EXECUTIVE OFFICE OF THE PRESIDENT
PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION
WASHINGTON, D. C. 20506

July 13, 1970

MEMORANDUM

TO : The Council

SUBJECT: Independent Regulatory Agencies Presidential Memo

Here is your copy of the final Presidential memo and the staff working papers on independent regulatory agencies. These materials were forwarded to Peter Flanigan on Friday, July 10, 1970. We also sent a copy of the Presidential memo to John Ehrlichman. Copies of the cover memos to Messrs. Flanigan and Ehrlichman are also attached.

I will advise you immediately upon receipt of word on intended action from Flanigan or Ehrlichman.

Andrew M. Rouse
Acting Executive Director

Enclosures

EXECUTIVE OFFICE OF THE PRESIDENT
PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION
WASHINGTON, D. C. 20506

July 10, 1970

Mr. Peter Flanigan
Assistant to the President
The White House
Washington, D.C.

Dear Pete:

Attached is the Council's memorandum to the President on the regulatory agencies. Two copies of the staff working papers are also attached, as is the analysis you asked us to do of our interviews.

The staff, somewhat changed in its composition, is now working on revising the working papers so that they will be an intellectually respectable document for publication. To do this, we need to add considerable historical background, a description of the differences of the legal authorities of the various agencies, and a thorough review of the works of those who have commented on these agencies and their structure in the past. We are doing this work in anticipation that you will decide that publication is a proper tactic for obtaining public comment on these proposals. When you have a chance, I would appreciate knowing if you and your colleagues approve the idea of publishing these papers as modified.

Of course the Council is anxious to receive any feedback you care to give us, both as to your reaction to the proposals and those of your colleagues and, of course, the President.

It is also of some importance if the President does give tentative approval of any of these recommendations to bring the Office of Management and Budget into the picture quickly so that the necessary legislative drafting and ground laying with Congress can go forward.

In your memorandum to us of June 29, you asked that we brief Secretary Volpe on the Council's recommendations. We have not yet scheduled the briefing since we felt it would be best to wait until after we had delivered our memorandum to you and the President. After you have read the memorandum and have some feel as to how you would like us to proceed with such a briefing, we, of course, will do so immediately.

If you wish to discuss the Council's recommendations or if we may be of any assistance, please call.

Very truly yours,

Andrew M. Rouse
Acting Executive Director

Attachments

Complimentary copy of Presidential
Memo for Mr. Ehrlichman

EXECUTIVE OFFICE OF THE PRESIDENT
PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION
WASHINGTON, D. C. 20506

July 10, 1970

MEMORANDUM FOR MR. JOHN EHRLICHMAN

SUBJECT: Independent Regulatory Agencies

Attached is a copy of the Council's Memorandum to the President on the IRAs. Peter Flanigan, with whom we have discussed these recommendations, has received the originals for the President and will undoubtedly be following up with you.

Enclosure

Andrew M. Rouse
Acting Executive Director

EXECUTIVE OFFICE OF THE PRESIDENT
PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION
WASHINGTON, D. C. 20506

July 10, 1970

MEMORANDUM FOR

THE PRESIDENT

SUBJECT: The Independent Regulatory Agencies

This Council has completed its study of seven independent regulatory agencies (IRAs).

Interstate Commerce Commission
Civil Aeronautics Board
Federal Maritime Commission
Federal Power Commission
Securities and Exchange Commission
Federal Trade Commission
Federal Communications Commission

In the course of its examination, the Council has relied heavily on the work of other groups and individuals who have studied these agencies. We have also interviewed and drawn freely on the insights of experts in the regulatory process, members of Congress, and representatives of the regulated industries and the public.

The IRAs function in some, but not all, areas where economic regulation or consumer protection is considered necessary. They profoundly affect the economic and financial aspects of the regulated industries through the administration of statutes involving legislative, executive, and judicial tasks: (i) making rules and regulations; (ii) awarding licenses or routes; (iii) approving or establishing rates; (iv) approving certain acquisitions and mergers; (v) adjudicating disputes arising under the regulatory statutes; and (vi) acting as prosecutor and judge in enforcing regulatory statutes.

