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The Federal Trade Commission—Drafting in a Regulatory Agency

The Project believes that an inquiry into legislative drafting in the executive branch should include an independent regulatory agency. These agencies are a group of commissions established by Congress to regulate technical and limited problems.³²⁸ The agencies are an adjunct of, and directly responsible to that

328. The chart below identifies the regulatory agencies, their year of founding, statutory authority, and primary purpose:

AGENCY	DATE	STATUTORY LAW	PURPOSE
Interstate Commerce Commission	1887	Interstate Commerce Act of 1887 (24 Stat. 379,383)	Regulation of interstate commerce.
Federal Communica- tions Commission	1934	Communications Act of 1934 (48 Stat.) 1064)	Regulation of the communications industry.
Security Exchange Commission	1934	Securities Exchange Act of 1934 (48 Stat. 881)	Regulation of the issuing and pur- chase of securities
Civil Aeronautics Board	1938	Civil Aviation Act of 1938 (52 Stat. 973)	Regulation of domestic air routes.
Federal Maritime Commission	1961	Reorganization Plan No. 7, effective Aug. 12, 1961	Regulation of waterborne ship- ping in the foreign and domestic offshore commerce of the U.S.
National Labor Relations Board	1935	National Labor Relations Act of 1935 (49 Stat. 449)	Prohibition of labor practices regulation of col- lective bargaining.
Federal Trade Commission	1914	Federal Trade Com- mission Act of 1914 (38 Stat. 717)	Regulation of certain aspects of trade and business competition including some antitrust enforcement and consumer protec- tion measures.
Atomic Energy Commission	1946	Atomic Energy Act of 1946 (60 Stat. 755)	Control of all facilities for production of fissionable matter
Federal Power Commission	1920	Federal Water Power Act of 1920 (41 Stat. 1063)	Regulation of the interstate aspects of the electric power and natural gas industries.

body's control,³²⁹ and are particularly vulnerable in matters of statutory authority, appropriations, and review and oversight.³³⁰ Each agency issues, enforces and adjudicates regulations pertaining to its specialized authority. Executive control, however, is exerted in the form of appointed commissioners³³¹ and through a subtle "de facto" practice of conforming to the particular administration's program.³³²

Their odd position within the government has been characterized by a mixture of control and independence. Judge Friendly notes that agencies have been given broad and discretionary authority, while simultaneously subject to confining legal and practical limitations.³³³ The charge of Congress has traditionally involved broad regulatory authority, *e.g.*, "in the public interest," while important restrictions principally in the guise of limited enforcement

GSA, UNITED STATES GOVERNMENT ORGANIZATION MANUAL 398, 403, 420, 428, 433, 440, 459, 470, 483 (1970-71).

329. The commissions are affected by Congress in four main areas: (1) review and oversight; (2) need for legislative authority; (3) required organizational changes and review; and (4) by appropriations needs. Professor Davis has commented:

Appropriations committees are especially felt; in their reports are mingled many shades of suggestions, of precise . . . recommendations . . . and of rebukes.

* * *

[Congress] does supervise administration, with respect to rule making and other functions. It can and does revoke or modify grants of authority, it uses its power of appropriation to control the general direction of policy, the Senate uses the power to confirm or reject appointments, and the various committees listen to complaints and allow administrators to explain their policies. Sometimes Congressional supervision seems clearly excessive. . . .

K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2-16, at 154-55, § 608, 44387 (1958) [hereinafter cited as Davis Treatise].

330. See footnote 329 *supra*.

331. Each agency has either five or seven commissioners, save for the ICC where there are nine. Traditionally the incumbent political party has one more commissioner, giving it the voting majority. In the past, the regulatory agencies have been well-known depositories for deserving political appointees. This contention has been substantiated in virtually all major reports on the agencies and was confirmed in detail in the Nader Report on the Federal Trade Commission. See E. COX, R. FELLMETH, & J. SCHULZ, THE NADER REPORT ON THE FEDERAL TRADE COMMISSION 129-59 (1969) [hereinafter cited as Nader Report].

332. See, H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 147-50 (1962) [hereinafter cited as Friendly].

333. *Id.* at 12-14, Judge Friendly quotes from a 1960 Staff Report on the regulatory agencies by the House Interstate and Foreign Commerce Committee:

The statutes from which they [the agencies] derive their authority are so often couched in broad general terms 'as to endow them' with a discretion so wide that they can offer a more or less plausible explanation for any conclusion they choose to reach with respect to many, perhaps the great majority, of the matters coming before them

[W]here the initial standard is thus general it is imperative that steps be taken over the years to define and clarify it—to canalize the broad stream into a number of narrower ones.

powers and small appropriations have been imposed.³³⁴ Moreover, in addition to being responsible to both major institutions, the commissioners have generally adhered for self-protection to the interests which they are supposed to regulate.³³⁵ Close cooperation and the interchangeability of executives in private industry and the commissions has been recognized and documented.³³⁶ The commissions have evolved a paradoxical "cooperative" concept of regulation, due at least partially to proximity with interest groups aware of the unique statutory position of these agencies.³³⁷ This approach has reflected the laissez-faire orientation of the early twentieth century, but such ideas are gradually eroding.³³⁸ The courts have nudged the commissions toward more progressive and vigorous regulation;³³⁹ and public interest groups have investigated and litigated on behalf of minority and consumer-oriented causes, prodding internal administrative reform and Congressional reaction.³⁴⁰ Moreover, various studies have urged a multitude of Commission reforms from the restructuring of

334. The Nader Report noted that:

the Commission has not vigorously pressed for more statutory authority at large or in specific problem areas. In general, it needs the authority to seek preliminary injunctions and criminal penalties in cases involving Section 5 of the FTC Act. It should also seek changes in the Act's language on jurisdiction to make clear its power in intra-state matters.

Nader Report, *supra* footnote 331 at 167.

335. Professor Davis notes that the administrative process

is also used as a means of protecting vested interests. . . . Although the administrative process is politically colorless in that it has no distinct political character of its own, it does have a peculiar chameleonic quality of taking on the color of the substantive program to which it is attached. . . .

Davis Treatise, *supra* footnote 329, § 1-03 at 14.

336. One study has reported that:

Among the 14 FTC Commissioners appointed since 1949 who are not presently incumbents, the average tenure was only four years, less than a full term (7 years). The majority of these Commissioners left the agency to join private law firms. The turnover among the staff is also high, and most of those who leave enter the private practice of law, too.

M. KIRKPATRICK, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 116 (1969) (Separate statement of Richard A. Posner) [hereinafter cited as Kirkpatrick Report].

337. Professor Davis, for example, has remarked that "[e]ven though the ICC was created to protect the public against railroad abuses, no voice can be heard today crying out against antirailroad regulation of the railroads, but many voices are crying out against an alleged 'railroad mindedness' of the ICC." Davis Treatise, *supra* footnote 329, § 1-03 at 16.

338. The consumer protection movement and the recent government interest in the environment are two examples of the more open and active concern operating upon traditionally competitive economic forces.

339. See *e.g.*, Chief Justice (then Judge) Burger's opinion in *United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966). In holding that a certain portion of the local citizenry represented by the Church of Christ had established rights in their choice of the station's program format, the court commented at length upon the notable hesitancy which regulatory agencies had shown in using their statutory powers to regulate specialized industries.

340. See, *e.g.*, Nader Report, *supra* footnote 331.

the administrative process to the admission of public interest advocates in commission proceedings.³⁴¹ However, congressional action to date has been sorely lacking.³⁴²

The movement towards a firmer independent and regulatory response signaled a marked change in the position of the commissions, particularly in relation to their functions within the legislative process. In a practical sense, "built-in" legislative restraints have developed. For example, the agencies seemed at once to be part of and yet separate from the executive's legislative program. In practice, all legislative statements and materials are cleared with the OMB, although the legal obligation to do so remains unclear.³⁴³ Before congressional committees the usual practice has been to defer the administration in power. Initiation of legislative proposals within the agency has been negligible.³⁴⁴ Agency spokesmen generally responded in this manner: "The legislative remedy is one of last resort for the Commissions. There are many preliminary administrative and judicial courses available which should first properly be exhausted. Moreover, the particular administration in office has the primary legislative responsibility."³⁴⁵

However it is seldom recognized that effective enforcement and the initiation of substantive programs have in the past occurred only through a slow, tedious "cooperative" process.

Internally the result generally has been: (1) little or no systematic review of

341. See, e.g., Kirkpatrick Report, *supra* footnote 336; Minow, *Suggestions for Improvement of the Administrative Process*, 15 A.L. REV. 146 (1963).

342. Although there has been some action at the committee level in both the Senate and the House, the Congress has not enacted the consumer legislation advocated by the Commission and the Johnson and Nixon Administrations. Mr. Robert Fellmeth, the principal author of three major regulatory commission investigations, questioned the responsibility of the Congress because of its inactivity in a wide range of investigative and legislative areas. While concurring in the Project's thesis that the administrative agencies have largely neglected to establish a structured legislative drafting process, Mr. Fellmeth noted that the mandate and authority of Congress in these matters seemed clear, while its inactivity seemed to foster and reinforce the regulatory agencies' own neglect and disinterest in the matter. Letter from Robert Fellmeth to Catholic U. L. Rev., Oct. 27, 1971 at 2-3.

