

RESPONSE TO FEDERAL TRADE COMMISSION

REPORT TO CONGRESS

LG 2006721

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I. Introduction: The report is not responsive to  
the congressional mandate.

On June 30, 1967, the Federal Trade Commission rendered a report to Congress pursuant to the Federal Cigarette Labeling and Advertising Act. This report was furnished pursuant to the requirement of Section 5(d)(2) of the Act, which provides as follows:

"The Federal Trade Commission shall transmit a report to the Congress not later than eighteen months after the effective date of this Act, and annually thereafter, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate."

Although it purports to deal with the effectiveness of cigarette labeling and with current practices and methods of cigarette advertising and promotion, the report actually consists of a collection of immaterial data, speculative opinions and unsupported recommendations which are largely irrelevant to the question whether the declared Congressional policy and the purpose of the Act has been accomplished.

In requesting that the Commission make such recommendations for legislation as it may deem appropriate, Congress was not issuing a broad commission to the FTC to suggest any measures which it might consider to be in the interest of the public health, but was soliciting the advice of the Commission concerning matters which would appropriately come within the purview of its expertise and responsibility. Unfortunately, the Commission proceeded on the mistaken assumption that it was authorized and expected to formulate a new national policy in relation to smoking and health; and what Congress received was an emotional blast against cigarettes, endorsing legislation which would (1) Require the unwarranted and punitive label on cigarettes that the FTC wanted in 1965; (2) Eliminate cigarette advertising; and (3) "Prompt" (the FTC's own word) the cigarette industry to change its product to conform to the FTC's conception of a "safer" cigarette.

This memorandum sets forth points which should be considered in evaluating the Commission's report and its recommendations.

## II. Effectiveness of Cigarette Labeling.

### A. The purpose of the Cigarette Labeling Act.

The Cigarette Labeling and Advertising Act did not authorize the Commission to erect its own standards for judging the effectiveness of cigarette labeling. What is meant by effectiveness is clearly spelled out in the declaration of policy contained in Section 2 of the Act.

"It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby--

"(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

"(2) commerce and the national economy may be--(A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health."

Senator Magnuson, the sponsor of S. 559, which became the Cigarette Labeling and Advertising Act, in a statement which accompanied the introduction of the bill, made it plain that the label had an informative purpose. This is clearly demonstrated also in the Congressional debates, the testimony before the Commerce Committees of both houses and the reports of those committees in connection with this legislation. See Appendix A. Both the

Surgeon General of the United States and the Chairman of the Federal Trade Commission, two of the principal witnesses in support of the Magnuson bill, have stated that governmental action in relation to smoking and health should be directed to informing the public. Former Surgeon General Terry observed in 1965 that "beyond this, the decision to take up and continue to smoke is and should remain the prerogative of the individual." When Paul Rand Dixon testified before the Senate Committee on Commerce in 1965 he stated that if a warning was required then "at that time anyone who buys that product is on notice". He added, with respect to his presentation, "that is all we are talking about -- truth."

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B. The FTC chose an improper index of effectiveness:

Sales.

The Commission chose as its index to measure the effectiveness of the label cigarette sales figures from 1963 through 1966. The report argues that the inadequacy of the warning statement becomes clear by comparing the drop in cigarette sales following publication of the Surgeon General's report with the continuing rise in sales after the warning statement appeared on

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cigarette packages. The Commission goes on to explain that the warning statement on the package alone has proved to be ineffective namely because few people seem to "pay attention" to it. However, as the Commission should know from its examination of the legislative history, the criterion prescribed by Congress was not whether people "paid attention" to the warning label (i.e., ceased smoking) but whether, as the result of the warning, they became aware that cigarette smoking may be hazardous. As Senator Magnuson stated in recommending to the Senate the acceptance of the conference report, "The significance of the warning on the label must not be minimized. This warning will serve notice upon all who read it that they smoke at their own risk." (Congressional Record July 6, 1965, page 15032.)

C. The recommendation to "strengthen" the present label is scientifically unsound, not based on any principle of "deception" and nothing more than a warmed over version of the Commission's 1964-1965 position on labeling, which Congress rejected.