Although the IRAs are similarly organized, their roles in relation to their regulated industries are by no means identical, as illustrated by the following examples.

- Two (the SEC and FTC) are primarily law enforcement bodies.
- Four (the ICC, CAB, FPC, and FCC) grant franchises and control entry to regulated fields.
- Five (the ICC, CAB, FMC, FPC, and FCC) regulate rates.
- One (the FCC) functions in an area with an extraordinary degree of political and constitutional sensitivity.
- One (the CAB) has a specific statutory mandate to foster and promote the development of the airline industry.

We have concluded that significant changes in most of the agencies are desirable (see Tab A for alternatives considered but rejected). These changes fall into two categories - those which rearrange functions that are presently misaligned and those which deal with the inherent deficiencies of regulation by independent commission.

Recommendations to Realign Functions

There are at least four specific misalignments:

- Responsibility for regulating transportation is improperly fragmented among the ICC, CAB, and FMC.
- Responsibility for promoting transportation is unwisely divided between the CAB and the Department of Transportation.
- Responsibility for antitrust and trade practices enforcement is unwisely combined within the FTC.
- Responsibility for certain aspects of public utility regulation is unnecessarily divided between the FPC and the SEC.

These are discussed below.

Transportation Regulation. This nation has an organization, the Department of Transportation, which has the responsibility for national transportation policy. But the mission of DOT is impeded in part by the fact that the three independent agencies which regulate transportation

neither coordinate their regulatory activities among themselves nor with the Department of Transportation.

The separation of transportation regulation among three agencies might at its inception have corresponded to specific needs or inherent differences among the various modes of transportation; however, two central facts now require unified and coordinated transportation regulation. First, competition among modes of transportation, a fact for many years, is steadily increasing. Second, a shipper often uses, or would find it most advantageous to use, two or more different modes for a single shipment.

Competition between trucks and rails (ICC) has been apparent for 35 years. Competition between buses (ICC) and airlines (CAB) came into focus when youth fares were introduced only a few years ago. Finally, there are now indications that air freight transport (CAB) competes favorably with maritime shipping (FMC) for high rated traffic, and is threatening to divert large segments of similar traffic from domestic surface carriers (ICC).

Confronted with intermodal competition for freight and passenger traffic, of which the instances cited above are examples, the appropriate regulatory response should be to

optimize the national interest by assuring that this traffic is carried by the mode which economically and profitably provides the best service. This judgment can best be made by a regulatory agency with jurisdiction over all the modes.

Today, our transportation system is such that a shipper may be required or may wish to use more than a single mode. Under the present system of regulation, no single agency is in a position to encourage the regulated carriers to adopt uniform systems of establishing rates, classifying goods, and billing shippers. Thus, the shipper is confronted by a bewildering array of modes, commodity classifications, rates, terminal points, and billing systems, all making it difficult for him to secure comparative rates, conditions for alternative routes, and combinations for intermodal shipments.

We believe that a single transportation regulatory agency would best be able to encourage and require uniform practices throughout the industry. Additionally, in establishing routes and setting rates, it would determine which modes do the best job for the benefit of the industry and public alike.

Recommendation

We recommend that the regulatory functions of the ICC, CAB, and FMC be combined within a new Transportation Regulatory Agency.

Transportation Promotion. The Department of Transportation is concerned with developing and maintaining the national transportation system at a high level of service and to this end is vested with promotional functions which directly aid, support, and subsidize transportation. These include, for example, building public roads, controlling air traffic, and subsidizing the development of high-speed intercity rail passenger transport. We believe that DOT is the logical repository for these kinds of direct promotional functions since it is equipped to make the necessary trade-off decisions.

Regulatory agencies, on the other hand, perform functions, such as setting rates and assigning routes, which directly or indirectly affect the economic health of individual carriers and the transportation industry.

