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The Federal Trade Commission: Internal Organization and Procedure

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The Federal Trade Commission: 
Internal Organization and Procedure

Professor Auerbach was the staff director of the Committee on Internal Organization and Procedure of the Administrative Conference of the United States. This Article is the outgrowth of his report to the Committee, embodying notably commentary of the heads of staff of the Federal Trade Commission and of the Commissioners to the initial report. The Article is comprehensive and extensive; a full grasp of its scope can best be gleaned by reference to the general outline below.

Carl A. Auerbach*

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*Professor of Law, University of Minnesota
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I. INTRODUCTION

This Article was written for the Committee on Internal Organization and Procedure of the Administrative Conference of the United States, on which the author was privileged to serve as staff director. The Administrative Conference expired before the Committee had a chance to study the report; the views expressed herein, therefore, are solely those of the author and not the Committee or the Conference.

The Committee on Internal Organization and Procedure was given "primary responsibility" to consider problems of "delegation of authority within and to the agencies, separation of functions within agencies, institutional decisions, and other organizational matters which may promote expedition and efficiency in the work of the agencies, apart from the conduct of formal or informal proceedings."

In the main, this Article deals with problems that fall within these delineated areas. It does not undertake to evaluate recent proposals to restructure the work of the FTC either by transferring its adjudicatory functions to an administrative court or by transferring its antitrust activities (excluding its Robinson-Patman Act jurisdiction) to the Department of Justice.


2. Administrative Conference of the United States, Bylaws § 5(b).


4. This proposal was made in a report by Dean James M. Landis. SENATE COMM. ON THE JUDICIARY, 86th Cong., 2d Sess., Report on Regulatory Agencies to the President-Elect 51–52 (Comm. Print 1960) [hereinafter cited as Landis Report]. Dean Landis does not say whether, under his proposal, the adjudicatory functions of the FTC in this area would be performed by the existing federal courts or by a special administrative (trade) court.
The first draft of this Article, prepared in September 1962, was based upon a study of the public records of the FTC and talks with members of the Commission’s staff, Commissioner Philip Elman and members of the private FTC and antitrust bar. Copies of the draft were submitted to the Commissioners and heads of staff of the FTC. The heads of staff prepared memoranda commenting on the report. Every important instance in which any FTC Bureau Director or Division Chief disagrees with the views or recommendations set forth herein is noted in the final Article, which was completed in December 1962. Though the memoranda express agreement with many of the views and recommendations of the Article, care has not been taken to note every instance of such agreement. On a number of matters, too, the members of the Commission’s staff do not agree among themselves.

II. INTERNAL ORGANIZATION OF THE FTC

Four of the five present FTC Commissioners were appointed by President Kennedy. Under the leadership of its Chairman, Paul Rand Dixon, the new Commission has introduced a number of organizational and procedural innovations. To date, however, the full potential for increased effectiveness inherent in these changes has not been realized.

5. Memoranda were prepared by the Director of the Bureau of Restraint of Trade, the Assistant Director, and each of the five division chiefs in the Bureau; the Director of the Bureau of Deceptive Practices (reflecting the views of the Director, Assistant Director, and the five division chiefs of the Bureau, except that the Chief of the Division of General Practices joined only in parts thereof); the Director of the Bureau of Textiles and Furs, the Assistant Director, the Chief of the Division of Enforcement and the Chief of the Division of Regulation (a joint memorandum); the Director of the Bureau of Industry Guidance; the Director of the Bureau of Economics, the Assistant Director, and each of the three division chiefs in the Bureau; the Director of the Office of Hearing Examiners; the General Counsel, the Assistant General Counsel for Consent Orders, the Assistant General Counsel for Appeals and the Assistant General Counsel for Legislation; the administrative head of the Office of Special Legal Assistants and the Program Review Officer.

6. President Kennedy appointed Chairman Paul Rand Dixon and Commissioners Philip Elman, Everette MacIntyre, and A. Leon Higginbotham, Jr. Commissioner Sigurd Anderson is the fifth. Commissioner Higginbotham was sworn in on October 18, 1962, succeeding Commissioner William C. Kern, whose term had expired. In October, 1963, the President nominated Commissioner Higginbotham to be United States district judge for Eastern Pennsylvania and John Reilly to fill the unexpired term of Commissioner Higginbotham.

7. The Bureau of Deceptive Practices insists that “substantial gains” have already been made:

For example, proceedings in formal contested cases have been
A. The Principal FTC Bureaus

A chart depicting the present organization of the Commission is set forth below.

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The 1960 Staff Report of the Budget Bureau states that the "principal Federal Trade Commission organizational problem, in recent history, has been whether to organize by type of case handled (i.e., by program) or by function performed (i.e., by greatly expedited. Of the thirty-five formal complaints which had issued during the calendar year 1962 in contested deceptive practice cases (under section 5 or 12, FTC Act), as of September 30, 1962 final order had been issued in one case, initial decisions had been rendered in two cases, and the reception of evidence had been concluded in four cases. Thus, a total of nine cases, or one-fourth of the cases, had progressed through the stage of receiving evidence and were awaiting decision by the hearing examiner or the Commission. This is believed to be a vast improvement over the experience in previous years.

Memorandum from Daniel J. Murphy, Director, Bureau of Deceptive Practices, to Frank C. Hale, Program Review Officer, Nov. 1, 1962 [hereinafter cited as Murphy Memorandum].
In 1949, the Task Force of the first Hoover Commission disapproved the organization of the FTC along process lines; a Bureau of Legal Investigation and a Bureau of Litigation were then the two principal bureaus of the Commission.

Since different bureaus of the Commission are responsible for different stages of its cases and are relatively autonomous, this creates problems of coordination between bureaus on both general programs and particular matters. A prime example relates to the investigation and trial of cases. Responsibility for gathering data on violations is in the Bureau of Legal Investigation; responsibility for trial is with the Bureau of Litigation. One bureau collects a miscellany of facts, often unrelated to any particular theory of the case, and turns the data over to the trial lawyers to be fitted into a case that will stand up in the courts. In nonroutine cases, and particularly in antimonopoly cases, there should be a close knitting of the investigation and trial aspects. In gathering evidence the investigators should work with the trial lawyers; two or three should continue as investigators during the trial, assisting the attorney and collecting new evidence as it may be needed.

Accordingly, the Task Force suggested that the FTC should be organized along program lines— one bureau to do the antimonopoly work and another the deceptive practices work.

A separation of the two types of cases in different bureaus might (a) for antimonopoly cases, link more closely the investigations and trials and facilitate the integration of the services of economists at both stages; and (b) for false and misleading advertising cases, link together responsibility for investigations, trials, stipulations and trade practice conferences (now in four separate bureaus).

The suggestion of the Task Force was adopted, but Heller & Associates disapproved it. To provide flexibility in the assignment of attorneys to different types of cases, Heller & Associates recommended a return to organization along process lines. To coordinate investigation and litigation, they recommended the creation of the position of "project attorney," who was to be in charge of the case throughout the stages of investigation and

8. BUREAU OF THE BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, FEDERAL TRADE COMMISSION STUDY 4 (Staff Report No. CF-60-124, 1960) [hereinafter cited as Budget Bureau Staff Report]. This study was undertaken, with the approval of the FTC Chairman, in order to evaluate the organization and operations of the Commission which then reflected the recommendations contained in the Federal Trade Commission Management Survey Report of Robert Heller & Associates Inc. (1954) [hereinafter cited as Heller Report].


10. Id. at 128.
litigation, although he was not to present the case for the complaint to the hearing examiner or, eventually, to the Commission. The recommendations of Heller & Associates were adopted, bureaus of Investigation and Litigation were reconstituted, and 30 "project attorneys" were appointed.

The Budget Bureau Staff Report concluded that "excellent arguments can be made for functional as opposed to program-oriented organizational structures and vice versa" and that the general organizational plan of the FTC should not "be disturbed at this time by any major changes."11 Dean Landis, however, was persuaded that the reorganization based upon the recommendations of Heller & Associates "resulted in a fractionalization of the handling of cases before the Commission and has proved to be a failure."12 He subjected the project attorney to particular attack for increasing delay in, and the cost of, FTC operations.13

The new Commission has returned to an organization along program lines. Its principal bureaus are once again the Bureau of Restraint of Trade and the Bureau of Deceptive Practices. The Bureau of Restraint of Trade "investigates, litigates, and secures compliance with orders to cease and desist in all cases arising under the Clayton Act and in all restraint of trade cases arising under section 5 of the Federal Trade Commission Act" and "administers the Webb-Pomerene Act."14 The Bureau of Deceptive Practices "is responsible for the investigation and trial of all cases involving acts or practices alleged to be deceptive and for obtaining and maintaining compliance with orders to cease and desist issued in such cases."15

The recent history of the FTC demonstrates that its effectiveness, or lack thereof, is not the result either of the program, or the process, model of organization. The FTC has been charged with ineffectiveness when it was organized according to either model. The ready availability of two different organizational models, however, offers a new chairman the oppor-

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11. *Budget Bureau Staff Report* 5.
13. *Id.* at 49-50. In support of his conclusion, Dean Landis cites "the opinion of practitioners [and] members of the staff of the Federal Trade Commission" as well as a 1956 report of Subcommittee No. 1 on Regulatory Agencies and Commissions of the Select Committee on Small Business of the House of Representatives. *Id.* at 48-49.
tunity to alter top personnel through organizational change. This advantage should not be minimized because it enables a new chairman to shake bureaucratic routine.

Whether some other organizational structure would increase the effectiveness of the FTC is a question that must be deferred until the alleged grounds of FTC ineffectiveness are explored.

B. Organization for Planning

1. How Effective Is the FTC?

The charge that the Commission "has engaged mainly in activities contributing little toward accomplishing the primary congressional objective of assuring widespread effective competition" has been heard throughout its history. In support of its charge, the first Hoover Commission Task Force pointed to the fact that approximately 70 percent of the cases leading to cease-and-desist orders involved false and misleading advertising and deceptive practices and that the bulk of the remaining 30 percent of the cases, although they involved price discriminations and anticompetitive practices, affected small corporations of little consequence to the national economy.

Examination of all the orders issued by the Commission during the period January 1, 1961 through June 29, 1962 reveals that the distribution of orders between deceptive practices cases on the one hand and restraint of trade cases on the other, is approximately what it was in 1949, when the Task Force reported.

Another way of comparing the emphasis placed by the Commission on its deceptive practices work with that placed by it on its restraint of trade work is to examine the professional manpower allotted to the two areas. The Bureau of Restraint of Trade consists of a Director (GS 17), an Assistant Director (GS 16), an assistant to the Director (GS 15), 4 Division Chiefs (1 GS 16 and 3 GS 15) and 107 attorneys, at grade levels from GS 7 to GS 15. In addition, it has an accounting division consisting of a Chief (GS 15) and 11 accountants, at grade levels from GS 9 to GS 14.

Two bureaus deal with deceptive practices — the Bureau of Deceptive Practices and the Bureau of Textiles and Furs. The former consists of a Director (GS 17), an Assistant Director (GS 16), an assistant to the Director (GS 15), 4 Division Chiefs (4 GS 15) and 60 attorneys, at grade levels from GS 7 to GS 15.

17. Ibid.
| Deceptive Practices | Consent Orders | | Non-Consent Orders | | Total Number of Orders |
|---------------------|----------------|----------------|------------------|------------------|
|                     | Number         | % of Total Number of Orders | Number | % of Total Number of Orders |
| Robinson-Patman Act | 120            | 86%           | 20\(^b\)       | 14%             | 140 |
| Clayton Act, § 7    | 5              | 71%           | 2\(^c\)        | 29%             | 7   |
| Other               | 8              | 62%           | 5\(^d\)        | 38%             | 13  |
| Total               | 133            | 83%           | 27              | 17%             | 160 |
| Grand Totals        | 515            | 85%           | 92              | 15%             | 607 |

* In addition, there were 10 orders of dismissal.

* In addition, there were 7 orders of dismissal and 3 orders remanding the cases to the hearing examiner.

* In addition, there was 1 order remanding the case to the hearing examiner.

* In addition, there were 3 orders of dismissal and 9 orders remanding the cases to the hearing examiner.
TABLE II

FTC ORDERS, JANUARY 1, 1961 — JUNE 29, 1962

<table>
<thead>
<tr>
<th>Deceptive Practices</th>
<th>Consent Orders</th>
<th>Non-Consent Orders</th>
<th>Sub-Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>63%</td>
<td>74%</td>
<td>71%</td>
</tr>
<tr>
<td>Restraint of Trade</td>
<td>22%</td>
<td>26%</td>
<td>29%</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

It also has a Division of Scientific Opinion with a chief (GS 15), and 7 professional employees, at grade levels from GS 13 to GS 15. The Bureau of Textiles and Furs consists of 1 Director (GS 17), 1 Assistant Director (GS 16), 2 Division Chiefs (2 GS 15) and 17 attorneys, at grade levels from GS 7 to GS 15.

It has not been possible to estimate how much of the time of the General Counsel's Office, the Bureau of Industry Guidance, the Bureau of Economics, the Bureau of Field Operations, the FTC field offices and the Commissioners themselves, is spent in the respective areas of deceptive practices and restraint of trade.

On the basis of the figures set forth above, 126 professional employees are engaged in restraint of trade work in the Washington offices of the FTC, and 94 in its deceptive practices work. These figures more adequately reflect the comparative emphasis of the FTC than the nature of the orders issued. There is little question but that the new Commission is attempting to place greater emphasis upon its restraint of trade work.

It should be added, however, that there is no reason to think that the current work of the FTC in the restraint of trade area is of greater consequence to the national economy than it was in 1949. As Table I above shows, 140 out of the 160 orders issued in the restraint of trade area in the period January 1, 1961 to June 29, 1962, prohibited future violations of the Robinson-Patman Act. Many, if not most, of these orders were directed against relatively small sellers and had little effect on the national economy. It is not suggested that the FTC will solve its problems by neglecting its deceptive practices work in favor of its restraint of trade work, and it is fruitless to
argue which is more important to the consumer and the economy. The important question is whether the Commission has a system of priorities by which it is guided in discharging all the tasks entrusted to it by Congress. To date, the answer is no. Thus, Commissioner Philip Elman, for example, has publicly deplored the lack of a "positive, planned, and systematic effort" by the Commission to achieve its statutory objectives even in the field of deceptive practices.  

2. The Organization of the Planning Function — the Program Review Officer

One of the criteria used to determine the extent of FTC planning is the percentage of the total number of investigations that originates within the agency as compared with the percentage that stems from "applications for complaint" received from the public at large. The Budget Bureau Staff Report sets forth the following table to indicate "the trend away from the passive 'mail bag' approach to the active FTC determination of what work will be done."

| TABLE III  |
|-------------------|---|---|---|
| PERCENT OF INVESTIGATIONS ARISING DIRECTLY | FROM APPLICATIONS FOR COMPLAINT |
| 1958 | 1959 | 1960 |
| Restraint of trade cases | 48% | 46% | 17% |
| Deceptive practice cases | 55 | 48 | 40 |
| Total, all cases | 52 | 47 | 31 |

The Staff Report explains the large 1959 to 1960 drop in the percentage of restraint of trade investigations stemming from applications for complaint on the ground that "a number of large industry-wide investigations which were initiated in 1960, involving several hundred individual investigations, found their original seed in complaints received from the public" but "the bulk of the companies being investigated were not the subject of applications for complaint received from the public."

20. Id. at 77. The Bureau of Deceptive Practices doubts that "it is reliable" to decide whether the planning function "is being properly exercised on the basis of the percentage of investigations which arise from letters of complaint" and points out:

... it is expected that the initiation of one investigation in an indus-
The trend noted by the Budget Bureau staff seems to have been reversed in the restraint of trade area in fiscal years 1961 and 1962, as the following Table indicates.

**TABLE IV**

**Percent of Investigations Arising Directly From Applications for Complaint**

<table>
<thead>
<tr>
<th></th>
<th>1961</th>
<th>1962</th>
</tr>
</thead>
<tbody>
<tr>
<td>Restraint of trade cases</td>
<td>82.5%</td>
<td>89.9%</td>
</tr>
<tr>
<td>Deceptive practice cases</td>
<td>58.6</td>
<td>48.9</td>
</tr>
<tr>
<td>Total, all cases</td>
<td>69.2</td>
<td>65.8</td>
</tr>
</tbody>
</table>

Yet even an increasing percentage of “self-generated” investigations does not necessarily reflect effective planning. For example, during the period studied, a large number of Robinson-Patman Act cases that eventuated in orders was self-generated. They resulted from general investigations conducted by the Commission under Section 6 of the Federal Trade Commission Act in the citrus fruit, wearing apparel, and drug industries. It would be difficult to say that the orders which terminated these proceedings will have a very great impact on the economy. The important questions are whether and how the process of initiating investigations is itself planned.

In recent years, the Commission has resorted to a number of organizational devices to perform the planning function. In 1948, it created a Planning Council of 12, composed of the General Counsel, the bureau heads, and the chiefs of important divisions, to furnish direction to its work and place increased emphasis upon its antimonopoly activities. The first Hoover Commission Task Force regarded this action as a step “to

try will often be accompanied by initiation of investigations against other members, especially if contact with the first industry member discloses that his competitors are engaged in similar practices. However, the investigation of the first industry member may have occurred because of a letter of complaint and it then becomes conjectural to say whether or not broadening the investigation to include other members of that industry did or did not result from a letter of complaint.

*Murphy Memorandum.*

21. Letter from John A. Delaney, Director, FTC Office of Administration, to the Staff Director, July 13, 1962. Mr. Delaney’s figures related to the percent of investigations “self generated” by the FTC. I deducted each of his percentages from 100% to arrive at the figures set forth above in order to make them comparable with the figures in the *Budget Bureau Staff Report.*
revitalize the agency and its program.” By 1954, however, Heller & Associates concluded that the effectiveness of the Planning Council “had diminished” and that the “need” for the Council was “negligible” because “administrative planning activities can be adequately performed by the Commissioners and the Chairman together with his immediate subordinates.”

Accordingly, the Planning Council was abolished.

The Budget Bureau Staff Report, however, found that the optimism of the Heller Report was misplaced and that no “such organizational mechanism as the Planning Council and no such procedure as the system of priorities [which apparently was a Planning Council effort that died even before 1954] exist at the present time.” To give the FTC “a satisfactory institutional means of determining how and where to apply its available staff resources to assure maximum impact on the economy and to assure maximum effective utilization of its resources,” the Budget Bureau staff recommended the establishment of a “small, high-level program review staff, composed of [two] attorneys and [two] economists” in the Office of the Executive Director. This staff would

(a) seek out and make use of, other available staff groups in FTC . . . to locate the primary “trouble spots” in the economy in which FTC should apply its efforts, (b) evaluate competing proposals for project-type investigations, (c) determine and recommend to the Commission appropriate division of effort between anti-merger, other anti-monopoly, and antideceptive practices work, (d) determine and recommend to the Commission the amount of agency effort which should be devoted to “applications for complaint” investigations as opposed to project-type investigations, and (e) develop or approve standards by which such applications will be judged. . . . All this and other pertinent data should be presented to the Commission in such a manner that it may weigh the priorities and determine the annual program.

The new Commission has moved to carry out this recommendation. A Program Review Officer has been designated “to make reports and recommendations directly to the Commission with respect to how and where its functions should be exercised in order to best serve the public interest.” The Program Review Officer is to act under the direction of the Executive Director, who, under the direction of the Chairman, “exercises executive

24. Budget Bureau Staff Report 18.
25. Id. at 12.
26. Ibid.
and administrative supervision over all the bureaus and the 
staff of the Commission." To date, however, the Program 
Review Officer— who has been given no staff of his own—has 
not succeeded in performing the functions envisaged by the 
Budget Bureau staff. His time seems to have been pre-empted 
by the performance of miscellaneous chores for the Executive 
Director and the Commission.

3. A Program for Planning

It would not be fair to ascribe the failure of all efforts during 
the past 14 years to institutionalize planning in the FTC to the 
indifference or ineptitude of the Commission. The failure to plan 
our antitrust objectives and the means of achieving them has 
also characterized the efforts of Congress, the courts, and the 
Antitrust Division of the Department of Justice.

(a) The Necessary Economic Studies

The essential step in such planning is to gather the information 
that will make it possible. Economic studies of the structure of 
each industry and the practices prevalent within it must be made. 
These studies should undertake to say whether the structure and 
behavior of particular markets are consistent with the goals 
of the antitrust laws; and if not, what structure and behavior 
would be so consistent and by what means the desired structure 
and behavior can be brought about. The effects of any antitrust 
decrees outstanding in an industry should be studied. These 
studies should guide the FTC in selecting the areas in which 
to proceed and in fashioning the decrees in those cases in which 
violations of the antitrust laws are found. Such economic analysis 
could also help in the allocation of antitrust tasks between the 
FTC and the Antitrust Division.

Finally, it is possible that economic analysis may reveal that 
the attainment of antitrust goals in certain markets is impos-

28. Id. § 4.
29. The memorandum from the Program Review Officer to the Com-
mmission on the first draft of this report consists almost entirely of excerpts 
from the memoranda of the Bureau Directors and Assistant Chiefs designed 
"to invite attention to statements [in the report] which are not factually 
correct, and statements from which incorrect inferences might be drawn" 
without "comment on the validity of his [the Staff Director's] opinions and 
c conclusions or on the appropriateness of his recommendations." Memoran-
dum from Frank C. Hale, Program Review Officer, to the Commission, Nov. 
20, 1962 [hereinafter cited as Hale Memorandum]. 
The Executive Director did not submit any memorandum.
sible under existing laws and procedures. The antitrust agencies would then have a basis upon which to request additional legislation from the Congress. Or analysis may cast doubt on the current validity of certain of the objectives of the existing antitrust statutes. In either case, Congress would have an informed basis upon which to review basic antitrust objectives from time to time.

It is not to be expected, of course, that economic analysis alone will solve the antitrust problem with which the country has been struggling since late in the 19th century. We must not expect the economists to perform miracles in the FTC, lest there be disenchantment with the effort to make more effective use of their professional abilities. As a discerning student of the antitrust problem has recently stressed, we must rely upon economic analysis to perform the function of “pointing out the available policy alternatives and their relation to existing policies, of making predictions about the effects of the alternatives, and of analyzing the results of past decisions.”

30

Since its inception, the FTC has conducted general economic investigations not only on its own initiative but also at the request of the President, the Congress, the Attorney General and other government agencies.31 The first Hoover Commission Task Force concluded:

Of all its activities, the Commission's investigations have probably had the most substantial impact and enduring value. Its general investigations, more than 100 in number, have in several instances resulted in the passage of major legislation—notably the Packers and Stockyards Act, the Securities Act of 1933, the Stock Exchange Act of 1934, and the Public Utility Holding Company Act of 1935.2

Of late, this activity has dwindled almost to the vanishing point. From 1956 to 1960, no other branch or agency of the Government requested the FTC to conduct any study and the FTC made only three studies on its own motion.33 The decline in this activity is not entirely due to FTC inertia. As the Task Force explained:


31. An alphabetical list of the general inquiries conducted by the FTC since 1915 is set forth in 1961 FTC ANN. REP. 115–99.


33. Budget Bureau Staff Report 31.
The Commission’s investigatory powers were first limited in the 1920’s by a Supreme Court decision restricting its use of subpoenas, and were later curtailed by limitations on appropriations, and on investigations upon resolution of either House. Since 1936 investigations at legislative request have required the concurrent resolution of both Houses and specific appropriation of funds to finance the cost of investigation. A

The Task Force reported that the Commission contemplated “a considerable expansion in economic investigations by the agency.” It regarded this expansion as vital and this work as the principal reason for continuing to place antitrust enforcement in the hands of an administrative agency like the FTC, the rejuvenation of which it held out hope. None of the hopes of the Task Force materialized; the role of the economists within the FTC continued to decline after 1949.

(b) A Strengthened Bureau of Economics

The original staff of the FTC was composed largely of the economists who made up the Staff of the Bureau of Corporations of the Department of Commerce. By 1960, however, attorneys accounted for 77 percent of the FTC’s professional staff, economists for only 7 percent. While there were 28 economists and 86 attorneys in the FTC in 1928, in 1960 there were 28 economists and 320 attorneys. The Bureau of Economics itself had a staff of only 14 economists in 1960 and the Budget Bureau staff found it to be a “relatively isolated unit” in the FTC, almost totally divorced from operations. It recommended:

Steps should be taken to assure that economic considerations are taken into account in the development of programs and policies by the Commission. A new position, Economic Adviser, should be established. The incumbent could be utilized to advise either the Chairman or the Commission as a whole. Economists should also assist the Executive Director in planning the FTC program.

While the new Commission has not followed these recommendations in detail, it has sought to revitalize the Bureau of Economics. Prior to the Heller Report, all FTC economists

34. First Hoover Commission Task Force Report 123.
35. Ibid.
36. Id. at 124–25.
37. Budget Bureau Staff Report 30.
38. Id. at 32.
39. Id. at 119. In 1960, the Bureau of Investigation and the Bureau of Litigation also had economists on their staffs. Id. at 30. The Budget Bureau Staff Report lists 15 economists in the Bureau of Economics. Id. at 14, 30, 119.
40. Id. at 30.
were in the Bureau of Economics, where the Accounting Division and the Division of Financial Statistics were also located. In accordance with the Heller recommendations, the Division of Financial Statistics was transferred to the Office of the Comptroller; the Accounting Division was transferred to the Bureau of Investigation; the economists working on merger problems were transferred to the Bureau of Investigation; and two economists were attached to the Bureau of Litigation. The Bureau of Economics was left with one division—the Division of Economic Evidence and Reports—to prepare the relatively few industrial economic reports issued after the Heller Report.41

The new Commission has once again centered all economic work in the Bureau of Economics. Headed by a Director (GS 16) and an Assistant Director (GS 16), it now consists of three divisions; (1) a Division of Economic Evidence, composed of a Chief (GS 15), 16 economists at grades from GS 5 to GS 15 and one statistician (GS 13); (2) a Division of Economic Reports, composed of a Chief (GS 15), an Assistant Chief (GS 14), 14 economists at grades from GS 5 to GS 14, one statistician (GS 12) and one business economist (GS 11); and (3) a Division of Financial Statistics, composed of a Chief (GS 15) and 37 statisticians, accountants and business analysts. Thus there are 35 economists in the Bureau, an increase of 7 over the total found by the Budget Bureau Staff. By the end of 1962, the Bureau is expected to have 45 economists.42 The Accounting Division, at one time part of the Bureau of Economics, is now a Division of the Bureau of Restraint of Trade.

The Division of Economic Evidence has been given the function of providing “economic and statistical assistance to the enforcement bureaus in the investigation and trial of cases.”43 Its relations with the enforcement bureaus are still in the process of being worked out. As things now stand, the economists in this Division are primarily engaged in merger work. Only infrequently are they called on for assistance by the Bureau of Deceptive Practices or the Bureau of Textiles and Furs or even by the divisions of the Bureau of Restraint of Trade other than the Division of Mergers.

41. Id. at 31.
42. Memorandum from Willard F. Mueller, Director, Bureau of Economics, to Frank C. Hale, Program Review Officer, Oct. 31, 1962 [hereinafter cited as Mueller Memorandum].
43. Statement of Organization § 13(a).
The Director of the Bureau of Economics comments:

It is perhaps unfortunate that economists have not been used more fully in these latter areas. Certainly with sufficient competent staff, the Division of Economic Evidence could make a significant contribution in these areas as well as in the Commission's merger work. Even now the needs for economic assistance in these areas exceed the ability of the Division of Economic Evidence to supply them adequately. I am certain that if this division actively sought to provide economic assistance in these areas a large un-met demand could be tapped. But, frankly, it has avoided attempting to tap this demand during the past 18 months because of the realization that it did not yet have adequate resources to provide substantial assistance in this area.44

With respect to merger work, it has become the practice in recent months for the Division of Economic Evidence to be consulted on the question whether an investigation should be instituted in a particular case. The Chief of the Division of Economic Evidence explains:

44. Mueller Memorandum. The Bureau of Textiles and Furs takes the position that the "need for the assistance of an economist within the sphere of activity of the Bureau of Textiles and Furs at the present time is not apparent." But it adds: "Personnel thoroughly familiar with the wool, textile and fur industries and the technical aspects thereof are invaluable however." Joint memorandum from Henry D. Stringer, Director, Bureau of Textiles and Furs, Charles F. Canavan, Assistant Director, Bureau of Textiles and Furs, Harold S. Blackman, Chief, Division of Regulation, and Eugene H. Strayhorn, Chief, Division of Enforcement, to Frank C. Hale, Program Review Officer, Oct. 30, 1962 [hereinafter cited as Bureau of Textiles and Furs Memorandum].

The Bureau of Deceptive Practices points out:

Just recently we have been consulting with the Bureau of Economics to obtain an expert opinion regarding certain surveys made to support a proposed formal complaint charging use of deceptive pricing practices against one of the largest corporations in the United States selling a consumer commodity of widespread use . . . , and we are consulting the Bureau of Economics to obtain expert opinions regarding the reliability of claims made in advertising to the effect that 9 out of 10 doctors use a product or that the advertiser has conducted surveys which show the popularity or extent of use or effectiveness of his product. Murphy Memorandum.

The Chief of the Division of General Trade Restraints states:

It is foreseeable that the need for economic and statistical assistance to this Division will expand greatly in the coming months as certain investigations now under way or which may be undertaken take shape. Memorandum from Rufus E. Wilson, Chief, Division of General Trade Restraints, to Frank C. Hale, Program Review Officer, Oct. 26, 1962 [hereinafter cited as Wilson Memorandum].
At the present time, [November 2, 1962] we make the initial review of the mergers which are reported in the press and trade sources daily, and we then recommend to the attorneys whether, in our opinion, further investigation is warranted. Where the merger appears to be significant and where available data are inadequate, we usually recommend that a letter be written to the companies for additional information. The attorneys review our preliminary analysis, and they then make the judgment as to whether a letter should or should not be sent out. This procedure constitutes a considerable change over the procedure previously in effect since we now have the responsibility for the preliminary analysis. This was previously done by the attorneys. However the attorneys retain the authority to approve or disapprove our recommendations.45

Recently, too, the Division of Mergers has sought to bring the Division of Economic Evidence into every phase of its work. The views of the economists are solicited on whether the Division of Mergers should recommend to the Commission that a case be closed or a proposed complaint be issued, the content of the proposed order, and the negotiations in connection with a consent order. If a consent order is not negotiated and a complaint is issued, the assistance of the economists in the preparation of the case will be requested “in most instances involving important cases,” as determined by the attorney in charge of the case.46 Occasionally, an economist will be asked to testify in the hearing before the Hearing Examiner.

The Chief of the Division of Mergers concludes:

[W]e have been at great pains to attempt to work out an improved relationship between the Division of Mergers and the Division of Economic Evidence. . . . In fact, it has often appeared that the demands of the Division of Mergers upon the Division of Economic Evidence has been far in excess of the limited resources, both qualitative and quantitative, of the Division of Economic Evidence.47

The Chief of the Division of General Trade Restraints, however, does not seem to approve of the developing relationship between the lawyers in the Division of Mergers and the economists. He writes:

It would not be feasible nor desirable for economists to participate in the decision to issue a complaint. The Commission is an enforce-

45. Memorandum from Harry Bender, Chief, Division of Economic Evidence, to Frank C. Hale, Program Review Officer, Nov. 2, 1962 [hereinafter cited as Bender Memorandum].

46. Ibid.

47. Memorandum from Philip R. Layton, Chief, Division of Mergers, to Frank C. Hale, Program Review Officer, Oct. 24, 1962 [hereinafter cited as Layton Memorandum].
ment agency and is charged with the responsibility of correcting unfair methods of competition and unfair and deceptive acts or practices in commerce. Is the Commission to be guided by an economist and substitute his economic theories as grounds upon which to issue or not issue a complaint or is the Commission to rely on its staff members who are trained in the law and who have advised that a violation of law does or does not exist? The Commission must, under its organic act, prosecute where it has reason to believe the laws that it enforces are being violated.