343. See OMB (the Bureau of the Budget) Circular No. A-19 (June 9, 1964) at 2-8 (copy on file at Catholic U. L. Rev. offices), which contains specific guidelines for coordinating agency legislative recommendations.

344. In an interview, Mr. J.R. VerBrycke, an FTC attorney, acknowledged that the FTC had not proposed a legislative program in the past. He noted that the only example which he could recall involving FTC initiation of legislation was the cigarette smoking legislation, Federal Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. § 1331 (1970). Interview with J.R. VerBrycke, FTC, Aug. 1971 [hereinafter cited as VerBrycke Interview].

345. Interview with Mr. Tobin, presently Secretary of the FTC, Aug. 1971 [hereinafter cited as Tobin Interview].

past policies and statutory authority; (2) no recognized hierarchy within the agencies for the initiation of legislative proposals; (3) development of a "reaction" commenting system limited to congressional and departmental proposals; and (4) the employment of non-specialists as legislative drafting personnel.³⁴⁶

The Federal Trade Commission

For a variety of reasons, the Project chose the FTC as the prototype independent regulatory agency. It was felt that the FTC embodied crucial public responsibilities, internal commission reform and constant congressional scrutiny. Such an examination should be equally applicable to other less prominent agencies by identifying possible reforms that could prove beneficial to all.

The FTC is the second oldest independent regulatory agency, having been established in 1914³⁴⁷ to investigate and inhibit "unfair methods of competition . . . and unfair or deceptive acts or practices in commerce."³⁴⁸ It has been suggested that the FTC can trace the impetus of its establishment to the Supreme Court decision of *Standard Oil Co. of New Jersey v. United States*³⁴⁹ which held that the Sherman Act³⁵⁰ was to be enforced by a "rule of reason."³⁵¹ The Kirkpatrick Report suggests that

[T]hose in favor of vigorous antitrust enforcement feared that the judiciary would be disinclined to enforce the statute vigorously, businessmen and their advisors worried about operating under such a vague standard, and Congress was apprehensive about possible judicial usurpation of its power to regulate business practices.³⁵²

Although the Commission was initially given authority only to enforce the FTC Act and the Clayton Act³⁵³ the scope of its authority has been broadened until presently the Commission enforces or administers a number of diverse statutes most of which have something to do with American business and commerce.³⁵⁴ Rather than spark activity and rigorous enforcement, however, the increased statutory burden had, until 1970, led to considerable institutional

346. See text accompanying footnotes 413-414. See generally Friendly, *supra* footnote 332 and Nader Report, *supra* footnote 331.

347. See chart, footnote 328 *supra*.

348. Federal Trade Commission Act § 5(a)(6), 15 U.S.C. § 45(a)(6) (1970).

349. 221 U.S. 1 (1911).

350. 26 Stat. 209, as amended, 15 U.S.C. § 1 et seq. (1970).

351. 221 U.S. at 67 (1911).

352. Kirkpatrick Report, *supra* footnote 336 at 6.

353. 38 Stat. 730, as amended, 15 U.S.C. § 12 et seq. (1970).

354. E.g., Wool Products Labeling Act, 15 U.S.C. § 68 (1970); Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-39 (1970); and the Fair Credit Reporting Act, 15 U.S.C. § 1681 (1970).

malaise and lethargy.³⁵⁵

In 1970 as a result of the flood of criticism leveled against the FTC, the author of the ABA report on the FTC, Miles Kirkpatrick, was made chairman of the Commission and given broad authority to institute reforms along the lines suggested by both the Nader and the ABA reports. The Project was able to trace two bills in the FTC; the Consumer Protection Act³⁵⁶ and the amendment to the Flammable Fabrics Act.³⁵⁷ Most of the Commission participation in the consumer legislation was prior to the Kirkpatrick reforms: its participation in the fabric amendment drafting was after the reorganization. While the reforms are analyzed in more depth below, perhaps it is sufficient to mention a significant improvement in the later fabric legislation.³⁵⁸

The Consumer Protection Act

The drive for consumer protection legislation began following publication of The Nader Report³⁵⁹ and a subsequent investigation by a special committee of the American Bar Association (ABA).³⁶⁰ These reports, which differ somewhat in substance and conclusion, established at least the following:

- (1) that the FTC had failed to establish priorities both in its enforcement policies and in its research projects;
- (2) that the Commission had failed to properly use the methods available to combat unfair and deceptive practices;
- (3) that the Commission displayed an inadequate awareness of consumer problems and had not identified and provided local information and enforcement services;

355. The Kirkpatrick Report concluded, *inter alia*, "[w]hen actual performance is measured against the potential which the FTC continues to possess, the agency's performance must be regarded as a failure on many counts." Kirkpatrick Report, *supra* footnote 336 at 35.

356. Currently S. 986, 92d Cong., 2d Sess. (1972).

357. 15 U.S.C. § 1191 et seq. (1970).

358. See text accompanying footnotes 403-409. The Project confined itself to several specific questions:

1. What is the practice of the Commissioners in establishing a policy on a congressional or administration proposal?
2. What were the legal and practical restrictions under which the Commission operated?
3. What are the internal practices of reviewing existing statutory authority and initiating measures for broadening or establishing statutory responsibilities?
4. What amount of its time does the Commission spend on legislative work?
5. What is the commenting procedure within the Commission?
6. What function and purpose does the legislative draftsman serve in light of the agency's responsibilities?

359. Nader Report, *supra* footnote 331.

360. Kirkpatrick Report, *supra* footnote 336.

(4) that the Commission had not pressed for specific legislative authority in either enforcement or policy matters.³⁶¹

The response to these reports varied. The Commission did little until the Chairman, Paul Rand Dixon, resigned in January, 1970, but Congress, as early as October, 1969, had begun to hold hearings on the Nader Report. In the spring of 1969, specific legislative measures were introduced to improve the enforcement policies available to the Commission and the consumer. Of 200 consumer-related bills introduced during the 1st Session of the 91st Congress, three measures were principally oriented to consumer protection.

The Congressional Proposals

First, Senator Tydings and Congressman Eckhardt introduced similar legislation providing for consumer class actions in Federal Courts where State consumer protection laws had been violated.³⁶² These bills would have adopted the liberal machinery of Rule 23 of the Federal Rules of Civil Procedure without regard to the amount in controversy, while opening the federal courts to class actions based on any state law presently benefiting the consumer.³⁶³ In May, 1968, Senator Moss introduced a bill entitled "The Deceptive Sales Act of 1968," which proposed to amend sections 13(a) of the Federal Trade Commission Act (FTCA) thereby providing the Commission with the authority for the first time to secure temporary injunctions or restraining orders for Section 5 violations or unfair and deceptive practices under the FTCA.³⁶⁴ In July, the Senate Subcommittee on Improvements in the Judicial Machinery began hearings on the Tydings legislation.³⁶⁵

Mrs. Knauer, the President's Advisor on Consumer Affairs, suggested in her testimony that the Tydings measure was defective in that class action suits possible under the Act were exclusively oriented to state law.³⁶⁶ She proposed

361. See generally Nader Report, *supra* footnote 331 at 37-95; Kirkpatrick Report, *supra* footnote 336 at 32-36.

362. The first substantive measures introduced were Senator Tydings' and Congressman Eckhardt's bills, S. 1980 and H.R. 14585, 91st Cong., 1st Sess. (1969).

363. These bills were designed to reverse the effects of the Supreme Court's decision in *Snyder v. Harris*, 394 U.S. 332 (1969), and to broaden the basis for federal jurisdiction over consumer fraud. In essence, *Snyder* severely limited the application of Rule 23 of the Federal Rules of Civil Procedure (F.R. Civ. P.), refusing to allow the aggregation of claims to achieve the jurisdictional amount of \$10,000 in a class action in which the rights of the claimants are "several and distinct." This effectively closed the federal courts to class actions brought by the consumer, since the overwhelming majority of consumer fraud problems are below the jurisdictional amount of \$10,000.

364. S. 2246, 91st Cong., 1st Sess. (1969).

365. *Hearings on S. 3201 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 5-10 (1970) (Testimony of Senator Tydings) [hereinafter cited as 1970 Senate Consumer Hearings].

366. *Id.* at 5, 10.

that such actions incorporate Federal law, thus identifying a range of practices condemned as "unfair or deceptive" under Section 5(a) of the FTCA.³⁶⁷ Senator Tydings and Congressman Eckhardt concluded that their approaches were complementary and should be combined. The result was Senator Tydings' new proposal, S. 3092, which proposed to make unlawful under Rule 23 and subject to class actions acts that defraud consumers that "affect" commerce enumerated in both Federal law and State statutory and decisional law.³⁶⁸ On October 30th, the President issued his Consumer Message to the Congress, accompanied with the introduction of the Administration proposal on Consumer Protection.³⁶⁹

The Administration Bill

The Administration proposal was formulated and drafted after the July hearings on the Tydings legislation by the legislative section in the Anti-Trust Division of the Department of Justice.³⁷⁰ The process was supervised by Mr. McLaren's Office; the principal draftsmen were Mr. Wilson, Special Assistant to the Assistant Attorney General, and Mr. Pearce, the Assistant Chief of Public Counsel and Legislative Section.³⁷¹ Work on both this measure and the President's Consumer Message was done in consultation with Mrs. Knauer's staff, although, as was confirmed in the December hearings, Mrs. Knauer's office continued to consult with and advise Senator Tydings on his radically different consumer protection bill.³⁷² According to one FTC Commissioner, the FTC, with the overwhelming burden of enforcing consumer laws, was not consulted or asked to comment on the substance of S. 3201 or even the entire thrust of the President's Consumer Message.³⁷³

The Administration measure offered a traditional approach to a corporate law enforcement problem, as set out in the general scheme of the Clayton Anti-Trust Act.³⁷⁴ In Assistant Attorney General McLaren's words, "we set up certain substantive offenses; we allow for coordinate jurisdiction in the Federal Trade Commission and the Justice Department; and we create a private right

367. *Id.* at 5.