The Commission has recommended that "(1) Section 4 of the Federal Cigarette Labeling and Advertising Act should be amended by changing the required warning statement to read:

'Warning: Cigarette Smoking is Dangerous to Health And May Cause Death From Cancer And Other Diseases.' "

The Federal Cigarette Labeling and Advertising Act presently requires the following statement on cigarette packages:

"Warning: Cigarette Smoking May be Hazardous to Your Health."

The trade regulation rule promulgated by the FTC in 1964 (for the prevention of unfair or deceptive advertising and labeling of cigarettes in relation to the health hazards of smoking) deemed it "an unfair or deceptive act or practice within the meaning of Section 5 of the Federal Trade Commission Act (15 USC §45) to fail to disclose, clearly and prominently, in all advertising and on every pack, box, carton or other container in which cigarettes are sold to the consuming public" the following: "Cigarette smoking is dangerous to health and may cause death from cancer and other diseases." (See pages 417 - 418, 1965 Senate Hearings.) This is the same language the Commission is now recommending as a substitute for the language agreed upon by Congress in 1965.

Obviously the FTC is not competent to determine what warning language is justifiable on the basis of present medical

and scientific evidence. Analysis of the report reveals that the recommendation for a "stronger" warning is not related to the purpose of preventing deception, but rather seeks to bring into effect a new public policy with the following goals: A reduction of cigarette sales and elimination of cigarette advertising. Regardless of the belief of the Commission that what it is doing may be "good" for people, practically no one openly favors making people stop smoking by any means (fear, coercion, threats) and less people in the 1966 PHS survey were agreeable to banning cigarette advertising than in 1964 (36% in 1964 and 34% in 1966). (On the other hand, approximately 64% of the group selected by the Commission felt that certain cigarette advertising should be prohibited and over 45% thought that it should be completely prohibited. Commissioners Elman and Jones, in concurring opinions, have favored the abolition of television advertising of cigarettes.)

When Recommendation No. 1, relating to a "stronger label" is combined with Recommendation No. 2, which will be discussed hereafter and which relates to requiring a warning in connection with advertising, the Commission's hope to abolish cigarette advertising becomes clear. Emerson Foote, an advertising agency executive, then Chairman of the National Interagency Council on

Smoking and Health, stated, in testifying before the Senate Committee on Commerce in 1965 that while a ban prohibiting the right of an advertiser to buy space or time "is not right" (page 131), that no "real gain will be made on the health front until you make the advertising self-defeating". In response to a question as to who would advertise if advertising was self-defeating he responded "I hope nobody will."

The purpose of the Cigarette Labeling Act was to advise people with respect to the possible hazards of cigarette smoking. To recommend a caution label that is scientifically unsound (and Chairman Dixon himself said on March 23, 1965, with reference to a proposed bill and speaking for the Commission: "In our opinion, the required warning that habitual smoking 'is injurious to health' overstates the medical and scientific evidence of the health hazards of smoking"), one whose effectiveness would be measured not in terms of factual accuracy but in terms of its power to deter and one which, if affixed to advertising, would eliminate advertising is to go on record as favoring any means available to decrease cigarette smoking and cigarette advertising.

D. The FTC presented no evidence that the present label has failed to inform or that a "stronger" label would discourage smoking.

Significantly, neither the Federal Trade Commission survey set forth in Appendix A nor the Public Health Survey set forth in Appendix B contains any data indicating the degree of awareness on the part of the public that cigarette smoking may be hazardous to health. The question which comes closest is Question 1 in Appendix B which indicates that 93% of current smokers had seen or heard about the health warning label required on the outside of each package of cigarettes (as of May, June and July, 1966, which was shortly after the label first appeared). It would seem to be a safe assumption that if members of the public had been asked whether they were aware that cigarette smoking may be hazardous to health probably close to 100% of them would answer "Yes".

In determining adequacy of the present label, the Commission should have referred to Question 2 of Appendix B, the Public Health Service questionnaire survey. Only 22% of those surveyed thought the present warning label was "too weak".

