AUTHORIZATIONS FOR THE FEDERAL TRADE COMMISSION AND GENERAL OVERSIGHT ISSUES

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

H.R. 2313 and H.R. 2367

BILLS TO AMEND THE FEDERAL TRADE COMMISSION ACT TO EXTEND THE AUTHORIZATIONS CONTAINED IN THE ACT, AND FOR OTHER PURPOSES

FEBRUARY 28, MARCH 1 AND 7, 1979

Serial No. 96–35

Printed for the use of the
Committee on Interstate and Foreign Commerce

U.S. GOVERNMENT PRINTING OFFICE
47-917 O WASHINGTON : 1979

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

HARLEY O. STAGGERS, West Virginia, *Chairman*

JOHN D. DINGELL, Michigan
LIONEL VAN DEERLIN, California
JOHN M. MURPHY, New York
DAVID E. SATTERFIELD III, Virginia
BOB ECKHARDT, Texas
RICHARDSON PREYER, North Carolina
JAMES H. SCHEUER, New York
RICHARD L. OTTINGER, New York
HENRY A. WAXMAN, California
TIMOTHY E. WIRTH, Colorado
PHILIP R. SHARP, Indiana
JAMES J. FLORIO, New Jersey
ANTHONY TOBY MOFFETT, Connecticut
JIM SANTINI, Nevada
ANDREW MAGUIRE, New Jersey
MARTY RUSSO, Illinois
EDWARD J. MARKEY, Massachusetts
THOMAS A. LUKEN, Ohio
DOUG WALGREN, Pennsylvania
ALBERT GORE, JR., Tennessee
BARBARA A. MIKULSKI, Maryland
RONALD M. MOTTL, Ohio
PHIL GRAMM, Texas
AL SWIFT, Washington
MICKEY LELAND, Texas
RICHARD C. SHELBY, Alabama
SAMUEL L. DEVINE, Ohio
JAMES T. BROYHILL, North Carolina
TIM LEE CARTER, Kentucky
CLARENCE J. BROWN, Ohio
JAMES M. COLLINS, Texas
NORMAN F. LENT, New York
EDWARD R. MADIGAN, Illinois
CARLOS J. MOORHEAD, California
MATTHEW J. RINALDO, New Jersey
DAVE STOCKMAN, Michigan
MARC L. MARKS, Pennsylvania
TOM CORCORAN, Illinois
GARY A. LEE, New York
TOM LOEFFLER, Texas
WILLIAM E. DANNEMEYER, California

W. E. WILLIAMSON, *Chief Clerk and Staff Director*
KENNETH J. PAINTER, *First Assistant Clerk*
ELIZABETH HARRISON, *Professional Staff*
JOHN H. ALLEN, *Professional Staff*

SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE

JAMES H. SCHEUER, New York, *Chairman*

RICHARDSON PREYER, North Carolina
RICHARD L. OTTINGER, New York
DAVID E. SATTERFIELD III, Virginia
THOMAS A. LUKEN, Ohio
HARLEY O. STAGGERS, West Virginia
(Ex officio)
JAMES T. BROYHILL, North Carolina
MATTHEW J. RINALDO, New Jersey
SAMUEL L. DEVINE, Ohio
(Ex officio)

JANIE KINNEY, *Counsel/Staff Coordinator*
NANCY ANN NORD, *Minority Staff*

CONTENTS

AUTHORIZATIONS FOR THE FEDERAL TRADE COMMISSION AND GENERAL OVERSIGHT ISSUES

WEDNESDAY, FEBRUARY 28, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2322, Rayburn House Office Building, Hon. James H. Scheuer, chairman, presiding.

Mr. SCHEUER. This meeting of the Subcommittee on Consumer Protection and Finance will come to order.

We will commence our first day of hearings on the authorization bill for the Federal Trade Commission. This will be the first of 3 days of hearings. In the last session of Congress we had several amendments to the Federal Trade Commission authorization. They were defeated twice on the floor, so I think it is time to perhaps take a step back and look at the FTC in detail and look at all aspects of their operations before making any substantive amendments to the basic authorizing legislation.

Therefore, my bill, H.R. 2313, simply authorizes funds for the fiscal years 1980 and 1981. I would hope that after this legislation is out of the way, we could conduct a well thought out significant series of substantive hearings and perhaps, then, put together some amendments after the end of that process.

My distinguished colleague, Jim Broyhill, has a bill, 2367, which does address several other matters and does contain several amendments. He is at an important meeting and will be with us very shortly. In the meantime, he is very well represented by counsel.

And we have the pleasure of another distinguished member of the committee present, Sam Devine, so we will proceed.

I did not serve on this subcommittee for the last year. I was on it before that but when I was made chairman of the Select Committee on Population I resigned from this subcommittee because of time constraints. So, I am really not in a position now to hold out any expertise on the FTC programs.

This set of hearings will be a learning process for me. I have asked the witnesses to address themselves to the general operation of the Commission, how it sets its priorities and the validity of those priorities and how successful it has been in carrying out its mission and meeting its statutory mandates.

As I said, we will have extensive hearings later on the detailed work of the FTC. We also plan to hold a joint set of hearings with

Congressman Bob Eckhardt, chairman of the Oversight and Investigations Subcommittee on the costs and benefits of the Government regulatory process.

There are those on the consumer end of the spectrum representing consumer interest and consumer oriented organizations who talk persuasively about the benefits of Government regulations. On the other hand, from the industry end of the spectrum, we hear frequent criticism of the regulatory process and much talk about the cost of regulation.

We do know there are both benefits and costs. The question is: How do you quantify them and how do you arrive at the right mix? How do you stop regulating at the point of diminishing returns?

It will be my goal with Bob Eckhardt and the members of his subcommittee to look at the costs and the benefits of the Government regulatory process in all of the regulatory agencies under the jurisdiction of the Interstate and Foreign Commerce Committee and perhaps a few others outside of the jurisdiction of our committee, assuming that we can stimulate the encouragement of some standing full committee and subcommittee chairmen of other standing full committees and subcommittees.

We will also be having a look at the effectiveness of the Magnuson-Moss rulemaking procedures. So, I would think by the end of the year we would be in a much better position than we are now to assess whatever substantive changes, if any, seem needed to be made in the Federal Trade Commission Act or in the direction of its proposed rulemaking.

Without objection the text of H.R. 2313 and H.R. 2367 will be printed at this point in the record.

[Testimony begins on p. 19.]

[The text of the bills referred to follow:]

96TH CONGRESS
1ST SESSION

H. R. 2313

To amend the Federal Trade Commission Act to extend the authorization of appropriations contained in such Act.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 21, 1979

Mr. SCHEUER introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

---

A BILL

To amend the Federal Trade Commission Act to extend the authorization of appropriations contained in such Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 20 of the Federal Trade Commission Act (15 U.S.C. 58) is amended by striking out "and" after "1976;", and by striking out "1977. For fiscal years ending after 1977, there may be appropriated to carry out such functions, powers, and duties, only such sums as the Congress may hereafter authorize by law." and inserting in lieu thereof "1977; not to exceed $75,000,000 for the fiscal year ending

September 30, 1980; and not to exceed $80,000,000 for the fiscal year ending September 30, 1981.".

96TH CONGRESS
1ST SESSION

H. R. 2367

To amend the Federal Trade Commission Act to extend the authorization of appropriations contained in the Act, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 26, 1979

Mr. BROYHILL (for himself and Mr. RINALDO) introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

---

A BILL

To amend the Federal Trade Commission Act to extend the authorization of appropriations contained in the Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 20 of the Federal Trade Commission Act (15 U.S.C. 58) is amended—

(1) by striking out "and" after "1976;"; and

(2) by striking out "1977. For fiscal years ending after 1977, there may be appropriated to carry out such functions, powers, and duties, only such sums as

the Congress may hereafter authorize by law." and inserting in lieu thereof "1977; not to exceed $75,000,000 for the fiscal year ending September 30, 1980; not to exceed $80,000,000 for the fiscal year ending September 30, 1981; and not to exceed $85,000,000 for the fiscal year ending September 30, 1982.".

SEC. 2. (a) Section 5(a)(2) of the Federal Trade Commission Act (15 U.S.C. 45(a)(2)) is amended by inserting after "banks," the following: "savings and loan institutions described in section 18(f)(3),".

(b)(1) Section 6(a) of the Federal Trade Commission Act (15 U.S.C. 46(a)) is amended by inserting after "banks" the following: ", savings and loan institutions described in section 18(f)(3),".

(2) Section 6(b) of the Federal Trade Commission Act (15 U.S.C. 46(b)) is amended by inserting after "banks," the following: "savings and loan institutions described in section 18(f)(3),".

(3) The proviso at the end of section 6 of the Federal Trade Commission Act (15 U.S.C. 46) is amended—

(A) by inserting after "banks" the following: ", savings and loan institutions described in section 18(f)(3),"; and

(B) by inserting ", in business as a savings and loan institution," after "banking".

(c)(1) Section 18(f)(1) of the Federal Trade Commission Act (15 U.S.C. 57a(f)(1)) is amended—

(A) in the first sentence thereof—

(i) by inserting "or savings and loan institutions described in paragraph (3)" after "banks" each place it appears therein; and

(ii) by inserting "or (3)" after "(2)";

(B) in the second sentence thereof, by inserting after "System" the following: "(with respect to banks) and the Federal Home Loan Bank Board (with respect to savings and loan institutions described in paragraph (3))"; and

(C) in the last sentence thereof—

(i) by inserting "each" before "such Board" the first place it appears therein;

(ii) by striking out "such Board finds that (A)" and inserting in lieu thereof "(A) either such Board finds that";

(iii) by inserting "or savings and loan institutions described in paragraph (3), as the case may be," after "banks" the first place it appears therein;

(iv) by inserting after "or (B)" the following: "the Board of Governors of the Federal Reserve System finds"; and

(v) by striking out "the Board" and inserting in lieu thereof "such Board".

(2) Section 18(f) of the Federal Trade Commission Act (15 U.S.C. 57a(f)) is amended by redesignating paragraphs (3), (4), and (5) thereof as paragraphs (4), (5), and (6), respectively, and by inserting after paragraph (2) thereof the following new paragraph:

"(3) Compliance with regulations prescribed under this subsection shall be enforced under section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464) with respect to Federal savings and loan associations, section 407 of the National Housing Act (12 U.S.C. 1730) with respect to insured institutions, and sections 6(i) and 17 of the Federal Home Loan Bank Act (12 U.S.C. 1426(i), 1437) with respect to savings and loan institutions which are members of a Federal Home Loan Bank, by a division of consumer affairs to be established by the Federal Home Loan Bank Board pursuant to the Federal Home Loan Bank Act.".

SEC. 3. (a) Section 18(a)(1) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)) is amended by striking out "The" and inserting in lieu thereof "Subject to the provisions of subsection (i), the".

(b) Section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) is amended by adding at the end thereof the following new subsection:

"(i)(1) Notwithstanding any other provision of this Act, simultaneously with prescribing any rule under this Act, the Commission shall transmit a copy thereof to the Secretary of the Senate and the Clerk of the House of Representatives. Except as provided in paragraph (2), the rule shall not become effective if—

"(A) within 90 calendar days of continuous session of the Congress after the date the rule is prescribed, both Houses of the Congress adopt a concurrent resolution, the matter after the resolving clause of which is as follows: 'That the Congress disapproves the rule precribed by the Federal Trade Commission dealing with the matter of , which rule was transmitted to the Congress on .', the blank spaces therein being appropriately filled; or

"(B) within 60 calendar days of continuous session of the Congress after the date the rule is prescribed, one House of the Congress adopts such a concurrent resolution and transmits such resolution to the other House, and such resolution is not disapproved by such other House within 30 calendar days of continuous session of the Congress after such transmittal.

"(2) If, at the end of 60 calendar days of continuous session of the Congress after the date on which a rule is prescribed, no committee of either House of the Congress has reported or been discharged from further consideration of a concurrent resolution disapproving the rule, and neither House has adopted such a resolution, the rule may go into effect immediately. If, within such 60 calendar days, such a committee has reported or been discharged from further consideration of such a resolution, or either House has adopted such a resolution, the rule may go into effect not sooner than 90 calendar days of continuous session of the Congress after such rule is prescribed unless disapproved as provided in paragraph (1).

"(3) Congressional inaction on, or rejection of, a resolution of disapproval under this subsection shall not be deemed an expression of approval of the rule involved.

"(4) For purposes of this subsection—

"(A) continuity of session is broken only by an adjournment of the Congress sine die; and

"(B) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of 30, 60, and 90 calendar days of continuous session of the Congress.".

(c) The amendments made in this section shall apply to any rule of the Federal Trade Commission which has not become final on or before March 1, 1979. If any such rule becomes final after such date, but before the date of the enactment of this Act, such rule shall cease to be in effect and shall be subject to the provisions of section 18(i) of the Federal Trade Commission Act, as added by subsection (b).

SEC. 4. (a) The Federal Trade Commission Act (15 U.S.C. 41 et seq.) is amended by redesignating section 21 as section 27 and by inserting after section 20 the following new sections:

"SEC. 21. The Commission, in connection with carrying out any proposed rulemaking under section 18, shall—

"(1) prepare a statement relating to the need for, and the purposes and applicability of, the proposed rule involved in accordance with section 22;

"(2) prepare a statement containing an analysis of regulatory and nonregulatory alternatives to such proposed rule in accordance with section 22; and

"(3) carry out an economic impact analysis of such proposed rule in accordance with section 23.

"SEC. 22. The Commission shall include in the general notice of proposed rulemaking required in section 553(b) of title 5, United States Code—

"(1) a statement which—

"(A) describes in specific terms the need for the proposed rule involved and the purpose which will be served by such proposed rule;

"(B) indicates the legal basis for the prescription of such proposed rule; and

"(C) specifies the scope and applicability of such proposed rule; and

"(2) a statement which—

"(A) describes each regulatory and nonregulatory alternative which was considered by the Commission in connection with preparation of such proposed rule;

"(B) discusses the reasons for selection of such proposed rule as the most effective means for the achievement of the policy goals and purposes of the Commission, taking into account the costs and benefits associated with each regulatory and nonregulatory alternative considered by the Commission; and

"(C) indicates the manner in which the economic impact analysis prepared by the Commission in accordance with section 23 was taken into account in connection with selecting the proposed rule as the most effective means for the achieve-

ment of the policy goals and purposes of the Commission.

"SEC. 23. (a) The Commission, in connection with carrying out any proposed rulemaking under section 18, shall prepare an economic impact analysis of the proposed rule involved. Such analysis shall examine—

"(1) the direct and indirect costs associated with compliance with such proposed rule;

"(2) the potential inflationary or recessionary effects of such proposed rule;

"(3) the direct or indirect effects which such proposed rule may have on employment;

"(4) the effects which such proposed rule may have on competition in businesses and industries affected by such proposed rule, with particular attention to any competitive effects upon small businesses;

"(5) the effects which such proposed rule may have on consumer costs, with particular attention to effects upon economically depressed segments of the national population;

"(6) the impact of such proposed rule on productivity in businesses and industries affected by such proposed rule; and

"(7) the impact of such proposed rule on recordkeeping and reporting requirements, including—

"(A) an estimate of the number of, and a description of the classes of, persons who would be required to maintain records, submit reports, and fulfill other information-gathering requirements under such proposed rule; and

"(B) an estimate of the nature and amount of information which would be required to be contained in such reports, the frequency of such reports, and the costs associated with complying with such recordkeeping, reporting, and other information-gathering requirements.

"(b) The Commission shall take the economic impact analysis prepared in accordance with subsection (a) into account in preparing the statement required in section 22(2).

"(c) Copies of each economic impact analysis prepared by the Commission in accordance with subsection (a) shall be made available by the Commission for public inspection and copying during normal business hours, subject to the payment of a reasonable fee to cover any cost of such copying.

"SEC. 24. (a)(1) Each statement prepared by the Commission under section 22 in connection with a proposed rulemaking, and included in the general notice of proposed rulemaking, shall be included by appropriate reference in the publication of the final rule in the Federal Register.

"(2) If the Commission makes any change or alteration in any statement specified in paragraph (1) before publication of the final rule, then the Commission shall include in such publication a detailed explanation of the nature of, and reasons for, each such change or alteration.

"(b) The Commission shall prepare a statement, which shall be signed by the chairman of the Commission and shall be included in the publication of the final rule involved in the Federal Register, indicating that the chairman of the Commission has reviewed such final rule and that—

"(1) such final rule is stated in clear, readily understandable, and unambiguous language which specifically describes the scope and applicability of such final rule;

"(2) such final rule is not in conflict with any existing rule prescribed by the Commission or by any other Federal agency;

"(3) such final rule shall not be interpreted or otherwise construed in such a manner as would make such rule in conflict with any existing rule prescribed by the Commission or by any other Federal agency; and

"(4)(A) such final rule is not duplicative of any existing rule prescribed by the Commission or any other Federal agency; or

"(B) in any case in which such final rule is duplicative of any such existing rule, there is a need for such duplication.

In any case in which a final rule is duplicative of any existing rule, the statement required in this subsection shall include a description of such duplication, together with an explanation of the need for such duplication.

"SEC. 25. (a) The Commission shall review each rule prescribed by the Commission not later than 5 years after such rule is prescribed (and not later than the end of each 5-year period thereafter) in order to determine whether—

"(1) such rule continues to be necessary, taking into account technological and other developments, any changes in economic and other conditions, and any changes in the policies and priorities of the Commission, which have occurred since such rule was initially prescribed;

"(2) such rule is carrying out the purposes it was designed to carry out at the time it was initially prescribed;

"(3) such rule is in conflict with, or is duplicative of, any existing rule prescribed by the Commission or any other Federal agency;

"(4) the language of such rule should be simplified or clarified; and

"(5) such rule should be amended or repealed.

"(b) The Commission shall, not later than 5 years after the effective date of this section, review each rule prescribed by the Commission which is in effect on such effective date in order to make the determinations specified in subsection (a) with respect to each such rule.

"(c) The Commission, in making the determinations required in subsection (a) and subsection (b), shall take into account—

"(1) the number and nature of complaints, comments, and suggestions received by the Commission with respect to the rule involved; and

"(2) the nature and extent of any burdens imposed by such rule upon persons required to comply with such rule, as compared to the effectiveness of such rule in achieving the purposes for which it was initially prescribed.

"(d) The Commission shall publish each determination required in this section, together with a summary of the reasons for such determination, in the Federal Register.

"SEC. 26. (a) If the Commission fails to comply with any procedural requirement established in section 21 through section 25, then any person may file a petition for judicial review in an appropriate circuit court of the United States not later than 60 days after such failure to comply.

"(b) Upon the filing of a petition under subsection (a), the court shall have jurisdiction to review the action of the Commission, and if the court finds that the Commission has failed to comply with any procedural requirement the court shall have authority to order the Commission to suspend further rulemaking proceedings relating to the rule which is the subject of the petition, or to order the Commission to suspend further enforcement of the rule, until the Commission is in compliance with the procedural requirements established in section 21 through section 25.

"(c) The judgment of the court in any action brought under this section shall be final, 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.".

(b) The amendments made in subsection (a) shall apply to proposed rulemakings of the Federal Trade Commission which commence after the date of the enactment of this Act.

O

Mr. SCHEUER. My distinguished colleague, would you like to make some preliminary remarks?

Mr. DEVINE. My interest today is perhaps parochial. I represent the Columbus, Ohio district. Recently, the Federal Trade Commission involved themselves in a case out there wherein a glass company called Federal Glass was in financial difficulty and there was an offer to acquire that by an organization known as Lancaster Colony.

The Federal Trade Commission in its wisdom or lack thereof denied the Lancaster Colony people the right to acquire this, notwithstanding the fact that this company was virtually going out of business unless something happened. The Federal Trade Commission remained adamant, did not respond to correspondence, and it was part of the record—there was no ex parte problem—that unless this acquisition did occur the business would go or they would go out of business and in fact it did and 1,500 longtime employees were put out on the street seeking other employment.

After the fact, the Federal Trade Commission decided they had indeed made a mistake in the action they took, seeking to preserve competition and prevent monopoly. It did in fact just the reverse; it cut down competition. When you put a place out of business, it creates more of a monopoly than letting someone acquire it and continue operation.

They changed their mind just last week and Lancaster Colony is in a position of reckoning with the defunct company and we are hopeful that 500 employees will go back on and the rest at a future time.

But it is a classic case, Mr. Chairman, of a regulatory agency overregulating and being self-defeating by the type of action that they took. That is a matter of concern to this member and to other members, I am sure, as we deal with regulatory agencies and their purpose and whether or not they are defeating their own purpose.

Thank you very much.

Mr. SCHEUER. Congressman Devine, what you are alleging—if it is true—would be a shocking example of the worst kind of regulatory abuse, and it is very disturbing to me. I justify Government regulation in all of its myriad forms when it is more than balanced by some provable benefit to the community, to the consumer, but the kind of action you have just described, if true, would be the classic kind of Government regulation that should never take place.

I would like to invite you to give us a brief on that subject, exactly what did happen, and perhaps we could get some official of your community to come and testify in one of our future days of hearings.

Mr. DEVINE. I have a file 5 to 6 inches deep already, and Congressman Wylie and Senator Glenn are involved in this as well as a number of other people.

Mr. SCHEUER. Congressman, on March 7, Commissioner Pertschuk and every member of the Commission is scheduled to testify here. I wonder if you could prepare a brief summary of your 5-inch file for the benefit of the members of this committee and if you would be kind enough to come to that hearing, we will recognize you forthwith.

Mr. DEVINE. I will accept the invitation and be happy to do so.

Mr. SCHEUER. I would very much like to hear their explanation of how, according to your report they could have bungled this case so. I will ask them to be prepared to answer questions on it.

I expect they will have some kind of answer. I suppose there are always two sides to every question, but you have made a prima facie case of maladministration of the regulatory process.

Mr. DEVINE. If I am not myself mistaken, the minority member, Mr. Broyhill, is aware of the situation. We have discussed it in the past.

Mr. BROYHILL. It has recently been brought to my attention.

Mr. SCHEUER. We know you had a very important meeting that delayed you a few minutes. Would you like to make some preliminary remarks before we begin?

Mr. BROYHILL. No.

Mr. SCHEUER. Sam Devine has done an excellent job in peaking our curiosity as to how this episode could have ever taken place.

Without objection, the Chair wishes to place in the record, as though read, the statment of Congressman Marty Russo of Illinois.

[Statement of Congressman Marty Russo follows:]

STATEMENT OF HON. MARTY RUSSO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. RUSSO. I appreciate the opportunity to appear before the members of the Commission this afternoon to present my views on the subject of Federal regulation of the funeral industry. I will attempt to address myself to the issue and not bore you with a lot of rhetoric. I do not believe your staff has proven the case that a Federal law governing the funeral industry is needed. In addition to that I am very distressed over the whole manner by which your investigation was begun and then conducted. I consider the exercise to have been a biased one with your staff often acting in an arrogant, sometimes belligerent manner and even utilizing the media to present a distorted picture of the funeral industry. This includes things like giving the impression that the average funeral costs twice as much as it does by including burial expenses which the funeral director does not control.

As chairman of a small business subcommittee, I am disturbed by what you say on the one hand and then what you do on the other. You have testified before another one of our subcommittees on more than one occasion that your resources are not what they should be, or you would be able to provide even more protection for small business. Yet, look at your record.

In recent years, you have begun several rulemaking proceedings. Of all the industries and companies affected, the overwhelming majority have been small businesses. The funeral industry for example is a small business intensive one. More than 92 percent of the firms are small businesses. This one rule alone so far has cost the taxpayers well over $1 million, perhaps even $2 million. Is it any wonder I question the real role of the Commission?

I will now direct myself to various specific issues.

Throughout the proceedings on this rule, your staff has given the impression that the furneal industry has been totally uncooperative in this investigation. In fact, at various times your staff has

even used the term "stonewalling" in reference to the industry's position. This apparently was said on the record by Presiding Officer Kahn among others.

In this connection at a recent Small Business hearing, representatives of the industry were asked about this. In respone, they gave us a list of contacts with your agency dating back to 1972. A reading of this list does not appear to support this stonewalling image. This list was included in my earlier submission for the Commission record. From reading the list it appears your staff had its mind made up and wasn't interested in sitting down with industry representative.

Although we brought this issue up back in the 94th Congress, none of the witnesses were sworn at the Commission's hearings on this rule. Your hearing officer explained that this was because some people find the requirement of an oath offensive. In a matter as important as this, I don't. What I would find offensive is a record filled with inflated and incorrect information due to the lack of an oath.

Although funeral industry representatives asked to be allowed to question FTC staff members, their request was refused. We were told that the record was not be based on staff opinion and therefore this was not needed. This is in violation of the legislative history of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. Proponents of the bill in the House assured House Members that staff members were indeed subject to questioning.

I was under the impression that the rulemaking proceeding was to be as fair to all interested parties as possible. This has not been the case. For example, your staff took well over a year to prepare its staff report summarizing the hearings. Yet everyone was supposed to obtain a copy of this 600-page document and comment on it in 30 days. After everyone involved complained, this was extended to 60 days after half of the original 30 days had lapsed. Fairness should have dictated much more time. It is obvious that the average consumer or businessman is not being considered a respondent, because how can they react in such a short time to such voluminous material?

I would also ask that you look at the report your staff put together summarizing the hearings which comes out supporting their rule. Then look at the staffs' summary of the comments of interested parties to the rule most of which were in opposition. The latter looks like it was thrown together in a few days. Again, are you getting an objective picture of what the issues are here?

It is my understanding that funds for public participants are intended for interested parties who are not able to afford extended participation on their own. Allegations have been made to me that your staff vigorously sought out various consumer groups, yet ignored any industry contacts. It is alleged that representatives of the Nation's black funeral homes were never contacted and never told such funds were available. The Commission should investigate this and make a statement on who is eligible for such funds and how notice should be served.

There are many examples of alleged lack of objectivity in the proceedings on your rule. I will give you one example which you all may want to personally review.

Dr. Roger D. Blackwell of Ohio State University is a well-known authority on consumer behavior. He coauthored the textbook "Consumer Behavior" which is used in many of the Nation's colleges.

In an appendix to the presiding officer's report there is a section concerning the credibility of the testimony of Dr. Roger D. Blackwell. I have received correspondence from Dr. Blackwell which indicates he believes he was not a participant in an informal hearing. Rather he suggests he was thrust in the middle of an adversary hearing without benefit of legal counsel and badgered, intimidated, and questioned over areas unrelated to my written statement. Dr. Blackwell further states that in his report the presiding officer in nine instances made statements which are contradicted by the record, or which would serve to mislead the Commissioners. Due to the seriousness of his allegations, I suggest Blackwell's testimony, the presiding officer's comments, and Blackwell's rebuttal all be reviewed by the Commission.

Beyond that you should be made aware of what has allegedly happened to Dr. Blackwell since his appearance before the Commission. Blackwell told my staff that the president of Ohio State received correspondence from a director of one of the consumer groups you funded claiming Blackwell should not be teaching and should be removed from his class on death. The letter caused both the vice president and academic dean to investigate the complaint fully. Needless to say this caused Blackwell much embarrassment and ridicule. Following this incident Blackwell received an inquiry from the Internal Revenue Service. They were acting on a tip that he had for several years received substantial sums of unreported income from the funeral industry. The IRS found nothing.

Needless to say I find this treatment of a voluntary witness outrageous. Such conduct will no doubt have a chilling effect on Blackwell and his colleagues who might again consider testifying before a Federal panel.

I have several more procedural problems with your investigation and these were mentioned in a statement on the House floor by me on September 28, 1978.

There are two versions of a proposed rule before you. Neither is needed. In my opinion your staff has not made a case for Federal regulation in this area.

The original attorney on the funeral investigation, Arthur Angel, told our committee back in 1976:

> Our position is—which returns to our rule—it should be up to the individual family member to make the arrangement, to choose as freely as possible the kind of funeral arrangements that meet their needs; free of any influence from the Federal Trade Commission, but also free from influence from a funeral director who is going to profit more on an elaborate funeral.
>
> We are attempting by the regulations to provide information to consumers which will give them a broader range of choices.

What we need is more consumer information not another Federal law. The funeral directors, consumer groups, and the Government should sit down and work out a voluntary program to provide any required information.

We are into a very dangerous area when we try to legislate funerals. Societal and religious customs dictate most funerals. This is not the average business. Priorities and preference differ as to people, businesses, and geography.

Our Government itself is already very involved in this area. When a major political or military figure dies, do we not have elaborate traditional funerals? Are not many social security and veterans benefits related to the death of a family member? Who are we in the Government to go a step further and almost reach a point of trying to influence a person's choice on how a death ceremony will be performed? I will not discuss all the issues raised section by section in the rule because later witnesses you will hear are intending to do that. Some observations are in order however.

Your staff has continually supported the concept of price itemization as being an important factor in lowering costs. Price advertising is also stressed. What has been overlooked is the added cost of advertising and psychological implications of itemizations.

In the State of New Jersey, itemization was mandated. The result of mandatory itemization in New Jersey has been increased not lower prices for funerals. Why? According to the State's funeral directors, once consumers saw a detailed breakdown of prices item by item they chose more items than ever before, because apparently they did not look at the overall total until the end of the process. For example, when a person saw a limousine was $25, they thought that was reasonable, so why not select two or three?

Our point here is that if one supports price itemization, he or she should state the facts for such support. There is evidence that itemization could raise, not lower funeral costs. Also, with forced itemization the package funeral could eventually disappear. This would be very economically harmful to lower income groups. I believe this debate on itemization is important because it is almost the backbone of both proposed rules.

The division of professional services has recommended modifying the original rule. In their memorandum they rightfully show that several provisions of the rule are not supported by the record and would cause impossible enforcement nightmares.

What will this rule cost? Very little according to your staff. Yet, recently, Dr. Vanderlyn R. Pine submitted a cost study of the original proposed rule to the White House Council on Wage and Price Stability. Since much of what he discussed is still a part of the final staff rule, his study warrants the Commission's attention. He concludes that the rule will cost the public an additional $50 million annually. This directly contradicts the assertions of your staff which infer, if anything, lower costs.

I think it is also important to note that the average funeral price in the Nation has been somewhat constant in recent years. Increased land and labor costs and cemetary regulations on the other hand have added more to the overall funeral and burial costs.

The inference that has run throughout this investigation is that there is gross consumer fraud and misrepresentation throughout the Nation in the funeral industry. It is fair to say that the industry's reputation has been damaged, and I think unfairly.

A former small business chairman said in 1976:

> In a democracy, it is not required that the public prove why the Government should not regulate them, the burden is on the Government to show why they should issue regulations against their citizens.

In my humble opinion that has not been done. I would hope you agree with me.

[The following was submitted for the record.]

NATIONAL FUNERAL DIRECTORS ASSOCIATION REPORT

In November of 1972 NFDA was contacted by an economist seeking certain information. An attempt was made to provide that information and meet with the economist. The economist never permitted a meeting with him nor was any arrangement made for him to get the NFDA material he originally requested. It was learned that this university professor was seeking a consultantship with the Federal Trade Commission. In his refusal for a meeting with the Executive Director of NFDA or one of the association's consultants, he indicated that the FTC was taking a look at funeral service and implied that when he would see Howard Raether it would be as the result of FTC litigation involving NFDA and Howard Raether.

Concomitant with this development was an FTC member approaching a representative of NSM about the possibility of a trade regulation rule such as had been suggested during the Senate Antitrust Subcommittee hearings in 1964.

On July 24, 1973 a resolution was passed by the Commission "directing use of compulsory process in a non-public investigation" of funeral service. NFDA was never notified of this although named in it. It had to read about it in the newspapers.

In October of 1973 the FTC called a press conference in Washington. The purpose was to discuss a resolution directing a funeral price survey in the District of Columbia. NFDA was never notified of this conference and learned of it through one of the media. Therefore, it sent its public relations consultant to be on hand. Advertently or inadvertently this conference was held during the NFDA Convention being staged in Cincinnati, October 14th to 18th.

On February 18, 1974 NFDA wrote to the FTC offering NFDA's cooperation and asking that guides be considered in lieu of a TRR.

On April 18, 1974 the NFDA proposed guides were filed with the FTC in Washington.

On April 30, 1974 NSM supported and endorsed the NFDA guides.

On May 3, 1974 NFDA's General Counsel wrote Managing Attorney Arthur Angel regarding complaints received by the FTC about funeral services.

On May 23, 1974 there was a meeting in Washington based on a request of NFDA and NSM. At that time members of the FTC staff revealed areas they think should be included in the guides or in a rule.

On May 29, 1974 printed material of NFDA referred to during the meeting of May 23, 1974 was sent to the FTC by NFDA.

On May 29, 1974 NFDA General Counsel Clark wrote to the FTC regarding disposition of complaints arising in Florida and asked if there were any further complaints.

In May of 1974 FTC representatives visited the late George Goodstein who was then Legal Counsel of the New York State Funeral Directors Association.

On July 26, 1974 representatives of NFDA and Mr. Goodstein met with the staff of New York's FTC regional office.

On October 29, 1974 FTC staff members Angel and Nelson wrote to NFDA regarding guides and itemization. General comments were made on the NFDA suggested guides. The conclusion of the letter indicated that the staff would provide a more comprehensive reply when they had finished their own draft of industry guides or regulations.

On October 30, 1974 and December 4, 1975 representatives of NFDA and the New York and New Jersey associations met with staff of New York FTC's regional office.

On February 13, 1975 New York regional office wrote to General Counsel Clark.

On February 28, 1975 NFDA representatives met in Washington, D.C. with Joanne Bernstein, James DeLong, Arthur Angel, and Thomas Nelson. NFDA representatives were told specifically that before any recommendation was made to the commissioners regarding a rule or guides that funeral service input would be requested. And, such input would be evident in what is submitted to the commissioners. Or, those in funeral service could submit their suggestions separate and distinct from those of the staff.

On August 7, 1975 the world learned of a trade regulation rule having been submitted to the Commission by the FTC staff with implication that a memorandum and a proposed rule soon would be announced. When Miss Bernstein was questioned about the commitment made on February 28th, she indicated there must have been a slip-up somewhere along the line.

On August 28, 1975 FTC staged news conference at which it released the staff memorandum and proposed rule.

This was followed by very much publicity in support of the proposed rule, much of which was initiated by the FTC staff.

On March 21, 1976 there was a hearing before what was then the Subcommittee on Activities of Regulatory Agencies of the Committee on Small Business.

On March 12, 1976 the petition for guides in lieu of a mandatory rule was discussed at a formal hearing with three commissioners present. The decision of the Commission was not to consider guides until after the hearings.

April 20th to August 6th, 1976, fifty-two days of hearings over a span of one hundred nine days.

August of 1977 report of Hearing Officer Jack Kahn was released.

September of 1977, there was a meeting with Albert Kramer who had been recently named Director of the Bureau of Consumer Protection. The purpose of the meeting was to see whether something could be worked out with the staff as to guides. No encouragement was given for such a session.

In March of 1978 an attempt was made to again meet with Mr. Kramer. After a lengthy delay Mr. Kramer responded that any session had to be arranged with the staff while implying that he was in support of a TRR.

On June 19, 1978 FTC staff report released.

Mr. SCHEUER. Our first witness will be Mr. Edward Densmore, Associate Director of the Human Resources Division at the General Accounting Office, who will discuss with us the results of two recent investigations by the GAO of the Federal Trade Commission's enforcement of its statutory responsibility.

We are happy to have you with us today. Your entire testimony will be reprinted in full in the record, so what you might like to do is give us the high points informally and then give us any other thoughts you might have, and then we will ask some questions.

STATEMENT OF EDWARD A. DENSMORE, JR., ASSOCIATE DIRECTOR OF HUMAN RESOURCES DIVISION, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY NORMAN RABKIN, SUPERVISORY AUDITOR, HUMAN RESOURCES DIVISION AND PAUL M. GREELEY, BOSTON REGIONAL OFFICE

Mr. DENSMORE. I would like to introduce my colleagues. On my right is Mr. Norm Rabkin, supervisory auditor in the Human Resources Division who is responsible for all of our work done at the Federal Trade Commission. On my left is Paul Greeley from our Boston Regional Office who did much of the work that we are going to be discussing today and who is involved with our other work at the Federal Trade Commission that we have underway at the present time.

We are pleased to appear here today to discuss our report on the Federal Trade Commission's limited success in helping consumers to obtain redress for economic injury resulting from unfair or deceptive business practices. We issued that report to the Congress on October 17, 1978.

Although a majority of businesses in this country operate reputably, unfair and deceptive practices by some companies pose serious problems for consumers and Federal, State, and local law enforcement officials.

When taken advantage of by unfair practices, consumers should seek redress. Consumer redress is satisfaction or payment to consumers by businesses for economic injury resulting from unfair or deceptive business practices. Redress can be in different forms including restitution of all or part of the consumers' financial loss, rescission of the contract between the business and the consumer, or a requirement that the business provide the promised goods or services.

Mr. SCHEUER. Excuse me, Mr. Densmore. Do you intend to read through your statement?

Mr. DENSMORE. Not all of it.

Mr. SCHEUER. I think it would be more interesting and informative for us if you would summarize what is in your statement, we have all had a chance to read it, and then we will be asking some questions.

Mr. DENSMORE. Basically, Mr. Chairman, we feel many consumers are the targets of unfair or deceptive business practices which work to the in detriment We looked into three areas where there seemed to be a lot of Commission activity, vocational training schools, land sales, and business opportunities.

We found several examples where consumers suffered serious economic injury and where in our opinion redress or some restitution was warranted. In many of the cases we looked at there was no redress obtained for the consumer. In many of the other cases redress that was obtained was very limited and it was given to only a very small number of the consumers that were so injured.

Mr. SCHEUER. How do you decide in a case where a consumer bought and paid for either a good or a service that it was not a good bargain? Which case justifies Government intervention and which case does not?

Mr. DENSMORE. That is not the type of decision that we would make. That is the type of decision that the Federal Trade Commission, going through its administrative procedures, would make. What we did was review some of the case of the Federal Trade Commission, review the files, talk to the people both in Washington and the regional offices, find out how they went about making their investigations, how they arrived at the conclusions they came to.

Mr. SCHEUER. Do you have anything to tell us about the cases in which they become involved?

On the top of page 4 you talk about a gas turbine mechanics course. You say that 2,500 students received little or no benefit from it. How does the Federal Trade Commission ascertain that these people received little or no benefit from the course? Was it that they did not learn anything or was it that what they learned was not relevant to the job market? Perhaps they learned something that was very valuable in past years, but when they got out with their certificate that described the skills they acquired, the job market had no demand for it.

How does the Federal Trade Commission define the situation where 2,500 kids received little or no benefit from a course they paid for?

Mr. DENSMORE. Let Mr. Greeley address that in a little detail, Mr. Chairman.

Mr. GREELEY. Several of the items mentioned are part of the consideration. For example, the quality of the training. But I think the most important reason usually is related to whether or not the students had favorable experience in obtaining employment. Generally that is the aspect that students are looking for most.

Mr. SCHEUER. In other words, the FTC is assessing the success or failure of the students in getting jobs. Does this mean the FTC feels

or should feel that a vocational school is, in effect, a guarantor of jobs for the preponderance of its graduates?

Mr. GREELEY. No, Mr. Chairman. I do not believe they feel that way. I think their position is that if the school in advertisements has led the consumer or potential student into believing that he will in effect be guaranteed a job.

Mr. SCHEUER. In other words, the FTC is looking to see if there is fraud or deception.

Mr. GREELEY. Yes. If there is deception in the advertisements that is of particular concern to the Commission. One of the ways they measure whether there was deception or fraud in the advertisements is to look at the actual placement rate. In this school the placement rate was low.

Mr. SCHEUER. If they advertise a high placement rate and in actuality they had a low placement rate, then there would be fraud or deception or both.

Mr. GREELEY. Right.

Mr. SCHEUER. From the paragraph on page 4 there did not seem to be any fraud or deception. It was just the students got little benefit from the work. That does not justify FTC intervention to me. I do not suppose FTC would want to undertake assuring that every business transaction results in benefit to both parties.

Mr. GREELEY. I do not believe they would want to do so.

Mr. SCHEUER. Also, when you talked about the land sale over on the middle of page 6, 10,500 lots in Arizona sold at an average unit price of over $4,000. You say that the Commission staff valued those lots at half that amount.

Well, that is your judgment. The people obviously valued them, perhaps erroneously, at $4,000. Again, was there fraud or deception there? You would not want to guarantee every person who bought a piece of real estate that he did not overpay for it. I do not think you would want to guarantee that every purchaser of real estate would make a profit on the deal, would you?

Mr. DENSMORE. No, sir, that is true. In this case there were representations made with regard to certain improvements of recreational facilities that would be provided which were not provided until such time as the Commission intervened and required that the company deliver the promised facility.

Mr. SCHEUER. So there was a failure to deliver. Was there any other fraud or deception in the original sale of the parcels? The Commission valued the lots at half the $4,000. What are we supposed to deduce from that? You must have had something in mind when you made that comment.

Mr. GREELEY. The $2,000 was some measure of whether the sales were good investments. There were representations that purchasing the property would be a favorable or a good investment.

Mr. SCHEUER. Isn't that the puffery that is involved in every real estate transaction? Unless there was specific language here guaranteeing it, doesn't every real estate sale involve somebody telling somebody else they are getting the bargain of the century?

Mr. GREELEY. I am not sure of every transaction, but I am sure there is some degree of puffery.

Mr. SCHEUER. I am not clear on what your perception of the FTC role is. Estimated consumer loss was between $17 and $21.5 million. How did that loss come about?

Mr. DENSMORE. In this case, Mr. Chairman, we were reviewing the FTC investigation and records and in the opinion of the FTC, there was a loss to the consumers on the basis of the prices that were paid for the property and FTC estimates as to what the property was worth, both the unimproved property as well as the value of the property that would be enhanced had these other facilities in fact been made available.

So, there is a combination of the original purchase price plus the facilities that the businessman promised to provide with the general development.

Mr. SCHEUER. The FTC charged the sales company with deceiving customers. Where was the deception, in failing to deliver the recreational facilities or was there earlier deception involved?

Mr. DENSMORE. The deception in this case was both with regard to the investment potential of the property plus the facilities that were to be made available. In some of these land sales part of the advertising or the promotion is the investment potential and in many cases the investment potential does not exist so this is deception or misrepresentation.

Mr. SCHEUER. I would take that statement with a large grain of salt. I suppose every person who ever buys a piece of property thinks it is going to appreciate in value and I would have real reservations about whether the FTC wants to be the guarantor of profitability to every real estate transaction that takes place.

If there is outright fraud and deception, that is a whole different ball game. I think that the elimination of fraud and deception is the Commission's appropriate mission. But I would have trouble seeing their role as to assure every purchaser that the Federal Government was going to back them up and make sure they did not lose money on a real estate deal.

I was wondering what your perception is as to if that is their role.

Mr. DENSMORE. Our perception is that it is not their role. We did not make an investigation to determine whether or not fraud or deception did exist. This is a case they brought.

Mr. SCHEUER. Please proceed.

Mr. DENSMORE. We found there were three basic reasons for the limited redress that the FTC was able to provide people that did suffer economic injury. One was the authority that FTC has is impractical because of lengthy and time-consuming procedures, weak financial condition of many businesses that were investigated and the internal management problems that the FTC has in this particular area.

We found that the authority the FTC has in section 19 of the FTC Act is time consuming and that it requires going through two specific processes—an administrative process, which can and has taken place in many instances more than 4 years plus follow-on judicial process which also can take several years. So we are talking about 4 to 6 or more years that could be required.

Mr. SCHEUER. Do you have any recommendations as to how they can expedite this process. How can they perhaps shorten the

number of steps in the process or take the same number of steps but shorten the time frame?

Mr. BROYHILL. Could I break in here? Let me break this down if I could. Under the present law the Commission can go directly to court for allegation of violation, whether it is allegation or violation of any rule under the act and then they can immediately seek civil action for relief. Is that not correct?

Mr. DENSMORE. That is correct.

Mr. BROYHILL. Why should there be any delay there?

Mr. DENSMORE. In this particular case where there is a violation of a specific rule or order, they can go directly to court for redress. In the other circumstance, where there has not been a violation of a direct rule or order but a situation where the FTC finds that there has been unlawful, deceptive, or fraudulent conduct, they will go through their administrative process to show this and then they must go into court to obtain redress.

Mr. BROYHILL. Don't they have to prove there has been a violation of the law first?

Mr. DENSMORE. Yes.

