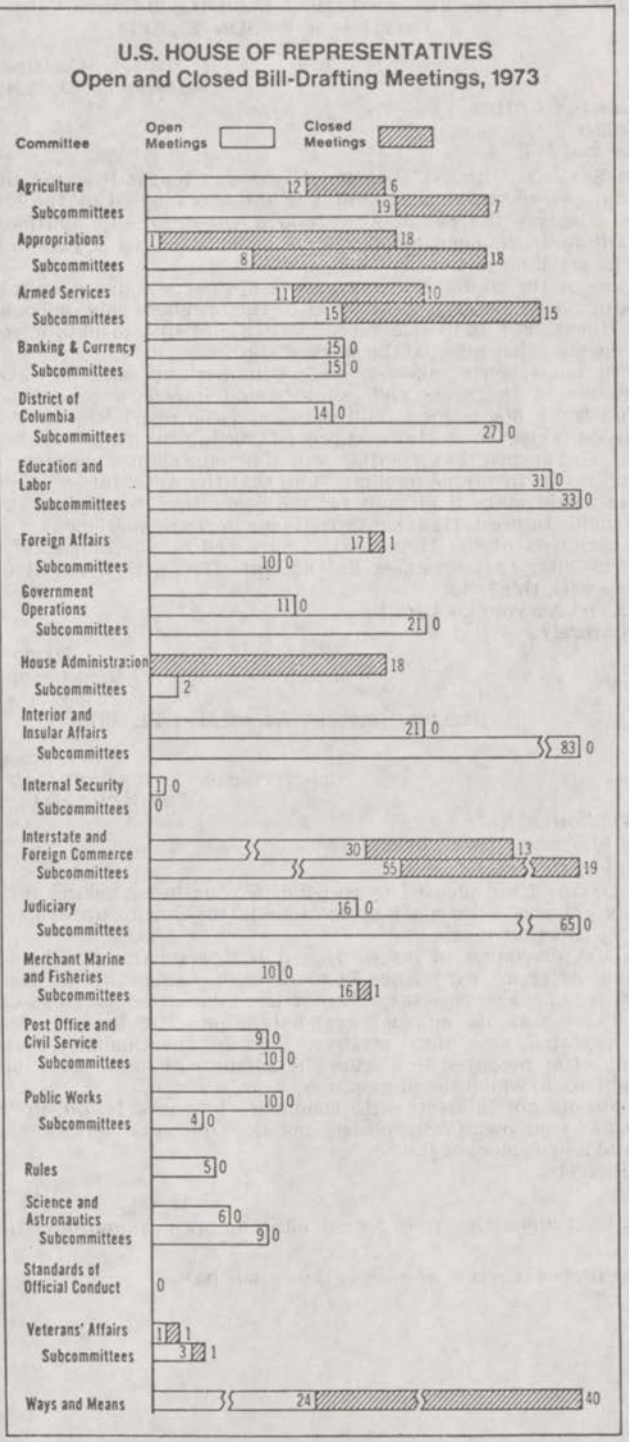
October 30

Notice of Cancellation: Executive Director Frederick Barrett's speech to the Safety Council of Greater St. Louis was cancelled.

November 6

Executive Director Frederick Barrett and members of CPSC's Operations Staffs met with Chester Giemak, Chief Executive Office, Kemp Shredder Company to discuss possible hazards of Kemp Shredders. (301) 496–7601. The meeting was requested by the Commission.

APPENDIX F


U.S. HOUSE OF REPRESENTATIVES
Open and Closed Bill-Drafting Meetings, 1973
Committee
Open Meetings
Closed Meetings
Agriculture 12 6
Subcommittees 19 7
Appropriations 1 18
Subcommittees 8 18
Armed Services 11 10
Subcommittees 15 15
Banking & Currency 15 0
Subcommittees 15 0
District of Columbia 14 0
Subcommittees 27 0
Education and Labor 31 0
Subcommittees 33 0
Foreign Affairs 17 1
Subcommittees 10 0
Government Operations 11 0
Subcommittees 21 0
House Administration 18
Subcommittees 2
Interior and Insular Affairs 21 0
Subcommittees 83 0
Internal Security 1 0
Subcommittees 0
Interstate and Foreign Commerce 30 13
Subcommittees 55 19
Judiciary 16 0
Subcommittees 65 0
Merchant Marine and Fisheries 10 0
Subcommittees 16 1
Post Office and Civil Service 9 0
Subcommittees 10 0
Public Works 10 0
Subcommittees 4 0
Rules 5 0
Science and Astronautics 6 0
Subcommittees 9 0
Standards of Official Conduct 0
Veterans' Affairs 1 1
Subcommittees 3 1
Ways and Means 24 40

APPENDIX G

LETTER SENT TO SENATOR CHILES FROM DAVID COHEN [1] AND REPLIES RECEIVED AS OF MAY 21, 1974

COMMON CAUSE,
Washington, D.C., April 18, 1974.

Hon. LAWTON CHILES
U.S. Senate
Washington, D.C.

DEAR SENATOR CHILES: Common Cause has long advocated that the Senate adopt an open meetings rule similar to the one adopted by the House in March 1973. We believe the Senate Government Operations Committee has taken an important and commendable initiative in establishing a presumption of openness in its mark-up sessions.

Because of the claims that open mark-ups carry some potential problems, we have been closely observing the effect of the openness rule on committee activity in the House. For the same reason, we would like to obtain your evaluation of how openness has affected the work of your committee.

As you know, some opponents of open mark-up sessions have argued that the presence of the press and public would impede a committee's work, that open and frank discussion would cease, and the real business of the committee would be done elsewhere. Has that proved true in your experience?

It was also argued that meetings would become shams, characterized by grandstanding to win favorable publicity, and that the watchful eye of special interest lobbyists would make it difficult for the committee to legislate in behalf of the general public interest. Has that proved true in your experience?

Most members of the House, when surveyed on the impact of the new rule, shared the view that openness did not interfere with committee business. Do you agree with this?

Thank you for your cooperation.

Sincerely,

DAVID COHEN,
Director of Operations.

REPLIES RECEIVED AS OF MAY 21, 1974

U.S. SENATE,
COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C., May 7, 1974.

Mr. DAVID COHEN,
Director of Operations, Common Cause,
Washington, D.C.

DEAR DAVID: I am pleased to respond to your letter asking for my views on having experienced open mark-up sessions in the Senate Government Operations Committee this past year.