The Federal Trade Commission's questionnaire survey of 450 people adds nothing at all to an evaluation of the effectiveness of the warning statement. Certainly Congress did not intend the Federal Trade Commission to formulate its advice on the basis of a questionnaire survey among 450 persons and organizations actively engaged or interested in the subject of smoking and health asking them if they felt that the current cautionary labeling statement is sufficient to warn people of the hazards of smoking. The people who were surveyed could not be expected to have any means of ascertaining whether the label was effective in the sense in which Congress intended it to function and it is significant that, as the report states, "Many of those responding emphasized that they had no hard facts to support their answers." Furthermore, it might be concluded from the fact that only 60% of the 450 persons canvassed responded to the questionnaire, that many people felt that a survey of this type was hardly worth the bother or preferred not to respond to such a "loaded" questionnaire.

The Commission cites its own survey to the effect that 82% of those responding indicated that they did not feel that "the current cautionary labeling statement is sufficient to warn people

of the hazards of smoking" but fails to cite the Public Health Service survey data on this issue (that only 22% thought it "too weak"). The Commission did cite the Public Health Survey for the proposition that "80% of the interviewees thought that only 'a few' or no smokers at all 'might quit smoking cigarettes because of this (the present one) warning label'". However, no question or answer appears in the appendices or in the report that would demonstrate any different answer if the person interviewed were asked about the warning label recommended by the Commission. It is particularly noticeable in both surveys that the questions directed did not invite a response which would indicate whether the person interviewed believed a label such as the FTC now proposes would be more "effective" and failed to inquire whether or not persons in the United States are aware that "cigarette smoking may be hazardous" to their health.

E. People are aware that cigarette smoking may be hazardous.

1. The label, states the FTC, has served "to convince some people, who might otherwise be in doubt, that smoking is in fact dangerous."

Despite the Commission's argument that the warning has been "ineffective" because it has failed to reduce consumption of cigarettes, it could be pointed out that a number of people in the field of public health, including the Surgeon General, have hailed the warning label on the package as a significant step in educating the public to the possible hazards of cigarette smoking.

The Commission itself calls the label useful as "proof" of the health hazards of smoking and recognizes that its "mere appearance" has served to convince people "that smoking is in fact dangerous."

2. A knowledge of risk is not necessarily related to behavior change.

Even those most zealous in the war against tobacco may consider the FTC position concerning a "stronger" label somewhat naive. The Commission would find it interesting, for example, to review some of the research reports submitted in connection with the National Research Conference on Smoking Behavior held last year in Tucson, Arizona, and supported by Public Health Service funds. Many persons (most of them recipients of Public Health Service

grants) gathered together in an attempt to better understand smoking behavior. It is clear from a review of the reports submitted that there is no lack of realization of the publicized hazards of cigarette smoking and that young people are not an exception. There are, however, many factors involved in smoking behavior other than whether a person has knowledge or not. For example, how would the FTC explain (either on a basis that a stronger label is needed or that advertising has an undue influence) the study involving over 1,000 medical students and over 300 law students which resulted in the following observations: "The freshmen in both groups were remarkably similar in level of information about the diseases associated with smoking. The medical, but not the law, students showed increasing information in this area with increased years of training. However, the higher level of knowledge among more advanced medical students was not associated with demonstrable differences in attitudes and personal smoking behavior. There was no trend toward decreased smoking by class in medical schools." In other words, as medical students received more information about smoking and health they failed to smoke less.

One study population included the total student body of

the University of North Dakota. 87.1% of the female students and 80.7% of the male students agreed with the statement, "Smoking is harmful to health". The investigation included a study of changes in behaviors, attitudes and beliefs following exposure to information "regarding the probably deleterious effects of smoking." Information in the form of a lecture, printed pamphlets and a movie were made available. Changes in smoking behavior were "slight" but the interesting finding came in connection with "attitudes". As the author stated, "Overall, there were a considerable number of students who changed their attitudes about smoking and, contrary to expectations, most of the changes were in the positive direction, i.e., more favorable toward smoking."