Its only discretion in this respect is the limitations of its budget and manpower and the weighing of one violation against another as to the amount of public interest involved.48

The Bureau of Economics offers no assistance to the Hearing Examiner and only rarely is it called on by the Office of Special Legal Assistants. At the stage of final decision by the Commission, each Commissioner determines whether and to what extent he will seek the advice and assistance of the Director of the Bureau of Economics, who also acts as Chief Economist to the Commission. The Chief Economist does not consult with any Commissioner on any case in which he has supervised or directed the work of the Division of Economic Evidence or has in any other way participated in the investigation or trial of the case. Finally, once an order is issued, the Division of Economic Evidence is "asked from time to time to review compliance reports," particularly in the more important cases.49

The Division of Economic Reports has the function of conducting "general economic studies and investigations in response to requests by the President, the Congress, and the Commission."

As of October 31, 1962, the new Commission initiated two general economic studies and investigations. One will deal with the ownership and corporate interrelationships of the nation's largest industrial corporations on which the Division plans to publish a report in 1963 and the other, with the market structure and business practices of certain industries.50 The Chief Economist also reports that the Commission "has asked the Bureau of Economics to make a recommendation with respect to the feasibility and probable scope of another" economic study

49. Bender Memorandum.
50. Statement of Organization § 18(b).
51. Memorandum from John J. Hurley, Acting Chief, Division of Economic Reports, to Frank C. Hale, Program Review Officer, Oct. 31, 1962. The Acting Chief refers to a third "economic report" of a confidential nature; it has not been ascertained whether it will be a "general" economic study or an investigation.
and anticipates that “before the end of the current fiscal year [June 30, 1963] the Commission will direct the Bureau of Economics to initiate two additional economic inquiries.”

The Division of Financial Statistics has the function, “acting in cooperation with the Office of Statistical Standards of the Bureau of the Budget,” of conducting “a continuing financial reporting program for the primary purpose of obtaining basic material for authoritative statistics concerning the financial characteristics of different groups of industries and of various classes of manufacturing corporations.”

Although the present Bureau of Economics has the potential to make the economic studies and analyses that must precede overall planning by the Commission, it has not been given this function. The duties of the Division of Economic Evidence are tied to particular cases; the Division of Economic Reports is just beginning to perform a function that, in time, will bear, significantly, upon the operational responsibilities of the Commission; while the task of the Division of Financial Statistics is still regarded as remote from these operational responsibilities.

If, as is recommended, the Bureau of Economics is asked to make the studies that must precede intelligent planning, the work of the three Divisions of the Bureau will become interdependent. It will be possible to rotate the economists among the Divisions and increase their interest in the overall functions of the Commission. The Bureau as a whole will need to be strengthened both in the quantity and quality of its personnel. The functions of the Bureau, however, will be sufficiently challenging to attract the ablest economists to the Commission.

Both the Chief Economist and the Chief of the Division of Financial Statistics seem to agree, however, that there is no connection between the Division’s present function of preparing, together with the Securities and Exchange Commission, quarterly profit data on American manufacturing corporations and any other work of the Bureau of Economics. “This information,” writes the Chief Economist, “has never been useful or even accessible to the rest of the Commissioner’s staff” and so long as its gathering is the Division’s “only function, it cannot

52. Mueller Memorandum.
53. Statement of Organization § 13(c).
be considered a useful vehicle for promoting the economic or legal work of the Commission.”

The Chief of the Division of Financial Statistics draws the logical conclusion and suggests that the Division “should stand separate and apart from the Bureau of Economics.” However, the Chief Economist reports:

The present Commission . . . in its 1964 budget request asked for additional funds to expand this division’s functions to include the collection of meaningful information on the structure of the American economy. If funds for this program are approved by the Bureau of the Budget and the Congress, this division will be able to provide information useful to the economic and legal programs of the Federal Trade Commission.

Funds to enable the Division to collect information on the structure of the American economy should be provided but, with all due respect, it would seem that the profit data collected by the Division should also be of interest to the Commission. Profit rates may be reliable indicators of the competitiveness of different markets— at least this question should be explored. Its exploration would not require the Division to disclose any information that it is required to keep confidential by law,

56. Levin Memorandum. The Division Chief writes:

The following factors are deterrents to any coordination of the work of the Division of Financial Statistics with that of the Bureau of Economics:

(1) An Executive Order gives us access to corporate income tax returns for the sole purpose of determining which corporations shall be required to file quarterly financial reports. Corporate names and addresses acquired thereby cannot be disclosed.
(2) The quarterly financial reports received from these corporations also cannot be disclosed.
(3) Any other work would interfere with the precision and alacrity with which reports from upwards of 10,000 corporations are received, edited, and otherwise processed each quarter.
(4) The data produced by the Division of Financial Statistics are used by at least two members of the Cabinet (The Secretaries of Treasury and Commerce) and by members of the Council of Economic Advisers and the Federal Reserve Board. Any interference with the precision and alacrity with which the quarterly financial reports are processed would result in unsatisfactory estimates of gross national product, national income, and anticipated revenue from corporate income taxes.

Ibid.
57. Mueller Memorandum.
and this activity could easily be coordinated with the contemplated studies of the structure of the economy.\(^59\) As the Assistant Director of the Bureau of Economics points out, to “make the Division of Financial Statistics an integral part of the Bureau of Economics will require Commission support of measures aimed at redirecting the work and reestablishing lines of communication with this Division.”\(^60\)

(c) The Role of the Program Review Officer

Once the necessary economic studies and analyses are made, the Program Review Officer should be given the task of gathering the views of the Bureaus and the General Counsel and submitting them to the Commission together with his recommendations for action. He should undertake to present to the Commission his recommendations for an annual program of activity which should take the form of (1) a system of priorities to govern the selection of areas in which the enforcement bureaus will operate; (2) a tentative statement of the objectives to be sought in these areas, including a delineation of the scope and content of the orders (whether obtained by consent or otherwise) that will be necessary to achieve these objectives; (3) a detailed prescription of standards to guide the bureaus in selecting the particular cases in which to proceed; and (4) a statement of the additional legislation, if any, needed to accomplish the planned objectives.

On the basis of the studies of the Bureau of Economics, the views of the other Bureaus and the General Counsel and the detailed proposals of the Program Review Officer, the Commission should formulate its annual program. To enable him to discharge his planning duties, the Program Review Officer should be relieved of all non-planning functions. It may also be necessary to furnish him with a small staff of (2) lawyers and (2) economists. This can best be determined after experience with the recommended planning program.

The first important planning task that will confront the Commission is to determine the priority of industries in which

59. The Division of Financial Statistics may need additional personnel to discharge additional duties; there is no reason to assume that anyone will wish to “interfere with the precision and alacrity” with which the Division performs its present duties, as the Chief of the Division of Financial Statistics seems to fear.

60. Memorandum from Roy A. Prewitt, Assistant Director, Bureau of Economics, to Frank C. Hale, Program Review Officer, Oct. 31, 1962 [hereinafter cited as Prewitt Memorandum].
the recommended economic studies should be undertaken. This determination should be the goal of the first study launched by the Bureau of Economics under the recommended program.

The Chief of the Division of Mergers agrees, in general, with the comments in this report “with respect to the necessity for planning by the Commission” and adds:

Since the beginning of this fiscal year [July 1, 1962], the Division of Mergers has been trying in a very modest way to apply planning principles to the work of the Division. If a plan for the Division of Mergers were a part of a larger plan covering all of the work of the Commission, there is no doubt that the merger function, as well as all of the other functions of the Commission, could be performed much more effectively.\(^6\)

Apparently the Chief of the Division of Mergers does not speak for the Director of the Bureau of Restraint of Trade who writes:

The Professor seems to believe that the Commission should operate on a completely planned program which would necessarily entail disregarding all applications for complaint which did not fit within the plan. As a single phase of this matter, I would . . . suggest that if the Professor will come with us, I shall be happy to put him in charge of all Congressional letters involving applications for complaint of matters which apparently come within the scope of our jurisdiction.\(^6^2\)

The Chief of the Division of General Trade Restraints agrees with his Bureau Director:

The recommendation or suggestions . . . of the report as to the role of the program review officer is, in the main, impractical as establishing programs on an annual basis. The overwhelming majority of our investigations arise through complaints received from the public. If we are to do the job Congress has required that we do, there must be some flexibility or elasticity in our ability to handle these complaints. The areas in which they fall cannot be anticipated so how could a system of priorities be set up to “govern the selection of areas in which the enforcement bureaus will operate.”\(^6^3\)

The Chief of the Division of Discriminatory Practices voices the same objection, somewhat more persuasively:

In its effort to channel Commission work into meaningful production, the report fails to recognize the importance of the Commission to the problems of small business operations which may have little or no

\(^6^1\) Layton Memorandum.
\(^6^2\) Memorandum from Joseph E. Sheehy, Director, Bureau of Restraint of Trade, to Frank C. Hale, Program Review Officer, Nov. 14, 1902 [hereinafter cited as Sheehy Memorandum].
\(^6^3\) Wilson Memorandum.
significant impact on the overall economy. Much of the Commission’s work is dictated by complaints filed by small businessmen and their only basis for judging the effectiveness of the Commission’s internal procedures is the action taken upon individually-filed complaints. While it would be well to plan Commission activity in relation to its overall impact upon the economy, we must not lose sight of the fact that lack of impact upon the economy can never be used as an excuse for failure to insure that the smallest of our independent businesses must be afforded the protection guaranteed by the statutes enforced by the Commission, even though it often means protecting small businessmen from the unlawful acts of other small businessmen.64

Surely a system of priorities that will enable the Commission to have maximum impact in safeguarding a free-enterprise national economy will also afford the maximum protection to small businessmen. If a choice must be made, individual complaints from particular small businessmen against allegedly unlawful acts of other particular small businessmen, whether or not supported by congressional letters, should not be permitted to divert the Commission from acting with maximum effectiveness on behalf of all existing and potential small businessmen. The Director of the Bureau of Restraint of Trade and the Chiefs of the Divisions of General Trade Restraints and Discriminatory Practices betray a lack of familiarity with the very concept of priorities which only underscores the need for Commission planning.

(d) Organization Along Commodity-Group Lines

As one ponders the fact that recommendations to expand the Commission’s economic research were made 12 years ago, by the first Hoover Commission Task Force,65 and that little progress has been made to carry them out, the following possibilities come to mind. Either the antitrust task is hopeless, or the personnel of the Commission in recent history is incapable of discharging it, or more radical structural changes in the organization of the FTC are necessary. There is not much point in discussing the first possibility in this context—we are committed to the policy of maintaining competition in the economy. It is the task of the antitrust agencies to make this policy sensible and manageable. It cannot be said that all the proposals to achieve such a policy have been seriously considered by the

agencies and Congress and rejected or tried and found to be inadequate.

Of course, the quality of Government personnel must be improved. The FTC continues to have serious turnover problems and difficulty in attracting the ablest people going into Government. Whether it will overcome these difficulties will depend on the quality and content of the Commission’s future planning.

We are left then with the possibility of structural alteration. It may be that it is a mistake to permit attorneys to dominate the FTC to the extent that they do. This is a difficult conclusion for a lawyer to reach, but attorneys are essentially case-minded, not program-minded. The winning of individual cases is their objective and the standard by which they are judged. With this orientation, the overall statutory objectives tend to fade from view. The first Hoover Commission Task Force expected the economic staff of the FTC to make up for these deficiencies of the lawyers, but the economic staff is outnumbered and does not yet occupy the strategic positions.

It is possible that the recommended economic studies of industry structure and market behavior would have a better

66. Id. at 124. The Chief of the Division of General Trade Restraints chooses to interpret the above discussion as follows:

Professor Auerbach gratuitously insults the quality of government personnel. It is my experience that the majority of the more experienced trial attorneys in the enforcement Bureaus are much more competent and able than their counterparts in the larger and well publicized law firms of New York, Chicago and Washington.

Every trial attorney wants to win his case. Not because of the personal satisfaction derived from winning but because he knows that the public benefits from his success. If the economic staff of the Federal Trade Commission was or is expected to make up for the deficiencies of the lawyers, who is to make up for the deficiencies of the economists? Surely there is some margin in the make-up of an economist for error.

Wilson Memorandum.

The Bureau of Deceptive Practices comments:

We do not concur in the statement . . . that attorneys dominate the Commission or that they are not program-minded. True, we must have tough-minded attorneys who understand and know how to prepare and prosecute the most complex type of individual case, because that is the ultimate test to determine whether the Commission can prohibit a deceptive practice. But our attorneys, now that they evaluate the applications for complaint and handle cases from beginning to end, are especially cognizant of the industry-wide implications of our work. During the work since the change from the former project-
chance of being made if the FTC were divided into bureaus and divisions responsible for major groups of commodities. Each industry division could then deal with both restraints of trade and deceptive practices in the markets within its area. This system of organization may force the FTC staff to think of the structures, behavior, and practices of industries and markets, and not solely of individual cases. The heads of these commodity divisions would not have to be lawyers; they could be— and a number of them should be— businessmen or economists. Each division headed by a businessman or economist could then have a legal advisor to counsel him and prepare cases for trial.

If this proposal seems too radical for adoption at one stroke, the Commission should, as an experiment, organize some of its work along these lines. One division within the Bureau of Deceptive Practices is so organized—the Division of Food and Drug Advertising—and so, of course, is the Bureau of Textiles and Furs. Some industry divisions should be created within the Bureau of Restraint of Trade, and one or two divisions should be set up to handle both restraints of trade and deceptive practices.

The Director of the Bureau of Restraint of Trade comments on the above proposal as follows:

The matter of reorganization along commodity group lines has been considered several times by the Commission. During the period when Dr. Corwin Edwards was head of the Bureau of Economics, he attempted to work out a plan of this kind but was not successful in attorney setup we have been training former project attorneys to do trial work, formal trial attorneys to do project-attorney work, and new attorneys to do both types of work. We believe that training program has been successful and that the results will be increasingly evident as the months go by. We feel sincerely that no one has greater concern for the interests of consumers and the general public than the staff of this Bureau.

Murphy Memorandum.

67. The Bureau of Textiles and Furs is opposed to assuming responsibility for eliminating restraints of trade "since it is beyond the scope of the Acts presently administered by the Bureau." Bureau of Textiles and Furs Memorandum. This is, of course, beside the point. While the Bureau's position is sufficient reason not to choose it to inaugurate the experiment of having a single division handle both restraints of trade and deceptive practices, surely there may be problems of restraint of trade and deceptive practices (other than those covered by the acts administered by the Bureau) in the textile and fur industries.
obtaining sufficient personnel to make it effective. This matter of personnel is really basic to the whole problem. It would be helpful in litigation, for example, if we could maintain a staff of specialists in each industry area. On the basis of my experience I believe it is naive to think that we would ever have a staff of that size. To the extent that it is possible to do so, we endeavor to keep our attorneys in certain industrial areas as, for example at the present time, in the paper industry, the petroleum industry, dairies, etc. Nowhere is it necessary for the Professor to take into consideration the fact that when we have a man broken in and somewhat informed in his field, he then obtains employment at a much higher salary elsewhere and we are put to the task of starting anew. What this means as a practical matter is just this— when a man with some experience on a paper case leaves, we can’t replace him on that case with a man fresh from law school so we reach over into the dairy or petroleum cases and pull a man who is at least experienced in some phases of trial work over to complete the paper case. We are not happy at the rate of progress being made in the trial of cases, but unless this flexibility is retained we shall be much more unhappy. . . .

The Professor envisions the Commission operating in a large number of commodity divisions headed by non-lawyers, each of whom would have a legal adviser to counsel him and prepare cases for trial. I would merely suggest that the Professor take his sabbatical year and come with us as the legal adviser on the St. Regis Paper case which for several years we have been attempting to prepare for recommendation to the Commission and trial if necessary. When he has completed that task I think he would be in a much better position to evaluate the function of the lawyer in these cases. . . .

The fact is that we attract extremely able people and because they are able, industry and private law firms hire them away at greater salary inducements after we have them trained. No amount of planning is going to prevent young men from accepting opportunities to improve their financial status. . . .

The relevance of some of these remarks is not readily apparent. The complaint of the Director about the turnover of personnel deserves serious attention, but the recommended organization may result in the more efficient use of personnel without curtailing the flexibility with which staff must be assigned. Indeed, the combination in a single industry division of responsibility for combatting restraints of trade and deceptive practices may even increase this flexibility. Furthermore, there is no intention to deny that able men have left the FTC to go

68. I assume the Director is referring to a plan for the organization of the Bureau of Economics. The Bureau of Economics has currently assigned “certain individuals the responsibility for keeping abreast of specific industries,” but, cautions the Assistant Director of that Bureau, “just how well this will work out remains to be seen.” Prewitt Memorandum.

69. Sheehy Memorandum.
into industry and private law firms. A redirection of FTC activities may rekindle enthusiasm for its objectives and create an atmosphere within the FTC that will attract and retain the ablest people going into Government.

It is interesting that the Assistant Director of the Bureau of Restraint of Trade comments:

It is believed . . . that within the framework of the present bureau organization it might be feasible to establish sections or branches within the divisions for the handling of certain type cases. This would tend to speed up the work in the various divisions as the attorneys assigned to such specialized type of case would become more proficient in the handling thereof, as it would require less research and consequently expedite the work. It is realized that such type organization has certain drawbacks, in that the skill of attorneys would be somewhat restricted as it would tend to prevent them from getting a broad and rounded experience in the over-all activities of the division and to that extent might tend to handicap the Division's operations. This would have to be considered in any decision reached on this subject.70

The Chiefs of the Divisions of Discriminatory Practices and General Trade Restraints have expressed themselves more forcefully in accord with the position taken by the Bureau Director. The former writes:

We have no basic quarrel with an experiment with the organization of the Commission's work along major commodity group-lines. This would mean a specialization by our enforcement attorneys to a very significant degree. I would welcome this but I believe it is impractical. Such specialization is simply above and beyond our budget. It would necessarily result in the neglect of some of our less spectacular but nonetheless very fruitful work. Also under our present system—hit or miss as it may be—numerous public complaints often result in concentration of personnel in specific areas. But with a limited staff we can hardly afford the luxury of such specialization on any continuing basis.71

The Chief of the Division of General Trade Restraints comments:

If the Federal Trade Commission were divided into Bureaus and divisions responsible for major groups of commodities, what would happen to the minor groups? The government is dedicated to the protection of small business. Is Prof. Auerbach suggesting that we should organize so as to be responsible only for commodity groups having major importance? What is the factor to be employed in determining

70. Memorandum from Cecil G. Miles, Assistant Director, Bureau of Restraint of Trade, to Frank C. Hale, Program Review Officer, Oct. 30, 1969 [hereinafter cited as Miles Memorandum].
71. Mayer Memorandum.
this group? And would the businessmen who head up these divisions zealously prosecute the friends in his own industry? How much attention would he pay to a legal advisor and what cases would the legal advisor prepare for trial—merger, Robinson-Patman, Section 3 Clayton Act, or Section 5 Federal Trade Commission Act? Yes, this proposal is too, too radical.\textsuperscript{72}

In the light of these criticisms, some further word, perhaps, should be said about the manpower needs of the recommended organizational structure. That structure is intended to implement a program of annual planning that will fix the priorities determining the assignment of FTC personnel. If Congress does not provide sufficient personnel to enable the Commission to attain all the planned objectives, the lowest priority objectives will have to be sacrificed. Is there a more sensible alternative?

The Bureau of Deceptive Practices joins the Director of the Bureau of Restraint of Trade in opposing the suggestion that a businessman or economist should head the experimental division or divisions organized along major commodity-group lines.

We do not subscribe to the theory which seems to underlie some portions of the report that economists or businessmen would be better able to protect consumers and the public than would lawyers. We believe personnel should be selected without prejudice against any particular profession or background, and that legal training is at least desirable if not essential for personnel engaged in the Commission’s law enforcement work.\textsuperscript{73}

No such theory underlies the report. The fact remains that lawyers now head all the enforcement Bureaus and divisions of the FTC. Only if an economist or businessman is chosen to head the experimental division or divisions will there be any basis for describing the Commission’s policy of personnel selection as “without prejudice against any particular profession or background.” While such leadership may help the Commission to see its work in fresh perspective, it will not diminish the importance of the lawyer in the preparation of cases for trial or as a legal and policy advisor.

\textsuperscript{72} Wilson Memorandum.

\textsuperscript{73} Murphy Memorandum. The Chief of the Division of Discriminatory Practices states flatly:

Enforcement bureaus and divisions should be directed by lawyers.

The suggestion would be more workable if the businessman or economist serves as an advisor.

\textit{Mayer Memorandum}. 
(e) Further Planning of Deceptive Practices Work

Additional considerations must govern the planning of the Commission's deceptive practices work. If the Commission is reorganized along commodity-group lines, its staff will become specialists acquainted with prevalent practices in each industry and trade. The knowledge should be valuable in planning the Commission's overall campaign against deceptive practices. Even then, as under the present organization of the Commission, special factors must be considered in planning the most effective use of the Commission's resources in this area. To this end, it would seem that the Commission should concentrate upon the elimination of deceptive practices that have national significance and particularly upon policing the national media of advertising—TV, radio, and nationally circulated periodicals. Most of the applications for complaint received by the Commission from members of the public involve charges of deceptive practices. While these charges should not be ignored, an attempt should be made to enlist state and local law enforcement agencies (principally the state Attorney General) in the handling of charges of deceptive practices that do not have national import.

To an increasing extent, the Attorneys General of the states have become interested in the problem of consumer protection. Recently, too, a national Consumers' Advisory Council has been established pursuant to Presidential direction. The Consumers' Advisory Council should be asked to set up regional, state, and local councils with the function, among other things, of investigating consumer complaints of deceptive practices, seeking voluntary discontinuance of such practices, referring cases to the Attorneys General of the states, and checking compliance with FTC decrees forbidding such practices. If the present mandate of the Council is not broad enough to authorize these activities, it should be enlarged.

Furthermore, the FTC should give to its regional offices (the number of which may have to be increased) the task of

74. See Message of the President of the United States to Congress (offering various measures for the protection of consumer interests), March 15, 1962. 1962–2 U.S. Code Cong. & Admin. News 4139. The President thus described the Council's function—"to examine and provide advice to the Government on issues of broad economic policy, on government programs protecting consumer needs, and on needed improvements in the flow of consumer research material to the public"; and to give "interested individuals and organizations a voice in these matters." Id. at 4143. The Council has been attached to the Council of Economic Advisors.
liaison with the Attorneys General of the states and with the regional, state, and local consumers’ councils that may be formed. Deceptive practice cases that do not have national significance should also be tried before hearing examiners in the field offices. General supervision of the liaison function should be assigned to the special assistant to the Chairman designated for such tasks. The special assistant should also maintain liaison for the Commission with the national Consumers’ Advisory Council.

The FTC Chairman has appointed the Director of the Bureau of Economics to act as his special assistant for consumer affairs and to maintain liaison with the national Consumers’ Advisory Council. The FTC General Counsel has suggested that “it would appear more practical” to assign the liaison function to the Office of the General Counsel because the recommended program “would entail legal, as opposed to economic, expertise.” The General Counsel continues:

Several states’ Attorneys General have expressed their need for advice in developing consumer protection programs and have indicated their desire for assistance in establishing enforcement departments. They have also requested expert advice regarding possible legislation directed to enabling their states to better protect the interests of local consumers. . . .

Under the Commission’s directive, new programs could be developed with a view of expanding and strengthening state laws relating to consumer protection and enforcement procedures could be worked out with the Attorneys General of the states (perhaps through the National Association of Attorneys General) directed to minimizing incipient and accomplished violations of the Commission’s acts and corresponding state laws. Such a program would have special significance to the consumer and the Commission in these cases where the Commission could not have, in any extent, prevented the unlawful practices, either because of a lack of jurisdiction or adequate resources.76

It is probably true that the Office of the General Counsel is in the best position to act for the Commission in advising states

75. In his message, the President also stated that he was directing the head of each Federal agency whose activities bear significantly on consumer welfare [to] designate a special assistant in his office to advise and assist him in assuring adequate and effective attention to consumer interests in the work of the agency, to act as liaison with consumer and related organizations, and to place increased emphasis on preparing and making available pertinent research findings for consumers in clear and usable form. . . .

Message of the President, supra note 74, at 4143.

76. Memorandum from James Mcl. Henderson, General Counsel, to Frank C. Hale, Program Review Officer, Nov. 6, 1962 [hereinafter cited as General Counsel’s Memorandum].
on the drafting of state laws dealing with the various matters covered by the federal statutes that are administered by the FTC. But the liaison functions referred to above are intended to aid in the day-to-day enforcement of the FTC statutes. The special assistant for consumer affairs, therefore, should be an official immersed in the problem of enforcement—either a representative of one of the operating bureaus or the Director of the Bureau of Field Operations who supervises the investigational activities of the Commission's 10 field offices.\(^7\)

The Bureau of Deceptive Practices has commented on this section of the report as follows:

> [W]e believe that, by and large, the cases selected for investigation and corrective action by the Bureau of Deceptive Practices have been the cases which were of greater importance from the public interest standpoint, either from the standpoint of flagrancy of practice or numbers of the public affected, and that there has been no appreciable lack of positive, planned or systematic effort in this area of the Commission's activity. We doubt that it is reliable to decide whether this function is being properly exercised on the basis of the percentage of investigations which arise from letters of complaint. With recent increases in the staff for the monitoring of advertising it is expected that a greater proportion of the work will be arising from this source. Twenty-five investigations have been initiated from this source since July 1, 1962. . . . With our having received some 5500 complaint letters last year, representing a 55% increase over the numbers received in previous years, it might be postulated that we are now hearing about nearly every deceptive practice existing in the country. . . .

> With regard to the suggestion . . . that "standards" be promulgated for the evaluating of applications for complaint, we believe that common sense and good judgment applied by experienced personnel to the matters presented will be more effective than any catalog of general criteria or standards. For example, we assume that any criteria adopted would permit us to investigate misrepresentations in connection with the sale of correspondence courses if it appeared likely that substantial numbers of the public were being affected by the questioned practice. We could suggest 50 or 100 other general types of deceptive practices, or product categories, that would probably have to be included in the catalog of criteria if the Commission does not abrogate its function of protecting businessmen and the public from deceptive practices when they are of a substantial character. We doubt that such a catalog of criteria would be of any appreciable help to the Commission or the staff in deciding what should be investigated. . . .

> We already are largely in compliance with the suggestion . . . that the deceptive practices staff be organized along commodity-group lines. We have attorneys who, for example, are specially qualified in matters such as the advertising of insurance, the labeling of watches as to composition or jewel content, the use of therapeutic claims in

\(^7\) Statement of Organization § 12.
mattress advertising, oral misrepresentations by encyclopedia salesmen, and misbranding of floor tile. However, because of the hundreds or perhaps thousands of commodities and services subject to the Commission's deceptive practices jurisdiction, and the fact that we have only about 50 attorneys engaged in the investigation and trial of such matters, it is impossible for our attorneys to specialize in only one commodity or type of practice. Nearly all of the attorneys must, for example, be competent in matters of fictitious pricing because this type of practice occurs regarding the sale of nearly all goods and services in commerce, and the type of practice is more important in this instance than is the commodity or service which may be involved. Creating of a separate division to handle matters involving both deceptive practice and restraint-of-trade charges is unnecessary, as we accomplish the same result now by agreeing with Bureau of Restraint of Trade that such matters will be handled by the bureau having cognizance of the primary charge.

We already are . . . concentrating upon the elimination of deceptive practices which have national significance and particularly those entailing use of national media of advertising, such as television and radio and periodicals with national circulation. We believe the staff is properly balanced between the work arising from the monitoring of advertising and other sources for initiation of investigation, and that all of the staff is giving the relative degree of attention warranted by the public interest respecting matters arising from all different sources. . . .

We already are complying with the suggestion . . . that matters of a local nature be referred to state or local authorities when deceptive practices not having national import are involved. Numerous matters have in recent months been referred to the state authorities. We are waiting to ascertain the extent to which the state authorities will take action in such matters. Previous experience does not suggest a bright outlook for action, as many of the state laws require proof of fraud before the state authorities can act, and in states having a law against deceptive practices comparable to the Commission laws, the state authorities frequently do not have sufficient funds or inclination to pursue vigorous and effective enforcement policies. . . .

We do not concur in the suggestion . . . that the President's Consumers' Advisory Council should attempt to investigate consumer complaints of deceptive practices or check upon compliance with FTC orders. We suggest that the . . . Council would more appropriately engage in general informational activities to alert the public to the functions of existing agencies such as the local Chambers of Commerce and Better Business Bureaus which generally endeavor to adjust matters of consumer complaints at a local level, and the services available from local law enforcement authorities and the Federal Trade Commission wherever the practice cannot be corrected locally. We think it would be particularly inappropriate for members of the Consumers' Advisory Council to attempt checking compliance with FTC orders forbidding deceptive practices. We have found that it takes attorneys with considerable experience and ability to investigate and enforce compliance with FTC orders. We do not believe this is a job for persons not having such training and experience.
We would not object to the attorneys in charge of the field offices of the Commission being designated as liaison with the attorneys general of the states. We believe this function is already being performed by the attorneys in charge, and that they perform similar functions in relation to the local Chambers of Commerce and Better Business Bureaus. . . .

III. INTERNAL PROCEDURE OF THE FTC

A. Delegation of Authority Within the FTC

For effective planning, it is essential that the Commissioners themselves have time for thought about the overall objectives of the statutes within their jurisdiction and the means for achieving them. They will have to give careful and close attention and direction to the recommended economic studies of market structures and practices.

The new Commission has taken steps to free itself from the burden of time-consuming routine, but again, the full potential of the organizational and procedural devices available has not been realized. Reorganization Plan No. 4 of 1961 authorizes the FTC “to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business, or matter . . . .” To date, the Commission has made sparing use of this authority.

1. Initiation of Investigations

The Commission has delegated to the Directors and Assistant Directors of its enforcement bureaus authority to initiate investigations (a) “of alleged or suspected violations of any law, or provision thereof, which the Commission is empowered or directed to enforce . . . .” and (b) “of . . . the manner and form of compliance with final orders issued by the Commission.” It is the practice, however, to inform the full Commission about, and give it an opportunity to pass upon, any investigation to which it is proposed to commit a large amount of money or manpower.

78. Murphy Memorandum.
2. Closing of Investigational Files

The Commission has delegated to the Directors and Assistant Directors of its enforcement bureaus authority to close docketed investigational files, except those involving alleged false advertising of food, drugs, devices or cosmetics which are inherently dangerous, the sale of fabrics and wearing apparel which are so highly flammable as to be dangerous, the suppression or restraint of competition through conspiracy or discriminatory or monopolistic practices, or violation of section 7 of the Clayton Act: Provided however, that such closing shall not be effective until the files shall have been transmitted to the Secretary and he shall have advised the Commission of the direction to close and no one member, within 5 working days thereafter, shall have objected to the closing. 81

It should be pointed out that this is a narrower delegation of authority to close cases than the delegation in effect before Reorganization Plan No. 4 became law. Before Plan 4, the Secretary was authorized to close cases without referring them to the Commission. 82 The Budget Bureau staff explained, however, that "in instances where any doubt at all exists in the Secretary's mind as to whether a case should be closed, or where principal staff members have disagreed, he submits it to the Commission for its decision." 83 In fact, the staff found, "a very small proportion of the cases received by the Secretary are forwarded to the Commission." 84 Now, the heads of the enforcement bureaus are deprived of the discretion formerly exercised by the Secretary.

3. Issuance of Complaints

The authority to issue a complaint has not been delegated. During the hearings on Reorganization Plan No. 4, Chairman Dixon made the following statement to a Senate Committee: "I don't think a majority of the Commission would ever delegate the right to anyone to issue a complaint and I would oppose it myself." 85

The proposal to issue a complaint originates in the enforcement bureau involved. It is supported by a memorandum from the Bureau addressed to the Commission. Every proposed complaint (and accompanying order) is assigned to a single Com-

81. Ibid.
82. 1961 FTC ANN. REP. 21.
83. Budget Bureau Staff Report 68.
84. Ibid.
commissioner for report to the full Commission. In practically all cases, only he will examine the investigational files and his judgment on whether the complaint should issue will be accepted by the other Commissioners. In a rare case, an individual Commissioner may dissent from the majority decision to issue a complaint.