You know, of course, of my own deep and personal commitment to openness legislation. After my experience in the Florida Legislature with a similar law, this past year held no real surprises for me. Committee meetings did not become shams. There was no unusual grand-standing. The impact of the openness rule, if anything, was quite positive. That is, the Committee members were, I believe, better prepared to discuss the business at hand, knowing there might be an audience to watch the proceedings.

Openness did not interfere with committee business. It did, in fact, facilitate it. As one of your own press releases put it, "Openness works!" I am convinced all we need now is more of it.

Sincerely,

LAWTON CHILES.

P.S.—What about the study for my effort to open up appropriations? L.C.

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[1] Similar letter was sent to members of three committees.

U.S. SENATE,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C., April 24, 1974.

Mr. DAVID COHEN,
Director of Operations, Common Cause,
Washington, D.C.

DEAR MR. COHEN: This responds to your letter of April 18 concerning open mark-up sessions on our committee.

In my opinion our experience of the new policy for the last year indicates the following:

1. It is more difficult and time consuming to arrive at a consensus and consequent committee action than it was in the closed session days.

2. While open and frank discussion continues to occur and the real business of the committee is still done in the mark-up sessions such discussion is not of the same quality as before. Individual and party positions are more likely to be worked out beforehand and more or less "set in concrete" at the markup.

3. There is a certain amount of grandstanding and speaking for publication.

4. The audiences are almost invariably balanced, with full press coverage, and I can discern no greater committee difficulty in attempting to legislate on behalf of the general public interest. The question, as always, is *what is* the general public interest.

5. The advantages include that public, administration, and special interest groups are immediately apprised of new formulations and point out to staff and committee members any pitfalls which may appear. Such observation has several times been a benefit to the committee and to the general public interest.

I have not yet determined to my own satisfaction whether the disadvantage of the extra time required in an already burdensome schedule and the other disadvantages mentioned above are outweighed by the obvious popularity of the move.

Sincerely,

PAUL FANNIN,
U.S. Senator.

U.S. SENATE,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C., May 16, 1974.

Mr. DAVID COHEN,
Director of Operations, Common Cause,
2030 M Street NW., Washington, D.C.

DEAR MR. COHEN: Thank you very much for your letter on behalf of Common Cause with regard to open mark-up sessions of the Senate Interior and Insular Affairs and Banking, Housing and Urban Affairs Committees. Through my experience as a member of these committees, I have found that the openness has not interfered with our ability to conduct committee business. Indeed, I believe that the open sessions have worked very well, and I am hopeful that this practice will be adopted by other committees in the future.

With kindest regards,

Sincerely,

J. BENNETT JOHNSTON,
U.S. Senator.

U.S. SENATE,
Washington, D.C., April 25, 1974.

Mr. DAVID COHEN,
Director of Operations, Common Cause,
2030 M St., NW., Washington, D.C.

DEAR DAVE: As a member of the Senate Interior Committee I welcome the opening of markup sessions and I have found that public interest is much better served by opening committee meetings.

I am advocating the same thing in the other committees on which I serve and would welcome your help.

With best personal regards.

Sincerely,

JAMES ABOUREZK,
U.S. Senate.

U.S. SENATE,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C., April 29, 1974.

MR. DAVID COHEN,
Director of Operations, Common Cause,
Washington, D.C.

DEAR MR. COHEN: Thank you for your letter on the open meetings rule.

I do not think that this is an entirely black and white issue and I do not suspect the motives of those who wish to hold meetings and markups in private. I strongly suspect that many of their misgivings are well founded and I have served long enough in the Congress to know that openness and honesty are not necessarily identical.

On balance, however, I think the argument for open hearings is the stronger. We are elected to do the business of the citizens of the several states whose tax money pays for the accomplishments of this business. In all fairness, the public should be able to scrutinize the manner in which this is done as well as the end result.

I therefore have supported and will continue to support legislation proposing open mark ups.

Sincerely,

JAMES A. MCCLURE,
U.S. Senator.

U.S. SENATE,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C., May 7, 1974.

DAVID COHEN,
Director of Operations, Common Cause,
Washington, D.C.

DEAR MR. COHEN: Thank you for your recent inquiry in regard to the open mark-up sessions of the Senate Interior and Insular Affairs Committee.

Frankly, at times the presence of press and public has impeded the Committee's work. It takes more time in an open session to conduct business. Some issues on occasion have been resolved before the mark-up sessions. However, this is rare.

There has been some grandstanding in the open sessions. This can be expected in the political arena, especially from Presidential aspirants.

The attendance of special interest lobbyists does not make it impossible to legislate in behalf of the general public. The general public is well represented by the Congress.

Despite the problems with the openness rule, I feel that the public and press should be entitled to know how the Committee conducts its business. I would generally recommend it to other Committees.

Sincerely,

CLIFFORD P. HANSEN,
U.S. Senator.

U.S. SENATE,
COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C., May 15, 1974.

DAVID COHEN,
Director of Operations, Common Cause,
Washington, D.C.

DEAR DAVID: A brief response to your letter of April 18th is that openness works is the Senate Government Operations Committee. As Ranking Republican member of the Committee I strongly supported opening all of our meetings to the public. My personal view, a view that I believe is shared by the majority of members of the Committee, is that open meetings have improved our Committee's operation. I personally am proud of the quality of our Committee's discussions. I am pleased that the public has the opportunity to know that this Committee is a dedicated Committee of Senators committed to through, frank discussion of the issues in the legislation we report.

I strongly favor a requirement that meetings of every committee of the Congress be open to the public. In my view that is one major way in which to help give the public confidence in our legislative institutions.

Sincerely,

CHARLES H. PERCY,
U.S. Senator.

U.S. SENATE,
COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C., April 26, 1974.

Mr. DAVID COHEN,
Director of Operations, Common Cause,
Washington, D.C.

DEAR DAVE: Thank you for your letter of April 18 requesting my views about the viability of open mark-up sessions.

As you know, I am a strong supporter of opening mark-up sessions to the public. Every business meeting of the Government Operations Committee in this Congress has been open to the public, and it is my belief that the quality of the work done at those meetings has not been impaired.

In answer to your specific questions, I have not found that opening up mark-up sessions has impeded the Committee's work, has curtailed frank discussion, and has caused the real business of the Committee to be done elsewhere. I have also found that our meetings have not been characterized by Senators grandstanding to win favorable publicity. I know of no case where opening up the meeting has interfered with the Committee business.

