

Michigan Law Review

Volume 68 | Issue 1

1969

Cox, Fellmeth, Schulz: The Consumer and the Federal Trade Commission

Ernest Gellhorn
Duke University

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Administrative Law Commons](#), and the [Consumer Protection Law Commons](#)

Recommended Citation

Ernest Gellhorn, *Cox, Fellmeth, Schulz: The Consumer and the Federal Trade Commission*, 68 MICH. L. REV. 151 (1969).

Available at: <https://repository.law.umich.edu/mlr/vol68/iss1/5>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

RECENT BOOKS

BOOK REVIEWS

THE CONSUMER AND THE FEDERAL TRADE COMMISSION. By *Edward Cox, Robert Fellmeth, and John Schulz*. Pp. 161. [Reprinted 115 CONG. REC. E370-99 (daily ed. January 22, 1969).]†

Many turbulent events crowded the summer of 1968. Student power competed with black power for public attention, and participatory democracy vied with street confrontations for student involvement. At the same time, another, and less spectacular, student movement also had its beginning. While some of their brethren were urinating into paper sacks or taunting police into unjustifiable riot, seven law students¹—dubbed “Nader’s Raiders” because they operated with the guidance of consumer champion Ralph Nader—sweated through a Washington summer examining the performance of the Federal Trade Commission as the protector of the American consumer. Their report, released in January 1969, drew headlines and evoked favorable editorial comment; indeed, the American Bar Association’s study of the FTC, undertaken at President Nixon’s behest, seems a by-product.² This past summer dozens more students flocked to Washington to study, under Nader’s leadership, several other governmental departments; reports dealing with those agencies are promised.³

The report on the FTC is the subject of this Review. I was hesitant to write the Review, not because criticizing Ralph Nader may be unpopular (although it does seem rather foolhardy to question the wisdom of one portrayed in shining armor on the cover of a national news magazine), but because the efforts of Nader’s students were directed toward improving the system, not toward destroying it. They did not “cop out”; they did not picket or engage in violence. Instead, they studied first and then wrote a report. Even so, the students are not above criticism. Their verdict was

† John E. Schulz, the Project Director and now an Assistant Professor at the University of Southern California Law Center, announced at a recent consumer law conference that this report would be published, probably under the title, “The Nader Report.” One of his co-authors indicated that it was to be published in September 1969 by Baron Press, New York. Fellmeth, *The Freedom of Information Act and the Federal Trade Commission: A Study in Malfeasance*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 345 n.1 (1969).

1. These students were all from Harvard and Yale; two of the seven graduated from law school in June 1968 before commencing the FTC study, and one entered law school after his summer experience.

2. The ABA-appointed commission issued its report as this Review was in the final stages of preparation. I have seen only a summary of that report, but it does not appear to dispute the basic complaints broadcast by Nader’s students.

3. Recent press conferences and releases indicate that this year’s studies will be even more critical. In fact, some agencies have already been stung to action. See, e.g., Washington Post, Sept. 7, 1969, § A, at 1, col. 3.

harsh: they found the Commission's performance in the consumer arena to be "shockingly poor"; they suggested to the FTC chairman, Paul Rand Dixon, that he quit; and they concluded that the current system requires substantial overhaul.⁴ Such judgments demand critical analysis.

The Nader Report begins by noting that its scope is limited to the FTC's "consumer protection activities" both under the FTC Act,⁵ which prohibits deceptive practices⁶ and false food and drug advertisements,⁷ and under specialized statutes which condemn flammable fabrics and mislabeled furs and textiles.⁸ The report concedes that it has ignored the Commission's "equally large and important . . . antitrust duties" (p. 4, p. E370)⁹—apparently on the assumption that such activities have a less direct and immediate impact on specific consumer transactions, and are therefore less significant to the consumer, than consumer protection activities. I wonder.