In 1941, the Attorney General's Committee recommended that the FTC should delegate to "one or more ranking and responsible agency officers authority to initiate investigations, close cases without the issuance of a complaint, issue complaints and approve informal settlements." The Committee suggested that the Commission should retain control of the manner in which this delegated authority was exercised by

(1) stating for the guidance of agency officials those policies which have been crystallized, and which the responsible officers need only apply to the particular case at hand; (2) consideration by the agency heads of cases for which no such policies have been crystallized or in which application of the policies is difficult; and (3) requirement that the officers in whom is vested the power to issue, or refuse to issue, a complaint, submit a periodic report (either weekly or daily) to the agency heads.

Twenty-one years have elapsed but the Commission has not yet effectuated these recommendations. In 1940, the Commission advanced the following reasons to the staff of the Attorney General's Committee for "its disinclination to lean more confidently on its subordinates' judgment": (1) the practical difficulty in distinguishing between the important and the unimportant makes it unfeasible for the Commission to rely upon its chief officers to refer to it those matters which should be considered by the Commission; (2) the statutes administered by the Commission require the same personal consideration prior to the issuance of a complaint as must precede the issuance of an order to cease and desist; (3) the damaging publicity incident to an unwarranted issuance of a formal complaint would not be cured by the subsequent dismissal of the complaint after a hearing; (4) Commission consideration of all cases at this stage acts as a check upon the zeal and thoroughness of its staff; and (5) with respect to any agency such as the Federal Trade Commission, the determination of whether a complaint should issue in the first instance is as

87. Id. at 23.
much a matter of policy as is the ultimate determination of whether a cease-and-desist order should be issued.\textsuperscript{88}

Reason (2) above has been removed by the provisions of Reorganization Plan No. 4. The other reasons merely reflect the continuing lack of effective overall planning by the FTC. If the recommended planning measures are adopted, the Commission in time would be able to evolve standards to guide its subordinates in the exercise of delegated authority to institute investigations, close cases, settle cases informally and issue formal complaints. In the absence of institutionalized overall planning, review of the initiation of every significant investigation, the closing of every case, the informal settlement of every case and the issuance of every complaint, affords the Commission its only opportunities to plan. The Commission's refusal to relinquish this opportunity for \textit{ad hoc} planning is valid, in the absence of an adequate system of advance planning. By so refusing, however, the Commission itself highlights the need for planning that would obviate the Commission's 1940 objections to the recommendations for delegation made by the Attorney General's Committee.

In the meantime, the following alternative to both the current position of the Commission and the 1941 recommendations of the Attorney General's Committee is suggested. The Commission itself should review every proposal to issue a complaint only to determine whether its issuance is necessary in the public interest. It should delegate to the heads of the enforcement bureaus the authority to determine, at this stage, whether there is reason to believe that a violation of law has been committed. Similar criteria would require the Commission to continue to review every proposal to institute an investigation that will deploy an appreciable amount of FTC manpower or to close an investigational file on the ground of lack of public interest but not on the ground that there is insufficient reason to believe that a violation of law has been committed.

If it is thought desirable that there should be some review of the determinations of the bureau directors on whether there is reason to believe that a violation of law has been committed, for the above stated purposes, the review function should be delegated to a single Commissioner. In fact, adoption of this suggestion would merely make express what is now implicit in the in-

ternal procedure of the Commission. As Commissioner Elman recently put it:

If the reality is that every member of the five-man Commission—unless he neglects his other and more important duties—can not personally examine the investigative files in every case to determine whether there is reason to believe a violation of the law exists, why then should the members of the Commission take personal responsibility for issuance of the complaint? Why not openly and candidly place the responsibility for such a prosecutorial judgment where it is actually made, so that those who are actually making it can be held strictly accountable, rather than those who only appear to be making it?89

The alternative suggested will permit the Commission to retain control over policy, in the sense that it alone will determine what Commission actions are or are not in the public interest. Its adoption will also minimize the objections currently being voiced against the mingling of prosecutory and adjudicatory functions in the Commission.90 The Commission will be able to undertake its adjudicatory functions without having had previously to determine whether the facts justified issuance of the complaint.

Furthermore, the Commission should delegate to its bureau directors full authority to initiate investigations, issue subpoenas and orders for section 6(b) reports, close investigational files, negotiate consent orders and issue complaints, in any area of its jurisdiction, as soon as it is able to prescribe, and has prescribed, policies and standards to control the exercise of delegated authority in that area. As planning proceeds, the areas in which the Commission is able to prescribe such policies and standards and delegate full authority should expand progressively.

Recently, Commissioner Elman supported the delegation of full authority to issue complaints under these circumstances and suggested two ways by which the Commission could assure itself that the delegated authority would be exercised responsibly: “Cases raising novel or important questions of law or policy could promptly be certified to the Commission for determination before complaint. The Commission could also retain the authority, to be exercised in its own discretion and on its own motion, to review

89. Address by Commissioner Elman, First Annual Corporate Counsel Institute, Northwestern University School of Law, Oct. 11, 1962, in CORPORATE COUNSEL INSTITUTE, PROCEEDINGS OF THE FIRST ANNUAL CORPORATE COUNSEL INSTITUTE 88, 98 (Ruder ed. 1962).

the issuance or non-issuance of complaints in exceptional cases." As the Attorney General's Committee recommended, the bureau directors could be asked to submit periodic reports to the Commission on the complaints they have issued.

The Chief of the Division of Mergers, who agrees that the recommended delegations "would be feasible and appropriate" when over-all planning is undertaken, adds that more delegation than has been made of authority to take the various actions described above could lead to greater efficiency "even in the absence of such master planning, for it must be admitted that the administrative distance from the enforcement bureaus to the Commission and return, with respect to all of these matters, is often long and sometimes astronomical." Unfortunately, the Director of the Bureau of Restraint of Trade does not entirely agree. He writes:

It is my belief that the Commission might well give full consideration to delegation of authority to bureau directors and their assistants to close files which now must go to the Commission for closing. Ample safeguards could be placed around this delegation so that the Commission would be kept fully informed and be in a position to bring before it any matters that would seem to warrant its consideration. Much has been written and said about the delegation of authority to issue complaints. It is my belief that the Commission can do this, but on balance I believe that that authority should be retained unless and until the accumulating burden of work dictates the necessity of delegation.

Supporting his chief, the Assistant Director of the Bureau of Restraint of Trade adds:

It is not believed . . . that the Commission should delegate to the bureaus the authority to issue complaints so long as all other administrative activities of the Commission are centralized in Washington. This authority should remain the prerogative and responsibility of the Commission. If the Commission were organized into Regions where all phases of the work were being handled, there might be some justification for such consideration.

And the Chief of the Division of Discriminatory Practices offers still another reason for opposing delegation of the authority to issue complaints:

Complaints, together with their ultimate disposition, afford the antitrust bar the most effective guide lines to the Commission's view of

91. Address by Commissioner Elman, supra note 89, at 94.
92. Layton Memorandum.
93. Sheehy Memorandum.
94. Miles Memorandum.
the application of our statutes. In this all-important area, definite responsibility should be in the sole province of the Commission. Also any such recommendation would appear to be of doubtful validity in view of our consistent procedure in the past of issuing complaints solely by the Commission.95

The Chief of the Division of General Trade Restraints, however, agrees with the Chief of the Division of Mergers:

Good reasons exist for delegation to the Bureau directors of the issuance of complaints, provided the Commission is informed, in advance, of the areas in which complaint is to issue as well as other details in connection thereto. More important, greater delegation of authority is desirable in issuing investigational subpoenas and orders for Section 6(b) Reports.96

The Bureau of Deceptive Practices thinks that it is desirable for the Commission to continue to pass upon any investigation that will commit a large amount of money or manpower. It agrees that the Bureau Directors should be delegated "wider authority . . . to pass finally upon the closing of investigational matters which in the judgment of the staff are not of sufficient importance to take up the time or attention of the Commission." Such a delegation, it points out

would save a tremendous amount of the time now spent by the staff in preparing detailed closing memoranda, memoranda which must be complete enough to apprise a Commissioner who does not have the file before him what is involved in the case and must set forth the facts and the law of the case in sufficient detail for him to make an informed judgment as to the appropriateness of the proposed closing.97

But the Bureau of Deceptive Practices opposes the recommendation that the authority to issue complaints should be delegated:

We do not think the present procedure contemplates the reviewing Commissioner's or the Commission making a detailed examination of an investigational file before concurring in our recommendation for the issuance of complaint. We assume that the Commissioner generally reads the complaint, the memorandum transmitting the complaint to the Commission, and perhaps the investigating attorney's final report, to be familiar with the general problems involved in the case and the general theory upon which the complaint is predicated, and that the Commissioner would mainly concern himself with whether the complaint appears to state a cause for action and whether if the facts are as alleged in the complaint the issuance of an order to cease and desist would appear to be warranted in the public interest. We think the Commission should continue to exercise that review function, as such function should not consume a large part of the Commission's

95. *Mayer Memorandum.*
96. *Wilson Memorandum.*
97. *Murphy Memorandum.*
time, and will help to assure that the public actions taken are in
the public interest and are in accord with Commission policy... 
If a case is so routine that the policy has crystallized respecting
propriety for issuance of a complaint, it will not take a great
deal of time or effort on the part of reviewing authority, includ-
ing the Commission, to concur in the recommendation that complaint
issue.98

According to the account of the Bureau of Deceptive Practices,

it should be noted, the Commission is not now reviewing the de-
termination of the Bureau that there is reason to believe that a
violation of law has in fact been committed. Yet this is precisely
what the Commission purports to be doing at present. Presum-
ably then, the Bureau of Deceptive Practices would not object
to the recommendation made above that the Commission review
proposals to issue complaints only to determine whether they are
in the public interest.

On the whole, the objections to delegation of the authority to
issue complaints voiced by the members of the staff quoted above
are even less persuasive than those advanced by the Commission
in 1940.

B. CONSENT SETTLEMENT PROCEDURES

As indicated in Table II above, consent orders accounted for 85
percent of all the orders issued by the FTC during the period,
Jan. 1, 1961 to June 29, 1962 — 85 percent of the orders in de-
ceptive practice cases and 83 percent of the orders in restraint of
trade cases (86 percent in Robinson-Patman Act cases, 71 percent
[5 out of 7] in section 7 cases and 62 percent [8 out of 13] in other
restraint of trade cases). It is undisputed that the Commission
would not be able to function without a system of consent
settlement.

1. The New Consent Order Procedure

The new Commission has entirely revised the procedures for
informal settlement. The new rules, which hold out the promise
of increasing the overall effectiveness of the FTC's work, are set
forth in Part 3 of the FTC's Procedures, Rules of Practice, and
Orders.99 It should be noted that, under these rules, the Commiss-
don does not obligate itself to use the consent order procedure
in every case; it will resort to the procedure only "where time,

98. Ibid.

99. 16 C.F.R. § 3 (Supp. 1963) (rules governing the consent order pro-
cedure) [hereinafter cited as Part 3].
the nature of the proceeding and the public interest permit."\(^{100}\) Since it was inaugurated, however, the Commission has invoked the new procedure in every case but one in which it has determined to issue a complaint.\(^{101}\)

The new rule of practice that "all hearings will be held at one place and will continue without suspension until concluded,"\(^{102}\) will require the enforcement bureaus to complete their investigations before going to hearing. Furthermore, the new consent order procedure assumes that the bulk of the investigatory work will have been done by the time the enforcement bureau proposes the issuance of a complaint. It should also be noted that the new rules of practice provide, in effect, a two-sided discovery procedure as part of the prehearing conference.\(^{103}\) This procedure could be used by the FTC trial attorney to fill in gaps in his case-in-chief or to prepare to meet the respondent's defense.

Rule 1 of Part 3 provides, in effect, that if the Commission decides to employ the consent order procedure, it will notify the prospective respondent of its determination to issue a complaint. The notice is served upon the prospective respondent together

\(^{100}\) Part 3, Rule 1.

\(^{101}\) The only case in which the new procedure was not employed is a case mentioned by the Bureau of Deceptive Practices—"a fur case in which complaint issued forthwith, where institution of criminal proceedings also was contemplated." Murphy Memorandum.


\(^{103}\) Part 4, Rule 8(a)(6) provides that the prehearing conference shall consider

such other matters as may aid in the orderly disposition of the proceeding, including disclosure of the names of witnesses or furnishing for inspection or copying of non-privileged documents, papers, books or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody or control of any party to the proceeding.

Rule 8(c) adds:

If counsel for any party after proper direction fails or refuses to disclose the names of witnesses or to make available for inspection or copying non-privileged documents, papers, books or other physical exhibits, the hearing examiner, in his discretion, may also enter in the record an order providing, as appropriate:

(1) That the testimony of the witnesses whose names are not disclosed or the documents, papers, books or other physical exhibits which are not made available for inspection or copying in accordance with the direction shall not be introduced in evidence; or

(2) That counsel who fails or refuses to comply with the hearing examiner's direction in respect of any of the foregoing shall be suspended or barred from participation in the proceeding . . . .
with the complaint which the Commission intends to issue and the order to which it seeks assent. The rules do not provide for publication of the notice, the proposed complaint, or the proposed order.

Much, of course, will have happened within the Commission before this stage of notification is reached. If, at the conclusion of the investigation, the enforcement bureau decides to propose the issuance of a complaint, it transmits a draft of the proposed complaint and order together with, in significant cases, a memorandum of justification to the Office of Consent Orders. This Office was established to supervise "the preparation and execution of agreements submitted to the Commission for the settlement of cases by the entry of consent orders."104

The Office of Consent Orders is headed by an Assistant General Counsel (GS 16) who has a staff of two senior attorneys (2 GS 15). It is a division within the Office of the General Counsel, but "only for housekeeping purposes."105 The General Counsel does not supervise its work.

The Office of Consent Orders sees its primary function at this point as that of reviewing the proposed order. It does not undertake to review the conclusion of the enforcement bureau that there is reason to believe that a violation of law has been committed and that issuance of the complaint will promote the public interest.

If the Office questions the proposed order, it will discuss the matter with the enforcement bureau, in an effort to reconcile differences. Occasionally, its study of the order may impel it to make suggestions for redrafting the complaint. If the Office and the enforcement bureau are unable to agree, their respective views will be submitted to the Commission. To date such differences have arisen in only a very few cases. Of course, in every case the Commission will decide whether to issue the proposed complaint and order.

Within 10 days after he has been served with notice of the Commission's determination to issue a complaint, the prospective respondent may "file a reply with the Secretary stating whether or not [he is] willing to have the proceeding disposed of by the entry of an order in substantially the form proposed."106

"If the reply is in the negative or if no reply is filed within the

104. Statement of Organization § 6(b).
106. Part 3, Rule 2(a).
time provided, the complaint will be issued and served forthwith. If the reply is in the affirmative, the files will be referred to the Office of Consent Orders, where the parties served and members of the Commission's staff may participate in the preparation and execution of an agreement containing a consent order."

The executed agreement must contain (1) an order; (2) admission of all jurisdictional facts; (3) express waivers of further procedural steps, of the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law, and of all rights to seek judicial review or otherwise challenge or contest the validity of the order; and (4) "provisions that the complaint may be used in construing the terms of the order; that the order shall have the same force and effect and shall become final and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders; and that the agreement shall not become a part of the official record of the proceeding unless and until it is accepted by the Commission."\(^{107}\) The agreement may contain "a statement that the signing thereof is for settlement purposes only and does not constitute an admission by any respondent that the law has been violated as alleged in the complaint."\(^{108}\) In fact, every consent order issued since the new procedure became effective contains such a statement.

"The Commission may accept an agreement containing a consent order" and "issue its complaint, in such form as the circumstances require, and decision, including the order agreed upon, or reject it and issue its complaint and set the matter down for adjudication in regular course" or "take such other action as may be appropriate."\(^{110}\) The question has been raised whether, in the event the Commission rejects an agreement containing a consent order, the prospective respondent will be permitted to attempt to reach a new agreement acceptable to the Commission.\(^{111}\) The answer is yes— if the Commission wishes to have the respondent make such an attempt. Upon rejection, the rules give the Commission an alternative—to issue its complaint or "take such other action as may be appropriate."\(^{112}\) In a number of instances, the Com-

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107. Id. Rule 2(b), (c).
108. Id. Rule 3.
109. Ibid.
110. Part 3, Rule 4(b).
112. Mr. Connor himself gives this answer. Id. at 375–76.
mission has rejected an executed agreement for a consent order and concluded that it was appropriate to instruct the Office of Consent Orders to attempt to negotiate a new consent order.113

The rules require that "an executed agreement containing a consent order shall be submitted to the Commission within thirty days after the date on which the files are referred to the Office of Consent Orders" unless "for good cause shown the time is extended by the Commission."114 "If an agreement is not so submitted, or if at any time it appears to the Office of Consent Orders that the execution of a satisfactory agreement is unlikely, the files shall be returned to the Commission and the complaint will be issued and served forthwith."115

Once a complaint is issued "the consent order procedure will not be available."116 By contrast, under the prior procedure, negotiations for a consent order did not begin until after a formal complaint was issued and made public, but they continued all the time the case was in litigation before the Hearing Examiner. FTC counsel for the complaint conducted negotiations with the respondent and submitted the agreed-upon consent order to the Hearing Examiner. If he rejected it, FTC counsel and the respondent could appeal jointly to the Commission; if the Commission upheld the Hearing Examiner, the trial would continue. If the Hearing Examiner approved the agreed-upon consent order, he would submit it to the Commission for its approval. If the Commission rejected it, the trial would continue.

The new procedure seeks to obviate the delays — and delay-seeking tactics — inherent in the old procedure. The old procedure did not compel the enforcement bureau to complete its investigation before the hearing opened or to do most of its investigating before the complaint was issued. A consent order might be negotiated after the complaint was issued and obviate the necessity for completing the investigation. If negotiations collapsed, the hearing could be postponed while additional investigation was carried on. By the same token, the respondent had nothing to lose by refusing to accept a consent order until he had forced FTC counsel into litigation.

The new rules impose on the Commission staff a heavier burden of investigation prior to the issuance of the complaint

113. Memorandum from Wayne Threlkeld, Assistant General Counsel for Consent Orders, to Frank C. Hale, Program Review Officer, Nov. 15, 1962 [hereinafter cited as Threlkeld Memorandum].
115. Ibid.
116. Ibid.
and the opening of the hearing. This burden is relieved only by the possibility that the matter may be disposed of pursuant to Rule 42 of Part 1 (the FTC’s General Procedures). Rule 42 provides:

When the facts disclosed by the investigation indicate that corrective action is . . . warranted . . . [and] it appears that the public interest will be fully safeguarded thereby, the matter may be disposed of by informal administrative treatment . . . ; or the individual, partnership or corporation being investigated may, at any time during the investigation, be afforded an opportunity to submit to the Commission through the Office of Consent Orders a proposed agreement conforming with the requirements of [Rule 8 of Part 3] . . . containing an appropriate order to cease and desist, together with a proposed complaint drafted by the Commission’s staff. . . .

Although Rule 42 speaks as if the prospective respondent must take the initiative to propose a consent order thereunder, in fact the enforcement bureaus, too, are prepared to propose consent orders thereunder to respondents. Failure of a respondent to enter into a consent order under Rule 42 will not preclude use of the consent order procedure under Part 3.

To date, it should be added, the consent order provisions of Rule 42 have been used sparingly. In the two groups of cases in which they have been invoked, as of this writing, the Commission took the initiative in proposing consent orders. It is too early to say how much practical significance Rule 42 will have.

2. Assurances of Discontinuance

The new Commission has also discarded the prior practice of informally settling a case, after a full-fledged investigation, by a stipulation that the allegedly unlawful practice will be discontinued. The stipulation, unlike the consent order, did not have the force of law.

The “informal administrative treatment” referred to in Rule 42 is used to obviate the necessity for a full-fledged investigation. The “treatment” consists of the securing of a written assurance from the private party, addressed to the Commission, that the behavior complained of will be discontinued. Since July 1, 1961, “324 informal assurances of discontinuance have been accepted as dispositive of deceptive practices investigations.” Rule 42 prohibits use of this alternative in cases “involving alleged false advertising of food, drugs, devices or cosmetics which are inher-
ently dangerous, the sale of fabrics and wearing apparel which are so highly flammable as to be dangerous, or the suppression or restraint of competition through conspiracy or discriminatory or monopolistic practices."

The Assistant Director of the Bureau of Restraint of Trade comments:

It is . . . believed that the time has come for the Commission to consider establishing a policy looking toward obtaining discontinuance of practices short of a formal complaint. It is believed that Congress intended the Federal Trade Commission to be a regulatory agency in the true sense of the meaning of the word 'regulatory', rather than playing the primary role of a prosecutive agency, except where necessary. It is also believed that an effort should be made to obtain voluntary discontinuance of an unfair trade practice, excluding price fixing, conspiracy, boycott, or other flagrant violations of long standing, before proceeding with formal complaint. By utilizing this method of enforcement, the Commission could regulate a much greater segment of our industrial economy and maintain a much higher degree of fair and equal competitive opportunity in the business world.

It is our opinion that the standard of measurement of production or accomplishments of the Bureau of Restraint of Trade should not be based solely on the number of formal proceedings initiated during a specified period of time, but that it should be based on the over-all activities of the Bureau, including its accomplishments in obtaining informal voluntary discontinuances of unfair trade practices before too much harm is done.

In a very large majority of complaints received from businessmen reporting unfair trade practices of a competitor, the complainants are not particularly interested in having the Commission issue a formal complaint against the competitor. They are merely interested in having the practice discontinued as quickly as possible, before severe injury is inflicted on their businesses and before it becomes necessary for them to engage in similar practices in order to retain their customers. The businessman knows that if a long drawn-out investigation ensues, followed by formal complaint and lengthy litigation, he will not likely remain in business long enough to enjoy the fruits of such litigation even if successful. It is believed that by the adoption of such a policy, the Commission would receive the undying gratitude of businessmen and their complete cooperation in reporting any resumption of such practices by a competitor and their assistance in any formal proceeding found to be warranted.

Therefore, it would appear that the role of the Commission could be much more effective to the business world in protecting our free competitive enterprise system by obtaining voluntary discontinuance of unfair practices where possible, and resorting to vigorous and expeditious prosecution where such methods fail. It is believed that such a procedure is worth considering, as well as worth trying.\footnote{119. \textit{Miles Memorandum}.}
While the Assistant Director's objectives are praiseworthy, precisely what procedure he has in mind to achieve them is not clear. A procedure now exists for "obtaining voluntary discontinuance of unfair practices" without resorting to a "long drawn-out investigation" and "formal complaint and lengthy litigation" — the new consent order procedure under Rule 42 of Part 1 or under Part 3. The Assistant Director must be referring to the fact that Rule 42 now prohibits employment of written assurances of discontinuance in all cases involving "the suppression or restraint of competition through conspiracy or discriminatory or monopolistic practices." The Budget Bureau staff, in this connection, recommended that "informal and voluntary compliance procedures be extended to appropriate types of violations of the Robinson-Patman Act, particularly those covered by the Guides Program and, where feasible, those encompassed in the Trade Practice rules." The proposals of the Assistant Director and the Budget Bureau staff deserve the serious consideration of the Commission.

3. Questions Raised by New Consent Order Procedure

(a) Should the Possibility of a Consent Order Be Foreclosed Once a Complaint Is Filed?

Mr. Martin F. Connor, a former FTC trial attorney, has objected to the new rule that the consent order procedure will not be available after the complaint is issued, on the ground that, in some cases, it will disadvantage the Commission itself and, in others, the respondent in the case. From the Commission's point of view, Mr. Connor is concerned that the rule may require the enforcement staff to conduct unnecessary investigations. In part, Rule 42 of Part 1, which Mr. Connor does not mention, may operate to weaken the force of this objection. In any case, completion of the investigation prior to the opening of the hearing is necessary if the trial before the hearing examiner is to proceed uninterrupted — an objective that must be attained to eliminate the principal source of delay in previous FTC proceedings. Equally important, fairness to the respondent dictates that he should not be subjected to the unfavorable publicity that attends the issuance of a formal complaint against him unless the enforcement bureau's investigation has gone far enough to convince it that a violation of law has been committed.

Mr. Connor also thinks that it is undesirable to deprive the

120. Budget Bureau Staff Report 42.
121. Connor, supra note 111, at 873–76.
Commission's trial staff of the possibility of a consent order in a case which has revealed weaknesses, from its point of view, during the course of litigation. The obligation to complete the investigation before the hearing opens and single Bureau responsibility for both investigation and litigation, should keep such cases to a minimum. Nevertheless, the possibility Mr. Connor suggests is an additional argument for permitting active negotiations to take place between the respondent and the Commission while the consent order procedure is being used.\textsuperscript{122} If such negotiations collapse and the Commission issues a complaint, however, the disclosure of weaknesses in the trial staff's case during the course of litigation is not a sufficient reason to reopen consent order negotiations.

In the first place, once the hearing on a complaint has begun, the Commission is not in a good position to evaluate the relative weakness and strength of the case for the complaint. The case is in the process of adjudication and the spirit, if not the letter, of section 5(c) of the Administrative Procedure Act would preclude the Commission from consulting, ex parte, either the trial staff or the investigational files. Indeed, the new consent order procedure was adopted to overcome this difficulty faced by the Commission under the old procedure. Secondly, the trial staff should not be in a position to attempt to coerce a respondent into agreeing to a consent order when litigation exposes weaknesses in the case for the complaint.\textsuperscript{123} Dismissal of the complaint is called for under these circumstances.

What if the respondent himself is willing to enter into a consent order, either because he wishes to avoid the expenses of further litigation or because weaknesses in his own position have been exposed? Respondents will have to consider these matters while negotiating consent orders under Part 3. The Antitrust Subcommittee of the House Judiciary Committee criticized consent decrees because they diminish the potency of private damage suits as a deterrent against the violation of

\textsuperscript{122} The problem of negotiation is considered at length below.

\textsuperscript{123} The coercion stems from the trial staff's ability to force the respondent to litigate further, with the attendant mounting costs. It was recently estimated that full-scale antitrust litigation before the FTC may cost each respondent involved more than $175,000 per year in legal fees, exclusive of the cost of the record. Note, The Federal Trade Commission and the Reform of the Administrative Process, 62 Colum. L. Rev. 671, 704 (1962). Legal fees for negotiating a consent order in such a case may exceed $25,000. \textit{Ibid}. 
the antitrust laws.\footnote{\textit{Antitrust Subcommittee (Subcommittee No. 5) of House Judiciary Committee, 86th Cong., 1st Sess., Report on Consent Degree Program of the Department of Justice} 22-25 (1959) [hereinafter cited as \textit{Antitrust Subcommittee Report}].} If a respondent makes it necessary for the enforcement bureau to complete its investigation, refuses to negotiate a consent order under Part 3, and compels the institution of formal proceedings before the Hearing Examiner, it is reasonable to say that subsequent awareness of weakness in his case should not afford him another opportunity to avoid a decree that can be used to support a private damage suit against him. If the respondent is motivated primarily by the wish to save the expenses of further litigation, he may stipulate the facts alleged in the complaint and not appeal from the hearing examiner's initial decision based thereon and containing the appropriate conclusions and order. In a case in which an FTC order may not be used to show a prima facie violation in a private damage action, such a respondent has no reason to resist stipulating the facts and accepting an order based thereon.

Mr. Connor also argues that the present procedure deprives the respondent of the right to proffer such customary objections to the complaint as lack of jurisdiction, failure to state a cause of action, and mootness, without sacrificing the possibility of a consent order under Part 3. Whether this argument is well taken depends on whether the Commission will entertain such objections in the course of the negotiations leading to a consent order under Part 3. Indeed, the views expressed above, in reply to the objections raised by Mr. Connor against the rule precluding the possibility of a consent order after the complaint is issued, assume that the respondent is not required by the new rules simply to take the proposed complaint and order or to leave it, but may negotiate about the scope and content of the complaint and order and, in the course of negotiation, adduce objections based upon the alleged weakness, in law or in fact, of the case for the complaint and order.

(b) To What Extent Should a Prospective Respondent Be Permitted To Negotiate About the Order to Which He Will Consent?

The rules governing the consent order procedure under Part 3 seem to invite negotiation. Rule 2 requires the prospective respondent to state whether he will accept a consent order
"in substantially the form proposed." 125 Rule 4(a) gives the respondent at least 30 days to execute an agreement that will satisfy the Office of Consent Orders. More time may be allowed by the Commission "for good cause shown." Provision for more time would not be necessary if the only task to be performed by the Office of Consent Orders and the respondent is the preparation and execution of an agreement accepting the order that originally accompanied the notice of the Commission's determination to issue a complaint. Finally, Rule 4(b) specifies that the Commission may reject the agreement arrived at by the Office of Consent Orders and the respondent or accept it and issue a complaint "in such form as the circumstances require." Since the Commission approved the issuance of the original proposed complaint and order, these provisions would be unnecessary if they did not contemplate the possibility that the Office of Consent Orders and the respondent might negotiate a different complaint and order requiring a fresh decision of acceptance or rejection by the Commission.

Furthermore, the very fact that the Office of Consent Orders was established and staffed with high-ranking personnel would seem to indicate that it was not intended to play a merely formal role, but rather a crucial one, in mediating differences between prospective respondents and the enforcement bureaus and, if necessary, in giving the Commission the benefit of judgment, independent of that of the enforcement bureau, on the strength or weakness of the bureau's case.

This seems to have been Chairman Dixon's original conception of the duties of the Office of Consent Orders. In explaining the new consent order procedure, the Chairman stated that "in recommending agreements to the Commission the Assistant General Counsel for Consent Orders, unlike a hearing examiner, can base his judgment on our investigational files." "Moreover," continued the Chairman, "the Commission can also consult these files in making its decision under the new procedure, something it could not do under the old; for at the time of settlement the case is not now under adjudication, whereas it was before." 126 Yet the Office of Consent Orders seems to take the position that it will not permit the prospective respondent to attack the basis in law or in fact, or to negotiate with it about the scope or content, of the proposed complaint and order.

In this connection, different considerations would seem to

125. (Emphasis added.)
apply, depending upon whether the case involves a consent order under Rule 42 of Part 1 or a consent order under Part 3. At the stage of the proceeding when a consent order under Rule 42 is in question, neither the Office of Consent Orders nor the Commission is in a very good position to negotiate. The question here is whether the public interest will be better protected by accepting the order proposed by the prospective respondent and shifting staff resources to other purposes than it would be by the order that could be supported after a full-scale investigation. If the enforcement bureau answers this question in the affirmative, its decision will be reviewed by the Office of Consent Orders and the Commission. If the enforcement bureau answers this question in the negative, there is no strong reason why the Office of Consent Orders or the Commission should permit any further negotiation about the matter. After all, the bureau is in the best position to know what a full-scale investigation may disclose. In other words, it makes sense for the Commission, in effect, to delegate to the enforcement bureau final authority to reject consent orders proposed by prospective respondents under Rule 42.127 Nor would a prospective respondent be prejudiced in any way by such a delegation because the consent order procedure under Part 3 is still available to him.

By the time a consent order is proposed under Part 3, the Office of Consent Orders and the Commission are in a position to evaluate the whole case. Up to this time, the Commission has had no opportunity to hear the prospective respondent's side of the case. Unnecessary litigation may result from the refusal of the Office of Consent Orders and the Commission itself to consider the prospective respondent's allegations that errors of fact, law, judgment, or policy, were committed by the Commission's staff. The consequences of the Commission's refusal are serious for the respondent. Once the complaint is issued, the possibility of a consent order (not admitting that a violation of law has been committed) is foreclosed. To be fair and effective, the new consent order procedure, as Chairman Dixon envisaged, would seem to call for negotiation.128

127. Insofar as the form of the consent order is in dispute at this stage, a more general question is raised that is applicable to non-consent orders as well and will be considered below. Solution of this problem will, of course, facilitate the negotiation of consent orders.