368. *Id.* at 7-9.

369. S. 3201, 91st Cong., 1st & 2d Sess. (1969-70).

370. *Hearings on S. 2246, 3092 & 3201 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 2d Sess., pt. 1, at 24 (1969-70) [hereinafter cited as 1969 Senate Consumer Hearings].

371. Anonymous interview, FTC, Aug. 1971.

372. 1969 Senate Consumer Hearings, *supra* footnote 370 at 24.

373. Anonymous interview with an FTC Commissioner, Aug. 1971.

374. Statement of Ass't Atty. Gen. Richard McLaren, 1969 Senate Consumer Hearings, *supra* footnote 370 at 16.

to recover for damages resulting from the prohibited practices."³⁷⁵ The bill provided for five substantive changes in existing laws: first, it extended the FTC's jurisdiction to acts "affecting" as well as those "in" interstate commerce;³⁷⁶ second, it specified eleven categories of unfair or deceptive practices, for which the "knowing" violator could be civilly and administratively prosecuted;³⁷⁷ third, it would organize a consumer division in the Justice Department, which could investigate and prosecute such practices on a "coordinate and co-equal basis" with the FTC;³⁷⁸ fourth, it provided for individual suits

375. *Id.*

376. S. 3201, 91st Cong., 1st Sess. § 101 (1969). There were differing opinions at the Senate and House hearings as to the effect and value of such a change in jurisdiction. Ass't Atty. Gen. McLaren stated that broadening the jurisdictional authority of the FTC would have the salutary effect of extending the Government's authority to fraudulent acts which are essentially "local," but which are often not prosecuted. 1969 Senate Consumer Hearings, *supra* footnote 370 at 16. FTC Chairman Dixon stated that he was not in favor of enlarging the Commission's jurisdiction. He opposed this recommendation of the ABA Report because it was contrary to his conception of the Commission's purpose and misread the agency's limited ability to function, in view of its existing enforcement authority and appropriations. *Id.* at 31-34. The other four Commissioners expressed varying views on the issue. Commissioner Elman, citing Commission decisions, asserted that such a proposal would be of "marginal value. . . . It may be useful to resolve any possible doubts about it . . . but as a practical matter . . . in my experience we have never been inhibited or deterred because of any jurisdictional problems." *Id.* at 68. Commissioner Jones agreed substantially with Commissioner Elman, stating that while it "would enlarge slightly the geographic scope . . . [and] bring it into accord with the more modern case law . . . I do not believe that the present slightly narrower definition of the Commission's jurisdiction has created any substantial obstacles. . . ." *Id.* at 109. Commissioner MacIntyre thought, however, that the amendment would be "very helpful," because it would enable the Commission to proceed against consumer frauds hitherto "beyond its reach;" and it enabled the Commission to proceed with more dispatch in cases "requiring corrective action," but where the evidence of interstate commerce is "marginal." *Id.* at 70.

377. S. 3201, *supra* footnote 376, § 201(a)(1)-(11). This provision was the crux of the Justice Department's proposal. It accomplished two things: it strictly limited the type of unfair and deceptive practices prohibited to the eleven specified in the bill, which, it was argued, covered approximately 85 percent of those prosecuted by the FTC; and it limited prosecutorial action to "knowing" violations of the specified offenses. Both of these provisions represented departures from existing FTC law. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) (1970), consists of a broad enabling clause which empowered the Commission to bring action where there were *any* unfair or deceptive practices. Thus, S. 3201 would tend to cancel the decisional law of the Commission developed over 50 years of Commission and court interpretation. The bill would, at the same time, eliminate some unfair practices already proscribed under FTC law and subject the eleven specified offenses to original judicial interpretation. Moreover, its exclusive definitional character prevented expansion of the categories to prevent new and unknown deceptive acts, except upon application to the Congress. As each of the Commissioners emphasized, this would severely restrict the Commission and DOJ's prosecutorial function, inhibit judicial interpretation and application of the law, and burden the federal courts through its negation of precedent. See 1969 Senate Consumer Hearings, *supra* footnote 376 at 36, 68, 72.

The administration, through Ass't Atty. Gen. McLaren, argued for specificity of offenses under the Act. *Id.* at 22, 23.

378. S. 3201, *supra* footnote 376, § 203. The Chairman of the FTC, Mr. Dixon, as noted in footnote 376, *supra* totally opposed the dual concept of regulation advocated by the administration.

by consumers "adversely affected" when a final court order was issued on an action brought by the Department of Justice;³⁷⁹ and fifth, it permitted the FTC, on its own, to bring suits in federal district courts to enjoin deceptive sales practices.³⁸⁰

Thus, the bill created two enforcement agencies in the Executive—the FTC and the Justice Department. Class actions could not be brought unless the Justice Department had first proved the existence of an unfair or deceptive practice. Such action, moreover, was limited to eleven specified unfair practices, thereby excluding some acts already barred under existing law and any new practices falling outside of the offenses defined. Moreover, S. 3201 placed an additional burden on the government of proving "scienter" or "knowledge of an unfair practice," something not previously required under FTC law.

The Tydings legislation utilized a simpler and more direct approach to consumer protection. In his bill the individual consumer, after complying with the requirements of a class action, could bring suit directly against the offending business under any federal or state law without waiting for prior adjudication by the federal courts. This unusual approach was supported by two premises: first, the concept of a federal "watchdog," in the person of the regulatory agencies, could not adequately prevent unfair and deceptive consumer practices;³⁸¹ and, second, legislation is "best [which] guides the direction of human

His testimony reflects an unswerving belief in the existing structure and purpose of the FTC as a regulatory agency. He comments, moreover, that the present controversy stems in large part from the absence of proper enforcement powers and Congress' unwillingness to expend the necessary appropriations for the Commission to implement its Congressional mandate:

Give to the Commission the funds to do the job, the funds which under this bill would be necessary to establish an effective consumer division at the Department of Justice and, in my opinion, you would give the consumer the greatest protection for his dollar.

1969 Senate Consumer Hearings, *supra* footnote 370 at 39. Three other commissioners generally expressed the opinion that the broad investigatory and enforcement powers available to the Justice Department would prove beneficial in the fight to provide effective consumer protection. *Id.* at 59, 70, 105.

379. S. 3201, *supra* footnote 376, § 204. Commissioners Elman and Jones viewed the Tydings' proposal of direct and unimpaired access to the federal courts as consistent with the enforcement problem posed in the area of consumer protection and the democratic tradition of open legal redress. They felt that it is precisely where the Government cannot, or will not, act that the private remedy is most needed by aggrieved consumers. Moreover, the two Commissioners maintained that the procedural and substantive requirements of a Rule 23 class action, particularly as developed by the courts during past years, would prevent the type of abuse feared by the Administration and the other Commissioners. 1969 Senate Consumer Hearings, *supra* footnote 370 at 62, 110-11.

380. S. 3201, *supra* footnote 376, § 102. Commissioner Elman was equivocal on this subject. He stated that the Commission "could benefit, but only to a limited degree, if it were also given power to request preliminary injunctions. . . ." 1969 Senate Consumer Hearings, *supra* footnote 370, at 65.

381. See generally statement of Rep. Eckhart (D. Tex.), *Hearings on H.R. 14931, et. al. Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign*

activity" and which "marshals the interests of those affected . . . so that the legislation is somewhat self-enforcing."³⁸²

The FTC's Role in the Legislation

The work of the FTC prior to and during the first hearings on the consumer protection bills illustrates some legislative practices which inhibit the agency's purpose. Certain political conditions existed which detracted substantially from the Commission's potential for positive contribution.

The files on the Consumer Protection Act indicate that the Commission was first informed on December 5, 1969, that the Senate Commerce Committee was scheduling consumer hearings, which began on December 16.³⁸³ Such late notice was apparently typical conduct by the congressional committee staffs. The FTC's function in the development of the consumer legislation was severely limited. The entire Administration consumer program, including S. 3201, had been drafted and developed by the anti-trust division of the Justice Department in conjunction with Mrs. Knauer's consumer office.³⁸⁴ Moreover, the Commissioners had not been asked to testify in relation to Tydings' proposal during the July hearings.

Commission spokesmen indicated, however, that the lack of a commenting function for the FTC prior to these initial consumer hearings was substantially in accord with established procedure.³⁸⁵ It was argued that "practical considerations necessitated this," since during the first session of the 91st Congress alone over 200 consumer-oriented bills had been introduced.³⁸⁶ Because of the increased volume of legislation the FTC commented as an agency only when particular bills were referred to the Commission or when hearings were scheduled by the respective committees.³⁸⁷ Two legislative assistants attached to the General Counsel's Office submitted an analysis and recommendations to all the Commissioners. The legislation was placed on the FTC agenda and the proposals were considered. Comments, alternatives and amendments would be suggested; and, if no unified agency position could be reached, majority and indi-

Commerce, 91st Cong., 2d Sess., at 8-9 (1970) [hereinafter cited as 1970 House Consumer Hearings].