A substantial amount of money has been spent for anti-smoking educational campaigns. Much of the available data seems to demonstrate that the campaigns in the schools may actually tend to recruit smokers rather than deter them.

A recent Scholastic Roto Survey reveals that 92% of senior high school students have seen a film, read a pamphlet or heard a lecture on the bad effects of smoking. Virtually all-- 98%-- have heard statistics citing smoking as a cause of lung

cancer and 94% of the sample said that they believed smoking was harmful to their health. Students listed friends as the major influence in their decision to smoke and did not feel that they were influenced by advertising (only 5% specified advertising in response to a question concerning the major influence in their decision to smoke). It is also interesting to note that 41% of the smokers are forbidden to smoke by their parents, while only 22% of nonsmoking students said they did not smoke because their parents forbid it.

3. Contrary to the FTC argument, there is evidence showing many people have made the personal decision to discontinue smoking.

Although the data is not really relevant to any consideration of the effectiveness of the warning label, the Trade Commission has cited figures on cigarette sales since 1964 and statistics on per capita consumption of cigarettes per persons eighteen years of age and over which it contends indicate increased sales and increased per capita consumption. (Actually, per capita sales decreased slightly from 1965 to 1966 according to the figures cited.)

Daniel Horn, Director, National Clearinghouse for Smoking and Health, Public Health Service, stated earlier this year that had it not been for "the health issue" Americans "might have smoked nearly 700 billion cigarettes in 1966" instead of the reported 542 billion. This, said Horn, was "about 25% less than might have been consumed."

In a paper presented to the 94th Annual Meeting of the American Public Health Association at San Francisco, California, November 2, 1966, Doctor E. Cuyler Hammond, Vice President of Epidemiology and Statistics for the American Cancer Society, found a decrease in smoking among men of 21.8% between 1959 and 1965 and a decrease of 12.4% among women for the same period. "P. reports linking cigarette smoking to increased death rates in lung cancer, emphysema, heart disease and certain other diseases had a major influence in this respect."

In a release by the Department of Health, Education and Welfare, Public Health Service, April 25, 1967, Surgeon General William H. Stewart disclosed that "health-minded Americans are giving up the habit at the rate of about a million a year". The Surgeon General commented that despite the number of cigarettes

smoked "more than 19 million adults have given up smoking as scientific evidence showing cigarettes to be a serious health hazard has accumulated in recent years."

III. Advertising and Promotion Practice.

A. The FTC presents no evidence that any practices of cigarette manufacturers have interfered with the purposes of Congress as reflected in the Cigarette Labeling Act.

The Commission deals with current practices and methods of cigarette advertising and promotion by discussing advertising and promotional expenditures, the size and composition of the audience and current advertising and promotional themes. Although the report argues that the themes used in cigarette advertising tend to blot out any consciousness of health hazards, it offers no data to support this contention. In fact, it concedes that "for the most part, however, assuaging of smoker anxiety has been in a very low key".

It seems clear that what Congress expected from the Federal Trade Commission by way of a report on current advertising and promotional practices was the identification of specific practices which could be shown to affect directly the effectiveness

of the warning label or which were in other respects unfair or deceptive and thus might be brought within the reach of the Commission's jurisdiction. Its basic criticism of cigarette advertising is that it fails to indicate that cigarette smoking may be hazardous. The Cigarette Labeling Act expressly dealt with the question whether cigarette advertising should be used as a vehicle for conveying a warning in Section 5(b) which provides: "No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act."

In 1964 the Trade Commission promulgated a trade regulation rule on cigarette advertising. In supporting its authority to issue such a rule the Commission in an accompanying brief stated:

"In stating that the Trade Commission Act imposes special requirements with respect to the advertising of such ['dangerous'] products, we do not of course imply that the Commission has been given by Congress a general jurisdiction to protect the health and safety of consumers. The Commission's responsibility is not to control or prevent the sale or use of dangerous products, but to insure that the advertising of such products is not unfair and does not deceive." (1965 Senate Hearings, 485)