Mr. BROYHILL. Isn't that a basic protection of rights under the Constitution that before seeking redress that you have to prove that you violated a law?

Mr. DENSMORE. Yes. And we are not suggesting that that would change. What we are making a recommendation for is that the Congress amend section 19 to provide in those cases, in the second situation, section 19(a)(2) that the FTC have authority to order redress.

We feel that the constitutional protections would be there and that if the administrative law judge would order redress, the businessman would have the opportunity to appeal to the Commission.

If the Commission upholds the administrative law judge, the appeal can then be made directly to the U.S. Court of Appeals. This would not change from the protection point of view; there would still always be the opportunity to appeal to the U.S. Court of Appeals.

What we are suggesting is that if the FTC makes a finding that a reasonable man would come to the conclusion that a practice was fraudulent or dishonest that they not only would have to prove that, that they would be in a position where they could order redress.

Mr. BROYHILL. Are you a lawyer?

Mr. DENSMORE. No, sir.

Mr. BROYHILL. I am not an attorney either but it does not seem to me that the procedures that you are spelling out here are fair to the person—maybe a small businessman—that might be involved because you are giving the authority to the same person, not only to bring the charge but to make the determination and hear the appeal.

Mr. RABKIN. The Commission has that authority now, where there are unfair or deceptive acts or practices, they hear the case if it is litigated.

Mr. BROYHILL. But not for this purpose. As I understand it, you do not go to the court of appeals under the present procedure. You go to district court.

Mr. RABKIN. That is correct. After the order has become final.

Mr. BROYHILL. Then you can make the record there whereas in the procedure you are describing, the appeal is going to be based on the record that the agency has made.

Mr. DENSMORE. That is correct.

Mr. BROYHILL. It does not seem to me that you are giving it much protection there under the Constitution.

Mr. DENSMORE. We feel, sir, on the basis of the records and the cases we have looked at—there have been many cases of fraudulent, deceptive, and unlawful practices that were very significant. A lot of people were significantly economically injured. What we are saying is under the present procedure, it is a very time-consuming and cumbersome process. We feel that the consumer in these very flagrant cases would have a better opportunity for redress if this particular procedure could be lessened, simplified.

Mr. SCHEUER. Do you have any specific recommendations to shorten the procedure and simplify the process?

Mr. DENSMORE. Yes. In our report we recommend that the Congress amend section 19 to provide that the FTC can order redress going through the administrative process.

Mr. BROYHILL. Has that legislation language been presented to the committee?

Mr. DENSMORE. We did not provide specific language. We did make a recommendation in a report that was issued to the Congress.

Mr. RABKIN. We also made recommendations in the report to speed up internal processes of the Commission.

Mr. SCHEUER. Please give us your recommendations in this matter in as much detail as you can.

Mr. RABKIN. This recommendation for the legislative change would be to allow the Commission to order the redress at the same time it orders the remedy for the unfair deceptive act or practice. The initial proceeding that results in a final order would include the redress remedy. That order, which is under section 5 of the current FTC Act appealable to a court of appeals after Commission review, would likewise be appealable. The remedies which would be available under section 5 prospectively would also include redress.

The Commission could order redress after finding that the act or practice was unfair or deceptive and, in addition, dishonest, and fraudulent. The safeguards built into section 19(a)(2) regarding fraudulent conduct which were added to protect business from unforeseen liability would remain.

The difference would be one instead of two processes. Now the final order would first come up in the administrative proceeding, the Commission would issue it and it is appealable to the courts. Once all appeals are exhausted and the order becomes final, the Commission would have to institute a second proceeding in the courts. We would combine those two.

Mr. SCHEUER. What do you think of the recommendations, Jim?

Mr. BROYHILL. Mr. Chairman, I have to express some reservations about going to a procedure like this because of the past actions of the Commission. If I thought that the Commission was going to really go after these very narrow cases of where fraud is

very clearly prevalent, I certainly would not have any objection but that is not the way the Commission has been operating.

The Commission will go after people that have been operating where the whole industry has been operating this way for generations and then suddenly single out one particular company and say, "You are a violator," and that was the reason that we gave them the authority to write fraud rules in the first place, that we did not want them using this procedure. We wanted them to issue a trade rule so that people knew where they stood.

What recommending would I give the Commission too much authority to bypass the route that they should be using and that is to issue a trade rule so everybody is operating in the same way.

Mr. DENSMORE. There is certainly a need for balance and oversight on the part of the Congress to insure that FTC is acting in accordance with the——

Mr. BROYHILL. To my knowledge this committee—and I have been a member of it for some time—we have never brought the Commission up here and made them justify all of their actions as far as the consent decrees and consent orders and so forth that they force on individuals that in many cases they should be going after an industry trade rule if they want to change industry trade practices.

Mr. DENSMORE. In some cases, sir, what we are saying is that there are specific instances where consumers are very——

Mr. BROYHILL. I understand that and if we could get at that, fine, but what you have done is give them a tremendous weapon to bypass, what I think was the intent of the Magnuson-Moss Act and that was to tell the Commission to stop going after individuals but to try to change the industry practices through industry trade rules.

Mr. SCHEUER. Was there any evidence that many of these cases of fraud and deception would not have met the test of reasonableness? In other words, do you think there is a justification for this two-step process or should it all be consolidated into a single process from which there would be appeal to the courts?

Mr. RABKIN. That is a difficult question to answer because we are not lawyers, although we do have lawyers on our staff. We do not have the expertise the Commission has. None of these cases have gone through section 19 proceedings and the courts have not ruled on whether in fact the Commission's idea of what is fraud or dishonesty is what the courts will accept.

There have been cases where the Commission staff in its discussions on what to do with a case have told the Commission in their opinion there was fraud, there was dishonesty, but for some other reasons, the cost of litigation or the financial condition of the firms, pursuing the matter in section 19 in the court was not feasible.

Mr. DENSMORE. It should be brought out too that we are talking about more than the unfair and deceptive practices. We are talking about an additional burden of proof on the FTC to show that something is dishonest or fraudulent which is a stiffer test than unfair or deceptive.

Mr. SCHEUER. You have a situation here where the delay is so long, 4 or 5 or 6 years, that the remedy is useless. Would it be

better from the consumer point of view to have one process that could be expedited that would have perhaps the higher standard but at the very beginning one process that would be promptly appealable to the courts?

Mr. DENSMORE. Yes, and that is in effect what we are recommending. We feel in these flagrant instances FTC should have stronger authority to act quicker and I would agree with what Congressman Broyhill is saying, that there is a need for oversight to determine that the agency is not carrying that to extremes beyond which the Congress deems inappropriate. We feel in those cases we looked at, these situations are flagrant.

There are a lot of people being very significantly adversely affected from an economic point of view, and we feel they would have a greater opportunity to get some restitution, some redress, if the FTC's authority were changed to allow them to more quickly get the redress than under the present legislation.

Mr. SCHEUER. Very good. Please continue.

Mr. DENSMORE. Beyond that, many of the institutions or companies the FTC wanted to institute redress against had either gone out of business or the assets had been dissipated or were so small in number that redress was not a feasible alternative.

Along these lines, we are recommending that once again there be an amendment to the legislation to provide that when the Commission has a reason to believe that a company may be dissipating its assets to avoid giving redress to consumers, the Commission should be able to seek an injunction to preserve those assets until it can complete its administrative proceedings.

We are recommending that section 13(b) be amended in that regard.

Mr. BROYHILL. Would that be before a finding was made that they had engaged in some unfair or deceptive practice or that the practice was fraudulent?

Mr. RABKIN. Under section 13(b) an injunction suit is brought approximately at the same time a complaint is issued against the company. This is before the final determination.

Mr. DENSMORE. What we are saying is in some of these situations while this investigation is being done, before the final order is made, a company anticipating redress is willfully dissipating its assets.

Mr. SCHEUER. How do they do it? Do they just make loans to the president or do they pay extraordinary salaries or what?

Mr. DENSMORE. That is one way. There is one example that is a matter of public record where an individual paid his wife $60,000 a week in consulting fees. In other cases the assets could be transferred to bank accounts or to other companies or corporations that may be set up.

These are the types of situations that we are talking about where there is a need or at least we perceive the consumer would have some additional protection. When FTC had reason to believe that these companies were dissipating assets before it could complete the present proceedings there could be an injunction to preserve those assets pending completion.

Mr. SCHEUER. It sounds eminently reasonable to me.

Mr. BROYHILL. What if it is later found that they were not engaged in any fraudulent practice or that they were not engaged in any unfair deceptive practice and here this has had the effect of limiting management decisions that should have been made? Is there any redress on the part of that company to the Government for relief for damage?

Mr. SCHEUER. The only limitation on management as I understand it would be they could not dissipate their assets. There would be no interference with normal corporate decisionmaking in running the business.

Mr. BROYHILL. Mr. Chairman, if it is like the proposal that was before us last year, an actual trustee would be appointed to run the company.

Mr. RABKIN. Mr. Chairman, Mr. Broyhill, our recommendation is similar to the proposal that was before the committee last year in H.R. 3816.

Mr. SCHEUER. Would it involve the appointment of a trustee?

Mr. RABKIN. No. We are recommending the Commission have the authority to go to court and let the court decide what is necessary. It could be periodic reporting. It could be a trustee. It could be a receiver, but we do not have any basis for recommending which specific actions be taken.

Similarly, we do not have a basis for recommending some of the procedural steps that were in last year's bill, about the burden of proof the Commission must have. All we are saying is the current section 13(b) injunctive authority that the Commission has should be made more specific so the Commission specifically has the authority to get an injunction in these cases.

Mr. DENSMORE. The authority now is unclear. We are recommending that Congress clarify the authority in this particular area.

Mr. SCHEUER. Really the authority would only give FTC the right to go to court and let the court apply the proper remedy that was justified by the circumstances and if the court felt that dissipation of the assets was a possibility, they could get some representation by the company president or an assurance of reporting.

If the court found there was a higher level of proof necessary, I would think then and only then would the court even contemplate the appointment of a trustee, which is a rather draconian remedy.

Mr. RABKIN. We would leave it up to the court.

Mr. SCHEUER. In any event, that would be at the discretion of the court. On its face that seems reasonable to me.

Mr. BROYHILL. No further questions.

Mr. SCHEUER. Please proceed.

Mr. DENSMORE. The only other thing I would like to point out is that we did discuss in addition to the legislative authority, in addition to the weak financial conditions of some companies, there were some internal management problems at FTC that contributed to the limited redress.

These dealt with lengthy negotiation periods, lack of adequate consumer injury analysis and problems with policy communication between the Commissioners and the staff. FTC has taken action on all of these points. We feel that the actions they have taken should expedite the process and should result in a more effective and efficient consumer redress program.

That concludes the summary of the report. We would be pleased to address any other questions that you may have.

[Mr. Densmore's prepared statement follows:]

STATEMENT OF EDWARD A. DENSMORE, JR., ASSOCIATE DIRECTOR, HUMAN RESOURCES DIVISION, U.S. GENERAL ACCOUNTING OFFICE

Mr. Chairman and members of the subcommittee: We are pleased to appear here today to discuss our report on the Federal Trade Commission's limited success in helping consumers to obtain redress for economic injury resulting from unfair or deceptive business practices. We issued that report to the Congress on October 17, 1978.

Although a majority of businesses in this country operate reputably, unfair and deceptive practices by some companies pose serious problems for consumers and Federal, State, and local law enforcement officials.

When taken advantage of by unfair practices, consumers should seek redress. Consumer redress is satisfaction or payment to consumers by businesses for economic injury resulting from unfair or deceptive business practices. Redress can be in different forms including restitution of all or part of the conusmers' financial loss, rescission of the contract between the business and the consumer, or a requirement that the business provide the promised goods or services.

Because of its broad powers and responsibilities and national jurisdiction, the Federal Trade Commission is in a unique position to reduce unfair and deceptive acts and practices in the marketplace. It is also able to seek, through the courts, redress for consumer losses resulting from acts and practices which a reasonable person would have known were dishonest or fraudulent.

Our report discussed the Commission's activities concerning three programs—vocational schools, land sales, and business opportunities—because these programs were among the most active in terms of consumer redress.

Many consumers are easy targets for vocational training abuses. They may be persuaded by misleading advertisements and salespeople promising the training and placement help needed to get jobs such as a medical assistant, an insurance adjuster, or a truck driver. The career hopes of many students dim after completing the courses when they are unable to get jobs. This happens in some cases where employers consider the vocational training as unacceptable or where the school's training or placement services may be inadequate. The student's investment of as much as $1,000 or more and many hours of time and effort in the training program proves virtually worthless.

People can also lose money on new business ventures. Take, as an example, a couple that invests their hard-earned life savings in a business opportunity that promises a chance to work at home and earn yearly gross profits from $39,000 to $67,000. Such advertising is enticing. Unfortunately, many people, like this couple, never see profits and instead lose much or all of their original investments.

Still other consumers are victims of land sales schemes. A seller may carefully lead a consumer into buying underdeveloped land by misrepresenting facts. For example, the seller may say that recreational facilities will soon be available, that development potential of the area is good, or that the land is an excellent investment. If these representations prove false, the consumer seeking financial gain or a home with facilities and amenities of a successful development may be left instead with largely underdeveloped land with a market value below cost.

LIMITED SUCCESS IN GETTING CONSUMER REDRESS

In many Commission cases, consumers have not received any redress. Even when the Commission is able to obtain redress it is often small or available only to a limited number of injured consumers.

The Commission did not obtain any consumer redress in 12 of 24 cases involving vocational schools, land sales, and business opportunities that were resolved between January 1975 and August 1978. In one case where no redress was obtained, the Commission issued a consent order on October 19, 1977, against a vocational school for misrepresenting current and future job prospects for students completing its gas turbine mechanics course. Commission staff estimated that from mid-1972 to mid-1975, about 2,500 students enrolled in the course but received little or no benefit from it. The course tuition in 1975 was about $1,100; the Commission estimated the total consumer loss at $2 million.

In another case, the Commission's investigation of an idea-promotion company showed that it misrepresented, among other things, its engineering and marketing ability to develop and promote clients' ideas and to obtain financial gain for its

clients. Consumers spent from $750 to $1,200 each to have their ideas and inventions promoted. Few realized gains. Commission staff estimated the total consumer loss at about $750,000.

The Commission did obtain some redress in the other 12 cases but the redress obtained was generally much less than the consumers' losses and was provided to only some eligible consumers. For example, in January 1975 the Commission settled its case against a vocational school offering courses such as computer keypunching, computer programing, secretarial training, and medical and paramedical personnel training. Commission staff estimated that students paid about $12 million in tuition for courses which were virtually worthless for future employment. The negotiated settlement required the school to refund up to $1.25 million to certain students. The school had diifficulty locating students eligible for the refund and ended up paying back only about $675,000.

On July 13, 1976, the Commission settled its case against another vocational school. The Commission charged the school with using unfair and deceptive practices in promoting and selling trailer truck driver courses. Commission staff estimated that 1,950 students each paid $795 in tuition, about $1.5 million in total, from 1971 to 1973. The negotiated settlement required the school to pay a total of only $25,000 to students enrolled in the courses during calendar year 1973. In the end, 292 students each received about $86.

Commission staff negotiated a settlement only for students enrolled during calendar year 1973 mainly because (1) an extensive survey of students enrolled during the other years would have been needed and (2) with the school having limited assets for restitution, expansion of the refund period might have doubled or tripled the number of eligible students, significantly reducing the amount of restitution each would receive.

These are two cases in which the Commission obtained some restitution for consumers. The amount of restitution obtained in most of the other cases was also substantially less than the consumer losses.

Redress has not always been restricted to restitution. In two land sales cases the Commission obtained consumer redress othe than restitution, such as land improvements. While the cost of the redress package to the business can be estimated, the total value provided to consumers is difficult to measure.

For example, on September 27, 1977, the Commission settled its case against a land sales company charged with deceiving consumers in land sales transaction. Over 10,500 lots in Arizona were sold at an average unit price of over $4,000. Commission staff valued these lots at about half that amount. While no detailed analysis was made, the estimated consumer loss was between $17 and $21.5 million. The major part of the Commission's settlement did not provide any restitution to individual consumers. It did, however, require the company to spend about $4 million on improvements and recreational facilities, including those originally promised to consumers along with some additional improvements. The real value of the redress package to consumers however, is unclear.

REASONS FOR LIMITED SUCCESS

The Commission's ability to obtain consumer redress has been limited by its impractical authority because of lengthy and time-consumer procedures; the weak financial condition of many businesses it investigates; and its internal managment problems.

The Commission's authority is impractical

In January 1975 the Congress added section 19 to the Federal Trade Commission Act (FTC Act) to enable the Commission to seek redress for consumers in Federal district courts or any State court with jurisdiction over such matters. Section 19(a)(1) authorizes the Commission to go directly to court to seek redress for consumers harmed by violations of the Commission's rules. Section 19(a)(2) authorizes the Commission to seek redress for unfair and deceptive practices which result in a final Commission order but requires the Commission to go through both administrative and judicial processes.

Section 19(a)(2) also provides that the courts are to order consumer redress only if the Commission proves that the act or practice resulting in a final order is one which a reasonable person would have known was dishonest or fraudulent. The legislative history on this provision indicates Congressional concern about protecting a business from the unforeseen liability of redressing consumers in those situations where the business would have no reason to suspect it was behaving unlawfully.

The administrative and judicial processes add considerably to the time it takes the Commission to obtain redress under section 19(a)(2). The Commission must first

issue a final order which can take several years. Once the order becomes final, the Commission must within 1 year initiate a second process which involves a State or Federal court proceeding which can also take several years.

In a majority of the 43 redress cases we reviewed, four years or more elapsed from the start of an investigation until the Commission issued a final order. In fact, of the 17 cases still in process when we finished our audit work in August 1978, 13 had been active for at least four years.

Long time frames can have a negative impact on consumer redress. First, as time passes, particularly if the case involves litigation, there is a greater chance that company assets will be unavailable for redress. Second, it becomes increasingly difficult as the years go by to locate consumers eligible for refunds. Therefore, fewer consumers may receive benefits. Third, years of inflation reduce the value of any refunds obtained. Finally, the Commission's bargaining position in negotiating settlements is weakened where a long processing time is viewed as inevitable.

It is significant to note that in the four years since the Congress added section 19 to the FTC Act, only two redress cases have reached the courts under section 19(a)(2).

To give the Commission clearer and more practical authority to obtain redress for economically injured consumers, we recommended that the Congress amend section 19(a)(2) of the FTC Act to authorize the Commission, after a hearing, to order redress if it determines that a reasonable person would have known that the violations were dishonest or fraudulent. Under this concept businesses would be protected from unforeseen liability as the Congress originally intended in enacting section 19 and the need for a separate judicial process would be eliminated.

Weak financial conditions limit a business' ability to provide consumer redress

In many of the potential redress cases we reviewed, the poor financial condition of the business was one of the major reasons that the Commission accepted a settlement that did not provide for full redress to injured consumers. In 3 of the 24 completed cases we reviewed, the business had closed. In 14 others, Commission staff cited the businesses' weak financial condition in recommending that the Commission accept settlements which required the companies not provide redress for consumers injured by past actions.

The Commission Chairman has stated that violators have often dissipated their assests and left only a shell of a closely held corporation before the Commission could complete its case. For example, the first section 19 redress case came under Commission investigation in 1968. From mid-1967 through mid-1972 when the Commission issued its complaint against the company, it had grossed about $44 million from its challenged practices. Between 1972 and 1973 the company's total assets dropped form $22.5 million to $11.7 million. The Commission issued a final order to the company in 1976 and began the redress action in February 1977. In November 1978 the Commission determined that only a limited amount of assets could be recovered for consumers and, that even if the Commission were successful, the amount it would recover would not redress, to any substantial degree, the injury to consumers. Therefore, the Commission withdrew its case and the suit was dismissed.

Preservation of company assets in consumer redress cases may be necessary to better assure that the assets will be available for consumer redress. Although the Commission may ask a district court to preserve a company's assets once the section 19 proceeding is underway, its authority to preserve a company's assets pending completion of administrative proceedings is into clear. Section 13(b) of the FTC Act authorizes the Commission to seek a court injunction against a company about to violate any law the Commission enforces. However, the Commission's injunctive authority does not explicity provide for the use of injunctions to preserve a company's assets. When the Commission has reason to believe that a company may be dissipating its assets to avoid redressing consumers, we believe that the Commission should be able to seek an injunction to preserve those assets until it can complete its administrative proceedings. Accordingly, we recommended that the Congress amend section 13(b) of the FTC Act to authorize the Commission to seek an injunction to prevent businesses from dissipating their assets to avoid redressing consumers.

Management problems reduce Commission effectiveness in obtaining redress

If consumers are to receive adequate redress, the Commission should begin cases as soon as possible and handle them expeditiously. Case delays weaken the consumers' position by lessening the potential for obtaining redress and reducing the value of any redress received. The Commission has experienced delays in some redress cases because of lengthy negotiation periods, lack of adequate consumer injury analysis, and problems with policy communication. Commission officials recognized these management problems and have revised operating policies and procedures.

Lengthy negotiations between the Commission and a business to reach a settlement agreement often caused the Commission's investigative activities to be suspended and evidence of deceptive practices to become stale. Dated evidence weakens the Commission's ability to litigate a case and seek consumer redress under section 19(a)(2). To eliminate the problem, in December 1977 the Commission's Bureau of Consumer Protection directed it staff to limit suspension of investigative activity during negotiations to 20 staff hours or 20 days, whichever comes first.

Consumer injury analyses are important because on every case questions can arise on a variety of issues such as (1) the choice of remedies; 92) whether to accept a consent agreement or issue a complaint; and (3) whether to require restitution for past transactions, protect consumers in future transactions, or both. Analysis of these issues requires a thorough understanding of the amount and nature of the consumer injury. The Commission has not always adequately analyzed these issues before attempting to negotiate a redress settlement. Such an analysis can be difficult, costly, and imprecise, but if it is not done adequately it can slow down the case or lead to an inappropriate decision.

In recent cases lack of adequate consumer injury analysis created problems in case handling. After review of these cases, Commission officials informed the staff about the need to obtain sufficient information to evaluate the propriety of seeking consumer redress. Also, in January 1978 the process for evaluating staff requests for Commission action was restructured so that attention is focused on the analysis of consumer injury at the outset of formal investigations.

When communications problems occur, delays in processing redress cases are inevitable. The Commission has had much difficulty communicating policies and procedures, including those pertaining to potential redress cases, to its staff. Studies by outside consultants and internal committees found this communications problem to be serious and frustrating to staff.

The Commission has implemented periodic review sessions of pending matters so that early communication of policies can be assured. In addition, the Commission told us that its Bureau of Consumer Protection and Office of General Counsel have established procedures to assure development of consistent policies and eliminate some review delays.

Several of the Commission's changes or proposals should expedite case processing and put consumers in a better position to receive redress. The Commission must emphasize and assure, however, that the management changes provide accelerated case procession, better communications among the staff and the Commission, and, ultimately, more equitable redress for injured consumers.

Therefore, we recommended that the Commission ensure that redress cases are handled as expeditiously as possible by monitoring the implementation of its management changes designed to reduce delay and improve communications.

Mr. Chairman, that concludes our prepared statement. We will be pleased to answer any questions that you or other members of the Subcommitte may have.

Mr. SCHEUER. You mentioned that in 12 of the 24 redress situations there was no redress. In two cases you cite the consumer loss at $2.75 million. Do you have any estimate of losses in the other ten cases?

Mr. DENSMORE. Yes. We have figures that deal with the consumer losses in many of the other cases.

Mr. SCHEUER. Can you give us some, an estimate of the order of magnitude in the other 10 cases?

Mr. DENSMORE. The largest one here is $500 million.

Mr. SCHEUER. That is a big case. What did that involve?

Mr. RABKIN. That was a land sales case. The loss was an estimate that the staff made to the Commission to balance against the redress that they had obtained in the case. The redress they valued at $20 to $30 million in terms of specific performance—having the company actually construct the facilities that the Commission alleged were implied in the representations the company had made to the consumers.

Mr. BROYHILL. Are these GAO findings?

Mr. RABKIN. We are reporting Commission findings.

Mr. BROYHILL. Have you confirmed all of these or are you just taking what FTC has given you and repeating it to us?

Mr. DENSMORE. The problem we have, Congressman, is we do not have access to records of these companies, so we were not in a position where we could go in and verify the specific numbers that we are talking about. These are FTC figures. They are the figures that are used in the cases, and we have accepted those because of the problem we have in getting access to the records of the companies.

Most of the others are in the magnitude of several hundred thousand dollars to $11 million or $12 million.

Mr. SCHEUER. Perhaps you could submit for the record the evidence of loss in 12 of the 24 redress cases where there was no redress.

Then in the 12 cases where there was some redress you cite some details for three of the cases. Do you have any information as to what the losses were on the other nine?

Mr. DENSMORE. Yes. We could give you the estimated consumer loss in all of the cases plus the redress available in those where we have it so you will be able to balance one against the other for all 24.

[Testimony resumes on p. 65.]

[The following information was received for the record:]

Estimated Consumer Loss

FIRM : Fuqua Industries

CASE NO. : C. 2626

DATE OF FINAL ORDER: 1/21/75

CHARGES : The firm misrepresented that (1) it knew of specific jobs in which graduates would be placed, (2) there was an urgent need or demand for graduates, (3) all graduates received free placement assistance, (4) the training program was specifically designed to qualify graduates for local employment requirements, (5) local businesses were hiring graduates, (6) graduates were guaranteed jobs through the firm's placement office, (7) purchasers of courses would receive full refunds of their "reservation fees" if they cancelled their agreement before the beginning date, and (8) the courses were approved for veterans educational assistance benefits.

ESTIMATED CONSUMER LOSS: The Commission charged that the firm's courses were virtually worthless. Staff estimated that the firm's potential liability for restitution could be as high as $24 million; staff had identified 38,000 students who had paid an average of $300 each, or a total of about $11 million.

VALUE OF REDRESS: The order required the firm and its controlling officer to make refunds of up to $1.25 million to students who (1) paid over $100 for a a course, (2) did not receive a job as a result of the training, (3) attended some of the courses, (4) did not drop out except for reasons related to the training received or the job demand, and (5) sought employment in training related fields.

FIRM : Weaver Airline Personnel School, Inc.

CASE NO. : C. 2638

DATE OF FINAL ORDER: 2/13/75

CHARGES : The firm misrepresented the degree of industry demand for its graduates, its selectivity in accepting enrollees, the availability of jobs, and the nature and effectiveness of its placement service.

ESTIMATED CONSUMER LOSS: Although the Commission did not estimate consumer loss its staff reported that the firm enrolled over 15,000 students during the year under investigation, of which about 2,000 graduated and 102 obtained employment with the airline industry. The course consisted of a home-study portion costing $765 and a residence training costing $200.

VALUE OF REDRESS: The firm agreed to two restitution funds. The first, $249,000, was paid to students enrolling after January 1, 1972, who paid in full for the course and who the firm had not placed in employment. The second fund was accumulated from the firm's collections on its accounts receivable and was paid to certain students who had not paid their account in full. [The first fund resulted in $251,732 being paid to 3,794 students; the second resulted in $98,004 going to 136 students.]

FIRM : Worldwide Systems, Inc.

CASE NO. : C. 2683

DATE OF FINAL ORDER: 7/16/75

CHARGES : The firm advertised its school in the "Help Wanted" column of newspapers, misrepresented employment opportunities and salary potential of its graduates, the cost of the training, the manner of payment for training, the training facilities, and the placement assistance provided by the school.

ESTIMATED CONSUMER LOSS: The Commission concluded that if graduates did not secure employment in a field related to the training, as was almost always the case, the money spent on the course was totally wasted. The firm's courses cost about $895, but the files we reviewed had no information on the number of enrollees, graduates, or graduates obtaining employment in a training related field.

VALUE OF REDRESS: The order contained no redress provisions. The Commission learned that the firm was defunct.

FIRM : Maralco Enterprises, Inc.

CASE NO. : C. 2711

DATE OF FINAL ORDER: 7/25/75

CHARGES : The firm falsely represented the likelihood of placement and starting salaries available to graduates of its computer school. The firm falsely implied that a college degree and job experience were not advantageous to secure a job as a computer programmer. The firm misrepresented the number of computer programming languages taught and the type of materials and computer hardware available to students. The firm assisted students in preparing resumes falsifying their job experience. The firm also failed to disclose to prospective students the "finance charge", "annual percentage rate", "cash price", and other credit terms required under the Truth in Lending Act.

ESTIMATED CONSUMER LOSS: Although no specific dollar figure was estimated, Commission staff reported that the school had an enrollment of only 40 to 50 students, but that the individual tuition was $2400.

VALUE OF REDRESS: The order contained no redress provisions. The staff reported that the firm was insolvent, based on unaudited financial statements.

FIRM : American Tractor Trailer Training, Inc.

CASE NO. : D. 9025

DATE OF FINAL ORDER: 9/17/75

CHARGES : The practices used by the firm in obtaining enrollees for its tractor trailer training course included false and misleading claims regarding employment and earnings opportunities for its graduates, the efficacy of its placement service, its affiliations with the trucking industry, and the quality of the course and the qualifications of the graduates. Further, the firm did not afford the prospective enrollees sufficient time to consider their purchase decision, did not furnish them with enrollee drop-out and graduate placement information which illustrated the firm's particular track record in placing students in the trucking industry.

ESTIMATED CONSUMER LOSS: About 500 students received training each year. The Commission estimated the economic loss suffered by each enrollee to be equal to the tuition - $795. The Commission believed that from the point of view of the enrollees' careers, employment, and earnings, the firm's course was worthleess.

VALUE OF REDRESS: The order contained no redress provision. The firm went out of business on 11/14/75 with substantial outstanding debts.

FIRM : Lear Siegler, Inc.

CASE NO. : D. 8953

DATE OF FINAL ORDER: 10/6/75

CHARGES : The firm misrepresented that (1) there was an urgent need or demand for all or most of its graduates in training-related positions, (2) it had a reasonable basis to conclude that the representations in (1) were true, (3) that all or substantially all of its graduates were able to secure training-related positions after graduation, (4) it was offering or knew of paid employment opportunities, (5) its placement office would secure employment for its graduates in most cases, (6) its graduates would qualify as experienced job applicants, and (7) its placement assistance was free.

ESTIMATED CONSUMER LOSS: The Commission concluded the courses' value for training-related employment was virtually worthless. During the period under investigation, about 600 students paid on the average $2,000 for the courses; the total loss would have been about $1.2 million.

VALUE OF REDRESS: The firm was ordered to pay $750,000 to certain former students who failed to obtain training-ralated employment.

FIRM : Diesel Truck Driver Training School, Inc.

CASE NO. : C. 2759

DATE OF FINAL ORDER: 11/3/75

CHARGES : The firm misrepresented the demand for its graduates and the salaries that its graduates were likely to obtain. Also, the firm misrepresented the ability of its placement service to find jobs for graduates and that the placement service was free.

ESTIMATED CONSUMER LOSS: The Commission concluded that if graduates did not secure employment as truck drivers, as was almost always the case, the money spent on the course was totally wasted. The tuition was $895. For the years which the Commission investigated, the firm enrolled 2,007 students, graduated 1,322 of them, but only 160 found employment in the field for which they were trained. The consumer loss under these circumstances would be between $1.04 million and $1.65 million.

VALUE OF REDRESS: The order contained no redress provisions. The Commission concluded that, on the basis of financial data submitted by the firm, restitution would impose an unreasonable hardship.

FIRM : G & A Industries, Inc., and Nord-Viscount, Inc.

CASE NO. : C. 2776

DATE OF FINAL ORDER: 1/6/76

CHARGES : The firm falsely claimed that persons who sold its auto polish would make up to $50,000 per year or $15 to $35 an hour; that sellers could make a 400% profit on each sale and would be assigned exclusive selling territories; and that a single application of its auto polish was guaranteed to protect and beautify a car for several years.

ESTIMATED CONSUMER LOSS: Although the Commission concluded that there was no way to precisely measure the consumer injury, it estimated it at $250,000 annually.

VALUE OF REDRESS: The firm was ordered to offer refunds for all unsold merchandise returned within 30 days of notification. The refund privilege applied to persons who purchased merchandise from the firm within the three years before the order and who had purchased no more that three separate shipments of product. [As a result of the order, a total of $4,387 was refunded to 83 persons.]

FIRM : COPE ENTERPRISES, Ltd.

CASE NO. : C. 2783

DATE OF FINAL ORDER: 1/23/76

CHARGES : The firm engaged in misrepresentations and deceptive practices in connection with sale of distributorships for batteries and hypo-allergenic lipsticks and nail polishes. The misrepresentations included overstatements regarding the high potential earnings of the distributors, the type and number of sales locations the firm would secure for the distributors, the availability of training, business assistance, sales aids, and advertising, the availability of other products to be added to the cosmetics line available to distributors, and the history of the company. The deceptive practices included the firm's failure to deliver locations, sales aids, and merchandise within a specified time, its failure to advertise and provide training and business assistance, its failure to buy back the distributorships or assist in the sale of same as provided in the distributors' agreements, and its failure to introduce new products to the cosmetic line.

ESTIMATED CONSUMER LOSS: The Commission concluded that although it would be difficult to estimate precisely the injury sustained by each distributor, it would

be safe to assume that the estimated dollar volume loss, at a minimum, would amount to $358.400--the sum paid to the firm by distributors, exclusive of monies paid for delivered merchandise.

VALUE OF REDRESS: The order contained no redress provisions. The firm was out of business when the order was issued and the individuals cited by the Commission were in jail for similar activities, having been prosecuted by a U.S. Attorney.

FIRM : Nationwide Training Service, Inc.

CASE NO. : C. 2814

DATE OF FINAL ORDER: 3/30/76

CHARGES : The firm advertised its school in the "Help-Wanted" and other columns of newspapers, and misrepresented the employment opportunities and salary potential of its graduates, the cost of the training, the manner of payment for training, the training facilities, the training program, placement assistance provided by the school, the nature of the contractual agreement for training, and the nature and manner of its business.

ESTIMATED CONSUMER LOSS: The Commission concluded that if graduates did not secure employment as truck drivers or heavy equipment operators, as was almost always the case, the money spent on the course was totally wasted. The firm charged $695 for its truck driver training course and $1,050 for its heavy equipment operator's course. The firm enrolled 954 students and graduated 409 during the period of the Commission's investigation, but the files we reviewed contained no information about the number of graduates hired as driver or operators.

VALUE OF REDRESS: The order contained no redress provisions. The firm submitted financial data to support its contention that it was not in a position to make extensive refunds.

FIRM : New England Tractor Trailer Training of Massachusetts, Inc.

CASE NO. : D. 9026

DATE OF FINAL ORDER: 7/13/76

CHARGES : The firm misrepresented the availability of jobs for its graduates, that it offered employment to qualified applicants, that its placement services would secure jobs for graduates, and that its representatives were qualified vocation counselors. The firm also made representations regarding the demand for its graduates and the wages earned by its graduates without having a reasonable basis to support such claims. In addition the firm failed to disclose information about placement and salary of graduates, about attrition, and about employment in the trucking industry.

ESTIMATED CONSUMER LOSS: The Commission concluded that the economic loss suffered by each enrollee was equal to the tuition amount - $795. From the point of view of enrollees' careers, employment and earnings, the course was worthless. About 1,950 enrollees attended courses during the period of the Commission's investigation; the total tuition was about $1.5 million.

VALUE OF REDRESS: The order provided a $25,000 restitution fund for students who enrolled in the course during calendar year 1973 and completed the course but failed to get a training-related job.

FIRM : Tri-State Driver Training, Inc.

CASE NO. : C. 2839

DATE OF FINAL ORDER: 9/20/76

CHARGES : The firm had falsely represented, among other things, that it had been requested to train drivers for specific jobs by trucking companies, that it offered employment, that its graduates would be qualified for truck driver jobs without further training or experience, and that graduates were assured of such jobs.

ESTIMATED CONSUMER LOSS: The Commission concluded that if graduates did not secure employment as truck drivers, as was almost always the case, the money spent on the course was totally wasted. The firm charged $795 for the course and had 101 graduates for the year under investigation. The Commission had no information in the files we reviewed about the employment rates of the firm's graduates.

VALUE OF REDRESS: The order contained no redress provisions. The Commission concluded that restitution would impose an unreasonable hardship on the firm because of the severe losses or reduced profits suffered by the firm during fiscal years 1971 through 1974.

FIRM : U.S. Marketing Institute

CASE NO. : C. 2844

DATE OF FINAL ORDER: 9/30/76

CHARGES : The firm misrepresented its expertise in the fields of marketing, engineering, and patent law; its ability to recognizze ideas or inventions which could result in financial gain; its ability to obtain manufacturing contracts for its clients; and its ability to obtain manufacturing contracts for its clients; and its ability to obtain financial gain for its clients. Few, if any, of the firm's clients had their ideas or inventions evaluated by qualified and appropriately licensed persons, received legal protection for their ideas or inventions, or received a financial gain as a result of contracting with the firm. In addition, the firm failed to protect clients' investments and failed to disclose facts concerning the probability that such clients would receive a financial gain as a result of contracting with the firm.

ESTIMATED CONSUMER LOSS: The firm's clients generally paid a fee of between $1.500 and $4,500. For the period under Commission investigation, the firm contracted with 213 clients and none had obtained a financial gain. Over this period, the firm received $340.000 and the Commission considered the entire amount as a loss.

VALUE OF REDRES: The order contains no redress provisions. Commission staff cited financial documents which revealed that the firm had no available revenue, assets, or the financial capability to pay any form of redress.

FIRM : International Inventors, Inc.

CASE NO. : C. 2845

DATE OF FINAL ORDER: 9/30/76

CHARGES : The firm misrepresented its expertise in the fields of marketing, engineering, and patent law, its ability to recognize ideas or inventions which could result in financial gain, its ability to obtain manufacturing contracts for its clients, and its ability to obtain financial gains for its clients. Few, if any, of the firm's clients had their ideas or inventions evaluated by qualified or appropriately licensed persons, received legal protection for their ideas or inventions, or received a financial gain as a result of contracting with the firm. In addition, the firm failed to protect clients' investments and failed to disclose facts concerning the probability that such clients would receive a financial gain as a result of contracting with the firm.

ESTIMATED CONSUMER LOSS: The firm's clients generally paid a fee of $1,690. For the period under Commission investigation, the firm contracted with about 260 clients and none received a financial gain. Over this period, the firm received about $298,115, and the Commission considered the entire amount as a loss.

VALUE OF REDRESS: The order contained no redress provisions. The firm closed its offices and ceased operations in June 1975. Commission staff cited financial documents which revealed that the firm had no available revenue, assets, or the financial capability to pay any form of redress.

FIRM : Lafayette United Corp.

CASE NO. : D. 8963

DATE OF FINAL ORDER: 10/26/76

CHARGES : The firm misrepresented that it would provide a high school equivalency diploma to those completing its home study course, and that no state exam was required for the awarding of a diploma. Misrepresentations also included assertions that there were many job openings available, persons completing the courses were assured of placement, and the firm maintained a placement service which actively sought jobs for graduates.

ESTIMATED CONSUMER LOSS: Commission staff estimated that about 5,500 students enrolled in the school's courses during the period under investigation at tuition costs ranging from $595 to $895. The Commission estimated the consumer loss to be at least $1 million.

VALUE OF REDRESS: The firm provided a redress fund of $200.000 for those students who (1) completed the courses but did not obtain related employment or elected not to seek such employment for reasons related to the sufficiency or quality of training or job demand, or (2) decided not to complete the course for reasons related to the sufficiency or quality of training or job demand.

FIRM : Commercial Programming Unlimited, Inc.

CASE NO. : D. 9029

DATE OF FINAL ORDER: 12/9/76

CHARGES : The firm misrepresented, among other things, that its courses would qualify graduates for employment as computer programmers; a college education was not necessary for placement of graduates; the firm had a reasonable basis from which to conclude that there was a need for people in its training fields and that graduates were virtually assured of placement in trained-for fields; it was advantageous to take more than one course of instruction; and it owned a computer located on the premises. The firm failed to disclose accurate information about the success of graduates in obtaining employment related to their training. The firm also violated the Truth in Lending Act by failing to provide all required credit cost information and to use proper terminology.

ESTIMATED CONSUMER LOSS: The Commission estimated that the school enrolled less than 2,000 students each year. [The files we reviewed contained no information as to the cost of these courses.] The Commission believed the courses were of little value in preparing graduates for existing entry level positions as computer programmer trainees and computer operator trainees.

VALUE OF REDRESS: Based on a review of the firm's financial statements by a Commission accountant, the Commission concluded that the firm's financial difficulties made redress impractical.

FIRM : International Telephone and Telegraph Corp.
ITT Community Development Corp.

CASE No. : C. 2854

DATE OF FINAL ORDER: 12/10/76

CHARGES : The firms misrepresented that the parent company was legally responsible for the subsidiary's debts and the development of the area in which land was being sold, that the purchase of a lot sold by the subsidiary involved little or no financial risk, and that the lots were, or were soon to be, within a self-contained and fully developed community. The contracts were also unfair in providing that the subsidiary kept all sums previously paid by a defaulting purchaser.

ESTIMATED CONSUMER LOSS: The Commission concluded that one of the factors contributing to consumer injury was the population estimates used by the firms. Consumers believed that the predicted massive influx of people would generate tremendous demand for land and land prices would consequently skyrocket. Consumer injury, the Commission concluded, could be the difference between the anticipated value and the actual value of the property. The director of the Commission's land sales program estimated the injury at half a billion dollars. Other staff commented that

although the Commission sought the advice of professional land planners, it lacked the expertise to estimate the consumer injury.

VALUE OF REDRESS: The order required the firm to provide: an office building for the corporate headquarters of the subsidiary; an office and research park; a multi-purpose office structure within the office and research park; a major highway interchange; and a shopping center. Commission staff estimated the value of this package at $20-30 million.

FIRM : Idea Research and Development, Inc.

CASE NO. : D. 9032

DATE OF FINAL ORDER: 1/11/77

CHARGES : The firm, engaged in the idea promotion business, was inducing clients to enter contracts for the promotion of clients' ideas, inventions, or products by representing that clients could earn substantial sums of money through their association with the firm. Few, if any, clients ever received a sum of money greater than what they paid. The firm also misrepresented its ability to recognize ideas which might result in financial gains, its engineering and marketing ability, the development or promotion of such ideas; its ability to provide legal protection for clients' ideas, and its ability to obtain manufacturing contracts for its clients.

ESTIMATED CONSUMER LOSS: The Commission concluded that the firm had received $752,373 in clients' fee over the period under investigation. Only $140 was paid to the clients. Therefore, the consumer loss was $752,233.

VALUE OR REDRESS: The order contained no redress provisions. The Commission concluded that, because the Internal Revenue Service, in its case against the firm, could not locate any assets, consumer redress was not feasible.

FIRM : Great Western United Corp.

CASE NO. : C. 2306

DATE OF FINAL ORDER: 1/26/77

CHARGES : The firm misrepresented that the land it offered for sale was a good investment because it was certain to rise in price; misrepresented the nature and extent of the real estate developments; misrepresented its policy concerning the resale of land purchased by consumers, misrepresented the amount of water available at the developments, and failed to include certain required affirmative disclosures in its advertising. (the firm had been violating a 1972 consent order.)

ESTIMATED CONSUMER LOSS: The files we reviewed contained no specific information on the consumer loss.

VALUE OF REDRESS: The firm was to make partial refunds of almost $4 million to up to 14,000 consumers who bought property between January 1, 1972, and the date of the order. In addition, the firm was to spend $16 million on capital improvements such as roads; electrical, gas, water, and sewer facilities; recreational facilities; stores; and commercial and industrial buildings.

FIRM : Flagg Industries, Inc.

CASE NO. : C. 2903

DATE OF FINAL ORDER: 9/27/77

CHARGES : The firm misrepresented that the unimproved lots it was selling constituted an excellent investment; that significant monetary gain could be achieved, that there was little or no financial risk involved in the purchase; that resale of the lots was not difficult, that the lots offered the comforts of suburban living; and that the lots were in other than isolated, sparsely populated areas.

ESTIMATED CONSUMER LOSS: From 1968 to 1975, the firm sold 10,528 lots for about $43 million. Commission staff estimated the lots to be worth from $21-26 million. Staff estimates were based on sales prices for these lots at a distress sale.