Recently I have made two statements in support of the concept of opening up the activities of Congress to more public scrutiny. The first was testimony I gave before the Joint Committee on Congressional Operations. The second was a statement I made on the Senate floor in support of Senator Chiles' amendment to open mark-up sessions of the new Senate Budget Committee—an amendment for which you lobbied so effectively. I am enclosing both of those statements and I am hopeful that they will be helpful to you.

I might add that the progress that has been made toward opening up the activities of Congress over the past two years has been due in large part to the hard work of your organization.

With very best wishes, I am

Sincerely,

EDMUND S. MUSKIE.

U.S. SENATE,
WASHINGTON, D.C.
April 22, 1974.

Mr. DAVID COHEN,
Common Cause,
Washington, D.C.

DEAR MR. COHEN: I have your letter of April 18 asking for my evaluation of the effect of the open mark-up rule on the business conducted during this Congress in the Committee on Banking, Housing and Urban Affairs.

I am glad to have been involved in the effort that was made at the beginning of this Congress to enact an open mark-up rule applicable to all Senate committees. As you may recall, when that effort failed, I offered the proposal that the Banking Committee modify its rules so as to permit open mark-ups.

I was of course pleased that that effort was successful and have been even more pleased with the results. To my knowledge, open mark-ups have not prompted Members of the Banking Committee to hold any secret caucuses or other behind-the-scenes discussions. On the contrary, it is my judgment that the rule has greatly facilitated the Committee's conduct of its business by providing Members with a new incentive to attend mark-ups, and to be well prepared to participate in the Committee's deliberations. I am firmly convinced that these advantages far outweigh any negative effects of the change from closed to open mark-ups.

I am glad to hear that your survey of House Members indicates that a majority of them believe that openness does not interfere with Committee business. I am confident that a majority of the Members of the Committee on Banking, Housing and Urban Affairs feel the same way. I will continue to do all that I can to persuade a majority of my colleagues to adopt that point of view—and vote accordingly the next time the issue is presented to the full Senate.

Sincerely,

ADLAI E. STEVENSON III.

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS,
Washington, D.C., May 13, 1974.

Mr. DAVID COHEN,
Director of Operations,
Common Cause,
Washington, D.C.

DEAR DAVID: I am in receipt of your letter dated April 18, 1974, concerning the open markup sessions that the Senate Government Operations and Banking, Housing and Urban Affairs Committees have been holding.

I feel that these sessions have not been affected adversely by openness. In fact, I think that the Senators have performed as well as, if not better than, those private markup sessions I have been a part of.

In other words, openness has not interfered with Committee business.

I have taken a very strong stand for openness throughout the Congress and hopefully the full Senate will adopt an openness rule at the beginning of the next Congress. Your consistent stand on openness is very much appreciated.

Very truly yours,

BILL BROCK.

U.S. SENATE,
Washington, D.C., May 6, 1974.

Mr. DAVID COHEN,
Director of Operations, Common Cause,
Washington, D.C.

DEAR MR. COHEN: This is in reply to your inquiry about my experience concerning markups in my committees.

Frankly, I was quite skeptical and reluctant to support open markup last year but on the basis of my experience in the Senate Banking, Housing and Urban Affairs Committee, my own attitudes have changed in favor of the additional openness in the Committee and I am now persuaded that this an appropriate and useful procedure.

My other major committee, the Armed Services Committee, of course, continues to be complicated by executive sessions because of the classified nature of much of its discussions.

Sincerely,

THOMAS J. MCINTYRE,
U.S. Senator.

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS,
Washington, D.C., May 8, 1974.

Mr. DAVID COHEN,
Director of Operations, Common Cause,
Washington, D.C.

DEAR MR. COHEN: Thank you for your recent request concerning my assessment of the impact of conducting open mark-up sessions by the Senate Committee on Banking, Housing and Urban Affairs. As you know, I strongly supported open mark-up sessions because I believe the public has a basic right to know what is going on and I can see little justification for conducting these sessions in secret.

I believe the open mark-up sessions conducted by the Senate Committee on Banking, Housing and Urban Affairs have enabled the press and others to gain a greater appreciation of the legislative process. At the same time, I have detected no appreciable difference in the behavior of the Committee members during open mark-up's. It is my impression that our Committee members engage in the same free and open discussion in open sessions as they did previously during closed sessions. Moreover, none of the adverse consequences predicted by open mark-up opponents appear to have materialized. I have noticed no increase in "grandstanding" by Committee members, nor do I feel that open mark-up's have become shame to ratify decisions already made in private.

I trust these observations will be useful to you.

Sincerely,

WILLIAM PROXMIRE,
U.S. Senator.

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS,
Washington, D.C., April 23, 1974.

MR. DAVID COHEN,
Common Cause,
Washington, D.C.

DEAR MR. COHEN: Thanks for your letter of April 18th. I am glad to have your request for my reaction to the open committee mark-up sessions.

I believe the Senate Banking, Housing and Urban Affairs Committee was the very first one to adopt a rule of complete openness in our meetings with the single exception of action on confirmation of appointees.

I must say that in the beginning I had some misgivings as to how open mark-up sessions would operate. I did feel that it might have a restraining effect on open discussion that is so necessary in getting a consensus in the committee. However, I went along with it, and I have been pleased to note that it has not restrained or restricted our operations in any way. Our discussions are open and frank, just as if no others were in the committee room other than our committee members. I have been pleased with the result.

Sincerely,

JOHN SPARKMAN.

APPENDIX H

OPEN MEETINGS REQUIREMENTS IN THE STATES

1. The "State Open Meetings Laws" chart was prepared on the basis of a survey of constitutions, statutes, and legislative rules as of mid-May, 1974. In many cases where these provisions were ambiguous, Common Cause interpretations were checked with officials in the states. Except where other provisions are cited, the information relates to the comprehensive statute cited.

2. Open Meetings Testimonials from Iowa and Pennsylvania Legislators.

STATE OPEN MEETINGS LAWS

State	Alabama	Alaska	Arizona
Law	Title 14, ch. 70, sec. 393	Sec. 44.62.310	Sec. 38-431.
Coverage:			
State	Yes	Yes	Yes.
Local	Yes	Yes	Yes.
Executive branch	Yes	Yes	Yes.
State legislature	No	No	No (except House, but not its committees).
Advisory bodies	No	Yes	No.
Exceptions	Discussion of character of individual.	(1) Affect finances. (2) Character of individual. (3) Matters required by law to be confidential; must first convene as public meeting.	(1) Where no legal action taken. (2) Employment or dismissal of employee. (3) Required by Federal regulation; requires majority vote.
Notice	No	Yes—"Reasonable public notice."	No.
Minutes	No	No	No.
Enforcement:			
Sanctions	Misdemeanor (not more than $500).	None	Misdemeanor (not more than $100 or 30 days or both).
Voidability	No	Void action	Void action.
Citizen standing			Yes.
Legislature:			
Floor	Constitution (art. 4 sec. 57): Open unless House determines that secrecy is required.		May have executive session by majority vote on business that requires secrecy (by rule).
Committees	Open by practice with certain important exceptions (e.g., rules committees and work on appropriations bills).	Open by rule with same exceptions as in State law.	Open by practice (rules allow executive sessions).
Party caucuses	No party caucuses	Closed	House caucuses for discussion of nonpolicy matters.