In attempting to justify its Trade Regulation Rule which would have required the inclusion of warnings in advertising, the Commission contended that massive and skillful cigarette advertising has blunted public awareness and appreciation of the hazards of smoking so that the advertisements themselves must refute the public misconception. This is very much the same reasoning used in the present report. In an article appearing in the University of Pennsylvania Law Review of December 1964, the author criticized the Trade Regulation Rule proposal for a warning in advertising as follows:

"Even accepting the Commission's determination that the public now carries a mistaken impression of the relation of smoking to health, the order is not justified. For the representations that the Commission describe as misleading say only that the product is good, a representation common to all advertising. Thus, if the Commission can here require affirmative disclosure, it can require all advertising to disclose all defects. Although the Commission attempts to distinguish the present case on the ground that a health hazard has been clearly established by a governmental report, neither does Section 5 give nor does the Commission claim general jurisdiction to protect the public from health hazards. The Commission asserts that many people believe the Government protects the public against advertisements to promote the sale of dangerous products. But statutory mandate and not popular conception of what constitutes proper government action must delineate the scope of Commission power. Since there is no deception there can be no correction."

The fact remains, as pointed out in the preceding section, that people are aware that cigarette smoking may be hazardous.

B. No deceptive practices have been charged by the FTC.

1. The Commission's characterization of cigarette ads as encouraging young people to smoke is not accurate.

The Commission's main argument relating to cigarette advertising is that young people are exposed to it. However, the report offers no data to demonstrate that cigarette advertising is a factor in the adoption of smoking by young people. It simply offers the lame conclusion, "Whatever effect this exposure of youth to cigarette advertising may have, it is a fact that in this country the general trend is toward starting smoking at an ever-earlier age".

In attempting to connect this "general trend" with cigarette advertising the Commission ignores the fact that conditions have changed since 1890 and that young people are also marrying, drinking and seeing psychiatrists at ever-earlier ages.

After carefully compiling data as to the number of young people who may be exposed to cigarette commercials, the Commission report cites figures from two surveys of high school students showing that teen-age smoking appears to be wide-spread. It then makes the unwarranted assumption that this is because teen-agers are constantly exposed to cigarette advertising. Although the Commission's report mentions the Newton High School Survey, it completely neglects to mention the fact that, in that survey, the smoking students were asked to give their reasons for starting. The results of this questionnaire survey were published in the Journal of Health and Human Behavior in 1963. Although the students were not restricted in their responses, it is significant that none of the students mentioned cigarette advertising. The reasons given included "conformity", enjoyment and tension release, curiosity, impressing others, and adult emulation.

An interesting finding in the Newton, Massachusetts, questionnaire survey, and one which has some significance in relation to the results of any survey, is that the students gave different reasons for their own smoking behavior than for the smoking behavior of other students. (The FTC questionnaire which

asks the respondents how they believe others react to cautionary statements and cigarette advertising would undoubtedly have come out with different results if the respondents had been asked how these things affected their own behavior.)

An article entitled "Smoking Habits and Incidence of Respiratory Tract Infections in a Group of Adolescent Males" in the American Review of Respiratory Diseases, 1966, reports on a survey of the motivational factors influencing smoking in 191 male high school students aged 14 to 19. "Ninety per cent of the students (both smokers and nonsmokers) expressed the opinion that what most encourages students to begin smoking is the fact that their friends smoke. . . . Television and other advertising media were considered to be least influential."

In further answer to the FTC's contention that cigarette advertising encourages young people to smoke, it is of interest to note the results of a questionnaire survey among 1,598 freshmen and sophomore students at the University of Arizona. These results are reported in the journal "Psychological Reports" Vol. 17 pp. 967-978 (1965). To a question asking whether advertising influences smoking behavior, only 8% of nonsmokers answered "yes".

The author's comment, "As would be expected, not many of the non-smokers consider themselves to be influenced by cigarette advertising" (of those nonsmokers who did respond "yes" to this item, many stated that they were affected negatively by "obnoxious" commercial messages).