VALUE OF REDRESS: The firm was to construct all facilities and amenities as represented in its report filed with the U.S. Department of Housing and Urban Development. The firm was also ordered to construct additional facilities and make additional improvements and to pay $100,000 to a property owners' assocation. The Commission estimated that these improvements would cost the firm about $4.1 million.

FIRM : Jetma Technical Institute

CASE NO. : D. 9061

DATE OF FINAL ORDER: 10/19/77

CHARGES : The firm misrepresented that there was a substantial need for its graduates and that jobs would be readily available to them. In addition, students were incorrectly led to believe that the need for gas turbine mechanics wouuld steadily expand in the future.

ESTIMATED CONSUMER LOSS: The Commission concluded that the consumer loss was the total fee paid to the school because there was no benefit derived from completion of the course. The staff estimated that about 2,500 students would be covered by the order; each paid a fee of about $1,095. Therefore the loss would be about $2.7 million.

VALUE OF REDRESS: The order contained no redress provisions. The Commission relied on certified financial statements in concluding that funds were not available for redress.

FIRM : Ryder System, Inc.

CASE NO. : C. 2915

DATE OF FINAL ORDER: 12/28/77

CHARGES : The firm falsely advertised, among other things, that (1) there was an urgent need or demand for graduates of its tractor-trailer driver and heavy equipment operator courses; (2) all or substantially all graduates were able, upon graduation, to secure positions for which they were trained; (3) students would complete the tractor-trailer driver course and qualify for employment as drivers within three weeks of beginning the course on a part time basis; and (4) the firm furnished a free placement service.

ESTIMATED CONSUMER LOSS: The Commission did not calculate the loss but rather estimated that the students who would be eligible for the redress had paid tuitions totalling about $7.6 million.

VALUE OF REDRESS: The firm set up a $1.5 million fund to provide restitution to certain eligible students. Although the Commission announced that it would not be able to estimate the total amount of tuition to be refunded until the eligibility was determined, its staff had estimated that total refunds would amount to about $768,000 to $986,000.

FIRM : Firestone Photographs, Inc.

CASE NO. : C. 2921

DATE OF FINAL ORDER: 4/20/78

CHARGES : The firm misrepresented, among other things, that it was closely affiliated with Kodak Corp., that a franchisee would earn between $5,200 and $52,000 or more a year and could recover the entire initial investment within one year, and that the firm would obtain and set up sales locations shortly after the contract was signed. The firm also required all suits against it to be brought in an Ohio court.

ESTIMATED CONSUMER LOSS: The Commission estimated the loss at $1 million.

VALUE OF REDRESS: The order required the firm to notify all franchisees that it would not enforce the contractual provision limiting lawsuits to Ohio. The order contained no other redress provisions.

FIRM : Driver Training Institute, Inc.

CASE NO. : D. 9060

DATE OF FINAL ORDER: 7/27/78

CHARGES : The firm misrepresented the employment opportunities and salary potential for truck and tractor-trailer drivers, the availability of steady, high-paying jobs to graduates of its training courses, and the effectiveness of its placement activities in securing jobs for its graduates. The firm also failed to disclose to prospective students important facts, such as the minimum age requirements for drivers and employer preferences for experienced drivers.

ESTIMATED CONSUMER LOSS: The Commission estimated that the firm's placement rate was at best 37% of all graduates. Since the average cost of tuition was $1,000 and about 1,000 students enrolled each year, the consumer injury was about $630,000 annually.

VALUE OF REDRESS: The firm established a $50,000 restitution fund from which it was to make pro rata refunds to each former student who met certain eligibility requirements.

Mr. BROYHILL. Again, these come from the staff of the FTC.

Mr. DENSMORE. These are FTC estimates that are in the case files. These are staff estimates, yes.

Mr. SCHEUER. You have not done any independent verification of the reasonableness of those estimates.

Mr. DENSMORE. The reason for that being we are not able to get access to the records of the companies.

Mr. SCHEUER. Why can't you get access to everything that FTC has?

Mr. RABKIN. We can get what they have, but we cannot get what they do not have. To make an analysis, we would have to go beyond what they have.

Mr. SCHEUER. To come up with estimates of loss they must have had access to the company files, didn't they?

Mr. RABKIN. Certainly.

Mr. SCHEUER. And you would have access to those files.

Mr. RABKIN. We would have access to what the Commission had in its records.

Mr. SCHEUER. You could not send your investigators to the company files just as FTC does?

Mr. DENSMORE. I do not believe we have that authority.

Mr. SCHEUER. So you could only have access to what they actually placed in their files, the studies they did and the analysis they did and copies of documents they took. That would be the limit of what you could look for.

Mr. DENSMORE. Yes.

Mr. SCHEUER. Presumably they would have in their files whatever they thought from the company's files made their case.

We have Congressman Rinaldo here. Do you have any questions?

Mr. RINALDO. I am sorry I am late. Probably most of the same questions that I would want to ask have been already covered. However, in an effort to insure that it is on the record, I would like to ask about GAO's findings that consumers are not receiving the benefits of section 19. I note from your recommendation that you want to give FTC the power to freeze a company's assets.

Now, I cannot picture myself wanting to do business with a company whose assets are frozen. In other words, wouldn't such an injunction almost guarantee a company will fail? If a company is only accused of wrongdoing, I fear that it could be ruined and just about put out of business based only upon allegations that it intends to dissipate its assets.

Could you comment on that?

Mr. DENSMORE. We discussed that a while ago, sir, and the same concern was raised but what we are talking about is FTC going into court and getting an injunction to prevent a company from dissipating its assets. I think it is a little different than saying those assets are frozen.

We gave a couple of examples where for instance one company was paying an individual's wife $60,000 a week in consulting fees, transferring large sums from one account to different accounts, setting up additional corporations and so forth. We are talking about this type of flagrancy. It would rest with the court to determine what particular restrictions should be placed.

So we are talking about only dissipating assets in anticipation of being required to provide redress.

Mr. BROYHILL. Would the gentleman yield? The problem, as I pointed out a few moments ago, is this is fine and we would like to see these people make redress, but the problem is that the Commission will take this as they have in the past, to try some new and novel theory and they will use the threat of going to court, seek consumer redress for this new and novel theory of authorization and use this to force them to sign a consent decree when they are entirely innocent.

And it is probably something that should have been done through industry trade rule.

Mr. RABKIN. That could well happen.

Mr. BROYHILL. It has happened. Did you investigate that?

Mr. RABKIN. We have no way of knowing what goes on at the negotiations between the business and the Commission and what threats, if you will, the Commission makes as to the potential actions it could take if the company does not consent.

Mr. SCHEUER. I must confess—none of you three fellows are lawyers, but I must confess as a one-time lawyer I do not understand Congressman Broyhill's case at all because all the Commission is doing is going to court. If they do not, under your situation, they would not have any power to affect that business operation. They would simply present their case to the court alleging certain improprieties, deceptions, frauds, whatever.

Now, any company that is doing business would have a lawyer and, of course, the FTC would have the burden of the proof. They would have the burden of making their case. The company would have a lawyer. I think Congressman Broyhill is unduly exercised and has anxieties that are not real.

The company would then come to court with their lawyer and they would tell the court what the facts were. I cannot believe if this was a frivolous thing that the FTC was trying to do that for a very brief court appearance the company could not get the FTC off their backs.

We do have a judicial system in this country and what these recommendations would do would be to shortcircuit in effect the regulatory process and require the FTC to make its case very early on in a court of law; in a Federal court, too, where you have a very high quality of judicial expertise and professionalism and responsibility.

I think a Federal court would give very swift comeuppance to the FTC if they were trying in effect to blackmail a company into signing some kind of consent order that was not justified by the fact or unfairly to do any arm twisting or whatever. It is what we have a federal court system for.

Mr. RINALDO. The problem, however, Mr. Chairman—and I understand exactly what Mr. Broyhill is saying—is that it is one thing for us to say here how it is going to work. It is one thing for us to say here how we are going to legislate.

But I think you yourself not too long ago, at a meeting we had when we were laying out the groundwork for this subcommittee, admitted one of the biggest problems in the country today is overzealousness in the bureaucracy and the extension of regulations to

the point where the bureaucracy does not even follow the intent of Congress. Certainly where the FTC is given the power, as it would be under the terms of this particular section, to freeze a company's assets or prevent them from——

Mr. SCHEUER. That is a big difference. Are you a lawyer?

Mr. RINALDO. No, I am not. The fact of the matter is no matter how we try to paint it, you are causing a stigma to be placed on that company. You are causing that company to be on the front page of the newspaper. You are causing that company to lose sales. You are causing that company to have problems. That is why I am surprised at what you are saying.

Last year I signed the conference report. Let me quote one of the main sentences: "The possibility exists that some few overzealous staff people may be tempted to suggest equitable relief as a negotiating device even when they know it would not be proper."

Now, this is exactly the problem. The problem is not with the intent as set forth here. The problem is not with the legislative language. The problem, as I see it, is with the interpretation of the legislative language, the rules that will be promulgated and the harm that will be done.

Mr. SCHEUER. Congressman Rinaldo, you and I both identified a problem but in that conference report we gave them equitable relief and you signed that very same conference report so we both recognize it as a problem, but we are relying on the Federal judiciary to bring the FTC up very short and to keep them on a very tight rein if they abuse the right that we are now giving them to take a case to court for some kind of injunctive relief.

Mr. RINALDO. You have more faith in FTC and the Federal judiciary system than I do.

Mr. SCHEUER. I have a lot of faith in the Federal judiciary system.

[Discussion off the record.]

Mr. SCHEUER. I have a lot of confidence in our court system. When push comes to shove that is the best thing we have going for us in this country to preserve not only our democracy but to preserve the free enterprise system that has made this country great and has been the foundation of our prosperity.

Mr. DENSMORE. If I could say just one more thing along these regards. There are a couple of other things I think should be taken into consideration. That is, that with this type of authority, in order to get the injunction FTC would have to prove to the court that it had a likelihood of ultimate success in the complaint against the defendant and that it has a likelihood of obtaining of restitution or other redress under section 19. It is not a question of only going in and making a case to stop a practice but they would have to show at that particular point in time the chance of success they would have in the final proceeding.

Mr. RINALDO. I have no further questions, Mr. Chairman.

Mr. SCHEUER. Thank you very much. We appreciate your testimony.

We will now move to Jeffrey Joseph, who is representing the Chamber of Commerce of the United States. Mr. Joseph, we are running against a time constraint this morning. Your entire statement will be printed without any abridgement in the record, so

what we would hope is that you would just chat informally with us hitting the highlights, summarizing your statement and then I am sure we will have some questions for you.

STATEMENT OF JEFFREY H. JOSEPH, DIRECTOR, GOVERNMENT AND REGULATORY AFFAIRS, CHAMBER OF COMMERCE OF THE UNITED STATES, ACCOMPANIED BY MARK SCHULTZ, REGULATORY AFFAIRS ATTORNEY

Mr. JOSEPH. Good morning, Mr. Chairman, Congressman Broyhill, and Congressman Rinaldo. I am Jeffrey H. Joseph, Director of Government and Regulatory Affairs of the Chamber of Commerce of the United States. Accompanying me today is Mark Schultz, Regulatory Affairs Attorney at the National Chamber. In the past, it has been our impression that reauthorization hearings such as these were considered by all parties to be relatively proforma. Times change, however, and today a new political environment is sweeping our country. An increasingly cynical and frustrated public is becoming more vocal about the role of government in society. Proposals that 1 year ago no one could have predicted with great certainty, like proposition 13 and constitutional conventions, are becoming familair concepts for today's politician.

This new public attitude has permeated all levels of our government. As candidate Jimmy Carter ran against the Washington establishment; the Congress has since become more conservative. Current events continue to escalate the public debate. For example, one month ago, in a little publicized address to the faculty and students of the University of Kansas, Attorney General Griffin Bell offered a grim perspective on the state of our Nation today. The Attorney General's premise for the public address was, "that if the republic is to remain viable, we must find ways to curb, and then to reduce, this government by bureaucracy. We must return to government by directly accountable public officials—local, State, and Federal."

Mr. SCHEUER. What distinguishes a public official directly accountable to the people from one who is a bureaucrat?

Mr. JOSEPH. These people who go to the ballot boxes who find fault with anything you as an elected official might do have a chance to express some feeling about it. They cannot find the bureaucrat who has come up with the regulation that mandates what they have to do next. The Attorney General proposed drastic solutions including a one 6-year term for the President, reduction of the litigating authority of the independent agencies, reduction in the staff of all bodies, the courts, the Congress, even the Presidency, and suggested to Congress they should sharply curtail rulemaking which he said was a complete total substitute for all forms of government, executive, legislative, and judicial. Its abuse could stymie the government of whole States in the operation of entire industries.

Mr. SCHEUER. I am confused. Congressman Broyhill and Congressman Rinaldo want to cut down on adjudications which means they want more rulemaking. You want to cut down on rulemaking. I do not understand it. Do you want to cut down on the access of regulatory agencies to the court so the courts would do most of that work or do you want that process handled through rulemaking?

Mr. JOSEPH. I am offering an observation by the Attorney General that rulemaking process has created a lot of problems and rulemaking has really focused a lot of attention on the Federal Trade Commission.

Mr. SCHEUER. But this whole process we are talking about this morning——

Mr. BROYHILL. I was referring a few moments ago to the narrow practice of the Commission in using either consent decrees or cease and desist orders in certain instances where perhaps it would have been better advised to have used rulemaking. That is a narrow area. That is what I was referring to.

Mr. SCHEUER. You are not in favor of a vast expansion of rulemaking.

Mr. BROYHILL. No. I am just saying in some instances the Commission instead of going in and issuing a rule or set of regulations for industrywide practice, has attempted to do this on a case-by-case basis.

Mr. SCHEUER. Via the court system?

Mr. BROYHILL. Right.

Mr. SCHEUER. Please proceed.

Mr. JOSEPH. Perhaps more so than any other Federal agency, the FTC typifies what the average American seems to be concerned about in government. Through its rulemaking powers, the FTC has involved itself in the affairs of industry and commerce stretching from one end of society to another. Hearing aid dealers, funeral parlor operators, used car dealers, cereal and food manufacturers, vocational school operators, mobile home manufacturers, T.V. advertisers, protein supplement manufacturers, health spa operators, and the science of product standards and certification are all subject to action by the Federal Trade Commission.

There appears to be no area in our society where the FTC does not seem to have a better idea. This omniscience raises a fundamental question: As it now exists under the FTC act, is rulemaking prudent and consonant with the principles of government embraced by the constitution?

Now it is interesting to note just last week the administrative conference published in the Federal Register for public comment some preliminary findings as a result of a study they were mandated to do. The study so far raises some significant questions and criticisms about the Commission's handling of the rulemaking process.

You go back to the statute. The operative words are: "either unfair or deceptive." Clearly in legal practice it need not be both. From 1938 on, FTC spent most of their time eliminating deceptive practices and they built up a good case history on what a deceptive practice was.

There is no arguing that a misrepresented produce characterizes something that should be enjoined, but it has only been recently that the Commission has gotten into determining what is unfair and after all what is unfair is really in the eye of the beholder. That is creating a problem for the Commission.

Mr. SCHEUER. Do you have any egregious examples that spring to mind of some activity that they declared unfair that you would say is not unfair?

Mr. JOSEPH. Go through the entire list of rulemakings and you will find novel concepts proposed from 1975 on.

Mr. SCHEUER. I am asking you for a specific example.

Mr. JOSEPH. I listed in the statement that what brings most instances to light is the rule for the ban on advertizing to children that has generated a lot of criticism on the part of the public. Whose right is it to say you should mandate what children should be able to see on television?

The same thing with what people who produce hearing aids should have to advertise in their product. Should they claim what is substantial benefit or additional substantial benefit? Why should protein supplement manufacturers have to put labels on their products and say people do not need to buy them?

If you run through the whole list of proposals that have come out in trade regulation rulemaking proceedings you will see novel concepts have been proposed where staff people at the FTC have taken their definition of what is unfair and said this should apply for the whole country.

This is the kind of point you will get into when you have your in-depth hearings on rulemaking process because they are not isolated instances by any means.

Mr. SCHEUER. I must say you have not cited a single instance that bothers me one iota, and I would be happy to take up the cudgel in each of those cases but that is not our role here today. Do you have any other instances of what you would feel would be unfair intrusion on unfettered, free, private enterprise?

Mr. JOSEPH. You have to look at the whole process. The question is: Is the rulemaking process fair? You have half a dozen to a dozen industries who spent millions of dollars participating in these rulemaking proceedings where the prosecuting attorney is a staff member of the Bureau of Consumer Protection and the hearing officer, who was determining the objectiveness of everything presented, was from the same bureau.

The same bureau determined which public interest group got funds to participate and offer novel points of view which were reiterations of the points the staff was proposing. So, you ask if industry thinks they are being fairly treated, and the answer most people seem to have is no, it is not very fair.

The public funding program raises important questions of fairness and equity. We believe—all National Chamber believes all interested groups, particularly consumers, should be represented in agency proceedings. But we continue to oppose the authorization of additional Federal expenditures to result in unfair or unnecessary regulatory efforts.

The same study of the Magnuson-Moss Act by Professor Boyer has another preliminary report out which reinforces testimony that was given and information that was learned in hearings in the Senate Judiciary Committee in June of 1977. Professor Boyer confirmed that the FTC had a potentially extremely difficult task in identifying which interests should be compensated but attempted to avoid the problem by accepting at face value a conclusory definition of consumer interest that the applications advanced FTC took a liberal approach on the issue of financial inability with the

agency concluding a group was financially unable to participate if its unrestriced funds had been budgeted for other projects.

Mr. Boyer also found that FTC staff attorneys have played a major role in selecting paid participants, both in making formal recommendations and through informal preapplication contracts with consumer groups and other applicants. Also, Mr. Boyer found that "like staff, the consumer groups tended to mobilize witnesses who were rule-supporters and overall there were many more pro-rule than anti-rule witnesses at the hearings." He observed that, "Compensated consumer groups tended either to support the rule or take the position it did not go far enough."

The concept of intervenor funding is not one that is business versus consumer because you have the former Executive Director of FTC in Senate testimony—Margaret Smith says she had reservation about how the program was going and you have John Gardner who said if the concept of conflict of interest means anything, there is danger in potential criticism of an agency being financed by the agency that criticized and the problem was you would create a class of critics.

Now, the problems we raise, we are not saying we are against rulemaking. We are saying as long as abuses in rulemaking exist and FTC takes it upon themselves to determine what is unfair, then the concept of congressional veto becomes a much more important issue and it raises more and more interest as the days go by because as long as unelected agency officials come out with new rules and regulations which have the effect of law and can be enforced in court, there should be an opportunity for Congress to affirmatively do something to stop these from going into effect and let Congress impose its judgment of what is fair.

There are two instances in the Federal Trade Commission now that come to mind where the Commission is going ahead with proposals which got no place in the Congress. For a number of years Senator Kennedy had a proposal to restructure voluntary standards. No congressional support, so now they are doing it by regulatory fiat. Senator Kennedy had difficulty promoting legislation in the Congress that would break up oil companies so he petitioned Federal Trade to do it by rulemaking.

If agencies do by bureaucratic fiefdom what the Congress, as the policymaking body of the United States, refused to do, we think congressional veto as a concept should be established and the Congress should have the right to stop these agency regulations from going into effect.

Our board recently gave support to Congressional veto——

Mr. SCHEUER. Doesn't the court at the present time have a role in stopping them from going into effect if they are unfair and arbitrary? Don't the companies have as their first line of defense the five Commissioners who themselves must approve staff recommendations and after that can't the companies have access to the Federal courts on the whole question of the fairness and reasonableness of the FTC output?

Mr. JOSEPH. There are due process safeguards but they are all ex post facto. One of the things we like about HR 2367 is that it lays out a number of regulatory reform type procedural requirements for an agency to follow. There is an opportunity for interlocutory

challenge. Why should industry have to spend 4 or 5 years negotiating, litigating, getting involved in agency appeals to the Commissioners, appealing to courts and spending all that time and money to overturn what the public does not seem to want?

I seem to recall that not that many months ago FDA came out with a provision to ban saccharin. It did not take long for the public as a mass to get to the Congress and get a message to Congress.

Mr. SCHEUER. How would you have Congress play that role?

Mr. JOSEPH. The Congress plays the role in the congressional veto. Anyone has the right to try and raise the issue. We think that in H.R. 2367 there are a number of concepts which need to be applied to the Federal Trade Commission so it can be made more responsive, so industry does not have to spend time and money for no results.

You are aware of the political scenario that happened in the last Congress, great support for this concept on this bill. It is not without justification. There is enough pressure for a lot of different reasons to create this environment. So, I do not think what we are talking about is something that is a phantom issue. The regulatory reform provision——

Mr. SCHEUER. Congressman Levitas will be testifying before this committee tomorrow, and I suppose he will be making an eloquent plea for support of the congressional veto.

Mr. JOSEPH. As I said, we support that provision which is in H.R. 2367, section 3 of that bill, section 4. H.R. 2367 also embodies a number of basic principles that the chamber has adopted in terms of reforming the regulatory process. We support the requirement that FTC conduct cost-benefit analyses, issue economic impact statements and consider alternatives, and indirect costs interest all rulemaking proceedings.

In addition, we support its requirement of periodic review of existing and new FTC regulations to determine whether they continue to be necessary, are carrying out their statutorily intended purposes or whether they conflict with or duplicate any other rule or regulation.

Finally, we endorse the idea of providing an opportunity for judicial review, on an interlocutory basis, of any rulemaking proceeding which fails to comply with any procedural requirement outlined in section 4.

Consequently, we urge subcommittee adoption of the Broyhill bill, legislation that would achieve meaningful regulatory reform by eliminating excessive, inflationary regulations. As we see it, this proposal would be beneficial not only to the business community, but to the American consumer as well.

In summary, we hope that the above recommendations will be received in the spirit in which they are intended. They are offered as part of the national chamber's continuing effort to achieve regulatory reform, and our continued commitment to remove Government impediments to growth in the regulatory system, a commitment clearly shared by President Carter, as evidenced by this statement to Congress:

> One of my administration's major goals is to free the American people from the burden of overregulation. We must look, industry by industry, at what effect regulation has—whether it simply blunts the healthy forces of competition, inflates the

prices and discourages business innovation. Whenever it seems likely that the free market would better serve the public, we will eliminate government regulation.

[Testimony resumes on p. 84.]

[Mr. Joseph's prepared statement follows:]

STATEMENT
on
H.R. 2313 and H.R. 2367, AMENDMENTS TO
THE FEDERAL TRADE COMMISSION ACT
before the
CONSUMER PROTECTION & FINANCE SUBCOMMITTEE
of the
HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Jeffrey H. Joseph
February 28, 1979

I am Jeffrey H. Joseph, Director of Government and Regulatory Affairs of the Chamber of Commerce of the United States. Accompanying me today is Mark Schultz, Regulatory Affairs Attorney at the National Chamber. On behalf of our 80,000 members, who produce most of America's goods and services, we greatly appreciate the opportunity to present our views on the role of the Federal Trade Commission in our society today.

PUBLIC ATTITUDE TOWARD GOVERNMENT

In the past, it has been our impression that reauthorization hearings such as these were considered by all parties to be relatively pro-forma. Times change, however, and today a new political environment is sweeping our country. An increasingly cynical and frustrated public is becoming more vocal about the role of government in society. Proposals that one year ago no one could have predicted with great certainty, like Proposition 13 and constitutional conventions, are becoming familiar concepts for today's politician.

This new public attitude has permeated all levels of our government. As a candidate Jimmy Carter ran against the Washington establishment; the Congress has since become more conservative. Current events continue to escalate the public debate. For example, one month ago, in a little publicized address to the faculty and students of the University of Kansas, Attorney General Griffin Bell offered a grim perspective on the state of our nation today. The Attorney General's premise for the address was, "that if the republic is to remain viable, we must find ways to curb, and then to reduce, this government by bureaucracy. We must return to government by directly accountable public officials -- local, state and federal."

Attorney General Bell went on to offer a few "modest" suggestions to turn the tide. Among these he proposed:

- A constitutional amendment to provide for a sole, six-year term for the President;
- A complete review and reduction of the regulatory and litigating authority of the independent federal agencies;
- A reduction in the staffs allocated to the President, the Congress, and even the federal courts; and
- A drastic call to Congress to "sharply curtail, if not abolish, the so-called rulemaking power of the independent regulatory commissions."

Attorney General Bell called rulemaking "a total substitute for all forms of government, executive, legislative, and even judicial. Its abuse can stymie and frustrate the government of whole states and the operations of entire industries."

RULEMAKING AND THE FTC

Public attitudes today dictate that Congress take an extremely hard look at the operations and policies of the Federal Trade Commission. Perhaps more so than any other federal agency, the FTC typifies what the average American seems to be concerned about in government. Through its rulemaking powers, the FTC has involved itself in the affairs of industry and commerce stretching from one end of society to another. Hearing aid dealers, funeral parlor operators, used car dealers, cereal and food manufacturers, vocational school operators, mobile home manufacturers, T.V. advertisers, protein supplement manufacturers, health spa operators, and the science of product standards and certification are all subject to action by the Federal Trade Commission. There appears to be no area in our society where the FTC does not seem to have a better idea. This omniscience raises a fundamental question: as it now exists under the FTC Act, is rulemaking prudent and consonant with the principles of government embraced by the constitution?

It is clear to many observers that the Federal Trade Commission's rulemaking process is not working well. The Administrative Conference of the

United States has published in the Federal Register of February 21, 1979, a request for public comments on certain proposed recommendations which pertain principally to the preparation and prehearing stages of the trade regulation rulemaking process. The study is directed by Professor Barry B. Boyer, a law professor at the University of Buffalo who is serving as a consultant to the Administrative Conference. The Conference is scheduled to report to Congress the results of its study of the Magnuson-Moss Act. The preliminary study raises significant questions and criticisms of the FTC's handling of the preparatory and prehearing phases of the rulemaking process.

Any study of rulemaking by the FTC must commence with a close examination of the powers from which the trade regulation rules emanate. The FTC Act, as amended by the Magnuson-Moss FTC Improvement Act, reads in part as follows: "The Commission may prescribe ... rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce." There are two clear standards applicable to the FTC rulemaking -- "unfair" and "deceptive." Under the clear language of the statute, an illegal practice need not be both.

Since 1938, when the "unfair or deceptive acts or practices" language was added to the FTC Act, the Commission has made great strides in defining and eliminating "deceptive" practices. Its premise has been that the free flow of accurate consumer information is necessary for the efficient operation of markets -- a premise with which few would argue. There is no arguing with the proposition, for example, that a misrepresented product characteristic is a deception that should be enjoined.

However, it has not been until recently that the Commission has made significant use of the "unfairness" standard. Evidence of the FTC's judgement as to what is or is not unfair is evident in the current debates which are keeping the highly controversial nature of this agency in the public's eye. From the standpoint of the FTC, "unfairness" has no bounds. It lies in the eyes of the beholders, in this case the staff and the members of the FTC.

Furthermore, the vagueness of unfairness is increased in the context of rulemaking, which itself has ill-defined boundaries. The FTC was originally

intended to be a "cease and desist" agency. Under rulemaking, it may apparently order any affirmative or negative action it wishes to eliminate the practice it deems unfair. It is obvious to those who are contesting FTC actions that the agency is the second most powerful "legislative" body in the United States.

While it is clear that the FTC is going out of its way to impose its standard of "unfairness" on the country, the public is becoming increasingly aware that the base concept, "fairness," is not always present in the conduct of the various rulemaking proceedings. As this committee examines the performance of the agency, it must ask why semblances of fairness must continually be compromised. Why, for example, did the staff lawyers in the hearing aid proceeding take the unprecedented step of providing their personal evaluation of the credibility of various participants in the rulemaking proceeding, arriving at a statistically impossible conclusion that almost all of the individuals who testified in opposition to the rule were deemed not to be credible, while those who supported the rule had, by no strange coincidence, most unimpeachable characters? The concept of commenting on the credibility of witnesses is astounding, since the staff lawyers are supposedly serving as advocates, not factfinders.

The concept of fairness also extends to the relationship among FTC staffers who participate in rulemaking. Many industries which face the possibility of living with new, agency-mandated rules of practice feel victimized in a proceeding where a staff member of the Bureau of Consumer Protection proposed the rule; a colleague from the Bureau served as the "impartial" hearing officer; and still other bureau colleagues decided which "public interest" groups were reimbursed to play the "objective" role of supporting the proposed rule.

The FTC's "public funding" program itself raises an important question of fairness and equity. While opposing the proliferation in other agencies of the concept of direct reimbursement of participant costs, the National Chamber is well aware that the FTC has the statutory authority pursuant to the Magnuson-Moss Warranty Act to award public participation grants under certain conditions. We also are aware that the FTC makes separate grants to witnesses from its own budget, and has authority to do so.

In fact, when the Magnuson-Moss bill went to the President for his signature, we informed him that we supported the bill and were curious to see how the intervenor funding portion would be administered. In our opinion, it has not been administered well.

Hence, we will not address the underlying concept of direct reimbursement for public participation in rulemaking proceedings. We view that issue, at least as it applies to the FTC, as moot. Nor do we object to the Commission's issuance of rules of practice or its issuance of Guidelines to explain those rules of practice. However, we regret the FTC's decision not to adopt the guidelines suggested by the National Chamber in a statement submitted to the FTC on July 25, 1977.

While the National Chamber believes that all interest groups, particularly consumers, should be represented in agency proceedings, the National Chamber continues to oppose the authorization of any federal activity or expenditure that would result in an unfair or unnecessary regulatory effort.

In testimony before a Senate Judiciary Subcommittee in June of 1977, these serious abuses in the funding program used at the FTC were cited:

- Funds were disbursed, in many instances, to specific individuals or groups in agreement with the FTC's position.
- Funds went to individuals and groups not qualified to receive them under the definition of "participation," as spelled out in the law.
- Funds went to organizations which had sufficient funds of their own to pay the costs of their participation in FTC proceedings.
- Staff attorneys of the FTC, in effect, played a double and conflicting role; they took part in the hearings and joined in determining what outside groups should be compensated for taking a position in the hearings.
- The FTC failed to guard against staff excesses, such as what might be called "ventriloquist advocacy" -- the preparation of written statements delivered by public witnesses.

These abuses suggest there are many difficult questions to be resolved in framing detailed standards for a direct compensation program

and in administering the granting of compensation funds. This point has also been confirmed in another report by Barry B. Boyer.

Professor Boyer, in a preliminary review of the FTC's use of payments to public participants, says that the FTC had "potentially an extremely difficult task" of identifying which interests should be compensated, but "tended to avoid the problem by accepting at face value the broad and conclusory definitions of the consumer interest that the applicants advanced." The FTC took a "liberal approach" on the issue of financial inability, with the agency concluding that "a group was financially unable to participate if its unrestricted funds had been budgeted for other projects."

Mr. Boyer also found that FTC staff attorneys have played a major role in selecting paid participants, both in making formal recommendations and through "informal pre-application contracts with consumer groups and other applicants." Also, Mr. Boyer found that "(l)ike staff, the consumer groups tended to mobilize witnesses who were rule-supporters, and overall there were many more pro-rule than anti-rule witnesses at the hearings." He observed that "(c)ompensated consumer groups tended either to support the rule, or take the position... (it) did not go far enough."

In view of this evidence and other "abuses" which have occurred, the National Chamber urges Congress to engage in an in-depth analysis of the FTC's federal advocacy funding program to ascertain whether or not its procedure is functioning fairly, impartially, and with proper restraint in the use of public funds.

Because the reimbursement program has been used to give special status, advantages, or exemptions to consumer groups sharing an agency's position, and has led to unnecessary, duplicative testimony and preparation of testimony by staffers to be submitted by ostensibly objective witnesses, Congress should take a serious look at this program.

Lest this be viewed as a classic confrontation between the business community and the consumer movement, consider the following comments made by respected "consumerists." John W. Gardner, founder of (the citizen lobbying organization) Common Cause, has commented that "if the concept of

conflict-of-interest means anything, then there is a danger in potential critics of an agency being financed by the very agency they criticize. We could easily create a class of kept critics, and damage the future of an independent public interest movement." Margery Waxman Smith, former Executive Director of the FTC, in testimony before a Senate Judiciary Subcommittee, noted that she had a number of reservations about the FTC's reimbursement program.

CONGRESSIONAL VETO

Ours is a government that rests on checks and balances. A backlash to regulatory agency excesses is growing. At the present time, administrative rules and regulations of the FTC have the same force and effect as laws passed by Congress. As long as our unelected bureaucrats continue to pass laws without effective Congressional control, support will continue to grow for the use of congressional veto as an effective tool to improve the regulatory process.

National Chamber support for the congressional veto concept was recently enunciated by our Board of Directors with the realization that there are existing tools available to Congress to control the agencies. These include greater and more effective oversight, stricter standards on the appointment of cabinet members and agency chairmen, and greater reliance on the authorization and appropriation process. However, we have determined that these tools simply are not adequate to address the problem a particular rule or regulation may present. All the above remedies are ex post facto -- after the damage has been done. The congressional veto would prevent the damage and serve as a possible tool of "consumer redress" from egregious FTC rulemaking actions. Therefore, we support the effort to apply this process to the FTC, as found in section 3 of the Broyhill bill.

From a political standpoint, we must recall the noteworthy votes taken on this issue in the last Congress. Although the House passed an amendment providing for congressional veto of FTC regulations by a 2 to 1 vote, 272 to 139, the Senate refused to accept that provision in conference. On two seperate occasions, the House voted to reject the FTC conference report because it did not contain a congressional veto of FTC regulations. The first vote was 146 to 255; the second vote was 175 to 214. The two-time rejection

of the conference report constituted unprecedented action on the issue and dramatized the feeling of concern that the actions of the FTC have brought to bear on our public.

REGULATORY REFORM

In addition to supporting the addition of a congressional veto provision to the FTC Authorization Act, the National Chamber strongly endorses the regulatory reform procedures outlined in Section 4 of the Broyhill bill.

A 1978 report by the Center for the Study of American Business revealed that federal regulation of business for fiscal year 1979 would cost more than $100 billion or about $500 per person. However, we feel this figure seriously understates the actual costs involved for business and the public-at-large. Almost certainly, this figure does not reflect the "hidden costs" of regulation resulting from business time, money, and manpower being diverted to preparing reports and complying with regulations, rather than being spent on hiring and training new personnel and improving a firm's productivity. This leads to higher overhead for business and, in turn, to higher prices for the product, adding to the inflationary spiral.

Often, the net effect of regulation is a diversion of manpower and capital from the firm's business activities to work which adds little or nothing to the perceived utility of the ultimate product or service offered to the consumer. As a result, consumers do not understand the reason for certain price increases.

In sum, the federal government's regulatory activity -- and, the FTC's in particular -- is being viewed by American business as a significant impediment to economic growth.

Consequently, in addition to supporting efforts for government reorganization, zero-base budgeting, and sunset legislation which certainly will help reduce the regulatory and paperwork burden, the Chamber supports regulatory reform based on the following guidelines:

-- A competitive free market system should be retained and encouraged to provide an incentive for innovation and productive economic activities;

-- Regulations should be only those essential to the protection of the health, safety and the general welfare, and should be revised and administered so as to...

(1) Provide that degree of regulation essential to the proper functioning of a competitive free market system;

(2) Eliminate uneven and inequitable enforcement;

(3) Eliminate regulatory duplication and conflict;

(4) Provide for prompt regulatory decisions consistent with due process;

(5) Assure adequate consideration of costs and benefits;

(6) Minimize compliance costs;

(7) Provide federal preemption preemption only in essential instances;

(8) Assure a more orderly development of regulation with the Congress establishing basic policy, agencies regulating in accord with intent of Congress, and Congress reviewing regulatory actions through its oversight function.

As we see it, Section 4 of the Broyhill bill is the embodiment of these principles. We wholeheartedly support its requirement that the FTC conduct cost/benefit analyses, issue economic impact statements, and consider alternatives and indirect costs in all FTC rulemaking proceedings. In addition, we support its requirement of periodic review of existing and new FTC regulations to determine whether they continue to be necessary, are carrying out their statutorily-intended purposes, or whether they conflict with, or duplicate any other rule or regulation. Finally, we endorse the idea of providing an opportunity for judicial review, on an interlocutory basis, of any rulemaking proceeding which fails to comply with any procedural requirement outlined in Section 4.

Consequently, we urge Subcommittee adoption of the Broyhill bill -- legislation that would achieve meaningful regulatory reform by eliminating

excessive, inflationary regulations. As we see it, this proposal would be beneficial not only to the business community, but to the American consumer as well.

CONCLUSION

In summary, we hope that the above recommendations will be received in the spirit in which they are intended. They are offered as part of the National Chamber's continuing effort to achieve regulatory reform, and our continued commitment to remove government impediments to growth in the regulatory system -- a commitment clearly shared by President Carter, as evidenced by this statement to Congress:

> One of my Administration's major goals is to free the American people from the burden of overregulation. We must look, industry by industry, at what effect regulation has -- whether it simply blunts the healthy forces of competition, inflates the prices and discourages business innovation. Whenever it seems likely that the free market would better serve the public, we will eliminate government regulation.

Mr. BROYHILL. I would like to ask Mr. Joseph a couple of questions. I am interested in his comment with respect to the reimbursement of public witnesses or participation in the rulemaking proceeding before the Trade Commission. Did I understand now that you are opposed to the concept or you are expressing the concern as to how this has been implemented? That is, that the weight of the testimony of the witnesses has been slanted or they have been expressing one point of view.

Mr. JOSEPH. When the intervenor funding provision was given to the Federal Trade Commission in 1975, the chamber had no position on the concept and it is much the same concept in its application as the Federal Trade Commission has now given us, the position that we oppose.

We oppose the concept in its totality.

Mr. BROYHILL. I want to interject. I did note in the Federal Trade Commission report on public participation in the rulemaking process, that in several instances substantial funds have been expended. I assume the groups receiving funds are primarily consumer groups such as in the food advertising rule—$154,375 has been expended and I assume these are 9 or 10 consumer groups. I do not note any business groups on the three pages here and since we are discussing it, Mr. Chairman, I would ask unanimous consent that this be put into the record so anybody who wants to can review the record.

Mr. SCHEUER. No objection. It is so moved.

Mr. BROYHILL. I assume industry groups are well financed and are able to appear but I would also assume that in many instances that some of the consumer groups might have budgets that are far in excess of small business organizations or particularly individual small businesses that might want to participate.

I do not know many small businesses, for example, that could expend $26,000 as was granted to one organization here to participate in the rulemaking process through the advertizing rule. That is one example. There have been several cases here on this sheet which show that groups have been given grants into five figures, $10,000, $20,000, $30,000, $40,000 to participate and there are not many small businesses, particularly who might be affected by these rules, who could afford that type of expenditure to participate in the rulemaking process.

So, I assume what you are saying is you are concerned about the watchdogs.

Mr. JOSEPH. All the consumer groups that have been reimbursed are full-time political groups. They are in business to try and serve as watchdogs from one perspective or another. A small business is not politically oriented. They have a lot of things to do besides the Congressional Record to keep up with where they can go in Washington to spend 6 months and tell their point of view.

Mr. SCHEUER. Isn't that what trade associations do? Isn't that what you are doing?

Mr. JOSEPH. That is right. But let's say we support the concept and we were to go to the Federal Trade Commission and say, "There is a new rulemaking that has come up and we do not have money budgeted for this, so we would like you to pay us to be

there." They would not buy that from us but they would buy it from consumer groups.

Mr. BROYHILL. Americans for Democratic Action, which I thought was a political action group per se, has been given substantial grants to participate in several of these rulemaking procedures. I appreciate the endorsement of my bill. I have introduced it and have provided for what I think would be some requirements on the Commission in their role of rulemaking or writing of regulations that would be helpful and would be in the public interest.

I have no other questions.

Mr. RINALDO. I just have one point I would like to make and a question to ask. In the first several pages of your prepared testimony, you make the point that FTC has used its rulemaking power to in effect inject itself into all areas of society. You seem to question whether rulemaking is even consonant with our constitutional principles of government and then go on to quote Attorney General Bell at length on page 2.

The last point that Mr. Bell makes is a drastic call to Congress to "sharply curtail if not abolish the so-called rulemaking power of the independent regulatory commissions."

Aside from what is in the legislation that we discussed, the bill that Congressman Broyhill and I have introduced and the congressional veto, do you have any other suggestion in that area? Certainly, we cannot just abolish rulemaking, and I do not know what would take its place. You seem to have skimmed over that area.

While you were highly critical of it—and with some justification—you did not suggest any course of action aside from what has already been offered in the legislation.

Mr. JOSEPH. Congressman, I think that we are not proposing that the rulemaking be abolished. What we are saying is that the way the process is being conducted, there needs to be safeguards applied, and we are making reference to the congressional veto as a safeguard.

I think that the administrative conference study that is in the process of starting to come out will have specific suggestions on how the rulemaking process of FTC can be better structured. Procedural safeguards that were put in in 1975 clearly are not working as well as they could.

And I think that there will be some constructive legislative suggestion probably coming out of the administrative conference. But the chamber has no formal recommendations at this time to give you about what to do with rulemaking per se.

Mr. RINALDO. Except for your endorsement of the congressional veto.

Mr. JOSEPH. Congressional veto is a tool which allows elected officials to believe that they have more of a say in what is going on.

Mr. RINALDO. Which certainly does not curtail or slow down the rulemaking process in any manner, shape, or form.

Mr. JOSEPH. No. Although we would hope that the recognition that the Congress has, the authority to involve itself in the process, would get the attention of a lot of the agency staff people who promote ideas that if they think hard about, might realize it would not make sense to proceed with them.

Mr. RINALDO. I have no further questions, Mr. Chairman.

Mr. SCHEUER. Can you give us any advice on the kinds of staff increase that each of the 535 Members of the House and the Senate would need to handle the additional burden of the flow of papers through our offices that would result from the legislative veto? Have you ever done a study of that?

Mr. JOSEPH. Mr. Schultz will be glad to respond to that.

Mr. SCHULTZ. About 34 States have some variation on the theme of a congressional veto, using the States as social laboratories and using their——

Mr. SCHEUER. The Congress of the United States would have to deal with far more regulations than the State legislatures.

Mr. SCHULTZ. I am a lawyer and I understand that.

Mr. SCHEUER. Off the record.

[Discussion off the record.]

Mr. SCHULTZ. The point I was trying to make is State legislators have smaller staffs and meet more infrequently than the Federal Legislature. They have had a successful effort with respect to implementing the congressional veto. I have not seen any facts or figures as to what kind of increase as far as staff members or budgetary increases that would be incurred if congressional veto was implemented.

Our feeling is since there are oversight committees that are already monitoring regulatory activities of given agencies that congressional veto would work part and parcel with their oversight responsibilities, and in fact probably would make the oversight committees even more effective with respect to singling out particular rules and regulations that are excessive or inflationary.

We think that congressional veto could make the existing committee staffs more effective without making a significant increase in the number of staffers that you would have to employ.

Mr. SCHEUER. But I would have to express a position on all kinds of matters outside of the purview of the Interstate and Foreign Commerce Committee. Would I not have to equip myself with staff?

For example, we spent 3,000 hours just on oversight of the passive restraint system last year. Now I do not say every one of the 535 Members of the House and Senate are going to ask their staff to spend 3,000 or 300 or 30 hours, but still and all, if you ask every Member of Congress to have to take a position on major acts of the executive branch, you are going to impose an enormous additional burden on us for which we are going to have to staff ourselves up.

There is no question about it. We have access to staff that would help us scrutinize matters coming within the purview of both the subcommittee and let us say all of the work of the full committee, but there are a lot of other standing committees out there. How are we going to pass on their work without significant extra staff assistants?

Mr. SCHULTZ. At the present time you are asked to vote on a number of pieces of legislation outside the ambit of Interstate and Foreign Commerce.

Mr. SCHEUER. This is legislation that comes out of this body. If you are going to ask us to review innumerable acts of the executive branch, I think you are imposing an additional burden on us for which we are going to need additional staff.

Mr. SCHULTZ. Mr. Chairman——

Mr. SCHEUER. Please do not interrupt me before I am finished speaking. I do not interrupt you. I wonder whether you have factored into your computer and could give us any advice on the enormous amount of work that we are going to have to do scrutinizing the acts of the executive branch in addition to scrutinizing all the legislative proposals of other congressional committees and subcommittees for which we are staffed now?

I have heard criticism from the private sector of the degree to which we are staffed now to enable each Member of Congress intelligently to pass on our own acts, the legislative proposals of our own subcommittees and the full committee on which we serve as well as all of the others.