	Arkansas	California	Colorado
Law	Sec. 12-2801	Sec. 11120 Government Code	3-33-1.
Coverage:			
State	Yes	Yes	Yes.
Local	Yes	Yes (title 5 division 2 ch. 9).	Yes (3-19-1).
Executive branch	Yes	Yes	Yes.

STATE OPEN MEETINGS LAWS

State	Arkansas	California	Colorado
State legislature		Note: Low opening legislative meetings subject to constitutional amendment on ballot in June 1974.	Yes.
Advisory bodies	Yes (if supported in whole or in part by public funds).	No	No.
Exceptions	Discuss individual public officer or employee.	(1) Employee. (2) Prepare and grade licensing exams. (3) Administrative adjudications. (4) National security. (5) Parole. (6) Tax returns. (7) Gifts and degrees. (8) Collective bargaining (also several specific exemptions for specific agencies).	As provided in constitution.
Notice	Yes	Yes	Yes.
Minutes	No	No	Yes.
Enforcement:			
Sanctions	Misdemeanor (not more than $200 or 30 days or both).	None	No.
Voidability	Not valid action	No	Not valid action.
Citizen standing	Yes	Yes	Yes.
Floor	Constitution (art. 5 sec. 13): Open unless business ought to be secret.	Constitution (art. 4 sec. 7): Open unless business ought to be secret.	Constitution (art. 5 sec. 14): Open unless business ought to be secret.
Legislature:			
Committees	Open by House rule; Senate open by practice.	Open by rule unless majority vote.	Open by statute.
Party caucuses	Seldom have party caucuses	Generally closed	Open.

	Connecticut	Delaware	Florida
Law	Section 1-21	29 section 5109	Section 286.011.
Coverage:			
State	Yes	Yes	Yes.
Local	Yes	Yes (boards and commissions).	Yes.
Executive branch	Yes	Yes	Yes.
State legislature	No	No	Yes (attorney general's opinion).
Advisory bodies	Yes	Yes	Yes (Supreme Court).
Exceptions	Executive sessions upon majority vote.	Where no business is transacted.	(1) As provided in constitution, (2) when official acts are not taken.
Notice	Yes	No	No.
Minutes	Yes	No	Yes.
Enforcement:			
Sanctions	None	None	Misdemeanor (not more than $500 or 6 months or both).
Voidability	No	No	Not binding action.
Citizen standing	No	No	Yes.
Legislature:			
Floor	Constitution (art. 3 section 16): Open unless House determines secrecy is required.	Constitution (art. 2 section 11): Open unless business is such as ought to be kept secret.	Constitution (art. 3 section 4(b)): Open except Senate sessions considering appointment to or removal from public office.
Committees	Open by practice	Open by rule unless chairman calls executive session at which no official action may be taken—open by practice.	Open by statute.
Party caucuses	Closed	Closed and important	Democrats open; Republicans generally open.

	Georgia	Hawaii	Idaho
Law	Section 40-3301	Section 92-1	No.
Coverage:			
State	Yes	Yes	No.
Local	Yes	Yes	Open on final action, (sec. 59-1024).
Executive branch	Yes	Yes	No.
State legislature	Yes (Harvey v. Maddox) (1974.)	Yes	No.
Advisory bodies	No	Yes	No.
Exceptions	(1) Where official action not taken. (2) Investigations. (3) Acquisition of real estate. (4) Appointment, employment, etc. of public officer or employee. (5) Protect attorney-client privilege (laws in conflict repealed).	Upon ⅔ recorded vote (except no final action may be taken in executive session).	

STATE OPEN MEETINGS LAWS

State	Georgia	Hawaii	Idaho
Notice	No	No	No.
Minutes	Yes	Yes	No.
Enforcement:			
Sanctions	Misdemeanor (not more than $100).	None	No.
Voidability	Not binding action	No	No.
Citizen standing	Yes		No.
Legislature:			
Floor	Open by State statute		Open by Constitution (art. III, sec. 12).
Committees	Open by State statute	House: Open by rule unless discussion could unfairly damage reputation of individual. Senate: Open by rule unless otherwise ordered by Senate.	Senate rule: Executive session by majority vote; House rule: executive session by ⅔ vote but may not take official action.
Party caucuses	Generally closed	Generally closed	Closed and important.

	Illinois	Indiana	Iowa
Law	Ch. 102, sec. 41	Sec. 57-601	Ch. 28A.
Coverage:			
State	Yes	Yes	Yes.
Local	Yes	Yes	Yes.
Executive branch	Yes	Yes	Yes.
State legislature	No	No	No.
Advisory bodies	Yes (except consideration of professional ethics).	No	Yes.
Exceptions	(1) Collective negotiation with public employees. (2) Parole board. (3) Acquisition of real property. (4) Jury. (5) Campus security. (6) Discussion of employee. (7) Discipline student. (8) Fill vacancy.	Existing laws, rules, or regulations not repealed.	(1) Reputation of an individual. (2) Acquisition of real property. (3) Other exceptional reason (requires vote of two-thirds of members present).
Notice	Yes	No	Yes.
Minutes	No		Yes.
Enforcement:			
Sanctions	Not more than $100 or 30 days or both.	Misdemeanor—not more than $500 plus 30 days.	Misdemeanor—not more than $100.
Voidability	No	Yes	No.
Citizen standing		Yes	Yes.
Legislature:			
Floor	Open by Constitution (art. IV, sec. 5) unless two-thirds vote.	Constitution (art. 4, sec. 13); open unless House determines that secrecy is required.	Constitution (art. 3, sec. 13); unless House determines that secrecy is required.
Committees	Open by Constitution (art. IV, sec. 5) unless two-thirds vote.	Open by rule except conference committees.	Open by rule.
Party caucuses	Closed	Closed	Closed except that Senate Democratic (minority) caucus is open.