2. The FTC has failed to show that advertising filter cigarettes is somehow deceptive.

After a wordy and obscure argument that advertising filters and tobacco blends in the same message somehow indicates "safe-taste" (page 21, FTC Report), the Commission refers to the FTC and U. S. Public Health surveys to demonstrate "that the overall impression fostered by recent cigarette advertising has been that it is less hazardous to smoke filter than regular cigarettes". (These same surveys were referred to to support the FTC position that cigarette advertising "has encouraged young people to smoke".)

The Commission notes that "The belief appears to be widely held that filter cigarettes are less hazardous to health than regular cigarettes." (Page 19) It appears to attribute this fact to the advertising themes used in connection with commercials for filter cigarettes. However, the data which it cites

in support of the contention that people believe filters reduce the health risk in cigarette smoking indicates that only 44% of the people surveyed agreed with this proposition (Public Health Survey, Part C, Question 1). The questionnaire survey among college freshmen and sophomores referred to in the preceding section asked the subjects if they believed that filters kept out harmful substances in smoke. A bit over 40% of the students surveyed did so believe. However, the comments of the authors are enlightening. They state, "The respondents' belief in the efficacy of filters is lower than expected." Many of the smokers indicated in open-ended questions that they smoked filters not because of health, but because of "coolness", cleanliness, etc.

If people do believe filters "reduce" some health risk, it is more likely to be a result of FTC, Public Health Service or other anti-tobacco utterances concerning the "desirability" of reducing "tar" and nicotine (see Part IV) rather than any cigarette advertising.

C. The FTC recommendation for a warning in ads was rejected by Congress once, there is no evidence it would increase public awareness, a warning is not necessary to prevent deception

and the real purpose of the Commission is to ban advertising.

The Committee's "support" for its Recommendation No. 2 (legislation requiring the warning statement to appear in all advertisements as well as on all cigarette packages) is contained in its surveys. These surveys, of course, are opinions either from the group selected by the FTC or from persons interviewed in connection with a massive survey financed by the Public Health Service which contained many hundreds of questions. There was considerable doubt during the 1965 cigarette hearings as to whether or not a poll of this type should be given any weight. Questions and answers taken from the same poll were referred to during the Senate Hearings (page 46, et seq.) and Senator Hartke questioned their value saying: "I am interested in what the people think, but basically I am interested in trying to do what is right for the people and that would have to be based, number one, on scientific information."

Sixty-nine percent of the persons interviewed reportedly disagreed with the statement that "cigarette advertising or commercials should not be required to carry a warning statement to the effect that smoking may be harmful". On the other hand,

practically the same percentage of people (66%) would disagree with the statement, "Cigarette advertising should be stopped completely". Yet, this would be the effect of such a requirement. Of what value is this?

The Commission has produced no evidence that if "adequate health warnings" were included in cigarette advertising it would have any more effect than the FTC claims the label has had. It would have been interesting if the Commission had asked persons whether or not they thought putting a warning on advertising would affect smoking habits. This would have been no more speculative and perhaps somewhat more illuminating than most of the questions asked. Again, however, the FTC wants to measure effectiveness only by decreased smoking, not by whether people are making an informed decision and is attempting, by requiring a warning that goes beyond the established scientific evidence, to eliminate cigarette advertising.

The FTC would probably like to approve only ads which specified any drawback that a given product might have. It has now gone far beyond any concept of "deceptive" advertising and is urging cigarette manufacturers to affirmatively advertise that

people should not buy their product, should not smoke it if they do buy it and that they will die an early death if they do smoke it. A review of the recommendations of the Federal Trade Commission, including "themes that are not used in cigarette advertising", indicates that the only way to satisfy the Commission would be to "show an habituated cigarette smoker with a hacking cough, groping for a cigarette upon awakening in the morning", suggesting "the tension felt by a chain smoker when he runs out of cigarettes" and urging people in a positive persuasive way to stay as far away from cigarettes as possible.

The goal of the Federal Trade Commission in proposing its cautionary warning for cigarette advertising is spelled out in the concurring opinions of Commissioners Elman and Jones: A complete ban on cigarette television advertising.