382. *Id.* at 7-8.

383. FTC-CPA note 1. This memorandum indicates that Chairman Dixon was given only nine days to prepare his testimony on S. 3201. This illustrates the apparently strong feeling in the government that the FTC had no real power or significance in the consumer field. See footnote 51 *supra* for instructions on how to use the file citation system.

384. See 1969 Senate Consumer Hearings, *supra* footnote 370, at 24.

385. Tobin Interview, *supra* footnote 345.

386. *Id.*

387. *Id.*

vidual views would be set forth and transmitted.

This internal commenting process was followed during the short period before the consumer hearings.³⁸⁸ All of the Commissioners recognized, however, that the hearings required the submission of individual positions since there were well-established fundamental differences among the Commissioners on the FTC's regulation of consumer practices and the hearings were regarded as critical to the development of future regulatory policies for the FTC.³⁸⁹

The past year had been a particularly hard one for the Commission. An exhaustive amount of time had been spent defending and reviewing Commission practices. The FTC's own consumer protection hearings, for example, had occupied a three-week period, while official and unofficial investigations occupied a considerably greater portion of the agency's efforts.³⁹⁰ The December hearings were the culmination of a year-round inquiry into the FTC's regulatory practices, and the testimony of the Commissioners reflected these strained conditions and a unified approach was impossible.

The legislative problems noted in the 1969 consumer hearings continued through most of 1970. The operational deficiencies of the Commission's legislative process had two important aspects: first, the Commission lacked a commenting structure through which substantive comments of the affected operating bureaus could be transmitted to the Commissioners themselves; second, the General Counsel's Office did not have the expertise necessary to formulate legislation or to analyze and comment appropriately upon Congressional proposals. As a result, the five Commissioners relied in varying degrees upon their own staff to evaluate legislation and to prepare Commission responses.

The Commission continued to suffer from lack of direction in the legislative process and the lack of legal expertise, *i.e.*, the lack of a professional draftsman.³⁹¹ The files indicate that Mr. Barnes, the Acting Assistant General Coun-

388. See FTC-CPA note 2. The commenting procedure began with a memo from the Acting Ass't General Counsel for Legislation to the General Counsel outlining the bills. The General Counsel, in turn, developed some suggestions for the Chairman's testimony.

389. See footnotes 376-380 *supra*, for an example of some differences of opinion.

390. See, *e.g.*, Nader Report, *supra* footnote 331 and the Kirkpatrick Report, *supra* footnote 336.

391. For example, Mr. Royal, an assistant director in the FTC Bureau of Deceptive Practices, discovered several errors in the drafts of the consumer protection bills: "[w]hile studying the captioned bills in preparation for a speech to the American Management Association, [I was] horrified to discover that the injunction provisions contain[ed] a loophole of gigantic proportions." The bills provided that only acts or practices which were unfair or deceptive "to a consumer" could be enjoined. This effectively would have prevented the Commission from enjoining a large class of operators, specifically the multiple-level distributorship promoters and the fraudulent franchise purveyor. Mr. Royal's more important finding, however, is contained in his conclusion:

[I]t seems to me regrettable that this Bureau is not given the opportunity to submit its

sel for Legislation, and the Commission struggled frequently with definitional and other language problems in the bills.³⁹² Mr. Barnes noted that his division did not think that the definition of "consumer" was sufficiently encompassing. But "not having a better definition in mind this division recommends that the Commission merely call attention to the need for an expanded definition without furnishing suggested language."³⁹³ When the bills were circulated, Commissioner Jones lent her support to more inclusive injunctive powers and illustrated by examples the need for changes in the bills' language.³⁹⁴ Her office also made an attempt at solving the language problem by proposing specific amendments to the definition of consumer.³⁹⁵ In a memorandum to Chairman Weinberger, Mr. Barnes suggested that you cannot specifically categorize all of the unfair and deceptive practices to be covered under the proposed legislation.³⁹⁶ With Mr. Hale, the Director of the Bureau of Deceptive Practices, he also concluded that to be effective the bill would need to specify twenty-eight unfair practices, some of which in their language were "broad and overlapping."³⁹⁷ Chairman Weinberger, in an effort to break the impasse caused principally by the Department of Justice and Mrs. Knauer's Office, suggested that the categories be eliminated entirely and that substitute language be employed to the effect that all unfair and deceptive practices presently prohibited under the Act and under the case law of the Commission be prohibited.³⁹⁸

Reform at the Commission

One of the first regulatory agency appointments made by President Nixon designated Casper Weinberger, a former California state finance director, FTC chairman. By July of 1970, after Chairman Weinberger had begun to grasp the day-to-day operations of the agency, a reorganization plan was announced which would channel the FTC's operations more directly toward its two principal functions—regulation of business competition and consumer practices.³⁹⁹

views to the Commission on these important consumer legislative proposals. The present procedure of having the General Counsel's Office prepare comments on legislation is fine as far as it goes, but certainly someone at some level should consult with the Bureau where its field of expertise is directly involved.

FTC-CPA note 24.

392. See, e.g., FTC-CPA notes 2, 29 & 44.

393. FTC-CPA note 29.

394. FTC-CPA note 23.

395. FTC-CPA note 28.

396. FTC-CPA note 44.

397. *Id.*

398. 1970 House Consumer Hearings, *supra* footnote 381, at 76.

399. See FTC organizational charts for 1969 and 1970, Appendix A, *infra*, for a graphic description of the changes. Under the reorganization two operating bureaus, the Bureau of Consumer Protection and the Bureau of Competition, were established to consolidate the operations

After September 15, 1970, the changes begun under Mr. Weinberger, particularly the reorganization of July, 1970, were implemented much more extensively. Newly appointed Chairman Kirkpatrick changed virtually all of the policy-making personnel.⁴⁰⁰ A second change reorganized the General Counsel's Office.⁴⁰¹ A third change, and perhaps the one with the most long range effects, changed the methods of recruitment of new attorney personnel.⁴⁰²

The Flammable Fabric Act Amendment

The FTC initiated its phase of the fabric act amendments with a series of

of five previous bureaus. To help the Commissioners develop goals and set priorities an Office of Policy Planning and Evaluation was established.

The day-to-day administrative responsibilities were transferred to an executive director, while a Deputy Director for Operations was to coordinate the Bureau's interrelated activities in its field and regional offices. With each of these changes the reorganization plan re-asserted the two principal regulatory purposes of the Commission, and at the same time affected a personnel turnover that developed new vigor and spirit in the Commission's operations. The changes established a clearer separation of management and commissioner responsibilities, created a methodology for evaluating activities on a basis of priorities, and signaled an active campaign to find qualified personnel to fill the principal policy-making offices at the Commission. *See, e.g.*, FTC News Release on FTC Reorganization, June 8, 1970, copy on file in Catholic U.L. Rev. offices.

400. For example, both new bureaus received new bureau directors from outside the Commission. Consumer Protection Director Pitofsky came from a professorship at New York University Law School and had previously worked in a Wall Street firm. Competition Director Alan S. Ward was recruited from a Washington, D.C., law firm. Biographical data contained in an April, 1971 FTC press release on file at Catholic U.L. Rev. offices.

401. The initial reform eliminated extraneous non-legal duties for the office, set up four assistant general counsels directly under the General Counsel and provided a fifth attorney to deal exclusively with congressional relations. Further reforms relating directly to the Commission's legislative duties were promulgated in 1972 and provide explicit and detailed instructions on processing of legislation. *See* FTC Administrative Manual, ch. 2-951, release No. 2-23, Jan. 20, 1972, copy on file at Catholic U.L. Rev. offices. These new instructions establish, *inter alia*, a written and established policy on matters relating to the specifics of processing and reviewing legislative proposals. In so doing, they identify a process that had been regulated in an unwritten and often vague manner. They clearly identify the principal responsibilities of the General Counsel's Office as being (a) the liaison between the Commission and the Congress; (b) the principal organizational unit responsible for all legislative matters affecting the Commission; and (c) responsible for writing proposed executive orders affecting the Commission. Finally, they established guidelines on the Commission's relationship with OMB and specifically delineated legislative responsibilities that had previously been outlined for the executive in OMB Circular No. A-19, *supra* footnote 343.