In the case of civil aviation, however, an important direct promotional function--granting subsidies to air carriers--has been vested in the CAB. The dual responsibilities of regulation and promotion do not comfortably co-exist

and sometimes force the Board to make a choice between the interests of its two constituencies, the carriers and the public. Transferring the subsidy granting power of the Board to DOT would relieve the Transportation Regulatory Agency of this conflict, as well as vest in a single organization, DOT, the responsibility for direct promotion of transportation.

Recommendation

We recommend transferring to DOT the CAB's subsidy granting responsibilities.

Antitrust Enforcement and Trade Practices. The Federal Trade Commission has two responsibilities--antitrust enforcement and consumer protection--which are essentially unrelated. There are several disadvantages in combining these functions.

Few administrators have both antitrust enforcement and consumer protection backgrounds; separation would permit each new agency to attract top people with expertise.

Antitrust experts would be able to pursue their responsibilities without diverting attention to, say, labeling of furs.

Consumer protection problems are generally susceptible to resolution by rules and regulations, while antitrust

cases are so complex and unique that they are often better dealt with case-by-case.

Finally, antitrust enforcement should be oriented toward in-depth economic research, centered in Washington, while consumer protection enforcement primarily requires field investigators, relatively few economists, and should be conducted principally from field offices.

Recommendation

We recommend that the FTC's antitrust enforcement responsibility be transferred to a new Federal Antitrust Board and the FTC's consumer protection responsibility be transferred to a new Federal Trade Practices Agency.

Public Utility Regulation. Each of the last three SEC chairmen has recommended transferring to the FPC the SEC's regulatory functions under the Public Utility Holding Company Act of 1935. There are several persuasive reasons which favor the transfer.

The principal purpose of the 1935 Act--eliminating or reorganizing the complex and financially unsound holding company structures of the 1920s--has been accomplished. The major problems of the gas and electric utilities are no longer those of corporate structure; rather, they now

relate to technology--problems of interconnections and coordination of electric power facilities so as to meet the power requirements of the nation.

The power regulatory agency is better staffed than the SEC to evaluate and act in these areas. In fact, the SEC has relied upon the FPC for technical assistance on these matters for some time.

The transfer would relieve the securities agency of a function relating to corporate structure in a particular industry, a function which is unlike the other responsibilities of the SEC.

Recommendation

We recommend that the regulatory functions of the SEC under the Public Utility Holding Company Act of 1935 be transferred to the power regulatory agency.

Recommendations Concerning IRA Structure

To move forward with the recommendations just described will not alone position the regulatory agencies for the tasks which lie ahead. The reasons additional changes are needed are inherent in the collegial form of organization.

Collegial bodies are by nature slow to meet the demands of a changing and challenged economy. The tempo of the

economy has steadily accelerated and the relationships between government and business have become increasingly complex and interdependent. These trends demand a more rapid and effective response to change than the process of collegial regulation permits.

Many of the authorities who have commented on the regulatory agencies, and most of those interviewed, cite the quality of personnel at both the commission and staff levels as the primary reason for the ineffective performance of the IRAs. While the reasons are complex, a root cause clearly emerges: many men of exceptional ability refuse to serve on collegial bodies where, by the nature of the institution, they may not be able to influence decisions to the extent they believe important. The fact that in many instances appointments have been made on grounds other than merit also inhibits good men from accepting or in some cases from being considered for such appointments.

There are other inherent organizational difficulties which make the collegial body an anachronistic form for economic regulation and consumer protection. Co-equal commissioners are too often unable to agree on major policies and priorities. The result is that the more efficient method of policy declaration through rules and regulations

is less frequently used than it might be, in favor of the more cumbersome case-by-case method. Thus, even qualified commissioners find it difficult to make a genuine contribution to the regulatory process.

The adversary procedure has become the normal way of life in the IRAs, creating wasteful case backlogs. These delays often produce irreparable harm to the regulated industry and to the public. And not infrequently, procedural delays are used by parties in interest to negate or stave off the consequences of regulatory decisions.

To overcome these delays, various reorganization plans theoretically have vested the commission chairmen with broad administrative powers. Yet the staff, as a practical matter, must still respond to each commissioner. Allocation of staff resources becomes more difficult to control, and delegation of authority to field offices is sometimes resisted when commissioners sense that such delegation may enhance the chairman's power.