In view of the Trade Commission's past attempts to exercise its regulatory authority arbitrarily in the field of cigarette advertising, it is not surprising that it applauds the FCC's recent ruling requiring stations to give free time to persons wishing to rebut cigarette advertising. (It may be observed that the ruling of the Federal Communications Commission does not say anything

about affording "both sides a fair opportunity to be heard on the subject of cigarette smoking and health", as claimed by the FTC. The ruling requires that broadcasters devote a "significant amount of time" to the hazards of smoking.) Advertising Age, June 12, 1967, observed that writing a letter to a listener who complained about one station's programing of cigarette advertising "seems somewhat less than forthright" as a way of introducing a radical revision of public policy. "Not only was the Congress itself bypassed, but the Commission's procedure did not even provide for a public hearing or the formal adoption of a regulation." See Appendix B.

IV. "Tar and Nicotine Recommendation.

A. Generally

The Commission's third recommendation for legislation requiring a statement setting forth the tar and nicotine content of each cigarette to appear on the package and in all cigarette advertising does not appear to proceed from any of the facts reviewed in the report. There is nothing in this report to indicate that the failure to list tar and nicotine contents represents a deceptive practice. The report recites only that "on March 25, 1966,

the Federal Trade Commission advised the Cigarette Industry that it would not object to disclosure of tar and nicotine content in cigarette labeling and advertising, provided that no health claims were made." The Commission goes on to complain, "Despite this opportunity, the industry has made only limited use of tar and nicotine disclosures." The Commission completely ignores its own long history of opposition to such disclosure prior to March 25, 1966, which was based on the reasoning that tar and nicotine disclosure does amount to a health claim. Furthermore, in spite of its insistence that no health claims be made in connection with tar and nicotine disclosure, the Commission itself in its report characterizes True cigarettes as "less hazardous" because of its ranking in tar and nicotine tests. No basis for this conclusion is found in the report.

B. The Commission's purpose is to "prompt" development of a "less hazardous cigarette".

Just as the FTC wants to impose a punitive requirement by "strengthening" the warning so that it goes beyond the established scientific facts (and conforms, incidentally, to the label

which the FTC recommended several years ago) and to ban advertising by requiring that it carry the warning statement, so the FTC wants to "prompt" the industry into developing a safer cigarette: "For the information of cigarette smokers, the Commission favors mandatory labeling of tar and nicotine content on cigarette packages and in cigarette advertisements and other measures that will prompt cigarette manufacturers to develop less hazardous cigarettes." (Page 8).

1. This is not only beyond the Commission's jurisdiction and competence but is a reversal of a long time position that the labeling of tar and nicotine is itself deceptive.

This recommendation is particularly worthy of study since it reverses a long time position of the Federal Trade Commission that such labeling would be deceptive (one which was shared by the Departments of Health, Education and Welfare, Agriculture and Commerce, among others). See Appendix C. When Chairman Dixon testified before the Senate Committee on Commerce in 1965, he said that the labeling of tar and nicotine content "could result in some other kind of a misrepresentation or something misleading if one cigarette

came out and said it had 1.5 in tar, and so much nicotine in it, and another came out and said it had 1. Basically, this study has never arrived at what is a safe tar and nicotine content, and they had not arrived at what in smoking is the agent as such that is causing cancer."

The following exchange also took place during the hearings:

"Senator Hartke. Did you individually or as a member of the Commission, or did the Commission, find that tar was a cause of cancer?"

"Mr. Dixon. No."

"Senator Hartke. Did you, in the same context, find that nicotine --"

"Mr. Dixon. No."

"Senator Hartke. Or that any of the known substances, per se; that is, other than any conclusions drawn in the whole, that any individual substance, chemical, drug, or item was the cause of cancer?"

"Mr. Dixon. No."

The Secretary of HEW in commenting on proposed legislation in 1965 said he feared another "tar derby" if labeling was required.

2. There is no evidence that the amount of "tar" and nicotine is significant in terms of human health.

A letter to Senator Sam Ervin, which appears in the Senate record, pages 391-2, describes the nature of "tar" and the difficulty in determining its composition. Professor Weybrew, who wrote the letter, states with regard to nicotine: "As for nicotine labeling, the Surgeon General's report seems to exonerate nicotine, at least in the light of present considerations. Therefore, its inclusion on the label might tend to create unwarranted alarm in the minds of the smoking public."