Aggressive prosecutions of deceptive practices and false advertising may improve the consumer's lot in the short term; but even Professor Galbraith does not dispute the fact that the single most important element determining the consumer's fate is control of the basic structure of the American economy, and that such control is the major thrust, if not always the impact, of the antitrust laws.¹⁰ As the current inflationary surge has clearly demonstrated,¹¹ relative prices and price rises are the primary determinants of consumer prosperity. It is precisely at that level that effective antitrust enforcement can have substantial impact. Several studies support this point. One such study, for example, estimates that the lost output which results from the existence of monopoly costs the American economy six per cent of national income annually—about 45 billion dollars

4. After reflection, the students went even further and called for the abolition of the FTC in order to make way for a fresh beginning. BNA ANTITRUST & TRADE REG. REP. No. 402, at A-12 (March 25, 1969) (testimony before Senate Government Operations Subcomm.).

5. 15 U.S.C. §§ 41-58 (1964).

6. 15 U.S.C. § 45(a)(1) (1964).

7. 15 U.S.C. § 52 (1964).

8. 15 U.S.C. §§ 68-70k, 1192 (1964).

9. The Commission's original jurisdiction over advertising was "a fortuitous by-product" of Congress' concern with restraints on trade. G. HENDERSON, THE FEDERAL TRADE COMMISSION 1-48, 339 (1924). If recent appropriations are a guide, Congress has increasingly viewed the Commission's antitrust mandate as its primary responsibility. See, e.g., LEGISLATIVE REFERENCE SERVICE, REPORT TO HOUSE SELECT COMMITTEE ON SMALL BUSINESS, CONGRESS AND THE MONOPOLY PROBLEM 550-51 (1966).

10. J. GALBRAITH, THE NEW INDUSTRIAL STATE (1967). The report's explanation that the "current crisis" in the American economy is the result of the rise of large corporate enterprises seems to concede, or at least to support, this conclusion.

11. NEWSWEEK, Sept. 15, 1969, at 74.

per year.¹² When applied to all consumers, that amount is four times what it would cost to assure every American family an annual income of 3,000 dollars.¹³ Other commentators have found even that estimate conservative; they have shown that the cost of monopoly reflected in inflated production costs,¹⁴ in the suppression of technological innovations,¹⁵ and in the redistribution of income from the poor to the rich,¹⁶ is of a much greater—in fact, staggering—magnitude.

In fairness, I do not judge the FTC study by what it expressly does not cover. But the omission of the FTC's antitrust enforcement cannot be completely overlooked. Despite the students' claims to the contrary, the Commission's activities in the "consumer protection sphere" cannot be fairly evaluated purely on the basis of its deceptive advertising regulation. Law students are not graded solely on incoherent class performance, and lawyers do not rest a case with one witness; similarly, the Commission's consumer protection actions should be judged on total performance. Nevertheless, if the Commission's antitrust performance were as unproductive as this report judges its "consumer" activities to be, I might be less inclined to quarrel with the students' sweeping condemnation of Chairman Dixon and his colleagues. Current evidence, however, suggests that at least some FTC antitrust enforcement has significantly benefited all consumers. An example is the tetracycline price-fixing conspiracy which lasted from 1953 to 1966. During that period, drug manufacturers did virtually no research in "broad spectrum" drugs, whereas during the five preceding years three of the firms involved had introduced four such drugs. More important from the consumer's view, developments occurring after 1966, when the FTC ordered that the collusion cease, strongly suggest that the pace of innovation has quickened.¹⁷

12. D. Kamerschen, *An Estimation of the "Welfare Losses" from Monopoly in the American Economy, 1964* (unpublished doctoral dissertation available at Michigan State University), discussed in *Foreword*, 1 ANTITRUST L. & ECON. REV. 1 (Summer 1968) and *Foreword*, 2 ANTITRUST L. & ECON. REV. 1, 2 (Fall 1968).