402. The Nader Report was particularly biting on this subject contending that the Commission deliberately recruits less qualified lawyers from smaller, less prestigious law schools while rejecting better qualified applicants from law schools with national reputations. Nader Report, *supra* footnote 331, at 150-158. On the other hand, Commission spokesmen indicate that presently the FTC has a highly developed Law School Recruitment Program under which staff attorneys from each of the major organizational components of the Commission make recruiting tours each fall to some 45 law schools throughout the country . . . Letter from Ronald M. Dietrich, FTC General Counsel, to Catholic U.L. Rev., dated March 13, 1972 [hereinafter cited as Dietrich Letter].

memos discussing the level of appropriations to be sought for FTC use for the Commission's part in enforcement.⁴⁰³ But the money problem was only one part of the larger problem of promulgation of standards for flammable fabrics under the Act. Commissioner Elman proposed the creation of authority which would give the FTC civil enforcement responsibilities in this area while at the same time dispensing with the notions of scienter or "willfulness" presently found in the Act.⁴⁰⁴

A second issue, whether manufacturers should be required to pretest fabrics, arose in conjunction with the civil enforcement problem. The FTC Bureau of Textiles and Furs assisted in drawing up an amendment which would have made it an unlawful trade practice to distribute flammable goods without pretesting.⁴⁰⁵ Under this suggested amendment the Commission would be able to promulgate certification procedures under its rule-making authority while at the same time it could levy civil penalties, *i.e.*, "cease and desist" orders or fines up to \$10,000.⁴⁰⁶

Since the fabrics legislation involved HEW and the Department of Commerce as well as the FTC, Commission participation is somewhat limited; but, nevertheless, at least two improvements over the consumer legislation were noted. First, there was considerably more interchange at early stages of the legislative process between FTC representatives and OMB personnel.⁴⁰⁷ Second, the component parts of the Commission—those sub-agencies who presumably have the highly specialized expertise necessary for meaningful comment on such matters—were permitted to participate in the earliest drafting stages. Indeed, at least one memorandum from Mr. Barnes to the full Commission indicates that the textile bureau helped draft the pretesting amendment.⁴⁰⁸ That this sub-agency participation was ordered by Chairman Weinberger⁴⁰⁹ is evidence of considerable and enlightened progress.

Further Reform

There is no doubt that the organizational reform and new spirit of the FTC has wrought many changes. As noted above, significant changes may be seen by examining just two pieces of legislation. Reform at the Commission contin-

403. FTC-FFA notes 1-10.

404. FTC-FFA note 20.

405. FTC-FFA note 26.

406. *Id.*

407. At least three memos indicate discussion with and participation of the OMB. FTC-FFA notes 30, 35 & 36.

408. FTC-FFA note 26.

409. FTC-FFA note 23.

ues, however, in similarly beneficial directions. For example, in Chairman Kirkpatrick's testimony before the Senate Commerce Committee on the Consumer Product Warranties Act and Federal Trade Commission Improvements Act of 1971, he expressed the views of the *entire* Commission.⁴¹⁰ This represents a substantial departure from previous hearings wherein the Commission had declined to agree on even major points in proposed Commission testimony before Congress.⁴¹¹

There has also been considerable reform in the allocation of the duties and the time of the attorneys in the General Counsel's Office who are predominantly concerned with legislation and drafting.⁴¹² The consumer warranty hearings in the Senate and House demonstrate that the FTC legislative personnel were sufficiently prepared in advance to seek to establish agreement among the commissioners, to comment in depth and to propose specific amendments to the bills. Thus, the FTC appears anxious to improve both its congressional relations and its own contributions and leverage in specific legislation.⁴¹³

FTC Evaluation

There is no doubt that the internal reform of the FTC plus its new-found aggressiveness is transforming the previously quiescent agency. Perhaps most significant from a legislative drafting point of view is the encouraging change

410. See *Hearings on S. 986 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 92d Cong., 1st Sess., at 31-51 (1971). "I am particularly grateful for the opportunity . . . to express the views of the *entire* Federal Trade Commission . . ." (emphasis added) (Statement of Miles W. Kirkpatrick, FTC Chairman). *Id.* at 31.

411. See, e.g., analysis of the various Commissioners' testimony on the Consumer Protection Act, text accompanying footnotes 376-380 *supra*.

412. See, e.g., the following table:

Position	Legal Memos	Cong. Corre- spon- dence	Prep. for Hearings	Reporting on bills and Other matters	Super- visory & Adm.	Non Legal
Ass't General Counsel	5*	5	10	5	70	5
Attorney # 1	10	10	20	55	—	5
Attorney # 2	5	20	15	50	—	10
Attorney # 3	5	10	15	50	—	20

* All figures are percentages; Total time each attorney = 100%

Table compiled from figures furnished by FTC General Counsel's Office. Dietrich Letter, *supra* footnote 402 at 2.

413. Furthermore, the Commission has established a Counsel for Consumer Legislation who acts as a clearing house for all legislative matters within the purview of the Bureau of Consumer Protection. As an example of the increasing influence of the FTC in the legislative area, one of the special assistants to the director in the consumer protection bureau along with two attorneys from the General Counsel's Office drafted Title II of S. 986, 92d Cong., 1st & 2d Sess. (1971-72). Dietrich Letter, *supra* footnote 402, at 15.

in the Commission's commenting procedure and method of testifying on legislative proposals. Also important are the newly-promulgated administrative regulations outlining specific responsibilities in the formulation and processing of legislative proposals. However, the Project has identified several problem areas which directly affect the FTC's ability to draft quality legislation. These areas are set out below:

1. The absence of professional draftsmen in the Commission. Recognition of this problem is crucial to legislative improvement. The employment of non-specialist attorneys in circumstances that offer little in terms of guidance, standards, and training, is harmful in an administrative agency, particularly an agency, such as the FTC, with a large body of statutory law to administer.

2. Judging from the table provided by the FTC General Counsel⁴¹⁴ the legislative attorneys appear to spend a very large amount of time on day-to-day reaction to congressional demands. There seems to be little time devoted by the legislative personnel to longer range projects such as codification, review of statutory authority and the like. Perhaps a little more legislative foresight would eliminate the need for "crash program" responses to congressional proposals such as the Consumer Protection Act.⁴¹⁵

3. While much attention has been paid to the recruitment of well-qualified young law graduates, there appears to have been little accomplished in the way of retaining the skilled experienced personnel already trained by the FTC. The Project has noted continuously throughout this study that there is no substitute for a well-qualified, experienced draftsman. The Commission would do well to direct a portion of its energies to the retention as well as the recruitment of personnel.

4. Once qualified personnel enter legislative divisions of the FTC there seems to be little organized or formal effort to train them. The response of the FTC is that the only worthwhile training is the on-the-job experience which each new attorney receives in actually drafting legislation.⁴¹⁶ But even if this assertion is correct, the Commission has provided virtually no guidelines for the inexperienced draftsman such as those established by DOT or DOD.⁴¹⁷

5. Although granting the diversity of the FTC's statutory authority the Project believes that some move could be made toward codification or, at the

414. See footnote 412 *supra*.

415. See particularly FTC-CPA notes 1-5 for an example of the hurried processing (9 days) of Chairman Dixon's testimony.

416. Dietrich Letter, *supra* footnote 402, at 3-4.

417. For DOT guidelines see text accompanying footnote 28, *supra*; for DOD guidelines see text accompanying footnotes 25-27 *supra*; the FTC position is set out in the Dietrich Letter, *supra* footnote 402, at 17.

least, consolidation of its statutes. Even the General Counsel has conceded that the fourteen statutes are "susceptible to some simplification and consolidation."⁴¹⁸ Codification may be extremely difficult, but it should be attempted.

Overall, the FTC is an excellent example of the ways in which a moribund agency can be revitalized. The ingredients of this reawakening are in no particular order: presidential interest and support; dynamic new leadership; public interest and criticism and an internal reshuffling of deadwood personnel and programs. A by-product of these new developments is a greatly improved legislative drafting posture. Many other executive departments should profit from the example of the FTC.

418. Dietrich Letter, *supra* footnote 402, at 10-11. The Project's starting point for this assertion was a statement made by Commissioner Elman testifying on the Consumer Protection Act in 1969:

What we have now is a body of separate and discrete statutes, each reflecting an ad hoc response to a specific immediate problem, enacted at different times and in various circumstances. What we should have is a code of consumer protection, comprehensive and cohesive in scope and fully responsive to present needs.

Statement of Commissioner Elman, 1969 Senate Consumer Hearings, *supra* footnote 370, at 57.

**FEDERAL TRADE COMMISSION FILES
CONSUMER PROTECTION ACT (FTC-CPA)**

FILE NO. I (12/5/69-9/9/70)

This file contains the material which the Commission made available relating to the Senate Consumer Protection Hearings. It begins with the Commissioner's testimony in December of 1969 before the Senate Commerce Committee on three bills, S.3092, S.2246 and S.3201. The processing of legislative comments through the Commissioner's and the General Counsel's Office is noted. Particular definitional problems are indicated. Time factors relating to comments on the bills in Committee can be seen, as well as changes in the processing of legislation in the Commission.

FILE NO. II (2/4/70-4/17/70)

This file notes further correspondence between the Commission and the House and Senate Congressional Committees. The problem of establishing categories of Consumer Protection practices which would be subject to departmental (DOJ) and agency action under S.3201 is noted particularly. There is also evidence of internal commenting procedure within the Commission and problems in establishing a united Commission position on a key issue.