Now, many people out there in the private sector have criticized the degree to which we have staffed ourselves and they have expressed the view that it is counterproductive if you are going to impose additionally this whole new level of oversight and analysis so that we have to gain additional staff that we will need to perform this function.

Mr. SCHULTZ. I am not aware of any dispositive study that demonstrates what exactly the increase in staff or budgetary level will be. The submission we are making is one, oversight committees already exist to monitor regulatory activities. This is part of the normal everyday task.

The other point we want to make is that it is not every regulation or rule that is going to require congressional action. It is only the most egregious and excessive regulations that will be subject to congressional review and veto. We are not asking Congress to act on every rule and regulation.

It probably would be only a handful of excessive regulations that would actually be reviewed and possibly vetoed by one or both bodies of Congress within a given session.

Mr. JOSEPH. If I may——

Mr. SCHEUER. Just take the last session. Why don't you submit for our edification the list of executive branch actions during the 95th Congress that, assuming we had a legislative veto, should properly have been acted upon by us. Could you submit that for the record?

Mr. JOSEPH. We would be glad to do that and the list would not be as long as you think.

That is the point we are trying to make. There are 300 laws now that require congressional action or some sort of agency action. On the front page of the paper this morning—the proposed energy conservation plan—both Houses have an opportunity to vote on that plan. It happens all the time.

What the purpose of the congressional veto would be, would be is to send a message to the bureaucracy that they are not completely out of control and nobody is watching. I suspect there would be additional staffing. We would expect the numbers would be minimal.

We expect all congressional veto does is give a Member of Congress the right to introduce a motion of resolution of disapproval to an agency rulemaking proceeding. It goes to the appropriate committee. It does not get acted upon.

There are many pieces of legislation which have been introduced by your colleagues on the subcommittee that you will never take up anyway and why should a congressional veto provision be any different?

Mr. BROYHILL. Would the chairman yield? I have in my hand a list of several hundred laws that require congressional review of agency actions that have been enacted since the 1930's and I do not note that there has been any undue amount of additional work that has been placed on my shoulders as a result of these requirements.

Frankly, I think it would be refreshing for the Congress for a while to do a better job of reviewing these rules and regulations coming out of these agencies, Mr. Chairman. After all, we have delegated our authority to them to make these rules which actually will have the force and effect of law.

If someone violates the rule or the regulation, they are violating the law and so we have in effect delegated to these agencies the authority to actually write law. I think it would be good if we did spend some time actually reviewing what they are doing.

I think this would actually make the Congress do a better job of congressional oversight.

Mr. SCHEUER. Thank you very much.

Now, we will hear from Mark Silbergeld, director of Consumers Union, Washington office. As we mentioned before, your entire testimony will be reprinted in full at this point in the record.

Mr. SCHEUER. What we would suggest to you—and we are running short of time—would be that you hit the high points of your testimony and then we will have questions.

STATEMENT OF MARK SILBERGELD, DIRECTOR, CONSUMERS UNION, ACCOMPANIED BY SHARON NELSON, LEGISLATIVE COUNSEL

Mr. SILBERGELD. I would like to introduce our legislative counsel, Sharon Nelson, who is here with me today. I will be glad to summarize very quickly, Mr. Chairman, and then I would like to address for a moment this rather amazingly overblown attack on the FTC's regulatory process. It is sort of like the mother hen who has provided at least a great deal of the warmth and comfort necessary to hatch the egg and who now wants to know why the chicks are running around the floor of the hen house. The history of those provisions of the Magnuson-Moss Act is very relevant to the discussion which preceded my taking the microphone. We support reauthorization of the Federal Trade Commission.

We do not think there is any doubt simply about the question of reauthorization. We support the Scheuer bill. We like the 3-year provision in Mr. Broyhill's bill, frankly, because that is the period for which regulatory agencies traditionally have been renewed.

But we do not believe this is the time to address the complex question of an FTC improvements bill which is in effect what Mr. Broyhill's bill partially is, partly because the FTC should have been reauthorized in the last Congress and that action is overdue.

We feel there is no question about the appropriateness of the Congress continuing the FTC's authorization. It is a keystone of consumer protection. It is the Federal agency that consumers look

to for protection from unfair and deceptive practice in the marketplace. Its consumer protection activities and its competition activities are antiinflationary in the long run at least.

We recognize of course antitrust actions take many years both at the Commission and in the judiciary review process but those activities are inflationary, and we are in a time when that is a major concern. We have to look to long-term antiinflationary remedies as well as to short-term efforts that the administration is making.

We think the Commission has used its resources well. The chairman in his opening statement asked about the way the Commission sets its priorities and while I will leave the details of that description to the Commission witnesses later in these hearings, I think it is well worth noting, as one can absorb from the hearing records of the past several FTC appropriations hearings in both Houses, that the Commission has focused a great deal of its resources on such key areas of the economy as food, energy, health care, transportation and other key areas and has come a long way since the charges of "do-nothingism" that came out of both the Nader report and the American Bar Association report. We believe that, basically, those resources are now well focused. There may be still plenty of room for improvement in the process of determining how they focus that but if we look at the result, it is a good result.

The Commission has turned a small portion, but an important portion, of its efforts to attacking itself, or calling to the attention of other Government agencies, areas where Government action is an impediment to competition of sellers and providers in the marketplace. We think that is a signal activity at the Federal Trade Commission.

I would note, with respect to rulemaking, the Commission itself has made substantial efforts in the last year or so to reduce the timelag involved in their own trade regulation rulemaking. For instance, the Commission has moved exceptionally fast in the home insulation trade regulation rulemaking by the Commissioners themselves designing a very truncated kind of proceeding in which everybody has the opportunity to be heard, yet without going through the unnecessary elaborate processes that sometimes have resulted from literal application of the Magnuson-Moss Act procedural requirements.

To summarize, I would say that the committee ought to act quickly to reauthorize the Federal Trade Commission and that then this committee, as the chairman has indicated, should take up the far more complex question of improvements of the FTC's statutory mandate and statutory authority and the question of oversight, looking into such individual cases as Mr. Devine brought to the subcommittee's attention this morning and many others. I can assure the committee that consumers as well as business interests and as well as members of this committee have specific questions in which they raise doubts about the adequacy of the Commission's performance, but none of that goes to the suggestion that it is not doing a basically effective job.

It goes to the question of whether there should be substantial improvements.

Finally, Mr. Chairman——

Mr. SCHEUER. You make the point on page 3 of your testimony that there are situations in which less government is good for consumers and the economy and that efforts to promote less government by FTC are too antiinflationary. Can you give us any examples of the areas in which you feel less regulation by FTC would protect the Government better than more regulation?

Mr. SILBERGELD. I am not addressing the question of less regulation by FTC although I am sure if we go down the list of all the activities they have allocated resources to, we can find some that are misallocated.

I am referring specifically to FTC's addressing questions where State law or regulations promulgated by State boards consisting of members of the regulated profession have served as an impediment to both price competition and the availability of needed consumer information in the marketplace, such proceedings as the optometry advertising rule and their addressing other questions involving the professions and State professional regulatory boards.

Mr. Chairman, in closing, the summary of my statement, I think the committee should be very much aware of a report recently released by Opinion Research Corp. which calls attention to the fact that while only 30 percent of what that polling organization calls "Washington thought leaders," thought the Commission was doing too little for consumers, 45 percent of the general public thinks the Federal Government is doing too little.

Mr. SCHEUER. Do you have a copy of that?

Mr. SILBERGELD. I will submit it for the record.

Mr. SCHEUER. How long is it?

Mr. SILBERGELD. I think it is only four pages and the relevant chart.

Mr. SCHEUER. If there is no objection, we will include that in the record.

[Testimony resumes on p. 100.]

[Mr. Silbergeld's prepared statement and the report of Opinion Research Corp. follow:]

STATEMENT OF MARK SILBERGELD, DIRECTOR, CONSUMERS UNION WASHINGTON OFFICE

Mr. Chairman, Consumers Union [1] appreciates the Subcommittee's invitation to express its views on the proposed reauthorization of the Federal Trade Commission for a period of three years. We fully support reauthorization and urge the Commerce Committee promptly to report a bill favorably to the House.

The Federal Trade Commission is a keystone of the protection which the federal government provides the consumer from improper practices which occur in or affect interstate commerce. Citizens look to the FTC to curb sharp practices, to improve the honestly and quality of information available regarding important goods and services, and to curb anticompetition inflationary forces in the marketplace. The FTC has jurisdiction over a broader variety of marketplace practices affecting consumer wellbeing than has any other federal agency. And Section 5 of the Federal Trade Commission Act gives FTC the flexibility required to deal with unfair, deceptive and anticompetitive situations in the face of an ever changing marketplace.

[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of new York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of Consumer Reports, its other publications and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to the reports on Consumers Union's own product testing, Consumer Reports, with more than 1.8 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumer Union's publications carry no advertising and receive no commercial support.

In the decade since the Nader and American Bar Association reports, which charged the FTC with do nothingism and incompetence, great changes have taken place which once again make FTC an important force for making the marketplace more fair afor the consumer and the honest competitor.

FTC's attention in the early 1970's to practices in the advertising industry appears to have reduced sharply nationally distributed ads, especially on television, which are on their faces, false, misleading or deceptive. That having been accomplished, the Commission is able to turn a portion of its resources to equally troubling questions involving the more subtle effects inherent in some forms of advertising, including those which may be amenable to the pro-competitive remedy of better information disclosure. And the FTC has shifted from an emphasis on issuing complaints against individual advertisers to one which emphasizes rules which effect equally all advertisers in a like situation. This promises the doublt-beneficially effect of prompting greater fairness to all competitors in a product or service market and of assuring consumers of broader compliance with the law by advertisers.

Other FTC proceedings now under way address a variety of marketplace practices which require reform in the form of curbs or addition provision of the information to prospective consumers of goods or services. These, two, will benefit from the greater fairness and broader compliance promised by rulemaking.

The FTC's antitrust function is of great importance to consumers. For the long run, it is part of the national effort to combat inflation, for lack of effective competition adds to high prices and costs us all dollars in the marketplace. A number of investigations and proceedings which the Commission has implemented in the past few years address anticompetitive problems in such key areas as food, energy, health care, transportation and other goods and services essential to the economy. Section 5 of the FTC Act provides the flexibility to challenge practices which indeed may be anticompetitive, but which may not quite fit into the more narrow confines of the Sherman Act, or the other antitrust laws which the Justice Department is empowered to enforce.

FTC has used a portion of its resources itself to challenge or to call the attention of the public and other government agencies to government actions and regulations which reduce and prevent effective competition. By doing so, FTC makes clear its awareness that, while there are situations in which a government rule or regulation is required to protect the public, there are other situations in which less government is good for consumers and the economy. These efforts, too, are anti-inflationary.

FTC has taken steps within its authority to reduce unnecessary delay within the limits set by the Due Process requirement of the Constitution. While some rulemakings now pending before the agency have taken a seemingly inordinate length of time, last year the FTC initiated steps in some others which have reduced the time involved in the processes of public hearings and preparation of staff and hearing officer reports. This is not to suggest that procedural efficiency is yet the order of the day. However, it is encouraging that some effective action in this direction has been initiated.

If this overview of the Commission's functional importance to a more fair and efficient economy sounds overly rosy, let me hasten to assure the Subcommittee that each consumer organization and each "FTC Watcher" has a list of things which the Commission has left undone, has yet to do, or could have done better. These should be the subject of oversight hearings during this Congress. However, such specific criticisms relate specifically to the adequacy of the detailed statutory authority granted the FTC and of the detailed statutory requirements imposed on it.

As to the continued authorization of the FTC, there should be no doubt. The FTC in the past decade basically has addressed important issues facing the economy and the marketplace. We believe that it has done so fairly well.

The Subcommittee may find it interesting to note, in this respect, a recent opinion poll released by the Opinion Research Corporation entitled "Government Action on 25 Key Issues". That poll shows that while only 30 percent of Washington "opinion leaders" believe that the federal government is lax in "looking out after the interest of the consumer", 54 percent of the general public believes that the government is doing too little. Thus, it appears that the FTC is fulfilling not only the statutory duties assigned to it by Congress, but a popular mandate, in carrying out its consumer protection function. If anything, the demand appears to be for better, not less, federal consumer protection from agencies such as the FTC.

Therefore, we urge the Subcommittee to act promptly and favorably on the proposed FTC reauthorization.

Thank you, Mr. Chairman.

CONSUMERS UNION / A NONPROFIT ORGANIZATION / PUBLISHER OF CONSUMER REPORTS
Washington Office: 1714 MASSACHUSETTS AVENUE, WASHINGTON, D. C. 20036 / 202-785-1906

March 27, 1979

Honorable James Scheuer
Chairman, Subcommittee on
Consumer Protection and Finance
Committee on Interstate and
Foreign Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed is the item requested by you for inclusion in the record of the February 28 hearings on reauthorization of the Federal Trade Commission. It is a copy of the Opinion Research Corp. poll showing that more citizens than "Washington Thought Leaders" believe the federal government is not doing enough to protect consumers.

Also enclosed is another item which I would like to offer for the record. It is Table 11 from the recently distributed Yankelovich, Skelly and White, Inc. 1978 corporate priorities opinion poll, entitled Leadership Report to Participants on 1978 Findings of Corporate Priorities. Table 11 shows that, in 1978, only 10 percent of the public believed that the government should cut back its consumer protection activities, while 30 percent believed that these activities should continue at the same rate and 46 percent supported a stepup in government's consumer protection activities.

It is interesting to note, also, the trend reflected by the Yankelovich poll. The 10 percent still favoring less government consumer protection activity declined from 18 percent in 1977 and the 46 percent favoring increased activities of this nature increased from 37 percent in 1977.

These opinion poll findings relate directly to the colloquy between myself and Mr. Rinaldo during the hearings. They are important because they tend to demonstrate that whatever general sentiment for less government may prevail does not extend to consumer protection functions. Because Mr. Rinaldo raised this

National Office: 256 WASHINGTON STREET, MOUNT VERNON, NEW YORK 10550 / 914-664-6400

question during the hearings, I am extending him the courtesy of a copy of this letter with enclosures.

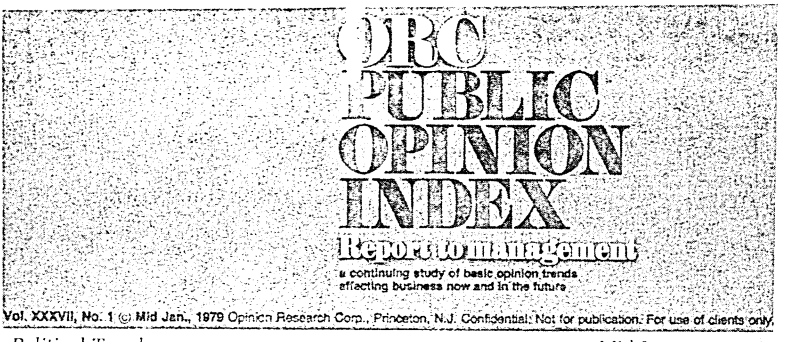
Your request to submit additional materials is appreciated.

Sincerely,

Mark Silbergeld
Director
Washington Office

Enclosures

cc: Honorable Matthew Rinaldo
House of Representatives
Washington, D.C. 20515



PRIORITIES FOR FEDERAL GOVERNMENT ACTION ON 25 KEY ISSUES:

The View Of The Public Vs. The View Of Washington Thoughtleaders

When the 96th Congress settles down to business on January 15, where should its efforts be directed? To look at this question, the Index presented both the public and Washington thoughtleaders with 25 issues and asked, with regard to each one, if the federal government is doing too much, about the right amount, or too little. The results are shown in this report.

The findings are based upon data drawn from 1,019 telephone interviews with a national probability sample of the U.S. public, as well as personal interviews with 102 thoughtleaders in Washington, including members of key committees of Congress, executive/regulatory officials, union leaders, leaders of public interest groups, and members of the Washington press corps, interviewed during the Index's latest Washington thoughtleader survey. While the views of the Washington thoughtleaders, unlike the projectable sample of the general public, are not representative of all legislators, executive/regulatory officials, union leaders, etc., the prominence and influence of the respondents on the Washington scene make their views highly significant.

There is considerable dissatisfaction on the part of both the general public and thoughtleaders in Washington regarding the sufficiency of federal government activity in numerous problem areas.

At least half of the general public think the federal government could do much more in 12 areas involving broad economic and social welfare issues. At least half of thoughtleaders also select 12 issues for increased government activity.

It is not that either group necessarily supports increased government spending to accompany greater efforts in these broad areas. In fact, the public favors legislation that would put an overall limit on government spending (see Index study, "Public Attitudes Toward Federal Tax Reform And Tax Incentives For Business Growth," End July, 1978).

Very few thoughtleaders (13%) would like to see government spending increased. Almost half say spending should actually be reduced (47%), while four in ten (39%) would at least favor holding spending at the current level. Moreover, the majority of legislators (56%) favor spending cuts, although eight in ten of these legislators advocate selective cuts.

Thus, it is clear that priorities for federal action take on an even greater significance, especially in the light of current budget-tightening efforts undertaken by the Carter Administration as it attempts to rein in the galloping rate of inflation and move toward a balanced budget.

The prime focus of the public and also of thoughtleaders is on economic issues.

As can be seen at the right, there are five issues on which over six in ten members of the general public say that more government action is necessary. Note that four issues are economic: controlling inflation, protecting Americans against the financial hardship of a long-term illness, ensuring a job for all who are willing and able to work, and providing a fair and equitable tax system.

Four out of five of the top issues of primary concern to thoughtleaders also are economic in nature: controlling inflation, eliminating the trade deficit, providing a fair and equitable tax system, and protecting Americans against the financial hardship of a long-term illness. Moreover, three of these economic issues are given top priority by both groups, including majorities of all key subgroups in Washington—legislators, executive/regulatory officials, union leaders, public interest group leaders, and members of the Washington press corps.

At the same time, there now appears to be less concern among the general public about several key social welfare issues.

This is apparent when findings in this study are compared with results of a similar study conducted by the Index three years ago:

Too Little Action By Federal Government

Total Public	1975	Latest	Significant Points Difference
Providing assistance to those families whose incomes are below the poverty level	61%	44%	−17
Providing adequate housing for all Americans	60%	47%	−13
Helping solve the problems of big cities	55%	49%	− 6
Providing an adequate level of medical care for the elderly	64%	59%	− 5

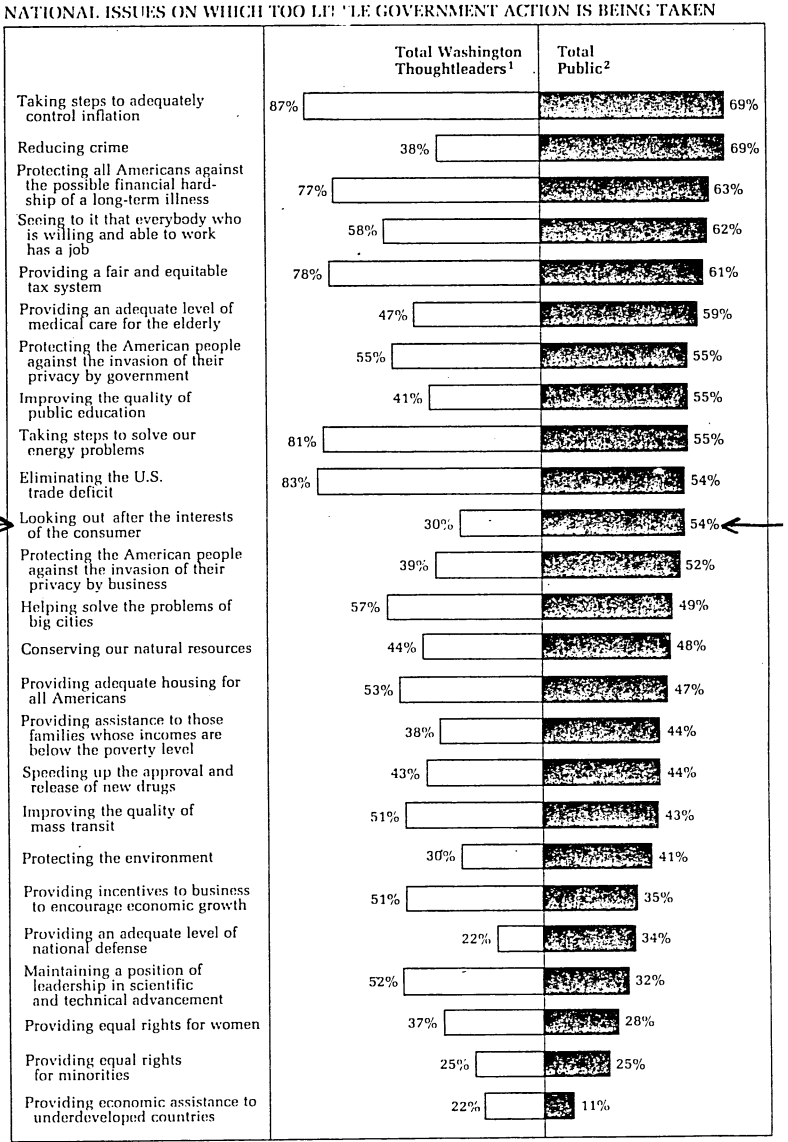
On the other hand, there are strong feelings in favor of action on many of these social issues among certain thoughtleader subgroups, namely, union leaders, public interest group leaders, and press/media representatives:

Too Little Action By Federal Government

	Union Leaders	Public Interest Group Leaders	Press/Media Representatives
Providing assistance to those families whose incomes are below the poverty level	61%	77%	60%
Providing adequate housing for all Americans	100%	77%	50%
Helping solve the problems of big cities	92%	85%	70%
Providing an adequate level of medical care for the elderly	85%	62%	70%

(Continued on page 4)

NATIONAL ISSUES ON WHICH TOO LITTLE GOVERNMENT ACTION IS BEING TAKEN



"Too much," "About the right amount," and "No opinion" omitted

[1]"Now, I am going to hand you a list of 25 statements that deal with the role of the federal government in various problem areas. For each statement, please indicate by circling the appropriate number whether you think the federal government is doing too much, about the right amount, or too little."

[2]"Now, I would like you to think about a number of national issues. As I read each one, please tell me whether you think the federal government is doing too much, about the right amount, or too little?"

(Continued from page 2)

In fact, overall, the greatest dissatisfaction with government activity across the board comes from the nongovernment thoughtleaders.

For example, the majority of union leaders cite 17 out of the 25 issues as ones where they think too little government action is being taken and the majority of public interest group leaders cite 19. Most importantly, half or more of the members of the media—the all-important interface between the public and the government—name 16 different issues as needing more action. (Legislators select only eight issues and executive/regulatory officials only seven.)

There are other important differences in attitudes between the government and nongovernment subgroups. For example, on the one hand, the majority of legislators and executive/regulatory officials believe that the federal government should do more about providing incentives for business, while union and public interest group leaders, as well as the public, are much less likely to focus on the issue:

The Federal Government Is Doing Too Little About Providing Business Incentives For Growth

Total Public	35%
Legislators	64%
Executive/Regulatory Officials	57%
Union Leaders	15%
Public Interest Group Leaders	31%
Press/Media Representatives	50%

On the other hand, the majority of union leaders and public interest group leaders agree with the majority of the public that the federal government is not doing enough about looking after the interests of consumers, while legislators and executive/regulatory officials give this issue a low priority:

The Federal Government Is Doing Too Little About Protecting Consumer Interests

Total Public	54%
Legislators	11%
Executive/Regulatory Officials	29%
Union Leaders	54%
Public Interest Group Leaders	69%
Press/Media Representatives	40%

A similar attitudinal pattern exists with regard to protecting the American people against the invasion of their privacy either by government or by business. In both instances, all nongovernment thoughtleaders express greater discontent with government action than do legislators and executive/regulatory officials. Note, too, in the two tables below, that legislators are more likely to express concern about the invasion of personal privacy by government than intrusion by business:

The Federal Government Is Doing Too Little About Protection From Government Invasion Of Privacy

Total Public	55%
Legislators	44%
Executive/Regulatory Officials	48%
Union Leaders	69%
Public Interest Group Leaders	77%
Press/Media Representatives	70%

The Federal Government Is Doing Too Little About Protection From Business Invasion Of Privacy

Total Public	52%
Legislators	27%
Executive/Regulatory Officials	29%
Union Leaders	62%
Public Interest Group Leaders	61%
Press/Media Representatives	60%

ABOUT THIS STUDY: Results in this report are based on telephone interviews with a national probability sample of 1,019 persons aged 18 and over, conducted between November 9 and November 12, 1978. Attitudes of Washington thoughtleaders are drawn from a sample of 102 persons: 45 legislators and legislative aides, 21 executive/regulatory officials, 13 union leaders, 13 public interest group leaders, and 10 press/media representatives. Extensive personal interviews were conducted during the period September 12 through October 6, 1978. It is important to bear in mind that the individuals interviewed in this study are not representative of any particular group but should be considered "purposive" samples of people prominent and highly influential in regard to government affairs.

Index Managing Director: Kenneth Schwartz, Vice President
Opinion Research Corporation
North Harrison Street, Princeton, New Jersey 08540/Telephone: 609/924-5900
Suite 513, 1735 I Street, N.W., Washington, D.C. 20006/Telephone: 202/833-3040
Suite 1034, 410 N. Michigan Avenue, Chicago, Illinois 60611/Telephone: 312/828-9280
One Maritime Plaza, San Francisco, California 94111/Telephone: 415/421-1198
AN ARTHUR D LITTLE COMPANY
80192

REPORT TO LEADERSHIP PARTICIPANTS ON 1978 FINDINGS OF CORPORATE PRIORITIES

Corporate Priorities

A service of

Yankelovich, Skelly and White, Inc.

TABLE 11

ATTITUDES TOWARD NADER AND CONSUMERISM

General Public

	1978	1977	1976	1975	1974
	%	%	%	%	%
Total	100	100	100	100	100
Statement: "Ralph Nader and Other Such Consumer Representatives Are Doing Only Good for the Country, Even If They Are a Little Extreme."					
Agree	64	65	61	63	70
Disagree	33	32	35	32	28
Don't know/no answer	3	3	4	5	2

	1978	1977	1976	1975
	%	%	%	%
Total	100	100	100	100
Government Should:				
Step up its activities	46	37	40	41
Continue at the same rate	30	30	28	27
Cut back its activities	10	18	17	19
Don't know/no answer	14	15	15	13

Question: "All things considered, do you feel the government should step up its activities, cut back its activities, or continue at the same rate to protect consumers?"

Mr. RINALDO. I would like to ask a question on that particular point. I think it is fine to bring in that type of survey, but I think the statistics are also misleading. You say in your prepared testimony that "the subcommittee may find it interesting to note in this respect a recent opinion poll released by Opinion Research Corp. entitled 'Government Action on 25 Key Issues"—the questions are not here of course. We will get them when the report is submitted and I am not doubting the accuracy of what you say.

While 45 percent of the general public may believe the Government is doing too little because they would like perhaps to see more protection, I am certain that more than 50 percent of the general public also feels that the Government is too big, that there are too many rules and regulations and that they are being harassed by government too much.

I have received within the past 6 months more mail than ever before about Government rules and regulations and the problems that they create, not only for business but for the average citizen. When we say there is not enough consumer protection—I am not aware of what every State has but certainly you can take the FTC as a starting point—you can take all the consumer protection agencies of the Federal Government and you have them in my State. You have a State consumer protection agency; you have county agencies.

Now, they are having municipal agencies and boards and it is getting to the point where we will soon have block leaders going around to see if people have any problems. The unfortunate part of all this is there is duplication at every level.

I just received an inquiry from a person who had a damaged rug and he is confused, not about whether there is a source of redress, but about which agency he should go to. Which one is more effective? He has a whole list. He doesn't even know where to turn because there are so many people out to help him, so the question really has to be addressed in the light of the specific question asked and also in relationship with other polls that ask similar meaningful questions about the public's attitudes.

Mr. SILBERGELD. I have no question about that. My point is simply that there is a lot of rhetoric being offered to the Congress that all the public wants is less government. What I am saying is there is at least one reputable poll that shows when you focus the question specifically on the issue of the Government doing too much for consumers, the public does not seem to respond to that specific question with the answer "yes."

And you are right. Of course, we have to look at specific questions. And the answer, yes, does not mean that they think the Government is doing it efficiently nor do they mean necessarily that the Government is giving them the best information about how they can use the process.

Those are all problems we have to deal with. But when you come to the bottom line, which is do we deal with this by getting rid of government or getting rid of regulations or getting rid of bureaucrats, which simply means people employed by the Government to do what Congress has given them basic statute authority to do, then the answer is "No."

Mr. SCHEUER. We have enjoyed your testimony very much. At a future time this subcommittee plus Bob Eckhardt's Subcommittee on Oversight and Investigations will be carrying on what we hope will be a very thoughtful, carefully crafted set of hearings on the costs and benefits of Government regulations.

Perhaps at that time you might want to come and testify as to how you think we in the Congress can strike a balance between on the one hand ignoring the societal implications of private sector activity in the field of health, environment, safety, so forth, and at the other extreme the kind of excesses you have heard described by Congressman Sam Devine.

You have heard various dramatic examples alleged of overregulation to the point of silliness by OSHA. How do we, short of scrutinizing every act of every regulatory agency, after a generation of experience with regulatory agencies, how do we bring some sanity into the process and how do we avoid these egregious examples of bad judgment?

So, in effect, we want to have our cake and eat it too. We want Government regulations where it is sensible, where it is productive, where on a cost-benefit weighing, it obviously helps more than it costs or helps more than it hurts, but we really want to sharpen our perceptions as to how we can stop some of these egregious and tragic examples of overregulation to the point of real harm and total silliness.

Maybe you would want to come back. It is going to be a couple of months from now, but you might start thinking about that now.

Thank you for your testimony. We will now get on with the last two witnesses today, Mr. Harding Williams, general counsel, National Savings and Loan League and Mr. James Cirona, representing the U.S. League of Savings Associations.

We are short on time. Why don't each of you speak for 5 or 6 minutes or so informally, summarizing your testimony, and then I am sure we will have some questions for you. Of course, as I have said before, your full testimony will be printed in its entirety in the record.

STATEMENTS OF HARDING deC. WILLIAMS, GENERAL COUNSEL ON BEHALF OF THE NATIONAL SAVINGS AND LOAN LEAGUE; AND JAMES CIRONA, PRESIDENT, ROCHESTER FIRST FEDERAL SAVINGS & LOAN, APPEARING ON BEHALF OF THE U.S. LEAGUE OF SAVINGS ASSOCIATIONS, ACCOMPANIED BY RAYMOND J. GUSTINI, ASSISTANCE COUNSEL

Mr. WILLIAMS. My name is Harding Williams, general counsel of National Savings and Loan League. We are here to support section 2 of Mr. Broyhill's bill and Mr. Rinaldo's bill which would provide for exemption for savings and loan associations in the Federal Trade Commission Act identical to that enjoyed by commercial banks at the present time.

I would like to acknowledge Mr. Rinaldo's efforts in the last Congress to secure the adoption of that amendment which of course both our organizations support. We note that the defeat of the conference report on the last year's bill, H.R. 3816, had nothing to do with the savings and loan exemption.

I am going to address briefly several of the questions that were raised during the course of consideration of that bill last year with respect to our industry.

The first one was how persuasive is the regulation of the savings and loan industry? Is there in fact duplication between the authority of the Federal Home Loan Bank Board with respect to the industry and the potential authority of power of the Federal Trade Commission, particularly under its rulemaking powers in section 18 of the act as well as its cease and desist powers under section 5.

The answer to that question is—and I think the record in last year's hearings bears this out—that the regulatory scheme of the Federal Home Loan Bank Board, and Federal Savings and Loan Insurance Corporation, is pervasive. Certainly every aspect of savings and loan operations are regulated or subject to regulation. Our regulation manual is about 1,000 pages. I almost brought it with me but it is heavy to carry.

With particular respect to unfair and deceptive acts or practices, the regulations of the Federal Home Loan Bank Board—I include the Bank Board and the insurance corporation—the members of the Bank Board are also operating heads of the insurance corporations—these regulations covering in detail activities of savings and loan associations deals with consumers, both savers and borrowers, in virtually every aspect, as I said, of consumer relations or acts or practices which could be determined to be unfair or deceptive acts or practices subject to the Commission's jurisdiction under the FTC Act.

I have a particular example. Both of our statements list the details of examples of this kind of regulation. I simply mention advertising of interest rates. This is a regulation of the Federal Home Loan Bank System. Interest or dividend rates should be stated in terms of annual rates of simple interest or dividend. In no case should a rate be advertised in excess of maximum rate for the particular savings account. It is noted one association tried to get around this by advertising not what their advertised rates were, but stated, "come into our office and we will whisper in your ear what you will really get in your account."

The Bank Board cracked down on that as being a violation of its own regulation. We list a number of other examples. There are specific examples dealing with the way associations can advertise, both in printed media and on radio and television.

As to enforcement, the Bank Board has pervasive enforcement powers to enforce its rules and regulations. And I might add the bill that was passed last year, the Financial Institutions Regulatory and Interest Rate Control Act, increased the regulatory powers of both the Federal Home Loan Bank Board and banking regulatory agencies even further to authorize the Bank Board to bring cease-and-desist orders against the individual officers, directors, and employees of savings and loan associations who the Bank Board believes might be violating a law, a regulation, or an order of the Bank Board.

I might also add that the Bank Board apparently, unlike the Federal Trade Commission, believes it has under its enforcement powers the power to effect redress or restitution. There is a case

now pending in which the Bank Board's order would require an association to make restitution to its borrowers.

Finally, I would like to call your attention to a precedent for this kind of exemption. Not only of course was the Rinaldo amendment approved by both the House and Senate last year, but the Hart-Scott-Rodino Antitrust Act of 1975, Public Law 94-435, which provided for premerger notification to the Federal Trade Commission and Justice Department, modified substantially the premerger notification for banks and savings and loan associations owings, that banks and savings and loan associations are already regulated by their respective regulatory agencies.

Those agencies have the power to review proposed mergers.

[Testimony resumes on p. 112.]

[Mr. Williams' prepared statement follows:]

STATEMENT OF HARDING deC. WILLIAMS

on behalf of the

National Savings and Loan League

before the

House Committee on Interstate and Foreign Commerce

Subcommittee on Consumer Protection and Finance

on

H. R. 2367, A Bill to Amend the

Federal Trade Commission Act

February 28, 1979

Mr. Chairman and members of the Subcommittee, my name is Harding Williams, and I am General Counsel of the National Savings and Loan League, on whose behalf I appear here today.

The National Savings and Loan League, chartered in 1943, is a nationwide trade association comprised of a membership of some 300 domestic savings and loan associations of all sizes, including those with Federal as well as State charters, 40 State leagues of savings and loan associations, and over 60 associate members comprised of domestic and international firms which are closely involved with the savings and loan business.

We would like to begin by thanking Congressman Broyhill and Congressman Rinaldo for their introduction of H. R. 2367, proposed legislation which contains an extremely important provision

relating to the savings and loan industry. This provision is contained in Section 2 of H. R. 2367 and provides an exemption for S&Ls from Sections 5, 6, and 18 of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) similar to the exemption now permitted for commercial banks.

This provision, which is identical to Section 3 of last year's authorization bill, H. R. 3816, originated in this Subcommittee by Congressman Rinaldo and was not only adopted by the full Committee on Interstate and Foreign Commerce, but was contained in two separate Conference Reports (H. Report 95-892 and H. Report 95-1557), both of which were approved by the Senate and rejected by the House on other grounds.

Congress, in effect, has already passed this amendment. We are here today to urge this Subcommittee to again include this vital provision in the authorization bill which it adopts.

Our basic argument is quite simple. It is that savings and loan associations are as extensively regulated by the Federal Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation and the regulatory agencies of the 50 States as are banks by their corresponding regulatory agencies. Further, there are no acts or practices of savings and loan associations which the Federal Trade Commission would reach under the FTC Act, which could not also be reached by the Bank Board, FSLIC or State agencies.

Indeed Congress has recognized the merits of this policy by providing in the Magnuson-Moss Act of 1975 that trade regulation rules for "banks" be set by the Federal Reserve Board under certain

circumstances and enforced by the respective banking regulatory agencies. As this Subcommittee is aware, savings and loan associations were included within this exemption in the Senate version of the bill, S. 356, 93rd Congress. The rationale for this approach was outlined in the Report of the Senate Banking Committee on S. 356 (S. Report 93-280, pages 2-3) (to which the bill had been referred by the Senate Commerce Committee for its comments) as follows:

> "The primary basis for [this provision] is the need for expertise in the financial area and in the functioning of the monetary system in any agency which is authorized to place requirements upon the functioning of depository institutions. The FTC does not have the requisite expertise, and the committee therefore transferred the situs of the rulemaking authority to the Federal Reserve Board. The Board would be expected to work closely with the other financial agencies in exercising this important consumer function, including the drafting and modification of regulations.
>
> "...banks and other financial institutions are already among the most regulated forms of business in the country today, and...an additional layer of regulation by a different agency is likely to detract from, rather than add to, the incentive of institution managers and owners to attempt innovations in operations which will benefit the consumer..."

The General Counsel of the Federal Home Loan Bank Board, in a letter of October 11, 1974 to Senator Frank E. Moss, Chairman, Senate Commerce Subcommittee on the Consumer, before which S. 356 was then pending, stated:

> "Apparently, the reason the House bill does not exempt thrift financial institutions from FTC jurisdiction is because the FTC Act, as it was enacted in

1914, exempts "banks" from supervision by the FTC and it was felt that the amendments to be made by S. 356, which to a large extent clarify that exemption, should be limited to the original coverage of that exemption.

"The Board does not agree with this reasoning. In the first place, when the FTC Act was enacted in 1914, thrift financial institutions were not subject to Federal regulatory control and it is no doubt for this reason that thrifts were not specifically exempted. At present, Federal savings and loan associations are chartered by the Federal government much the same as national banks, and the majority of State associations are insured by the Federal Savings and Loan Insurance Corporation in a similar fashion to the FDIC's insurance of the majority of the nation's State banks.

"It is the Board's opinion that thrift institutions and banks, which are competitors, should be subject to the same regulatory standards with respect to consumer protection and that it is unfair and inefficient to provide for enforcement by the FTC on the one hand, and by the bank regulatory agencies on the other. The FTC should not regulate some Federally regulated financial institutions, and not others. The Board has full, plenary power over the operations of Federal savings and loan associations and the authority to protect against and prevent unsafe and unsound practices in any financial institution insured by the Federal Savings and Loan Insurance Corporation."

As to the pervasiveness of the regulatory scheme to which S&Ls are now subject, the General Counsel of the Bank Board addressed this subject in a letter of May 3, 1977 to Senator Wendell Ford, Chairman of the Subcommittee on Consumer Protection and Finance, of the Senate Committee on Commerce, Science, and Transportation. That Subcommittee was then considering S. 1288, a bill similar to H. R. 3816.

The letter begins by citing the general authority of the Bank Board:

"The Bank Board charters Federal savings and loan associations and, as the operating head of the

FSLIC, insures most State-chartered associations. The Board has full, plenary authority over the operation of Federal associations and has broad authority over the operation of FSLIC-insured institutions. 12 U.S.C. §§1464, 1725-26 (1976). In addition, the Board has specific statutory authority to require information and reports from and to conduct examinations of insured savings and loan associations. 12 U.S.C. §§1726, 1730 (1976). Thus, the Bank Board has authority with regard to savings and loan institutions which essentially duplicates that of the Commission under sections 5 and 6 of the FTC Act.

"The courts have construed this Congressionally delegated authority to issue regulations as being "comprehensive" and governing "the powers and operations of every Federal savings and loan association from its cradle to its corporate grave...

"Thus, the Board has the necessary statutory authority to enforce sections 5 and 6 of the FTC Act with regard to Federally-chartered savings and loan institutions. The Board has similar broad authority over the operations of FSLIC-insured savings and loans. 12 U.S.C. §§1725-26, 1730 (1976). The proposed amendment to S. 1288 would eliminate this unnecessary duplication of regulatory authority...

"The Board's regulatory authority over Federal and FSLIC-insured savings and loan associations includes general rulemaking authority. 12 U.S.C. §§1464, 1725 (1976). The Board has used its existing rulemaking authority to prevent unfair methods of competition and unfair or deceptive acts or practices by institutions under its jurisdiction."

As to specific regulations dealing with unfair or deceptive acts or practices, the letter goes on to say that:

"There are additional regulations which the Board has promulgated to prevent unfair and deceptive acts or practices by institutions under its jurisdiction. Thus, for example, the Board has promulgated regulations: prohibiting misleading advertising; prohibiting discrimination in lending; limiting giveaways; requiring payment of interest on escrow accounts under certain conditions; limiting late charges and due-

on-sale clauses; governing loan payments and prepayments; governing forms of certificates and passbooks; prohibiting sale of loans with recourse; prohibiting tie-ins; and prohibiting loan procurement fees, kickbacks and unearned fees."

In addition, advertising of interest or dividends is covered by detailed provisions (12 CFR 526.6; 563.27). Supplemental Technical Memoranda ("T-Memos") have dealt with particular aspects of advertising and promotion, such as whether or not a particular slogan of an association was misleading (T.50) and whether or not a particular promotion plan involving green stamps was in violation of the Board's regulation (T-51). Further limits are imposed on advertising for remote service units which are basically electronic funds terminals (12 CFR 545.4-2).

The letter then deals with the Bank Board's supervisory and enforcement powers:

> "In addition to its rulemaking authority, the Bank Board maintains a continual program for the examination and supervision of all Federal and State-chartered FSLIC-insured savings and loan associations. Examinations of insured institutions is made under the authority of 12 U.S.C. §1726 (1976). Board examiners have full authority to inspect all books, papers and records of insured institutions and may be given the authority to administer oaths and affirmations, to examine and to take and preserve testimony under oath and to issue subpoenas and subpoenas duces tecum.
>
> "Existing statutory authority confers an assortment of formal supervisory powers upon the Board. The ultimate supervisory power is the termination of insurance of accounts. The most flexible supervisory tool available to the Board is cease-and-desist authority. Under this authority, the Board may issue an order that an institution and its directors, officers, employees and agents cease and desist from a violation of a law or regulation and take affirmative action to correct the conditions resulting from any such violation or practice. Other supervisory tools include temporary

> cease-and-desist authority, suspension or removal of a director or officer and termination of Federal home loan bank membership. Enforcement of Board supervisory orders is in the United States district court. 12 U.S.C. §§1464, 1730 (1976)."

These enforcement powers were expanded by Title I of the "Financial Institutions Regulatory and Interest Rate Control Act of 1978" (P. L. 95-630) to empower the Bank Board to bring cease-and-desist actions against individual officers, directors, and employees of a savings and loan association, its subsidiaries, its holding company parent, and non-savings and loan affiliates of savings and loan holding companies.

Two examples of actions by the Federal Trade Commission which have intruded into areas clearly within the Bank Board's jurisdiction are the holder in due course rule, 16 CFR 433, (along with its proposed extension to creditors, 43 Fed. Reg. 54950, November 24, 1978), and its action against Perpetual Federal Savings and Loan Association, Washington, D. C., alleging that its director interlocks with commercial banks in the same city was an "unfair method of competition" within the meaning of Section 5 of the FTC Act. (Docket No. 9083, May 13, 1976).

One of the most alarming things about the holder in due course rule to National League members was the fact that the Commission apparently believed that the broad rulemaking powers of Section 18 of the FTC Act could have applied to subsequent holders of first mortgages on residential property. There is no specific exemption for such mortgages in the rule itself, and we are guided only by a staff interpretation to that effect.

The application of the rule to residential mortgages would among other things severely disrupt the secondary market in such mortgages, which is a vital source of funds for housing finance. The power to affect the rights of subsequent holders of mortgage loans originated by savings and loan associations should clearly be within the exclusive jurisdiction of the Bank Board.

The Perpetual case is an attempt to apply the general language of Section 5 of the FTC Act to director interlocks in the face of: (1) regulations issued by the Bank Board on the same subject; and (2) a court decision that Section 8 of the Clayton Act, which deals specifically with corporate and bank interlocks does not prohibit interlocks between a bank and a non-banking entity. (U. S. v. Crocker National Corp., 422 F. Supp. 686, N. D. Cal., 1976).

Our purpose at this hearing is not to argue the merits of either the holder in due course rule or the Perpetual case, but to simply cite them as examples of actions affecting savings and loan associations which need not have been taken.