128. It might be added that § 5(b) of the Administrative Procedure Act would seem to require that the Commission give a prospective respondent the opportunity to negotiate. This section provides:

The agency shall afford all interested parties opportunity for (1) the
The Assistant General Counsel for Consent Orders insists that "nothing could be further in point of fact from the position of this Office" than to say that it will not permit a prospective respondent to attack the basis in law or in fact, or to negotiate about the scope and content, of a proposed complaint and order. He writes:

This office endeavors to afford a respondent opportunity to direct his objections to any point and to state his view fully. In turn, we give consideration to all such matters, and when in doubt we bring serious questions of various nature to the Commission's attention for its consideration and our ultimate guidance in the particular or related matters. In addition, the Commission has entertained and in instances ruled on petitions directed to it by proposed respondents on such matters. Parenthetically, however, we have not considered that the Office of Consent Orders was ever intended to sit as a Hearing Examiner, in effect, and ask counsel for the Commission to engage in a full dress disclosure of information from the confidential files or otherwise to conduct what would amount to a pre-trial conference.

Innumerable instances of revised proposed complaints and orders bear witness to the conduct of negotiations contrary to the foregoing observation [in the report]. Only this must be borne in mind, namely, that apart from serious questions which are referred in advance to the Commission as stated heretofore, this Office must have a creditable and convincing basis upon which to act before it will consider changes in the proposed complaint or order. Such basis may take many forms, e.g., mistake, new evidentiary facts (generally supported by affidavit or other creditable documents), change in laws, etc.129

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129. Thralkeld Memorandum.
The comments of the Assistant General Counsel would seem to illustrate the position toward negotiation attributed to his Office above and make his disclaimer of this position rather perplexing. In particular, his parenthetical remarks conflict with Chairman Dixon’s explanation of the duties of his Office. The question at issue is not whether the Office of Consent Orders will agree to a modification of a proposed complaint and order when warranted by a prospective respondent’s demonstration of “mistake, new evidentiary facts . . . change in law, etc.” It is taken for granted that it will do so. The crucial question is whether, in the absence of such a demonstration, the Office of Consent Orders will examine the investigational files to determine whether the prospective respondent’s attack upon the proposed complaint and order, in whole or in part, has any basis in fact, law, or policy. This is precisely the function that Chairman Dixon envisaged that the Office of Consent Orders would perform and the Assistant General Counsel in charge repudiates.

It is also not clear what the Assistant General Counsel means when he states that “the Commission has entertained and in instances ruled on petitions directed to it by proposed respondents on such matters [the objections to a proposed complaint and order].” In one case, for example, the Assistant General Counsel for Consent Orders has written to counsel for a prospective respondent that the order to which the respondent proposed to consent would not even be submitted to the Commission because his Office would not agree to it. As of this writing, the Commission has not yet determined whether the prospective respondent, under these circumstances, will be permitted to enter into negotiations directly with the Commission about the proposed complaint and order.

It is also apparent from the memoranda of the various Bureau Directors and Division Chiefs that the Commission’s staff has no clear conception of the new consent order procedure. The Bureau of Textiles and Furs, for example, states:

It is believed that the operating Bureaus should continue to have the responsibility for conducting the negotiations as to the substance of the draft of complaint and order. The Office of Consent Orders can well have charge of the procedural aspects of such negotiation. The engagement of the Commission in full scale negotiations during this phase of the case could lead: (1) to delay; and (2) to discussion and decision by the Commission of points at issue, which have not been presented to the Commission in an orderly fashion and which may not be supported by reliable evidence.

The entry into detailed negotiations between the Commission and
the respondent could well result in the Commission having to prejudge a case without the benefit of all the facts.

The Consent Agreement procedure, it would seem, is designed to aid in resolving cases where the parties are in agreement as to the evidence and facts. Where these are at issue, (and such a situation generally becomes known only during the period when the staff and the respondent are trying to reach an agreement) the Commission should hold itself aloof until such issues are properly presented to it.130

No explanation of the new consent order procedure could be more at variance with the public position taken by Chairman Dixon or with the exposition of the Assistant General Counsel for Consent Orders quoted above.

The views of the Bureau of Deceptive Practices are more in accord with those of the Assistant General Counsel for Consent Orders:

It is true that, as a rule, a proposed consent order agreed upon by the staff of the enforcement bureau and the Office of Consent Orders and approved by the Commission probably cannot be changed materially in the negotiations, except on express authority of the Commission, because the staff will generally have been aware of the kind of order needed to prevent the practice under consideration; but there nevertheless is room to "negotiate" to the extent that a respondent might suggest changes consistent with the facts and the law of the case.131

The Director of the Bureau of Restraint of Trade professes not to see the issues sought to be raised in the report and manages to avoid any clear statement of where he would stand on them:

The Professor devotes considerable space to the question of negotiation with regard to consents. I am not certain whether he is for it or against it, but I do know that if we are to have consent settlements, we must necessarily have negotiations at staff level. Since under the Commission's present rules consent settlements are not in the adjudicating area, the Commission if it so desires can keep itself informed as to matters of negotiation. In our memorandum of transmittal this bureau undertakes to outline the major points of negotiation and the reasons for the staff decisions that have been made. The Professor seems to believe that there should be greater willingness on the part of the Commission to negotiate consent orders. I am at a loss to know what he may have in mind. We are willing to negotiate a consent settlement in every case and spend a very substantial part of our time in conducting negotiation conferences with respondents and their attorneys. We are not willing to accept their proposals for settlement unless we believe we are getting an effective order.132

130. Bureau of Textiles and Furs Memorandum.
131. Murphy Memorandum.
132. Sheehy Memorandum.
But the Chief of the Division of Discriminatory Practices comments:

The Commission should review negotiations—not negotiate. To fully negotiate a consent order would involve entirely too much time and effort on the part of the Commission and it is felt that in this area more reliance should be placed upon the recommendations of the enforcement bureaus inasmuch as they are more acutely aware of the difficulties of proof inherent in the individual case and the various technical difficulties involved in securing compliance with the statute in any one given area.  

On the other hand, the Program Review Officer writes:

As I understand it, existing policy does permit negotiations and a prospective respondent does have the opportunity to have his “side of the case” considered by the Commission prior to complaint, even if the Office of Consent Orders does not agree with the prospective respondent’s proposal.

Obviously, this Officer’s statement of consent order policy clearly conflicts with that of the Bureau of Textiles and Furs and the Chief of the Division of Discriminatory Practices and is not quite consistent with the explanation of the Assistant General Counsel for Consent Orders. Furthermore, it is difficult to reconcile the Program Review Officer’s understanding with a most recent action of the Commission.

On January 2, 1963, the Commission announced that it had mailed identical complaints and proposed consent orders to 248 manufacturers of wearing apparel allegedly making discriminatory advertising allowances in violation of section 2(d) of the amended Clayton Act. The manufacturers were given until February 15, 1963 to avail themselves of the consent order procedure. The complaint and order were drafted “in skeleton form and in very general terms.” Commissioners Elman and Higginbotham, who filed a joint statement of dissent from the Commission’s action, described the order as “a broad order comprehensively prohibiting any and all violations of section 2(d), and not merely discriminatory allowances.” Any manufacturer who will not accept the proposed order by February 15, 1963, was warned by the Commission that it might “find it necessary to direct the issuance of a complaint and proposed cease-and-desist order in greater detail and more specific terms to serve as a basis for litigation.” Manufacturers who accept the proffered order are “invited to discuss with the Commission’s

133. Mayer Memorandum.
134. Hale Memorandum.
staff their proposed new promotional plans for the purpose of being advised whether such plans would be in compliance with the orders.”

The two dissenting Commissioners described the Commission's action as a “take-it-or-leave-it-by-February 15, 1963, approach” and argued that each manufacturer “should be allowed to request the Commission's advice as to the legality of a new non-discriminatory advertising allowance plan he has formulated to replace his present, allegedly discriminatory practice . . . before being compelled to decide whether or not to accept the form of consent order being offered by the Commission.”

It remains to be seen whether this action reflects a general “take-it-or-leave-it” approach to the consent order on the part of the Commission majority or a particular approach thought to be necessary in order to eliminate an alleged industry-wide illegal practice. Even the dissenters acceded that all “consent orders agreed to by respondent manufacturers should be identical in terms” but “limited to the specific practice of discriminatory advertising allowances.” The manufacturers would have been in a stronger position to negotiate about the details of new plans for making advertising allowances if the views of the dissenters had prevailed. According to the dissenters, this way offered the best hope of securing industry-wide compliance with statutory requirements. This aspect of the Commission's action will be considered further in the next section of the Article.

The question of the limits of permissible negotiation about consent settlements has been vigorously debated in connection with the consent decree procedures of the Antitrust Division of the Department of Justice. It may be instructive to examine how much of this debate is relevant to the problems of the FTC.

The consent decree program of the Antitrust Division was most recently studied by the Antitrust Subcommittee of the House Judiciary Committee. The Subcommittee was concerned about the procedure of entering into negotiations for a consent decree with a prospective defendant before a formal complaint was filed in court. It endorsed the following criticism of this procedure voiced by Professor Louis B. Schwartz in his

135. The above account is based upon FTC News Release, Jan. 2, 1963, to which were attached copies of (1) the letters from the FTC Secretary, acting by direction of the Commission, to the manufacturers and (2) a joint dissenting statement by Commissioners Philip Elman and A. Leon Higginbotham, Jr.

136. ANTITRUST SUBCOMMITTEE REPORT.
dissent from the 1955 Report of the Attorney General’s National Committee To Study the Antitrust Laws:

"Such a practice will ... whittle away the last remnants of judicial control and public scrutiny in this area, and involve the Government in bargaining with a law violator not only as to the relief but also as to the nature of the accusation to be made against him. The proposal [that the Department of Justice should enter into negotiations with prospective defendants for consent decrees] opens the possibility that the Government’s complaint will be modified so as to be consistent with the relief the defendant is prepared to consent to. But the settlement of an antitrust case ought not to be a simple matter of bargaining between the Department and the defendant."137

This ground of criticism would be avoided if the Commission adopted the policy that a prospective defendant must either take or leave, but not negotiate about, the proposed complaint and order. But would this criticism apply with equal force to the consent order procedure under Part 3, if the Commission adopts a policy of negotiation?

Professor Schwartz feared that the Justice Department’s consent decree procedure would “whittle away the last remnants of judicial control” in the antitrust area. The Antitrust Subcommittee pointed out that courts accept and sign consent decrees as a matter of routine and do not attempt independently to determine the legal or factual issues involved.138 Consent decrees thus deprive the courts of the opportunity to “establish precedent that gives content to the meaning of the antitrust law.”139 The Subcommittee concluded:

As a consequence of the stoppage in the growth of judicial precedent, business and the bar are deprived of an opportunity to ascertain whether, in fact, the practices attacked in the Government’s complaint are illegal. Antitrust enforcement officers, also, are deprived of a yardstick by which to measure comparable activities in other industries.

Thus it is apparent that what has happened under the current consent decree procedures is that the judicial function has been superseded by an administrative procedure in which there are no administrative rules to safeguard the interests of the public or the interest of parties not privy to the Government’s case. The consent decree practice has established an orbit in the twilight zone between established rules of administrative law and judicial procedures.140

138. ANTITRUST SUBCOMMITTEE REPORT 14.
139. Id. at 15.
140. Ibid.
It is not necessary to determine the aptness of these criticisms of the Justice Department's consent decree procedures to appreciate that they are not applicable to the FTC consent order procedure envisaged herein. Unlike the Antitrust Division, the FTC has adjudicatory, as well as prosecutory, functions. It is in a position to see to it that the policies by which it is guided in the negotiation of consent orders are consistent with the policies it enunciates in the adjudication of cases. Unlike a court, it does not have to rely solely on the adjudication of cases to announce its policies for the guidance of business; it may also use, for this purpose, trade practice rules, trade regulation rules, guides, and advisory opinions.

No one will dispute Professor Schwartz's insistence that "the settlement of an antitrust case ought not to be a simple matter of bargaining between" the antitrust agency and the prospective defendant or respondent. All the Government's complaint should not be modified solely for the sake of getting the defendant or respondent to agree to some decree or order; but the Commission has the means to see to it that this does not happen. Its Office of Consent Orders can act on its behalf to check an enforcement bureau willing to accept a consent order that would sacrifice overall statutory objectives. The Commission itself has the last word and can enlist the aid of its Chief Economist and General Counsel in passing on proposed consent orders. If events demonstrate that the Commission has made a mistake in approving a particular consent order, it does not have to ask and persuade a court to undo the damage; it has the power to rectify the situation by itself. Whatever doubt may exist about a court's power to modify a Justice Department consent decree when industry conditions have not changed, there is

141. Id. at 12.
142. The Supreme Court of the United States has not had occasion to pass squarely on this question. The Antitrust Subcommitte Report 8–6, cites Aluminum Co. of America v. United States, 302 U.S. 230 (1937); United States v. International Harvester Co., 274 U.S. 693 (1927); United States v. Radio Corp. of America, 46 F. Supp. 654 (D. Del. 1942) as authority for the proposition that the doctrine of res judicata precludes modification of a consent decree in the absence of a change in underlying conditions. It concludes, however, that more recent cases, Liquid Carbonic Corp. v. United States, 350 U.S. 869 (1954); Hughes v. United States, 342 U.S. 353 (1952); Chrysler Corp. v. United States, 316 U.S. 556 (1942), foreshadow the probability that the Supreme Court will now hold that a consent decree may be modified even when industry conditions have not changed, if the modification is necessary to effectuate the purpose of the original decree.
no doubt about the Commission's power in a similar case.\textsuperscript{143}

All these factors would seem to militate in favor of a policy of negotiation under Part 3. There would be an added strong reason for such a policy if the Commission adopted the recommendation made above that it should not review the enforcement bureau's determination that there is reason to believe that a violation of law has been committed, in determining whether to issue the complaint proposed by the bureau. The consent order procedure would then offer the Commission the first opportunity to review the enforcement bureau's case and nothing would be gained by its refusal to hear what the prospective respondent had to say about it.\textsuperscript{144}

It has also been argued that a policy permitting the negotiation of consent orders will enable the hard bargainer to obtain a better deal than the more cooperative prospective respondent. It may be said in answer to this objection that there is no guarantee that the respondent who insists on litigation will not receive better treatment than his competitor who accepts a consent order. In any case, it is the task of the Office of Consent Orders and the Commission to minimize such competitive inequities. There is no reason to suppose that the attainment of this objective is inconsistent with fruitful negotiations under Part 3.

It is significant that the Antitrust Subcommittee did not recommend that the Department of Justice should discontinue

\textsuperscript{143} Part 3, Rule 3 requires that every agreement for a consent order shall contain a provision that the order "may be altered, modified or set aside in the same manner . . . provided by statute for other orders . . . ."

Section 5(b) of the Federal Trade Commission Act provides: the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any . . . order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require . . . . 52 Stat. 112 (1938), as amended, 15 U.S.C. § 45(b) (1958). Section 11(b) of the Clayton Act contains a similar provision with respect to orders issued under that section relating to the enforcement of §§ 2, 3, 7, and 8 of the Clayton Act. 72 Stat. 943 (1958), as amended, 15 U.S.C. § 21 (1958).

\textsuperscript{144} It should be pointed out that it is not practical to keep the Commission from examining the facts of the case, in some detail, by the time the consent order stage is in progress. It would not be wise for the Commission, as yet, to delegate to its staff the authority to reject a consent order proposed by a prospective respondent. Thus, if consent order negotiations fail, the Commission will be required to adjudicate a case in which it has already taken a position, for the purpose of these negotiations, on the facts and the law in the case. This is unavoidable.
its use of negotiated settlements. It urged, however, that the following "corrective steps" be taken:

(1) When novel questions of law are presented, or, when the Government's complaint attacks the structure and operations of dominant corporations that determine the standard of conduct for an entire industry, only in the most extreme situation should a negotiated settlement be undertaken by the Government. Compromise of the Government's position in such a case is not warranted, and a consent decree should only be assented to by the Government when the defendants agree to all of the relief which the Department of Justice believes is essential to reestablish competition, eliminate the conditions which caused the Government to institute its action, and to dissipate the fruits of monopoly.146

(2) When the Department of Justice presents a consent decree to the court for its approval, it should be accompanied by an opinion that would set forth the facts involved, the defendant's position, the meaning of the terms of the decree, and the reasons that form the basis for the Department's acceptance of the particular compromise.146

Recommendation (1), it should be emphasized, reflected the Subcommittee's opinion that "currently there are too many consent decrees in relation to litigated judgments" and that a greater proportion of litigated judgments was required in order that "the deterrent effect of the antitrust laws may be realized and growth in judicial precedent assured."147

As mentioned above, this particular criticism is not applicable to the FTC. In fact, it is recommended that the FTC should be more willing to negotiate consent orders under Part 3 than it seems to be at present. It is doubtful whether recommendation (1) embodies a very helpful standard by which negotiations in any particular case can be guided. As indicated above, Rule 1 of Part 3 provides that the FTC's consent order procedure is to be employed only when "time, the nature of the proceeding and the public interest permit." If this limitation is taken seriously, the FTC should promulgate and publish the standards by which it will be guided in determining when "the nature of the proceeding and the public interest" will not permit the consent order procedure to be used.

The Antitrust Subcommittee's recommendation (2) above is intended "to insure against arbitrary action in the consent dis-

145. ANTITRUST SUBCOMMITTEE REPORT 27. The minority of the Subcommittee accepted this recommendation but thought the Justice Department was giving due consideration to the listed factors. Id. at 328A.
146. Id. at 27. The minority of the Subcommittee did not comment on this recommendation.
147. Ibid.
position of antitrust litigation."\textsuperscript{148} Wholesale adoption of this recommendation by the FTC would unduly delay the consent order program and divert Commission attention from more important tasks. In some cases, it might even impede the successful negotiation of consent orders. Yet the Commission might profitably experiment with the Antitrust Subcommittee’s recommendation in connection with significant consent orders in the restraint of trade area. These opinions would serve as guides to the enforcement bureaus and the Office of Consent Orders in their efforts to evolve a consistent settlement policy. They would also be helpful in securing future compliance by all firms in a situation similar to that of the particular respondent.\textsuperscript{149}

Mr. Connor has suggested that if the Commission rejects a consent order agreed to by the Office of Consent Orders and the prospective respondent but instructs the Office to conduct further negotiations with the respondent, it should notify the Office and the respondent of the reasons why it rejected the agreement.\textsuperscript{150} This practice would facilitate the new negotiations and serve further to elaborate the Commission’s consent settlement policy for the benefit of its staff and the parties subject to its jurisdiction. It would also minimize the need for the Commission itself to enter into negotiations with respondents.

(c) Should Other Interested Parties and Members of the Public Be Given Opportunity To Comment on an Agreed-Upon Consent Order Before It Becomes Effective?

The Antitrust Subcommittee also criticized the secrecy inherent in the then-existing consent decree program of the Justice Department. This criticism is equally applicable to the FTC’s consent order procedure. The provisions of the consent order and accompanying complaint are not made public until they are formally issued by the Commission. No person other than the prospective respondent is given an opportunity to be heard during the course of the negotiations leading to the consent order.

The Antitrust Subcommittee recommended that the Justice Department “should provide public notice of the terms of the consent decree and a waiting period after there has been agree-

\textsuperscript{148} Ibid.

\textsuperscript{149} The Chief of the Division of Discriminatory Practices comments: “To complicate the [consent order] procedure by insisting upon detailed findings of fact and accompanying opinions is simply not feasible.” Mayer Memorandum.

\textsuperscript{150} Connor, supra note 111, at 376. See also Administrative Procedure Act § 6(d), 60 Stat. 241 (1946), 5 U.S.C. § 1005(d) (1958).
ment between the Government and the defendant. During the waiting period private parties, who may be affected by the terms of the decree, should be given an opportunity to intervene in the Government's case in order to present their objections to the court for its consideration.151

Three bills were introduced in the 86th Congress to effectuate this recommendation. It is significant that these bills would also have applied to the consent orders of the FTC. Two of them were companion bills that would simply have required the Attorney General to publish every proposed consent decree under the Sherman and Clayton Acts in the Federal Register not less than 30 days before they were entered by the court. The bills would have imposed a similar requirement upon the FTC with respect to proposed consent orders under the Federal Trade Commission Act and the Clayton Act.152

The third bill went further. In addition to the publication requirement, it would have given "any person who may be aggrieved by the proposed operation of such . . . decree, or who may be aggrieved by reason of anything not properly set forth in or omitted from such proposed . . . decree," the opportunity to ask the court or the FTC to refuse to enter or issue the decree in the form proposed.153

The Judicial Conference approved the proposals contained in all three bills,154 but the FTC opposed these bills. The Assistant General Counsel for Legislation summarizes the Commission's objections as follows:

[T]he Commission believes consent order negotiations would be unfavorably affected by the enactment of these bills; that expeditious settlement of cases is one of the considerations inducing violators of the law to consent to the entry of the order without litigation, and that the publication and waiting period prescribed in the bills probably

151. Antitrust Subcommittee Report 27. The Subcommittee was unanimous on this recommendation. See id. at 306, 328. The minority emphasized that this recommendation "was made in 1948 during a Republican Congress by the Select Committee on Small Business [H.R. Rep. No. 2405, 80th Cong., 2d Sess. 27 (1948)]." Id. at 328. The minority, however, thought it would be impractical "to permit third parties to participate in the settlement proceedings or to actually intervene and become parties to the litigation." Id. at 328B.

152. These bills were S. 1387, 86th Cong., 1st Sess. (1959) (introduced by Senator Humphrey of Minnesota); H.R. 6253, 86th Cong., 1st Sess. (1959) (introduced by Congressman Multer of New York).

153. This bill was H.R. 5942, 86th Cong., 1st Sess. (1959) (introduced by Congressman Roosevelt of California).

would result in some delay in final settlement of such cases, and might make consent orders less acceptable to respondents.

The reports by the Commission . . . on these bills also pointed out that under present procedures, applications for the issuance of a complaint may be filed for anyone at any time even if an order already exists but is unknown to or considered inadequate by the applicant; that cease and desist orders issued with the consent of respondents may be modified in precisely the same fashion as those issued after litigation; and that modified orders, like original orders, may be issued by consent or after adjudication.

The reports further pointed out that if these bills were enacted, the major result would be that whereas under present procedures consent orders are in effect during the determination of the desirability of modification, the proposed legislation would prevent an order becoming effective during the waiting period.

The reports of the Commission . . . finally stated that the Commission considered it doubtful if publication in the Federal Register would likely bring the proposed actions of the Commission to the attention of the general public.\footnote{155}

Judging by the fact that the new consent order procedure makes no provision for public comment on an agreed-upon consent order before it becomes effective, these views of the 1959 Commission would seem to represent the views of the Commission today. It is interesting to note, however, that Attorney General Kennedy has accepted the substance of the proposals in the bills opposed by the 1959 Commission.

The Attorney General has announced that it will be the policy of the Justice Department to file each proposed consent decree in court, or otherwise make it available to interested persons upon their request, at least 30 days prior to the entry of the decree by the court. The Department will then receive and consider written comments on the proposed decree from such persons and take whatever action it deems necessary in the light thereof.\footnote{156}

It is difficult to see why this Justice Department policy should not also be followed in the restraint of trade area administered by the FTC — particularly in the area where its jurisdiction and that of the Justice Department overlap. A reasonable delay is not too high a price to pay for the opportunity of

\footnote{155}{Memorandum from Fletcher G. Cohn, Assistant General Counsel for Legislation, to Frank C. Hale, Program Review Officer, Nov. 1, 1962 [hereinafter cited as Cohn Memorandum].}

\footnote{156}{The "Consent Judgment Policy" of the Department of Justice is set forth in 28 C.F.R. § 50.1 (1963). The Department reserves the right "to object to intervention by any party not named as a party by the Government." The Assistant Attorney General in charge of the Antitrust Division is authorized to establish procedures to implement the announced policy.}
other interested parties and the public in general to express their views in these cases. As a practical matter, opposing views are more likely to be expressed and given serious and expeditious consideration in the course of the consent order proceeding itself than if the opponent is required to file an application to modify a consent order which has become effective.

The Director of the Bureau of Restraint of Trade has “no quarrel” with the above recommendation that the Justice Department policy should be followed in the restraint of trade area administered by the FTC. “As a matter of fact,” he points out, “the Commission did this in the Iron and Steel Institute case many years ago. At that time the staff realized that this might well be a controversial settlement and for that reason recommended a waiting period during which any interested party might submit criticisms. It is my recollection that no criticisms were received.”

The Chief of the Division of Discriminatory Practices opposes the recommendation:

The report demonstrates no need for publication of consent orders in advance of their effective date, and we see no reason to invite comments from both interested and non-interested parties prior to issuance of the agreed-upon order.

The Bureau of Deceptive Practices also opposes the recommendation on the ground that “no useful purpose would be served and . . . finality of consent orders would merely be delayed thereby.” It is true that the problem of delay may be more serious in the deceptive practices area because this area accounts for the overwhelming proportion of FTC consent orders. Yet competitive considerations also enter the picture here and the public is directly concerned. To give competitors and the public at large an opportunity to participate in the consent order program will not only increase the sources of information available to the Commission, it will also increase confidence in the program and afford safeguards which should induce the

157. The fact that publication in the Federal Register is not a likely way to bring proposed Commission actions to public attention only means that the Commission should employ supplemental means to achieve this end.
158. Sheehy Memorandum.
159. Mayer Memorandum.
160. Murphy Memorandum. The Bureau adds:

This suggestion seems to be premised on the assumption that the staff will take an order which is less than adequate to protect the public. We deny the validity of that assumption.

Ibid.
Commission to negotiate consent orders more freely, thus speeding up overall FTC administration.

It is not possible to determine whether the gains to be derived from a policy of encouraging public comment on proposed consent orders will be worth the attendant delays until the policy is tried. The Commission, therefore, should experiment with such a policy, but should reserve the authority not to follow it in any case in which it decides that special reasons exist for making the consent order effective without delay.\textsuperscript{161}

C. Efforts To Secure Industry-Wide Compliance

From its earliest days, the FTC has operated under the handicap of not having sufficient authority to take effective action to prohibit industry-wide illegal practices. To proceed on a case-by-case basis results in the unfairness that an individual firm may be placed under an order to cease and desist from practices in which its competitors are still free to engage.\textsuperscript{162} In addition, to bring an entire industry into line with statutory requirements on a case-by-case basis may often require more resources than the FTC can afford to expend for this purpose and, in any case, is a time-consuming and wasteful process.

1. Industry-Wide Investigation and Consent Settlement

During the last few years, the Commission has attempted to overcome these difficulties by exercising its powers under section 6(b) of the Federal Trade Commission Act to investigate charges of industry-wide illegal practices. For example, the most recent action against the 248 wearing apparel manufacturers was initiated by sending section 6(b) questionnaires to 310 manufacturers inquiring about their practices and programs with respect to advertising allowances. When warranted, investigation has been followed by the simultaneous issuance of proposed complaints against a large number of alleged violators and by efforts to secure consent settlements. In the apparel case, the

\textsuperscript{161} The Justice Department's "Consent Judgment Policy" authorizes the Attorney General to "permit an exception to this policy in a specific case where extraordinary circumstances require some shorter period than 30 days or some other procedure than that stated herein, and where it is clear that the public interest in the policy hereby established is not compromised." 28 C.F.R. § 50.1 (1963).

\textsuperscript{162} In Moog Indus. v. FTC, 355 U.S. 411 (1958) (per curiam), the Court held that a court of appeals has no authority to postpone the effective date of a valid cease-and-desist order against a single firm until similar orders are entered against that firm's competitors.
Commission informed the 248 manufacturers allegedly violating section 2(d) of the Clayton Act that while they had until February 15, 1963, to agree to the proposed consent orders, the consent orders would not become effective until July 1, 1963. From February 15, 1963, until July 1, 1963, then, the manufacturers would be given the opportunity “to discuss with the Commission’s staff their proposed new promotional plans for the purpose of being advised whether such plans would be in compliance with the orders.” In this way, it was hoped, the 248 manufacturers, “accounting for a substantial share of the sales of the industry,” would be brought into compliance simultaneously by July 1, 1963.\textsuperscript{163}

The Director of the Bureau of Industry Guidance thinks that this approach has been effective in the past to eliminate widespread violations of the Robinson-Patman Act in the Florida citrus fruit, toy manufacturing, and comic book and paperbacks distribution industries.\textsuperscript{164}

Commenting on these proceedings, the Assistant Director of the Bureau of Restraint of Trade writes:

It is true that all members of the industry were not proceeded against in each instance, but a substantial majority, either in number or volume of production, were included in the industry-wide proceedings. It is further pointed out, however, that in such a wide scale operation, to be successful, the Commission must obtain the cooperation of industry or otherwise get bogged down in a mass of adjudicative processes. The industry-wide type of action taken by the Commission has been made possible, to a large degree, through the use of Section 6 type investigations, which until recently had not been utilized to any great extent except in making survey reports or obtaining corporation material by the Bureau of Economics for its use.\textsuperscript{165}

The obstacles that jeopardize the successful outcome of proceedings by way of simultaneous complaint and order on a large scale are highlighted by the Commission’s recent action in the apparel case. In their joint dissenting statement, Commissioners Elman and Higginbotham stated that it had been estimated that there are 34,500 manufacturers of wearing apparel and apparel accessories in the United States and that even if this estimate is exaggerated, “if the 310 companies investigated by the Commission represent a fair sample, the


\textsuperscript{164} Memorandum from Bryan H. Jacques, Director, Bureau of Industry Guidance, to Frank C. Hale, Program Review Officer, Oct. 31, 1962 [hereinafter cited as Jacques Memorandum].

\textsuperscript{165} Miles Memorandum.
number of manufacturers in the apparel industry who are granting illegal advertising allowances may run into thousands.\textsuperscript{165}

Under these circumstances, the Commissioners thought that the use of trade regulation rules, together with an expanded application of the advisory opinion procedure (both of which are discussed below) offered the best hope of contending with an "obviously serious and difficult" problem of law enforcement. They did not think that the procedure adopted by the Commission held out great promise of success.

For a manufacturer who wishes in good faith to comply with the law by discontinuing only those advertising allowances which are discriminatory but not those which are non-discriminatory and lawful, the Commission's approach may pose a dilemma. If he signs the broad consent order offered by the Commission, he does so in spite of the fact that many of his competitors may not simultaneously be subject to the same prohibitions. Competing manufacturers against whom the Commission has proceeded, and who choose not to sign consent orders but to litigate, will be free from any orders during the many months, if not years, of the pendency of such litigation; and even if orders should eventually be entered against them, they might be substantially narrower than the broad consent order proposed by the Commission (see \textit{Vanity Fair Paper Mills, Inc. v. Federal Trade Commission}, decided by the Court of Appeals for the 2d Circuit, November 27, 1962, and cases there cited.) And manufacturers against whom the Commission neither has proceeded nor is likely to proceed in the future because of its limited resources will be wholly free from the restrictions of any cease and desist orders.\textsuperscript{167}

No matter how imaginatively used, the difficulties in the multiple complaint and order procedure, pointed to by Commissioners Elman and Higginbotham and the Assistant Director of the Bureau of Restraint of Trade, stand in the way of effective industry-wide enforcement of statutory requirements. Other means of achieving this objective will have to be sought. The staff of the Attorney General's Committee pointed out that while nothing "in the statutes then administered by the Commission makes any provision for the promulgation of rules applicable to whole industries," nevertheless, "the legislative history of the Federal Trade Commission Act abounds with indications that the . . . Commission was expected to do more than institute formal adversary proceedings in the clarification of the law of unfair competition."\textsuperscript{168}

\textsuperscript{167} Ibid.
\textsuperscript{168} Monograph on FTC 81.
2. Trade Practice Rules

Until recently, the Commission has attempted to satisfy this expectation by the announcement of trade practice rules through the trade conference procedure. These rules do not, themselves, have the force of law. If they are not observed, the Commission must proceed against each violator just as if the rules did not exist. Complaints in such cases make no reference to the trade practice rules but charge violations of the applicable statutory provisions. Commissioner MacIntyre has concluded that it is “difficult, if not impossible in the case of many rules to evaluate their effectiveness” because “(1) No accurate measurement of the number of violations existing prior to promulgation of the rules is available; (2) In most such proceedings there is no thorough, complete industry-wide investigation after the promulgation to determine the number and nature of continuing violations; and (3) In increasing numbers of industries, rules involving specific practices have been developed early in their usage, and their service lies not only in ending existing abuses, but it is frequently much greater in the prevention of future abuses.”