NAME	POSITION
<i>FILE NO. I</i>	
1. Mr. Magnuson	Sen. Magnuson, Chairman of the Senate Commerce Committee
2. Mr. Dixon	Chairman, F.T.C. (1961-69)
3. Mr. Nixon	President of the United States
4. Mr. Barnes	Acting Assistant General Counsel for Legislation (Chief Legislative Draftsman for FTC until transferred to Hearing Examiner position August, 1970)
5. Mr. Tydings	Sen. Tydings; introduced Consumer Class Action bill; S.3092.
6. Mrs. Jones	Commissioner, F.T.C.
7. Mr. MacIntyre	Commissioner, F.T.C.
8. Mr. Elman	Commissioner, F.T.C.
9. Mr. Goss	Attorney, Office of the General Counsel
10. Mr. Moss	Senator Moss, Chairman of the Senate Subcommittee on Consumers; introduced S.2246, a bill granting preliminary injunction authority to the FTC.
11. Mr. Weinberger	Chairman, FTC (1/70-8/70)
12. Mr. Murphy	Cong. Murphy
13. Mr. Rommel	Ass't Dir. of Legislative Reference, OMB.
14. Mr. Royal	Ass't Dir., Bureau of Deceptive Practices
15. Mr. Robin	Attorney, F.T.C.
16. Mr. Schultz	Director, OMB.
17. Mr. Jones	Attorney, F.T.C.
18. Mr. Tobin	Attorney, F.T.C.; Secretary to the Commission

FILE NO. II

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|--------------|--|
| 19. Mr. Mayo | Director, OMB. |
| 20. Mr. Hale | Director, Bureau of Deceptive Practices. |
| 21. Mr. Shea | Attorney, F.T.C. |
| 22. Mr. Taft | Ass't to the Chairman, FTC. |

**CONSUMER PROTECTION ACT
(FTC-CPA)**

FILE NO. I

1. Dec. 5, 1969

From Sen. Magnuson to Paul Rand Dixon, Chairman, FTC.

Subject: Sen. Magnuson wants the Commission's testimony on S.3201, a bill which he introduced at the request of President Nixon.

Comment: No earlier files given as to the Commission's role in drafting the Administration bill.
2. Dec. 15, 1969

From Mr. Barnes, Acting Ass't Gen. Con. for Legislation to General Counsel (Mr. Buffington).

Subject: Federal-State cooperation. Mr. Barnes in the memo states that he has been advised by the Committee by telephone that two other bills are to be considered, S.3092 and S.2246. S.3092, by Senator Tydings, has four main aspects:

 - (a) Amend Sec. 5 to authorize consumers who have been damaged by deceptive acts to bring *class actions*.
 - (b) Authorize suit in any Federal District Court.
 - (c) Consumer not have to await FTC action to bring suits.
 - (d) No provision for a final FTC order to be used as *prima facie* in consumer class action.

General Counsel suggests:

 1. Chairman's testimony here is that S.3092 is a *broad* consumer class action bill on FTC Act and state law. Not fully reviewed specific provisions, but inclined to limit consumer class actions to testimony on S.3201.
 2. S.2246 (Deceptive Sales Act of 1968)—enlarge § 13 of FTC Act—authorizes Commission to put injunctions or restraining order to practices, unfair or deceptive. (Similar to part 102 of S.3201).

Majority of Commission supports bill S.2246 in *legislative report* sent to OMB on July 29, 1969, OMB never cleared to Commerce. Recommends: Chairman should support bill.

 3. Senate wants Commission in 1970 to suggest state legislation *re* categorizing of unfair practices.
3. Dec. 15, 1969

From FTC to OMB.

Subject: Clearance of Chairman's testimony before Commerce Committee.

4. Dec. 15, 1969 Same
5. Dec. 1969 Same
6. Dec. 17, 1969 Testimony of Mrs. Jones, Commissioner FTC, before Senate Commerce Committee:
 1. S.3201-inadequate. Commission asked for testimony on December 8, 1969.
Concerned with quality of life and the adequacy of regulatory authority to deal with factors relating thereto.
 2. Need for product information (consumers) and for performance standards to make marketplace decisions.
 3. Consumer real need for protection. 25 states no civil consumer protection or adm. machinery. Many others poor.
 4. Need educational and informational programs.

An analysis of provisions of S.3201—

 1. Increase geographic scope of Commerce's authority—in concert with modern case law. (interstate commerce)
 1. Want increase in administrative jurisdiction to make broad studies.
 2. Express authority to promulgate rules to require disclosure.
 2. Expand Consumer Protection Authority
 - series of enumerated fraud practices that can be sued in Federal District Court not enough.
 - exempts credit transactions.
 - nor hard core frauds.
 - standards of proof too hard.
 - scare tactics.
 - affirmative misrepresentations in loans
 - similar misrepresentations.
 - collection tactics, waiver of service.

SUGGEST:

 - (1) specific amendments to outlaw such practices.
 - (2) high fines—power to restitute property, refund and enjoin suits already in process.

Consumer Class Action—

S.3201 too narrow—shouldn't have to wait till government acts—suppose to add to power; less than treble damages in anti-trust law.

Moreover, consumer action against a single industry prohibitive most of the time.

Recommend: S.3201 be amended as follows:

 - Informal grievance machinery.
 - New York State example.
 - Get rid of lawyer function.
 - 3 year statute of limitation instead of 1 year.

Should amend to include:

 - (1) Court civil damages awards for violation of FTC orders.

Business required to give notice to consumer.

A. *Standards Authority*

1. Commerce Department designate products for standards and industry initiation of such.
2. Consumer petition for standards.
3. Consumer public representative in standards hearing and right to appeal inadequacy.
4. Consumer Boards.

B. *Consumer Information and Research Programs.*

1. Provide research fund.
2. Legal aid.
3. Education and information.
4. Devise method to detect where greatest deception occurs and design program of *effective* government protection.

7. Dec. 17, 1969

Statement of Commissioner MacIntyre to Senate Commerce Committee.

8. Dec. 17, 1969

Statement of Commissioner Elman:

"What we have now is a body of separate and discrete statutes, each reflecting an *ad hoc* response to a specific immediate problem, enacted at different times and in various circumstances. What we should have is a code of consumer protections, comprehensive and cohesive in scope and fully responsive to present needs."

Comment: Excellent review.

Consumer Frauds:

- original idea of FTC to advise on monopolies.
- bring institution to context of times.
- consumer protection is needed.
- one free bite idea.
- informal enforcement methods.

Department of Justice-Consumer Protection Division

- not just initial fraud should be protected.

Defines (Pg. 14-15)—what type of function the FTC can serve to the Consumer.

(ex) *informational*

(ex) wants substantive rulemaking power and authority for civil penalties.

Consumer Damages for unfair practices, *e.g.*, NLRA—29 U.S.C. § 60(c),

Internal reform required by recommendation.

Critique of S.3201.

9. Dec. 16, 1969

Statement of the Chairman, Mr. Dixon.

1. Against enlarged authority; wants to modify Federal law and give local governments a chance to grow and govern their own.
2. Favors injunction.
3. Should not limit to 11 specific categories. Unfair and deceptive is any reliance on part of commerce and Court decision.

4. Against Consumer division at *Justice*.
 5. For consumer class action *after* commerce final order.
 6. Reciprocity for Justice and FTC authority.
10. Dec. 30, 1969
From Attorney Gass to Acting Ass't Gen. Counsel for Legislation.
- Subject:* Consumer legislation. Comments of Individual Commissioners on S.3201; summation of Chairman's testimony. From Attorney Gass to Acting Ass't Gen. Counsel for Legislation.
11. Dec. 30, 1969
Subject: Summation of Commissioner MacIntyre's testimony and comments on S.3201.
12. Dec. 30, 1969
From Attorney Gass to Acting Ass't Gen. Counsel for Legislation.
- Subject:* Commissioner Elman's comments on S.3201.
13. Dec. 30, 1969
From Attorney Gass to Acting Ass't Gen. Counsel for legislation.
- Subject:* Comments by Commissioner Jones on S.3201.
- 14-15 No Date
From Senate Commerce Committee staff members to Mr. Barnes.
- Subject:* Drafts of substitute pages to amend S.3201:
Title I -Deceptive Sales affecting Commerce.
Title II -Office of Consumer Protection.
Title III-Unfair or Deceptive Consumer Acts.
16. Jan. 27, 1970
From Senator Moss to FTC.
- Subject:* A letter-memorandum which outlines Senator Moss' objections to S.3201; it states specific areas where he feels the bill must be improved:
- (1) S.3201 inadequate.
 - (2) Need Consumer Protection Office and expanded enforcement power in FTC.
 - (3) DOJ should have tools to prosecute hardcore fraud.
 - (4) Consumer Class Action right.
17. Feb. 4, 1970
Statement of Commission Chairman Casper Weinberger on H.R. 14931 and H.R. 14832.
- Comment:* Mr. Weinberger was appointed Chairman, FTC, in January, 1970. H.R. 14931 and S.3201 on identical bills introduced by the Administration.
18. Feb. 11, 1970
From Mr. Barnes to Senator Moss.
- Subject:* Response to Senator Moss' letter dated January 27, 1970. A draft which is not used.
19. Feb. 13, 1970
From Commission to Congressman Murphy.
- Subject:* Consumer Protection bills before the House.
- Comment:* Letter not available in files, but referred to in other internal memoranda.
20. Feb. 18, 1970
From Mr. Barnes to Chairman Weinberger.
- Subject:* Comparison of General Counsel of NLRB with Consumer Counsel proposed in Office of Consumer Protection of FTC.

-complete separation of power.
 -almost same, except appointed by Commission instead of President.

21. March 6, 1970

From Mr. Barnes to Mr. Wilfred Rommel, Ass't Dir. of Legislative Reference, BOB.

Subject: Proposed Commission Amendments to H.R. 14931, to accompany the Chairman's testimony.

1. letter with amendments to give Commission additional power.
2. letter with amendment to § 201.*
3. letter with amendment to § 201.*

*ALTERNATE PROPOSALS not yet approved by the Commission.

22. March 19, 1970

Copies of House Commerce Committee replies to Senator Moss with proposed amendments.

23. March 30, 1970

Memoranda relating to Commission Agenda.