The whole purpose of the regulatory process is to provide a forum in which complex issues can be resolved and conflicting viewpoints analyzed. This process should be conducted by the agency which Congress intended to exercise such powers, not by the FTC, and certainly not by litigation.

We believe that these exemptions which are contained in H. R. 2367 will not only be fair to the savings and loan industry, but will also provide a reasonable separation of jurisdiction between the Federal Trade Commission and a highly regulated industry.

Mr. SCHEUER. Does the Federal Home Loan Bank Board have the authority to enforce the Clayton Act with respect to the savings and loan institutions just as the Federal Reserve Board has the authority to regulate the banks?

Mr. WILLIAMS. The Bank Board has the power to approve proposed mergers. They do not have the same kind of power that the Bank Merger Act conferred on the bank regulatory agencies. But we are not asking that any modifications to the Clayton Act be made with respect to savings and loan associations.

The Justice Department and the Federal Trade Commission have had since the inception of the Federal Savings and Loan System the power to question mergers. They have not exercised that power to the best of my knowledge, so the Bank Board does have the power to approve or deny merger applications affecting savings and loans.

Mr. SCHEUER. So the answer——

Mr. WILLIAMS. Substantially is yes.

Mr. SCHEUER. Is the Federal Home Loan Bank Board required by statute to consider the antitrust laws and decisions in their regulatory determinations just as the Federal Reserve Board is so required under the Bank Merger Act?

Mr. WILLIAMS. Not formally by statute, but the Bank Board can certainly use the tests and criteria under the Sherman and Clayton Acts in approving the mergers or in examining any other practices that are deemed to be anticompetitive.

Mr. SCHEUER. They can but do they as a matter of course systematically?

Mr. WILLIAMS. Yes, they do. The conflict regulations, which were issued in 1976, deal with director interlocks which is one of the subjects that the Federal Trade Commission involved itself in with respect to Perpetual Federal here in Washington.

Mr. SCHEUER. The regulations require disclosure of interlocks or do they prohibit interlocks?

Mr. WILLIAMS. It requires disclosure of quite an elaborate set of information if the interlock guidelines are not adhered to.

Mr. SCHEUER. That is quite a big difference, wouldn't you say?

Mr. WILLIAMS. Yes, it is but again our point is, we are seeking exemption only for the Federal Trade Commission Act, not the Sherman Act or the Clayton Act, so the Justice Department can certainly challenge a practice of a savings and loan association which seems to have a monopolization of a market in a particular area.

Mr. RINALDO. On that point, could you provide any examples that would illustrate practices of S. & L.'s which the FTC could reach under the FTC Act which the Federal Home Loan Bank Board could not reach?

Mr. WILLIAMS. No, I could not and indeed when the chairman of the Federal Trade Commission wrote to the Senate counterpart of this subcommittee, when the Senate bill was pending before it, in his letter to Senator Ford which is in the hearing record over there, he did not himself come up with any act or practice which he considered FTC could reach that the Bank Board could not.

Mr. RINALDO. Along the same lines and in order to give an answer in greater depth to the question Congressman Scheuer

asked, I wonder if you consider the banking regulatory agencies to have greater enforcement powers than the bank board.

Mr. WILLIAMS. No. As a matter of fact, both the last year's financial institutions regulatory act and the 1966 financial institution supervisory act, which had initially conferred cease-and-desist powers on the regulatory agencies, contained parallel provisions, parallel amendments to the various banking and savings and loan statutes.

I would not say they were identical but I think for most purposes they are identical. That is simply because the financial scheme of financial institutions involves five or six acts. The National Housing Act and Home Owners Loan Act—it is a very cumbersome practice but you will note in last year's financial institution act one of the reasons title I was so long was because of the necessity of having parallel amendments to those acts.

Mr. RINALDO. Thank you.

Mr. SCHEUER. We will hear from Mr. Cirona and again we would suggest that you hit the high spots and not read your testimony.

STATEMENT OF JAMES CIRONA

Mr. CIRONA. I hope I can do that.

My name is Jim Cirona. I am president of First Federal Savings and Loan Association, Rochester. With me is Mr. Raymond Gustini who is assistant Washington counsel in the Washington office of the United States League of Savings Associations.

We are appearing today before the subcommittee asking for essentially the same treatment that savings and loans were accorded in bills that were introduced in Congress last year. We are seeking exemption from the Federal Trade Commission jurisdiction and what we are asking for is parity in the treatment of savings and loan associations and banks.

Banks have been exempted from the FTC jurisdiction since the inception of the act in 1914 on the basis that they had adequate supervision from their supervisor. Thus, we believe the Federal Home Loan Bank Board believes that they have adequate authority to regulate savings associations. As an operating person, I can say that they exercise that authority very well.

The rationale for the exclusion is that banks are specialized institutions serving special purpose and that their regulators' have a better degree of control over their activities. I might say I think that applies very well to savings and loan associations.

Our primary business is financing homes and extending credit for mortgage purposes and as such, it serves that business or that segment of the economy very well. It is carefully regulated and monitored by the Federal Home Loan Bank Board in the exercise of that activity.

We do not think there are any material differences between the bank supervisory authority and S. & L. supervisory authority and, as I said earlier, the Chairman of the Federal Home Loan Bank Board, Mr. Robert McKinney, has already stated that the Federal Home Loan Bank Board has full authority to regulate unfair or deceptive acts or practices that might occur in the savings and loan business. He has sent a letter to the Congress to that effect.

The Bank Board, in addition to regulation of the business, has responsibility for operation of the insurance corporation, FSLIC, that covers the deposit accounts in savings and loan associations. As such it is very concerned about the activities of associations insured by that corporation, and carefully monitors their activities.

As mentioned earlier, the FHLBB issued regulations regarding conflicts of interest, interlocking directorates. They get into such things as premium promotions, giveaways in connection with savings accounts and how S. & L.'s can advertise and promote rates.

The other point I would make is that the bulk of our lending is secured-type lending. It is mortgage lending. In our particular association, only 1 percent of the dollar amount of lending that we do in any 1 year is unsecured lending.

The disclosure requirement, the notice that we are required to give by Federal Home Loan Bank Board regulation, is very extensive and it applies to that particular type of lending. Thus we do not engage in many of the lending practices that commercial banks pursue.

I think I will stop at this point and try to be responsive to your questions. The only other point that I might add is that in some areas of the country, notably the Northeast, there are other mutual thrift institutions, namely, mutual savings banks which have the word "bank" in their name and presumably because they are a bank, are exempt from FTC jurisdiction. But, they look like us; they behave like us, and in many ways are very similar to a savings and loan association.

So, because of a name; that is, "bank", they would be exempt and we would not be exempt from FTC jurisdiction, and I would like to call that to your attention.

[Testimony resumes on p. 125.]

[Mr. Cirona's prepared statement follows:]

STATEMENT OF JAMES CIRONA
ON BEHALF OF THE U.S. LEAGUE OF SAVINGS ASSOCIATIONS
BEFORE THE SUBCOMMITTEE ON
CONSUMER PROTECTION AND FINANCE
RE: FTC EXEMPTION FOR SAVINGS AND LOAN ASSOCIATIONS

FEBRUARY 28, 1979

MR. CHAIRMAN:

My name is James Cirona. I am President of First Federal Savings and Loan Association of Rochester, New York. I am pleased to be here today to testify on behalf of the United States League of Savings Associations* with respect to the question of exempting savings and loan associations from Federal Trade Commission jurisdiction.

At the present time, insofar as we are aware, there is no legislation before this subcommittee like last years' comprehensive H.R. 3816, The Federal Trade Commission Improvements Act of 1977. Nonetheless, the U. S. League appreciates the opportunity to comment upon this important question, and we are hopeful that FTC legislation reported by this subcommittee and the Senate Commerce Committee will contain an exemption from Federal Trade Commission jurisdiction for savings and loan associations.

---

*The United States League of Savings Associations (formerly the United States Savings and Loan League) has a membership of 4,400 savings and loan associations representing 99-2/3% of assets of the $510 billion savings and loan business. League membership includes all types of associations -- Federal and state-chartered, insured and uninsured, stock and mutual. The principal officers are: Joseph Benedict, President, Worcester, Mass.; Ed Brooks, Vice President, Richmond, Va.; Lloyd Bowles, Legislative Chairman, Dallas, Tex.; Norman Strunk, Executive Vice Pres., Chicago, Ill.; Arthur Edgeworth, Director-Washington Operations; and Glen Troop, Legislative Director. League headquarters are at 111 E. Wacker Drive, Chicago, Ill. 60601; and the Washington Office is located at 1709 New York Ave., N.W., Washington, D.C.; Telephone (202) 785-9150.

We view the exemption of savings and loan associations from Federal Trade Commission jurisdiction as noncontroversial since it tracks the bank exemption and was approved (although not enacted) by Congress last year. In my statement I intend to discuss the views of the Federal Home Loan Bank Board, the chief regulatory body of the savings and loan business on the question of an FTC exemption and the powers of the Federal Home Loan Bank Board to control a wide spectrum of practices and activities in the savings and loan business. Finally, I will briefly review Public Law 95-630 approved last year, The Financial Institutions Regulatory and Interest Rate Control Act, because I believe that its enactment meets most of the prior objections of the FTC during markup of H.R. 3816 with respect to the FHLBB's regulatory authority over savings and loan associations.

A) Historical Background. The nation's banks have been exempted from Federal Trade Commission jurisdiction since the genesis of the Federal Trade Commission in 1914. At that time banks were subject to Federal Reserve Board jurisdiction and to Federal administrative controls. There was no Federal Home Loan Bank system for savings and loan associations nor was there Federal insurance of accounts. The exemption provided for banks in the FTC Act as well as for other specialized businesses such as common carriers and packers reflected long standing Congressional adherence to dividing regulatory responsibilities along industry lines. The Commission's authority under Section (6) of the Act to compile information, to conduct investigations and to require the filing of reports on matters within domestic commerce or affecting foreign trade similarly does not extend to banks thus forming the second part of the two-part banking exemption.

There were good and substantial reasons why the 1914 Federal Trade Commission Act excluded banks. Simply stated, Congress recognized when the Act was passed that certain entities, including banks, were subject to specialized, pre-existing regulation. The intrusion of an additional regulatory agency into a specialized world was not deemed necessary. Savings and loan associations, however, were never specifically excluded under the 1914 law although the scope of the term "banks" in Sections (5) and (6) (as I will point out later) is still uncertain.

In 1975, the broad banking exemption from Federal Trade Commission jurisdiction was narrowed with respect to FTC rule-making authority. The Magnuson-Moss Amendments to the FTC Act provided that 60 days after FTC rules were final the Federal Reserve Board was required to promulgate "substantially similar" rules to apply to similar unfair or deceptive practices by banks. A specific exemption for savings and loan associations was not included in the 1975 Magnuson-Moss Amendments although it would have been appropriate at that time to place banks and savings associations on the same footing with respect to the Federal Trade Commission.

B) Recent Congressional Action with Respect to S&Ls. In 1977 and 1978, Congress saw fit to approve an exemption from FTC jurisdiction for Federally-insured savings and loan associations or Federal Home Loan Bank System member associations. This exemption differs slightly from the bank exemption which applys to all banks, not just those with some Federal nexus. The Senate passed a bill with a narrower S&L exemption, but then also voted to accept the Conference Report with the broader exemption for savings and loan associations passed by the House. For reasons which this Committee knows well, the S&L exemption and the rest of H.R. 3816 did not "stick". However, to my knowledge no Congressional objections were raised in either the House or Senate with respect to the S&L exemption. The amendments following their debate in this subcommittee were perceived as noncontroversial. We recommend, therefore, that the exemption from FTC jurisdiction for savings and loan associations be part of any FTC bill reported by this Subcommittee or a comparable Senate committee. There are several reasons for our recommendation.

C) FHLBB Powers and Authority. The first of these is the jurisdiction of the Federal Home Loan Bank Board over virtually every facet of S&L operation. There are no material differences between bank and S&L supervisory authority. Moreover, the supervisory powers of financial institution regulators were buttressed even further just last year. The Chairman of the Federal Home Loan Bank Board, Robert McKinney, has said that the Federal Home Loan Bank Board possess full authority to regulate unfair and deceptive acts or practices occuring in the savings and loan business. He notes in a letter sent last year to Conferees on H.R. 3816 that:

> "The Home Owners Loan Act of 1933 gave the Board a comprehensive authority to regulate Federal savings and loan associations including the authority to enforce any law or regulation which would affect the operation of Federal savings and loans. The National Housing Act of 1942 conferred similar broad authority over the operations of Federally-insured savings and loans. Thus the composite regulatory jurisdiction which the Board has excercised over the savings and loan industry leaves no meaningful area for supervision of these institutions by the FTC".

McKinney goes on to say that providing savings associations with the same limited exemption as banks under the FTC Act would:

> "eliminate overlapping and potentially conflicting regulatory authority in the savings and loan industry. Since the enactment of the Federal Trade Commission Act in 1914 the savings and loan industry has matured and has become subject to comprehensive Federal regulation. H.R. 3816 would amend the FTC Act and recognize these fundamental changes and confer upon savings and loans the same exemption presently conferred upon commercial banks".

Attached to Mr. McKinney's letter was an appendix (see Appendix A attached) which describes Federal Home Loan Bank Board regulations. In exercising such jurisdiction the Board has utilized the broad plenary authority contained in Sections 5(a) and 5(d) of the Home Owners Loan Act, 12 U.S.C. Section 1464 (1976) to support its actions. In addition the FHLBB's dual function, operation of the FSLIC (Federal Savings and Loan Insurance Corporation) gives it jurisdiction over the operations of state chartered savings and loans. For example, Conflict-of-Interest regulations which apply to all Federally-insured S&Ls have enabled the Board to set guidelines concerning the composition of the boards of directors of insured institutions and misleading advertising. The Board has issued similarly broad regulations on discrimination in lending and the amount of give-aways which savings and loan associations may utilize in connection with savings campaigns. Regulations have been issued concerning late charges on mortgage loans, payment of interest on

escrow accounts, the use of due-on-sale clauses, loan procurement fees, kickbacks and unearned fees. All of these matters are discussed in more detail in the Appendix.

Another reason supporting the exemption for S&Ls is the specialized lending in which they are involved. Unlike banks, savings and loan associations are not heavily involved in consumer lending or installment loans. Savings and loans do not operate bank-type credit card subsidiaries and make few unsecured installment loans. Thus they are not active participants (as are banks) in the consumer lending fields which are the object of recent FTC proposed rulemaking -- short-term, unsecured installment loans. Home mortgage lending is a specialized activity and closely regulated by the Federal Home Loan Bank Board. It should not be subject to dual and potentially disruptive oversight of more than one regulatory authority.

D) Effect of Public Law 95-630. Last year, the 95th Congress expanded the supervisory authority of the Federal Home loan Bank Board and the banking agencies. This law, which has been described as the most comprehensive rewrite of Bank-Savings and Loan supervisory laws of the past 25 years, gives financial institution regulators tremendous new authority. In the area of interlocks, it prohibits outright any interlocks between management officials of depository institutions within certain geographic areas and of larger institutions without regard to geographic restriction. With respect to S&L's, the FHLBB is the primary enforcement authority. The Justice Department obtained "referral" authority for any cases not deemed subject to FHLBB jurisdiction. In addition, the Board obtained new authority to remove officers and directors from boards of directors, cease and desist authority against individuals and the right to order the termination of holding company activities.

E) The Meaning of the Word "Bank". Finally, there is an illogical result which will continue if the FTC exemption for banks is not extended to S&Ls. The term "bank" is undefined. It is not entirely clear that it was not intended to apply to all financial institutions. There are, for example, numerous laws and regulations in which the term bank is also deemed to include savings and loan associations. Also, simple reliance on the word "bank" raises interesting

questions. Mutual savings banks are thrift institutions like savings and loan associations, but are insured by the Federal Deposit Insurance Corporation. They are presumably exempted from FTC jurisdiction simply because the word "bank" appears in their title. "Bank" left undefined also means that Federal insurance of accounts is not required for the bank exemption. Cooperative banks, thrift institutions operating in New Hampshire and Massachusetts, which meet the savings and loan tax definition, are presumably already exempted as well because the word "bank" appears in their title. It is not clear whether Congress intended to put so fine a point on the differences between financial institutions or whether its intent was broader -- to divide regulation along general industry lines. Whatever the intent of the Act, our hope is to clarify it to provide parity for bank and savings and loan associations.

We believe it is time that the burdens of joint FTC-FHLBB regulation be eliminated. The reasons which compelled the bank exemption in 1914 are more compelling today in the case of savings and loan associations. I might also observe that the word "exemption" may not be an accurate description of bank status. Banks today are subject to indirect FTC jurisdiction in that the Federal Reserve Board will be required to write substantially similar trade regulation rules 60 days after final FTC rules are promulgated. The S&L business seeks no more than comparable treatment under the Act for savings and loan associations.

We appreciate the opportunity to present our statement. Our Appendix, in addition to providing a list of the numerous regulatory activities affecting the savings and loan business engaged in by the Federal Home Loan Bank Board also contains a draft of an amendment to the Federal Trade Commission Act which exempts S&Ls following a pattern identical to that for banks.

Thank You.

APPENDIX A

Significant FHLBB Regulations Regarding Unfair Methods of Competition and Unfair or Deceptive Acts or Practices

A. Conflicts of Interest

The Board's conflict of interest regulations set forth guidelines concerning the composition of boards of directors of insured institutions. These guidelines:

(1) discourage officer or director interlocks between FSLIC-insured institutions and all other thrift institutions,

(2) discourage directors and officers of FSLIC-insured institutuions from serving as salaried officers or employees of a commercial bank and

(3) suggest limitations on director interlocks between FSLIC-insured institutuions and commercial banks.

12 C.F.R. §563.33 (1977). Failure to comply with these regulatory guidelines would subject an institution to making required disclosure of such relationships to its voting members. 12 C.F.R. §563.44 (1977).

B. Misleading Advertising

Insured institutions are prohibited from using any type of advertising or making any representation which is inaccurate in any particular or which in any way misrepresents its services, contracts, investments or financial condition. 12 C.F.R. §563.27 (1977)

C. Discrimination in Lending.

The Board has proposed regulations to halt redlining and other discriminatory home lending practices by insured institutions. 42 Fed. Reg. 58182-86 (Nov. 8, 1977). The proposed regulations would:

(1) prohibit denial of a mortgage loan application because of the age of the dwelling or the neighborhood in which it is located,

(2) require institutions to review their advertising and marketing practices to ascertain that they are serving adequately all segments of their communities,

(3) require institutions to develop written standards to be used in processing loans and

(4) require institutions to consider all relevant factors in making loan decisions without giving undue consideration to arrest records, educational level, lack of previous homeownership or a history of numberous jobs.

D. Give-Aways

Federal associations are restricted from offering give-aways on condition of the recipient's possessing, opening or adding to a savings account, or maintaining a minimum balance in such an account. 12 C.F.R. §545.5 (1977)

E. Payment of Interest on Escrow Accounts

Federal associations are required to pay interest on any escrow account maintained in connection with a loan on the security of a single-family dwelling occupied by the borrower in States where State-chartered institutions are required to pay interest.

F. Late Charges

Federal associations are prohibited from assessing late charges on any periodic installment payment received within 15 days after the due date of such installment, in an amount exceeding 5 percent of the aggregate amount of the periodic installment, where the late charges had not been disclosed, or more than once. 12 C.F.R. §545.6-11.

G. Due-on-Sale Clauses

Federal associations are prohibited from exercising their rights under a due-on-sale clause based upon creation of a lien subordinate to that of the association, creation of a purchase money security interest for household appliances, transafer by devise, descent or by operation of law upon the death of a joint tenant, or the granting of any leasehold interest of three years or less not containing an option to purchase. No Federal association may impose a prepayment charge in connection with the exercise of its rights under a due-on-sale clause. 12 C.F.R. §545.6-11 (1977).

H. Loan Payments

The regulation governs the timing and disposition of periodic installment payments on conventional home mortgage loans. Federal associations are prohibited from charging prepayment penalties to borrowers who prepay up to 20 percent of the original amount of a loan during a 12-month period. 12 C.F.R. §545.6-12 (1977).

I. Form of Accounts

Forms for all types of savings accounts and certificates offered by insured institutions must be approved by the FSLIC. 12 C.F.R. §563.1 (1977).

J. Tie-ins

No insured instutution may grant a loan on the prior condition that the borrower contract with any specific person or organization for insurance services, building materials, construction services, legal services, brokerage services or property management services. In addition, reimbursement that may be charged a borrower or legal services is limited. 12 C.F.R. §563.33 (1977).

K. Loan Procurement Fees, Kickbacks and Unearned Fees

No person affiliated with an insured instutution may receive a loan procurement fee, kickback or unearned fee. 12 C.F.R. §563.4 (1977).

RHL:PMB:cpp:1/4/78

APPENDIX A

S&L EXEMPTION FROM FTC JURISDICTION

(a) Section 5(a)(2) of the Federal Trade Commission Act (15 U.S.C. 45(a)(2)) is amended by inserting after "banks," the following: "savings and loan institutions described in section 18(f)(3),".

(b)(1) Section 6(a) of the Federal Trade Commission Act (15 U.S.C. 46(a) is amended by inserting after "banks" the following: ", savings and loan institutions described in section 18(f)(3),".

(2) Section 6(b) of the Federal Trade Commission Act (15 U.S.C. 46(b)) is amended by inserting after "banks," the following: "savings and loan institutions described in section 18(f)(3),".

(3) The proviso at the end of section 6 of the Federal Trade Commission Act (15 U.S.C. 46) is amended—

(A) by inserting after "banks" the following: ", savings and loan institutions described in section 18(f)(3),"; and

(B) by inserting ", in business as a savings and loan institution," after "banking".

(c)(1) Section 18(f)(1) of the Federal Trade Commission Act (15 U.S.C. 57a(f)(1)) is amended—

(A) in the first sentence thereof—

(i) by inserting "or savings and loan institutions described in paragraph (3)" after "banks" each place it appears therein; and

(ii) by inserting "or (3)" after "(2)";

(B) in the second sentence thereof, by inserting after "System" the following: "(with respect to banks) and the Federal Home Loan Bank Board (with respect to savings and loan institutions described in paragraph (3))"; and

(C) in the last sentence thereof—

(i) by inserting "each" before "such Board" the first place it appears therein;

(ii) by striking out "such Board finds that (A)" and inserting in lieu thereof "(A) either such Board finds that";

(iii) by inserting "or savings and loan institutions described in paragraph (3), as the case may be," after "banks" the first place it appears therein;

(iv) by inserting after "or (B)" the following: "the Board of Governors of the Federal Reserve System finds"; and

(v) by striking out "the Board" and inserting in lieu thereof "such Board".

(2) Section 18(f) of the Federal Trade Commission Act (15 U.S.C. 57a(f)) is amended by redesignating paragraphs (3), (4), and (5) thereof as paragraphs (4), (5), and (6), respectively, and by inserting after paragraph (2) thereof the following new paragraph:

"(3) Compliance with regulations prescribed under this subsection shall be enforced under section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464) with respect to Federal savings and loan associations, section 407 of the National Housing Act (12 U.S.C. 1730) with respect to insured institutions, and sections 6(i) and 17 of the Federal Home Loan Bank Act (12 U.S.C. 1426(i), 1437) with respect to savings and loan institutions which are members of a Federal Home Loan Bank, by a division of consumer affairs to be established by the Federal Home Loan Bank Board pursuant to the Federal Home Bank Act.".

Mr. RINALDO. I just have one question and perhaps directed to Mr. Williams or either of you, or both of you can answer it. Has either the League or your association ever done or had done any sort of cost-benefit analysis of the removal of FTC jurisdiction?

In other words, what we really have here is a case of duplicate jurisdiction which certainly costs the taxpayers money and costs the savings and loans money. I have in mind such things as man hours saved, filing of duplicative forms, not having to appear in proceedings before the FTC, and things of that nature.

And if not, do you think such an analysis would be helpful? Do you anticipate having anything done? Could you give me some idea of the savings that would accrue by getting rid of unnecessary and duplicative regulation?

Mr. WILLIAMS. That is a good question, Mr. Rinaldo. I think the answer from the National League's standpoint is we have not done any such study primarily because it was not until recently—in fact in 1975 or 1976—that we were aware that the Federal Trade Commission was asserting jurisdiction against the savings and loan industry.

Mr. SCHEUER. For how long a period of time did they not assert jurisdiction, and on how many occasions have they done so since?

Mr. WILLIAMS. Not since the Home Owners Loan Act of 1973.

Mr. SCHEUER. How many cases have they brought?

Mr. WILLIAMS. Just one. So their intrusion into the savings and loan industry has been recent, so we would not have any cost data. I am sure the legal fees of Perpetual would be substantial.

Mr. SCHEUER. For that one case. How about the rest of the industry? How will they be affected by that one case or the assertion of jurisdiction?

Mr. WILLIAMS. That is hard to measure. We do not know what is in the back of the minds of the Commission.

Mr. SCHEUER. To the extent there are duplicative filings and so forth, how does that work? How onerous are those filings, how extensive?

Mr. WILLIAMS. We do not have any filing requirements yet.

Mr. SCHEUER. I heard talk here of duplicative filings. Maybe we should ask Congressman Rinaldo what he had in mind.

Mr. WILLIAMS. What we are talking about is the potential.

Mr. SCHEUER. Wait, Congressman, are you talking about potential duplicative filings or duplicative filings that exist in fact in the real world?

Mr. RINALDO. Let me ask this: I will reframe that part of it. Are there duplicative filings now or is it merely that you anticipate them?

Second, I think as the situation now stands, the whole point you are trying to make is that because of the sudden FTC incursion into savings and loans, the savings and loans are being treated in a discriminatory fashion.

Mr. SCHEUER. Excuse me, Congressman Rinaldo. I have to meet the distinguished speaker of the New York State Assembly.

[Discussion off the record.]

Mr. SCHEUER. Could I impose on you, Congressman Rinaldo, to take over the remainder of this hearing.

Mr. RINALDO. Perhaps better yet, I will conclude.

Mr. SCHEUER. I think we should have an exhaustive inquiry into the matter of duplicative filings.

Mr. RINALDO. I would like Mr. Williams to answer the question and to point out what I think is the core of the matter, the fact they are being treated in a discriminatory fashion vis-a-vis other banking institutions.

So, then you can be convinced that this is a good provision in this bill before you leave.

Mr. WILLIAMS. I think the present state of laws is discriminatory in that with commercial banks or the Federal Reserve Board is required to consider promulgating a trade regulation rule for banks within a certain time after FTC promulgates its rules.

The savings and loans do not have that privilege of having their own regulator with relevant expertise follow the same procedure. That is what we are saying. Yet the Bank Board decides whether a trade regulation really is needed for the savings and loan industry.

Mr. SCHEUER. I wish you would submit for the record—I must leave now—a brief statement on what the actual burdens are, the cost to you, to the industry of this duplicative jurisdiction. I do not have a clear idea in my mind as to what is required or even to the extent that you have volunteered to undertake filings and so forth.

If you would give us a clear statement of what the costs are to you of this alleged duplication, I think it would help clarify things.

Mr. CIRONA. If I might say from the perspective of an operating person that we have extensive filings that we do for the Federal Home Loan Bank Board. If we were to add more reporting requirements, we of course would comply with those requirements.

But you have to keep in mind that we do not pay the cost. Our customers pay the cost.

Mr. SCHEUER. But you have not been asked to, I take it.

Mr. CIRONA. We have not at this point been asked to.

Mr. SCHEUER. So, I do not get the extent of this burden of duplicative filings. I am fuzzy on it.

Mr. CIRONA. We are anticipating what would be required.

Mr. SCHEUER. Is there any evidence that it is going to be required?

Mr. GUSTINI. If I may, Mr. Chairman, give you an example, not of duplicative filing because the FTC's involvement, as Mr. Williams said with respect to the savings and loan business, is in its nascent stages. There are, however, two FTC trade regulation rules that are pending which have an effect on S. & L.'s. But the intrusion of the FTC into the savings and loan business is right now in the stage that we discussed.

Mr. SCHEUER. Why isn't your interest in the nascent stages too?

Mr. GUSTINI. We are vigorously pursuing the exemption because even the nascent stages of FTC involvement, it has been costly to several institutions and to the U.S. League of Savings Associations as a whole.

Mr. SCHEUER. If you could give us a brief statement on what that burden has been, we would appreciate that.

[The following information was received for the record:]

USL
UNITED STATES LEAGUE of SAVINGS ASSOCIATIONS WASHINGTON OFFICE
1709 NEW YORK AVENUE, N.W. / WASHINGTON, D.C. 20006 / TEL. (202) 785-9150

RAYMOND J. GUSTINI
Assistant Washington Counsel

April 30, 1979

The Honorable James H. Scheuer
U. S. House of Representatives
2402 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Scheuer:

During the hearings at which we appeared last month testifying on behalf of an exemption for savings and loan associations from FTC jurisdiction, we indicated we would provide additional information on the Federal Trade Commission involvement in the savings and loan business. We said in our testimony that FTC involvement was confined to a few areas. Nonetheless, the extent of FTC interest and involvement in the savings and loan business demonstrates clearly to us that future action will grow and be even more costly and time consuming for savings and loan associations. Let me provide several examples.

In May of 1976 the Fedederal Trade Commission filed its complaint against Perpetual Federal Savings and Loan of Washington, D.C. alleging that Perpetual's Board of Directors was comprised of interlocks which violated "per se" Section 5 of the FTC Act. Shortly thereafter, on August 23, 1976, the Commission issued a statement of policy which said that as of January 1, 1977 savings and loan association directors would be charged "individually" in complaints challenging unlawful interlocks. At that time the Perpetual case had not been heard by the Commission's ALJ. However, shortly after the complaint was filed, the policy statement allegedly affecting all S&L directors was issued by the Commission. Subsequently, a Florida-based savings and loan association sued the Commission to obtain clarification of the statement. In oral argument the FTC conceded what it would not concede or clarify publicly -- despite many inquiries from S&L directors -- that not all bank-S&L interlocks were illegal and that the statement of policy had no legal effect in and of itself and that it was not enforceable. It was unfortunate that costly, time consuming legal proceedings had to be instituted before routine clarification of the statement could be issued.

The FTC also has a pending rule on credit collection practices. The record comprising its proposed rule has now reached some 25,000 pages. The primary purpose of the Commission's proposal was to curb aggressive, sometimes abusive collection practices of small loan and consumer finance companies. However, the rule was drawn in the broadest possible terms. Thus, when the League first reviewed the FTC's proposed rule, we were concerned that on its face it applied to loans secured by liens on real estate which comprise over 84% of savings and loan assets. We raised this issue with FTC staff members and were assured orally that the rule was not intended to apply to such loans. However, despite our requests we were never able to secure any clarification or opinion which would alleviate this concern. Accordingly, to make certain that loans secured by real estate are not covered by the rule, the League has already incurred high legal fees and spent a number of man-hours on the project.

We are also very concerned with a recent press report (attached) which indicates a growing interest by the FTC in housing and related areas. One area of interest directly affecting savings and loans is the Community Reinvestment Act enforced for our institutuions by the Federal Home Loan Bank Board. CRA provides that the record of a financial institution in meeting "community credit needs" will be considered in connection with approval of branch applications, merger applications and the like. The interest of the Commission in CRA is puzzling since regulations have been final for only six months giving the enforcing agencies modest CRA enforcement experience at best. It is therefore difficult to visualize how the Commission can suggest (notwithstanding questionable jurisdiction) that it would consider intervening in CRA matters with the agencies and Congress. The first branch application rejected for CRA purposes was reported last week when the FDIC took this action against a New York Savings Bank. Therefore, the Commission's interest in a very new law, where the agencies designated by Congress have had very little time to work with the existing regulations appears premature and ill advised.

I hope that these examples have helped to illustrate our concern and that they have been helpful to you. Again, thank you for the opportunity which you afforded Mr. Cirona and I last month to appear before the Subcommittee.

Very truly yours,

Raymond J. Gustini

Raymond J. Gustini
Assistant Washington Counsel

RJG:cac

cc: Members of the Subcommittee
Jim Cirona

National Savings and Loan League

1101 Fifteenth Street NW
Washington, DC 20005
202 331-0270 Cable: NATLISA

Harding deC. Williams
General Counsel

April 5, 1979

The Honorable James H. Scheuer
Chairman
Subcommittee on Consumer Protection
and Finance
Committee on Interstate and Foreign
Commerce
U. S. House of Representatives
3275 Annex 2
Washington, D. C. 20515

Dear Mr. Scheuer:

RE: H.R. 2367, a bill to amend the Federal Trade Commission Act; Exemption of Savings and Loan Associations from the FTC Act

This letter is the response of the National Savings and Loan League to a request for additional information on a question raised at the hearings before your Subcommittee on February 27, 1979, on the above bill.

Section 2 of that bill would exempt savings and loan associations from the FTC Act in the same manner as banks are now exempt.

We were asked to provide information on the burden to the savings and loan industry which have been caused by its coverage under Section 18 of the Federal Trade Commission Act.

I wish to state at the outset that our position on savings and loan exemptions from the FTC Act is based primarily on the problems which will inevitably result in the future from the subjection of our industry to the overlapping jurisdiction of the FTC, the Federal Home Loan Bank Board and state regulatory agencies. Our coverage under that section has been, as you know, of relatively short duration since it was a part of the Magnuson-Moss Act, which was enacted in 1975.

There has already been, however, sufficient evidence since 1975, of the expense and uncertainty caused by this dual coverage, and alleged dual coverage, to warrant adoption of Section 2 of the above bill on the basis of that experience alone.

Since 1975, the Commission has issued two Trade Regulation Rules which have caused considerable confusion in the savings and loan industry because of the difficulty in securing an interpretation of the application of such rules to residential mortgages made by Federally-insured savings and loan associations.

The first was the proposed rule on "Credit Practices" published on April 11, 1975, 40 FR 16347. The National League wrote the Commission on May 30, 1975, and again on August 16, 1977, seeking a clarification of the scope of this rule, since, by its terms, its application to residential mortgages was not clear. To date, we have received no answer from the Commission on this question.

The second Rule was that on "Preservations of Consumers' Claims and Defenses", known as the "holder in due course" Rule published on November 18, 1975, 40 FR 53506. This Rule, again, did not specify its impact on the closely-regulated savings and loan industry. A staff interpretation does spell out that the Rule does not cover residential first mortgages, but this is not binding on the Commission. More to the point, however, is the fact that the FTC apparently believed that it had the power to affect rights of subsequent holders of such mortgages. The exercise of such power would have severely disrupted the secondary market in such mortgages -- with little corresponding protection for the home purchaser -- and would have adversely affected that market, which is designed to stabilize the flow of funds into housing and to tap capital markets for additional sources of such funds.

This market consists of institutional and private investors, other financial institutions, and the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Corporation, and the Government National Mortgage Corporation. These latter three agencies carefully monitor appraisal and underwriting standards of lenders who sell loans to them, and along with savings and loan associations, do not require overlapping regulation.

The FTC's action against Perpetual Federal Savings and Loan Association (Docket No. 9083) in May, 1976, demonstrates the potential for harm which exists when one agency intrudes into aspects of a regulated industry which have been the subject of careful evaluation and action by the primary regulator. As pointed out in our statement before the Subcommittee, the Perpetual case involved a challenge to relationships which the FTC had not addressed since the enactment of the FTC Act in 1914, and which had been under the jurisdiction of the FHLBB since 1933.

On August 23, 1976, the Commission issued a Statement of Policy, 41 FR 35572, which was obviously designed to "scare" persons who were serving as a director of a bank and a savings and loan association into resigning, without legal action being brought against them and while the Perpetual case was still before the Administration's Law Judge.

The statement provided in pertinent part:

> "...the Commission will henceforth in appropriate situations adhere to its customary practice of naming individuals as well as corporations in interlock complaints subject to the Commission's jurisdiction. The Commission recognizes, however, that, in view of the apparent ubiquity of savings and loan association interlocks with banks, immediate resignations by interlocking directors might be disruptive. The Commission, therefore, believes that a short grace period may be appropriate as a matter of policy. It is the Commission's intention, however, that after January 1, 1977, savings and loan association directors will be charged individually in complaints which may from time to time issue challenging allegedly unlawful interlocks of this nature which it has reason to believe remain in existence on or after that date." (emphasis supplied)

This statement was interpreted as having legal effect in many quarters and many directors did in fact resign.

It took a lawsuit by a National League member to secure an admission by the FTC staff -- which was made only during oral argument on the case in Federal district court -- that the Policy Statement had no legal effect. Arthur H. Courshon, et al, v. FTC (No. 76-2308, D.D.C., January 28, 1977).

Perpetual Federal and the National League, the U. S. League of Savings Associations, the Federal Home Loan Bank Board (with numerous amicus briefs) and Mr. Courshon spent substantial amounts of time and money dealing with a lawsuit which should never have been brought in the first place -- on a subject that was clearly within the exclusive purview of the Federal Home Loan Bank Board.

The above actions by the FTC and affecting the savings and loan industry, we submit, has not brought one iota of benefit

to savings and loan depositions and borrowers. They are well protected by the agencies which regulate savings and loan associations.

Congress should acknowledge this fact and reaffirm the exemptions for savings and loan associations which were approved by both the House and Senate in 1978.

Sincerely,

Harding deC. Williams
General Counsel

Mr. RINALDO. We would like an appraisal of the burden nationally, not just on one institution. We are not in the business of legislating in terms of individual institutions, but to meet national needs and national problems.

Could I amend that to include also, as a result of incurring potential costs, a comparison of your situation with that of other banking institutions.

Mr. SCHEUER. Thank you very much. Thank all of you.

The hearing is hereby adjourned until 10 tomorrow morning, in the same room.

[Whereupon, at 1:30 p.m. the subcommittee adjourned; to reconvene Thursday, March 1, 1979, 10 a.m.]

AUTHORIZATIONS FOR THE FEDERAL TRADE COMMISSION AND GENERAL OVERSIGHT ISSUES

THURSDAY, MARCH 1, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2322, Rayburn House Office Building Hon. James H. Scheuer, chairman, presiding.

Mr. SCHEUER. We will now commence the second hearing of the Consumer Protection and Finance Subcommittee on the authorization bill for the Federal Trade Commission.

This morning we are going to hear a very interesting panel on the legislative veto. In the last Congress two Federal Trade Commission conference reports were debated in the House and defeated largely because of the failure to include a legislative veto provision that was not subject itself to Presidential veto.

Furthermore H.R. 2367, sponsored by Mr. Rinaldo and Mr. Broyhill, also contains a legislative veto. So there seems to be a considerable bipartisan support for a legislative veto.

Today we have a very distinguished panel of witnesses who will appear before us. It is, perhaps, the most credible and thoughtful that has ever been collected at one place at one time. The issue involves enormously important constitutional issues as well as very important public policy issues. In the past there has been far too much heat generated on this issue as compared to the light that has been focused on it.

I am sure this morning's hearings will be of interest to all concerned.

With that let us invite to join us at the table Congressman Bob Eckhardt, our distinguished colleague on this committee and chairman of the distinguished Oversight and Investigations Subcommittee and former chairman of this subcommittee: the Honorable Elliott Levitas, very distinguished and thoughtful colleague who has been the prime mover in Congress of the legislative veto; Prof. Bernard Schwartz of New York University School of Law, a distinguished scholar and social critic; and Mark Green, director of Congress Watch.

If you will all come up to the table.

STATEMENTS OF HON. BOB ECKHARDT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS; HON. ELLIOTT H. LEVITAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA; MARK GREEN, DIRECTOR, CONGRESS WATCH; AND BERNARD SCHWARTZ, PROFESSOR, NEW YORK UNIVERSITY SCHOOL OF LAW

Mr. SCHEUER. We are going to ask each of you to speak more or less briefly on your position on the subject. We will then, I am sure, have a great deal of questioning to do. We will keep it very informal. I have suggested to my two colleagues here that if either of them have questions or comments to make as you are testifying, it is not written in the stars that they must wait until the end of your testimony.

We may break in from time to time to express astonishment, chagrin or even agreement. So with these preliminary words we are happy to hear you and let me first ask my colleague Jim Broyhill if he has a word?

Mr. BROYHILL. No. I am just delighted to see each of these witnesses here and you have already pointed out I am a supporter of the concept of the legislative veto and have included that concept in a bill that Mr. Rinaldo and I introduced that would authorize appropriations for the operations of the Federal Trade Commission for the next 3 years along with other amendments that we have included.

With that we can proceed.

Mr. SCHEUER. My colleague from North Carolina, Rich Preyer.

Mr. PREYER. No comment.

I too want to welcome this distinguished panel. I look for light and possibly some heat.

Mr. SCHEUER. If they don't provide the heat I am sure we will.

Congressman Eckhardt, you may proceed.

Mr. ECKHARDT. Thank you, Mr. Chairman.

I am in a somewhat unusual position in this subcommittee today but I enjoy being here.

Mr. SCHEUER. Let us say you are here in quite a few categories. You are here as former chairman of the subcommittee. You are here as chairman of a distinguished sister subcommittee and you are also here because you are by far the most distinguished and credible constitutional expert in the House of Representatives and you have proven that over your four or five terms of service on many, many issues.

We value you not only as a thoughtful public policy critic in the House, one of our most thoughtful, but as the single most authoritative constitutional commentator in the House. We are happy to have you in all those categories.

Mr. ECKHARDT. It is possible I got that reputation because I have little trepidation in getting into a field that is thorny with problems.

At the outset I would like to say that I feel that under the precise language of the Constitution——

Mr. SCHEUER. Excuse me, Bob, I made a mistake. I meant to ask Elliott Levitas to start off, because he is a supporter of the legislative veto. I think that makes a little more sense in terms of the way the debate should go. I apologize for being thoughtless. I don't

know why I was thinking about Eckhardt. Elliott, I apologize to you.

This basically is your proposal. I think it probably would make sense for us to hear the case for it and then we will hear some comments by Bob Eckhardt. Then we will go to Bernard Schwartz and we will end up with Mark Green. That is the way we had this structured.

As the foremost and most thoughtful and eloquent exponent of the legislative veto, Mr. Levitas, we are very happy to hear your statement of the case and please go forward.

STATEMENT OF HON. ELLIOTT H. LEVITAS

Mr. LEVITAS. Thank you Mr. Chairman.

As I look around this table I think that perhaps we are setting up the first session of the Camp David on legislative veto issue. I hope that we will be able to bring about accord and harmony with much more certainty and dispatch than apparently we have been able to accomplish between Israel and Egypt. I think this discussion is good, and I commend the committee and you, Mr. Chairman, for this type of format which brings together at one point and in one place the varying points of view rather than each of us going out and taking our own positions without the benefit of critical response in either direction which is needed to get to the bottom of any issue.

I have a prepared statement which I would like to be made a part of the record.

Mr. SCHEUER. It is so ordered.

Mr. LEVITAS. I will refer to it without trying to read it in its entirety. However, I would like to point out in addition to the specific legislation which your subcommittee is considering with respect to the Federal Trade Commission, there has also been introduced legislation, H.R. 1776, which will provide for legislative veto on all regulations issued by the agencies of Government.

It is the same as H.R. 12048 that was favorably reported by the Judiciary Committee in the 94th Congress.

Although the enactment of comprehensive legislation providing for congressional veto of administrative rules and regulations is my primary goal, I believe that we need to deal with the problems each regulatory agency presents as we go along. If you are out in the wilderness and in danger of exposure, you can't wait until a house is built to your specifications. While you are building, you must shelter yourself and protect yourself whatever way you can. This is the sort of serious danger in which I see this country slipping because of overexposure to Government regulations, and we cannot wait until comprehensive legislation is passed. The separate efforts will complement the comprehensive effort.

I do not intend at this juncture to discuss at length the issue of constitutionality of the legislative veto nor its various forms, whether it is a one-House veto, a two-House concurrent resolution, a modified one-House or the form that was in the legislation which the House passed in the last session with respect to the Federal Trade Commission. I think we will probably get into that, and I invite discussion. I am prepared to deal with these questions. I

prefer the form that was in the legislation which the House passed in the last session with respect to the Federal Trade Commission.

I will simply say this, though, on that subject of constitutionality. The constitutional issue is not going to be decided by this subcommittee, by me, by Bob Eckhardt, by the Attorney General, or by others who advocate a particular position. Ultimately the constitutionality is going to be decided by the Supreme Court of the United States. I have heard some good arguments on both sides of the issue, some more ingenuous arguments on some side of the issue but I think——

Mr. SCHEUER. Which side of the issue were the ingenuous arguments on?