Multi-member commissions, in addition, are by their nature subject to still other deficiencies. No single officer is clearly responsible and accountable for agency policies, operations, and decisions. Coordination of

policies with other agencies of government is, of course, extremely hard to achieve, given the need first to reach internal agreement.

Finally, the IRAs combine the roles of rule maker and prosecutor with the role of judge. At the very least, this combination of roles lays the commissions open to charges of unfairness and harrassment, contributing to the view within some of the regulated industries that the IRAs are interested primarily in the prosecutorial aspects of their regulatory responsibilities. In addition, it creates within the IRAs themselves a pressure for prosecution which would not exist to the same extent without the reinforcement and support provided by the agencies' judicial powers.

We have concluded that the most effective organization of regulatory agencies requires the implementation of the following recommendations.

- Regulatory agencies should be headed by a single administrator.*
- The judicial responsibilities of each IRA should be transferred to a new Administrative Court or the Federal District Courts.*
- In the areas of communications regulation and antitrust enforcement, there are overriding factors which have caused us to recommend retention of the collegial form.

*See dissent by Mr. Frederick R. Kappel, pages 30 and 31.

The first two proposals are not new in principle. As long ago as 1937, for example, the U. S. President's Committee on Administrative Management (the Brownlow Report) recommended:

> "The following proposal is put forward as a possible solution of the independent commission problem, present and future. Under this proposed plan the regulatory agency would be set up, not in a governmental vacuum outside the executive departments, but within a department. There they would be divided into an administrative section and a judicial bureau or division in the department, headed by a chief with career tenure and staffed under civil service regulation. It would be directly responsible to the Secretary and through him to the President. The judicial section, on the other hand, would be 'in' the department only for purposes of 'administrative housekeeping,' such as the budget, general personnel administration, and material. It would be wholly independent of the department and the President with respect to its work and its decisions. Its members would be appointed by the President with the approval of the Senate for long staggered terms and would be removable only for causes stated in the statute." p.41.

It is, of course, clear that our recommendations differ substantially from those of the Brownlow Committee, yet it illustrates that recommendations similar to ours were considered necessary over thirty years ago, even before the economy reached its present tempo.

Single Administrator. The single administrator form of administration is obviously not a panacea. Many a single-headed agency has floundered for lack of leadership. It is

conceded that an unduly aggressive administrator might attempt to seize an unwarranted amount of power. The President himself might be subjected to more criticism for the operation of the regulatory processes since his man alone would head the agency.

We believe, however, that replacing commissions with a single administrator who serves at the pleasure of the President, on balance, offers significant advantages.

- It increases the probability that superior executive talent will be recruited.
- It identifies the man responsible for agency policy and effectiveness.
- It contributes to regulatory policy formulation through rulemaking rather than through adjudication.
- It encourages better policy coordination with other agencies.
- It encourages more rapid recognition of structural and technological changes in the regulated industry and more expeditious response to the needs of the regulated industry and the public.
- It promotes more efficient use of staff through appropriate delegation of authority.

There was a time when the Congress itself performed most of the functions now performed by the regulatory agencies. As American society became more complex, it became necessary, despite the resistance of Congressional

traditionalists of that day, to delegate much authority to the IRAs, to be exercised within broad statutory guidelines.

For all their faults, the IRAs have done their job--a job that Congress simply could not have done. The multi-member, bipartisan form, designed to meet the doubts and fears of legislators, has by no means been a disaster.

Today, however, the potential inequity and inadequacy of regulation stems more from inefficiency and delay than from the charges of bias against a party in interest. The time has come, we believe, to take the next step, dictated by logic and demanded by a spiraling increase in the pace and complexity of the economy. That step is to vest in a single man the administrative responsibilities of each regulatory agency.

Judicial Functions. Transfer of the judicial functions of the transportation, power, and securities agencies to an Administrative Court, and of antitrust adjudication to the Federal District Courts also offers important advantages.

- It halts the practice in which the policy maker and prosecutor also decides the case.
- It increases the accessibility of the administrator and staff to the regulated industry, the public, the Executive Branch and Congress, since ex parte rules no longer apply.