13. See *Foreword*, 2 ANTITRUST L. & ECON. REV. 1, 2 & n.4 (Fall 1968).

14. W. Erickson, *Price Fixing Under the Sherman Act: Case Studies in Conspiracy, 1965* (unpublished doctoral dissertation available at Michigan State University) discussed in *Foreword*, 2 ANTITRUST L. & ECON. REV. 1, 2 (Fall 1968). That study found that in the industries examined, conspiracies inflated prices by 35% and costs by 23% above preconspiracy, that is, competitive, levels.

15. Costello, *The Tetracycline Conspiracy: Structure, Conduct and Performance in the Drug Industry*, 1 ANTITRUST L. & ECON. REV. 13 (Summer 1968).

16. *Foreword*, 2 ANTITRUST L. & ECON. REV. 1, 3 (Fall 1968); Shepherd, *Conglomerate Mergers in Perspective*, 2 ANTITRUST L. & ECON. REV. 15 (Fall 1968); Martin, *Comment*, 2 ANTITRUST L. & ECON. REV. 43 (Fall 1968). *Contra*, Weston, *Comment on Professor Shepherd's Conglomerate Mergers in Perspective*, 2 ANTITRUST L. & ECON. REV. 33 (Fall 1968).

17. See Costello, *supra* note 15.

After discussing the scope of its concern, the Nader Report concentrates on the FTC's efforts to stamp out deceptive practices, but, in that regard, the picture it draws is more of foot-dragging than of foot-stamping. The students begin with the premise that the agency has failed abysmally in fulfilling its responsibilities to consumers. Their aim is a call for action. But despite their obvious bias and prejudice, the authors present a persuasive case. They demonstrate that the Commission's method of detecting violations by relying on the mailbag for complaints is inadequate; and they point out that the FTC frequently issues complaints only because of congressional pressure, and that those complaints are usually against industrial pygmies who have committed trivial or marginal violations. They attack the Commission's prosecutorial delay, during which the violator can continue to profit from his deceptions, and its system of issuing unsupervised decrees, which permit the convicted to go free after a meaningless tongue-lashing. The report analyzes these deficiencies in painful detail. The pain comes not from the report's statistical and analytical methodology, which in general appears accurate and reliable; but rather from the stark realization that the Commission lacks a program to detect law violations, is unable to develop prosecutorial priorities, and engages in no sustained effort to make its orders meaningful by continued vigilance.

Some might object that many of these facts have been exposed before. Indeed, the FTC's preoccupation with trivia, its inordinate delay in adjudicatory hearings, its fetish for secrecy, and its failure to develop specific and sound policies are common complaints.¹⁸ But the Nader Report does not stop with re-examining timeworn charges. It marks the first time that anyone has so openly or authoritatively condemned the misdirection and misuse of FTC power, the staff's demoralized condition, or the Commission's political backscratching with Congress and industry. Last year's quixotic decision to open an FTC field office in Oak Ridge, Tennessee, provides an example.

18. COMM. ON INDEPENDENT REGULATORY COMMISSIONS, U.S. COMM. ON ORGANIZATION OF THE EXECUTIVE BRANCH, REPORT 125 (Hoover Commn. Task Force Report, app. N, 1949):

As the years have progressed, the [Federal Trade] Commission has become immersed in a multitude of petty problems; it has not probed into new areas of anticompetitive practices; it has become increasingly bogged down with cumbersome procedures and inordinate delays in disposition of cases. . . . The Commission has largely become a passive judicial agency, waiting for cases to come up on the docket, under routinized procedures, without active responsibility for achieving the statutory objectives.

See, e.g., H.R. REP. NO. 2235, 86th Cong., 2d Sess. 35 (1961); H.R. REP. NO. 3236, 81st Cong., 2d Sess. 16-20, 84-88 (1951); Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383 (1964); Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U. CHI. L. REV. 113, 157-77, 181-83 (1968); Note, *The Federal Trade Commission and Reform of the Administrative Process*, 62 COLUM. L. REV. 671, 700-03 (1962); *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1063-97 (1967).