Mr. LEVITAS. I may be identifying individuals so I would rather not say. I would leave that aside and say at the heart of this issue of legislative veto of administrative rules and regulations is the simple but serious question: Who makes the laws in this country? Is it the elected representatives of the people, or the unelected bureaucrats?

FTC rules are in effect, laws. They have the same force and effect of statutory law. The FTC deals with the same breadth of economic policy as Congress itself. The question becomes then: Are we going to continue to let unelected bureaucrats continue to pass laws without effective congressional control?

The legislative veto mechanism is perhaps most appropriate when applied to FTC rules. The FTC has very broad and awesome powers to write rules and regulations governing virtually every aspect of the economy and commerce in this country.

The FTC derives this broad and awesome rulemaking authority from one section of the Federal Trade Commission Act, section 5, which states that the FTC has the power to adopt rules to eliminate unfair and deceptive trade practices. That is all that it says. From that point forward, these unelected bureaucrats make law.

On the basis of this authority, the FTC has engaged in rulemaking proceedings covering such diverse groups as hearing aid manufacturers, funeral home directors, doctors and dentists, physical fitness center operators, franchisors, and food processors, to name a few.

The Agency has promulgated rules or is in the process of proposing rules on holder-in-due-course commercial notes, used car sales and television advertising aimed at children. It has adopted an optical advertising regulation which essentially repeals laws passed by elected legislatures of 40 States—an FTC regulation written by unelected bureaucrats which can repeal the laws passed by duly elected members of 40 State legislatures.

I cite these examples of FTC proceedings to illustrate the vast scope of the FTC's authority. The action of the FTC itself has best demonstrated the breadth of its power to the public and the need for a congressional veto control it.

I am not quarreling here with the outcome of each of these rulemaking proceedings. Some of the regulations may be good, and others are surely bad. I am arguing for accountability. The FCC can promulgate far ranging regulations which have the force and effect of statutory law. Five commissioners, or in some cases, two commissioners, at the FTC can make law.

I dare say that most of the Members of Congress—perhaps even some Members here today—cannot even name the FTC Commissioners, yet they are making law, just like Congress. Not one of them, however, has suffered the inconvenience of running for public office nor are they accountable for their legislative acts at the polls a year from next November.

Of course, Congress has delegated to the FTC the authority to promulgate regulations. In giving the FTC the right to engage in such broad rulemaking, Congress has the responsibility to guarantee that the Agency exercises this authority in a responsible manner. Congressional veto of FTC regulations provides us with an effective mechanism to guarantee that the Commission's interpretation of what constitutes unfair and/or deceptive trade practices, does not run far afield from Congress intent in enacting the FTC Act.

Not only is the scope of the FTC rulemaking authority broad, but it is a so-called independent agency. The FTC is not an executive branch agency. It does "belong" to the President. It is really a creature or an extension of the Congress. As such, the FTC maintains that it is not subject to control by the President. If it can object to such simple directives from the elected President as writing regulations in plain English, how will it deal with more controversial White House initiatives such as cost/benefit analyses.

If the elected President cannot exercise any control over FTC rulemaking, and Congress cannot exercise any control over FTC rulemaking, the result is that the FTC is a freewheeling minilegislative, not answerable to anyone. In the words of Judge Lee Loevinger, an attorney who was an FCC Commissioner himself, the FTC has all the independence of the judiciary but with the power, not exercised by the judiciary, to legislate. At this point, Mr. Chairman, I would like to make part of your record a letter which Mr. Loevinger wrote me which I introduced into the Congressional Record last year on the subject.

Mr. SCHEUER. Without objection, it is so ordered. [See p. 147.]

Mr. LEVITAS. If that assessment is correct and the FTC is not subject to executive or congressional control, who then is it accountable to?

In our system of government, a system of checks and balances, such a situation should not exist. Simply because it has existed in the past does not mean that we should continue it. Congress, as the creator of the FTC, must take this situation in hand. Congress, who delegated rulemaking authority to the FTC, must exercise some sort of control over it.

Legislative veto of FTC regulations is a way to achieve this. Since Congress has the authority to delegate rulemaking power to the FTC, it can delegate less than all that power or it can condition or limit that power by making it subject to a congressional veto.

This is nothing new. It has been done before. There are numerous statutes providing for legislative review or executive action. In fact, it is not even radical. Attorney General Griffin Bell, in a recent speech at the University of Kansas, proposed abolishing the rulemaking authority of all the independent regulatory commissions. In comparison, legislative veto is a mild remedy for an overwhelming problem.

Since 1932, approximately 159 different acts of Congress with 214 separate provisions mandating some sort of congressional approval or disapproval of executive implementation of those laws, have been passed. Even in the last Congress, President Carter signed into law 38 bills containing congressional approval or disapproval provisions or amendments to such provisions previously enacted.

Section 1013 of Jefferson's Manual for the 95th Congress lists the many laws providing various procedures whereby Congress has reserved to itself the right to review, by approval or disapproval, certain actions of the executive branch or independent agencies, and in one case, rules of evidence recommended by the Supreme Court.

Congressional veto would give us a measure of control over the FTC. Not only would it serve to guarantee greater accountability to Congress and congressional intent in passing the FTC Act, it would also provide a mechanism to make the FTC more accountable to individual citizens. If the agency regulators know that Congress is ready and willing to review and veto rules, we would find more carefully drafted rules, as well as more attention being paid to the views of citizens during the comment period.

The public would be a beneficiary of such a provision. How many times have you heard from your constituents that the bureaucracy has gone too far—that there must be some control over the bureaucracy. This is what legislative veto is all about. It is your opportunity to say that something is being done about controlling the bureaucracy.

Mr. Chairman, I want to emphasize the House has expressed itself very strongly in favor of legislative veto of FTC regulations. When the House originally considered the FTC authorization bill in the 95th Congress, a legislative veto amendment was passed by a 2-to-1 vote, 272 to 139.

I might say it was done by means of a motion to recommit with instructions, which is perhaps the most difficult way to do it, because a lot of Members simply come in and vote against the motions to recommit, so it was done the most difficult way with a vote of almost 2 to 1.

Thereafter on two separate occasions, the House voted to reject the FTC conference report because it did not contain a legislative veto of FTC regulations. This first vote was 146 to 255; the second vote was 175 to 214. That two-time rejection of a conference report constituted unprecedented action by the House.

I have every reason to believe that in the 96th Congress, support for the legislative veto is even stronger. I also have reason to believe that the Senate is now ready to look at this proposal more favorably. In light of this, I strongly urge you to report an FTC reauthorization bill which contains a strong legislative veto provision. I am sure you are aware of the sentiments which the House has on this issue and will not work to stymie those sentiments. Whatever your personal views are on this issue, it must be recognized that the House has overwhelmingly exressed itself on three occasions on this very issue and on this very bill. As a Committee of the House, I am confident that you will give the House the opportunity to do it again.

Thank you, Mr. Chairman.

[Testimony resumes on p. 148.]

[Mr. Levitas' prepared statement and attachments follow:]

STATEMENT OF HON. ELLIOTT H. LEVITAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. Chairman, I wish to express my appreciation to you and the other Members of this Subcommittee for inviting me to testify on the subject of legislative or Congressional veto. As you know, since coming to Congress in 1975, I have directed a great deal of attention to this issue of legislative veto, particularly with respect to rules and regulations. In this Congress, I am the principal sponsor of comprehensive legislation, H.R. 1776, amending the Administrative Procedures Act, to provide for legislation veto of all administrative rules and regulation. To date, this bill has over 150 cosponsors in the House. I expect that it will be passed by the House during the 96th Congress. The Rules Committee has promised to hold hearings on H.R. 1776, and it is identical to a bill reported in the 94th Congress by the Judiciary Committee to which H.R. 1776 has been jointly referred.

Although the enactment of comprehensive legislation providing for Congressional veto of administrative rules and regulations is my primary goal, I believe that we need to deal with the problems each regulatory agency presents as we go along. If you are out in the wilderness and in danger of exposure, you can't wait until a house is built to your specifications. While you are building, you must shelter yourself and protect yourself whatever way you can. This is the sort of serious danger in which I see this country slipping because of over-exposure to government regulations, and we cannot wait until comprehensive legislation is passed. The separate efforts will compliment the comprehensive effort.

I am pleased that you have decided to devote a full day of the hearings on the FTC re-authorization to the subject of legislative veto of FTC regulations. As you may recall, when the House considered the second conference report on the FTC Act Amendments last September, one of the reasons I urged its defeat was that I felt this issue was so important that it needed to be thoroughly examined and debated without the pressure of passing a conference report in the closing days of the 95th Congress that would have put the FTC off limits for the next three years. I am delighted, then, to have this opportunity to participate on this distinguished panel to discuss this subject. I would like to point out that my statement does not address the issue of constitutionality of the legislative veto, nor the various forms legislative veto may take such as one-House, two-House, modified one-House, or the form that was contained in

in the second conference report last year. However, I invite discussion on these matters, and will be happy to answer any questions.

At the heart of this issue of legislative veto of administrative rules and regulations is the simple, but serious question: Who makes the laws in this country? Is it the elected representatives of the people, or the unelected bureaucrats?

FTC rules are, in effect, laws. They have the same force and effect of statutory law. The FTC deals with the same breadth of economic policy as Congress itself. The question becomes then: Are we going to continue to let unelected bureaucrats continue to pass laws without effective Congressional control?

The legislative veto mechanism is perhaps most appropriate when applied to FTC rules. The FTC has very broad and awesome powers to write rules and regulations governing virtually every aspect of the economy and commerce in this country. The FTC derives this broad and awesome rulemaking authority from one section of the Federal Trade Commission Act, Section 5, which states that the FTC has the power to adopt rules to eliminate "unfair and deceptive trade practices." That is all that it says. From that point forward, these unelected bureaucrats make law.

On the basis of this authority, the FTC has engaged in rulemaking proceedings covering such diverse groups as hearing aid manufacturers, funeral home directors, doctors and dentists, physical fitness center operators, franchisors, and food processors, to name a few. The agency has promulgated rules or is in the process of proposing rules on holder-in-due-course commercial notes, used cars sales and television advertising aimed at children. It has adopted an optical advertising regulation which essentially repeals laws passed by elected legislatures of forty States -- an FTC regulation written by unelected bureaucrats which can repeal the laws passed by duly-elected members of forty State legislatures.

I cite these examples of FTC proceedings to illustrate the vast scope of the FTC's authority. The action of the FTC itself has best demonstrated the breadth of its power to the public and the need for a Congressional veto to control it.

I am not quarreling here with the outcome of each of these rulemaking proceedings. Some of the regulations may be good, and others are surely bad. I am arguing for accountability. The FCC can promulgate far-ranging regulations which have the force and effect of statutory law. Five commissioners at the FTC can make law. I daresay that most of the Members of Congress cannot even name the FTC Commissioners, yet they are making law, just like Congress. Not one of them, however, has suffered the inconvenience of running for public office nor are they accountable for their legislative acts at the polls a year from next November.

Of course, Congress has delegated to the FTC the authority to promulgate regulations. In giving the FTC the right to engage in such broad rulemaking, Congress has the responsibility to guarantee that the agency exercises this authority in a responsible manner. Congressional veto of FTC regulations provides us with an effective mechanism to guarantee that the Commission's interpretation of what constitutes "unfair and deceptive trade practices" does not run far afield from Congress' intent in enacting the FTC Act.

Not only is the scope of the FTC rulemaking authority broad, but it is a so-called independent agency. The FTC is not an executive branch agency. It does not "belong" to the President. It is really a creature or an extension of the Congress. As such, the FTC maintains that it is not subject to control by the President. If it can object to such simple directives from the elected President as writing regulations in plain English, how will it deal with more controversial White House initiatives such as cost/benefit analyses.

If the elected President cannot exercise any control over FTC rulemaking, and Congress cannot exercise any control, the result is that the FTC is a free-wheeling mini-legislature, not answerable to anyone. In the words of Judge Lee Loevinger, an attorney who was an FCC Commissioner himself, the FTC has "all the independence of the judiciary but with the power, not exercised by the judiciary, to legislate." (I would ask at this time that the entire text of Judge Loevinger's letter be made part of the record.)

If that assessment is correct and the FTC is not subject to executive or Congressional control, who then is it accountable to?

In our system of government, a system of checks and balances, such a situation should not exist. Simply because it has existed in the past does not mean that we should continue it. Congress, as the creator of the FTC, must take this situation in hand. Congress, who delegated rulemaking authority to the FTC, must exercise some sort of control over it. Legislative veto of FTC regulations is a way to achieve this. Since Congress has the authority to delegate rulemaking power to the FTC, it can delegate less than all that power or it can condition or limit that power by making it subject to a Congressional veto.

This is nothing new. It has been done before. There are numerous statutes providing for legislative review or executive action. In fact, it is not even radical. Attorney General Griffin Bell, in a recent speech at the University of Kansas, proposed abolishing the rulemaking authority of all the independent regulatory commissions. In comparison, legislative veto is a mild remedy for an overwhelming problem.

Since 1932, approximately 159 different Acts of Congress with 214 separate provisions mandating some sort of Congressional approval or disapproval of executive implementation of those laws, have been passed. Even in the last Congress, President Carter signed into law 38 bills containing Congressional approval or disapproval provisions or amendments to such provisions previously enacted. Section 1013 of Jefferson's Manual for the 95th Congress lists the many laws providing various procedures whereby Congress has reserved to itself the right to review, by approval or disapproval, certain actions of the executive branch or independent agencies, and, in one case, rules of evidence recommended by the Supreme Court.

Congressional veto would give us a measure of control over the FTC. Not only would it serve to guarantee greater accountability to Congress and Congressional intent in passing the FTC Act, it would also provide a mechanism to make the FTC more accountable to individual citizens. If the agency regulators know that Congress is ready and willing to review and veto rules, we would find more carefully drafted rules, as well as more attention being paid to the views of citizens during the comment period.

The public would be a beneficiary of such a provision. How many times have you heard from your constituents that the bureaucracy has gone too far -- that there must be some control over the bureaucracy. This is what legislative veto is all about. It is your opportunity to say that something is being done about controlling the bureaucracy.

Mr. Chairman, the House has expressed itself very strongly in favor of legislative veto of FTC regulations. When the House originally considered the FTC authorization bill in the 95th Congress, a legislative veto amendment was passed by a 2 to 1 vote, 272 to 139. On two separate occasions, the House voted to reject the FTC conference report because it did not contain a legislative veto of FTC regulations. This first vote was 146 to 255; the second vote was 175 to 214. That two-time rejection of a conference report constituted unprecedented action by the House.

I have every reason to believe that in the 96th Congress, support for the legislative veto is even stronger. I also have reason to believe that the Senate is now ready to look at this proposal more favorably. In light of this, I strongly urge you to report an FTC re-authorization bill which contains a strong legislative veto provision. I am sure you are aware of the sentiments which the House has on this issue and will not work to stymie those sentiments. Whatever your personal views are on this issue, it must be recognized that the House has overwhelmingly expressed itself on three occasions on this very issue and on this very bill. As a Committee of the House, I am confident that you will give the House the opportunity to do it again.

I commend you, Mr. Chairman, for holding these hearings and giving this issue the attention it deserves.

CONGRESSIONAL RECORD--96th CONGRESS, FIRST SESSION, VOL. 125, NO. 20, THURSDAY, FEBRUARY 22, 1979

ATTORNEY GENERAL WARNS OF REGULATION DANGER

NOTES ON THE SITUATION: A CRITIQUE

Benjamin Harvey Hill was a distinguished Georgian who did his best prior to the Civil War to prevent the secession of Georgia from the Union. Having lost, he joined the Confederacy. Following the War and Reconstruction, he became a United States Senator from Georgia, but it was during the Reconstruction that he became prominent by reason of a series of newspaper columns entitled, *Notes on the Situation*.[1] I have appropriated that title for my remarks tonight.

What happened to the South during the Reconstruction is a subject of continuing interest to political scientists as well as to historians. It was a period when one part of our country was under occupation by the armed forces of the nation. It was a period during which the national Congress engaged in a concerted effort to reconstitute the political and economic structure of the conquered territory.

We have no occupation as such today, but the entire nation—not just the South—is presently regulated by a force more pervasive and more powerful than all the Union armies of the Reconstruction. That force is the federal bureaucracy, which by laws and regulations, by orders and printed forms, and by a thousand other unseen methods subjects all of us to some degree of federal scrutiny and control.

It will be my thesis tonight that if the Republic is to remain viable, we must find ways to curb, and then to reduce, this government by bureaucracy. We must return to government by directly accountable public officials—local, state, and federal. The only other alternative, I predict, is to have an increasingly costly and inefficient form of government, wholly removed from democratic control—and I use the lower case "d" in democratic here! When our society is threatened from within and without by such awesome problems as inflation, military aggression, poverty, and world famine, this evergrowing bureaucracy is more than a painful nuisance: it is a prescription for societal suicide.

In elobarting on this thesis, I speak to you from the vantage point of a public official, one who has served in the Federal Judiciary and who now serves in the Executive Branch. My observations are not those of a political scientist or a historian, although I claim to be an amateur in each field.

Footnotes at end of article.

Obviously, for the next half hour, I will be speaking to you as a concerned citizen schooled in public service and not as a spokesman for the Administration. These thoughts are definitely my own—as you will shortly hear!

Let me begin by noting my credentials to criticize the federal bureaucracy. As Attorney General I am in charge of some 55,000 employees within the Justice Department, who are spread over 23 separate component offices, bureaus, and divisions. Our budget, which is small by comparison, will come to about two and one-half billion dollars for fiscal year 1979.

I am not alone in concluding that the unchecked growth of the federal bureaucracy may be a mortal threat to our historic forms of government. New York's Senator Daniel Patrick Moynihan, the eminent scholar and former Ambassador to India, gave a memorable address last March in New York City, in which he spoke of the imperial presidency, the imperial Congress, and even the imperial judiciary.[2] He concluded that the inevitable concomitant of "imperial" government was the spread of bureaucracy from the executive branch to the legislative and the judicial branches as well. If I may quote from that speech: "* * * the long run effect will be to create government by submerged horizontal bureaucracies that link the three branches of government, speaking their own private language, staying in place while their Constitutional masters come and go."[3]

It is in the vein of Senator Moynihan's remarks that I speak to you tonight about our federal government. The restlessness of the American people is now manifesting itself in the notion of calling a Constitutional Convention through an application from two-thirds of the state legislatures.[4] The Founding Fathers gave us this alternative way of amending the Constitution, doubtless foreseeing that the people might some day lose control of the federal government and even of the Congress to the extent that they could not achieve their will.

This state of governental affairs is worth pondering. Lack of control has a good deal to do with the scourge of inflation, fueled in part by government spending; it has much to do with the present flood of stultifying federal regulations; and it has much to do with citizen frustration, caused by a seeming inability to govern ourselves.

A recent Wall Street Journal editorial made the clearest statement about this phenomenon: "There is a clear sense in this country that government has become highly wasteful of resources and too big and internally contentious to respond to changing circumstances and needs. The time required to get the necessary government clearances and build a single electric power plant in the U.S. is now triple the length of time the U.S. needed to mobilize for and fight World War II."[5] That is a cold and sober observation.

Senator Moynihan has provided us with a short and accurate description of the problem, but few have gone beyond rhetorical attacks on that problem. It has often been said that it is better to light one candle than to curse the darkness. As a lawyer, I put it in different terms in stating that one should not rail at the law. By the same token, we should not rail at the government; rather our approach should be to correct the government.

Therefore I would like to make a few modest suggestions which, hopefully, may assist in turning the tide.

These suggestions are in the nature of refurbishment. They in no way undermine or even disparage our system. They are corrective in nature and are asserted under our duty as citizens to seek to improve the system. It is through such duty that we replenish our democracy under our constitutional system.

As a first step, I would amend the Constitution to provide one six-year term for the President.[6] This is certainly not a new idea, having been originally proposed in Congress in 1826 and reintroduced some 160 times since then. It has been advocated by several Presidents. But it is an idea whose time may have come. This change will enable a President to devote 100 percent of his or her attention to the office. No time would be spent in seeking reelection. Under the present system, the President serves three years and then must spend a substantial part of the fourth year in running for reelection, assuming a President decides to seek reelection.

Moreover, the current four year term is actually too short to achieve any of the major changes and improvements that a President should accomplish. The funding cycles are so long that it is well into a President's third year before his own program changes take effect. This leaves the bureaucracy in control.

A single six-year term would permit the long-term, steady planning and implementation that our government needs, plus saving that fourth year now lost to campaigning.

Second, I would propose a complete review and reduction of the regulating and litigating authority of the independent federal agencies. The President has the authority now to curb those departments within the Executive Branch of the government, but, to the surprise of most Americans, the independent agencies such as the Federal Trade Commission, the Consumer Products Safety Commission, and the Nuclear Regulatory Commission are all wholly separate and not subject to his control at all. Most have the power to promulgate regulations and rules that affect all of us, and many have the statutory power to litigate in the name of the United States, even when the positions being advocated by them are contrary to those taken by the Department of Justice. And their regulations are legion and growing every day.

Third, I would place a severe restriction on the staffs allocated to the President, the Congress, and even the federal courts. More staff invariably means more time in which to evolve more ideas about how to increase government control over the lives of the American people. But at the same time we make this move, we as citizens must also lower our own expectations about government. In large measure, the size of government has grown because we have all benefited at one time or another from some federal programs. The temptation is overwhelming to ask that the federal government pay for this project or to support that program, because then the average citizen cannot so easily perceive the linkage between the service delivered and the price paid in terms of the incremental federal tax dollars. Local officials and local citizens alike praise the award of federal grants to local communities, but they fail to recognize that such aid builds the federal bureaucracy and furthers the loss of local government control and responsibility.

As a former federal judge and now as Attorney General, in charge of our 3,800 lawyers in the Justice Department, I can personally testify to the growth of the federal judiciary and its increased own role in our lives. Again, this growth stems mostly from the desires of the American people, who now turn to the courts—and especially the federal courts—at the slightest provocation.[7] The caseload in turn fuels the demands for more and more judges and more and more support staff. The citizenry must reaffirm its commitment to other and more informal dispute resolution devices, or it cannot rightly complain when the judiciary, like its sister branches, continues to increase in size in response to cries for more services.

Fourth, I would urge Congress to sharply curtail, if not abolish, the so-called "rule-making" powers of the independent regulatory commissions. To most of you in this audience tonight, the concept of "rule-

making" might sound as though it were simply a procedural device, used to set out the rules under which a particular agency might conduct itself. That is far from the way that term is used in Washington! In truth, rule-making is a total substitute for all other forms of government, executive, legislative, and even judicial. Its abuse can stymie and frustrate the government of whole states and the operations of entire industries.

A classic case was presented to me while I was a Circuit Judge on the 5th Circuit.[1] The State of Texas had, pursuant to federal law, produced a state plan to control smog within the limits set down by federal regulations. The Environmental Protection Agency—or EPA, as we call it—disapproved the Texas plan and issued under its rule-making powers its own plan, which incorporated the Texas controls and a host of other more stringent requirements. To our surprise, we found that the EPA had established its standards for Texas largely on a study done for the Los Angeles, California, region, and that that study had been performed 15 years earlier, so as to be totally out of date. Yet, but for our order to the EPA, the citizens of Texas would today still be paying for a set of air quality controls promulgated by a set of faceless bureaucrats in Washington, based on a contracted study from Los Angeles, 15 years out of date. That is rule-making.

Of course, once the rule is made by an agency, all interested parties are given the right to comment. But the point is that rule-making has none of the safeguards of the legislative process and yet also is a non-adversary proceeding.

Fifth, I would urge strong support for President Carter's plans to reduce the volume, complexity, and cost of government regulations generally. As Attorney General, charged with enforcing the nation's laws, I have seen so much burden cast upon our citizens by the host of regulations. Federal regulations currently in force cover about 60,000 printed pages with thousands more in interpretations and guidelines. They are often written in defiance of the English language. Many of these regulations have retarded our real economic growth, by impairing our efforts to improve the productivity of labor and capital. And the paperwork and compliance burden on the smaller American businesses is simply impossible, so that the net result is wholesale disobedience, which then breeds disrespect for the law generally. If large numbers of our people begin to ignore our law, we will lose that cohesive attitude which has so symbolized our country and which has saved our Republic from anarchy and ruin on countless occasions.

For these reasons, the President has ordered the reduction in the number of regulations and a simplification of their reporting requirements.[2] Thus far, the number of reporting hours has been reduced by 85 million hours per year, or about 10 percent—which is equivalent to the work of 50,000 people for one year. He has also required major new regulations to be accompanied by a comprehensive cost-benefit study, so that the social and economic merits can be weighed against the likely costs. That, too, will reduce the number and complexity of regulations. Necessary and proper regulations will be continued but at the least expensive and burdensome level. And this will help in the fight against inflation, because each incremental cost added to a product or service by a new and perhaps unnecessary regulation further erodes the buying power of the American dollar. Such a watch over the cost of new regulations might be termed an "inflation impact statement."

And, sixth, we need to restore confidence and nonpartisan support to some of the fundamental units of the federal government. It is interesting to note that three Cabinet officials were exempted by the President from attending the recent mini-convention of the Democratic Party in Memphis: the Secretary of Defense, the Secretary of State, and the Attorney General. That suggests to me that these officers and their departments have to be seen as non-partisan, charged to work under neutral principles of law and policy. There is no room in our federal system for the vagaries and vicissitudes of partisan politics in the conduct of our national defense or our foreign relations; in like fashion, the laws of our land must be enforced without fear or favor as to party affiliation.

I mention this last fact, not because it relates to my earlier observations about bureaucracy, but because these three arms of the executive branch are the guardians of our freedoms. It is through their independence and professionalism that we American citizens have the liberties—and even license—to debate and discuss how our government is to be run. So in their strength lies the strength of the American people.

I can tell you that we at the Justice Department have tried very hard over the last two years to erase the ugly stains of the Watergate era and to create a truly independent, professional organization. I am proud that from the FBI to the DEA to our litigating divisions, we have accomplished that goal. We operate by and fully in accordance with the law, on a non-partisan basis, as President Carter pledged to do when he took office. That will be the pledge of the Department from now on.

As I said at the beginning of these remarks, I am speaking as an American citizen proud of his country's achievements over two centuries and yet fearful of what lies ahead for his nation. We have come to a crossroad in the history of this land—politically, morally, and philosophically. Each of us must now decide who, if anyone, shall be given this enormous power over our lives.

I have often said that the wisest use of power is not to use it at all. But if such power must be used, use it sparingly. That is the prescription I would write for our federal government today, for the temptation of great power may otherwise be too great to resist. As Abraham Lincoln so aptly put it in 1837, "I believe it is universally understood and acknowledged that all men will ever act correctly, unless they have a motive to do otherwise."[3]

President Carter and I share a common conviction that it is time to return government to the people. We believe that we have no roving commissions to do good, that such an attitude on the part of government constitutes a gross abuse of power. Our Administration is committed to devolving power back to the people of this country, to save the nation from its own ever-growing government.

So, in closing, let me once again refer to Benjamin Harvey Hill, that distinguished Georgian and American, whose statue in the Georgia State House bears this inscription: "Who saves his country saves himself, saves all things and all things saved do bless him. Who lets his country die lets all things die, dies himself ignobly and all things dying curse him." Thank you.

FOOTNOTES

[1] B. H. Hill, *Notes on the Situation*, (Augusta, Ga., 1967).

[2] Senator Daniel Patrick Moynihan, "An Imperial Presidency Leads to an Imperial Congress Leads to an Imperial Judiciary: The Iron Law of Emulation," Herbert H. Lehman Memorial Lecture, March 28, 1978.

[3] *Id.*, p. 17.

[4] U.S. Constitution, Art. V.

[5] *Wall Street Journal*, January 22, 1979, p. 20.

[6] *See* Hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, S.J. Res. 77 (to amend the Constitution by providing a single, six-year term for the President), October 28-29, 1971. *See also* Lyndon B. Johnson, *The Vantage Point*, p. 344 (Holt, Rinehart: New York, 1971).

[7] *See*, e.g., "Why Everybody Is Suing Everybody," *U.S. News and World Report*, December 4, 1978, pp. 50 et seq.

[8] *State of Texas* v. *Environmental Protection Agency*, 499 F2d 289 (5th Cir. 1974), *stay denied*, 421 U.S. 945 (1975).

[9] Executive Order 12044, March 23, 1978.

[10] Abraham Lincoln, Speech in the Illinois Legislature, January 11, 1837.

WASHINGTON, D.C.
May 8, 1978.

HON. ELLIOTT LEVITAS,
House of Representatives, Congress of the United States, Washington, D.C.

DEAR CONGRESSMAN LEVITAS: The Antitrust and Trade Regulation Report in a recent issue reports that you are the leader of a group in the House of Representatives which is insisting on the right of Congressional veto for FTC Trade Regulation Rules.

I am a lawyer engaged in private practice who has had many years experience with the FTC and has in the past had a number of years experience as a government lawyer, both in the Department of Justice and in administrative agencies. Based on many years of experience I simply wish to convey to you an expression of my support for your position.

It is paradoxical and anomalous that the FTC and other administrative agencies have objected to being subject to orders issued by the White House, even on such noncontroversial subjects as writing regulations in plain English. The objection has been that the agencies are the creatures of Congress and, therefore, not subject to control by the Executive. However, now that Congress proposes to exercise direct control, the FTC comes in and says that this is an infringement of its independence. The net effect of this position is that the FTC (and, presumably, other administrative agencies) is a free floating independent lawmaking authority which is not answerable to anyone. If its several objections are correct, the FTC is not subject to control by the Executive or by Congress and it is not answerable to any electorate. This would give it all of the independence of the judiciary but with the power, not exercised by the judiciary, to legislate. I submit that this is an illogical paradox and a monstrosity.

In all candor, I must admit to considerable doubt that the Congressional veto will be exercised often or effectively. However, its mere existence may have some salutary effect in restraining the FTC and its staff. In recent years the FTC and its staff have become one of the least restrained, and, sometimes, least responsible, agencies in Washington. This limited and reasonable step toward providing a warranted restraint on the legislative action of the FTC appears to be entirely reasonable and I hope that you and the House of Representatives will adhere to the position which you have taken.

Sincerely yours,

LEE LOEVINGER.

Mr. SCHEUER. Thank you very much, Elliott.

Rich?

Mr. PREYER. Nothing.

Mr. LEVITAS. If I may, Mr. Chairman, I have with me a copy of the full text of the Attorney General's speech to which I referred to. It is very interesting.

Mr. SCHEUER. Why don't we put the speech and the letter in the record right after the prepared remarks.

Our distinguished colleague, Bob Eckhardt.

STATEMENT OF HON. BOB ECKHARDT

Mr. ECKHARDT. Mr. Chairman, what I have to say is not so directly addressed to the bill as to the proposition of legislative veto. If I understand the gentleman from Georgia correctly, I believe that I somewhat disagree with him on one very fundamental question, and that is that I believe very firmly that it is the duty of Congress itself to construe the Constitution and not to relegate that activity to the courts.

However, constitutional issues are not raised as directly as some persons who agree with my position generally believe. In terms of the Constitution itself, the legislative authority is by far the predominant authority. No. 1, its powers are set out in article 1. It is called upon to enact the laws, which means it is given authority to make all policy within the general range of Federal authority; the executive department, on the other hand, is called upon to faithfully carrying out those laws.

Therefore I believe that Congress may provide for legislative veto and may pattern the devise to the need.

The Constitution does, though, constrict the effective use of the legislative veto. There is no way that you can get by the express terms of article 1, section 7, second paragraph with respect to the President's authority himself to veto anything that calls for the concurrence of both bodies. Thus, it seems to me that you cannot effectively provide for a two-House legislative veto.

It itself may be vetoed. The dilemma then arises in this way. Those who support the legislative veto insist that Congress ought to have a second opportunity to see whether the executive department has carried out the congressional mandate. If Congress provides for a two-House veto or if it provides for what amounts to the same thing—the requirement of concurrence by acquiescence—for then the provisions of article 1, section 7 require presentation to the President and thus permit his veto.

On the other hand, if Congress uses the one-House veto, permitting either House to curb the power of the administrative agency, it cannot be said that the ultimate result is a result which is an interpretation of congressional intent. It constitutes the action of one House, not Congress at large.

Now I do not argue that the one-house veto should never be used. As a matter of fact, I have voted for a number of bills in which it has been used, and there are cases in which it is appropriate. The reason I argue against using it extensively or using it in a case in which the committee and the House are addressing themselves to a precise situation, as in the case of a Federal Trade Commission rule, is that it abuses the use of the congressional veto.

Mr. SCHEUER. Bob, could you tell us the circumstances under which you think the congressional veto would be appropriate.

Mr. ECKHARDT. It was appropriate, for example, when we were dealing with the very, very difficult and emergent problem of what to do about allocating gasoline to filling stations and No. 2 fuel oil to the East under freezing weather conditions. That was at the time when Torby Macdonald was chairman of the Subcommittee on Energy and Communications.

That was just before and during the time of the Arab embargo, and we simply did not have time to devise in detail the administrative process by which this extremely technical and difficult problem could be met. So we wrote general provisions concerning allocation and the policy underlying them. As I recall, we broadly delegated authority to the President. In such a situation, it is entirely appropriate to provide a legislative veto in order to curb, by the action of either House, the excessive use of an authority that had to be hastily granted.

Another instance in which we have provided for a legislative veto—and as I recall it is a one-House veto—is in the case of gasoline rationing. First, we do not know whether gasoline rationing should go into effect at all because the existence of conditions which would call for rationing do not presently exist. But we have recognized the fact that rationing might have to be put into effect very quickly and without an opportunity for very deliberate attention by Congress with respect to specific questions that might arise in connection with rationing. So we have said, let the President establish a plan for rationing gasoline, but, since we do not know the circumstances or the details of the plan, we want an opportunity for that plan to be submitted to the Houses of Congress for, as I recall, a one-House veto before the plan goes into effect.

What I am really arguing for here is to preserve all of the extensive powers of Congress—and I think they are very extensive—to be used in cases in which the circumstances demand, but not to institutionalize a process which turns the ordinary procedures of government upside down—so that the executive legislates and the Congress vetoes.

I think that if you overly extend the use by Congress of this sort of yoyo string-type control on legislation you do turn the Government on its head and, in the extreme case, you risk unconstitutionality. At the very least you create a serious confrontation between Congress and the Presidency.

In that case, the determination would be made by the court—which I think is a very bad thing. One reason why I said at the outset that I think Congress has very wide authority is to emphasize the fact that Congress, having such authority, should not use it to the very utmost bounds of congressional authority and thus to the very periphery of executive authority. I think it is always a mistake for either the executive department or Congress to come so close to the boundary line that they may go over it.

If one does transcend the boundaries, the Supreme Court ultimately makes a decision that the executive and the legislative departments might better have decided themselves by remaining clearly within their respective bounds, I am not so much arguing the question of constitutionality, as arguing the question of policy.

There has been a long period of confrontation between the House and the Senate. The situation that has existed is that the House has taken a rather institutionalized and, perhaps, an almost religious view in favor of the legislative veto.

The Senate, on the other hand, has been just as rigid against it. As a result, we have been confronted with situations in which the proper committees of Congress are not able to fashion their bills. Instead we have had to depend upon appropriations act, waiving the usual authorization act, or upon an extended appropriation.

It seems to me that it is really our duty to try to work out a problem in a more refined way than is likely to occur on the floor of Congress, where many Members find out what the issues are on their way across the street and take their signals from a green or red lights on the board. It seems to me, it is important for you and your subcommittee, to try to work out and resolve these kinds of difficulties at an earlier time. Now I would——.

Mr. SCHEUER. Excuse me, Bob. Could you tell us—and maybe it would be a good idea to have it on the record—what has been the intellectual underpinnings of the House's position for it and the Senate's position against it? Is it that we are preoccupied with the House as an institution and the Senate is preoccupied with the fact that the FTC and perhaps the other regulatory agencies are more liberal at the present time than the center of gravity at the House and Senate at the present time? Is the Senate thinking more about the current political mix, while the House is thinking about the institutional implications or the integrity of the legislative function in our constitutional responsibilities? Why is there this sharp difference between the House and Senate on this matter?

Mr. ECKHARDT. I think we are discussing intellectual differences here, as well as the questions you raise concerning political pressures and differences in the two bodies. I think the House has been preoccupied with the congressional veto because it has a bifercated appeal. It has an appeal to the staunch advocates of House authority, who have an institutional desire to control. To a certain extent, this appeals to those who have traditionally been liberals in the House, who have opposed for a very long time a Republican executive. It also has an appeal——

Mr. SCHEUER. It is not only liberals in the House who feel we lost our warmaking power and it took a lot of work to recover the warmaking power.

Mr. ECKHARDT. It drew upon liberals as defined by the questions which arose over Viet Nam.

Mr. SCHEUER. But that was not just a liberal-conservative matter. That was a concern for constitutional obligations of the House. Why is there such a different feeling on the Senate side?

Mr. ECKHARDT. The veto is also very appealing to a very conversative view—another feeling in the House—that regulatory agencies should be constrained. It also appeals, it seems to me to an increasing view the people who simply think that government has gone too far. But I want to address that for just a moment and show you how that is not a well-founded view.

When Congress feels that it may pull back power which it delegates, it is likely to delegate more authority than it would do if it were finally transferring power to an agency. If you want to re-

strict delegated power, you should restrict it by defining it more accurately and in more limited terms and with more restraint when the delegation is originally made. I suggest to you that there is no other way to restrict power effectively, because of this dilemma: If you attempt to restrict power delegated to an agency by providing a legislative veto, as I said before, you are constrained to make that legislative veto a one house veto in order to avoid making the legislative action subject to Presidential veto. But if you do this you take away the power of Congress, as a body, to make the decision. The answer is, I think, to make the rulemaking procedure fair and participatory.

Mr. Broyhill and I have tried to devise the fairest and most extensive due process in administrative procedure.

The negating effect of legislative veto of a regulatory action by an agency may adversely affect some businesses while it favorably affects others. The veto action is one which is political. If successful, it will overturn another procedure which was far more a adjudicatory in its process, if its process is as carefully devised as those which Mr. Broyhill and I have required in the case of the Federal Trade Commission.

Mr. BROYHILL. Would the gentleman yield there? We did work long and hard on devising a procedure that the Commission would use in the case of the Federal Trade Commission and also we adopted some of those same procedures with respect to some of the other agencies such as consumer products and others as well. However, what else could you do, what else could you put into those procedures? As you know we considered whether or not to permit unlimited cross-examination and we discarded that concept and adopted a limited cross-examination procedure in place of that. But what else could you do in order to make sure that all points of view are being considered by the Commission in making the decision?

Mr. ECKHARDT. My suggestion is that you should do nothing else. I think that the procedure is a very good one.

Mr. BROYHILL. The point I am getting at, if I could, is your statement that what we should do is to go back to the basic statute itself and to revise that statute in some way as to give further direction to the agency and, perhaps maybe this is not the time but I wanted to bring out the point that that is very difficult to do.

Now you were also saying that by use of the legislative veto you tend to retry the issue again in another forum politically. The problem is that the agencies are thinking up new concepts or new policies perhaps that the Congress has never had in mind in the first place or maybe they might be going beyond their authority. For example, the used car rule that the Federal Trade Commission has proposed, in my view, is going to require automobile dealers to put a warranty on the cars and as you know, that was actually prohibited in the statute itself.

That is, the statute said that the agency could not require anyone to put a warranty on a product no matter what it is. It did lay down certain standards that they had to follow if they put a warranty on a particular product but they had no authority to require one. In this case I think the agency has gone beyond that authority. So I am saying in these two instances, one where they go beyond the authority or, two, they come up with new concepts or

policies perhaps that the Congress did not have in mind whatsoever when they were writing the statute and this would be the only time that the Congress has had an opportunity to address that issue, it seems to me that as representatives of the people we have a responsibility to address ourselves to that.

Mr. ECKHARDT. I thought that was addressed to me.

Mr. SCHEUER. Let me interject here. I think we probably ought to get on with the other two witnesses so we can engage in a totally unfettered free-for-all which I see looming up on the horizon. I am very happy about it but I have a lot of questions to ask Bob and a lot to ask you and I am trying to restrain myself from getting into the fray at this point so, Bob, you finish.

Mr. ECKHARDT. I would finish by simply responding to Mr. Broyhill's question involved when an agency has gone beyond the authority of the statute. If the rule is reviewable, not on the basis of arbitrary and capricious action as in the ordinary case in rulemaking but on the basis of substantial evidence on the record as a whole the agency is effectively held within bounds of the statute by the court.

Mr. SCHEUER. Supposing there was, as a legal matter, but supposing on public policy grounds Congress did not like the rule at all?

Mr. ECKHARDT. Then the only response is simply for Congress, in its ordinary way, to carry a bill through both Houses of Congress, and change its policy. That is the way we have always done it in the past and it has been a rather good process for 200 years.

Mr. SCHEUER. Is there a hearing process anywhere in the legislative veto procedures?

Mr. LEVITAS. The resolution is introduced as any resolution. It is then referred to the committee with jurisdiction.

A resolution to veto FTC rule would be in fact referred to this committee.

Mr. SCHEUER. I am a little torn, Bob, and I am trying to restrain myself from getting in at this point because this is not the proper time for me to bust in. Temperamentally and philosophically I am a strong supporter of the Warranty Act and you know we have had discussions about having hearings to extend that warranty to 3, 4, or 5 years to encourage the automobile industry to make not only changes in specifications but changes in automobile design to make the automobile far more cost effective. It should be more effective not only from the point of view of the industry's profit center but from the point of view cf consumers' loss center, looking at it from the point of view of both production and use.

I totally support the FTC position on children's advertising. So as a philosophical matter I support you. On the other hand, as a Member of the institution, I must say all of us have felt a sense of frustration at passing laws and seeing bureaucrats who are not politically accountable administer our laws.

They sometimes seem to go into orbit and develop a lifestyle all their own and they are responsible to no one and we have seen them destroy the integrity of what we legislated. Looking at it from the long haul we are the peoples' representatives. We do the peoples' work and this is one way that we can retain a long rod and rap them on the knuckles once in a while and keep their minds concentrated on the fact that they get their powers from us and we

intend to keep them on a rein, not necessarily a short rein but a rein that comes back here, so I am torn between those two needs.

One, I sympathize with what this particular agency has done in a couple of areas that have really made a lot of brows go up over here. On the other hand I share a sense of frustration from serving around here for a number of terms as you have and seeing what they have done to our handiwork. All right, let us get on with the other two witnesses and then I will have to restrain myself less.

Prof. Bernard Schwartz, of New York University Law School, a thoughtful, articulate and scholarly member of the legal community who has made a great contribution not only to constitutional law but to public policy discussion.

Mr. RINALDO. Mr. Chairman, before the professor starts, may I make one comment. I started out as an opponent of the legislative veto, specifically because I had my doubts and still have my doubts as to its workability and the practical manner in which it would be applied. I was also concerned about the constitutional implications which Congressman Eckhardt discussed.

I have come around to the point that unless the panel here this morning can come up with something in lieu of the legislative veto that will enable a Congressman or Congress as a whole to show to their constituents and to the citizenry at large that we are responsive, then I feel that I have no alternative except to go along wholeheartedly with the legislative veto.

I have watched for years while we have fought, and Congressman Eckhard is well aware of this as are all my colleagues here, Federal Motor Vehicle Safety Standard 121. We have listened to panels of truck drivers tell us how that standard, that rule, that regulation, caused accidents, caused death on the road, and yet we have not been able effectively to do anything about it.

This is only one example of many. When I go back home and face my constituents, when I talk to a group of truckers and say we are practically powerless, they are absolutely bewildered, shocked, stunned and amazed. We have been fooling around with it for a few years. We have conducted hearings. We have looked into tbe matter but nothing has taken place. We are supposed to be legislating and yet we appear to be helpless.

So I would hope that those members of the panel who are opposed to the legislative veto would try to come up with an alternative device that would accomplish the same result. Give us a handle on the rules and regulations that seem to be produced at an ever increasing rate.

Mr. SCHEUER. Professor Schwartz.

STATEMENT OF BERNARD SCHWARTZ

Mr. SCHWARTZ. I was taken aback by Mr. Rinaldo's interruption. I feared he was going to dissent.

Mr. SCHEUER. It was not an interruption. We are free here to——

Mr. SCHWARTZ. I was fearing he was going to dissent from your gracious introduction. I was pleased he confined himself to the merits.