- It creates a better judicial forum for the resolution of controversies arising under the regulatory statutes.

In making these recommendations we wish to underscore our belief that the quality of personnel is the overriding factor in the performance of the IRAs. To emphasize the need for and to encourage men of exceptional ability to seek and to accept appointments to these vital agencies is a prime objective of our recommendations.

Application of Structural Recommendations to Specific Agencies

The Transportation Regulatory Agency (TRA). We have recommended that the regulatory functions of the ICC, CAB, and FMC be consolidated into a single agency to be known as the Transportation Regulatory Agency. The TRA would be headed by a single administrator nominated by the President and confirmed by the Senate to serve at the President's pleasure. The administrator would be assisted by a deputy administrator for economics, a deputy administrator for policy and administration, and three assistant administrators responsible, respectively, for routes, rates, and industry structure (including finance). The deputy and assistant administrators also would be nominated by the President and confirmed by the Senate.

The administrator would be responsible for all executive functions of the TRA, including management, policy making, promulgating rules and regulations, assigning routes, approving rates, and reviewing proposed changes in industry structure.

In all these activities, the administrator would follow procedures now used by the CAB and the ICC in contested matters. The initial decision to award a route would be made by a hearing examiner. We suggest that the administrator be authorized, on his own motion, to modify the examiner's decision within 30 days, concurrently setting forth his reasons. This would assist the administrator in maintaining control over the policies of his agency. The examiner's decision, or the administrator's decision if he elects to modify the examiner's ruling, could be appealed by any aggrieved party to a three-judge panel of the Administrative Court and from there to the United States Supreme Court.

All judicial responsibilities of the ICC, CAB, and FMC would be transferred to the Administrative Court. Cases of the following kinds would be matters of first instance for the Court and would be tried before a single judge: (i) disputes arising under the regulatory statutes among members

of the regulated industries and between members of these industries and shippers, passengers, and others; and (ii) actions brought by the administrator to enforce the regulatory statutes or rules and regulations thereunder.

In addition, as noted above, upon request of any aggrieved party, the Court would have the authority to review decisions of the transportation administrator with respect to matters of fact and law to the extent provided in Section 10(e) of the Administrative Procedure Act (see Tab B).

Federal Power Agency (FPA). We recommend the establishment of a Federal Power Agency to replace the FPC. The FPA would be headed by a single administrator nominated by the President and confirmed by the Senate to serve at the pleasure of the President. He would be assisted by a deputy administrator and assistant administrators (not to exceed three in number), who would be similarly nominated and confirmed.

The administrator would promulgate rules and regulations, formulate policy, approve rates, grant licenses and permits, and decide all other administrative matters now under the jurisdiction of the FPC. The procedures to be used by the administrator in performing his functions would parallel

those of the transportation administrator. All adjudicatory responsibilities of the FPC would be vested in the Administrative Court in a manner similar to that of the transportation agencies.

Securities and Exchange Agency (SEA). We recommend that the Securities and Exchange Commission be redesignated the Securities and Exchange Agency. The SEA would be headed by a single administrator nominated by the President and confirmed by the Senate to serve at the President's pleasure. The administrator would be assisted by a deputy administrator for policy and administration, and three assistant administrators responsible, respectively, for the Divisions of Corporate Finance, Trading and Markets, and Corporate Regulation. The deputy and assistant administrators would also be nominated by the President and confirmed by the Senate.

The administrator would be responsible for all executive functions of the SEA including internal management, policy making, summary actions not requiring notice and a hearing, promulgation of rules and regulations, granting exemptions, reviewing disciplinary actions taken by a registered securities association against its members, suspending (for periods of ten days, as provided by statute) trading in

certain securities, analyzing the problems of the securities industry and making appropriate remedial recommendations, and acting against violations of statutes and rules and regulations administered by the SEA.

All adjudicatory responsibilities of the Securities and Exchange Commission would be transferred to the Administrative Court, as would adjudication of all cases which the Commission now brings in Federal District Courts; i.e., suits to enjoin violations of a statute or suits to require attendance and testimony of witnesses.