To the outsider it appeared to be a sensible attempt to reach out to the rural consumers who were not served by most field offices.¹⁹ But Nader's probing students offer a more plausible explanation. They state that the office was created to satisfy the needs of an unemployed political friend of Congressman Joe Evins of Tennessee, the chairman of the House appropriations subcommittee which approves the FTC's budget. One might wish for additional documentation of such personal and political charges, especially since many are so damaging. On the other hand, it is surprising how much material the students did unearth in three months, since they lacked the subpoena power or the other sanctions of an official investigatory body.

Unfortunately, these strengths are often marred by the report's substantial defects. Substance can be ruined by style, and loose charges will destroy the soundest case. The students are not careful advocates. Their conclusions tend to outrun the evidence they have marshaled, and, in some cases, their suggestions seem wholly unrelated to what has gone before. They foolishly rely on intemperate rhetoric designed to raise hackles rather than to persuade doubters. Calling for Chairman Dixon's scalp may be effective headline hunting, but the educated lawyer eschews such tactics. Moreover, it is unfair to excoriate Dixon as the sole villain. His authority is not without check, and the other commissioners are equally responsible for whatever consumer record the FTC has compiled.

If the students' judgment is correct, the Commission's record is a sorry one; but the documentation in their report is far too incomplete to support any valid conclusion. Of course, waiting until "all the evidence is in" would require that one's judgment remain suspended forever, and change would never come. But it is equally objectionable to present, as an objective analysis, a study which makes no mention of the pro-consumer efforts which the FTC has made—efforts that must be considered substantial even if one accepts the students' decision to disregard the antitrust area completely.²⁰ Surely, a middle ground was available. Nor does it seem fair to judge

19. The Commission's other general field offices are located in metropolitan areas, yet they are geographically dispersed in order to enable investigation of possible violations throughout the nation. Although there are twelve offices, there is none between Kansas City and the West Coast, and cities such as Detroit and Philadelphia do not have FTC offices.

20. See, e.g., *Crowell-Collier Publishing Co.*, 3 TRADE REG. REP. ¶ 18,684 (FTC 1969); *Leon A. Tashof*, 3 TRADE REG. REP. ¶ 18,606 (FTC 1968); *Consumer Prods. of America*, 3 TRADE REG. REP. ¶ 18,059 (FTC 1967), *aff'd.*, 400 F.2d 930 (3d Cir. 1968), *cert. denied*, 393 U.S. 1088 (1969); *Empeco Corp.*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,859 (FTC 1967), *affg.* [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,805 (Hearing Examiner 1966); FTC, ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS (1968); FTC, REPORT ON THE DISTRICT OF COLUMBIA CONSUMER PROTECTION PROGRAM (1968); FTC, *Notice of Hearings on National Consumer Protection and Education*, 33 Fed. Reg. 15,232 (1968).

the FTC's past performance by today's consumer standards. Consumerism's rise as a potent political force is of recent origin, and in a democratic society a federal administrative agency is, and should be, limited by the bounds of political reality.

The authors' harshest judgment is rendered against the FTC staff, which is labeled an inept group of lazy political cronies. Much of the supporting evidence, particularly with regard to the General Counsel's office, seems indisputable; indeed, the Commission's recent change of General Counsel may be a concession of that point. Some of their argument, however, is pure rubbish. For example, the report, reversing the traditional American ethic, condemns the fact that the chief hearing examiner and most bureau chiefs are small town natives. They are said to be insensitive to the consumer problems facing urban residents. Yet nowhere is it established, nor can it be, that being born or raised in a large community provides special wisdom in ferreting out deceptive practices which flourish in the big cities.²¹

The report also condemns the Commission's hiring practices, particularly its failure to hire minority group attorneys and graduates of prestige law schools. That attack, too, is unfair—at least on the basis of the support offered in the report.²² The allegation that the Commission has not sought or hired minority group attorneys relies on incomplete information. At the time of the report there were five black attorneys on the staff of the FTC not three, as the report alleged.²³ In any event, it is misleading to suggest that this issue can be tested solely by reference to the number of black lawyers on the staff or to the number of visits made to Howard Law School. The Commission's competitive salary position vis-à-vis that of the Justice Department, the attractiveness of the FTC's available positions in relation to competing government positions,²⁴ and similar factors need to be explored before such severe judgments can be rendered. The attempt to show anti-prestige-school bias is equally weak. For example, it relies in part upon irrelevant data such as Law School Admission Test scores, which are designed to predict academic success in law school, not to measure either academic prowess or trial talent. Furthermore, the figures are too fragmentary to substantiate the charge.