3. Guides

In 1955, the Commission instituted the practice of issuing Guides that attempt “to spell out in layman’s language the requirements of the law applicable to different types of advertising practices under the Federal Trade Commission Act and discriminatory practices under the Robinson-Patman Act.” As of October 31, 1962, nine Guides have been issued, covering cigarette advertising, tire advertising, deceptive pricing, bait advertising, deceptive advertising of guarantees, advertising allowances, fallout shelters, shell homes, and shoes. The function of these Guides is to facilitate the Commission’s program of securing voluntary compliance with statutory requirements by “codifying” the administrative and judicial interpretations of these requirements in specific types of cases.

The Commission has had occasion to pass upon the legal

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170. MacIntyre, American Marketing Association Address.
effect of the Guides. In Arnold Constable Corp.,\textsuperscript{173} the Commission held that it was “patently erroneous” for a hearing examiner’s initial decision to state that the respondent’s luggage advertisements were “violative of the Commission’s Guides Against Deceptive Pricing,” if the statement implied that the Guides had “force and effect as substantive law,” in the sense that proof of a violation of the Guides would alone be sufficient to warrant issuance of a cease-and-desist order. “Those administrative interpretations as to the application of the statute to various categories of pricing representations [the Guides],” said the Commission, “were formulated for use by the Commission’s staff in evaluating such matters, and their release to the public looked to obtaining voluntary and prompt cooperation by those whose activities were subject to the Act.” At the adjudication stage, the question “is not whether the advertising departed from criteria announced in the Guides but whether violation of the Act itself was shown.”\textsuperscript{174}

The new Commission, however, seems to be trying to give the Guides some independent legal effect, but its position is not entirely clear. Speaking for a unanimous Commission in Gimbel Brothers, Inc.,\textsuperscript{175} Commissioner MacIntyre agreed that the Guides “are not substantive law in and of themselves,” but emphasized that “this does not mean that they may be completely ignored and rejected in the fashion herein accomplished.” He explained that the Guides Against Deceptive Pricing “list many of the common terms used by advertisers in making price savings and value claims, including most of the terms at issue in this proceeding and point out the meaning these terms convey to the public as determined in past proceedings.” “The Guides,” added the Commissioner, “were promulgated after lengthy and detailed study of all pertinent decided cases and are the end product of continuous official observation of advertising practices and consumer reaction from the founding of the Commission to the date of publication.” Viewed “as a compilation and summary of the expertise acquired by the Commission from having repeatedly decided cases dealing with identical false claims,” the Guides, concluded Commissioner MacIntyre, “serve to inform the public and the bar of the interpretation which the Commission, unaided by further consumer testimony or other

\textsuperscript{174} In the particular case, the hearing examiner also found expressly that the advertisements in question violated the Federal Trade Commission Act.
\textsuperscript{175} 1961–1963 FTC Complaints, Orders, Stipulations ¶ 16020 (1962).
evidence, will place upon advertisements using the words and phrases therein set out.”

The practices found to be deceptive in *Gimbel Brothers* included the representation in a newspaper advertisement that luggage offered for sale therein at prices ranging from $6.98 to $15.98 was “usually” priced at $9.98 to $24.98, when in fact Gimbel itself had not previously sold the luggage at prices higher than the advertised selling prices. The Commission overruled the hearing examiner who found that there was no sound basis in the record for concluding that “the term ‘usually’ is interpreted by the buying public as meaning that the advertiser had previously sold the luggage at the higher stated prices.” Since the record in the case contained no evidence that the buying public so interpreted the term “usually,” it would seem that the Commission held that the fact that the *Guides* so interpreted the term made such evidence unnecessary. Commissioner MacIntyre also indicated that such evidence would have been unnecessary even if the respondent had introduced evidence that a number of consumers did not so interpret the term. “It is our view,” he wrote, “that words and phrases of the type set out in the *Guides* must be consistently dealt with by the Commission or its decisions will have no meaning.” “Only by consistent interpretation,” he continued, “can some order be brought to the semantic jungle of advertising.”

The difficulty is that Commissioner MacIntyre also implied, very clearly, that the Commission could have similarly interpreted the words and phrases in question — “usually,” “list price,” and “regularly” — in the absence of evidence in the particular case supporting the interpretations and in the face of opposing evidence even if the *Guides Against Deceptive Pricing* had not been issued. This was not a case of first impression, he pointed out.

We have met the representation “list price” many times, have reviewed consumer testimony as to its import, and see no reason for expending further funds and time in pursuit of knowledge already acquired. There can be no doubt that among the many millions in the New York City area, ten, twenty or even fifty witnesses could be produced to testify that they understand the term “list price” means the price generally charged by retailers in their area. And, doubtless, respondent could produce an equal number to testify to a different understanding of the term. A record containing such conflicting testimony would, at substantial expense, prove only what is already

176. *Ibid.* (Emphasis added.)
obvious from a reading of the advertisement itself, that is, that some people are likely to be misled thereby.

Commissioner MacIntyre here seems to be speaking the language of the official notice doctrine, to which, as we shall see, the Commission has recently given new life. But what legal difference did the existence of the Guides make in the Gimbel Brothers case? Are they to be regarded, then, as depositories of official notice?

The Director of the Bureau of Industry Guidance has expressed the opinion that for many years, "the Commission, through the trade practice conference procedure and by the promulgation of Guides, has dealt effectively with unfair competitive methods on an industry-wide voluntary basis." Commissioner MacIntyre, to the contrary, has stated that "in a number of very important areas, industry-wide practices adverse to the trade generally, and apparently inconsistent with the law, have been continued despite the full light of pitiless publicity of the Commission's Trade Practice Rules and Guides."

4. Trade Regulation Rules

To facilitate enforcement on an industry-wide basis, the Commission has instituted a new and very promising procedure—the issuance of trade regulation rules. These rules will "express the experience and judgment of the Commission, based on facts of which it has knowledge derived from studies, reports, investigations, hearings, and other proceedings, or within official notice, concerning the substantive requirements of the statutes which it administers." The rules may cover "all applications of a particular statutory provision and . . . be nation-wide in effect, or they may be limited to particular areas or industries or to particular products or geographic markets, as may be appropriate."

A trade regulation rule will not have the force and effect of law, in the sense that a violator of the rule will become subject to a penalty for its violation. But if such a rule "is relevant to any issue involved in an adjudicative proceeding thereafter instituted, the Commission may rely upon such a rule, provided that the respondent shall have been given a fair hearing on the

178. MacIntyre, American Marketing Association Address.
179. Part I, Rule 61.
legality and propriety of applying the rule to the particular case."\(^{181}\)

Proceedings for the issuance of trade regulation rules may be initiated by the Commission itself or by petition of an interested party.\(^{182}\) Notice of such a proceeding will be published in the Federal Register, together with the precise terms of the rules or a statement of their substance or of the subjects and issues involved; and interested parties will be given an opportunity to present written data, views, and argument with respect thereto.\(^{183}\) Tentative rules, together with a concise general statement of their basis and purpose, may then be published in the Federal Register.\(^{184}\) Interested parties will be given an opportunity to file written protests against the tentative rules,\(^{185}\) and after due consideration, the Commission may formulate and adopt rules.\(^{186}\)

The trade regulation rule, then, will perform two functions: (1) it will be a formal, authoritative guide by which all firms may regulate their conduct; and (2) as Chairman Dixon hopes, it will eliminate "the necessity of proving again and again that the particular practice [involved in the adjudicative proceeding against a violator] is unlawful,"\(^{187}\) and thereby speed up the proceeding and the process of securing industry-wide compliance with FTC policies.\(^{188}\) To what extent the trade regulation rules will satisfy the Chairman's expectations cannot yet be determined because, to date, no trade regulation rule has been issued.\(^{189}\)

\(^{181}\) Part 1, Rule 63.

\(^{182}\) Part 1, Rule 65.

\(^{183}\) Part 1, Rule 66.

\(^{184}\) Part 1, Rule 67.

\(^{185}\) Part 1, Rule 68.

\(^{186}\) Part 1, Rule 69.


\(^{188}\) See Address by Chairman Dixon, American Association of Advertising Agencies, April 28, 1962.

\(^{189}\) Part of the answer to this question will depend upon whether the trade regulation rule, as such, is subject to judicial review. Part 1, Rule 63 apparently contemplates that it will not be, because it requires that the respondent shall be given "a fair hearing on the legality and propriety of applying the rule to the particular case." A hearing on these issues can only take place in the context of the adjudicative proceeding itself. Nor is a trade regulation rule an "order . . . to cease and desist," which must be subjected to review proceedings not later than 60 days after it is served, within the meaning of § 5(c) of the Federal Trade Commission Act, 38 Stat. 719 (1914), 15 U.S.C. § 45(c) (1958) or § 11(c) of the Clayton Act, 38 Stat. 735 (1914), 15 U.S.C. § 21 (1958). Nevertheless, the question of the reviewability of a trade regulation rule, as such, must be considered open in the face of FTC v.
In any case, promulgation of trade regulation rules will not, by itself, solve the problem of the Moog Indus. case because an individual firm may still secure a competitive advantage by violating the rules with impunity and suffering no consequences other than subjection to an adjudicative proceeding which can only eventuate in a cease-and-desist order.

Commissioner MacIntyre thinks that effective enforcement requires more than this and has urged that the Commission exercise a "substantive rule making" power.\textsuperscript{190} He contemplates rules which will themselves be subject to judicial review and for the violation of which penalties will attach. It seems clear that the Commission does not now possess the power to issue such rules under the Federal Trade Commission Act or the Clayton Act.\textsuperscript{191} Section 6(g) of the Federal Trade Commission Act empowers the Commission "to make rules and regulations for the purpose of carrying out the provisions of this Act" but provides no penalties for violations of such rules and regulations. The Clayton Act does not contain even this express authority to make rules and regulations. Nevertheless, the power to issue trade regulation rules having the effect previously noted would seem to inhere in the Commission's adjudicatory power. These rules are akin to the FCC's chain broadcasting regulations\textsuperscript{192} and rules governing multiple ownership of radio and TV broadcast stations.\textsuperscript{193} They are also similar to the FPC's policy statements setting forth rate guidance schedules for various natural gas producing areas.\textsuperscript{194}

The FTC has been given broader powers expressly under


\textsuperscript{191} Under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, the Commission is authorized to promulgate "quantity limit rules," which have the force and effect of law in the sense that they fix the maximum quantities of the particular commodity or class of commodities upon which price differentials on account of quantity may be based. 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958).


\textsuperscript{193} See United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). These FCC rules are enforced only through the medium of the FCC's licensing power, exercised in the course of adjudicative proceedings.

other statutes that it administers. Section 5(c) of the Flammable Fabrics Act authorizes and directs the Commission "to prescribe such rules and regulations as may be necessary and proper for purposes of administration and enforcement of" the act.\textsuperscript{196} No penalties are imposed for violations of such rules and regulations, however, although section 7 imposes criminal penalties for a willful violation of the substantive provisions of the act.\textsuperscript{196} Section 7 of the Textile Fiber Products Identification Act also authorizes and directs the Commission "to make such rules and regulations . . . under and in pursuance of the terms of this Act as may be necessary and proper for administration and enforcement."\textsuperscript{197} Section 3, however, makes it unlawful to violate the provisions of these rules and regulations,\textsuperscript{198} and section 11 imposes a criminal penalty for a willful violation of them.\textsuperscript{199} The Wool Products Labeling Act and the Fur Products Labeling Act contain similar provisions.\textsuperscript{200}

To assure effective enforcement of all the statutes administered by the FTC in a manner that will afford equal treatment to competitors, these statutes should be amended, where necessary, to give the Commission the power to issue substantive rules and regulations for the violation of which criminal and civil penalties should attach. The Director of the FTC's Bureau of Industry Guidance opposes the imposition of such penalties because it "is too drastic and also because it is inimical to the Commission's basic philosophy."\textsuperscript{201} The Bureau of Deceptive Practices takes a different position:

[L]egislation should be sought authorizing the issuance of such rules and regulations, and imposition of penalties, with regard to those types of practices which have been clearly established as violations of the statutes, leaving the Commission the present latitude, however, to cope with novel practices or variations of old practices as they might be encountered in the market place. For example, a rule enforceable by penalties for violation could be established with regard to the use of lottery methods of merchandising which in very many cases have been declared unlawful.\textsuperscript{202}

\begin{footnotes}
\footnotetext[201]{Jacques Memorandum.}
\footnotetext[202]{Murphy Memorandum.}
\end{footnotes}
If the recommended legislation is enacted, it will be up to the Commission to decide in what areas it would be desirable for it to issue such rules and regulations. Even if such rules and regulations are issued in a particular area, the Commission would retain discretion, in the case of a particular violation in this area, either to seek the imposition of civil or criminal penalties or a cease-and-desist order or both.

If the recommended legislation seems too drastic, it might be provided, as Commissioner MacIntyre has also suggested, merely that the rules and regulations shall be subject to direct judicial review but then shall become conclusive upon every respondent in every adjudicative proceeding in which they are applicable. To confine the issue in the adjudicative proceeding to the question whether the respondent violated an applicable rule or regulation would speed up the proceeding greatly. As long as no penalties attach directly to the violation of such a rule or regulation, every respondent is still permitted a “first bite” that might hurt his competitors.

It would not be wise to impose penalties for the violation of the substantive provisions of the Federal Trade Commission Act or the Clayton Act, apart from implementing rules and regulations, because these provisions, unlike the provisions of the Textile Fiber Products, Wool, and Fur Acts, are too imprecise for this method of enforcement.

The power and duty to issue substantive rules and regulations implementing the statutory provisions will force the Commission to think on an industry-wide basis and encourage the type of overall planning recommended in the Article. In turn, the success of such planning will facilitate the task of promulgating industry-wide rules and regulations.

5. Official Notice

The new Commission has also indicated that it will resort more frequently to the doctrine of official notice in the conduct of adjudicative proceedings, in order to speed up these proceedings in still another way. In Manco Watch Strap Co., the Commission ordered respondents (a) to cease and desist from distributing imported merchandise packaged in such a way as to conceal from prospective purchasers the name of the country or place of origin of the merchandise (Japan or Hong Kong) and (b) to disclose such information clearly in a conspicuous place.

203. MacIntyre, American Marketing Association Address.
on the package or container.

In his opinion for the Commission, Commissioner Elman announced that the Commission would adopt the following policy "concerning the requirements of proof in cases of this type arising in the future":

In view of the frequency and consistency with which proof [that a substantial number of buyers prefer American goods and believe that they are getting American goods unless informed to the contrary] has been shown in countless prior proceedings, the Commission may take official notice of that fact, and dispense with the need to re-prove it in each new proceeding that is brought.205

Commissioner Elman explained that, henceforth, every complaint predicated on the existence of a general consumer preference for American-made goods of which the Commission takes official notice, will state that the Commission has taken such official notice. The Commissioner also suggested that the hearing examiner set forth this fact in his prehearing order and give the respondent an opportunity to rebut the officially noticed, general presumption of fact by showing that "in the particular circumstances no substantial segment of the buying public believes or assumes that his unmarked foreign-made product is of domestic origin or is prejudiced by the failure to disclose its foreign origin."206

Commissioner Kern dissented in an opinion joined by Commissioner Anderson. Commissioner Kern argued that (1) the parties in the case had no opportunity to brief or argue the official notice doctrine laid down by the majority in the "longest sustained example of dicta to come to my attention"; (2) the Commission should have used a rule-making proceeding, complying with the requirements of section 4 of the Administrative Procedure Act, to promulgate its announced doctrine; (3) the factual basis for the particular officially-noticed general presumption was doubtful; and (4) setting forth the doctrine in future complaints would deprive the hearing examiner of "complete independence and impartiality."

Commissioner Kern stated that he would not object to having the Commission's trial staff request the hearing examiner, in future watch band cases, to take official notice of a public preference for watch bands of domestic origin, giving the respondent an opportunity for rebuttal.

205. Id. at 20595.
206. Id. at 20597.
The Commission announced its intended use of the official notice doctrine in *Manco* before it adopted the procedure for the promulgation of trade regulation rules. There is room for the doctrine and the rules.\textsuperscript{207} The official notice doctrine is the vehicle by which the Commission will notify respondents of general presumptions of fact by which it will be guided in the conduct of adjudicative proceedings. The doctrine performs the function of shifting to the respondent the burden of disproving the applicability of the general presumption to the particular case. The trade regulation rule is intended to serve the broader function of stating, authoritatively, the policies that the Commission will follow in the case-by-case implementation of the statutes within its jurisdiction. Use of each of these administrative techniques is necessary to increase the Commission’s overall effectiveness.

6. Advisory Opinions

To furnish additional guidance to the business community, the new Commission has also adopted the policy of issuing advisory opinions. Any person “may request advice from the Commission as to whether a proposed course of action, if pursued, would probably violate any of the laws administered by the Commission.”\textsuperscript{208} The Commission, where practicable, “will advise the requesting party whether or not the proposed course of action, if pursued, would be likely to result in further action by the Commission.”\textsuperscript{209}

Any advice given is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the advice, but information submitted will not be used as the basis for a proceeding against the requesting party without prior notice and opportunity afforded for such party to discontinue the course of action pursued in good faith in reliance upon the Commission’s advice.\textsuperscript{210}

The FTC news release announcing the use of advisory opin-
ions states that Commissioner Elman did not concur therein. The substance of his objection is explained as follows:

Commissioner Elman questioned the legality under section 5 of the Federal Trade Commission Act of a procedure for issuing advisory opinions that purport to bind the Commission unless and until specifically revoked, and which does not expressly recognize and preserve the Commission's statutory responsibility to take such further action, if any, as and whenever the law and the public interest may require. In addition, he objected to the new advisory-opinion procedure as administratively unrealistic and impracticable, holding out to businessmen a promise to the ear that would probably be broken to the hope.211

Since the advisory-opinion rules merely bind the Commission to give a party acting on its advice an opportunity voluntarily to discontinue a practice against which, contrary to its previous advice, the Commission now wishes to proceed, it is difficult to see the force of Commissioner Elman's first objection.

Mr. Elman's second objection is based on practical considerations, on "doubt that the Commission — within the limitations of its present organization, budget and personnel — would be able to fulfill the expectations of each of the millions of businessmen in the United States that he could secure from the Commission in advance a responsive, meaningful, and binding ruling as to the legality of a proposed course of business action." Mr. Elman fears that the Commission "if it resolutely and conscientiously attempted to perform this additional work, . . . would be obliged to divert substantial time, energy, and personnel — resources already in short supply — from functions not yet being performed with maximum efficiency and dispatch." Not expecting that this will happen, he doubts that "many advisory opinions issued by the Commission would be sufficiently explicit and unqualified so that a prudent businessman could safely rely on them."212

The Commission devotes appreciable resources to its Bureau


212. Ibid. Commissioner Elman sees a use for declaratory orders pursuant to § 5(d) of the Administrative Procedure Act "(1) where the principle being laid down is a novel one, and it would be unfair to make it applicable ex post facto; and (2) where, although a cease-and-desist order against the particular respondent would serve no practical purpose, a declaration of the applicable principle would be generally useful in furnishing guidance to businessmen and their lawyers." Address by Elman, First Annual Corporate Counsel Institute, Northwestern University School of Law, Oct. 11, 1962, in CORPORATE COUNSEL INSTITUTE, PROCEEDINGS OF THE FIRST ANNUAL CORPORATE COUNSEL INSTITUTE 88, 96 (Ruder ed. 1962).
of Industry Guidance. Headed by a Director and Assistant Director (2 GS 16), the Bureau is composed of three divisions. The Division of Trade Practice Conferences, responsible for the promulgation of trade practice rules, consists of a chief (GS 15) and 7 attorneys (at grades from GS 11 to GS 15). The Division of General Rules and Regulations Applicable to Unlawful Trade Practices, responsible for the promulgation of trade regulation rules, consists of a chief (GS 15) and 4 attorneys (at grades from GS 9 to GS 15). The Advisory Opinions and Guides Division consists of a chief (GS 15) and 10 attorneys (at grades from GS 9 to GS 15).\footnote{213}

Yet a staff of 26 attorneys, of whom 11 are assigned to work on Guides and advisory opinions, is hardly too large for the task of securing voluntary compliance by businessmen with the statutes administered by the FTC. Since there are so few measures of the extent of compliance with these statutes it is difficult to assess the effectiveness of the Bureau’s work.

It might be added that businessmen subject to final FTC orders, for the violation of which heavy civil penalties may now be imposed, have great need for guidance concerning their applicability, in the form of declaratory orders as well as advisory opinions.\footnote{214} Apparently, a businessman seeking such an advisory opinion would consult, not the Bureau of Industry Guidance, but the Division of Compliance of the Bureau of Restraint of Trade or of the Bureau of Deceptive Practices or the Division of Enforcement of the Bureau of Textiles and Furs, as the case may be.\footnote{215}

The new rules regarding advisory opinions have been in effect since June 1, 1962. As of October 1, 1962, the Commission had received a total of 79 requests from businessmen and lawyers for advisory opinions under these rules and issued 13 opinions.\footnote{216} The requests raise questions under practically all the laws administered by the Commission; they concern the legality of proposed advertising copy, quantity discount plans, exclusive dealing contracts, promotional allowance schemes, mergers, brokerage payments or payments in lieu of brokerage,
and practices that might be regarded as restraining trade under section 5 of the Federal Trade Commission Act.\footnote{217. Letter from Frank C. Hale, Program Review Officer, to Staff Director, Sept. 5, 1962.}

It is too early to say whether Commissioner Elman's practical misgivings about the advisory opinion program will materialize. Of considerable interest, however, is the fact that the joint statement of Commissioners Elman and Higginbotham, in the recent cases involving the 248 wearing apparel manufacturers, pointed out that "imaginative and resourceful application of consent-order and advisory-opinion procedures" might help to secure industry-wide compliance. The Commissioners urged that July 1, 1963, should be set as the "target date . . . for simultaneous and uniform discontinuance of . . . illegal allowances by all segments of the industry." Until then, the Commission should render advisory opinions on the legality of the advertising allowance plans which the manufacturers proposed to put into effect on and after the target date. These opinions, they argued, should be rendered before the manufacturers were compelled to decide whether or not to accept the proposed consent orders.\footnote{218. Joint Dissenting Statement of Commissioners Elman and Higginbotham, accompanying FTC News Release, Jan. 2, 1963.} The advisory opinions would thus become the means of persuading the manufacturers to accept consent orders.

It is not premature, however, to comment on the Commission's policy of not publishing its advisory opinions. This policy is motivated by the wish to avoid the disclosure of trade secrets and current dealings (involving a proposed merger, for example) which the parties would insist on keeping confidential. The advisory opinions are disseminated, as confidential documents, to selected members of the Commission's staff.

This policy of secrecy destroys the precedent value of the advisory opinion and makes it impossible to use it as an additional means of encouraging industry-wide compliance with Commission policies. Nor is a general policy of secrecy necessary to protect trade secrets and confidential dealings. For example, an advisory opinion concerning the legality of proposed advertising copy could certainly be made public after the copy is used, without hurting anyone. The Commission should keep an advisory opinion secret only if and as long as necessary to avoid harm to the persons requesting the opinion. If there is no reason to keep a particular advisory opinion secret or the
reason for doing so has disappeared, the opinion should be made public.

The FTC General Counsel has suggested that the function of rendering advisory opinions under the new rules should be transferred from the Bureau of Industry Guidance to the Office of the General Counsel.

The range of the advisory opinions that will be rendered and the binding nature thereof suggest the importance and sensitive nature of the work being performed by this unit. The function is that of interpreting provisions of statutes in relation to a specific set of facts and by its inherent nature comes within the defined scope of the functions of the General Counsel who is the "chief law officer and consultant to the Commission."

The Division of Advisory Opinions in the rendering of opinions to individual businessmen is performing in a role that is basically dissimilar to the role in which the other units of the Bureau of Industry Guidance operate. Trade Practice Rules are designed for the guidance of an industry; and Guides are promulgated for the guidance of all members of industry who may have occasion to employ a practice covered by a Guide. On the other hand, Advisory Opinions are individual, and are not the enunciation of general principles for general guidance.

The nature of the determinations made are more closely related to the work of the General Counsel's office in rendering opinions to the Commission and to the Enforcement Bureaus on specific legal matters. Placement of the function in the General Counsel's office would facilitate coordination of the work of attorneys preparing memoranda on legal questions.219

The reasons given by the General Counsel for the transfer are not very persuasive. There is an advantage in having all requests for advice come to the Bureau of Industry Guidance. The Bureau is then in a position to decide whether the statutory objectives can best be achieved by an advisory opinion, a Guide, a trade practice conference, a trade regulation rule, or a combination of these instruments of compliance. Commission organization should facilitate the possibility that a request for an advisory opinion might trigger the issuance of a trade regulation rule. Nevertheless, it should be added that the General Counsel's proposal has not been given the careful consideration that it deserves and no final judgment thereon is intended to be expressed herein.

D. THE PROCESS OF FORMAL ADJUDICATION

If a consent order is not agreed to by the respondent and the

219. General Counsel's Memorandum.
Commission, a complaint will be issued and served and a formal adjudicative proceeding will begin. This Article will not deal with the pleading, prehearing or hearing stages of the proceeding. It is, however, concerned with the process of decision by the hearing examiner and the Commission.

1. The FTC Hearing Examiner

The Bureau of the Budget staff found that the FTC examiners "come as close to being 'judges' as any in the Government." Although Rule 13 of Part 4 provides that the Commission or one or more members of the Commission may preside over a hearing in an adjudicative proceeding, no Commissioner has, in fact, sat in such a capacity since 1956. A hearing examiner presides over the hearing in every adjudicative proceeding, and in every case he is called upon to render an initial decision.

The FTC has a total of 22 hearing examiners, all of whom were appointed pursuant to section 11 of the Administrative Procedure Act. Five of them have been employed by the Commission for more than 10 years; 3 for 6-10 years; 7 for 1-5 years and 7 for less than 1 year. Including their service as hearing examiners with other agencies of the Government, 8 have served more than 10 years; 4 have served 6-10 years; 6 have served 1-5 years and only 3 have served less than 1 year.

All 22 examiners are at grade GS 15; they are in the Office of Hearing Examiners, which is headed by a Director (also GS 15). Their isolation from the staff of the FTC is marked and regrettable, and may be further accentuated by the physical movement of the hearing examiners from the Federal Trade Commission building to another building about one-third of a mile away, which took place in the Fall of 1962.

The examiners perform their duties without professional staff assistance of any kind, except for a single business analyst (GS 12). Nor do the examiners consult with any Commission personnel about their work—not with the General Counsel's Office or the Bureau of Economics or the Accounting Division or the

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220. Part 4, Rule 2, defines "adjudicative proceedings" as "those formal proceedings conducted under one or more of the statutes administered by the Commission which are required by Statute to be determined on the record after opportunity for an agency hearing."

221. See Part 4, Rules 1-18, which govern these stages.

222. Budget Bureau Staff Report 99.

223. No inquiry was made as to the practice before this date.

224. Part 4, Rule 19.

Commissioners themselves. The individual examiners discuss their cases with each other and are encouraged by the Director of the Office of Hearing Examiners also to discuss their problems with him. From time to time, staff meetings are held to consider common problems, but no manual for examiners has been prepared and no system of training new examiners is in effect.

Every initial decision written by a hearing examiner passes over the desk of the Director of the Office of Hearing Examiners. The Director does not undertake to supervise the writing of the initial decision or to review the finished product. He may make suggestions to the examiner about the initial decision, but the examiner is free to ignore the suggestions. In such case, the Director will not pass his suggestions on to the Commission.

It is difficult to generalize about the quality of the work of the FTC hearing examiners. Quality varies with the individual. In the course of the hearings on Reorganization Plan No. 4, Chairman Dixon presented data on the results of the Commission’s review of initial decisions during the period from 1956 through the first 10 months of fiscal 1961. The following Table V summarizes these data.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
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<tbody>
<tr>
<td>1956</td>
<td>1957</td>
<td>1958</td>
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<tr>
<td>Reversed</td>
<td>3</td>
<td>3</td>
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<tr>
<td>Remanded</td>
<td>1</td>
<td>4</td>
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<tr>
<td>Affirmed</td>
<td>43</td>
<td>188</td>
</tr>
<tr>
<td>Modified</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>Without</td>
<td>40</td>
<td>131</td>
</tr>
</tbody>
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227. There are a few minor arithmetical errors in the tables set forth in the *Hearings on Reorganization Plans of 1961*, supra note 226, at 103–04, which have been corrected in Table V above.

228. A note accompanying the tables in the *Hearings on Reorganization Plans of 1961*, supra note 226, at 104, explains: “Modification can vary from dropping or adding a charge or action against 1 or more of multiple respondents to changing a single word for grammatical correctness.”
These data indicate that a large percentage of the number of initial decisions is affirmed by the Commission without change. This fact alone, however, is not an indication of the quality of the hearing examiners’ work. In the first place, the cases categorized in Table V above include those settled by consent agreements that, under the Commission’s old rules, were embodied in the examiners’ initial decisions. The inclusion of these cases inflates the percentage of initial decisions affirmed by the Commission. Furthermore, before any conclusion can be reached about the quality of the hearing examiners’ performance, it would be necessary to know more about the relative importance and difficulty of the initial decisions affirmed, as contrasted with the relative importance and difficulty of the initial decisions reversed, remanded, or modified significantly. The grounds for reversal, remand, or modification would also have to be known. Without this information, which is not available, some reliance may be placed upon the reputation of the hearing examiner corps within the Commission itself and among FTC practitioners. As might be expected, opinion varies from examiner to examiner and disagreement exists even about the merits of particular examiners. It is not essential, however, to arrive at a conclusion about the quality of the FTC’s hearing examiner corps in order to make certain recommendations that would improve its usefulness to the Commission.

The “independence” of the hearing examiner is to be prized and safeguarded to give the Commission the benefit of his own determination of the facts and his views of the law and the policies that the Commission should follow. But “independence” of judgment does not require isolation from the Commission’s staff or the Commissioners themselves, and it certainly does not
call for disregard of Commission policies or defiance of its directives. After all, the hearing examiner is an agent of the Commission, acting in its place only because it is not practical for the Commission itself to preside at hearings. His function is to facilitate the task of the Commission.

To increase his usefulness to the Commission, it is imperative that staff assistance should be made available to each hearing examiner. As a beginning, a staff of 22 law clerks (one for each hearing examiner) should be attached to the Office of Hearing Examiners, subject to the general administrative supervision of the Director of the Office. These law clerks should be of the calibre of the special legal assistants to the Commissioners. The Director of the Office of Hearing Examiners should be responsible for assigning a law clerk to assist the hearing examiner designated to preside over a particular proceeding. The law clerk should then be subject to the hearing examiner’s direction, so far as that proceeding is concerned, until after the initial decision is rendered.

Thus, it is not contemplated that a law clerk would be assigned to a hearing examiner on a permanent basis, but rather that the 22 law clerks would constitute a central legal staff from which individuals would be assigned to hearing examiners for particular cases. It is hoped that in this way, members of the central staff will be able better to educate themselves and achieve a greater uniformity of approach to the problems of the Commission.

As an alternative, it would be possible to organize the legal assistants to the hearing examiners as a unit in the Office of the General Counsel. This form of organization would have the advantage of involving the General Counsel more intimately in the work of the hearing examiners. This alternative has been rejected because it may also lead to a conflict in the direction of the work of the assistants in an area in which the hearing examiners—also lawyers—should be fully competent to exercise direction.

The Director of the Office of Hearing Examiners comments that the “assignment of law clerks is an excellent idea, but is not a new suggestion.” This excellent old suggestion, however, has


230. Memorandum from Earl J. Kolb, Director of the Office of Hearing Examiners, to Frank C. Hale, Program Review Officer, Oct. 30, 1962 [herein-
not yet been adopted by the Commission. The Director adds: "On the basis of present work load, I consider the recommendation for twenty-two law clerks excessive at this time. The appointment of five law clerks to function as a pool to be assigned by the Director of Hearing Examiners would suffice." While the Director underestimates the need of hearing examiners for legal assistance, significant progress would be made if only five law clerks were assigned to the hearing examiners. In time, the Commission will be able to judge whether the number of law clerks should be increased to expedite the rendering of initial decisions and improve their quality.