These would be cases of first instance and would be tried before a single judge of the Administrative Court. Any person aggrieved by a decision of an Administrative Judge could obtain review in any United States Court of Appeals having jurisdiction.

We do not recommend that the Administrative Court adjudicate cases by private parties seeking recovery for violations of a securities statute. To centralize adjudication of such cases in Washington would create unnecesary and unacceptable burdens when all of the parties involved are located in other sections of the country. Therefore, we recommend continuation of the present practice of adjudicating such cases "in any court of competent jurisdiction."

Any person aggrieved by an order issued by the administrator could obtain review of the order before a three-judge panel of the Administrative Court. Appeals from such decisions of the Administrative Court would be to the United States Supreme Court.

Administrative Court of the United States. We have recommended the transfer of the judicial functions of the transportation, securities, and power regulatory agencies to a newly created Administrative Court of the United States. These functions, together with authority to review actions of the transportation, securities, and power administrators would comprise the responsibilities of the Administrative Court.

We suggest that the Court be established initially with 15 members. Each administrative judge would be nominated by the President and confirmed by the Senate for a 15-year term. The initial appointments to the Court should be on a bipartisan basis. Subsequent appointments, however, should not be subject to such a requirement.

Federal Antitrust Board (FAB). We have recommended separation of the antitrust enforcement and consumer protection responsibilities of the FTC. All antitrust

enforcement responsibilities would be vested in the Federal Antitrust Board, with adjudication transferred to the federal courts.

The board would have three members, a chairman and two economic administrators.

Each member of the board would have specific responsibilities.

- The chairman would have responsibility for all executive functions of the FAB. He would decide which cases to investigate, he would be the public spokesman for the agency, and he would supervise the agency as a whole, including the Bureau of Economics.

- Under the general direction of the chairman, the economic administrator heading the Bureau of Economics would be responsible for staffing the Bureau, and would see that the board received such economic analyses as it may require.

- The second economic administrator would be appointed from the President's Council of Economic Advisers. He would provide economic advice to his two colleagues and vote with them on decisions to prosecute antitrust violations.

A three-member board, having two economists, is recommended in order to insure that the prosecutory role does not unduly dominate the economic analysis function.

We have recommended that a member of the CEA serve on the board because he would be a top-notch economist, he

would understand the economic problems of the national economy in general, not just antitrust matters, and he would further demonstrate the importance of economics in the work of the FAB. Finally, we propose that a member of the CEA be placed on the board because the third member of the board is needed only for limited functions, and a member of the CEA would have other major responsibilities to occupy most of his time.

The chairman and the economic administrator heading the Bureau of Economics would be nominated by the President and confirmed by the Senate to serve at the pleasure of the President. The economic administrator designated by the President from among the members of the CEA would not require a second Senate confirmation.

Currently, the FTC prosecutes antitrust violators by seeking a cease and desist order from one of its hearing examiners. Appeals from the decision of an examiner are to the full commission, and then to the appropriate United States Court of Appeals and the United States Supreme Court.

We believe that prosecution and adjudication of antitrust cases should be separated. We recommend that adjudication of the antitrust cases of the FAB be vested with the Federal District Courts, with appeals to the appropriate

United States Court of Appeals and the Supreme Court. Both the Department of Justice and the FAB would thus use the same courts to adjudicate antitrust cases, courts which our analysis has found to perform efficiently in these matters.

The creation of the FAB would continue the traditional dual enforcement of several antitrust statutes such as Section 7 of the Clayton Act, which prohibits certain corporate acquisitions and mergers. To avoid unnecessary confusion as to whether the Department of Justice or the FAB would enforce a particular type of violation of a statute such as Section 7, the two agencies should agree to an appropriate division of responsibility.

We considered merging all antitrust enforcement into the Department of Justice. We have concluded, however, that it is preferable to create the FAB, continuing dual antitrust enforcement. The principal function of the FAB which would distinguish it from the parallel antitrust enforcement role of the Department of Justice, would be to implement antitrust policy based upon in-depth analysis of economic matters and consideration of long-term economic trends.