Most disappointing is that solid investigation is too often fol-

21. Applying this special brand of logic to the authors, of course, would mean that they have neither the expertise nor the experience—whether as regulators, as attorneys, or as poor consumers—to evaluate the Commission's performance.

22. In fact, the latter charge seems to reflect the disappointments of these Harvard and Yale students—none of whom, incidentally, is black.

23. Statement of Paul Rand Dixon, 115 CONG. REC. E399, E400 (daily ed. Jan. 22, 1969).

24. It is probably true, for example, that the FTC could more easily recruit black attorneys if it had a civil rights division.

lowed by ill-conceived and unrelated suggestions. The proposal to which the report gives first priority supplies the most obvious illustration. The students urge that the Commission, as its primary task, attack motivational-research advertising, since such advertising distorts consumer choice and demand. But it is never made clear just why priority should be given to prohibiting advertisements which use subtle, psychological appeals and which rely upon strongly irrational forces of human personality. The lack of supporting argument makes the conclusion especially questionable in light of the report's concession that such advertisements may not constitute either a "deceptive" or an "unfair" practice. Indeed, the students' advice seems to be about as bad as one could possibly give the Commission today. It is true that if the FTC were to follow this advice, the noneconomic differentiation that such subtly persuasive advertising creates among closely related products would be removed from the competitive market. At first blush, that potential benefit seems to meet my earlier criticism that the report gives too little emphasis to the consumer benefits which result from the prosecution of anticompetitive forces.²⁵ But the primary thrust of my suggestion was against aggrandizement and abuses of market power. The authors' major focus seems to be that such advertising persuades consumers to buy what they do not need or to make choices on nonrational grounds. Although I may agree with the students' view of most such advertisements, I doubt that government should intervene in such a big-brother fashion and that it should impose a "cultural tyranny" of intellectual taste.²⁶ Indeed, after reading the students' exposé, I am certain that I do not want the FTC deciding such delicate questions. Furthermore, it is unlikely that the Commission has the power to follow the advice, for it is highly doubtful that motivational-research advertising contravenes section 5 of the FTC Act.²⁷ If the FTC were

25. See text accompanying notes 9-17 *supra*.

26. Cf. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 555-56 (1967). Professor Richard Posner, the dissenting member of the American Bar Association's FTC Study Commission, summarized another possible response to the motivational-research argument as follows:

This "brainwashing" theory would be more plausible if there were a monopoly on advertising. In fact, advertisers compete for the consumer's patronage. One would expect the best products to win out in competition among advertisers, just as the market in ideas, a market also characterized by inflated claims, is assumed to lead to the adoption of the best ideas. Why individuals can be trusted to make intelligent political choices, but not intelligent product choices, is not explained.

Posner, *Working Paper for the Task Force on Productivity and Competition: Advertising and Product Differentiation*, in PRESIDENT'S TASK FORCE ON PRODUCTIVITY AND COMPETITION, REPORT (1969) (Stigler Report), reprinted in 5 TRADE REG. REP. ¶ 50,250, at 55,527, 55,528 (1969).

27. 15 U.S.C. § 45 (1964). One leading commentator has argued persuasively that the FTC's mandate regarding social values is more limited. Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 444-45 (1964). He does suggest, however, that such advertisements raise questions whether the promise

to bring an action, would proof that the respondent's product is superior to competing products—that is, that consumers are making a wise choice but on nonrational grounds—be a defense? As long as consumers continue to be exploited by deceptive selling practices and as long as major industries continue to rely on misleading pricing methods, such as new car “sticker” prices and used car blue-book prices, or on fraudulent sales techniques, such as those used in almost every installment sales contract, the Commission would be wasting its resources if it prosecuted such dubious violations.