	Kansas	Kentucky	Louisiana
Law	Sec. 74-4317	House Bill 100 of 1974 session.	Title 42, § 6 (Note: 1974 constitution provided for open meetings except as established by law).
Coverage:			
State	Yes	Yes	Yes.
Local	Yes	Yes	Yes.
Executive branch	Yes	Yes	Yes.
State legislature	Yes	Yes	No (specifically exempted by law).
Advisory bodies	Yes	Yes	No.
Exceptions	Executive session upon majority vote (must state justification).	(1) Parole board. (2) Acquisition of real property. (3) Litigation. (4) Juries. (5) Collective bargaining. (6) Individual employee. (7) Industrial prospects. (8) Cabinet. (9) G.A. committees other than standing committees. (10) Where secrecy required by law or constitution.	Executive session upon majority vote except for final action.
Notice	Prior to adoption of rule or regulation (Sec. 77-421).	Yes	Yes.
Minutes	No	No	No.
Enforcement:			
Sanctions	Class C misdemeanor	Not more than $100	Not more than $1,000 or 7 days
Voidability	No	Voidable	No.
Citizen standing	No	Yes	No.

STATE OPEN MEETINGS LAWS

State	Kansas	Kentucky	Louisiana
Legislative:			
Floor	Open by statute	Open by statute	Open by practice.
Committees	Open by statute	Standing committees open by statute.	Open by rule (except legislative personnel matters).
Party caucuses	Closed and important	Closed	No party caucuses.
	Maine	**Maryland**	**Massachusetts**
Law	Title 1, ch. 13, sec. 401	Art. 41, sec. 14	Ch. 30A, sec. 11a.
Coverage:			
State	Yes	Yes	Yes.
Local	Yes	Yes (art. 25, sec. 5 and art. 23A, sec. 8).	Yes (ch. 39, sec. 23A).
Executive branch	Yes	Yes	Yes.
State legislature	Yes	No	No.
Advisory bodies	Yes	Yes	Yes.
Exceptions	Executive session by majority vote except for final action.	Executive session except for final action.	(1) Federal requirement. (2) Reputation of individual. (3) Public safety. (4) Fiscal condition (majority vote required).
Notice	No	No	Yes.
Minutes	No	No	Yes.
Enforcement:			
Sanctions	Not more than $500 or 1 year	No	No.
Voidability	No	No	Voidable.
Citizen standing	Yes	No	Yes.
Legislature:			
Floor	Open by statute	Constitution (art. 3, sec. 21): Open unless business is such as ought to be kept secret.	Open by practice.
Committees	Open by statute	Open by practice	Open by rule unless majority vote.
Party caucuses	Open	Closed	Closed.
	Michigan	**Minnesota**	**Mississippi**
Law	4.1800	471.705	None.
Coverage:			
State	Yes	Yes	
Local	Yes (78.23; 350.561)	Yes	
Executive branch	Yes	Yes	
State Legislature	No	Yes	
Advisory bodies	No	Yes	
Exceptions	Required to be open only while voting; investigations exempted.	Quasi-judicial disciplinary proceeding.	
Notice	Yes	No	
Minutes	No	No	
Enforcement:			
Sanctions	No	Civil penalty of not more than $100.	
Voidability	No	No	
Citizen standing	No	No	
Legislature:			
Floor	Constitution—open unless public welfare requires secrecy.	Constitution—open unless House determines secrecy is required.	Open by practice.
Committees	Open by practice	Open by statute	Generally closed by practice.
Party caucuses	Closed	Closed	No party caucuses.
	Missouri	**Montana**	**Nebraska**
Law	610.010	Art. II sec. 9 of 1972 constitution 82-3402.	84-1401.
Coverage:			
State	Yes	Yes	Yes.
Local	Yes	Yes	Yes.
Executive branch	Yes	Yes	Yes.
State legislature	Yes	Yes	No.
Advisory bodies	Yes	Yes	Yes.
Exceptions	(1) Litigation. (2) Acquisition or disposal of real estate. (3) State militia. (4) Individual health, scholastic, personnel. (5) As provided by other laws.	Demand of individual privacy clearly exceeds the merits of public disclosure (exceptions in present statute—82-3402—appear to be unconstitutional.	Executive session a majority vote.
Notice	Yes	No	Yes.
Minutes	No	Yes	Yes.
Enforcement:			
Sanctions	Misdemeanor	None	Misdemeanor (not more than $25).
Voidability	No	No	No.
Citizen standing	No	No	No.

STATE OPEN MEETINGS LAWS

State	Missouri	Montana	Nebraska
Legislature:			
Floor	Open by statute	Open by constitution	Constitution (art. III, sec. 11) open unless business is such as ought to be kept secret.
Committees	do	do	Executive sessions open to press by rule.
Party caucuses	Closed	Closed	Nonpartisan legislature.

State	Nevada	New Hampshire	New Jersey
Law	241.010	Title VI, ch. 91–A	10: 4–1.
Coverage:			
State	Yes	Yes	Yes.
Local	Yes (also 244.080, 268.305, 386.335).	Yes	Yes.
Executive branch	Yes	Yes	Yes.
State legislature	No (attorney general's opinion).	Yes	No.
Advisory bodies	No	Yes	No.
Exceptions	(1) Individual public employee. (2) Legislative investigation.	May hold executive sessions; hearings and actions may be taken in closed session on: (1) Individual public employee, (2) reputation of individual, (3) acquisition or dispossession of real property (4) legislative committee if ⅔ vote.	(1) Other law. (2) Federal fund contingency. (3) Confidential record. (4) Procedure of meeting. (5) Office of Governor. (6) Parole. (7) Investment of public funds, litigation if materially prejudicial official action.
Notice	No	Yes	No.
Minutes	No	Yes	No.
Enforcement:			
Sanctions	Misdemeanor	None	None.
Voidability	No	No	Voidable.
Citizen standing	No	Yes	No.
Legislature:			
Floor	Constitution (art. IV, sec. 15): open except Senate may hold executive session.	Constitution (pt. 2 art. 8th): open except when welfare of State requires secrecy.	Open by practice.
Committees	Open by practice	Open by statute (conference committees meet in closed session).	House open by rule; Senate at will of chairman.
Party caucuses	Closed	Open	Closed.