Mr. SCHEUER. The introduction stands in every respect and I am sorry I could not have been more effusive about it.

Mr. SCHWARTZ. Let me say first how pleased I am to be here. This is more than a perfunctory expression of courtesy. I think this is one of the most important issues before Congress at the present time and I want to make a few general comments. I have no prepared statement.

I want to talk primarily about the constitutional issue because I think it is a spurious one and I think that the way the issue is presented is indicative of a trend in the present day world, a trend which has to do first of all with the question of language, semantics if you will.

Those who most oppose a greater role for representative bodies—and I am not including any members of the panel or of this distinguished subcommittee—but as a general thing those who oppose a greater role for representative government tend to abrogate for themselves the words we tend to use as connotating representative

Most governments calling themselves democracies on peoples governments have nothing to do with representative government at all. And in the field we are concerned with control of administrative power, one of the great issues of this century and one which those who wrote the constitution did not even dimly foresee in this area, too, you have a misuse of language, congressional control is used in terms of congressional oversight.

I think most people think that that noun derives not from the verb oversee but from the verb overlook. The same with the legislative veto. I think this is a very unfortunate acceptance by the Congress of terminology which almost damns the device at the outset because it, the term, has pejorative connotations in terms of a constitutional infringement on the President's veto power.

Mr. SCHEUER. Which term?

Mr. SCHWARTZ. Legislative veto. The very term itself. This has nothing to do with the President's veto. It is a device for congressional control of administrative power. The term which ought to be used is the term which is used in the States and in other countries, legislative review of administrative rules and regulations.

Now I think, and perhaps I am being unscholarly in saying so, but I think the constitutional issue here is a red herring. I think there is no constitutional issue with all respect to those who feel the other way on this panel and elsewere. I think this is one of the few constitutional issues where the law on one side is relatively clear and I say this not only because this is my own point of view but it is the point of view which has been expressed for example by the only two Supreme Court justices who have spoken on the subject.

In the first place 3 years ago in *Buckley* v. *Valeo,* which dealt with the constitutionality of the amendments to the Federal Election Act, Justice White in a concurring opinion went out of his way—it had nothing to do with the case—but he went out of his way to say that in his opinion the provision, the legislative veto provision as it were—I have to use the terminology also—the legislative veto provision of the Federal Election Act was constitutional and he said in his concurring opinion that this has nothing to do with the provision of article I, section 7 which contains the clause subjecting every bill and every order, resolution or vote, which

requires the concurrence of both houses, to the President's veto power.

He said the FEC's regulations—I am quoting here—

> Are subject to disapproval but for a regulation to become effective neither house need approve it, pass it or take any action at all with respect to it. The regulation becomes effective by nonaction. This no more invades the President's powers than does a regulation not required to be laid before Congress.

Some years earlier, in 1949, Mr. Justice Clark when Attorney General submitted a memorandum dealing with the constitutionality of this type of provision and he said also that in this procedure—and I am quoting—

> In this procedure there is no question involved of the Congress taking legislative action beyond its initial passage of the reorganization act nor is there any question involved of abdication by the Executive of his executive functions to the Congress. It is merely a case where the Executive and the Congress act in cooperation for the benefit of the entire government and the nation.

If you attack the constitutionality of this type of provision, the attack on the constitutionality of the legislative veto rests upon a spurious interpretation of the doctrine of separation of powers which has not been feasible, or practicable for over a century—not since the rise of the administrative process.

I think if you were to apply a literal watertight construction of the separation of powers, you would come up with the result that the very delegation of the power to enact rules and regulations to administrative agencies violates article I to which Congressman Eckhardt referred because clearly under this theory an agency like the FTC is enacting laws because otherwise how can Congress, in voting a resolution of disapproval, be exercising a power which should be subject to the President's veto power?

Congress is exercising the kind of power here under this theory because the FTC is enacting law but if that is true that too would violate the Constitution. I think this kind of approach has been repudiated by courts, commentators, and legislators.

Mr. SCHEUER. What you are saying is that if it is constitutional for us to extend some legislative powers to an agency, it therefore flows that the way they exercise those powers is a legitimate constitutional concern of ours and that you can't say the latter is unconstitutional while saying the former is constitutional?

Mr. SCHWARTZ. You can't have it both ways. I don't see how Congressman Eckhardt with his constitutional theory can say, "But sometimes this is constitutional."

Mr. ECKHARDT. Will you please yield a moment? I am trying to agree with you and I thought I had agreed with you from the beginning. I have not said it is unconstitutional.

Mr. SCHWARTZ. You did imply that if it were a two-House type of procedure then it would violate article I, section VII.

Mr. ECKHARDT. I have not said that. I said it was itself vetoable.

Mr. SCHEUER. Have we agreed there is no significant constitutional question here?

Mr. ECKHARDT. Yes.

Mr. GREEN. Just to join the issue, if not because I believe in it, I shall argue it is unconstitutional.

Mr. SCHEUER. You don't have any great constitutional problem, Bob, I take it?

Mr. ECKHARDT. The only thing I say is that you have got to read the constitutional literally, that that which requires the concurrence of both houses is subject to executive veto.

Mr. SCHEUER. The proposal we have before us doesn't require veto by both Houses. Do you have any grave constitutional problems on the proposal that we are addressing ourselves to today?

Mr. ECKHARDT. I don't. I think you have.

Mr. SCHEUER. Do you want to speak briefly on the constitutional issue and not the public policy issue?

Mr. SCHWARTZ. Could I finish? I want to continue with the point you made, Mr. Chairman, which is really the key point. These governmental agencies possess what is in effect lawmaking power only because such power is delegated by the Congress. This is true not only of the so-called independent agencies like the FTC, it is also true of the executive departments and agencies.

Under the Supreme Court's decision in the steel seizure case in 1952, the President does not possess any inherent or autonomous lawmaking powers. If Congress can delegate the power Congress can delegate the power on condition. Surely one of the conditions which Congress may lay down is the condition that the lawmaking power exercised by the agency goes into effect only if the Congress does not take any action the other way.

That is really Justice White's constitutional theory. One last point which I think you should be made aware of is that you are not considering this subject in a vacuum. During this century there has been a movement in governments throughout this country and throughout the world in favor of legislative review of administrative rules and regulations, legislative veto if you will.

Mr. SCHEUER. Mr. Schwartz, that may be this country but throughout the world it seems to me you have had a steady growth toward executive authoritarianism with legislatures around the world playing progressively less independent roles in government.

Mr. SCHWARTZ. Let me say in the English-speaking world, Great Britain and those countries which derive their institutions from Britain—the former British dominions.

Mr. SCHEUER. Democracy and representative government is on the retreat throughout the world.

Mr. SCHWARTZ. We are in a state of seige.

Mr. SCHEUER. We will recess for 10 minutes.

[Brief recess.]

Mr. SCHEUER. We will start again. Elliott Levitas has not come back but we expect him shortly. In the meantime we will hear from Mark Green, director of Congress Watch.

STATEMENT OF MARK GREEN

Mr. GREEN. Thank you, Mr. Chairman.

Because I was recently called to substitute for Mr. Bolton of American Enterprise Institute I have no prepared statement but will offer oral remarks. I cannot resist observing for a Nader associate to replace an American Enterprise Institute scholar could astonish if not insult both camps.

But I think there is an important point here—that independent of traditional ideology there is substantial concurrence that legislative veto is a bad solution to a real problem.

Mr. SCHEUER. This is on public policy grounds not on constitutional grounds I take it?

Mr. GREEN. Both Mr. Bolton and public citizen believe legislative veto is unconstitutional. I will make a brief remark about that. The problem is real. How to make a bureaucracy effective and accountable. But we have four problems with legislative veto.

First it politicizes if not perverts a four-decade-long agency process. With millions of dollars at stake and particular rules, Congress will inevitably become a magnet for special economic interests who will try to win with political leverage in Congress what they have previously lost in the merits in an agency proceeding.

Consider how the process would actually work. A counselor for a chair of a subcommittee might call the agency and say that "Our chairman has trouble with this pending rule." That agency chairman and his staff have to be responsive to this. That chairman of Congress could influence appropriations and has other means of discouraging that agency. Here is not a pristine situation that the House can rule up or down on. Instead there is an off-the-record process which can be influenced by a chairman as wise as Brandeis or a chairman who is not as wise as Brandeis.

Mr. SCHEUER. Let the record show we are all as wise as, if not wiser than, Brandeis.

Mr. BROYHILL. Since we have a rule of informality, you are not implying that it is improper for Mr. Scheuer and or I to express our views to the Commissioners with respect to a particular rule?

Mr. GREEN. Not at all except with the backing of legislative veto that call takes on an added leverage which it now would not have. Clearly Mr. Scheuer, who has institutional responsibility to oversee the Federal Trade Commission, has to have a daily interest in what that agency does.

Mr. SCHEUER. You are saying it is OK to have the institutional responsibility but the FTC should not take us seriously?

Mr. GREEN. Not at all and we should not use this committee as an example because it might get more personal than I intend but I don't think it is advisable to give a subcommittee chairman—and there are 300 subcommittees in the Congress—have the effective ability to veto almost individually a rule proposed by an agency after years of consideration.

Mr. SCHEUER. You are supposing they are going to be able to veto with a phone call. I think the regulatory agency members are made of sterner stuff. I have no question of that.

Mr. RINALDO. I want the record to show I completely agree with the chairman. I don't think a phone call is going to cause any of the regulatory chairmen that I know of to back down. Consider the example I cited before of FMVSS 121. We have been fighting Ms. Claybrook ever since she took the job and she has not backed down at all, and I don't think she would back down if we had legislative veto.

In response to a question I asked earlier, you said you would give some alternatives. You still have not given any alternatives to the legislative veto.

Mr. SCHEUER. Professor Schwartz has given us an alternative that would at least answer part of your problem. He feels that the oversight function over the regulatory process and particular rule-

making decisions should not go to the standing legislative subcommittees but ought to go to a new—and I take it presumably more bipartisan and less emotionally charged and more independently stanced—entity of the Congress.

Do you want to take just a moment—I tell you what. Why don't we ask Mark Green to finish and then we will come back to you and ask you to describe briefly the British experience as you described it to us during the last recess, Professor? I think that would be helpful to us.

Professor Schwartz did in just the few minutes while you were voting describe the experience of the British who have set up a parliamentary committee. It is not a standing legislative committee but is designed to provide oversight over all the regulatory rulemaking processes of the regulatory agencies and it does provide sort of a middle ground that might take away some of this enormous absolute power that Mark Green is concerned about where Jim Broyhill and I would pick up the phone and the FTC would quiver like aspen leaves.

Mr. BROYHILL. I express myself concerning rules and regulations periodically and I don't think it is improper at all. I think those of us who helped make the laws have a responsibility to express ourselves. I want to make it clear that my remarks are always on the record.

Mr. SCHEUER. Let us recess here and when we come back we will ask you to finish, Mark, and then we will have general discussion. We will recess for 12 minutes.

[Brief recess.]

Mr. SCHEUER. Let us proceed with Mark Green and we hope by the time he is finished Congressman Levitas will be back here.

Mr. GREEN. Just to put a period on my first point: I think it would be unfortunate that if after an agency makes a decision on the public record, following a careful due process procedure that has been refined after several decades, the possibility exists that a nonpublic decision could reverse that preceeding's conclusions.

Mr. BROYHILL. Are you implying that the procedures in the Congress are nonpublic, that the Members would not be voting on the record?

Mr. GREEN. No. What I should have said was that if an interested consumer group or interested business wants to influence an agency decision they must do so on the record and not ex parte so both can see what the other is arguing. That would not be a procedure to be followed in Congress in exercise of its legislative veto decision.

Mr. SCHEUER. Maybe something like that should be thought about. I would never call an executive branch agency where I would not be happy to see the whole conversation printed on the front page of the New York Times and maybe there should be such a requirement that when we intervene on a regulatory finding if we chose to do so, that——

Mr. BROYHILL. I think what he is saying, Mr. Chairman is if your constituents come to talk to you that that should be on the public record. Is that what you are saying?

Mr. GREEN. When a constituent talks to a Member of Congress, that public record could not be kept. It would be larger than the building.

Mr. SCHEUER. It could be kept but you would not want to read it. As a practical matter let me say, Mr. Green, that I as a Member of Congress, when I call an executive branch agency—and I do it from time to time, particularly a regulatory agency—I just assume that they are making careful notes of the phone call as frankly I think they should and that in effect what I say is a matter of public record. I believe it ought to be. I assume that it is and that is how I conduct myself.

I have a sneaking suspicion that most Members of Congress operate on the same assumption.

Mr. BROYHILL. I was not being critical. I was just trying to get a definition of what Mr. Green was referring to when he said you would be going from a decision made with everything on the public record to one with everything not on the public record and I think there is a difference. I think in the case of a Member of Congress that their decision is a matter of public record and the fact that they have tended to side with one side or the other, their views at least are on the public record and they have to defend that at the polls every 2 years.

I think there is a considerable difference than a person who has a term of office that can't be terminated.

Mr. GREEN. Certainly their views are on the public record, although their contacts might not be.

Mr. BROYHILL. I am sure that if a decision were brought here in the form of a legislative veto to you, you would be really going over the same grounds that they had gone over before. If there was anything new brought up I would be surprised.

Mr. GREEN. Second, I think the legislative veto solution might prove unworkable. In a not unusual month, February of 1976, the nine agencies over which your full committee has jurisdiction issued 149 rules, many of them based on tens of thousands of pages of documentation. By analogy IRS could say they will audit every tax return because taxes are so important to this Government. Instead it takes a decision to selectively audit occasional returns.

I think Congress could make that same judgment and not give the expectation that it would be reviewing all rules—which it could not do but—and that it will selectively review rules through the process of oversight. Assume that legislative veto passed. Then business opponents of proposed regulations would be first able to try to oppose statutory law when enacted. Second, they would try to oppose the rule when considered by the agency. Third, they would go to court trying to overrule the rule. Fourth, they would then go to the regulatory analysis review group or Council of Economic Advisers for Intervening Agencies, who are intervening in proceedings with legislative veto, they will be able to go to Congress to overrule all that went before. Imagine what Congress could do if one is concerned about unelected bureaucrats—which is the dominant phrase used in the circumstances.

Why not have review of every jurisdictional ruling—judges certainly are unelected bureaucrats? They have lifetime tenure. Then critics of regulation could try to have Congress review a judge's

ruling. I think this is an unwieldy process for a Congress which already has to consider 30,000 bills every 2 years with over 900 recorded votes a year. I don't know if there is enough time in the day or year and I don't know if there is enough staff to absorb all these rules.

Chairman Brooks estimated congressional staff will have to increase by several hundreds to accomplish this. One wonders whether Congress would want to become in effect a super-regulatory agency reviewing all regulatory rules.

Third, I have not intended to discuss much of the constitutional problem. That probably is best done by a separate hearing. But Professor Schwartz provokes me to make a few comments. When you said the only two Justices who have ever spoken about it, supported it—you left out Attorney General Robert Jackson, later to become Supreme Court Justice during President Roosevelt's term, who said, "The Constitution contains no provision whereby Congesss may legislate by concurrent resolution without the approval of the President."

I would point out that Robert Jackson, Lloyd Cutler, Judge MacKinnon in the Clark case, Professor Kurland, William Rehnquist, Office of Legal Counsel, Kenneth Davis, preeminent law professor, have all said versions of legislative veto are unconstitutional. Reasonable men may differ about whether this is constitutional or not, but I am surprised at your level of confidence in the face of such eminent opposition.

Finally, what are the alternatives? For those who are concerned about the efficiency and responsiveness of the bureaucracy, several recent bills have been enacted. Several are being considered. First the Sunshine Act passed so Commissioners have to discuss their cases and render their judgments openly. Conflict of interest legislation was passed insuring that regulatory judges make decisions free of economic self-interest.

Civil Service Reform bill was passed making civil servants more courageous in their activities. Inspectors general are now being appointed to regulatory and executive branch agencies.

Finally those who say FTC is without accountability could not have read Judge Gesell's opinion requiring that Chairman Michael Pertschuk not take part in what is called the "Kid-Vid" rule. I am not saying I support or oppose that rule. The point is appointees have the sophistication and resources and self-interest to watch what the FTC does, haul them into court immediately before the proceedings begin to insure that the Commission follows the law as Judges see it.

This year Congress is going to be considering regulatory reform legislation. The Presdient will propose his plan by March 15. Senator Ribicoff's version, which has been introduced, would require that prior to the proposing or implementation of a regulation affecting $100 million or more from Congress, that that agency has to estimate or explicate the projected costs of different alternatives, estimate or at least articulate the intended benefit of that rule so that the agency and the public and the press and the Congress can appreciate the benefits and the costs of that intended rule.

Second, there will be a legislation to encourage standing to sue, so citizens who think an agency has acted unlawfully can get into

court to make sure their government follows the law. Also, there is legislation, that Mr. Levitas has in the past supported, providing for public participation moneys so that groups of individual citizens or citizen groups, like seniors, who have something to say at a regulatory proceeding but cannot afford to do so, get small amounts of money to come forward and testify—so long as they don't duplicate what someone else has said and do it not vexatiously.

This has been enacted for the Federal Trade Commission by statute. The public participation bill would propose that approach governmentwide. Also, of course, there is Sunset legislation pending. I personally have problems with Sunset legislation. Yet I think a version of Sunset legislation would probably pass this Congress. It too is aimed at making sure the bureaucracy is periodically reviewed, which is what legislative veto intends to do in a far more daily way.

Two other points: Congress of course, if it is unhappy with regulation or an agency, can pass a law to reverse that ruling. That is hardly hypothetical.

When Henry Ford suggested that cars have a buzzer interlock system instead of airbag system, which was adopted by President Nixon's Department of Transportation, Congress reacted by overruling it. That is, it did not need legislative veto. It fulfilled the requirement of article I by having both chambers vote on a bill signed by tbe President. The legislative veto, however, erases the President from the process of lawmaking.

Second, consider the food stamp program. When Secretary Butz cut off 3 million people from the food stamp program several years ago, Congress within a couple of months passed legislation preempting that ruling. Congress has the authority to act if it has the will to act.

Finally of course there is oversight. It is hardly appropriate for me to lecture this committee about oversight. It has one of the most excellent records of any subcommittee and full committee in Congress on the area of oversight.

It should be encouraged and it clearly is a workable alternative to what I think is a clumsy and unconstitutional term called legislative veto.

In conclusion Mr. Levitas says with some shock that five FTC Commissioners can make law. They have been doing it for decades. Ever since the 1930's when this society decided that substantive due process should be interred and that a legislature is made of individuals who are generalists representing their district, not experts on every possible question that arises in this society.

Hence you delegate authority to agencies to issue rules, reviewable closely by Congress which prepares preemptory legislation or reviews those rules by oversight.

I would urge this committee to be very careful before proposing a change which would undo decades of evolution of due process on the record by administrative agencies.

Thank you.

Mr. BROYHILL. Mr. Chairman, could I make a comment or two. I do appreciate the thoughts that Mr. Green has brought before the committee and they are very useful.

Congress of course has delegated to the FTC very broad authority to write legislation, and the FTC has often entered areas which we have never thought of. It is not five Commissioners who are making the decision. Oftentimes it is two Commissioners who are making the decision because of the fact that there has been a vacancy and that meant three people were acting and any two of those could be making the decision.

And on a number of occasions two people have actually made the decision as to what the Commission policy will be. Also in regard to your argument that the Congress can pass a law to overturn whatever the Commission has done, that does not always occur and it is oftentimes impractical and oftentimes comes years after the rule has been in effect.

For example in the case—I was on the committee—in the case of the seatbelt interlock rule, that decision was made by the agency, was allowed to go into effect and caused great expense and inconvenience to the consumers whereas it should have been overturned at that time. In other words that came years later. The interlock caused great inconvenience and expense to the consumer which was unnecessary.

Mr. SCHEUER. It also caused about 9,000 additional deaths a year and about 300,000 additional serious accidents.

Mr. BROYHILL. I am not sure. We could have gone to something else other than interlock.

Mr. SCHEUER. I want to make sure I say I lost my seat in reapportionment in 1972 and I was not here in 1973 and 1974 and therefore I take no responsibility for any of the foolish acts of Congress in those 2 years, most distinguished of which was abolishing the interlock which has caused us at least 10,000 deaths a year and untold billions and billions of dollars of expense. We require that seatbelts be installed on cars and then we sit there with a bemused look on our face with our jaws hanging slack while about 80 percent of our people don't use the seatbelt.

I don't want to get into a seatbelt discussion but in my opinion that was one of the most costly acts of Congress in my memory both from the human point of view and from the point of sheer hard financial cost, the cost of death, the financial cost of death, and of welfare cost, the cost of serious hospitalization, long-term incapacity and dependency and if you know how to put a human cost on heartbreak and family tragedy, I would add that cost too.

Mr. BROYHILL. I don't know if we need review all the record on this but if you want to review the record, Mr. Moss and I did not vote for that amendment—for other reasons. But, let me make one other point. Mr. Green made this point and this is true. The Congress can pass a law to overturn the action that the agency has taken but the problem is there are many of us here that don't control the legislative faucet. Particularly those of us on the minority side. We have absolutely no power to get a committee to take action and then there are many others such as in the case of Mr. Levitas, wbo is not a member of the House Committee on Interstate and Foreign Commerce; he feels strongly about a particular issue or rule that has been promulgated by an agency and he knows well a majority of his colleagues feel that way but he has no power or authority over doing something about that.

So it makes us all feel rather helpless.

Mr. SCHEUER. But at the same time even if we had a legislative veto that would hardly give 535 Members of the House and Senate individual veto capability. And you would not advocate that?

Mr. GREEN. I would have to answer by citing a conservative argument, the Constitution. Clearly the Constitution devised a system for passing laws which are not always expeditious. One could call it bulky if not time consuming, but to shortcut that deliberative process would require an explosion of staff I think should be very carefully considered by Congress.

You might want to consider—given the anxiety you cite about minority Members and junior Members not being on relevant committees—you might want to consider what has been called a "wait and see" bill. If regulations are proposed above a certain large threshold, before they become effective a certain period of time passes during which Congress on an expedited schedule can consider them; and if they want to reverse them for whatever reason, they could do so with both Houses voting to do so signed by the President.

I think that would be constitutionally valid.

Mr. SCHEUER. Mr. Green, I think the record should show that was the first proposal that we tried in the last Congress and I am informed by counsel that it lost by about 110 votes in the House. I think our most important mission here is to try to find an acceptable form of a congressional veto because the political realities being what they are we are going to have to come up with one. We can't ignore it and we are going to have to try to structure something that meets with some kind of a consensus. That is an excellent suggestion you made but apparently it did not do the job because it went down in flames.

Mr. GREEN. Hope springs eternal.

Mr. SCHEUER. They say that hope is to a politician what courage is to a general. If we did not have hope I would not be here.

Are you finished, Mr. Green?

Mr. GREEN. Yes.

Mr. SCHEUER. I think we ought to try and discuss new permutations and combinations and forms of the veto that will meet some of the legitimate points you have made. Before we do that I would like to ask Professor Schwartz to give us a brief rundown both on the experience in England and the experience in the 20 States that have the legislative veto. How has it worked in practice and how have they managed the problem Mr. Green outlined of this incredible flood of papers that would then be crossing our desks and how as a matter of practice they have coped with the sheer volume.

Mr. SCHWARTZ. Can I just say one thing? Mr. Green mentioned me. I must get on the record the fact that the Jackson opinion did not refer to the legislative veto generally and I believe that was true of the Renquist opinion as well. The Jackson opinion had to do with termination by constitutional resolution of the Lend-Lease Act which is an entirely different thing. My remarks are addressed only to the power to annul, by resolution of one or both Houses, regulations or executive orders which are issued.

I think also, Mr. Renquist would be delighted to learn that he is such a mainstay of Mr. Green's argument but also one other minor

thing, and let me get to the point you raise. I think Mr. Green is looking at this in a vacuum if he assumes the elaborate procedural safeguards of Moss-Magnuson exist in the case of 99 percent of administrative regulations. There you have only the notice and comment safeguard of the Administrative Procedure Act and this point is emphasized by the Supreme Court's recent decision in the Vermont Yankee Nuclear case. You don't have the kind of due process you are talking about in the case of almost all administrative regulations.

Mr. SCHEUER. Do you think that because of the Moss-Magnuson safeguards that the legislative veto is less necessary for FTC rulemaking?

Mr. SCHWARTZ. I think it would be less necessary here than in most other cases.

Mr. SCHEUER. Is it appropriate here?

Mr. SCHWARTZ. I think it is appropriate in any case but I think the kinds of safeguards he is talking about do not exist in most cases. You don't have the public participation, the due process record which you do here.

Mr. SCHEUER. You still think that it is appropriate here?

Mr. SCHWARTZ. Yes, because I think it is a vital tool for assertion by the representatively elected body of control over the nonelected bureaucracy.

Mr. SCHEUER. Professor Schwartz, I want to call on Congressman Eckhardt and Congressman Levitas after you have given us a short description of the actual experience with the legislative veto both in England and in the 20 States that have it.

Mr. SCHWARTZ. Let me be brief on that. I am more familiar unfortunately with the actual working of this in Britain. In England there has been general revision requirements under legislation since the turn of the century. All administrative regulations are laid before both Houses of Parliament. Under the present procedure the House of Commons and the other house have 40 days within which to pass a resolution annulling any statutory instrument, as they call them.

In 1944 the House of Commons set up a permanent select committee. It is called Select Committee on Statutory Instruments composed of 11 members and it is this committee which has the job of going through all—we call them rules and regulations—they call them statutory instruments—they go through all of these which are presented to the House.

Mr. SCHEUER. How is the committee divided between majority Members and members of Her Majesty's loyal opposition?

Mr. SCHWARTZ. The division is on party lines in terms of the House but the chairman has always been a Member of the opposition. So now you have a conservative chairman and when the conservatives were in power you had a Labor chairman. This is a fact. I am not saying it is relevant.

If I may say so I think Mr. Green is assuming—maybe he is right—that Parkinson's law must operate in every case where a committee or any arm of government functions. If you look at the British system you will find they have an amazingly small staff. It is not an earthbreaking task for a committee like this with a small staff simply to read these as they come in.

There are only a minute number of regulations relatively speaking which the committee calls to the attention of the House.

One other point which was mentioned. Any Member of the House of Commons may move what they call a prayer to annul and they have a——

Mr. SCHEUER. I knew there had to be a remedy.

Mr. SCHWARTZ. That is what they say there, all we can do is sit and pray. But the prayer is really a motion which is exempt from governmental control of business. On any night after a certain hour—they meet at night—any Member may move a prayer to annul and this gives the individual, what they call the Back-bencher who is not affiliated with the leadership at all, a Member who is elected for the first time can move such a prayer and it has to be considered.

Mr. SCHEUER. It has to be considered by whom?

Mr. SCHWARTZ. By the House if a prayer is moved.

Mr. SCHEUER. What kind of volume of work would that impose?

Mr. SCHWARTZ. As it has worked with them, relatively few prayers are moved. Whether that would happen here——

Mr. SCHEUER. Are they less addicted to prayer in Britain than our people are?

Mr. SCHWARTZ. Of this type. Other types I think not. But that is the machinery they have there. I have not been there, I have not seen how it worked personally, in a number of years but it used to work effectively.

The staff would read these things for the committee. There were thousands of regulations each year but it does not take that many people to go through them and say, "This looks important. You talk to the Chairman of the committee. Maybe we should call the House's attention to it."

Mr. SCHEUER. Do you want to turn to the experience of the 20 States?

Mr. SCHWARTZ. There are 20 States which have some form of legislative review provision. I should say in at least 19 of them. There are some 19 States which have special committees in the legislature. Some of them are joint committees. Some of them are committees of both Houses whose job it is to review all regulations passed in the States that year. At least 10 States have machinery for annullment by resolution of the Houses of the legislature. Unfortunately I can't tell you how that has worked in practice.

I think one of the things this committee or some other committee ought to do is to get people from these States, particularly some of the larger ones, Michigan, Minnesota, a few of the others, to tell you whether this has worked in practice. But they have set up the machinery and the National Conference of State Legislatures 2 years ago formally voted that every State should establish this kind of machinery.

Mr. SCHEUER. Why don't we hear frcm Congressman Levitas on this?

Mr. LEVITAS. Let me follow on what Mr. Schwartz was just talking about. The experience of the State legislatures has been documented. We have it. In fact, last year there was a council of State legislatures meeting here at which they devoted themselves

exclusively to their experience with legislative veto and the national journal had a writeup about that experience last year.

It has proved to be very successful. There are different modes. Some of them use a joint committee, as Dr. Schwartz said. Some of them use a one-House veto. Others have other modes but whatever it is, all of them have reported that it has been either successful or very successful.

Let me deal with another thing. While I disagree with a great deal of what Mr. Green says, I think perhaps the most specious argument is there is going to be an explosion of congressional staffs and there will be a new bureaucracy created in the committees. I assume—I know my committee does—I assume somebody on your staff reads regulations that come out of the FTC already.

Don't they? You would not enact legislation and not have anybody read the regulations?

Mr. SCHEUER. Counsel tells me that is not done.

Mr. LEVITAS. Nobody on the Interstate Commerce Committee reads the regulations that come out of the agencies over which you have legislative jurisdiction?

Mr. SCHEUER. I am told by counsel—Peter, describe the situation.

Mr. LEVITAS. The other Members during the course of debate on this assured me you do read regulations. I think that admission perhaps is the most startling admission I have heard yet and reemphasizes the need for legislative veto, particularly if you are not reading the regulations now——

Mr. SCHEUER. We are not carrying out our oversight responsibility. Peter tell them what the de facto situation is.

Mr. KINZLER. Mr. Levitas, as Mark Green indicated in the month of February, 190 rules came out from the agencies within the jurisdiction of this full committee. That is a lot of rules to read particularly if they are not important ones.

Mr. SCHEUER. If they are controversial, do we scrutinize them?

Mr. KINZLER. Certainly so. We have oversight on controversial rules as well but, as Mr. Eckhardt can tell you in the last Congress with respect to the passive restraint rule the professional staff time committed by this subcommittee was 3,000 hours.

Mr. LEVITAS. That is a different question, Peter. I think this is the point to make and the experience of the States support it. I don't expect the Congress to review and read every regulation because most of them are noncontroversial. You pick it up, it deals with something in-house.

We do exercise a selectivity. There are 15,000 bills introduced into Congress each year. Do you vote on 15,000 bills?

Mr. KINZLER. The difference here is that the whole purpose of Magnuson-Moss rulemaking was to provide for rules that had general applicability to industries. You cited a number of the rules before—funeral industry, vocational school industry. Every single one of these rules has become controversial because the Commission is doing what it is supposed to.

The vocational school rule record runs 100,000 pages. Staff time runs 12,000 hours. The question is can this staff at this level or any other reasonable level be able to exercise a similar amount of time to be able to make rational judgments to help the Members.

Mr. LEVITAS. That is a different question. That is one of the few legitimate questions that is raised about this. Do we have the time to do it? I think there are two answers to that. First of all, legislation comes before the House of Representatives every day which has a record that high.

Do we all go back into the transcripts and look at the testimony that was presented to the committees before we vote? I suggest that not every Member of Congress who is about to vote on that legislation has read the transcripts of all those hearings.

Mr. KINZLER. But the staff of the committees have in large part.

Mr. LEVITAS. The votes are cast by Members of Congress.

Mr. KINZLER. Many of the members of the individual committees have read enormous portions of the legislation and have been briefed by staff.

Mr. LEVITAS. It is no argument to ask: Does Congress have time to read the 100,000 pages of testimony on whatever rule it is? In the case of the FTC, however, that certainly is no great burden. There are only 18 to 30 rules that are even kicking around now, but when the decision comes to the Congress we are not talking about a technical decision, we are talking about a policy decision. When I was in the State Legislature of Georgia, I introduced legislation to repeal the holder in due course defense. It was a legislative policy matter. It did not become legislative policy when under the concept of unfair and or deceptive trade practices the FTC did it.

You asked the question earlier, Mr. Chairman, why does the Senate have a different position on this. I don't recall a response. It is a good question because I have asked it myself of Members of the Senate. The answer that I have received in most instances from Members of the Senate is it is just one of those issues they have not yet focused on.

They have been going after Sunset and things of that sort and they have not focused on it. I am told during this Congress the picture of the Senate will change dramatically. Senator Kennedy has indicated he will hold hearings on his Judiciary Committee for this although he does not favor it. There are six Members of the Senate I think—five or six who came from the House—each of whom were sponsors of this legislation and the newly elected Senator from Michigan has indicated that this is goinig to be his No. 1 legislative priority.

Mr. SCHEUER. Is the Rules Committee seriously looking into this matter?

Mr. LEVITAS. I have been assured both publicly and privately by the Chairman of the Rules Committee and by Congressman Moakley, who has been designated as chairman of the subcommittee that not only do they intend to take this seriously but it will be the first priority of business in Moakley's subcommittee.

Congressman Bolling who has reservations about it has indicated as a matter of practical reality we have got to deal with the issue in this Congress.

Mr. SCHEUER. I agree with you we have to cope with it because as a realistic man it is an absolute must for us. Otherwise nothing is going to happen.

Mr. LEVITAS. One thing Mr. Green said that I think is an interesting aside to point out, that this is not an unprecedented matter.

He raised the specter that perhaps Congress would want to get involved in passing on judicial rules. That is already the case. Congress has had the right of congressional veto over the rules of evidence issued by the Supreme Court for many years and has exercised it.

Mr. SCHEUER. Elliott, let me ask you as a matter of strategy and tactics how should this subcommittee address this matter considering the fact that other major committees of both the House and Senate are going to scrutinize it? Should we wait on the consideration of this matter in depth by Congressman Moakley and his subcommittee? What would you advise? What would be the orderly way for us to proceed?

Mr. LEVITAS. I want to be as candid as I can with you about this. I want to see conprehensive legislation passed and so therefore I want to see Congressman Moakley's effort to go forward. On the other hand I must tell you that this committee is in no position to wait for that to happen because dealing with the comprehensive question is much more complex. I assure you that if you report out any authorizing legislation without the legislative veto, the issue will be brought to the floor. You are much better equipped to deal with it in this committee rather than go through the process which Congressman Broyhill and I did, and others engaged in, most of the last Congress.

I think that it is unavoidable. It may not be the best way to deal with it but I think you have to deal with it.

Mr. SCHEUER. Bob, let us hear from you. How should this subcommittee deal with this matter in view of the fact that the Rules Committee and the Judiciary Committee of our House are going to deal with a competitive approach to the matter?

Mr. ECKHARDT. I am essentially a common law lawyer. I believe in the common law approach. I think you tailor the law to the need and consider practical aspects as they arise. I think you don't make the same rule for the Federal Trade Commission that you make for some other agency. Now, I am presently chairman of the Oversight Committee. We are going to have to look into several rules which are extensions and enlargements of an existing law. For instance, a rule that would permit higher rates for oil than is provided by law until an energy action is submitted to Congress for possible one-House veto.

I think this is a proper exercise of the legislative veto because here an agency is not acting within existing law. It has been permitted by law to tentatively enlarge its authority, enlarge the law in a manner which we have not yet dealt with.

Congress is going to be dealing with several different items of this nature. I think it is appropriate that we deal with them using the legislative veto process, but I would not enlarge the area of congressional review in matters which you have already dealt with in other ways. For instance the Federal Trade Commission, as has been pointed out, has the most due process oriented proceeding of any agency of Government with respect to participation by those affected by the rule.

That its delegation is very broad is not an evil. Some of the most important laws, laws that have affected our entire economic structure in the United States—have been the antitrust laws—where we

delegate authority really to the courts. We create standards in broad terms of art and ultimately let the courts determine what they mean. What is monopoly? What is action in restraint of trade? In these areas we have decided it to be more appropriate to decide the ultimate question in an adjudicatory forum under very broad statutory standards.

I think we have acted correctly in the Federal Trade Commission Act in giving broad authority to the administrative agency but when we did that we at the same time provided very extensive processes for participation by those affected by the rules. Each time you are confronted with such a problem it is my opinion that you ought to tailormake the process.

I am not speaking here against Congress authority to institute processes that include legislative veto. I thought I made that clear in the beginning, When I referred to Congress as having broad authority to make the laws, I meant Congress had the authority to make the law and that law could include delegating authority.

It could include a law delegating authority with conditions. I agree with Professor Schwartz that Congress does have broad authority in these areas and may institute legislative veto.

I think where we may get into some difficulty here is if Congress purports to grant authority for legislative veto by two Houses it may not cut off the President's right to veto, and I think some of the decisions that Mr. Green was talking about were cases of that nature.

Mr. SCHEUER. I take it then in summarizing—we have got a very interesting presentation from Mark Green that we have constructed enough protective devices and procedures to give people, affected by regulatory rulemaking under the FTC, their input.

Professor Schwartz agrees that we have done better with FTC than most of the regulatory agencies but he still considers a legislative veto appropriate and necessary even contemplating what I think he would describe as worthwhile and excellent opportunities for input and involvement by affected groups.

I take it you fall on Mark Green's side of the fence on that one, on the Federal Trade Commission?

Mr. ECKHARDT. Yes. I would not grant legislative veto. I think everyone here knows that.

Mr. SCHEUER. We have just had second bells and it is five after one so we must adjourn promptly. We must recess promptly for this rollcall vote.

Do any of you feel the need for us to come back here? I for one am willing to come back.

Mr. GREEN. I don't, if I could ask for 1 minute to respond since people have commented on my remarks.

Mr. SCHEUER. Elliott, have you more?

Mr. LEVITAS. I didn't get a chance to comment as fully as I would like.

Mr. SCHEUER. If you would like me to come back I would be happy.

Mr. LEVITAS. No.

Mr. SCHEUER. How about you, Professor?

Mr. SCHWARTZ. No. Thank you very much for a stimulating discussion.

Mr. GREEN. I would ask Mr. Levitas, since he cited approvingly the congressional veto of Federal Rules of Civil Procedure, would he urge legislation providing for legislative veto of all Federal District and Appellate Court decisions, since his arguments about faceless bureaucrats in the executive branch apply equally to the judicial branch. I would point out, based on Professor Schwartz' comment, that Great Britain lacks a constitution with no tradition of separation of powers between executive and legislative branches of government. So it is really not analogous to the United States, and I would wonder if State experience is analogous to Federal Government.

No State has anything approaching a $500 billion entity to oversee. This goes to the point about burden, and here I would only cite Mr. Levitas' words in a different context. Congress should be careful about legislating another layer of bureaucracy given the levels of bureaucracy which already exist.

Mr. SCHEUER. Thank you very much, Mr. Green, and thank you, Professor Schwartz. You have certainly given us a great deal of food for thought. We are grateful to you.

This hearing is adjourned and we will meet again next Tuesday morning, I think, in the same room.

[Whereupon, at 1:10 p.m. the subcommittee adjourned, to reconvene on Tuesday, March 7, 1979.]

AUTHORIZATIONS FOR THE FEDERAL TRADE COMMISSION AND GENERAL OVERSIGHT ISSUES

WEDNESDAY, MARCH 7, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2322, Rayburn House Office Building, Hon. James H. Scheuer, chairman, presiding.

Mr. SCHEUER. The Subcommittee on Consumer Protection and Finance will come to order.

We are starting our hearing today on the Federal Trade Commission authorization bill.

I am delighted that we have our colleague here, Sam Devine who has an important contribution to make. We are happy to have Jim Broyhill here. We are very happy to have all of the members of the Commission here. I would say that Mrs. Elizabeth Hamford Dole has recently resigned from the Commission. Although she was of the other political faith, she was a fine, professional, worthy, and contributing member to the FTC. I have a sneaking suspicion that sentiment is widely shared in the FTC. We will miss her here. I think she will be missed at the FTC. Her inputs, her valuable, professional, and thoughtful inputs will be missed by the public.

In preparing for these hearings today I was struck by the irony of the situation in which the FTC finds itself today. For many years the FTC was considered a toothless tiger that was more concerned with protecting its constituents in the industries. It was supposed to regulate them; it was not protecting the public. Like a number of other regulatory agencies it seemed to have come to the point where it was treating the public with benign neglect and seemed to feel an exclusive concern for the industry it was designed to regulate. There was consistent criticism along those lines.

Now, of course, we hear that the Pertschuk Commission is too big for its britches; that it is muscling all over the place; that it is too powerful; that it is moving too aggressively into areas that affect large segments of the business community.

So, gentlemen, if you feel somewhat beleaguered, I think we can understand your concerns.

Another point of irony is that much of the agitation in industry is directed at proposed rules that originated under Mr. Pertschuk's Republican predecessors. Here and now the ships are coming in

and Mr. Pertschuk is bearing the brunt of that criticism, which is an interesting irony of the Government process.

At any rate, it is perfectly clear that FTC rulemaking, along with the rulemaking of other regulatory agencies, is becoming an important and a critical part of our administrative law and the process of Government. This is particularly true with regard to the enormously important parts that regulatory agencies play in the meat and potatoes of making our legislation a reality.

The Congress is going to have a good, hard look at the regulatory process in general. I suppose we will be looking at FTC as a prototype. I have a sneaking suspicion myself that FTC is more acutely aware of many of the problems of overregulation, of insensitivity to the requirements of business, than many regulatory agencies. I feel they have made a determined effort to cope with some of the complaints that have been heard. However, all of that, I suppose, will be coming out in the wash that we will be doing in the next few days of hearings.

We will be having a long, hard look in this subcommittee—along with Congressman Eckhardt's Subcommittee on Oversight and Investigations—on the costs and benefits of the regulatory process. Those hearings are in the works. We hope they will be a very thoughtful, professional, creative, and productive set of hearings. Too frequently we hear from consumer groups and environmental protection groups of the benefits of the regulatory process. However, they fail to take into account the costs, and they are not terribly interested in drawing fine lines. At the same time we hear a cacophony of voices from the industry that seem to be almost exclusively occupied with the costs of regulation. They do not factor into their equations the benefits that come from regulation. They want to do little or nothing.

It seems to me the time has come for somebody to consider costs versus benefits and help produce some kind of criteria that can be applied to the regulatory process to help Government determine the elements that should be considered in making the value judgment of when regulation is past the point or approaching the point of diminishing returns. They should be an exceptionally interesting set of hearings.

We will also be looking at the question of the legislative veto in this committee. We will be doing that in conjunction with Congressman Joe Moakley of the Rules Committee. Congressman Moakley has been assigned a subcommittee to look into the question of the legislative veto, and how Congressmen can keep a handle on the legislative process, in the form of regulations that flow from legislation we pass here. We sometimes get the feeling that we pass legislation that then becomes spun off into space and creates its own momentum and its own life style. The executors of our acts seem to be responsible to no one. We have very little handle on the kind of interpretation is placed on our legislative product. I think there is a fairly widespread sense of frustration about that on the Hill. Congressman Elliot Levitas has taken an important initiative and put in some legislation. Congressman Jim Broyhill has been a very thoughtful exponent of this general frustration that all of us feel to some extent.

So, in cooperation with Congressman Joe Moakley we will try to have some kind of joint consideration of this matter. We will certainly be looking into the experience of the 29 States that have established some kind of legislative veto. We will be looking into the experience of England, where they have set up a special parliamentary committee to look into the regulations that have been based upon Parliament's legislative products.

I will not go into the details of that, but the British have had considerable experience and have quite a staff assembled to scrutinize all of the legislation, all of the regulatory products that emanate from their own legislation. We will have a "look see" on how that goes.

Incidentally, Commissioner Pertschuk, we will very much welcome any views you may have about the legislative veto. We know the Administration and the Bureau of the Budget have taken a clear position on the subject. If you will sample the winds, I think the winds will tell you that something is going to happen on Capitol Hill: there is a fairly general sense of frustration that crosses party lines. We do want to have a stronger hold on what happens after we pass the legislation and the President signs it. We would be very much interested in your ideas as to the various alternative forms that could take; the various permutations and combinations of handles that we could produce that would make sense and that you could live with.

Congressman Broyhill?

Mr. BROYHILL. No comment at this time.

Mr. SCHEUER. All right, we are delighted to have Congressman Preyer of North Carolina, who is one of our most valuable and productive colleagues.

Mr. PREYER. I have no comments. I am glad to be on your committee for the first time. I am in a learning phase here and look forward to the hearing.

Mr. SCHEUER. Congressman, thank you very much. Congressman Sam Devine?