In addition, a staff consisting of five to seven economists and an accountant should be formed in the Bureau of Economics to assist the hearing examiners in analyzing the economic and accounting evidence and issues in the case. Unlike the law clerks, this staff should not be under the administrative supervision of the Office of Hearing Examiners. To attract able economists to this staff, it is important that their work be directed and evaluated by men in their own profession. Furthermore, to place the economists who will assist the hearing examiners in the Bureau of Economics will help the Bureau's effort to develop a coherent economic policy for the guidance of the Commission.

This organizational recommendation is not intended in any way to make the hearing examiner any less a master in his own house. He will receive the benefit of the views of the economic staff, but he will also decide whether to accept or reject them. In the process, he will sift them for the Commission's benefit. To the extent that the views of the economists are reflected in the initial decision, the respondent, as well as the counsel for the complaint, will have full opportunity to criticize them before the Commission makes its final decision.

The Director of the Office of Hearing Examiners comments: "I believe it would be advantageous for the time being to have an accountant and an economist permanently assigned to the hear-
ing examiners, to be assigned to specific cases by the Director." Again, significant progress would be made if one economist and one accountant were assigned to assist the hearing examiners, although in stating his opinion that the economist and accountant should be permanently assigned to the Office of Hearing Examiners, the Director failed to examine the reasons given in the Report for placing the economist and accountant in the Bureau of Economics.

The hearing examiners should also consult freely with the General Counsel, the Chief Economist and the Chief Accountant. In effectuating these recommendations, careful attention will have to be paid to the separation-of-functions requirements of section 5(c) of the Administrative Procedure Act. The requirements of section 5(c) in this context will be discussed below.

The possibility has been considered that the Director of the Office of Hearing Examiners, aided by a small group of the ablest examiners, should be given the duty of reviewing and approving every initial decision before it is issued. This possibility was rejected because of the potential for delay inherent in such review and because it is thought that the provision of adequate staff assistance is an alternative way of improving the quality of the initial decision that should be tried before the suggested review procedure is seriously considered.

If the hearing examiner is to carry out Commission policies, he must know what they are. To this end, a program should be devised for training new hearing examiners, particularly those without prior Commission experience. The Commissioners themselves should participate in this program. The hearing examiners should also meet periodically, by themselves and with the Commissioners, to discuss common problems, new policies and future plans. To break down the existing "wall" that separates the hearing examiners from the Commissioners would boost the morale of the examiners and improve the quality of their work. It would also give the Commission informal access to valuable opinions and judgments about its work. In the main, this "wall" has been

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232. *Ibid.* The Chief of the Division of General Trade Restraints states:

The hearing examiner is required by the Administrative Procedure Act to base his decision upon the record. At this juncture, there is no place for an economist. However, after the violation has been found, then it is entirely feasible that the economist should be consulted. This should also prove to be the correct procedure for final agency decision. *Wilson Memorandum.* The Division Chief does not state on what issues the economist would be consulted after the initial, and then final, decisions have been rendered.
created by unduly meticulous and unnecessary concern for the "independence" of the hearing examiner.

This concern is reflected in the comments of the Director of the Office of Hearing Examiners who sees "no reason" why the Commissioners "could not meet occasionally with the hearing examiners regarding various problems" but who fears that the "practice of holding regular meetings might tend to result in a hearing examiner receiving instructions of various kinds from the Commission, which might be undesirable." The Director leaves his fear nameless, and therefore difficult to exorcise, by not indicating what kinds of instructions from the Commission would be "undesirable."

Finally, consideration should also be given to relocating the hearing examiners in the FTC building. The Director of the Office of Hearing Examiners has written, in objection to this suggestion, as follows: "The physical isolation of the hearing examiners staff to a separate building has been in operation for a sufficient length of time to indicate that this has been a move in the right direction. With the exception of certain mechanical difficulties, this separation has worked out satisfactorily." Since the Director does not state by what criteria he judges the physical move to be satisfactory, it is not possible to evaluate his objection to the suggestion.

2. Procedure for Review of Initial Decisions

(a) The Petition for Review

On June 29, 1961, the FTC issued new Rules of Practice for Adjudicative Proceedings, which became effective July 21, 1961. Apparently these changes were not announced publicly until July 6, 1961, two days before Reorganization Plan No. 4 of 1961 became effective. Rule 19 of Part 4 requires the hearing examiner to file an initial decision that will become the decision of the Commission unless, within a stated time, a "petition for review" is filed or the Commission, on its own motion, orders the case to be reviewed.

Rule 20 of Part 4 requires that the petition for review, which may be filed by the respondent or by FTC counsel for the complaint, "shall concisely and plainly state (1) the questions pre-

233. Kolb Memorandum.
234. Ibid.
sented for review, (2) the facts in abbreviated form, and (3) the reasons why review by the Commission is deemed to be in the public interest." The opposing party may file an answer in opposition to the petition for review. The petition for review will be granted where, on examination of the record, the petition for review, and the answer, the Commission finds that the questions presented are substantial and that determination thereof by the Commission is necessary or appropriate under the law to insure a just and proper disposition of the proceeding and to protect the rights of all parties. If the petition for review is denied, the initial decision of the hearing examiner shall thereupon become the decision of the Commission. No petition for review will be denied by the Commission where, in the opinion of two or more of its members, it should be granted.

If the Commission grants the petition for review, Rule 21 of Part 4 authorizes the petitioner to file exceptions to the initial decision and a brief in support thereof. Each exception (1) shall relate only to substantive or procedural matters presented on the record, limited to the questions stated in the petition for review; (2) shall identify the part of the initial decision to which objection is made; (3) shall specify the portions of the record relied upon; and (4) shall state the grounds for the exception, including the citation of authorities in support thereof. Any objection to a ruling, finding or conclusion, or to a provision of the order, which is not made a part of the exceptions shall be deemed to have been waived. Any exception which fails to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration may be disregarded.

An answering brief and a reply brief are authorized.

Rule 22 of Part 4 provides:

(a) Upon review of an initial decision, the Commission will consider such parts of the record as are cited or as may be necessary to resolve the issues presented; and in addition will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision.

(b) In rendering its decision, the Commission will adopt, modify, or set aside the findings, conclusions and order contained in the initial decision, and will include in the decision a statement of the reasons or basis for its action.

As authority for the new rules the Commission originally cited section 6(g) of the Federal Trade Commission Act, which empowers it "to make rules and regulations for the purpose of carrying out the provisions" of the act. Of course, Reorganization Plan No. 4 of 1961 is an additional basis for such authority.

The precise type of review contemplated by the new rules is
not entirely clear. From the fact that the petition for review must state “the reasons why review by the Commission is deemed to be in the public interest” and the fact that exceptions to the initial decision may be filed only if the petition for review is granted, it may be supposed that a certiorari-type review in the strict sense of that term is contemplated.386 This supposition is fortified by the preamble to the rules, which states that “the Commission’s review of initial decisions will be limited to those cases in which the party seeking the review first establishes, in a petition for review, that important substantive or procedural matters are involved.” The preamble implies that the parties will no longer “as a matter of right” be able to “file a notice of intention to appeal and thereafter appeal from a hearing examiner’s initial decision.”

The factors which the Commission states it will consider in granting or denying review do not relate to the importance of the particular case, but rather to the merits of the initial decision. That action on the petition for review is intended to be taken in the light of the Commission’s view of the merits of the particular case is further indicated by the fact that the Commission undertakes to examine the record in passing upon the petition. As the preamble to the rules also states, the “principal effect of the amended rule will be to eliminate appeals which are clearly without merit and which are made for the sole purpose of delaying the final decision.” The word “substantial” in Rule 20, therefore, would not seem to refer to the general importance of the questions presented but to whether the petitioner has succeeded in raising doubts in the minds of the Commissioners about the merits of the hearing examiner’s initial decision.

On the whole, the Commission’s new rules seem to contemplate a summary-type review,287 but it is not clear whether it will be of a de novo or appellate nature. Rule 22 states that on review, the Commission “will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision”; the phrase “to the extent necessary” implies a de novo-type of review. Is an appellate-type of review of initial decisions contemplated if that should prove to be “desirable”?

The rules governing the petition for review would become clear if they were viewed not as providing a new ground for refusing

286. See Memorandum from Auerbach (The Scope of Agency Power to “Limit the Issues” on Appeal from or Review of Initial Decisions Under the Administrative Procedure Act) to Committee on Internal Organization and Procedure, Administrative Conference of the United States, Feb. 6, 1902.
287. Ibid.
to hear appeals from initial decisions, but as authorizing the Commission to dispose of such appeals summarily by adopting the initial decision as the agency's decision. On this view, the Commission's task would be facilitated if the exceptions to the initial decision accompanied the petition for review.

To date, experience with the petition for review procedure has been scanty—for an unfortunate reason. Petitions for review have been denied in only three cases. In each of these cases, it was the respondent who petitioned for review. In each, the Commission's order recites that it has "examined . . . the entire record" in coming to its decision to deny the petition. In each, the Commission adopted the hearing examiner's initial decision "as the decision of the Commission," but in one case it modified the initial order to cease and desist to make it conform more clearly to the hearing examiner's findings of fact. The Commission's actions thus illustrate a summary-type, not certiorari-type, of review.

Clearly, the meager results of the petition for review procedure do not measure up to the expectations of the proponents of Reorganization Plan No. 4. It is common knowledge within the Commission that two of the Commissioners oppose the procedure and exercise their right under Rule 20 and Reorganization Plan No. 4 to vote for plenary review in every case, without undertaking to determine whether the standards for granting plenary review set forth in the rules are satisfied.

So long as the rules governing the petition for review remain in effect, it is suggested with all due respect, each Commissioner has an obligation to make the decisions they call for. The power of two members to require plenary review was granted to protect minority views on the merits of particular cases, not to thwart the objectives of the Reorganization Plan itself.

(b) Oral Argument

Rule 21 of Part 4 provides that oral argument "will be held in cases in which the Commission grants review, unless it otherwise orders." In none of the cases decided since January 1, 1961, has

the Commission ordered otherwise. In two of these cases, how-
however, oral argument never took place — in one, because the Com-
mmission and attorney for the respondent could not agree on a
mutually convenient day for argument and in the other, because
the respondent stated that he could not afford to come to Wash-
ington for the argument and sought, unsuccessfully, to have the
argument heard in Los Angeles.

(c) Review by Commission on Its Own Motion

In Paul J. Lighton,239 neither the respondent nor counsel for
the complaint petitioned for review. But, as Chairman Dixon ex-
plained, as “the result of the Commission’s routine practice of re-
viewing all initial decisions prior to adoption,” the Commission
set aside the initial decision and entered a new opinion and cease-
and-desist order. Commissioner Elman wrote a “nonconcurring
opinion” in this case because the Commission acted “without giv-
ning notice to counsel, without having the benefit of briefs or oral
argument.” He urged that “the Commission should at least hear
the parties before venturing to make any radical changes in the
initial decision and order.”240

Subsequent to its decision in Lighton, the Commission amended
its rules to provide in Rule 22(c) of Part 4 that if “the Commis-
sion’s decision contemplates the entry of an order against a re-
spondent broader in its prohibitions than those, if any, contained
in the initial decision, or . . . the Commission’s decision differs
from the initial decision in any substantial respect affecting the
scope or content of the order which should properly be entered,”
the Commission will, in effect, issue a tentative decision and order
to which the respondent will be given an opportunity to except.

The new rule goes far to meet Commissioner Elman’s objec-
tions in Lighton,241 but it still permits the tentative decision and
order, in a case like Lighton, to be made without giving the re-
spondent, or counsel for the complaint, a prior hearing. Such a
hearing may contribute to the Commission’s information and
understanding and obviate the necessity for the proceedings con-
templated by Rule 22(c). It is difficult to see why it should not be
afforded, just as it is afforded when a petition for review is granted.

239. 1961–1963 FTC Complaints, Orders, Stipulations ¶ 18556, at 20642
(1962).

240. Id. at 20647 (Elman, Comm’r, nonconcurring statement).

241. It should be noted that the new rule also applies to cases in which
a petition for review has been granted.
(d) The Tentative Decision and Order

Rule 22(c), too, comes into play only if, on review of an initial decision on its own motion or after granting a petition for review, (1) the Commission "contemplates the entry of an order . . . broader in its prohibitions than those . . . contained in the initial decision," or (2) the Commission's decision "differs from the initial decision in any substantial respect affecting the scope or content of the order." It would seem that Rule 22(c) does not apply if the Commission materially alters the findings of fact or the opinion of the hearing examiner in ways which were not considered in the briefs of the parties or during the course of the oral argument, but thereby affects only the justification of the order and not its scope or content. It might be said, of course, that changes which affect the justification of the order necessarily affect its scope or content. But this may not always be so. Yet, to afford the respondent a hearing before the entry of a final order in a case in which contemplated changes may affect only the justification of the order may help further to inform the Commission and keep the respondent from appealing to the courts to obtain such a hearing. (The rules of the Commission, it should be noted, do not provide for petitions for reconsideration.) Rule 22(c) should be amended to make clear that it will provide such a hearing to the respondent in such a case.

3. Process of Decision-Making by the Commissioners

(a) Assignment of Cases to Individual Commissioners

Heller & Associates found that it was the practice "to assign both informal and formal cases to individual Commissioners in rotation, despite the variation in importance, character, complexity and size of cases."242 They concluded that this routine system failed to take into account the fact that the work load thus generated for individual Commissioners varied widely. Accordingly, "backlogs of work frequently develop in a Commissioner's office and cause serious delays in submitting to the full Commission his proposals regarding disposition of cases."243 Heller recommended that the Chairman should be permitted to "automatically make a reassignment of a case after a prescribed period in which no report had been

243. Ibid.
received” from the Commissioner to whom the case was originally assigned.244

This recommendation was adopted. The Budget Bureau staff reported that “the Commission has adopted a policy which requires that if a Commissioner holds a case for more than a month it is listed for explanation (to his colleagues) of the reasons for delay. If the case remains in his office for over 75 days, it is subject to reassignment.”245

The new Commission has made no formal change in these assignment policies. The Commission’s Secretary handles the mechanics of assignment. The assignment of a case to an individual Commissioner is made prior to oral argument. In practice, however, the individual Commissioner who holds a case for more than a month does not explain the reasons for delay to his colleagues and a case held by him for more than 75 days is not reassigned to another Commissioner.

(b) The “Tentative” Vote and Nature of Deliberations Accompanying It

Immediately after a case has been orally argued, the Commission meets to discuss and vote on its disposition. At this time, while the Commissioners present at the oral argument will have the benefit thereof, none of them (except, occasionally, the Commissioner to whom the case is assigned) will have examined the record carefully. Each of them may or may not have read the initial decision and the briefs with care. The vote taken is tentative, but it is only in a rare case that it will not represent the final decision of the Commission. Only the Commissioners are present during the deliberations leading to the tentative vote.

After the vote, the individual Commissioner to whom the case was assigned proceeds with the drafting of the opinion. If, however, he happens to have voted with the minority in a particular case, the writing of the opinion will be assigned to one of the Commissioners in the majority.

This kind of procedure for the consideration and decision of cases, which insulates the decision-making process from the opinion-writing process, has been subjected to telling criticism, yet it seems to be widely used by courts,246 as well as administra-

244. Id. at 57.
245. Budget Bureau Staff Report 66.
246. For a criticism of the use of a similar procedure by the Supreme Court of the United States, see Hart, The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84 (1959).
tive agencies.\textsuperscript{247} To Professor Hart, for example, "the most disturbing feature of the conditions under which the [Supreme] Court [of the United States] works" is "the shortness of time available and used for collective deliberation and for private study of argued cases prior to such deliberation."\textsuperscript{248} Professor Hart goes on to say:

The critical fact here is the known practice of the Court of voting on an argued case at the conference which comes at the end of the week in which the case was argued, coupled with its apparent practice of treating this vote as ordinarily final even though in theory tentative. For this means, it will be seen, that positions tend to jell before any member of the Court, in the usual case, has yet had an opportunity to make an intensive study of the problem. It means that the opinion-writing Justices, who make the only intensive study which the cases receive, work not only under a regrettable pressure of time but under the further handicap that their nonwriting brothers have already disabled themselves from dealing with uncommitted minds with the difficulties which intensive study turns up. It means that the limited time available for scrutiny of draft opinions and for final discussion in conference must necessarily tend to be employed largely in firming up positions already taken and shoring up lines already drawn rather than in thoughtful and dispassionate reconsideration of the issues as they have finally been exposed to view.\textsuperscript{249}

In essentials, this criticism is applicable to the practice of the FTC Commissioners in reaching their decisions. In fact, there is less time for deliberation prior to voting in the FTC than there is in the Supreme Court. In the Court, there is usually an interval, at least overnight and sometimes several days, between the oral argument and the Friday conference. The individual Justice may use this interval to explore a particular matter that may have arisen during the oral argument or any other matter he thinks requires some research. At the FTC, however, there is no interval at all between the end of oral argument and the "tentative" vote.

Professor Hart's recommendation for the Court is also applicable to the FTC. Let "the votes which in practice are decisive" come "at the end rather than at the beginning of the Court's intensive study of cases" and let the Justices recognize that "an opinion of the Court is the responsibility of the whole Court and not simply of the Justice who writes it."\textsuperscript{250}

\textsuperscript{247} For a criticism of the use of this procedure by the Civil Aeronautics Board, see Hector, \textit{Problems of the CAB and the Independent Regulatory Commissions}, 69 \textit{YALE L.J.} 981 (1960) (originally prepared as a memorandum from Louis J. Hector to the President, Sept. 10, 1959).

\textsuperscript{248} Hart, \textit{supra} note 246, at 124.

\textsuperscript{249} Ibid.

\textsuperscript{250} Id. at 124–25.
To make this suggestion applicable to the Commission, it is recommended that the Commissioners should not vote on the disposition of a case immediately after oral argument. Instead, the individual Commissioner to whom the case is assigned should prepare a memorandum that will (1) set forth the issues of fact and law in the case and the arguments for and against the decision of hearing examiner on each of these issues; (2) analyze the record on any issues of fact that may be involved; and (3) put forth the Commissioner's recommendations for the disposition of each of these issues, together with his reasons for his recommendations.

The memorandum should be submitted to each of the other Commissioners. After the lapse of a sufficient period of time for individual study of the memorandum, the Commissioners should meet to discuss and vote on the final disposition of the case. The Commissioner who wrote the memorandum should then be asked, if he is in the majority, to draft the Commission's opinion.

By ensuring that the dispositive vote will take place only after each Commissioner is fully acquainted with all the factual, legal and policy aspects of the case and has received the benefit of the views of colleagues possessing the same knowledge of the case, the above recommendation will make possible a more responsible exercise of the power of decision.

To assist his colleagues to prepare for oral argument, the Commissioner to whom the case is assigned should distribute parts (1) and (2) of the recommended memorandum to his colleagues prior to the oral argument. These parts would set forth the issues of fact and law in the case, analyze the record on any issue of fact which may be involved, and summarize the arguments for and against the decision of the hearing examiner on each of the issues. The Commissioner would not be asked to reach even a tentative conclusion on these issues prior to oral argument. He may, of course, wish to amend even parts (1) and (2) of his memorandum after oral argument.

It may be that the recommended memorandum-writing requirements would become too burdensome if made applicable to each and every case decided by the Commission. If so, the requirement should be dispensed with, in whole or in part, in any case in which three Commissioners — other than the Commissioner to whom the case is assigned — agree to the dispensation.

(c) Staff Assistance in Reaching Decisions

The procedure recommended above would also enable the Commission to make full use of its staff in the final decision-making
process. This is a consideration which is not present in the judicial process and affords an additional reason for urging that agencies like the FTC adopt the procedure.

At present, the Commission does not, as a rule, bring the Chief Economist or the General Counsel into Commission discussions at the decision-making, or opinion-writing, stage. General legal problems raised by particular cases are sometimes referred to the General Counsel for opinion, but his views about the disposition of particular cases are not sought. Occasionally, individual Commissioners consult the Chief Economist on particular cases. The deliberation of the Commissioners preceding their disposition of a case would be very much enriched if the Chief Economist and the General Counsel—and the Program Review Officer—participated in these deliberations.

The individual Commissioner preparing the memorandum on the case, as recommended above, should consult with the Chief Economist and the General Counsel in the course of its preparation. Each Commissioner should also consult with these officials when studying the individual Commissioner's memorandum. The Chief Economist, General Counsel and Program Review Officer, should be present—and prepared to state their views if called upon—when the Commission meets to discuss and vote on the final disposition of the case. The possibility of such staff consultation is the great advantage which an administrative agency has over a court. It should not be discarded lightly.

The presence of the Program Review Officer will enable that officer to gain insight into the Commission's thinking which should prove invaluable in the performance of his own duties. In turn, the Program Review Officer may help the Commission to see the wider implications of the particular case.

Consideration has been given to the possibility that the hearing examiner in the case might also be requested to participate in the discussions of the Commission leading to its dispositive vote in the case. In this way, the Commission would be able to make continued use of the hearing examiner's intimate knowledge of the record; in turn, the examiner would be able to enrich his own understanding of the Commission's policies. While such a practice may have considerable merit in connection with agency decisions of primarily a regulatory or policy nature—such as the licensing of domestic air transportation—its merit is not quite
so clear when the decisions also have the accusatory and law-enforcement character of FTC decisions.

The National Labor Relations Board once permitted the hearing examiner to be present when his case was being decided, but this practice was foreclosed by the Taft-Hartley Act. Eight NLRB examiners, who were with the Board when the old practice prevailed, were asked whether they preferred the old or the new practice. All of them favored the Taft-Hartley limitation. It seems that the examiners themselves disliked attending decisional meetings of the Board. When they attended, they felt compelled to act as advocates for the positions they took in their recommended decisions. Arguments between the examiners and Board members, or other staff members present, were frequent. Some Board members also hesitated to voice their criticism of the decision of the hearing examiner in his presence, although such criticism was warranted and essential to the consideration of the case. Free discussion of some cases was thereby inhibited. These unfortunate results may flow from the accusatory nature of an NLRB proceeding which, in this respect, is similar to an FTC proceeding.

The recommendations already made with respect to the decisional process at Commission level should give each FTC Commissioner a greater familiarity with the record and the issues than he now has before voting on a case. Furthermore, the recommendations for more informal meetings between hearing examiners and Commissioners should help examiners better to understand Commission policies. It is concluded that these recommendations should be tried before the Commission should seriously consider the possibility of inviting the examiners to participate in the final decision-making process.

Two additional measures may, however, be suggested. It may

at 408-09. The Administrative Conference has recommended that the CAB should “endeavor to establish some measure of contact between the decisional process at the Board level and the Board’s hearing examiners, as for example, by (a) encouraging opinion writers to consult with hearing examiners . . . .” Conference Recommendation No. 21(10), S. Doc. No. 84, at 53.

252. Section 4(a) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 61 Stat. 136 (1947), 29 U.S.C. § 154(a) (1958), provides that “no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations.”

253. This information was gathered by Jed Pritchett and Judith Bleich Kahn of the National Labor Relations Board. The examiners who volunteered this information are among the ablest on the Board.
be worthwhile to request the Director of the Office of Hearing Examiners to forward to the Commission, in writing, any suggestions with respect to the initial decision which he made to the hearing examiner but which the examiner did not adopt. The Chairman of the Commission should also notify the examiner informally of any criticism of his decision by any Commissioner that is not reflected in the final Commission opinion. Both these steps would provide needed additional avenues of communication between the Commission and the hearing examiner corps.

With regard to these measures, the Director of the Office of Hearing Examiners has written:

I do not believe that the Commission should be advised of such suggestions [made by the Director to a hearing examiner but not adopted by the examiner] which may relate to facts or the merits of the case. The Director of Hearing Examiners should, however, where matters of policy are concerned, call the attention of the Commission to any such disregard of policy which might be present in an initial decision forwarded by him to the Commission, so that the Commission will be fully aware of the situation when the case comes to it particularly where an appeal is taken by either party. The decision to advise or not to advise the Commission should rest entirely with the Director.\textsuperscript{254}

The last point is well taken, but the Director should recognize the obligation to the Commission that his suggestion, if accepted, would impose on him. Moreover, the distinction that the Director tries to draw between the “facts or the merits of the case” and “matters of policy” is not warranted. It is not expected that the hearing examiner in the case would consult another examiner or the Director of the Office of Hearing Examiners about the facts in the particular case or about the credibility of particular witnesses. It is assumed, too, that such consultation would not be used for the improper purpose of making \textit{ex parte} additions to the facts in the record. Of course the Director of the Office of Hearing Examiners would be bound by these same considerations of propriety when he communicated with the Commission about a particular case. Within these bounds of propriety, however, there is room for consultation about how the facts in the record should be evaluated and what legal conclusions should be drawn from them. The views of the Director of the Office of Hearing Examiners on these matters, which “may relate to facts or the merits of the case,” should be as available to the Commission as the views of the Chief Economist, General Counsel, or Program Re-

\textsuperscript{254} Kolb Memorandum.
view Officer. If, as a result, the suggestions made by the Director to the hearing examiners are more likely to be heeded, the purpose of the proposal in question will be achieved. The hearing examiner in the particular case, however, will still retain the option of rejecting any suggestions made to him, and weight will still have to be accorded to his judgment of the credibility of any witness in the case.

The Director of the Office of Hearing Examiners also thinks that "in the cases where the Chairman feels that it would be helpful for the hearing examiner to be aware of any particular criticism, that he handle it through the Director, who could in turn, take the matter up with the hearing examiner and thereby avoid the implication that the Commission is attempting to coerce the hearing examiner in connection with his decision in a particular line of cases." Although it is difficult to see why the implication feared by the Director would be justified, it may be desirable to enhance the Director's position by making him the usual intermediary for such communication between the Chairman and a hearing examiner. The Chairman should not, however, preclude himself from criticizing a hearing examiner, face to face, whenever he deems it advisable to do so.

(d) Opinion Writing — The Office of Special Legal Assistants

If the Commissioner to whom the case is assigned prior to oral argument votes with the majority to dispose of the case, he will have the responsibility for drafting the Commission's opinion, which will appear under his name.

To assist them in the writing of opinions, Chairman Dixon and Commissioners Anderson and MacIntyre rely on the Office of Special Legal Assistants, which is under the administrative supervision of the Chairman. In addition, each of them has a personal assistant who may also participate in the opinion-writing process.

Commissioners Elman and Higginbotham do not use the Office of Special Legal Assistants for this purpose; each of them has two personal legal assistants who devote much of their time to assisting in opinion writing.

The Office of Special Legal Assistants consists of 5 attorneys (at GS 14 or GS 15) with 6 to 15 years of service with the FTC.

255. Ibid.

256. Commissioner Kern made use of the Office of Special Legal Assistants for opinion writing, as did Commissioner Higginbotham until he was assigned a second personal assistant.
A legal assistant is assigned to a particular case, prior to oral argument, by the senior assistant whose duties are administrative, not supervisory. His task is to allocate the burden of work so that there are no bottlenecks in the Office. No single assistant is assigned to a particular Commissioner, nor is any effort made to specialize the assistants in particular matters.

Prior to attending oral argument, the assistant will read the initial decision, the exceptions thereto and the briefs. He will not be present when the Commissioners discuss and vote on the disposition of the case immediately after oral argument. The Commissioner to whom the writing of the opinion is assigned will inform the assistant of the Commission's vote and instruct him with respect to the drafting of the opinion. In most cases, the instructions are oral; in some, they are written. The degree of generality or specificity in these instructions varies with the individual Commissioner.

It is only after the assistant receives his instruction in the particular case that he undertakes to read and analyze the record. The extent to which the assistant will consult with the opinion-writing Commissioner in the course of drafting the opinion varies from case to case. Generally, the initiative for such consultation comes from the assistant. The assistant may speak with the Commissioner or submit a memorandum to which he will receive an oral or a written reply.

The special legal assistants do not consult with any other agency personnel (except the personal assistants of the Commissioners) in the course of their work. They do consult each other. Draft opinions are circulated among themselves for mutual criticism, but each assistant is responsible for his own opinion, which does not have to be approved by any other assistant before it is submitted to the opinion-writing Commissioner.

Each assistant regards his function as that of drafting the best opinion he can to conform with the instructions he has received. In no case since January 1, 1961, has an assistant recommended that the “tentative” vote of the Commission should be changed. In some cases, however, the form of the order was changed on the recommendations of assistants. If the above recommendations for changing the Commission's internal decision-making procedure are adopted, the special legal assistants could be given the task of writing the first draft of the memorandum to be circulated to the Commissioners as the basis for their subsequent, decisive votes. In such case, it would be reasonable to assume that the
assistants would regard their function less as one of post-hoc rationalization and more as one calling for their independent views of the issues in the case and the policies the Commission should follow.257

The opinion-writing Commissioner affects the draft opinion principally by the instructions and continuing guidance that he gives to the special legal assistant. The extent to which the Commissioner seeks to inject his personal style and tone varies from Commissioner to Commissioner and from case to case. In most cases, the language of the opinion, in the main, is that of the special assistant.

When approved by the opinion-writing Commissioner, the draft opinion is submitted to the other Commissioners. Generally, it becomes the opinion of the Commission with relatively few changes made at the suggestion of the other Commissioners.

Commissioner Elman's relations with his personal assistants are like those of a judge with his law clerk. His opinions have been marked by individuality.258

There is a strong current of opinion that many of the ills of the administrative process will be overcome if only Commissioners

257. The senior Special Legal Assistant maintains:

The implication . . . that the special Legal Assistants do not give the Commissioners the benefit of their independent opinions in my view is not warranted. In those instances where an examination of the record or a review of the applicable law convinces the special legal assistant of the existence of questionable areas which may not have been foreseen, he advises the Commissioner in charge of the case of that fact. At the same time, he also writes:

The reason that the Special Legal Assistant regards his job primarily as one of articulating as best he can a result in conformity with his instructions is simply, as Professor Auerbach apparently recognizes, that positions have become largely frozen because the Commission makes its decisions in most cases immediately after oral argument prior to intensive study of the record. By virtue of this procedure, both the Commissioner and his assistant have, of course, at least to a degree, become committed to a certain course of action. The dissolution of this office is not a likely remedy for this problem.

Memorandum from S. E. Combs to Frank C. Hale, Program Review Officer, Oct. 23, 1962 [hereinafter cited as Combs Memorandum].

As indicated above, the likeliest “remedy for this problem” is the recommended change in the Commission's internal decision-making procedure.

258. Mr. Higginbotham's work, in general, was not considered in the writing of this report. It is believed that the only specific reference to the Commissioner's work in the Article is to his joint statement with Commissioner Elman dissenting from the recent action against the 248 wearing apparel manufacturers.
will write their own opinions.\footnote{259} If the heads of an agency are overburdened with work and must perform significant, time-consuming tasks other than the adjudication of cases, the adoption of this suggestion — whatever its merits — is not practical. Yet the Commissioners of the FTC — with the exception of the Chairman — are not overburdened.

As Table I above shows, during the period from January 1, 1961 through June 29, 1962, the FTC issued a total of 92 orders that were accompanied by opinions.\footnote{260} This represents an average of about one opinion per month per Commissioner. Even if each Commissioner, then, undertook to make a substantial, individual contribution to the writing of the opinion, his overall duties would seem to be manageable.\footnote{261}

So far as opinion-writing is concerned, this conclusion is supported by the fact that the Office of Special Legal Assistants is quite small.\footnote{262} This fact has an important bearing on the question whether the Office of Special Legal Assistants should be maintained or abolished. In the latter event, one additional personal assistant should be made available to each of the Commissioners now using the Office and two additional assistants to the Chairman.