Subject: Commissioner Jones places the following items with written comments:

(1) Injunction provision comments made by Ass't Director of Bureau of Deceptive Practices on Consumer Class Action Bills:

-“serious, probably unintended loophole, in Administration's consumer protection bills” (Why appears too in the Tydings and Eckhardt class action bills).

Consumer phrased so not to enable “a wide variety of victims of deceptive schemes to sue for their damages such as victim of the Chinchilla breeding stock franchise or pyramid selling caskets.”

24. March 26, 1970

From Ass't Dir. of Bureau of Deceptive Practices to Commission.

Subject: Amendments suggested and noted by Mrs. Jones in FTC-CPA note 23; Mr. Royal was, according to the letter, “studying the captioned bills in preparation for my speech to the American Management Association, I was horrified to discover that the *injunction* provisions contain a loophole of gigantic proportions.”

“the bills provide that only acts or practices which are unfair or deceptive ‘to a Consumer’ may be enjoined.” As defined in the bills, “Consumer means any natural person who is offered or supplied goods or services for personal, family or household purposes; . . .”

The “business opportunity” promoter is not selling goods or services as defined in the bills and is hence excluded.

1. Powerless to enjoin multiple-level distributorship promoters.
2. Unable to enjoin that the fraudulent franchise purveyor. (Windsor Distributing Case, Docket No. 8173).

“In closing, may I state that it seems to me regrettable that this Bureau if not given the opportunity to submit its views to the Commission on these important consumer legislative proposals. The present procedure of having the General

- Counsel's Office prepare comments on legislation is fine as far as it goes, but certainly someone at some level should consult with the Bureau where its field of expertise is directly involved."
25. April 3, 1970 Secretary of the Commission-memorandum *re* Rican American Corporation, File No. 6623758, order on deceptive practices, try to stop—suggest use as example for need of injunctive powers.
26. April 7, 1970 General Counsel Memorandum
Subject: draft of letter to advise House and Senate of "loophole" in bill.
27. April 13, 1970 From Mr. Royal, Ass't Dir., Bureau of Deceptive Practices to Mr. Barnes.
Subject: Wants to amend Title II in Bill; thinks that he can "probably come up with something better."
Comment: the whole tenor of the letter and prior exchanges indicates the obvious need for the training of draftsmen within the executive.
28. June 5, 1970 From Commissioner Jones to the Commission.
Subject: The matter of the draft letter and changes to be made regarding the word "Consumer." Also reiterate support for and demonstrates need for temporary injunction.
 -question of example used—*Riccan American or Crowell Collier*. delete word "to the consumer" in § 102(a).
 However, what about class action?
 -so need different definition of consumer. § 204.
 -suggests "For the purpose of this section consumer shall also include any natural person who is offered or sold goods or services for the purpose of inducing the offer or buy to establish a business enterprise; provided, that any such offer or sale shall be made in the regular course of the offer's or seller's business."
Comment: Mrs. Jones and her staff are making the suggestion as to draft language defining "consumer" over two months after the "loophole" is discovered.
29. May 12, 1970 From Mr. Barnes to Commission.
Subject: Suggested letter and amendment. "Consumer" defined as meaning "any natural person who is offered or supplied goods or service for personal, household or income-producing purposes."
 This division does not agree that this definition is workable because it would encompass normal business transactions by retailers who purchase goods for income-producing purposes. Not having a better definition in mind, this Division recommends that the Commission merely call attention to the need for an expanded definition without furnishing suggested language.
30. June 12, 1970 Agenda Matters.
Subject: Suggest that the Commission move in accordance with Mrs. Jones' memo and that they look for better case

in relation to FTC's need for preliminary injunctive authority.

31. June 23, 1970

From Mr. Barnes to House and Senate Committees

Subject: Draft of Chairman Weinberger's letter to the Committees.

32. June 24, 1970

Letter from Chairman Weinberger to Commerce Committee. Committee Print No. 2 of S.3201 available.

33. July 8, 1970

From Commissioner Jones to all Commissioners.

Subject: Wants General Counsel to submit report on Commerce's Committee Print for FTC's consideration.

34. July 9, 1970

Senator Magnuson to FTC.

Subject: The Senator wants an FTC response by Tuesday morning on S.3201. If not sufficient time to establish a Commission position, wants at least an analysis of the minority staff's proposed amendments, relating to the strengthening of FTC and DOJ in the consumer enforcement area.

35. July 17, 1970

The entire Commission backs Chairman Weinberger's earlier (June 24, 1970) letter on Committee Print No. 2.

Secretary Shea notes that it is too late to respond to specifics of Senator Magnuson's letter—the Chairman (FTC) not having had an opportunity to consider DOJ's comments on minority staff proposed amendments.

36. July 14, 1970

From Mr. Robin to Mr. Schultz, Director, OMB.

Subject: explains that since the Commerce Committee had not directed the request (for comments on S.3201, Committee Print No. 2) to the Commission as a whole, but to the Chairman, they were not sent to OMB.

37. Sept. 9, 1970

From Mr. Terrence Jones to Mr. Charles Tobin.

Subject: H.R. 9811 and S.3201. Advocates changes of procedure:

(1) Budgeter to OMB not have to be appointed.

(2) Submit recommendations for additional legislation without submission to OMB or clearance by OMB.

FILE NO. 2

38. No Date

From Mr. Barnes to Chairman Weinberger.

Subject: H.R. 14931 identical to S.3201.

39. Feb. 4, 1970

From Mr. Barnes to Mr. Mayo, Director OMB.

Subject: Statement of Mr. Weinberger before House Committee (Draft).

40. No Date

Draft statement of Weinberger not used.

41. No Date

A third draft of Weinberger's statement—not used; also includes other Commission statements on S.3201.

42. Feb. 9, 1970

From Mr. Barnes to Mr. Hale, Director of Bureau of Deceptive Practices.

Subject: Wants reply to the categories of deceptive and unfair acts which are not included within H.R.

- 14931—deadline of Feb. 13, 1970.
43. Feb. 18, 1970 From Mr. Barnes to the Commission.
Subject: Changes suggested by the Chairman with draft language:
1. Civil redress for injury to consumer.
 2. Civil penalty authority.
 3. Clarify rulemaking authority.
44. March 6, 1970 From Mr. Barnes to Chairman Weinberger.
Subject: Proposed amendments to H.R. 14931:
- (1) Would not categorize the unfair and deceptive practices (says you "can't").
 - (2) If necessary, would use 28 categories—some of them broad and overlapping to prevent missing any and expedite judicial consideration of the matter.
45. No Date Copy of draft letter to Cong. Moss suggesting above amendments, listing the 28 categories.
46. No Date A draft of amendments—not used.
47. March 16, 1970 Three separate and different drafts of letter to Senator Moss. Commission decides that they want the two letters combined.
48. No Date Draft letter written by Mr. Hale, Director, Bureau of Deceptive Practices.
1. Letter
 2. 23 frauds not covered presently in the bill.
- "Should you decide to omit or change any of the suggestions made, we would appreciate having the opportunity to discuss them with you. Also, we would appreciate receiving a copy of the reply as forwarded to the subcommittee."
49. March 12, 1970 From Mr. Weinberger to Congressman Moss.
Subject: letter suggests that the Commission position is that the eleven categories presently enumerated should be eliminated and in its place the case law of the Commission should be substituted and "any act or practice which is unfair or deceptive to consumers and is prohibited by § 5(a)(1) of the FTC Act [15 U.S.C. § 45(a)(1)]".
50. March 9, 1970 Unused drafts of the above to Congressman Moss.
51. April 17, 1970 Suggested change in H.R. 14931. They have come through a conversation with a Mr. Nordhaus of the House Legislative Counsel's Office by Mr. Taft and Mr. Barnes.

**FEDERAL TRADE COMMISSION FILES
 FLAMMABLE FABRICS ACT (FTC-FFA)**

- FILE NO. I (4/16/70-9/27/70) The House Files reveal that the bill began as an appropriation measure for the FTC's enforcement of the FFA. The THREE AGENCIES INVOLVED—Commerce, HEW and the FTC—had to submit appropriation bills on OMB. Some involvement of Comptroller and Commission en-

FILE NO. II (10/3/69-9/4/70)

forcement people noted. Bill reported from the House (S. Rept. No. 91-1039) on Sept. 3, 1970.

In the Senate files, substantive amendments are suggested. Specifically, Commissioner Elman proposes creation of civil enforcement authority and the Chairman suggests sanctions applicable to the FFA which impose an affirmative duty with regard to pre-testing. Commission testimony before Senate Subcommittee suggests specific amendments to FFA. Consultation between the FTC and OMB is noted, while pressure from the interest groups builds against the Chairman's proposed amendments.

FILES END AT THIS POINT

NAME	POSITION
<i>FILE NO. I</i>	
1. Mr. William Yanch	Action Comptroller, FTC.
2. Mr. Barnes	Acting Assistant General Counsel for Legislation.
3. Mr. Staggers	Congressman Staggers, Chairman, House Interstate and Foreign Commerce Committee.
4. Mr. Mayo	Director, OMB.
5. Mr. Weinberger	Chairman, FTC (170-870).
6. Mr. J. Martin, Jr.	General Counsel, FTC.
7. Mr. Tobin	Attorney, Secretary to the Commission (11-70-).
8. Mr. Jamorick	Attorney, Acting Director of the Consumer Protection Division.
9. Mr. Gerald Thain	Attorney; Project Director of the National Commission Report on Produce Safety.
10. Mr. Verbrycke	Attorney, FTC.
<i>FILE NO. II</i>	
11. Mr. Nicholson	Commissioner, FTC.
12. Mr. Elman	Commissioner, FTC.
13. Mr. Stringer	Director of Bureau of Textiles and Furs.
14. Mr. Finch	Coordinator, FFA.
15. Mr. Moss	Senator, Chairman of the Subcommittee on Consumers.
16. Mr. Burrus	OMB.
17. Mr. Sherwood Small	Representative, OMB.
18. Mr. MacIntyre	Commissioner, FTC.