By even suggesting that the Commission should, as its first priority, attack such motivational-research advertisements, the authors reveal the superficiality of their analysis, for they vastly overestimate the capability of the Commission, which they accept at face value as a politically balanced, independent regulatory agency whose members are appointed by the President and whose activities are funded by Congress.²⁸ They seem unaware of the power which is possessed by those whom the Commission must police. Despite the size to which the advertising industry has grown, at least partially as a result of its ability to develop consumer product differentiation without significant product differences, the authors appear to expect the FTC to reduce advertising's role to its early, but long-abandoned, position as a mere information conduit. What would happen, for example, if the Commission implemented the students' suggestion that it prosecute the large television advertisers for their use of motivational-research advertisements? The answer seems obvious. The advertisers and advertising agencies would fight with all their resources such an attack upon the lifeblood of their business. Procedural delays and endless appeals would postpone any decision for at least a decade—long after the end of the advertising campaign which gave rise to the prosecution.²⁹ It is doubtful that this questionable object is worth a commitment of a vast share of the FTC's “consumer” resources. Of course, the power of a recalcitrant corporate giant should not immunize it from suit even if the result might

made by the advertisement is true and whether it has induced consumer action. *Id.* at 447-49; see Pollay, *Deceptive Advertising and Consumer Behavior: A Case for Legislative and Judicial Reform*, 17 KAN. L. REV. 625 (1969).

28. See generally W. CARY, *POLITICS AND THE REGULATORY AGENCIES* 57, 63-64, 88-89, 125 (1967). It is one thing to make a case for drastic changes in the Commission's direction and operation; it is another to evaluate its performance by a false standard and then to assail its failures. See note 33 *infra*.

29. The classic case, of course, is the FTC's successful sixteen-year struggle to remove the word “liver” from Carter's Little Liver Pills, after the Commission had found that the pills had no connection with liver function. *Carter Prods., Inc. v. FTC*, 268 F.2d 461 (9th Cir. 1959). For a perceptive analysis of economic reality, the argument of the Nader Report, and the Commission's performance, see Travers, *Foreword—Symposium: Federal Trade Commission Regulation of Deceptive Advertising*, 17 KAN. L. REV. 551 (1969).

impair its existence. Nor should that power justify either the Commission's light caseload or its current attention to trivial violations by tiny firms. But adherence to the authors' ill-considered suggestion is not the solution.

Other suggestions of simplistic solutions to complex questions also mar the Nader Report. The report charges that, because the FTC does not view business as its enemy, and because its members talk with trade groups, the Commission is coddling business. One gets the impression that the students consider such efforts to obtain cooperation improper. It is entirely legitimate to propose that Commission members hear nonbusiness views, or that ex parte conversations be carefully restricted, but the implementation of those proposals hardly justifies limiting information exchanges with affected business groups to formal rule-making or adjudicatory hearings. More disturbing is the report's apparent condemnation of the Commission's experimentation with voluntary and industry-wide enforcement efforts. The students' recommendations for preplanned prosecutions and for careful supervision of outstanding orders and consent decrees are indisputable. But the potential impact of vigorous prosecution of individual cases will be quickly lost and will encourage unnecessary resistance if competitors are unfairly disadvantaged and voluntary procedures are not given attention.³⁰ These are difficult issues to which the Commission has given thought and leadership and with which it has experimented.³¹ Naturally, mistakes have occurred. But experience as well as statutory requirements support the Commission's basic approach. Similarly, the perplexing problem of delay in the Commission's processes cannot be solved by citing statistics; fair summary procedures need to be developed.³² Due process cannot be summarily swept aside by the purity of the reformer's zeal.