Mr. DEVINE. Mr. Chairman, as you will recall, last week I brought up what I considered a classic case of overregulation on behalf of the Federal Trade Commission. If this is the appropriate time, I would like to make a statement in that regard.

Mr. SCHEUER. Do you want to make a statement now?

Mr. DEVINE. If it is appropriate.

Mr. SCHEUER. What would you think of making a very brief statement now, letting the chairman know what you are interested in? Then, as soon as he is finished, before any of us say anything, Congressman, we would be happy to hand the floor back to you and you can make your detailed statement.

Mr. DEVINE. That would be very appropriate. Chairman Pertschuk does indeed know the materials which I make reference to. I have not had an opportunity to read his remarks before this hearing. I would be very happy to wait until he has concluded his statement.

Mr. SCHEUER. Since you have a special interest in the problem, why not let the Commissioner make his presentation and then I will turn the floor over to you before any of us ask any questions.

Mr. Chairman, we would be very happy to have you give your testimony now. The ground rules we have adopted here, since there are only four of us, are intended to keep this very informal. I would welcome any spontaneous questions along the lines of helping to keep the audience awake——

Mr. PREYER. And the witness.

Mr. SCHEUER. And the witness. We do not consider the witnesses inviolate here and protected against any interruptions or questioning.

STATEMENT OF HON. MICHAEL PERTSCHUK, CHAIRMAN, FEDERAL TRADE COMMISSION, ACCOMPANIED BY PAUL RAND DIXON, COMMISSIONER; DAVID A. CLANTON, COMMISSIONER; ROBERT PITOFSKY, COMMISSIONER; AND MICHAEL SOHN, GENERAL COUNSEL

Mr. PERTSCHUK. Well, the kinds of concerns that Congress has and segments of the public have about us and about regulatory agencies generally are of deep concern. I think it is quite fair to call us to account.

I also want to say, this is the first time I ever had coffee presented while testifying before a committee. On behalf of the Commission I wish to express my appreciation to your committee.

We recognize that the burden is on us to demonstrate that society is in fact better off from our efforts, that the consumer receives real benefits, tangible benefits, from our action, that, in setting our priorities we choose the most important problems and propose realistic solutions, and that the costs we impose on the marketplace are greatly outweighed by the benefits. And in fact for the Federal Trade Commission, this is quite apt because for those agencies which deal in environmental and health and safety issues—which we primarily do not deal in—the benefits are often intangible. The possibilities of measuring them are difficult. But, in cases we propose to meet economic injury to the consumer, we do bear the burden of determining that the solutions will provide net economic benefits.

We continually reexamine our actions and correct our errors, and learn from history. We have worked long and hard in this commission to improve our effectiveness while minimizing the regulatory burden.

This morning I would like to outline, if I can, the results of these efforts.

We recognize that the most immediate and pressing public concern is the shrinking value of the dollar. And we sought to focus our efforts on promoting competition in those sectors of the economy that are most important to the consumer and sensitive to inflationary pressures.

Our activities in the area of health care provide an excellent example. Recent FTC initiatives in this area include:

Removing restrictions on price advertising of eyeglasses, contact lenses, and eye exams and requiring that eye doctors provide consumers with prescriptions, thereby helping consumers to comparison shop.

Barring publication of relative value scales—which may tend to decrease competition and facilitate price fixing—by the Minnesota State Medical Association.

Barring the American Society of Anesthesiologists from prohibiting its members from accepting salaried, rather than potentially higher cost fee-for-service, employment.

Barring a medical testing laboratory company from giving kickbacks to physicians.

Barring the Indiana Dental Association from inducing its members not to cooperate with health insurers' cost containment programs.

A number of other actvities in this area are now underway including: An investigation of physician control of Blue Shield plans, a rulemaking to determine whether manufacturers of hearing aids should provide more information to consumers, and a case in which an FTC administrative law judge's initial decision—which is now on appeal to the full Commission—held that the American Medical Association has unlawfully limited advertising by physicians.

A chief inquiry of ours in the health care area is whether professional self-regulation has anticompetitive consequences. We are actively involved in examining that same question with respect to the other professions.

For example: Our investigation of the legal profession seeks to determine whether there are unjustifiable restrictions on development of alternative, lower cost legal delivery systems.

Our investigation into the real estate industry is examining whether broker commissions are determined in a manner that keeps prices artificially high.

And recent investigations of veterinarian and accountancy professional organization practices have resulted in voluntary actions on the part of both groups to remove restrictions on advertising that allegedly hamper full, free, and fair competition.

I will not belabor the point. But I think a review of our activities in the other market sectors that are critical to consumers and responding to inflationary pressures—energy, food, housing, transportation, and clothing—demonstrates that we are targeting our efforts to those areas where inflation hits pocketbooks the hardest.

I think it noteworthy too that we are flexible in the way we approach these problems. The Magnuson-Moss Act, a product of this committee's work, encouraged us to look to alternatives to case-by-case litigation. While traditional administrative litigation remains an important law enforcement tool, it is augmented by other techniques.

For example, we are making increasing use of our mandate under section 6 of the FTC Act to compile information about business structure and practice and make the information available to the public and the Congress. Recent examples of this activity include:

A consumer pamphlet on individual retirement accounts. The report analyzed sales practices in this rapidly growing industry and provided information consumers need to make informed decisions.

Reports to Congress on cargo preference, showing the cost of cargo preference legislation then being considered and steel im-

ports, describing the likely cost of pending steel import restrictions legislation.

The development of a model State law concerning generic drug substitution. The model act is designed to save consumers money by allowing pharmacists to substitute lower price generic equivalents for brand name drugs. It was proposed by the Commission and the Department of Health, Education, and Welfare for adoption by the States. In fact, the President recently sent a letter to the Governor of every State, enclosing the model act and praising it as an "important initiative that the States in cooperation with the Federal Government can take to combat the spiraling cost of health care for Americans."

We also sought to provide support and advice to other agencies. We have intervened before the ICC urging an end to antitrust immunities in the trucking industry and more rate and entry flexibility in order to lower prices. And we have participated in CAB proceedings arguing for deregulation of airlines.

In 1973 Congress authorized the FTC to seek injunctions in Federal court when the Commission has reason to believe that such a remedy would be in the public interest. We are using this remedy increasingly as a support to both our competition and consumer protection missions. I will skip the examples.

The most direct measure of whether the Commission is fulfilling its congressional mandate—to root out abuses of market power, enhance the role of competition and preserve informed consumers as the true regulators of the marketplace—is to look to those actions that have provided tangible dollar benefits to consumers—the bottom line. Some recent examples are:

Eyeglasses. Consumers spend $4 billion a year on eyeglasses and eyeglass examinations. In States where advertising was restricted, studies found that prices ranged 25 to 40 percent higher than in the States where advertising was permitted. Our first trade regulation rule issued under the Magnuson-Moss Act removed restrictions on price advertising of eyeglasses, contact lenses, and eye exams and required that eye doctors provide consumers with prescriptions, thus allowing consumers to comparison shop. This action alone—a simple action and nonregulatory action—by introducing price competition into States where previously there had been none, could save consumers an estimated $500 million a year.

Blue Jeans. The day the FTC sued Levi Strauss, charging retail price fixing, Levi blue jeans were selling from $15 to $17. Today, after the Commission obtained an order prohibiting the practice, vigorous price competition exists and the price ranges from $10 to $14. A conservative estimate suggests that this development is saving consumers $50 million annually. There are other examples.

Let me turn to regulatory reform. We also recognize that we have an obligation to make our administrative process at the FTC more efficient and less burdensome, without sacrificing fairness, openness or accuracy. Since my arrival at the FTC, we have taken a number of steps toward regulatory reform at the Commission.

Eliminating unnecessary regulations. The Commission has completed its review of 152 pre-Magnuson-Moss trade practice rules—each affecting a major manufacturing or retailing industry—and rescinded 145 of them. I think this makes us unique among regula-

tory agencies in that we have actually reduced the number of pages our regulations take up in the Code of Federal Regulations.

Cutting down on reporting requirements. The Commission has reduced the reporting requirement in its QFR program—and that is the basic statistical source published by the Commission—by eliminating 3,100 smaller firms from the sample used to compile the Quarterly Financial Report and streamlining the report requirements of 600 firms so that they no longer must report the same data separately to both the FTC and SEC.

Speeding up administrative litigation. We sought to extend our regulatory reform efforts to adjudicative litigation before us by revising our discovery rules, giving administrative law judges more control over ongoing litigation and creating disincentives to delay by parties. We have also established a working group which prepared detailed recommendations for streamlining complex litigation.

I would like to turn now to review of our Magnuson-Moss rulemaking activities, a subject which I know is close to the hearts of the members of this subcommittee. Since my arrival at the Commission about 22 months ago, I have made examination and improvement of the rulemaking process a top priority. And, with the help of the members of this subcommittee, I believe, we have taken a number of significant steps to improve Magnuson-Moss rulemaking at the Commission.

We have developed new procedures to reduce the time required to conduct Magnuson-Moss rulemaking proceedings as well as the size and redundancy of the evidentiary record generated in those proceedings. Hearings on the proposed rule on disclosure of insulation R-values were completed within 4 months after commencement of the proceeding compared to a previous average of 18 months. Final staff recommendations on that rule were presented to the Commission within 12 months of the rule's proposal, also a record.

In the proposed children's advertising proceeding, with the help and encouragement of Mr. Eckhardt and Mr. Broyhill, and other members of this subcommittee, we employed a two-step hearing procedure that separates the hearing into two phases: a legislative phase where all witnesses testify and an adjudicative phase where certain witnesses are subject to appropriate Magnuson-Moss cross-examination. This procedure insures that all interested members of the public have the opportunity to present their views to the Commission. At the same time it reduces unnecessary and duplicative cross-examination by providing for examination only where the statutory criteria set out in the Magnuson-Moss Act are met; those disputed issues of material fact that must be resolved if the Commission is to make an informed judgment on the merits of the rule proposal.

Mr. BROYHILL. If I could interject right there? Since Mr. Eckhardt and I did, as you know, discuss that at length with you in hearings last year, I want to compliment you on the change. I think it is a good change and it is in the spirit of the procedure that we wrote into the Magnuson-Moss at the time that this went through the committee.

Mr. PERTSCHUK. Thank you.

We have also reversed the order of the presiding officer and staff reports so that the staff report, which contains the detailed summary of the factual record, is made available first. This allows the presiding officer to prepare a shorter report that focuses primarily on his differences from the staff analysis.

In addition, we now publish at the outset a timetable for completion of each proceeding. This small step has the healthy effect of committing all participants, including our staff, to avoid delay and proceed in an orderly fashion.

Improved readability of rules is another objective that I know we share with the members of this subcommittee. Our commitment to simple comprehensible rules remains strong, and the benefits are now being shown. The recently promulgated vocational school rule, for example, contains consumer notices that are vast improvements over the dense and turgid prose of earlier versions.

I found myself reading one of the piles of paper before me and thought I was reading a simplified description of the R-value rule, and it turned out I was reading the rule itself. That is a pleasant discovery because it is clear and direct and anyone could understand it.

A number of these improvements resulted from recommendations of a rulemaking task force chaired by the Commission's General Counsel, Mike Sohn. Another recommendation of that task force which we have implemented is the transfer of the presiding officers from the Bureau of Consumer Protection to the General Counsel. While the competence, independence, and objectivity of the presiding officers who chair our rulemaking proceedings are above question, some participants in our rulemaking proceedings were concerned by the fact that our original structure located the presiding officers in the Bureau of Consumer Protection. By transferring the presiding officers from the Bureau I think we have alleviated that concern about appearances.

We also have implemented a procedure at the conclusion of each proceeding that allows persons who have participated in the rulemaking to present their views directly to the Commission before the Commission begins to act on the staff recommendations. We have used this procedure in our two final rules, the eyeglass rule and the vocational school rule, and in the two rules now pending before the Commission for final action, the R-value insulation rule and the funeral rule.

I am pleased to report that this procedure has worked exceptionally well, winning substantial praise from those who have participated in it. For example, last week the Commission spent 8 hours hearing the views of those interested in our funeral rule proposal, including the funeral directors, the Small Business Administration, interested consumer groups, and a Member of Congress.

I believe it is fair to characterize the reaction of those who appeared, representing all the parties, Mr, Chairman, as feeling they have the opportunity to have access to the Commission. Many of the committee members in particular, many members of the industry were frustrated in the earlier stages because they felt the Commission was not listening to them. I believe they felt the Commission now was open and responsive to their concerns. We intend to continue to provide for oral presentations in the rules we

will consider in the next few months, including used cars, hearing aids, and others.

We also are in the process of revising our rule concerning ex parte contacts in rulemaking. The new rule will open up our proceedings still more without sacrificing their integrity. Outside parties will be allowed to meet with Commissioners so long as a transcript of that meeting is kept and later placed on the public record. This revision will provide for more direct access to the Commission while maintaining procedures that are consistent with recent court decisions concerning ex parte contacts, which was another concern.

We have also sought over the course of the last 2 years to devote substantially greater resources to analyzing the real world economic impact of our final rules. Throughout the rulemaking proceedings we received extensive submissions on the likely economic impact of these proposals. And, before the Commission makes a final determination on the rule, we study that evidence and make our best judgment as to the economic consequences—including the likely impact of small business and the consumer. But we realize that that is not enough, that we have a responsibility to consumers and affected industries alike to monitor what happens once a rule goes into effect. Thus, for example, this year we are conducting the first phase of a study of the vocational school rule's economic impact. We will gather additional data which will assist in determining the actual cost in practice to the affected schools, and the impact the rule has had on advertising and sales practices in the industry. We plan similar detailed impact analysis of future Magnuson-Moss rules.

We have also come to recognize that even before a rule is proposed by the Commission, we must do all we can to determine what that rule's cost might be. And we have set up new internal procedures to insure that we get the best economic analysis available before the Commission acts to propose a rule. For example, the Commission recently proposed a rule concerning standards and certification. While the staff proposal was in the developmental stage, economists worked closely with consumer protection staff attorneys to assist in the drafting of the proposal and to identify potential problems. Before the proposal reached the Commission for consideration, it was examined in detail by our Bureau of Consumer Protection Evaluation Committee, which includes economists, lawyers from the Bureau of Competition and the Office of Policy Planning, as well as senior staff from the Bureau of Consumer Protection.

One of the benefits I think you have in the FTC, in considering the impact of economic rules, is that we have both consumer protection staff who focus on the interest of consumers, and we also have the Bureau of Competition's staff who look at the impact of competition as a whole. In some cases those two focal points are in conflict, and in some cases they need to be balanced. So, we have that internally, that discipline internally, which we bring to bear through the Evaluation Committees.

Next, public participation. In 1975, this subcommittee urged, and the Congress agreed that the Commission's new rulemaking procedures include a program to insure that all viewpoints were ade-

quately represented in Magnuson-Moss rulemakings. We have strived to make that program a success, and I am pleased to note that it has been soundly praised by the two congressional committees that examined it, as well as by most of the people who participated in the process. While the program has also received its share of criticism, much of that criticism seems to stem from a fundamental misunderstanding of what Congress sought to do in establishing that program. The legislative history makes clear that the public participation program reflected a judgment on the part of Congress that agency rulemaking proceedings often lack balance, and that, unless funds were made available to the small business and consumer groups then not participating in rulemaking proceedings, the imbalance would continue. In implementing this program, we have followed closely that mandate. As a result our rulemaking proceedings have had the benefit of strong and effective advocacy on all sides of the issues.

We have been criticized because funds have gone primarily to consumer-oriented groups. But in fact, the program was intended to provide funds to those very groups. We also have been criticized for not providing more funds to representatives of small business associations. But the facts are that we have funded every small business group that has applied and that about 10 percent of the public participation funds have gone to representatives of small business interests. We also have set up a series of seminars across the country designed to educate grassroots business and consumer organizations to the program and its eligibility requirements.

We also have made improvements in the way in which we evaluate funding applications, provide compensation, and insure that the funds are spent properly. First, the General Counsel now administers the program and decides who is to receive compensation. In addition, we have hired a full-time auditor who systematically reviews the records of those who have received funds to insure that all funds (*a*) are accounted for, and (*b*) have been expended only for approved purposes. These changes, I think, further strengthen the program.

I have sought this morning to review briefly the state of the Commission. In summary, the Commission is vital and active. It is pursuing vigorously its statutory mission to make the consumer sovereign in the marketplace by promoting vigorous and fair competition, but in a manner that is sensitive to the public's concern about overregulation.

My fellow Commissioners and I would be pleased to respond to your questions.

[Testimony resumes on p. 191.]

[Mr. Pertschuk's prepared statement follows:]

STATEMENT OF

MICHAEL PERTSCHUK

CHAIRMAN

FEDERAL TRADE COMMISSION

Good morning. It's our pleasure to appear today on behalf of H.R. 2313, the measure which provides for Federal Trade Commission's authorization in fiscal years 1980 and 1981.

Mr. Chairman, I think it fitting and appropriate that the Commission's first appearance before your Subcommittee concerns our reauthorization for fiscal years 1980 and 1981, for this occasion provides us with an opportunity to respond to the recent expressions of concern by Congress and the public about the role the regulatory agencies play in our daily lives and the skepticism about whether on balance the federal agencies, such as the Commission, offer a net improvement to consumer welfare.

We recognize that the burden is on us to demonstrate that society is in fact better off from our efforts, that the consumer receives real benefits from our actions, that in setting our priorities we choose the most important problems and propose realistic solutions, that the costs we impose on the marketplace are greatly outweighed by the benefits, and that our agency can and does continually reexamine its actions, correct its errors and learn from its history.

My colleagues and I have worked long and hard to improve our effectiveness while minimizing our regulatory burden. And this morning I'd like to outline--briefly in my oral remarks and at greater length in my written statement--the results of those efforts.

FTC Accomplishments

First, we recognize that the most immediate and pressing public concern is the shrinking value of the dollar. And we've sought to focus our efforts on promoting competition in those sectors of the economy that are most important to the consumer and sensitive to inflationary pressures.

Our activities in the area of health care provide an excellent example. Recent FTC initiatives in this area include:

-- removing restrictions on price advertising of eyeglasses, contact lenses, and eye exams and requiring that eye doctors provide consumers with prescriptions (thereby helping consumers to comparison shop).

-- barring publication of relative value scales (which may tend to decrease competition and facilitate price fixing) by the Minnesota State Medical Association.

-- barring the American Society of Anesthesiologists from prohibiting its members from accepting salaried, rather than potentially higher cost fee-for-service, employment.

-- barring a medical testing laboratory company from giving kickbacks to physicians.

-- barring the Indiana Dental Association from inducing its members not to cooperate with health insurers' cost containment programs.

A number of other activities in this area are now underway including: an investigation of physician control of Blue Shield plans, a rulemaking to determine whether manufacturers of hearing aids should provide more information to consumers, and a case in which an FTC administrative law judge's initial decision -- which is now on appeal to the full Commission -- held that the American Medical Association has unlawfully limited advertising by physicians.

A chief inquiry of ours in the health care area is whether professional self regulation has anticompetitive consequences. We are actively involved in examining that same question with respect to the other professions. For example:

-- Our investigation of the legal profession seeks to determine whether there are unjustifiable restrictions on development of alternative, lower-cost legal delivery systems.

-- Our investigation into the real estate industry is examining whether broker commissions are determined in a manner that keeps prices artifically high.

-- And recent investigations of veterinarian and accountancy professional organization practices have resulted in voluntary actions on the part of both groups to remove restrictions on advertising that allegedly hamper full, free and fair competition.

I won't belabor the point. But I think a review of our activities in the other market sectors that are critical to consumers--energy, food, housing, transportation and clothing--demonstrates that we are targeting our efforts to those areas where inflation hits pocketbooks the hardest.

I think it noteworthy too that we are flexible in the way we approach these problems. The Magnuson-Moss Act encouraged us to look to alternatives to case-by-case litigation. While traditional administrative litigation remains an important law enforcement tool, it is augmented by other techniques.

For example, we are making increasing use of our mandate under Section 6 of the FTC Act to compile information about business structure and practice and make the information available to the public and the Congress. Recent examples of this activity include:

-- A consumer pamphlet on individual retirement accounts. The report analyzed sales practices in this rapidly growing industry and provided information consumers need to make informed decisions.

-- Reports to Congress on cargo preference, showing the cost of cargo preference legislation then being considered, and steel imports, describing the likely cost of pending steel import restrictions legislation.

-- The development of a model state law concerning generic drug substitution. The model act is designed to save consumers' money by allowing pharmacists to substitute lower price generic equivalents for brand name drugs. It was proposed by the Commission and the Department of Health, Education, and Welfare for adoption by the states. In fact, the President recently sent a letter to the Governors of every state, enclosing the model act and

praising it as an "important initiative that the states in cooperation with the Federal Government can take to combat the spiralling cost of health care for Americans."

-- We've also sought to provide support and advice to other agencies. We've intervened before the ICC urging an end to antitrust immunities in the trucking industry and more rate and entry flexibility in order to lower prices. And we've participated in CAB proceedings arguing for deregulation of airlines.

In 1973 Congress authorized the FTC to seek injunctions in federal court when the Commission has reason to believe that such a remedy would be in the public interest. We are using this remedy increasingly as a support to both our competition and consumer protection missions. For example:

-- the Commission sought and obtained a preliminary injunction blocking the planned acquisition by Rhinechem of a competitor in the pigments market, on the grounds that the merger would substantially lessen

-- a maker of an acne preparation agreed to stop certain advertising after the Commission filed for an injunction, alleging the ads were false and deceptive.

-- and the manufacturer of cellulose insulation agreed to a permanent injunction to prevent the installation of hazardous flammable insulation.

The most direct measure of whether the Commission is fulfilling its Congressional mandate--to root out abuses of market power, enhance the role of competition and preserve informed consumers as the true "regulators" of the marketplace--is to look to those actions that have provided tangible dollar benefits to consumers. Some recent examples are:

--Eyeglasses. Consumers spend $4 billion a year on eyeglasses and eyeglass examinations. In states where advertising was restricted, studies found that prices ranged 25 to 40 percent higher than in the states where advertising was permitted. Our first trade regulation rule issued under the Magnuson-Moss Act removed restrictions on price

advertising of eyeglasses, contact lenses, and eye exams and required that eye doctors provide consumers with prescriptions, thus allowing consumers to comparison shop. This action alone, by introducing price competition into states where previously there had been none, could save consumers an estimated $500 million a year.

-- Blue Jeans. The day the FTC sued Levi Strauss charging retail price fixing, Levi blue jeans were selling from $15.00 to $17.00. Today, after the Commission obtained an order prohibiting the practice, vigorous price competition exists and the price ranges from $10.00 to $14.00. A conservative estimate suggests that this development is saving consumers $50 million annually.

--Audio equipment. The Commission sued major manu- facturers of audio equipment for allegedly engaging in resale price maintenance. It is estimated that the resulting FTC consent orders allowing retail price competition in audio equipment have saved consumers up to $15 million a year.

--Consumer redress. In the last year alone various companies were required by the Commission to pay out a total of over $10 million to redress consumer losses resulting from unfair or deceptive practices.

Regulatory Reform

We also recongize that we have an obligation to make our administrative process at the FTC more efficient and less burdensome, without sacrificing fairness, openness or accuracy. Since my arrival at the FTC, we've taken a number of major steps towards regulatory reform at the Commission.

--Eliminating unnecessary regulations. The Commission has completed its review of 152 pre-Magnuson-Moss trade practice rules (each affecting a major manufacturing or retailing industry) and rescinded 145 of them. I think this makes us unique among regulatory agencies in that we have actually reduced the number of pages our regulations take up in the Code of Federal Regulations.

--Cutting down on reporting requirements. The Commission has reduced the reporting requirement in its QFR program by eliminating 3100 smaller firms from the sample used to compile the Quarterly Financial Report and steamlining the report requirements of 600 firms so that they no longer must report the same data separately to both the FTC and SEC.

--Speeding up administrative litigation. We sought to extend our regulatory reform efforts to adjudicative litigation by revising our discovery rules, giving Administrative Law Judges more control over ongoing litigation and creating disincentives to delay by parties. We've also established a working group which prepared detailed recommendations for streamlining complex litigation.

Rulemaking

I would like to turn now to review of our Magnuson-Moss rulemaking activities, a subject which I know is close to the hearts of the Members of this subcommittee. Since my arrival at the Commission about 22 months ago, I have made examination and improvement of the rulemaking process a top priority. And, with the help of the members of this subcommittee, I believe we have taken a number of significant steps to improve Magnuson-Moss rulemaking at the Commission.

We have developed new procedures to reduce the time required to conduct Magnuson-Moss rulemaking proceedings as well as the size and redundancy of the evidentiary record generated in those proceedings. Hearings on the proposed rule on disclosure of insulation R-values were completed within four months after commencement of the proceeding compared to a previous average of eighteen months. Final staff recommendations on that rule were presented to the Commission within twelve months of the rule's proposal, also a record.

In the proposed children's advertising proceeding, with the help and encouragement of Mr. Eckhardt and Mr. Broyhill and other members of this subcommittee we employed a two-step hearing procedure that separates the hearing into two phases: a "legislative" phase where all witnessess testify and an

"adjudicative" phase where certain witnesses are subject to appropriate Magnuson-Moss cross-examination. This procedure insures that all interested members of the public have the opportunity to present their views to the Commission. At the same time it reduces unnecessary and duplicative cross examination by providing for examination only where the statutory criteria set out in the Magnuson-Moss Act are met: those disputed issues of material fact that must be resolved if the Commission is to make an informed judgment on the merits of the rule proposal.

We also have reversed the order of the presiding officer and staff reports so that the staff report, which contains the detailed summary of the factual record, is made available first. This allows the presiding officer to prepare a shorter report that focuses primarily on his differences from the staff analysis.

In addition, we now publish at the outset a timetable for the completion of each proceeding. This small step has the healthy effect of committing all participants including our staff, to avoid delay and proceed in an orderly fashion.

Improved readability of rules is another objective that I know we share with the members of this subcommittee. Our commitment to simple comprehensible rules remains strong, and the benefits are now being shown. The recently promulgated vocational school rule, for example, contains consumer notices that are vast improvements over the dense and turgid prose of earlier versions.

A number of these improvements resulted from recommendations of a Rulemaking Task Force chaired by the Commission's General Counsel, Mike Sohn. Another recommendation of that task force which we have implemented is the transfer of the presiding officers from the Bureau of Consumer Protection to the General Counsel. While the competence, independence and objectivity of the presiding officers who chair our rulemaking proceedings are above question, some participants in our rulemaking proceedings were concerned by the fact that our original structure located the presiding officers in the Bureau of Consumer Protection. By transferring the presiding officers from the Bureau I think we have alleviated that concern about appearances.

We also have implemented a procedure at the conclusion of each proceeding that allows persons who have participated in the rulemaking to present their views directly to the Commission before the Commission begins to act on the staff recommendations. We have used this procedure in our two final rules, the eyeglass rule and the vocational school rule, and in the two rules now pending before the Commission for final action, the R-Value insulation rule and the funeral rule.

I am pleased to report that this procedure has worked exceptionally well, winning substantial praise from those who have participated in it. For example, last week the Commission spent 9 hours hearing the views of those interested in our funeral rule proposal, including the funeral directors, the Small Business Administration, interested consumer groups, and a Member of Congress. I was delighted to find that those who appeared, including industry members, praised the procedure and the responsiveness that the Bureau and the Commission demonstrated. We intend to continue to provide for oral presentations in the rules we will consider in the next few months, including used cars, hearing aids, and others.

We also are in the process of revising our rule concerning ex parte contacts in rulemaking. The new rule will open up our proceedings still more without sacrificing their integrity. Outside parties will be allowed to meet with Commissioners so long as a transcript of that meeting is kept and later placed on the public record. This revision will provide for more direct access to the Commission while maintaining procedures that are consistent with recent court decisions concerning ex parte contacts.

We have also sought over the course of the last two years to devote substantially greater resources to analyzing the real world economic impact of our final rules. Throughout the rule-making proceedings we received extensive submissions on the likely economic impact of these proposals. And, before the Commission makes a final determination on the rule, we study that evidence and make our best judgment as to the economic consequences--including the likely impact on small business and the consumer. But we realize that that is not enough, that we have a responsibility to consumers and affected industries alike to monitor what happens once a rule goes into effect Thus, for example, this year we are conducting the first phase of a study of the vocational school rule's economic impact. We will gather additional data which will assist in determining the cost to the affected schools, and the impact the rule has had on advertising and sales practices in the industry. We plan similar detailed impact analysis of future Magnuson-Moss rules.

We have also come to recognize that even before a rule is proposed by the Commission, we must do all we can to determine what that rule's cost might be. And we have set up new internal procedures to ensure that we get the best economic analysis available before the Commission acts to propose a rule. For example, the Commission recently proposed a rule concerning standards and certification. While the staff proposal was in the developmental stage, economists worked closely with consumer protection staff attorneys to assist in the drafting of the proposal and to identify potential problems. Before the proposal reached the Commission for consideration, it was examined in detail by our Bureau of Consumer Protection Evaluation Committee, which includes economists, lawyers from the Bureau of Competition and the Office of Policy Planning as well as senior staff from the Bureau of Consumer Protection. The rule also was subsequently analyzed in detail by the Bureau of Competition to insure that it took into account competitive considerations. By the time the rule reached the Commission for our consideration, we had a diversity of views to consider and the best available analysis on economic impact. This is the model we intend to follow in the future.

47-917 O - 79 - 13

Public Participation

In 1975, this subcommittee urged, and the Congress agreed that the Commission's new rulemaking procedures include a program to insure that all viewpoints were adequately represented in Magnuson-Moss rulemakings. We have strived to make that program a success, and I am pleased to note that it has been soundly praised by the two Congressional committees that examined it, as well as by most of the people who participated in the process. While the program has also received its share of criticism, most of that criticism seems to stem from a fundamental misunderstanding of what Congress sought to do in establishing that program. The legislative history makes clear that the public participation program reflected a judgment on the part of Congress that agency rulemaking proceedings often lack balance, and that, unless funds were made available to the small business and consumer groups then not participating in rulemaking proceedings, the imbalance would continue. In implementing this program, we have followed closely that mandate. As a result our rulemaking proceedings have had the benefit of strong and effective advocacy on all sides of the issues.

We have been criticized because funds have gone primarily to consumer-oriented groups. But in fact, the program was intended to provide funds to those very groups. We also have been criticized for not providing more funds to representatives of small business associations. But the facts are that we have funded every small business group that has applied and that about 10 percent of the public participation funds have gone to representatives of small business interests. We also have set up a series of seminars across the country designed to educate grassroots business and consumer organizations to the program and its eligibility requirements.

We also have made improvements in the way in which we evaluate funding applications, provide compensation, and ensure that the funds are spent properly. First, the General Counsel now administers the program and decides who is to receive compensation. In addition, we have hired a full time auditor who systematically reviews the records of those who have received funds to insure that all funds (a) are accounted for, and (b) have been expended only for approved purposes. These changes, I think, further strengthen the program.

* * * * *

I have sought this morning to review briefly the state of the Commission. In summary, the Commission is vital and active. It is pursuing vigorously its statutory mission to make the consumer sovereign in the marketplace by promoting vigorous and fair competition, but in a manner that is sensitive to the public's concern about over-regulation.

My fellow Commissioners and I would be pleased to respond to your questions.

Mr. SCHEUER. Thank you very much, Mr. Chairman.

Before we turn to Congressman Devine, I would welcome any remarks by any of the other Commissioners present.

Commissioner Dixon. would you take the mike, please?

Mr. DIXON. I have difficulty, when I am offered that opportunity, turning it down because of things that have been said here.

I think, as you enter this broad study that you described, you should harken back and review a little history on where this agency came from. We are nothing in the world except an extension of your arm, the Congress. The Constitution clearly places the responsibility on the Congress for the regulation of interstate and foreign commerce. Now, this agency was created very early in this century. It followed some cases in the Supreme Court under the Sherman Act, that were trying to decide what was a violation and what was reasonable. It had developed by 1912 that we needed something—at least Congress was searching for some place—some kind of a program that attacked problems before they reached Sherman Act proportions. So, the Federal Trade Commission came into being to enforce a new type of law. Congress declared unfair methods of competition in commerce illegal. They did not choose to spell them out, they just declared them illegal. They set up the machinery, and you gave the Federal Trade Commission the broad—and I might describe it as, "inquisitional power of Congress"—to take a clear look at facts before we challenged them.

In the FTC Act you depended upon a court review procedure to see if our actions fit within the constitutional safeguards. So, we started along this way. One could say that you set us up first to do something about specific practices that were leading to Sherman Act violations in the competition field, before they reached Sherman Act proportions. There is further the problem of dominant firms or monopolies. What do you do about it? Are you against bigness per se? We have all been accused of these things when we try to do our job; but the point is, somebody has to do it.

So, you set us up to have the first look at such problems. I have never had any doubt in my mind that anything we ever did you could not reverse. You can do it by oversight. You can do it by just passing the law. You have that power.

Mr. SCHEUER. Well, it is easy to say that, and I suppose as a theoretical matter it is true. However, I would say there is a pretty generally felt perception here that things have perhaps gotten out of control over there in the "wild blue yonder" of the executive branch.

Mr. DIXON. We are not the executive branch, that is the difference between this agency and others; we are an independent agency and the only time a President ever stuck his hand in here in the Federal Trade Commission it was slapped pretty quickly by the Supreme Court.

Mr. SCHEUER. Yes. Well, both as to the independent regulatory agencies and the regulatory activities of the executive branch agencies like EPA, OSHA, and the rest, we hear you. However, I think you and we on this subcommittee have to deal with a fact of life. We are faced with a condition and not a theory, as Grover Cleveland told us about 100 years ago. The condition is that there is a generally felt perception that things have gotten out of control and that we no longer have that handle that you say we have.

Mr. DIXON. I understand that fully, and everybody who ever worked up here on Capitol Hill for any committee, subcommittee, or any Congressman or Senator knows full well how jealously you guard your right to legislate. You do not like anybody doing it for you. That is what rulemaking is.

Mr. SCHEUER. Commissioner, if we feel jealous about our legislative prerogatives it is clear that it has taken us a long time, really, to concentrate our minds on doing something about it.

Mr. DIXON. No one ever created a situation where you had to face it, you see. We have now bitten the bullet, so to speak.

Mr. SCHEUER. Well, I think Congress is biting the bullet, and you have to look at this proposal. As I said, my colleague, Jim Broyhill, has been a leader among those who feel that some kind of remedy is appropriate. This is a bipartisan thing, it is not a partisan thing at all. Something is going to happen. As I said before, we would really welcome your thoughts as to the ways and means by which we reassert these congressional prerogatives which—as you say and rightly so—we are very proud of. We have seen a war of attrition, let us say; they have been eroded over the period of time, just as our warmaking power was eroded. It took us a long time before we reestablished control over the warmaking power and made a reality out of the constitutional obligation that we have to exercise those powers.

Well, I think the same thing is in the cards, and these are the currents that you probably feel. We are going to try to recover these powers that seem to have been eroded by the passage of time. We want to do it in a responsible, thoughtful way, in a fashion that does not send baby down the drain with the bathwater. We welcome your contributions to our thinking on this matter.

Mr. DIXON. I remember when we first entered real rulemaking in the meaningful way. That was when we undertook to examine the cigarette-smoking problem in the United States of America. I spent—as Chairman then, of this agency—near 3 weeks up here defending my heart, my life, and everything in the agency before this committee, before the Commerce Committee of the Senate. Mr. Pertschuk was the counsel then, over there at that time, trying to explain our position. We stood steady and insisted that what we had done was fully cognizable not only under our authority, but our mandate; and we went from there.

Now, it had a very serious constitutional question that arose from that as to whether or not we should have gone and prohibited the advertising of cigarettes on television and radio. I refused to take that position, although my colleagues, when the bill was introduced over in the Senate, 4 to 1 outvoted me and supported it.

I will tell you this, when you get to dealing with the Constitution, and you are going to do it, I want you to pass that law. I do not want to even have to run interference for you out front.

Mr. SCHEUER. Well, on this subject of cigarette advertising, we did pass some legislation.

Mr. DIXON. It was passed.

Mr. SCHEUER. Then we updated it. I have not had a chance to talk to my colleagues, especially my two colleagues from tobacco-growing States whom I respect for their integrity, intelligence, and their thoughtfulness.

I have not a chance to talk to them but, speaking just personally, I would like for us to take a look see at what you are doing in the field of cigarette advertising. I see that little warning notice down at the lower left-hand corner; it is very, very small. It is the same message we have sort of mentally discarded because there is nothing new and different about it. It is sort of like a union label. There may be ways that you could make it a little bit larger and more visible; there may be ways that you could rotate the message; there may be ways that you can send different signals, different little messages and make it a little more interesting and a little more eye catching.

So, I welcome your thinking about that. What was proper for the 1960's may be inadequate for the 1970's because we live with experience, we see how things work. Our perception has sharpened and maybe we can do a little creative thinking on that some time soon.

Mr. DIXON. Well, I did not want to take too much time. I just wanted to give you this background because you are going to have to face this decision ultimately with the various bills, whether or not you want to pass the bill and make it automatic, the problem sitting there, automatic oversight and review, my colleagues know that I have welcomed these types of bills. If you are willing to pass that type of law, bless you because all I can make a prediction to

you is again, you have gone back to where maybe all you have had us sitting as the first line of the problem and then you can interject yourselves, if you want to.

But, I tell you what the bar association is going to do to you. If we announce it, if you pass such a bill and the rulemaking hearing is announced on the subject, they may organize each party that it affects—two groups of attorneys—one at the Commission to ride herd upon the record and pick up any error that we might make, so they can go to court and get it reviewed. Then, another group will come up here—and deal with each member on the subcommittee and responsible committees to get you to oversight them and change whatever we are going to do.

If that is what you want, that is fine. That is where you were before you created the Federal Trade Commission. Just imagine in these 65 years, about all of the problems that this agency has dealt with that were considered unfair methods, or an unfair and deceptive act of practice.

Now it is nonsense, we just do not have a real vision of the real America, and so forth. But, that is the way it has been, and we have had you depending upon judicial review. Now it seems to me a question of whether you can continue depending just on judicial review, rather than you reviewing it. Legislation is like saying, what contribution have we made from a cost standpoint on enforcing competition laws in this country. What is competition worth to the country? I have never seen anybody that can estimate.

Mr. SCHEUER. We are going to try to do that for you.

Mr. DIXON. Well, that will be quite a trick, if you can. All I can tell you is that I go back to the founding fathers that had a question in their hearts and minds as to the problems that monopoly and abuse of monopoly power gave to a free society. All I know is that there is no free enterprise without competition.

If our laws are deficient, that is where you should be, in my opinion, examining them very closely and changing them.

Mr. SCHEUER. You are absolutely right. We respect the system in that people who feel aggrieved by your good works can go to court and test the constitutionality of your product. We have something in addition to that, that we think ought to be tested: the sensitivity and the responsiveness of your product to the congressional mandate. We think they are both legitimate, somewhat different types of review. One relates to how your regulatory product jives with the Constitution. The second one, that we think has become pretty relevant and necessary, is how it jives with the original congressional intent and the current congressional intent. We see nothing inconsistent about them, they are quite compatible.

Let me also say that we are concerned about competition. In the memorandum that this subcommittee sent to the full committee when we got our budget approved by the full committee—and in the memorandum that we will send on Thursday morning to the Accounts, Subcommittee of the House Administration Committee—we have put in as one of our agenda items during this Congress a scrutiny of the current state of competitiveness of our economy.

I remember as a bright-eyed young college student, more decades ago than I care to remember, during the late thirties, when I was studying economics at Swarthmore College, how excited I was at

the TNEC reports. I can still remember the big blue book that they put out. Gardner Means was the staff director then. He must have been a young fellow because he is still around and still active. It was a blue book with three white letters, "SAE," the Structure of the American Economy. I remember how all of us on the university campuses that were seriously interested in becoming horseback economists, how excited and thrilled we were at that whole new vision; the whole new collection of insights about the structure of the economy and the degree to which it is competitive.

We think there may well be a need for an updating of that, and a new look at how competitive we are; the extent to which monopoly seems built into the economy; the degree to which these characteristics of the economy affect productivity, our ability to compete, and our ability to produce goods and services cheaply. This not only benefits the American consumer in the marketplace, but, as Chairman Pertschuk mentioned, has a major impact on the value of the dollar abroad. Why are we not able to compete abroad? Why can we not sell steel in the international market in competition with the West Germans? We cannot do it. I am not ready to accept the explanation, "Well, it is because of all that slave labor." The fact of the matter is that the Swedes, the West Germans, and the Japanese pay their skilled workers just about what we pay ours. Maybe the West Germans pay them a little bit more. It is something else.

So, why can we not sell steel abroad? The question is, "Not only why can we not sell it abroad", but why can we not sell steel FOB Pittsburgh. What is the cocoon in which we have wrapped our steel industry—this whole protective cotton wadding of protectionism—and how is that affecting the American consumer? How do you conduct a cost benefit analysis? I will ask you about this later, Commissioners, so, maybe you will not force me to repeat the question.

How do you apply a cost-benefit calculus to that? How do you establish the extra price we are paying from the consumers' point of view? How do you ascertain the multiplier effect of the increase in steel prices, that ripples throughout the economy in goods and in services? How do you put a price tag on our reduced ability to compete abroad, the impact on the dollar.

I read in the Wall Street Journal a few months ago that the Maritime Commission had made a contribution to one single firm on one order of about $350 million—if my memory serves me well—equal to 49 percent of the costs of a ship-building contract. That is what it would take for this particular company—I forget which it was—to get that contract, $350 million. Why is it that we cannot compete? Put a cost-benefit factor on that. How many jobs for how many years did that get us? What kind of payroll did it reclaim for this country? How much export of jobs did that reduce, and was it worth $350 million? That is a lot of Federal bucks.

I would like somebody to show me that it was worth $350 million for us to wrap that particular company and that particular industry with this cocoon of protection against foreign competition.

Our total inability to compete also is true in the textiles industry. I come from New York City. The clothing workers' union, the International Ladies' Garment Workers' Union, the Amalgamat-

ed—yes, they are in my backyard. I feel for those employees. A lot of them live in my district. The time has passed when we could be knee-jerk free-traders. I am not a knee-jerk free-trader, although that is where my instincts are.

But, I think we ought to do some hardnosed calculations about why the textile industry cannot compete; why the steel industry cannot compete. We want to stop the export of jobs, it threatens us—but, you know, what price glory? What price are we paying? What are the incentives that we need to establish; what are the disincentives that we need to wipe out; what are the impediments to increased productivity on the part of American business enterprise that we should remove?

It seems to me that you ought to be doing some hardnosed thinking about why our steel industry cannot compete; why our shipbuilding industry cannot compete; why our textile industries cannot compete. You should consider what it is costing us to protect them with this incredible cotton batting and, what it would cost if we went along a different route, perhaps, to help them compete. Where would the cost/benefit balance lie?

Mr. PERTSCHUK. We do have some serious studies underway on many of the issues you have raised. The steel industry study was published last year and was critical of the trigger-price mechanism for precisely the reasons that you raised. Our Bureau of Economics is planning to undertake studies of the impacts of tariffs and other nontariff trade barriers on competition. This is an area for our bureau of economics to do, the kind of work you are talking about.

Mr. DIXON. Mr. Chairman, I cannot let pass what you said. You referred to TNEC and Gardner Means. As staff director and counsel to the Kefauver Antitrust Subcommittee from 1957 until 1960, just before I was appointed chairman of this agency, we had what was called administered price hearings. I will assure you that if you will have your staff go dig those books up, you will get many of the answers that you would have to duplicate. If the Federal Trade Commission studied it again it would come to a proposition where in my opinion—it is a humble opinion—maybe for lack of competition or something else that was allowed by a deficiency or law enforcement or congressional oversight, or something, the point is that a great many of our great industries simply priced themselves out of the foreign market. They priced so high. After World War II and the Marshall plan we resurrected all that competition with better machinery and better equipment on a costing basis than we have in our own mills. So, they started coming into our market. The same industry that could be said had been abusing the system now came and said, "Protect me from this competition that is coming from the Japanese and from Europe."

When I get to that point, talking about whether a job goes down the drain—and this is kind of like what Congressman Devine is going to talk about—we had to face, finally, that bullet, I had no doubt in my mind, under all of the legal precedents, that our challenge at what was going to take place up there was correct. We ran into a real hardheaded fellow. He said, "You just do this, and I am going to close the damned place." He closed it. When he closed it he came to the political body and said, "Look at all the jobs,