The present form of organization of the special legal assistants is not needed to allocate the burden of their work equitably. Equitable allocation of the burden of opinion-writing among the Commissioners would automatically achieve the same result for


\footnote{260. It should also be noted that in a number of these cases, the Commission simply adopted the opinion of the hearing examiner.}

\footnote{261. Mr. Connor has expressed the opinion that the FTC staff, too, is not overburdened.}

\footnote{262. Including the five attorneys in this Office, each Commissioner has, on the average, two personal assistants.}
their assistants. There are other justifications for the Office of Special Legal Assistants. It may make possible freer informal discussion among the assistants than may take place if each of them is a member of a different Commissioner’s personal staff and located physically farther apart from his colleagues than he is at present. Free exchange of views among the opinion writers is important because it may facilitate the uniform articulation of the basic opinions on particular problems that all the Commissioners share. The resulting Commission opinions may afford better guidance to businessmen seeking to conform their practices to the statutory requirements than opinions reflecting the individual thought and style of the opinion-writing Commissioner.

A central staff also makes it possible to institutionalize opinion writing in the Commission. The special legal assistants are recruited from within the Commission. To be a member of this staff is a worthy aspiration of every young lawyer in the Commission. The tenure of the special legal assistant is not dependent upon changes in Commission membership or the whim of the individual Commissioner. A permanent, central opinion-writing staff can thus become a depository of valuable, nonspecialized knowledge and experience on which every Commissioner can draw to improve the quality of his decisions and opinions.

At the same time, the small size of the central staff permits the development of personal relationships between the Commissioners and each of the five opinion writers. In this way, as the senior special legal assistant points out, the members of the central staff “are . . . exposed to the divergent views of several Commissioners and naturally derive a professional benefit therefrom reflected in their work for individual Commissioners.”

These are weighty considerations, but there are countervailing points. An institutionalized, opinion-writing staff recruited from within the Commission may develop a tendency to see problems from the point of view of the enforcement bureau staffs. At the stage of final decision, the Commissioners have need for independence of view. To encourage such independence is one of the reasons for the recommendation made above to bring the

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263. Combs Memorandum.

264. The senior special legal assistant denies that such a tendency is manifest in the work of the Office of Special Legal Assistants; he thinks that the “necessity for insuring that the findings of facts made and the propositions of law set forth are in fact supported” guards against the development of this tendency. Combs Memorandum.
Chief Economist, the General Counsel and the Program Review Officer into the decisional process at the Commission level. The opinion-writing assistant may be more inclined to express his independent judgment if he is on the personal staff of "his" Commissioner, developing the intimate association that often characterizes the relationship between a judge and his law clerk. In this relationship, the Commissioner and his legal assistant can work in close partnership at every stage of the opinion-writing process, talking things out as they go along, each stimulating the other and acting as a sounding board for various ideas, good and bad, that each may offer. It is such a continuous exchange of ideas that is likely to result in a creative and imaginative exploration of new areas of law and policy and that is lacking in the relationship between the Commissioners and the special legal assistants in the central opinion-writing office of the FTC.

In many agencies, it is not practical to attempt to create this relationship between the agency member and his opinion-writing assistants. But it is possible in the FTC just because the special legal assistants are so few in number and the tasks of the Commissioners so manageable.

To suggest that the Office of Special Legal Assistants should be abolished is not to depreciate the value of Commission opinions that seek to guide businessmen by reflecting the consensus reached by the Commissioners. There is no warrant, however, for a general conclusion that in all agencies a central opinion-writing staff is more likely to produce opinions reflecting such a consensus and affording the best guidance to businessmen. If a generalization had to be hazarded, it would be my judgment that the individual opinions of Commissioner Elman offer more guidance to the businessmen with respect to the statutory requirements, upon which the courts will pass ultimately, than the more standard opinions of his colleagues. Mr. Elman's opinions are written more expansively. The opinions written by the special legal assistants tend to be more narrowly drawn, to be closely limited to the particular facts of the case and to disclose but little of the reasoning underlying the decision.²⁶⁵

²⁶⁵. The senior Special Legal Assistant does not dispute this conclusion but writes:

It is, of course, not my purpose at this point, nor is it my prerogative to debate the merits of broad versus narrow opinions, but I must point out that Judges, and indeed, Commissioners have for some time differed on this question. The Special Legal Assistants, of course, draft opinions with the breadth thereof already defined by the Commissioner
The crucial point is that the area in which the Commissioners agree should be expanding. Whether the area of agreement will expand, however, depends more on the nature of the Commission's deliberations preceding decision than on the organization of the staff for opinion writing after the decision is reached. To enhance the possibility of consensus is the purpose of the recommendations made above respecting the decisional process at the Commission level.

The senior special legal assistant strongly opposes any suggestion that his Office should be abolished. He insists that the individual Commissioners using the Office of Special Legal Assistants participate more actively in the actual writing of opinions than the report implies. While the FTC General Counsel agrees that the Office of Special Legal Assistants should not be abolished, he suggests that "it may be desirable, in the interest of coordinating the decisional work of the Commission, to now assign this staff to the Office of the General Counsel for supervision." Adoption of this suggestion would restore the situation that existed just prior to the reorganization effected by the new Commission. Yet it would make it more difficult to create an intimate relationship between the Commissioners and the special legal assistants and, for this reason, would be an undesirable change.

The FTC is unique in that its Commissioners are experimenting, simultaneously, with two different ways of organizing the opinion-writing function. It may be too early to say that one way is clearly superior to the other. Therefore, it is recommended only that the Commissioners reconsider the question of organizing the work of the special legal assistants in the light of the above discussion.

It may be, too, that if the recommendations for planning by the FTC are adopted, the work and burdens of the Commissioners will increase to the point where they will be unable to make substantial, individual contributions to the writing of opinions. If this should happen, a central, opinion-writing staff would become a necessity. And it would be wise, then, to place it under the supervision of the General Counsel.

responsible for that case. Irrespective of whether the assistant is on a central opinion writing staff, it is the Commissioner who prescribes the scope of the opinion.

Combs Memorandum.

266. Combs Memorandum.

267. General Counsel's Memorandum.
4. The Publication of Dissents

On July 17, 1962, the Bureau of National Affairs reported that the Commission had adopted a resolution to conduct certain public hearings on milk prices and voted against noting on the resolution, or otherwise making it publicly known, that a Commissioner had dissented from the action taken. The report came to the attention of Congressman Moss of California, Chairman of the Special Government Information Subcommittee of the House Committee on Government Operations, who directed his staff to investigate it. Chairman Dixon acknowledged that the report was substantially correct and that the Commission "has no regulations prescribing procedures to note dissents or to issue the opinions or views of dissenting Commissioners concerning matters affecting the public."

On July 23, 1962, Congressman Moss wrote to Chairman Dixon as follows:

The Federal Trade Commission is a multi-headed body with members appointed on a bipartisan basis. The Commission is not monolithic. Each member of the Commission, as a statutory officer appointed by the President with the advice and consent of the Senate, has a legal responsibility, as a member of the Commission, to make known his dissenting views whenever he believes that the Commission's action on any matter affecting the public is erroneous or improper and that the announcement of his dissenting views would be of interest to the public and to reviewing authorities (e.g., to the courts in cases that may be appealed, to Congress, etc.). There is no statutory foundation to assume that Congress ever intended to permit a majority of the Commission (or two Commissioners constituting a majority of a three-man quorum) to muzzle or delay the issuance of the views of dissenting members of the Commission with regard to Commission actions affecting the public.

When the Federal Trade Commission issues an order, or decision, or resolution, or takes any other definitive action, which affects the public (such as initiating a complaint, ordering a public hearing, or issuing a subpoena, or holding hearings, or issuing decisions in a case, etc.), the Commission cannot deprive any dissenting Commissioner of the right and duty to have his dissent noted and to have his views

and opinions concerning the matter fully expressed. If the dissenting Commissioner desires, for whatever reasons, that his dissent be noted and/or his dissenting views or opinions made public, this should be done through official Commission channels accompanying the Commission’s order, decision, resolution, or other document taking the definitive action.\(^{272}\)

Congressman Moss indicated in this letter that Chairman Dixon had informed the members of his Subcommittee’s staff that he would recommend to the Commission the adoption of a procedure for noting dissents and issuing dissenting opinions relating to all future Commission orders, decisions, resolutions or other definitive actions affecting the general public, which would reflect the views expressed by Congressman Moss.

On September 4, 1962, the Commission unanimously adopted the following resolution:

> When the Commission takes any action which it makes public, and a Member of the Commission does not concur in such action, such Member shall have the right to have his dissent and reasons therefor shown on the document or accompanying papers evidencing such action.

Congressman Moss wrote to Chairman Dixon on September 18, 1962, asking whether this resolution implied that a dissenting Commissioner might be prevented from publicly expressing views on any Commission action which is not made public. Chairman Dixon replied on September 25, 1962, that the resolution was not intended to prevent a dissenting Commissioner from publicly expressing views on any Commission action.\(^{273}\)

Congressman Moss has announced that his Subcommittee plans to study the procedures of all multi-headed government agencies with respect to the disclosure of dissents.\(^{274}\)

The Moss Subcommittee had a somewhat similar experience with the Federal Power Commission.\(^{275}\) While both the FPC and the FTC have taken action providing for the publication of dissents in accordance with the principles suggested by Congressman Moss, it is recommended that the Administrative Conference should endorse these principles and urge their adoption by all multi-headed agencies. No Commissioner should be precluded

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\(^{273}\) Copies of these letters, which have not yet been made public, were made available to the Staff Director.
from making public his dissent from any action taken by the Commission. This matter should not have to be the subject of a congressional investigation. The agencies, acting together in the Administrative Conference, should indicate, via Conference action, that they subscribe to the Moss principles and will implement them. Because the question of the publication of dissents concerns all multi-headed agencies, it should be considered apart from this Article.

5. Separation of Functions

(a) The Bureau of Economics

The Commission has demonstrated a scrupulous regard for the separation-of-functions requirements of section 5(c) of the Administrative Procedure Act. This section of the Article will endeavor to make certain organizational suggestions intended to satisfy the requirements of the APA without sacrificing the benefits to be derived from providing the Commissioners, and the hearing examiners, with the necessary economic, legal, and accounting staff assistance in the process of making their decisions. The organization of the Bureau of Economics is primarily in question.

Commissioner MacIntyre has emphasized that it is essential to “make reliable economic understanding the cornerstone of any legal edifice constructed to ensure the maintenance of a competitive economy.” To accomplish this aim, use must be made of professional economic analysis in every phase of the Commissioner’s work—the decision to launch an investigation, the negotiations about a proposed consent order, the decision to issue a complaint, preparation for the hearing before the examiner, the examiner’s initial decision, the final agency decision, the formulation of the order and the investigation to determine compliance.

The new Commission has taken steps to revitalize its Bureau of Economics so that it will be able to provide this economic analysis. The Bureau’s potential strength, at this stage of the FTC’s development, lies not only in the fact that excellent additions have been made to its personnel, but also in its structure. All FTC economists are now in the Bureau. Each economist thereby has the benefit of association with, and direction and supervision by, professional colleagues of stature and an independent line of communication to the Commission. For these

276. MacIntyre, American Marketing Association Address.
reasons, the Bureau should find it less difficult to attract able economists to the Commission, which will have the benefit of an independent, professional voice to complement and supplement that of the lawyers. 277

The FTC needs lawyers who understand the language and methods of the economist and economists who appreciate the limitations imposed upon them by the statutes administered by the Commission. Both professions have unique contributions to make and the Commission should not subordinate one to the other in the internal structure of the FTC. Great effort, therefore, should be made to preserve a unified and independent Bureau of Economics, in meeting the applicable requirements of section 5(c) of the APA. 278

It is clear that an individual economist in the Division of Economic Evidence who provides economic and statistical assistance to an enforcement bureau in the investigation or trial of a case is barred by section 5(c) from participating or advising in the initial decision of the hearing examiner or final decision of the Commission in that case or a factually related case. The Chief of the Division would be barred, too, if he supervised the work of the economist who provided such assistance, as he would be expected to do. Whether the Director of the Bureau of Economics would be barred depends on the nature and extent of his

277. The Chief of the Division of Economic Evidence makes the point that the economists in his Division "operate largely in a consulting and advisory capacity" in the day-to-day operations of the FTC bureaus. The decisions "are those of the attorneys" although economists "can of course be heard at the highest levels if they wish to interpose a strenuous objection on some matter of importance." Bender Memorandum.

The Assistant Director of the Bureau of Restraint of Trade insists that "the extent to which the Bureau of Economics should be consulted and requested to participate... should be left to the discretion of the Bureau having primary responsibility for the handling of the particular subject." Miles Memorandum.

Of course, responsibility for operations must be lodged in the heads of the operating bureaus. The economists should have no difficulty proving their worth to these bureaus. But the fact that the economists have an independent line of communication with the Commission gives their advice weight that it might not otherwise have.

278. Only the Chief of the Division of Discriminatory Practices has suggested that economists "can provide more assistance by being members of the enforcement staff":

The participation of economists in the conduct of investigations and hearings must be within the lawyer's framework of the case, and, of course, unanimity of approach must be insured. Mayer Memorandum.
personal involvement in the case prior to the stage of initial decision. Whatever their involvement at the stage of investigation, the Director, the Chief of the Division of Economic Evidence and the economists in the Division are not barred from assisting the Commission in reaching a decision about a proposed consent order.

Since it is most important that the Director of the Bureau of Economics, who is also Chief Economist to the Commission, should make himself available to the hearing examiner at the stage of initial decision and to the Commission at the stage of final decision of the case, the Director should not participate in the work of the Division of Economic Evidence on particular cases. The Director should rely on the Chief of the Division, or an Associate or Assistant Director, to direct and supervise the work of the economists in the investigation and preparation for trial of individual cases.

Neither the Chief of the Division of Economic Evidence nor any Associate or Assistant Director supervising his work should advise the hearing examiner, or assist him in any way, in reaching the initial decision or advise the Commissioners, or assist any one of them in any way, in reaching the final agency decision.

The recommended limitation on the activities of the Director of the Bureau of Economics should not be applied rigidly. In a particular case, the Director may determine, or be informed by the Commission, that the Commission's overall program would be served best if he assisted personally in the investigation and preparation for trial of a particular case. He would then, of course, abstain from advising or assisting the hearing examiner and the Commission in that case or a factually related case. This should occur infrequently, however, in order to assure FTC practitioners and the public about the reality of the separation of functions inside the Bureau of Economics.

It was recommended above that a staff of economists should be formed in the Bureau of Economics to assist the hearing examiners in analyzing the economic evidence and issues in the case. To satisfy the requirements of the APA, the members of this staff should be directed and supervised either by the Director of the Bureau of Economics or an Associate or Assistant Director who will not participate in directing or supervising the work of the Division of Economic Evidence.\[279\] The Director of the Bureau

\[279\] The Director of the Office of Hearing Examiners comments: I do not believe that we could or should consult with the Chief Economist or Chief Accountant, if any of their personnel are engaged
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of Economics now has one Assistant Director; an additional Assistant or Associate Director — as well as increased staff — will be required to enable the Bureau to perform its recommended tasks.

The internal separation of functions recommended for the Bureau of Economics would permit the Director to function as Chief Economist to the Commission. He would be able to (a) direct the recommended program of planning; (b) advise and assist the Commissioners and the hearing examiners in the decision of particular cases; (c) determine general policies and issue general directives for the work of the Division of Economic Evidence; and (d) discuss problems of economic analysis of general applicability with the Chief of the Division of Economic Evidence and the Associate or Assistant Director, if any, designated to supervise the Division. The Director’s task of coordinating the work of his Bureau would be facilitated by the policy — recommended above — of rotating the economists, including those assigned to work with the hearing examiners, periodically so that each economist, within a number of years, will gain experience in all phases of the Bureau’s and the Commission’s work.

In short, the Chief Economist would have the means to assist the Commission in formulating economic policy. If the positions of Chief Economist and Director of the Bureau of Economics are separated — as the Budget Bureau staff and Heller and Associates recommended — neither of the two men appointed to the two positions would be equipped to do his job effectively, but the basis would be laid for dissension and conflict.

The Assistant Director of the Bureau of Economics has commented on the view that the Director of the Bureau should also be Chief Economist to the Commission as follows:

The opportunity for dissension is a risk that would be taken if the jobs are separated. But weighed against this risk is the somewhat greater assurance that the economic point of view would be presented at the Commission level, if there were an Economic Adviser to the

in consulting with counsel supporting the complaint. It is difficult to conceive a situation in which it would be helpful to consult with them where they were not providing assistance to counsel supporting the complaint.

Kolb Memorandum.

It is apparent from his Memorandum that the Director did not consider the above section of the report dealing with the proposed internal separation of functions of Bureau of Economics or what is said below about the Accounting Division.

Commission whose sole function was to advise the Commission and who had authority to participate in Commission meetings and discussions. The success of Auerbach's proposal for one position rests basically on how receptive the Commission is to economic advice. Commissioners who are confident that economics can be useful will consult frequently with the Chief Economist. If all five Commissioners were of this mind the Chief Economist as Director of the Bureau could be overworked. Again if most of the Commissioners had no use for economics the Chief Economist (advisory function) would be nil and the job would be primarily one of administering the Bureau. But, under these conditions no economic advice is getting to the Commission. Were there an established position of Economic Adviser, the Commissioners out of courtesy might listen to his arguments (hear him out) even though they were not impressed. Under this arrangement, the Commission would not have complete discretion for rejecting a point of view without having first heard it. Under the dual-arrangement they have such discretion—they can choose not to consult with the Chief Economist.

In one sense the discussion of a dual or single role for the Chief Economist is moot until one or the other is given a thorough trial and to my knowledge the Commission has done neither. Why not experiment with Auerbach's suggestion and see how it works. But one cannot be unmindful of the emphasis the Report places on economic studies of industry structure, practices, and markets, and the recommendation to experiment with organization along commodity-group lines, all of which elevates the administrative position of Director of the Bureau of Economics to where its influence on policy and programs would be as important as the position of Chief Economist.\footnote{Prewitt Memorandum.}

It is precisely for this last stated reason that the Director of the Bureau of Economics should also be Chief Economist to the Commission. If the recommendations of the Article are adopted, the Director, in his capacity as Chief Economist, would attend and participate in Commission meetings and discussions at which cases were to be decided. The Director would have his chance to be heard. The fact that one man is Bureau Director as well as Chief Economist may make him even more influential as an economic adviser to the Commission. The Bureau Director emphasizes this latter point, as follows:

\begin{quote}
It is my present conviction ... that whatever limited success I have had in gaining the confidence of some Commissioners and others at the Commission stems in large part from the fact that I act in a dual capacity in my present position. This duality has given me an entree to many doors which might have been closed had another person occupied either the position of Chief Economist or Bureau Director. It is possible, of course, that the organizational framework may be most appropriate during one stage of bureaucratic growth
\end{quote}
and another framework at a later stage. If so, I am not yet ready to recommend that we have reached the appropriate stage for such a separation of functions.282

(b) The Accounting Division

The advice of the Chief Accountant should also be available to the hearing examiners and the Commission. By placing the Accounting Division in the Bureau of Restraint of Trade, the Commission has cut itself off from such advice. It is recommended that the Accounting Division should be placed in the Bureau of Economics. Its work should then be organized and supervised by the Chief Accountant in much the same way that the work of the Division of Economic Evidence would be organized and supervised by the Chief Economist under the above recommendations for the internal separation of functions within the Bureau of Economics.

The Chief Accountant opposes these recommendations. He argues that (1) “the logical place for the Accounting Division is its present location, the Bureau of Restraint of Trade” because its work “has been more closely related to the legal case work of the Commission than to economic surveys and reports”; (2) the recommendations would violate section 5(c) of the APA; and (3) if the Commission wishes to have accounting advice, it should appoint “an Accounting Adviser independent of the Division of Accounting.”283

The Assistant Director of the Bureau of Restraint of Trade argues simply that the services of the Accounting Division “are considered essential to the operation of this Bureau” and that the Division should “remain under the control and direction of the Bureau of Restraint of Trade.”284

The reasons for not separating the positions of Director of the Bureau of Economics and Chief Economist to the Commission also apply to the positions of Chief of the Accounting Division and Chief Accountant to the Commission. But even if the Commission decided to separate the latter positions and


284. Miles Memorandum. The Chief of the Division of Discriminatory Practices and the Chief of the Division of General Trade Restraints make essentially the same argument. Mayer Memorandum; Wilson Memorandum. The latter thinks “the flexibility required in obtaining accounting assistance” comes from not having to cut across Bureau lines.
appointed a special Accounting Adviser, there would still be sufficient reason to place the Accounting Division in the Bureau of Economics. The Division should be more active in the making of economic surveys and reports. As the Assistant Director of the Bureau of Economics has said:

[The Accounting Division needs to be invigorated as it can make an important contribution to the work of the Commission by participating in studies and investigations, as well as in case work. For the Accounting Division to be in the Bureau of Economics would make it possible to expand the work of the Division and utilize the skills of the accountants in the overall program of the Commission to better advantage.285

Furthermore, the relationship between the operating bureaus and the accountants should be no more disturbed by placing the Accounting Division in the Bureau of Economics than the relationship between the bureaus and the economists was disturbed by placing the economists in the Division of Economic Evidence within the Bureau of Economics. More effective accounting, as well as economic, assistance to the operating bureaus is likely to result from this move.

The Bureau of Deceptive Practices joins the Chief Accountant in charging that the proposal for the Accounting Division raises "questions of propriety under the Administrative Procedure Act" and adds:

- It is believed that such advice should not be received [by a hearing examiner or the Commission] if the official [Chief Accountant, Chief Economist, Chief Hearing Examiner or Program Review Officer] or his subordinates participated in the investigation or trial of the case.285

Neither the Chief Accountant nor the heads of the Bureau of Deceptive Practices direct themselves to the discussion in the Article about the separation-of-functions requirements of section 5(c) of the APA. These requirements will be discussed again in considering the comments of the General Counsel in the next section of the Article. At this point, it will suffice to say that the recommendations for the internal separation of functions of

286. Murphy Memorandum. The listing of the Chief Hearing Examiner by the Bureau of Deceptive Practices is perplexing. A hearing examiner participates in the "trial of the case" by presiding over it. Is the Bureau, then, casting doubt about the propriety of the present practice of consultation between the hearing examiner working on a case and the Director of the Office of Hearing Examiners?
the Bureau of Economics — which should be adapted to separate the functions of the Accounting Division once it is transferred to the Bureau of Economics — satisfy the requirements of the APA.

(c) The Office of General Counsel

The present organization of the Office of the General Counsel raises no questions under section 5(c) of the APA. At the same time, it is the weakest General Counsel’s Office — in terms of assigned functions — in the recent history of the FTC.287 Headed by a General Counsel (GS 17), an Assistant General Counsel (GS 15), and three assistants to the General Counsel (3 GS 15), it consists of three divisions — a Division of Appeals, a Division of Consent Orders, and a Division of Legislation. As we saw, the Division of Consent Orders is located in the General Counsel’s Office for housekeeping purposes only. The Division of Legislation is headed by an Assistant General Counsel (GS 16) with a staff of only one attorney (GS 15). It prepares drafts of, and reports on, proposed legislation for the Commission’s consideration.288 The Division of Appeals is headed by an Assistant General Counsel (GS 16) with a staff of 15 attorneys, at grades from GS 9 to GS 15. It represents the Commission in the courts and “also aids in preparing memoranda, opinions and reports on questions of law and policy referred to the General Counsel.”289

It has been recommended that the General Counsel should participate in the decisional process at the hearing examiner and Commission levels. His advice should be particularly valuable in formulating the order to be entered — whether arrived at by consent or otherwise — since it is his job to defend the orders of the Commission in the courts. More than any other attorneys on the Commission’s staff, those in the Division of Appeals are most intimately acquainted with the decisions and attitudes of the courts affecting the work of the FTC. Their experience should be used in the decisional process as well.

While the Director of the Office of Hearing Examiners agrees

287. Prior to the reorganization effected by the new Commission, the Office of the General Counsel consisted of five separate divisions — the Division of Special Legal Assistants, Appellate Division, Division of Compliance, Office of Export Trade and Office for Legislative Liaison. The Bureau of the Budget Staff Report indicates that the office then contained 38 attorneys. Budget Bureau Staff Report 140–41.
289. Statement of Organization § 6(a).
that the hearing examiners "are free to discuss matters with General Counsel and should do so if need arises," the General Counsel himself believes that he "should maintain his objectivity by participating in the decisional processes only at the Commission level," particularly because "a legal dichotomy between trial and appeal within the Commission" is "in keeping with the spirit, if not the letter, of the Administrative Procedure Act." The Assistant General Counsel for Appeals argues even more strongly that "it would be improper and probably in contravention of the Administrative Procedure Act for the Division of Appeals to participate in the decisional process at the hearing examiner level." The Assistant General Counsel for Legislation agrees.

The objections call for a reply. The only possible basis for the argument that consultation between a hearing examiner and the Office of the General Counsel is prohibited is the provision in section 5(c) of the APA that the officer making the initial decision shall not "consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate." Even if this provision is read literally, it does not preclude consultation between a hearing examiner and the Office of General Counsel on issues of law or policy — the issues on which the General Counsel is most likely to be consulted. And if read literally, it would preclude a hearing examiner from consulting, on any issue of fact, a fellow-examiner, the Director of the Office of Hearing Examiners, or any law clerk, economist or accountant, that may be assigned to assist the hearing examiner in his work. In other words, a literal interpretation of this provision of section 5(c) would mean that existing practices in the Office of Hearing Examiners were in contravention of the APA.

While no court has resolved the question, it is the best judgment of able legal scholars that a literal interpretation would be rejected by the courts. "Person or party" in the provision in question should be read to refer to persons outside the agency,
not agency staff. If so, a hearing examiner would still be precluded from consulting, on any issue of fact, law, or policy in a case, any "officer, employee, or agent engaged in the performance of investigative or prosecuting functions" in that case or a factually related case.

Nor would the suggested reading of section 5(c) contravene the "spirit" of the APA. The General Counsel is eager to have his Office participate in the decisional process at Commission level. As Professor Davis points out, however, so long as agency heads consult with staff members other than investigators and prosecutors, "allowing examiners to consult [with the same staff members] becomes largely advantageous to those who object in general to anonymity and to use of extra-record ideas, because the advice of the staff members who are consulted then may come into the case at the stage of the initial or recommended decision and will not be withheld until the final decision."

Thus, to make it possible for the parties to "get at" the advice of the FTC General Counsel, or Chief Economist, or Chief Accountant at the stage of appeal from a hearing examiner's initial decision is to promote the "spirit" of the APA.

E. THE FORM AND SCOPE OF THE ORDER

Controversy about the scope and form of the order terminating an FTC proceeding has blocked consent settlements and complicated compliance and enforcement efforts. In the main, although by no means exclusively, controversy centers on the scope and form of orders under the Robinson-Patman Act.

Most recently, the Supreme Court warned the Commission that the Finality Act — the 1959 amendments to section 11 of the Clayton Act — would compel the courts to limit the use of excessively broad and vague orders under the Robinson-Patman provisions of the Clayton Act.

Prior to the Finality Act, the Clayton Act, unlike the Federal

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295. The full sentence referred to reads as follows:

> No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings.


296. 2 Davis, op. cit. supra note 294, § 11.17, at 109.


Trade Commission Act, permitted a respondent to engage in the same illegal practices three times before penalties were imposed—twice with impunity. As the House committee report accompanying the Finality Act explained:

First, in order to issue . . . a cease-and-desist order initially, the commission . . . must investigate and prove that the respondent has violated the prohibitions of the Clayton Act . . .

Second, before the commission . . . may obtain a court ruling that commands obedience to its cease-and-desist order, it must again investigate and prove that the respondent has violated both the order and the Clayton Act . . .

Third, enforcement of the court's order must be secured in a subsequent contempt proceeding, which requires proof that new activities of the respondent have violated the court's order. This entails a third hearing before the commission and a review thereof by the court of appeals.

Furthermore, a contempt proceeding was the only sanction for violation of a court order commanding obedience to an FTC order. Prior to the Finality Act, the Clayton Act did not impose civil penalties for the violation of an order issued under its provisions.

The Finality Act applied the provisions of the Federal Trade Commission Act, added in 1938, to orders issued under the Clayton Act. The prior three-step process leading to the imposition of sanctions is now a two-step process. Once the FTC issues an order under the Clayton Act, the respondent may seek judicial review within a stated period of time. If the respondent fails to petition for review within that time, or if he does but the courts on review sustain the order, the order becomes final. Violation of a final order is subject to heavy civil penalties—5,000 dollars for each day the violation continues. Furthermore, if on review, the court affirms the FTC order, it is also required, at the same time, to issue its own order commanding obedience to its terms. The violator is then also subject to contempt proceedings.

In FTC v. Henry Broch & Co., the Supreme Court upheld an FTC order under section 2(c) of the Clayton Act, issued in 1957, paragraph (2) of which prohibited Broch, a food broker acting for some 25 sellers, from:

In any . . . manner, paying, granting or allowing, directly or in-

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300. 368 U.S. 360 (1962). Mr. Justice Brennan wrote the Court's opinion. Mr. Justice Black concurred. Mr. Justice Whittaker wrote a dissenting opinion in which Justices Frankfurter and Harlan joined.
directly, to the J. M. Smucker Co., or to any other buyer, or to any-one acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, any sale of food or food products [for Canada Foods Ltd., or any other seller principal] to such buyer for its own account.301

Except for the specification of the transactions in question, "sale of food or food products," and the omission of any mention of the statutory defenses, the order simply paraphrased the statute. The facts of record showed that Broch violated section 2(c) only in connection with transactions involving the single buyer, Smucker, and the single seller, Canada Foods Ltd.

The Court also upheld paragraph (1) of the FTC's order that forbade a repetition of the particular kind of violation which Broch committed. Paragraph (1) prohibited Broch from:

Paying, granting or allowing, directly or indirectly, to The J. M. Smucker Co., or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by [Broch] for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to [Broch] by such seller principal for brokerage services. . . .302

Even here, it should be noted, the Commission prohibited a repetition of this kind of violation in connection with transactions between any seller principal of Broch and any buyer. The Court curtly disposed of Broch's argument that even this part of the order was too sweeping. "The Commission has a wide discretion," it held, "to formulate a remedy adequate to prevent Broch's repetition of the violation he was found to have committed. . . . We cannot say that the Commission exceeded its discretion in banning repetitions of Broch's violation in connection with transactions involving any seller and buyer, rather than simply forbidding recurrence of the transgression in sales between Canada and Smucker . . . ."303

303. 368 U.S. at 364.
In the light of the Court's disposition of Broch's objections to paragraph (2) of the FTC's order, even this holding with respect to paragraph (1) was unnecessary and therefore gives us a preview of the kind of exercise of discretion in the formulation of an order by the FTC which will not be questioned in the future.

The Court's decision on paragraph (2) of the order in Broch implies that the Court will not scrutinize any order issued by the FTC under the Clayton Act prior to the time the Finality Act became law, unless the proceeding is one to obtain a court order commanding obedience to the FTC order. Broch, the Court held, was not such a proceeding, even though the FTC decision that Broch violated section 2(c) had been reviewed and affirmed judicially, because the Finality Act did not apply to the 1957 FTC order involved therein.304 Broch had not yet had its second "bite" which, in the pre-1959 state of affairs, was still free.

Broch contended that paragraph (2) of the FTC's order would jeopardize its business because it prohibited, unqualifiedly, "reductions of commissions coupled with lower prices — even uniform reductions, or reductions which are service- or cost-justified, or reductions for the purpose of meeting competition.' 1305 But, said the Court, "any attempt to restrict the scope of the order" is "premature."306 It explained:

Broch cannot be subjected to penalties except for violation of an enforcement order yet to be entered by an appropriate Court of Appeals, to be predicated upon a determination that some particular practice of Broch violated the Commission's order. Thus Broch is not, by virtue of that order, presently acting under the risk of incurring any penalty without further administrative and judicial consideration and interpretation, despite the fact that he has already received determination of his petition for review. . . .