As one reads the Nader Report, it becomes clear that what the students failed to perceive is that internal reform of the Commission—reform of its strategy and personnel—is not a panacea.³³

30. See, e.g., *Developments in the Law—Deceptive Advertising*, *supra* note 18, at 1082-84.

31. See, e.g., Elman, *The Federal Trade Commission and the Administrative Process*, 8 ANTITRUST BULL. 607 (1962); Jones, *Industry-Wide Enforcement*, 10 ANTITRUST BULL. 543 (1965); Millstein, *supra* note 27, at 493 & n.269.

32. See Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 KAN. L. REV. 559-61 (1969).

33. Professor Jaffe has summarized this point elsewhere as follows:

American reformers—and perhaps Americans generally—lack patience and a sense of history. They are forever in search of gadgets and gimmicks. Professional liberals and liberal professors hailed the independent administrative agency as a patented engine for continuous reform. The formula was a body of experts, independent of political control by President and Congress, generously endowed with wide powers to regulate some industry or area in "the public interest." We proposed to ourselves the notion that the problems in each of these fields could be reduced to technical questions. We knew of course that the establishment of each of these agencies had been preceded by years of controversy. Each enabling

Sweeping changes appear to be needed, and this report does suggest many of the places we need to look. Its suggestions, however, are by no means a complete catalog. I remain convinced, for example, that effective action will not be achieved until FTC procedure is overhauled and streamlined; but however constituted, the FTC will not perform miracles. Bold, even imaginative leadership, without regard to congressional views or public support, will not make much headway in attacking consumer problems. Independent agencies operate neither in a political vacuum nor from an independent power base.³⁴ Indeed, as the FTC has learned from sad experience, straying too far from the accepted path results only in congressional reversal, fund starvation, and lost time.³⁵

These limitations in the Nader Report obviously interfere with its message. But they do not overwhelm it. The report deserves to be read carefully, and its recommendations need to be explored further. Its primary value is as a call—to the FTC, to Congress, to the President, and to the public—that more can and must be done to protect the American consumer, that the FTC needs added authority to prevent and to curtail deceptive practices, and that the Commission can play an important role if it is adequately supported with funds and public attention. So long as the report is viewed as such a call, rather than as a judgment of FTC performance, it serves a valuable purpose. It is clear that the report says little that is wholly new. But in addition to repeating what many others have said before, it demands that its call not be ignored as the others have been.

There is a medieval tale about a traveler who meets three stonecutters. He asks each what he is doing. The first responds, "I am cutting stone." The second stonecutter replies, "I am making a cornerstone." And when the question is repeated to the third, he answers, "I am building a cathedral." Nader's students have expressed

statute was the resolution of an intense struggle for power. The statutory resolution was made possible only by an aroused public opinion. Yet somehow we believed that the statute once enacted, we could sit back and expect the continuing power confrontations to be posed as technical problems to be solved solely by "expertise." Of course it didn't work. And so disillusioned, but with the same impatience and shortsightedness, we fell to berating the agencies and calling them names (e.g., "industry oriented"). Once more we looked about for "solutions"—for devices which would put the agencies back on the track of reform. We have been disinclined to consider the notion that these agencies, as is true of any other organs of government, could do some jobs and not others, had their fertile periods and their dry periods, shared, one might say, the infirmities of man. Jaffe, Book Review, 43 NOTRE DAME LAW. 614 (1968).

34. See generally W. CARY, *supra* note 28.

35. See 15 U.S.C. §§ 1331-39 (Supp. IV, 1965-1968), *overruling* FTC Cigarette Label Warning Rule, 29 Fed. Reg. 8324-75 (1964). Early in its history the FTC outran its political support with disastrous consequences. See Herring, *Politics, Personalities, and the Federal Trade Commission*, 28 AM. POL. SCI. REV. 1016 (1934); 29 AM. POL. SCI. REV. 21 (1935).

the vision of the third stonemason. Too often, however, their report looks like cut stone. Still, if their call is heard, they will have helped to lay the cornerstone for future progress.

*Ernest Gellhorn,
Professor of Law,
Duke University*