State	New Mexico	New York	North Carolina
Law	Ch. 91 of 1974 session	No comprehensive law	143–318.1
Coverage:			
State	Yes		Yes.
Local	Yes	(New York Town law sec. 267, zoning board of appeals only).	Yes.
Executive branch	Yes		Yes.
State legislature	Yes		Yes.
Advisory bodies	No		Yes.
Exceptions	(1) Adjudicatory. (2) Personnel. (3) Issuance, suspension, renewal, or revocation of license. (4) Grand jury.		(1) Acquisition, lease, or alienation of property. (2) Negotiations with employees. (3) Individual medical records. (4) Privileged relationships. (5) Litigation. Majority vote required also: Employees, students public disorder, decision in quasi-judicial proceeding, license professional.
Notice	Yes		No.
Minutes	Yes		No.
Enforcement:			
Sanctions	Misdemeanor (not more than $100).		None.
Voidability	No action valid		No.
Citizen standing	Yes		Yes.
Legislature:			
Floor	Open by statute	Open by practice	Open by statute.
Committees	Standing committees open by statute except: (1) Personnel, (2) adjudicatory, (3) general appropriation bill.	Open by rule unless majority of committee or the chairman close it.	Statute allows executive sessions to prevent personal embarrassment or when in best interest of State; House open by rule.
Party caucuses	Closed	Closed	Generally closed.

State	North Dakota	Ohio	Oklahoma
Law	44–04–19	121.22	25 § 201.
Coverage:			
State	Yes	Yes	Yes.

STATE OPEN MEETINGS LAWS

State	North Dakota	Ohio	Oklahoma
Local	Yes	Yes	Yes.
Executive branch	Yes	Yes	Yes.
State legislature	Yes	No	No.
Advisory bodies	Yes	Yes	Yes.
Exceptions	As otherwise specifically provided by law.	Parole	Personnel (but action must be in public).
Notice	No	No	No.
Minutes	No	Yes	No.
Enforcement:			
Sanctions	None	No	Misdemeanor (not more than $100 or 30 days or more).
Voidability	No		Actions invalid.
Citizen standing	No	No	No.
Legislature:			
Floor	Constitution (art. II, section 50): Open unless business is such as ought to be kept secret.	Constitution (art. II, section 13): Open unless ⅗ of members believe secrecy is required.	Generally open by practice.
Committees	Open by rule and statute	Open by rule unless, ⅗ vote to close.	Senate may close by majority vote.
Party caucuses	Republicans closed; Democrats (minority) open.	Closed	Closed.

	Oregon	Pennsylvania	Rhode Island
Law	Ch 172 of 1973 session	No comprehensive law	No comprehensive law.
Coverage:			
State	Yes	No (state authorities are covered by 65 sec. 251).	No.
Local	Yes	Yes (65 sec. 251, 16 sec. 460, 16 sec. 3460).	No (chapter 16-2-29 relates only to school committees).
Executive branch	Yes	No	No.
State legislature	Yes	No	No.
Advisory bodies	Yes	No	No.
Exceptions	(1) Public employment or discipline. (2) medical cases; or upon ¾ vote: (a) labor negotiations, (b) purchase real property, (c) confidential records, (d) preliminary trade negotiations (media may attend executive sessions); final actions must be public.		
Notice	Yes		
Minutes	Yes		
Enforcement:			
Sanctions	None		
Voidability	No		
Citizen standing	Yes		
Legislature:			
Floor	Open by statute	Constitution (art. II, sec. 13): Open except when business is such as ought to be kept secret.	
Committees	Open by statute	House committees open by rule; Senate committees open by rule if chairman so designates; conference committees closed.	Closed.
Party caucuses	Closed	Closed plus important	Republican—open. Democrats—closed.

	South Carolina	South Dakota	Tennessee
Law	Article 2.2, sec. 1-20	1-25-1	Ch. No. 442 of 1974 session.
Coverage:			
State	Yes	Yes	Yes.
Local	Yes	Yes	Yes.
Executive branch	Yes	Yes	Yes.
State legislature	Yes	Yes	Yes.
Advisory bodies	Yes	Yes	Yes.
Exceptions	Discussion of: (1) Employee, administrative briefing, committee reports, (2) negotiations in regard to adversary (contractual plus legal) situations, (3) private matters presented by citizens; also: (1) Prepare plus grade exams, (2) deliberate on evidence from public proceeding, (3) disclose matters otherwise confidential, (4) security, (5) accept	(1) Otherwise provided by law. (2) Discuss student, employee plus personnel (after majority vote).	None.

STATE OPEN MEETINGS LAWS

State	South Carolina	South Dakota	Tennessee
	gifts, (6) General assembly majority vote in committee, (7) General assembly by const.		
Notice	No	No	Yes.
Minutes	No	Yes	Yes.
Enforcement:			
Sanctions	None	Misdemeanor	None.
Voidability	No	No	Action voided (unless affects public debt).
Citizen standing	Yes	No	Yes.
Legislature:			
Floor	Constitution (art. 3, sec. 23): Open unless opinion of House is that secrecy is required.	Constitution (art. III, sec. 15): Open unless business is such as ought to be secret.	Constitution (art. II, sec. 22): Open unless business is such as ought to be secret.
Committees	Open by statute unless maiority vote.	Open by statute; all Senate meetings open by rule.	Open by statute.
Party caucuses	Closed	Closed	Open.

	Texas	Utah	Vermont
Law	17 sec. 6252	52-4-1	1 V.S.A. 312.
Coverage:			
State	Yes	Yes	Yes.
Local	Yes	Yes	Yes.
Executive branch	Yes	Yes	Yes.
State legislature	Yes	Yes	Yes.
Advisory bodies	Yes	No	Yes.
Exceptions	(1) Discussion with counsel re litigation. (2) Negotiations re real property purchase plus accept gifts. (3) Employees. (4) Discipline students. (5) Security. (6) Collective bargaining.	Executive session	(1) Quasi-judicial capacity; ⅔ vote in public required if: (2) Contracts, (3) real estate transaction, (4) employment, (5) disciplinary, (6) clear and imminent peril.
Notice	Yes	No	Yes.
Minutes	No	No	Yes.
Enforcement:			
Sanctions	Misdemeanor (not more than $500 or 6 months or both.	Misdemeanor	Not more than $500.
Voidability	No	No	No.
Citizen standing	Yes	No	No.
Legislative:			
Floor	Constitution (art. 3, sec. 16); open except Senate when in executive session.	Constitution (art. VI, sec. 15): Open except Senate when in executive session.	Constitution (ch. II. sec. 8): Open unless welfare of State may require secrecy.
Committees	Open by statute	Open by practice	Open by statute.
Party caucuses	No party caucuses	Closed	Open.