The FAB, through its Bureau of Economics and its economic administrators, could provide a valuable educational service to the business community and to Congress in determining which business practices are, and which are not, detrimental to the health of the economy. It should provide effective antitrust enforcement if, at any time, the Department of Justice did not adequately perform this function. The FAB would provide a healthy diversity of approach in the constantly changing field of antitrust theory.

Federal Trade Practices Agency (FTPA). All consumer protection responsibilities of the FTC (Truth-in-Lending, Fair Packaging and Labeling, False and Deceptive Acts and Practices, etc.) would be transferred to a Federal Trade Practices Agency, headed by a single administrator. The administrator would have complete responsibility for administering the FTPA, for promulgating rules and regulations, and for prosecuting violations of the consumer protection statutes or FTPA regulations. As the FTPA proves its effectiveness in enforcing consumer protection laws and regulations, it may be desirable to transfer consumer protection responsibilities from other agencies and offices to the FTPA.

All FTC consumer protection suits for cease and desist orders currently are tried before one of the 11 hearing

examiners assigned to the FTC. Appeals from the examiner's decision are to the full commission and then to the United States Court of Appeals and finally to the Supreme Court. Adjudication of all other cases; i.e., temporary injunctions, seizures, and enforcement of orders and subpoenas are tried in Federal District Courts, with appeals to the United States Courts of Appeals and then to the Supreme Court.

We recommend retention of the same basic methods of adjudication of the consumer protection cases at the FTPA, except that appeals from decisions of a hearing examiner, in a cease and desist order case, would be to a single judge of the Federal District Court and not to the prosecutory officer of the regulatory agency. This is to achieve complete separation of prosecution and adjudication.

It would be possible to assign the initial adjudication of all cases, including cease and desist order cases, to the Federal District Courts; however, we believe it is advisable to continue the use of hearing examiners in the consumer protection adjudicatory process.

- Hearing examiners should be stationed throughout the United States, at the field offices of the FTPA, in order to provide a quick and basically informal response for the resolution of consumer protection disputes.

- Many consumer protection problems do not involve large sums of money and require what often amounts to arbitration (a service which a hearing examiner could provide) rather than complex and expensive adjudication of the federal courts.

As the use of hearing examiners proves effective, we would anticipate a broader use of this form of adjudication.

We do not recommend that consumer protection cases be adjudicated in the Administrative Court because such cases generally would not be unduly complex and technical and also would not require the same degree of consistency of results as transportation, power, and securities cases. In addition, it would be inadvisable to require adjudication of all consumer protection cases in Washington, D. C., rather than at the local level.

The recent reorganization of the FTC is a constructive step forward and it may represent about the maximum internal reorganization that the chairman of an IRA can achieve. We do not believe, however, that it has gone far enough to remedy the ills which plague the FTC, or indeed any IRA.

Retention of a Collegial Form for the FCC. Contrary to our views as to the other IRAs, regulation of communications poses special problems which we believe require the

retention of a bipartisan collegial body. The regulation of broadcasting--both through the assignment of licenses and the authority to review programming decisions--carries within it the seeds of a threat to the industry's independence. Appointing a single administrator with the power to reward and punish might severely compromise the public's confidence in the objectivity of nongovernmental sources of information. It would also be a standing invitation to charges of improper influence in this sensitive area.

In our view a multi-member, independent, and bipartisan body with all of its ills, continues to offer the best guarantee that this special type of regulation may be continued without such intrusion. Unique considerations of public policy outweigh the gains which could be achieved by the single administrator form of organization.

We believe, however, that improvement would result from reducing the number of commissioners from seven to five. This should speed up the working processes of the commission, and make it somewhat more responsive to technological change. It also may slightly enhance the ability of the President to recruit talented people to serve as

commissioners. In short, we believe that five members are bound to function with less institutional waste than seven.

Recommendation

We recommend that the number of commissioners for the Federal Communications Commission be reduced from seven to five and that their terms of office be reduced from seven to five years.