**FLAMMABLE FABRICS ACT
(FTC-FFA)***FILE NO. I*

- | | |
|-------------------|--|
| 1. April 16, 1970 | Copy of H.R. 16824, Flammable Fabrics Act, to authorize appropriation for the fiscal years 1971, 1972. |
|-------------------|--|

2. No Date
From Mr. Barnes to Mr. Yanch, Action Comptroller, FTC.
Subject: Submit to Mr. Yanch for comment H.R. 16824.
3. April 23, 1970
From Mr. Yanch to Mr. Barnes.
Subject: H.R. 16824; three agencies are involved—Commerce, HEW and FTC, with a combined appropriation of six million dollars.

Suggests for FTC ask for \$500,000.00 and such sums as may be necessary.
Reasons:
(1) *Standards* have to be promulgated. *Pointed this out in our draft bill to OMB.*
(2) Wants chance to assess what cost will be for the second year (covered in the appropriation).
Comment: Yanch memo indicates that the FTC drafted (or at least submitted a draft) a bill for OMB; this and earlier related documents (the “standards” above indicate some discussion material) were not made available to the project.
4. May 8, 1970
From Mr. Barnes to Congressman Staggers, Chairman, House Interstate and Foreign Commerce.
Subject: Draft letter on H.R. 16824—not used.
5. No Date
Draft letter which did not mention the money problem; not sent also.
6. No Date
From Mr. Weinberger to Mr. Mayo, Director, OMB.
Subject: Draft of letter—not used.
7. June 18, 1970
Memorandum suggests minor amendment to H.R. 16824
Comment: reference to a June 11, 1970, letter sent to the House Committee—not made available to the project.
8. June 23, 1970
From Mr. Barnes to the Commission.
Subject: Appropriation for FFA. \$500,000. dollars not enough. After talking with the Comptroller and the Bureau of Textiles and Furs, Mr. Barnes recommends \$700,000 dollars.
9. No Date
Memorandum which was not used on the possibility of raising appropriation amount since the Commission has the responsibility of enforcement and the STANDARDS on flammability are about to be raised by the Secretary of Commerce (to include children’s clothes).
10. June 30, 1970
From Mr. Barnes to Commission.
Subject: FFA- he recommends (1) \$700,000.; (2) Open end clause.
11. September 3, 1970
Memorandum by the General Counsel, Joe Martin, Jr. on S.3765 and H.R. 16824.
Comment: House has scheduled hearings for Sept. 10, 1970.
12. September 3, 1970
Copies of S.3765 and Sen. Rept. No. 91-1039.
13. September 3, 1970
Copy of the Martin letter noted in FTC-FFA note 18; Commerce Committee wants comments of the Commission on

- the administration's proposed changes and draft of amendments thereto.
14. September 4, 1970 Commission cannot get comments to the Commerce Committee before Sept. 24, 1970.
15. September 14, 1970 From Mr. Tobin to Mr. Jamarick (Acting Director of the Consumer Protection Division)
Subject: The National Commission on Product Safety has just issued a report. No discussion in the memorandum critiquing the report, rather reference is made pertinent material relating to the Commission which could be construed as critical. Wants answers for the Chairman to give at House Hearings to this criticism.
16. September 21, 1970 From Mr. Gerald Thain to Mr. Martin, General Counsel.
Subject: His response to an inquiry of the General Counsel in the National Commission's Report on Product Safety.
17. September 22, 1970 From Mr. Verbrycke to Mr. Tobin.
Subject: Legal distinction between "willfully" (with a bad purpose, intentional) and "knowingly"—concludes no real distinction.

FILE NO. II

18. October 3, 1969 From Commissioner Nicholson to Commission.
Subject: Use of *in rem* proceedings.
19. December 1, 1969 The *in rem* proceedings subject is put on the Commission Calendar.
20. December 3, 1969 From Mr. Elman to the Commission.
Subject: Analysis of the Commission's authority to impose civil penalties.
 (1) Amendments offered to give Commission such authority.
 (2) Wants to impose even though you can't prove "willfulness" necessary for a "cease and desist" order.
 (3) Similar observations made of all violators of FTC statutes.
 (4) Urge in the next legislative session that the Commission propose amendments to all enforcement statutes authorizing the imposition of civil penalties.
21. February 4, 1970 From Mr. Stringer, Director of Bureau of Textiles and Furs, to Mr. Barnes.
Subject: proposed amendments to FFA relating to Summary Seizure.
22. March 20, 1970 From Mr. Finch, Coordinator FFA to the Commission.
Subject: propose amendment that the Domestic manufacturers be required to conduct flammability tests on fabrics. Amend § 8 of FFA—mandatory rather than permissive requirements.
23. April 21, 1970 From Mr. Weinberger to the Commission.
Subject: Proposed amendment to FFA. The Chairman's comment to February 4 amendment Suggestion: don't need

- sanction after you go to market, but before. Order General Counsel and Bureau of Textiles to draw up an amendment.
24. May 7, 1970 Memorandum notes that General Counsel drew up amendment, but draft not contained in files.
25. May 13, 1970 Senate Commerce Committee to FTC.
Subject: wants comments on S.3765 FFA.
26. May 21, 1970 From Mr. Barnes to Commission.
Subject: proposed amendment to FFA; requiring pretesting of fabrics. Bureau of Textiles and Furs assisted in drawing up amendment.
 -§ 3 to amendment to make it unlawful to distribute goods in commerce without first pretesting. Impose an affirmative duty of pretesting.
 -Under 5(e) then have authority to issue rules and regulations (Commission).
 -Certification procedure on pre-testing would be left to Commission's rulemaking power. Also, civil penalty if violate § 3(a)(b)(c). Or § 8(13) (\$10,000).
27. June 10, 1970 Chairman Weinberger's statement to Subcommittee on Consumers of Senate Commerce Committee.
Subject: FFA and S.3765; notes defects in legislation and offers legislative recommendations by adopting Mr. Barnes' amendment.
 -Statement with respect to the existing provisions of the FFA; Chairman states the Commission has been engaged in a wide-ranging review and appraisal of its current administrative and statutory enforcement tools.
 -Deficiencies have been uncovered and new programs are being formulated.
 -States that the FTC needs to have ability to detect suspected fabrics and to do so need \$700,000. appropriation.
28. June 11, 1970 From Chairman to Senator Moss.
Subject: Amendments to FFA.
Comment: No copies of proposed amendments or correspondence between the Chairman's office and the Senate Commerce Committee.
29. June 11, 1970 From Mr. Barnes to Commission.
Subject: Proposed amendment to FFA- pretesting idea not used.
30. June 12, 1970 From Mr. Barnes to Chairman Weinberger.
Subject: OMB clearance of June 10, testimony
 -Mr. Burrus of OMB—OK
 -Mr. Small of OMB—suggests money problem, but next day the report cleared as written.
31. June 12, 1970 From Commissioner Elman to Commission.
Subject: proposed amendments to FFA. Suggests gap in Mr. Barnes' draft: not only should tests be required, but they should be successful and prove non-flammable material.

32. No Date Amendment sent to Senator Moss.
33. June 23, 1970 Allocation re FFA appropriations not sent because of Weinberger testimony of June 10.
34. July 29, 1970 Copies of S.3765, Calendar No. 1047; Sen. Rept. No. 91-1039.
35. Sept. 3, 1970 Series of meetings at OMB-Bill now in House.
36. No Date Mr. Verbrycke, III meets with OMB people *re* changes in the Bill.
37. September 4, 1970 House to consider amendments from Mr. MacIntyre, Acting Chairman to the Commission.
- Subject:* Memorandum:
1. Asks for suggested position since unable to get a consensus until after Hearings.
 2. Has received letter on September 3, 1970, from the National Cotton Counsel of America.

-In essence, it says that the three amendments proposed by FTC are unreasonable, unfair and impractical. They support the amendments proposed by the Department of Commerce.
 3. Their principal objection goes to the current state of technology in the application of fire resistant finishes to cellulosic fabrics, the use of fire resistant man-made fiber materials and of measuring textile flammability and estimating potential hazard. Goes thru his technical backgrounds and into practical problem. Statement includes opposition to FFA S.3765 by Apparel Industries International Association Commercial and Knitted Fabric Group.

"In Criminal Law it is essential that a statutory crime be defined most precisely; that the criminal act be specified in the most exact terms."
- Objections:
"Certification is a new concept never mentioned in the Act. Nowhere is it defined. Why is certification limited to manufacturers? Produce all garments (not fabric alone) has to be certified. Garment industry is a small enterprise. Ordinarily do not do testing. No provision against false certification. Does not cover imports. Bill prohibits manufacture without certification and act requires testing."
- Comment:* Substantive criticism by interest groups.

FILES END AT THIS POINT