	Virginia	Washington	West Virginia
Law	2.1-340	42. 30. 010	No comprehensive law.
Coverage:			
State	Yes	Yes	
Local	Yes	Yes	
Executive branch	Yes	Yes	
State legislatures	No	No	
Advisory bodies	Yes	Yes	
Exceptions	(1) As provided by law; upon affirmative vote; (2) acquisition or disposition of real property; (3) protect personal privacy; (4) discuss employees; (5) prospective business; (6) invest public funds; (7) discuss litigation.	(1) National security; (2) selection of site or purchase of real estate; (3) employees; (4) investigation; (5) decision on license, permit, certificate; (6) quasi-judicial between named parties; (7) Administrative Procedure Act.	
Notice	Yes	Yes	
Minutes	Yes		
Enforcement:			
Sanctions	None	Civil penalty of $100	
Voidability	No action shall become effective.	No	
Citizen standing	Yes	Yes	
Legislature:			
Floor		Const. (art. 2, sec. 2): Open except when public welfare requires secrecy.	
Committees	House rules allow executive session but final votes must be open; Senate rules allow executive sessions upon recorded vote.	Open by rules. Conference committees closed.	House rule-closed for vote. Senate rule-open unless majority vote.
Party caucuses	Closed	Closed	Closed.

STATE OPEN MEETINGS LAWS

State	Wisconsin	Wyoming
Law	SB 462 of 1974 session (not yet signed)	9-692.10.
Coverage:		
State	Yes	Yes.
Local	Yes	Yes.
Executive branch	Yes	Yes.
State legislature	Yes	No.
Advisory bodies	Yes	Yes.
Exceptions	(1) Deliberation after judicial or quasi-judicial hearing (2) discuss employee or licensee; (3) parole; (4) purchase public property, invest public funds, collective bargaining; (5) individual reputation; (6) discussion with attorney; (7) partisan caucus-legislation; (8) legislation where specific rule.	(1) Security; (2) employees; (3) litigation; (4) preparing and grading exams; (5) parole; (6) purchase real estate; (7) accept gifts; (8) classified information; (9) discipline students.
Notice	Yes	Yes.
Minutes	No	No.
Enforcement:		
Sanctions	Not more than $200	None.
Voidability	Voidable	No.
Citizen standing	Yes	No.
Legislature:		
Floor	Constitution (Art. IV, sec. 10); open except when public welfare requires secrecy.	Constitution (art. 3, sec. 14): open unless business is such as requires secrecy.
Committees	Open by practice (new statute requires open meeting unless specific exception in rules).	Open by practice.
Party caucuses	Closed	Closed.

Iowa Open Meetings Testimonials

The following statements were collected by Iowa Common Cause members from Iowa state legislators. The Iowa legislative process is completely open—even one of the party caucuses (Senate Democrats) meets openly. These are verbatim statements that can be quoted.

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We're not afraid of the public knowing what the basic issues are. A lot of people in Iowa said open meetings wouldn't work. Now most of us would be very fearful of a system which permitted closed meetings.

Representative Charles Grassley, Chairman of Appropriations: I don't see any problem with open committee meetings. I've served in the legislature under both systems and don't see much difference whether the meetings are closed or open. Public pressure probably influences the meetings some. We spend about 1½ billion dollars of the public's money and don't see any disadvantages to having Appropriations Committee meetings open to the public.

Representative Stephen Rapp, member Ways and Means, Judiciary and County Government Committees: I can see a lot of advantages and no disadvantages to open committee meetings. They can function almost like a public hearing in terms of the feedback we get from citizen observers. They are very useful in increasing the responsibility of public representatives and in educating the people through press coverage. It has never seemed to me that they put any restraint on debate or on expression of opinion The system works fine.

Representative Mary O'Hallorhan: Open meetings of committees were long overdue. They have significantly changed the manner of debate, especially in the early stages of legislative deliberation. Representatives become more responsible under public scrutiny.

Representative Joan Lipsky: I consider the open meetings law one of the most significant pieces of legislation on which I've been privileged to vote. We must always recognize the public stake in whatever is being done by their official representatives. It's the public's business to know what we're doing and why we vote the way we do. Our activities should be open to public scrutiny at all times.

The Council of State Governments 1973 Eastern Regional Conference—Open Legislative Committees: The Pennsylvania Experience

(By Robert J. Butera, Majority Leader, Pennsylvania House of Representatives)

September 12, 1973.

Early in the 19th Century, Thomas Jefferson suggested that legislators should "Enlighten the people generally, and tyranny and opression of body and mind will vanish like evil spirits at the dawn of day".

This principle of informing people was a basic principle in the creation of both the Unted States Congress and the state legislatures throughout the country.

Since then, Jefferson's motto has been too often followed in the breach rather than the execution. Secret meetings and complex parliamentary maneuvers designed to mislead the public have become an unwelcome part of the American legislative process.

Pennsylvania has been no exception. Although the House of Representatives and the Senate meet openly in the gracious legislative halls of our capitol, the art of politicing too often has been refined in the secret committee chambers and the private offices of our legislative leaders.

In particular, the committee system has, until this year, been a closed series of secret conferences dominated by a few powerful leaders. Before 1973, neither the press nor interested members of the general public had been allowed to listen in on the deliberations of the committee membership.

Consequently, the committee process was often a mockery of the democratic process. A bill could be brought out of committee at the whim of a chairman. Special interests, the Governor or powerful members of the House often determined whether a bill should be altered or even reported for a floor vote.

While keeping the committees closed may have served the interests of certain individuals or groups within the state, the practice in Pennsylvania was creating some serious problems which threatened the ability of the institution to perform in a meaningful manner.

For one thing, public mistrust and criticism of the legislature had grown to serious proportions. Time and again, my own mail as a legislator, was filled with letters from constituents who felt we were incapable of doing a good job. It was pointed out, with reason, that the 203 members of the House constituted an unwieldly body that did not know what it was doing. TV reports, editorial writers as well as irate voters were increasing their attacks on the legislature to the point where a continuance of the old policy had become untenable.

Much of this dissatisfaction arose from the fact that the committee system, by being closed, was not performing the necessary functions it was created for. A limited number of individuals were controlling the whole legislative process. The committee system had disintegrated to a point where the House had become a committee of the whole. Lacking a sub-structure, the institution was deserving much of the criticism leveled at it.