Conclusion

In assessing the performance of the IRAs, the Council has placed primary weight on changes designed to secure:

- Placement of functions to reflect the current structure and needs of each regulated industry.
- High quality of leadership.
- Separation of the prosecutory and adjudicatory functions.

Where a collegial body, such as the proposed Federal Antitrust Board, appeared to offer advantages without great countervailing deficiencies, we have recommended its creation. In the case of the FCC, where the use of a single administrator may be perceived as a potential threat to the independence of broadcasting, we have retained a bipartisan collegial commission.

It remains true, however, that the organizational improvements we have recommended will be ineffective unless highly qualified people can be found and persuaded to accept positions as administrators, administrative judges, and where collegial bodies have been retained, as commissioners.

Respectfully submitted,

Roy L. Ash*
Chairman

Frederick R. Kappel*, **
Member

George P. Baker*
Member

Richard M. Paget
Member

John B. Connally
Member

Walter N. Thayer*
Member

*To avoid any question of conflict of interest, Mr. Ash did not participate in the Council's discussions, deliberations, or recommendations with respect to the Federal Trade Commission, Mr. Kappel with respect to the Federal Communications Commission, and Mr. Thayer with respect to the Federal Communications Commission and Federal Trade Commission (see Tab C for the letters of disqualification). Dr. George Baker disqualified himself from the entire study of the IRAs. He did not participate in any of the Council's discussions, deliberations, or recommendations on this matter.

**Mr. Kappel makes the following statement concerning the recommendations found on page 12 for a single administrator and an Administrative Court:

"I do not share the judgments of my associates in recommending a single administrator and a separate Administrative Court. These proposals reflect their belief that they will bring about a greater capability of administration and improved decision processes. There is no certainty that these proposals will lead to more effective administration. The economic and technological aspects of transportation and power regulation are more complex than other industries studied. The problems raised in the regulation of these former industries cannot be resolved entirely in the atmosphere of an Administrative Court. I fear that this will be the result of the changes proposed by my colleagues.

I agree, however, along with my colleagues that we should emphasize the need to encourage men of exceptional ability to seek and accept appointments to these vital administrative posts as a prime objective of our recommendations. But, I would suggest that more careful attention to the selection of commissioners and other key personnel is as likely to improve the administrative process as is the single administrator and the Administrative Court.

In my opinion, it would be more appropriate to implement these proposals in one administrative agency, the FTC would be my selection. These innovations may then be studied carefully before any attempt is made to implement them elsewhere."

TAB A

Other Organizational Alternatives Explored

In coming to our conclusions, we considered retaining the status quo for each IRA; additionally, we considered the following alternatives.

A. Transportation.

1. Retention of separate agencies (ICC, CAB, and FMC), each being administered by a single administrator with adjudication vested in the Administrative Court.
2. Merging the ICC, CAB and FMC into the Department of Transportation.
3. Merging the ICC, CAB, and FMC into a single regulatory commission.

B. Antitrust and Consumer Protection.

1. Separation of the antitrust and consumer protection responsibilities of the FTC and transferring all antitrust to the Department of Justice and all consumer protection to the Federal Trade Practices Agency.
2. Retaining both antitrust and consumer protection responsibilities in a three-man FTC, reorganized in the form of the Antitrust Board, while transferring antitrust adjudication to the Federal District Courts.
3. Abolishing the FTC and transferring all antitrust responsibilities to the Department of Justice and all consumer responsibilities to the Department of Justice, HEW, FDA, etc.

C. Communications.

1. Vesting the functions of the FCC in a single administrator, redesignating the agency as the Federal Communications Agency, and transferring adjudication to the Administrative Court..

D. As a means of improving the quality of personnel nominated to serve as IRA commissioners, the Council considered:

1. Reducing the number of commissioners to five or three.

2. Establishing a Nominating Board which would prepare lists of qualified individuals from which the President would make appointments to the commissions.

3. Several procedures in which the regulated industry would draw up lists of individuals who could serve as commissioners.

TAB B

Section 10(e) of the Administrative Procedure Act

Section 10(e) of the Administrative Procedure Act, 5 U.S.C.A. 706, provides:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."