Upon any future enforcement proceeding, the Commission and the Court of Appeals will have ready at hand interpretive tools — the employment of which we have previously sanctioned — for use in tailoring the order, in the setting of a specific asserted violation, so as to meet the legitimate needs of the case. They will be free to construe the order as designed strictly to cope with the threat of future violations identical with or like or related to the violations which Broch was found to have committed, or as forbidding "no activities except those which if continued would directly aid in perpetuating the same

304. In support of its holding that the 1959 amendments do not apply to orders issued before they became law, the Court referred to Sperry Rand Corp. v. FTC, 288 F.2d 493 (D.C. Cir. 1961). 368 U.S. at 365 n.5.
305. 368 U.S. at 364.
306. 368 U.S. at 367.
old unlawful practices." Federal Trade Comm'n v. Cement Institute, 333 U.S. 683, 727. They need not—as we have already made clear—read the order as denying to Broch the benefit of statutory defenses or exceptions. . . . Nor need the order be construed as prohibiting anything as clearly lawful as a uniform reduction in commissions. And, we repeat, these various interpretive aids will have to be brought to bear by a Court of Appeals upon a particular practice of Broch, and will have to yield the announced result that such practice violates the order, before Broch can be subjected to penalties because of still a second repetition of the violation.307

Not so with Clayton Act orders issued after the effective date of the Finality Act. "We do not wish to be understood, however," concluded the Court in Broch, "as holding that the generalized language of paragraph (2) would necessarily withstand scrutiny under the 1959 amendments. The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application."308

For the same reason, too, it might be added, judicial review of an FTC decision that a violation of the Clayton Act has been committed will, under the Finality Act, always entail "tailoring the order" to assure that it is "sufficiently clear and precise to avoid raising serious questions as to [its] meaning and application."

The Court of Appeals for the Second Circuit reviewed an FTC order under section 2(d) of the Clayton Act, issued after the Finality Act became law, in Swanee Paper Corp. v. FTC.309 It directed the Commission to limit its order to the particular practice found to violate the statute310 and disapproved an order which enjoined Swanee from violating section 2(d) in the very

307. 368 U.S. at 365–67. (The third "bite.")
308. 368 U.S. at 367–68.
310. Pursuant to the court’s mandate the Commission issued an order prohibiting Swanee from paying or contracting to pay anything of value to any third person as compensation or in consideration for any advertising or promotional display services or facilities if such services or facilities are furnished by or through any customer of Swanee’s products, and such compensation or consideration paid or contracted to be paid to said third person is used in whole or in part to provide benefits for said customer, unless the benefits thus derived by said customer are made available on proportionally equal terms to all other customers of Swanee competing in the distribution of its products.

words of the statute. While the court justified a restricted order on the ground that nothing in the record indicated "flagrant or extensive violations of section 2(d) by Swanee; the single violation found occurred in an uncertain area of the law and was discontinued before the complaint was filed," it also relied on the Finality Act. It objected that by using the very words of the statute, the FTC order shifted "the duty of enforcing the prohibition of Section 2(d) as to Swanee . . . from the Commission to the federal courts, which may in the future be forced to decide the very issues that Congress has entrusted the Commission to determine."

The Second Circuit similarly restricted an FTC order under section 5 of the Federal Trade Commission Act which was directed at the customer of Swanee responsible for getting Swanee to enter into the arrangements held to violate section 2(d) of the Clayton Act. The court emphasized that what it said in Swanee about the need for specificity in Commission orders had "especial significance" in this case, because violations of section 5 orders are also subject to heavy civil penalties.

Prior to Broich, the Commissioners of the FTC did not agree on the significance of the Finality Act for their orders. In Vanity Fair Paper Mills, Inc., the Commission found a violation of section 2(d) and prohibited Vanity Fair from making or contracting to make, to or for the benefit of J. Weingarten, Inc., or any other customer, any payment of anything of value as compensation or in consideration for advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for sale or resale of [Vanity Fair's paper] products.

The original FTC order prohibited Swanee from paying or contracting to pay to or for the benefit of any customer anything of value as compensation or in consideration for any advertising, promotional displays or other services or facilities furnished by or through such customer in connection with the handling, processing, sale or offering for sale of [Swanee's paper] products unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

Swanee Paper Corp., FTC Dkt. 6927, March 22, 1960. (Emphasis added.)

311. The original FTC order prohibited Swanee from paying or contracting to pay to or for the benefit of any customer anything of value as compensation or in consideration for any advertising, promotional displays or other services or facilities furnished by or through such customer in connection with the handling, processing, sale or offering for sale of [Swanee's paper] products unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

Ibid.

314. Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962); accord, American News Co. v. FTC, 300 F.2d 104, 111 (2d Cir. 1962); Giant Food Inc. v. FTC, 307 F.2d 184 (D.C. Cir. 1962).

315. Grand Union Co. v. FTC, 300 F.2d 92, 100 (2d Cir. 1962).

ucts, unless such payment is offered or otherwise affirmatively made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.

Commissioner Elman did not agree that the order "constitutes the most effective and appropriate remedy for dealing with the violation found."\(^3\) Commissioner Elman urged that the Commission should abandon phrasing its orders in statutory language and define "those actions which the respondent must take in order to assure compliance with the law." In the particular case, he suggested an order requiring Vanity Fair "affirmatively to establish and maintain prescribed procedures whereby all customers of its products are informed of the terms of any promotional payment made to one or some of them, and all are given an opportunity to receive the same benefits, or a fair equivalent, on the same terms."

Recently, the Second Circuit, in an opinion written by Judge Friendly, modified the Commission's order in *Vanity Fair* and affirmed it as modified.\(^3\) Whereas the Commission ordered the company not to make discriminatory promotional allowances "for advertising or other services or facilities," the court modified the order to prohibit discriminatory promotional allowances for "advertising or promotional display services or facilities and like or related practices."\(^3\) Speaking of Commissioner Elman's suggestion for an order in the case, Judge Friendly said:

> Although experimentation by the Commission in drafting orders along such lines would indeed seem useful . . . we cannot say, nor did Commissioner Elman, that such a course is required . . . .\(^3\)

The Supreme Court's decision in *Broch* has not dissipated disagreement among the Commissioners. In *The Quaker Oats Co.*\(^3\), the Commission found a violation of section 2(d) and prohibited Quaker Oats from:

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\(^3\) The violation consisted of the payment by Vanity Fair to Weingarten of $215 in February 1958 and $215 in November 1958 for newspaper advertising and in-store displays of Vanity Fair's products in connection with anniversary sales in Weingarten's retail grocery chain stores. Of Vanity Fair's 28 customers in the trade areas in question, only Weingarten and one other chain received these special promotional allowances.

\(^3\) Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480 (2d Cir. 1962).

\(^3\) Id. at 487.

\(^3\) Id. at 488.

\(^3\) 1961-1968 FTC Complaints, Orders, Stipulations ¶ 16585 (1962); see also, Nuark Co., 1961-1963 FTC Complaints, Orders, Stipulations ¶ 16029 (1962), in which the Commission (in an opinion written by Commissioner Kern, Commissioner Elman dissenting) read Swanee Paper Corp. v. FTC
Paying or contracting for the payment of anything of value to, or for the benefit of, any customers of respondent as compensation for or in consideration of any [advertising, promotion or display] services or facilities furnished by or through such customers in connection with the handling, offering for sale, sale or distribution of [Quaker Oats' cat food and related products] . . . unless such payment or consideration is affirmatively made available on proportionally equal terms to all other customers competing in the distribution of such products.322

The violation found consisted of a $250 dollar special payment by the Coast Fisheries Division of Quaker Oats, maker of Puss 'n Boots Cat Food, to the Benner Tea Company, a retail grocery chain, in connection with the latter's anniversary sales promotion, called a "Foodarama."

A majority of the Commissioners agreed that the order should be limited to the products of the Coast Fisheries Division and should not be extended to the products of the Grocery Products Division, the only other division of Quaker Oats, because the latter division was in no way connected with the violation.323 Commissioner Anderson dissented on the ground that the violation was de minimis and steps had been taken to prevent even such a violation; therefore no order should be issued.

Commissioner Elman dissented, reiterating his position in Vanity Fair:

I believe that a Commission order should accentuate the positive, not the negative, side of compliance. The order should inform and direct the respondent not only as to what he may not do, but as to what he may and must do in order to carry on his business without again running afoul of the statute.... The Commission's primary and paramount objective must be to guide and encourage businessmen to conduct their affairs both competitively and fairly, without resort to practices that are restrictive, fraudulent, or otherwise harmful to the public.

322. 291 F.2d 833 (2d Cir., 1961), cert. denied 368 U.S. 987 (1962), narrowly limiting it to cases involving "an uncertain area of the law insofar as enforcement of Section 2(d) is concerned." "Where, as in this instance," wrote Commissioner Kern, "the practice found to have violated Section 2(d) is clearly unlawful and where that statute itself constitutes a very narrow definition of the illegal practices prohibited, incorporating the applicable statutory language in the order will not shift to the courts the burden of deciding issues whose resolution has been entrusted to the Commission." Nuark Co., supra at 26568-69.

323. In reaching this conclusion, Commissioner Kern, writing for the Commission, relied upon Bankers Sec. Corp. v. FTC, 297 F.2d 403 (3d Cir. 1961).
In this case, because the "only violation found consists of a solitary deviation from an otherwise unmarred record of complying with Section 2(d)" and "derives essentially from inadequate control and supervision by respondent over the making of promotional allowances to customers," Commissioner Elman proposed an order requiring respondent "to establish and follow affirmative procedures to assure that no similar 'deviation or aberration' will again occur." Under such an order, Commissioner Elman explained,

it would be respondent's duty to develop and put into effect a program for compliance which would include such specific and detailed steps as, for example, establishing standing operating procedures for advertising, promotional, and other payments and services to customers; making regular announcements to the trade of its strict nondiscriminatory policy regarding such payments and services; devising means for informing, and periodically reminding, the company's responsible officials of such policy and of the specific requirements of applicable provisions of law; providing for systematic high-level review and control of all promotional and advertising activities; and prescribing sanctions to be imposed on employees who fail to abide by the company's established policy and procedures.

To facilitate the drafting of such affirmative orders, Commissioner Elman suggested that the respondent should "be directed to come forward with a proposed order containing a plan for compliance" on which the views of Commission counsel should then be sought. The outcome should be an order "that gives clear, specific, positive, and concrete guidance and direction to those bound by it."

To Commissioner Elman's basic proposal, Commissioner Kern, for the majority, replied:

Though some may argue to the contrary, we do not view the narrow language of the Broch decision as justification for couching orders, either in broad or detailed language, which endeavor to define what respondents may do or must do in order to comply with the statute. We believe our present compliance procedures to be adequate. We recognize an obligation to tell the respondents, with as much specificity as possible, what they must stop doing. However, to suggest that a cease and desist order is an appropriate vehicle to gratuitously guide or instruct businessmen as to what they may do and must do, we firmly believe is beyond our province. Government regulation has not yet, and we hope never will, become a substitute for corporate management. American business, so we believe, should by and large, be left free to adopt its own methods of operation. The free enterprise system should remain, in fact, free and independent; shackled not by a bumptious bureaucracy—but restrained solely and effectively by fair enforcement of the laws enacted by the Congress. We do not
regard the *Broch* case or any prior decision of the highest court, as a command to take over, even in part, corporate direction and control. Suggestions of this character, we believe, only serve to debase the Administrative Process.

The Supreme Court’s admonition in *Broch* that FTC orders should be “at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application”\(^{324}\) does not need to be buttressed by any recommendation from the Administrative Conference. In the process of judicial review of particular FTC orders, the courts will have occasion to elaborate the import of the *Broch* decision. As we have seen, the Commission’s orders have already encountered difficulties in the courts.

To help to make its orders as specific as possible, it has been recommended above that the Office of Consent Orders, the Office of the General Counsel and the Chief Economist should be asked to participate in drafting Commission orders. If, however, a majority of the Commission continues to reject Commissioner Elman’s plea in *Quaker Oats* that it “experiment on a trial-and-error basis” with the kind of affirmative orders he champions, the courts will never have an opportunity to pass on the validity of such orders. There is sufficient inherent uncertainty in orders under the Robinson-Patman Act\(^{325}\) not to overlook any opportunity to narrow the field of uncertainty.

With all due respect to the majority of the Commission, the argument that the Commission lacks authority to issue affirmative orders is not very persuasive. On occasion, the Commission has issued such orders and they have been sustained by the courts.\(^{326}\) It would seem that when the statutes speak of an order

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\(^{325}\) Professor Davis makes the point that it is often impossible for an FTC order under the Robinson-Patman Act to make certain the future application of the statutory defenses. Whether particular price differentials, for example, “tend to lessen, injure or destroy competition,” 1 *Davis*, op. cit. supra note 394, § 8.19, at 608, cannot be decided, if the facts about competition change after the order is issued, until the acts allegedly constituting a violation of the order occur. Then, too, the application of the cost justification and the defense of meeting in good faith an equally low price of a competitor, or the services or facilities furnished by a competitor, cannot be known until the time of the alleged violation. In all these cases, determinations presumably within the special competence of the Commission will be shifted to the courts in enforcement proceedings. See id. § 8.16.

\(^{326}\) In Vanity Fair Paper Mills, Inc., 1961–1963 FTC Complaints, Orders, Stipulations ¶ 15796 (1962), Commissioner Elman cited the following cases in which affirmative requirements in orders were sustained. *Keele Hair & Scalp*
to "cease and desist," they do not mean to deprive the Commission of the power to issue a mandatory injunction (as well as a prohibitory injunction) when necessary to assure that a violator will cease and desist from violating the law. Furthermore, on judicial review, the courts may exercise their inherent equity power to issue a mandatory injunction when they "enter a decree . . . modifying . . . the order of the commission." If so, there is little reason why the Commission may not issue an affirmative order at the outset, if the exigencies of the particular case so require.

If affirmative orders are deemed necessary to the effective administration of the statutes under the FTC's jurisdiction, doubts about their legal validity should not deter their use. If the courts should hold that the Commission lacks authority to use them, Congress should be asked to grant the requisite authority.

With respect to the wisdom of the use of affirmative orders, it would seem clear that a vague and uncertain order, which paraphrases the general statutory language and for the violation of which heavy civil penalties may be imposed, shackles the businessman to a much greater extent than an affirmative order offering positive guidance. In fact, if the procedure for securing compliance with an order is taken into account, it will be seen that the traditional cease-and-desist order, inevitably, has affirmative consequences. The Commission accompanies every cease-and-desist order with a requirement that the respondent file with the Commission a written report setting forth in detail

Specialists, Inc. v. FTC, 275 F.2d 18 (5th Cir. 1960); Mohawk Ref. Corp. v. FTC, 263 F.2d 818 (3d Cir.), cert. denied, 361 U.S. 814 (1959); New Am. Library of World Literature, Inc. v. FTC, 213 F.2d 143 (2d Cir. 1954); Aronberg v. FTC, 132 F.2d 165 (7th Cir. 1943). All involved requirements for disclosure in advertising.

In Rubber Mfrs. Ass'n, 1961-1963 FTC Complaints, Orders, Stipulations ¶ 15,657 (1962), it might be added, a consent order halted a price-fixing conspiracy by 14 tire and tube manufacturers accounting for substantially all of the industry's domestic production. The order required each manufacturer independently to review its prices "on the basis of its own costs, the margin of profit individually desired, and other lawful considerations" and "establish new [prices] on the basis of such an independent review," id. at 20495, and maintain them for a six-month period unless a change was required "in good faith to meet a competitive pricing situation." Since a consent decree is "adjudicatory rather than contractual in nature," ANTITRUST SUBCOMMITTEE REPORT 3, it would be improper for the Commission, for consent settlement purposes, to insist on an order which it is of the opinion it could not promulgate upon the termination of litigation.
the manner and form in which it has complied with the order. Obviously, the Commission expects the compliance report to recite what the respondent did affirmatively to bring himself into compliance. In practical effect, then, the issuance of a vague and general negative order merely postpones the problem of giving the order affirmative content until the compliance report stage.

Although the Second Circuit modified the original order formulated by the Commission in *Vanity Fair*, as indicated above, Judge Friendly replied to the respondent’s objections to that order in language which seems to say that the Commission’s compliance procedure remedies the deficiencies of an excessively vague and general order. Judge Friendly wrote:

> The difficulties respondent foresees in determining whether it is complying with the order seem factitious. The order contains the usual provision for the filing of a report of compliance, ... and it is scarcely likely that if respondent proposes a method of compliance which the Commission accepts, and thereafter follows it, the Commission will subsequently and without notice claim a violation entailing the civil penalties of 15 U.S.C. § 21(1). If at some future time respondent should desire to change to a procedure different from what it originally proposed, it need not proceed at its peril. The Commission’s offices will still be open for discussion, ... whether or not, as Commission counsel suggested at the argument, the further remedy of the declaratory order procedure of § 5(d) of the Administrative Procedure Act ... will also be available.\(^{327}\)

The position here taken by Judge Friendly, it is respectfully submitted, is at variance with that adopted by the Supreme Court in *Broch*. In *Broch*, it will be recalled, the Court underlined “the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.”\(^{328}\) The difficulty with Judge Friendly’s position is highlighted by not assuming, as Judge Friendly does, that the respondent proposes a method of compliance which the Commission accepts, but instead, a method of compliance which the Commission rejects. If the respondent insists upon his plan, he will run the risk of incurring severe penalties for violation of an order, the “meaning and application” of which, in the words of *Broch*, may not be “sufficiently clear and precise.” He can avoid this risk only by agreeing to whatever

\(^{327}\) *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480, 488 (2d Cir. 1962).

the Commission may demand by way of compliance. If the respondent is prepared to take his chances, he will force the Commission to run risks — the risk that the order may not "withstand [judicial] scrutiny" under Broch or that the courts will interpret the order in the manner urged by the respondent.

Commissioner Elman proposes to telescope the processes of formulating the order and passing upon the compliance report. In this way, the Commission would (1) avoid any problem under Broch; (2) give the respondent an opportunity to propose a plan for conforming with statutory requirements free of the coercion of an order which has already become final; and at the same time (3) obtain greater control over what is actually done by the respondent to comply with statutory requirements without having to resort to enforcement proceedings in which the contentions of the respondent might prevail. Furthermore, as Commissioners Elman and Higginbotham pointed out in connection with the recent action against the 248 wearing apparel manufacturers, Commission willingness to telescope the processes of formulating the order and passing upon the compliance report may encourage consent settlements and thereby help to promote the Commission's overall objectives.

Accordingly, it is recommended that the Commission should experiment with the use of orders which will inform the respondent of what he may and must do in order to discontinue his violation of the law and in the formulation of which the respondent will be given an opportunity to participate by being asked to propose an order containing a plan of compliance. As Judge Friendly remarked in Vanity Fair, "experimentation by the Commission in drafting orders along such lines would indeed seem useful . . . ."

IV. SUMMARY OF RECOMMENDATIONS

It is recommended:

GENERAL ORGANIZATION

1. The Commission should experiment with the organization of its work along major commodity-group lines. As a beginning,

329. Id. at 488. The Chief of the Division of General Trade Restraints agrees that "the use of affirmative orders should be encouraged." Wilson Memorandum. The General Counsel expresses "considerable misgivings" regarding the above recommendation, but gives only the following reason for his position:

Such experimentation may tend to confound and confuse, rather
one or two divisions should be given the responsibility to eliminate restraints of trade and deceptive practices in the markets for particular groups of commodities placed under their jurisdiction. These divisions should be headed by a businessman or an economist. A chief legal advisor should be assigned to each division.

**PLANNING**

2. The Bureau of Economics should make studies of market structures and practices, and of the effects of any applicable antitrust decrees, which will undertake to say (a) whether the existing structure and practices of particular markets are consistent with the goals of the antitrust laws; (b) if not, what kind of structure and behavior would be required to attain antitrust goals; and (c) by what means the required structure and behavior can be brought about.

3. The Program Review Officer should gather the views of the Bureaus and the General Counsel with respect to these economic studies and submit them to the Commission together with his recommendations for action. It should be his responsibility to recommend an annual program of activity consisting of (a) a system of priorities to govern the selection of areas in which the enforcement bureaus will operate; (b) a tentative statement of the objectives to be sought in these areas, including a delineation of the scope and content of the orders (whether obtained by consent or otherwise) that will be necessary to achieve these objectives; (c) a detailed prescription of standards to guide the bureaus in selecting the particular cases in which to proceed; and (d) a statement of the additional legislation, if any, needed to accomplish the planned objectives.

4. On the basis of the studies of the Bureau of Economics, than clarify enforcement, as the [Article] seems to expect. The more cumbersome the order, the more burdensome its interpretation.

*General Counsel's Memorandum.*

The Chief of the Division of Discriminatory Practices comments:

I . . . feel that it is completely inappropriate in a report of this kind to urge the Commission to issue any particular kind of order. This is a decision which can be made only by the Commission in determining, according to its best judgment, the proper means to secure compliance with the statute in the future. Recommendations can and perhaps should be made concerning procedures and organization, but the kind of order to be issued must remain within the provision of the Commission. These are not procedural suggestions—these are substantive suggestions and should be rejected as such.

*Mayer Memorandum.*
the views of the other Bureaus and the General Counsel and the detailed proposals of the Program Review Officer, the Commission should formulate its annual program.

5. The Commission should concentrate its efforts upon plans to eliminate deceptive practices which have national significance and, particularly, to police the national media of advertising. It should enlist the Attorneys General of the states and other state and local law enforcement agencies in the campaign to eliminate deceptive practices which do not have national import. To this end (a) the national Consumers’ Advisory Council should be requested to set up regional, state and local councils to aid in the campaign against such deceptive practices; if necessary, the mandate of the Council should be enlarged by the President to authorize these activities; and (b) the Commission should (1) designate its field offices (the number of which may have to be increased) to maintain liaison with the Attorneys General of the states and the regional, state and local consumers' councils; (2) designate the special assistant to the Chairman for consumer affairs to supervise the field offices in this work and maintain liaison with the national Consumers' Advisory Council; (3) authorize the trial of deceptive practice cases which do not have national significance before hearing examiners in the field offices; and (4) authorize the General Counsel to act for the Commission in advising states on the drafting of state laws to deal with the various matters covered by the federal statutes administered by the Commission.

6. To give the Bureau of Economics the insight into the operational problems of the Commission which is necessary for realistic planning and to make economic understanding the basis of every phase of the Commission’s work, the advice and assistance of the Bureau should be sought by (a) each operating bureau before it decides to launch an investigation or issue a complaint and when it is in the process of formulating a proposed order, negotiating a consent order, preparing the case for hearing, or investigating to determine compliance with an order which has been promulgated; (b) the hearing examiner, in the process of rendering the initial decision; and (c) the Commissioners, in all phases of their work, including rendering the final agency decision.

To help coordinate the work of the Bureau, its economists should be rotated periodically, so that each economist, within a number of years, may gain experience in all phases of the Bureau’s — and the Commission’s — work.
DELEGATION OF AUTHORITY

7. The Commission should delegate to the directors of its enforcement bureaus full authority to initiate investigations, issue subpoenas and orders for section 6(b) reports, close investigational files, issue complaints and negotiate consent orders, in any area of its jurisdiction as soon as it is able to prescribe, and has prescribed, policies and standards to control the exercise of delegated authority in that area. Adoption and implementation of the above recommendations for planning should make it possible to expand, progressively, the areas in which the Commission is able to prescribe such policies and standards and delegate full authority.

8. In areas in which full authority is not delegated under Recommendation 7, the Commission should (a) continue to approve the institution of every investigation requiring a significant amount of manpower; (b) review every proposal to issue a complaint in order to determine whether its issuance will be in the public interest, but not in order to determine, at this stage, whether it has reason to believe that a violation of law has been committed; (c) review every proposal to close an investigational file on the ground of lack of public interest, but not on the ground of insufficient reason to believe that a violation of law has been committed; (d) delegate to the directors of the enforcement bureaus, or to a single Commissioner, the authority to determine whether there is reason to believe that a violation of law has been committed for the purpose of deciding whether to issue a complaint or close an investigation without further Commission action; and (e) continue to approve every consent order.

CONSENT SETTLEMENT PROCEDURES

9. The Commission should consider the possibility of accepting written assurances of discontinuance as an additional means of settling cases of alleged illegal restraint of trade in which full-fledged investigations have not been made.

10. The Commission should promulgate and publish the standards that guide its determination as to when the nature of the proceeding and the public interest will not permit the use of the consent order procedure.

11. The Commission should permit prospective respondents to enter into full-scale negotiations with the Office of Consent
Orders and the Commission itself about the scope and content of proposed consent orders. In the course of these negotiations, the respondent should be permitted to present to the Commission any objections of fact, law or policy that he may have against the Commission’s proposed complaint and order.

12. In connection with significant consent orders in the restraint of trade area, the Commission should experiment with the policy of accompanying the consent order with an opinion setting forth (a) the facts of the case; (b) the respondent’s position; (c) the reasons why the Commission accepted the particular consent order; and (d) the meaning of the provisions of the order.

13. If the Commission rejects a consent order agreed to by the prospective respondent and the Office of Consent Orders, but instructs the Office to conduct further negotiations with the respondent, it should notify the Office and the respondent of the reasons why it rejected the agreement.

14. The Commission should experiment with the policy of publishing every consent order, agreed to by the prospective respondent and the Commission, in the Federal Register at least 30 days before its effective date. During this time, it should entertain and consider written comments on the order from any person and take whatever action it deems necessary in the light of these comments. The Commission should reserve the authority not to follow this policy in any case in which it determines that special reasons exist for making the consent order effective without delay.

TRADE REGULATION RULES

15. The Federal Trade Commission Act, the Clayton Act, and the Flammable Fabrics Act should be amended (a) to give the Commission express authority to issue substantive rules and regulations to carry out the provisions of these Acts; and (b) to make violations of such rules and regulations illegal per se, subject to a cease-and-desist order or to civil and criminal penalties or both. (As an alternative to (b), per se violations of such rules and regulations may be made subject to cease-and-desist order but not to penalties.) The rules and regulations shall be subject to judicial review, and become final, in the manner now provided for cease-and-desist orders.
ADVISORY OPINIONS

16. The Commission should adopt a general policy of publishing its advisory opinions, except those disclosing matters which the Commission decides should, in fairness, be kept confidential. An advisory opinion which was not made public when issued should be published as soon as the reason for keeping it secret no longer exists.

HEARING EXAMINERS

17. Professional staff assistance should be made available to the hearing examiners.

a. A staff of five law clerks should be attached to the Office of Hearing Examiners, subject to the general administrative supervision of the Director of the Office. The Director should be responsible for assigning a particular law clerk to a particular hearing examiner for a particular case. It should be the primary duty of the law clerk to assist the hearing examiner in the preparation of the initial decision; but he should also be available for assistance with respect to any other phase of the proceeding. The law clerk should be under the sole direction of the hearing examiner for the duration of the particular proceeding to which he has been assigned.

b. A staff of at least one economist and one accountant should be formed in the Bureau of Economics to assist the hearing examiners in analyzing the economic and accounting evidence and issues in the case.

c. The hearing examiners should also consult freely with the General Counsel, the Chief Economist and the Chief Accountant.

18. The Director of the Office of Hearing Examiners should be authorized to forward to the Commission, in writing, any suggestions with respect to the initial decision of a hearing examiner which he made to the examiner but which the examiner did not adopt and which he thinks should be brought to the attention of the Commission.

19. Whenever he thinks it advisable, the Chairman of the Commission should transmit to the Director of the Office of Hearing Examiners any criticism of a hearing examiner's initial decision voiced by any Commissioner but not reflected in the final Commission opinion. The Director should communicate the criticism to the hearing examiner involved. But this general arrangement should not preclude the Chairman from communi-
eating with the hearing examiner himself in any case in which he thinks it advisable.

20. A program should be devised for training new hearing examiners, in which the Commissioners themselves should participate.

21. The hearing examiners should also meet periodically by themselves and with the Commissioners to discuss common problems, new policies and future plans.

22. The Commission should consider moving the hearing examiners back to the FTC building.

PROCEDURE FOR REVIEW OF INITIAL DECISION

23. To administer the rules governing the petition for review in accordance with their provisions and purpose, each Commissioner should undertake to make the substantive determinations they require in each case.

24. The rules governing the petition for review should be amended to require the petitioner to file his exceptions to the initial decision together with his petition.

25. Whenever the Commission, on its own motion, decides to review an initial decision to which neither the respondent nor counsel for the complaint took exception, it should afford the parties an opportunity to be heard by the Commission before it sets aside the initial decision and enters an order which differs in any substantial respect from the hearing examiner's order.

26. Whenever the Commission, on review of an initial decision, materially alters the findings of fact, or the opinion, of the hearing examiner in ways which were not considered in the briefs of the parties or during the course of oral argument, the Commission should make it clear in its rules that it will issue a tentative decision to which the respondent will be given an opportunity to except, even if the changes do not affect the scope or content of the hearing examiner's order.

PROCESS OF DECISION-MAKING BY THE COMMISSIONERS

27. Prior to oral argument, the individual Commissioner to whom the case is assigned should prepare a memorandum setting forth (a) the issues of fact, law and policy in the case; (b) the arguments for and against the decision of the hearing examiner on each of these issues; and (c) analysis of the record on any issues of fact involved.
The memorandum should be submitted to each of the other Commissioners to help them prepare for the oral argument.

28. After the oral argument, the individual Commissioner to whom the case is assigned should revise the memorandum called for in recommendation 27 if, in the light of the oral argument, he thinks revision is necessary and should add to it his recommendations for the disposition of each of the issues of law, fact and policy in the case, together with his reasons therefor. The memorandum should be submitted to each of the other Commissioners. After the lapse of a sufficient period of time for individual study of the memorandum, the Commissioners should meet to discuss and vote on the final disposition of the case. The Commissioner who wrote the memorandum should then be asked, if he voted with the majority, to draft the Commission's opinion.

29. If it would become too burdensome to make Recommendations 27 and 28 applicable to each and every case decided by the Commission, the recommended memorandum-writing requirements should be dispensed with, in whole or in part, in any case in which three Commissioners—other than the Commissioner to whom the case was assigned—agree to the dispensation.

30. In the preparation of the memoranda called for by Recommendations 27 and 28, the individual Commissioner assigned to the case should consult with the Chief Economist and General Counsel. The other Commissioners should also consult with these officials. And the Chief Economist, General Counsel and Program Review Officer should be present, and prepared to state their views if called upon, when the Commission meets to discuss and vote on the final disposition of the case.

31. The Commission should consider the advisability of abolishing the Office of Special Legal Assistants, assigning one of the legal assistants to the personal staff of each Commissioner now using the Office and two of the assistants to the personal staff of the Chairman.

SEPARATION OF FUNCTIONS

32. The Director of the Bureau of Economics should also act as Chief Economist to the Commission.

33. The Director of the Bureau of Economics should not participate in the work of the Division of Economic Evidence on particular cases, but should rely upon the Chief of the Division, or an Associate or Assistant Director, to direct and super-
vise the work of the economists in the investigation and prepara-

tion for trial of individual cases.

34. Neither the Chief of the Division of Economic Evidence, nor any Associate or Assistant Director of the Bureau of Eco-

nomics designated to supervise his work, should advise the hear-
ing examiner, or assist him in any way, in reaching the initial
decision or advise the Commissioners, or assist any one of them
in any way, in reaching the final agency decision.

35. The members of the Bureau's staff of economists assigned
to assist the hearing examiners in analyzing the economic evi-
dence and issues in the case should be directed and supervised
either by the Director of the Bureau of Economics or an Associate
or Assistant Director who will not participate in directing or
supervising the work of the Division of Economic Evidence.

36. The Accounting Division should be transferred from the
Bureau of Restraint of Trade to the Bureau of Economics. Its
work should then be organized and supervised by the Chief Ac-
countant in much the same way that the work of the Division
of Economic Evidence would be organized and supervised by the
Chief Economist, if the Recommendations 32-35 are adopted.

FORM AND SCOPE OF ORDER

37. The Commission should experiment with the issuance of
affirmative orders that inform and direct the respondent not only
as to what he may not do, but as to what he may and must do
in order to satisfy statutory requirements.

38. The respondent should be given an opportunity to propose
an order containing a plan for compliance.

39. The Chief Economist, the General Counsel and the As-
sistant General Counsel for Consent Orders, should participate
in the drafting of the Commission's orders, whether arrived at
by consent or otherwise.