With this limited participation taking place in the scrutiny of bills in the committees, legislation arriving on the floor was often shoddy and incomplete. This means that serious debate would fall victim to an endless wrangling over details which should have been worked out by a committee meeting separately.

Like a Pandora's Box, there were other debilitative effects on the institution. For example, the morale of individual legislators was constantly being lowered by their inability to participate in the creation of legislation. Attendance at committee meetings was naturally low. A large wasteland of talented and frustrated legislators existed as individuals felt their input into the process was negligible. This in turn was extremely disappointing to members of the leadership when they realized that the legislature as a whole was not equal to the sum of its parts.

By the time I became the Majority Leader in the House, the threat of open revolt against the traditional way of doing business was in the air. New legislators arriving in Harrisburg were no longer willing to sit back and wait for several years before taking part in the legislative process. Clearly, some kind of drastic change was needed.

Sensing this public disenchantment with the legislative process early in 1972, the then minority party of which I was a member, decided to base its fall campaign on the issue of secrecy. As the out party, we pledged to end the secrecy and open up the legislative process to the public.

This campaign strategy was powerful medicine. When the final votes were counted in the legislative districts, our party was once again in the majority. Thus, by last January the time had arrived to make good our promise.

This was done in the form of House Rule 45, adopted in January 1973, which reads as follows: ". . . All meetings at which formal action is taken by a standing committee or sub-committee shall be open to the public . . ."

I am not prepared to claim today that after passage of the resolution, the Pennsylvania House of Representatives became a model of efficiency. However, a number of positive forces have been at work now that members of the press and interested members of the public may sit in on committee deliberations.

First, the kind of legislation which emerges from the committees is of noticably higher calbre. The chances are now that 18 to 20 legislators have gone over a

piece of legislation, line by line, before finally agreeing to send it to the floor. Since this is done under the possible scrutiny of reporters and interested individuals, legislators in the committees are taking the time to learn more about each bill before speaking up.

In previous years one of our most important House committees was run by six members who had built up years of seniority. In fact, of the 23 members, usually only those six even attended the committee meetings.

This year, attendance at this same committee is running over 89 percent and those original six can no longer exercise complete control over legislation coming from their sessions. In fact, records we have kept indicate that many of our committees are now receiving over 90 percent attendance, a dramatic increase over prior years.

The participation and influence of all members has picked up remarkably under the new system as they find their abilities and energies being used. Undoubtedly they have to work harder. This spring, for example, the House Committee on Consumer Protection considered one bill for six full days before reporting it to the House membership.

Members are also having to spend more time in Harrisburg, since committee meetings are now mostly scheduled when the full membership is not in session.

Another positive effect of the open committee system is the wider range of press coverage given to issues before the legislature. Under the old system, reporters knew little about legislation until it came up for floor debate. Now, each chairman and each committee member has a stake in getting his point of view before the press.

I might add that this added press coverage can be a great help to the image of the legislature as an institution.

Even dissemination of information among the members becomes facilitated. Previously, knowledge about pieces of legislation was often a well-guarded prerogative of the leadership. Thus, when a party caucus was held, the leader could spoon-feed information about particular bills as he desired with the result that the general membership could be misled and thus manipulated.

I remember one instance several years ago when a member from upstate Pennsylvania had promised his voters he would oppose legislative pension increases. When the bill to increase pensions appeared on the calendar, the leadership did not fully inform the caucus that it was buried in a particularly complicated bill. This member voted for the pension increase without ever knowing what he was doing.

Today, this kind of situation is less likely to happen. Too many members know about specific pieces of legislation because they have gone over it in committee. We have also noticed a far greater interest in the preparation of reports and letters for distribution to other legislators by committee members who have a stake in educating their colleagues about particular legislation.

Gone are the days when a powerful committee chairman can tell his subservient committee, "Okay, let's kill this bill and forget it". Now, a full and open vote is needed on each piece of legislation. The chances of a Governor or a special interest bottling up legislation are more limited under this new system where each member must vote publicly before action is taken.

However, while many benefits accrue to both the legislature itself and the public at large by having an open committee system, there are pitfalls. Certainly, the job of Majority Leader becomes a more delicate and potentially dangerous position.

By disseminating power among the members and bringing more legislators into the process of government, the possibility of dominant, one-man rule becomes almost an impossibility. Rather than dealing with a few friends, the leadership must now work constantly with dozens of legislators who are working hard and want help to get bills considered. Failure to help his members carry out the projects into which he has placed them would be a risky business for the leader.

While risky, the stakes are higher. With increased action and better legislation being produced, the leadership is also in the position of governing a positive force in the state rather than an inactive and dispised institution.

As I stated earlier, opening the committee system is not a panacea for all the problems of running a good legislature.

There are approximately 15 states in the country where open committee meetings have been adopted by the legislature. In several of these states, reports indicate that the new procedure has created nothing new.

In Pennsylvania, we have often been disappointed with the few people from the general public who have attended committee meetings. At times, there are not enough reporters to attend all the sessions being held on one day.

Nor would it be fair to say that open committees eliminated the influence of pressure groups or lobbyists. The opportunity for partisan politics can be used at committee sessions much more effectively than in the past. Opportunity for grandstanding by individual members for home consumption is certainly greater now.

All of these hallmarks of the legislative process continue. Still, it is now just a little more difficult to practice deceit. The possibility of tying up important public matters through the use of closed committees is limited.

To those state legislatures and to the United States Congress now considering the possibility of opening committee sessions, I would say "be prepared".

It is not enough to simply open the committees. Both the individual members and the leadership must be prepared to take on a great deal more responsibility than before if the new system is to produce results.

In fact, the role of the legislative leader must undergo several changes. He must be prepared to engage in a vigorous follow-up of the work each committee is performing. One of his main jobs must be to help the committee chairmen obtain needed information, secure proper staffing and be supported by an intelligent selection of committee members.

Motivating people rather than controlling them becomes the leader's dominant role.

To merely open the committee to the public and do nothing more is likely to invite the deserved charges of making cosmetic changes. An alert press and public will soon discover whether the legislative institution is really doing a better job or dealing in gimmickery.

In the Pennsylvania House, our experiment with the open committee system has, I believe, developed a closer sense of cooperation and loyalty among our legislators because they are involved and because they feel themselves to be an integral part of the group.

The old politics of secret, autocratic rule is being jeopardized by the positive energies of the legislative membership. While the statistical results of our experiment may still be hard to measure, this new atmosphere of excitement and optimism toward the very difficult tasks facing State government has made the institution a more hopeful place in which to solve the problems of our people.

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