The Report of the Senate Commerce Committee had the following to say about "tar" and nicotine labeling:

"With respect to nicotine, the report of the Surgeon General's Advisory Committee states that 'there is no acceptable evidence that prolonged exposure to nicotine creates either dangerous functional change of an objective nature or degenerative disease.' The report concludes that various studies 'indicate that the chronic toxicity of nicotine in quantities absorbed from smoking and other methods of tobacco use is very low and probably does not represent a significant health problem'.

"As to tar, the Surgeon General testified before the committee that, 'While it seems at least plausible that cigarettes with lower tar and

nicotine may present lesser health hazards, there is presently no proof that this is so.' He further stated that 'further study' was necessary before he could recommend that particular ingredients be singled out for labeling."

Surgeon General Stewart said, during the hearings on the HEW Appropriations for 1968, with regard to substances in cigarette smoke which may cause cancer: "We do not know which substance, and it probably may not be which one, it may be a body of substances, within the smoke which is specifically the etiological agent of lung cancer we are talking about." He later stated that there is "no specific agent in cigarette smoke that can be specifically pointed to as the cause of lung cancer." With respect to "tar", the Surgeon General responded (after a statement that the agents in cigarette smoke which were carcinogenic, that is, tumors on the backs of mice) in answer to a question as to whether "there is a difference between mice and men": "There is always this problem of relationship of animals systems to man in testing things . . ." The Surgeon General knew of no additional research which would demonstrate that the Surgeon General's Advisory Committee's opinion on nicotine (as probably not representing an important health hazard) was wrong. He knew of no "new constituent"

identified in cigarette smoke since the date of the report "that has been found to be responsible for any human disease".

(The Federal Trade Commission has even left itself room to recommend additional requirements by footnote 51. They state there "that further scientific study may warrant extension" of the tar and nicotine labeling requirement "to include a statement listing the results of quantitative and qualitative analyses of hazardous components in a cigarette's smoke.")

Some of the technical difficulties in determining the amount of "tar" and nicotine in a given cigarette are referred to by the Commission in its reference to "Tar and Nicotine Retrieval From 56 Brands of Cigarettes", Cancer, March, 1967. In noting this article by Moore, et al., the Commission says that the testing procedures have been attacked by five of the six major cigarette manufacturers and that the establishment of the Commission's own laboratory on May 15, 1967, will "serve to eliminate the type of controversy surrounding the Roswell Park (Moore) tests". [The Commission's laboratory, incidentally, was established with the complete cooperation of the tobacco industry. Chairman Dixon stated, as a matter of fact, that he had received technical

assistance and "great cooperation" from the industry.] It does seem odd that the Commission, which only "established" its own laboratory on May 15, 1967, is already enough of an expert on tar and nicotine to suggest that figures relating thereto be affixed to cigarette labels and advertising.

The only data that the Commission cites to support its recommendation that "tar" and nicotine labeling may now be significant (as compared to two years ago) is a reference by Commissioner Elman to the findings of a "group of scientists convened by the Surgeon General". (See page 5 of Commissioner Elman's concurring report.) It should be noted, however, that the Commission's change in position (withdrawing its rule against advertising tar and nicotine content) was announced before the "scientists" had convened. The only reason given was that the information "may be material and may be desired by the consuming public". No new scientific evidence or proof was described nor was the slightest suggestion made that any had come into existence since the Chairman of the Commission had appeared before Congress and taken a contrary view.

Following announcement of the new position of the Federal Trade Commission (in March, 1966), the Public Health Service held

a one day meeting of a small group of investigators and others in June, 1966. No new evidence was announced following that meeting. The group did not demonstrate that tar or any specific ingredient was harmful nor did it venture to explain how the Surgeon General's Advisory Committee was wrong in exonerating nicotine. Instead, the group merely stated that the "preponderance" of existing evidence "strongly suggests that the lower the tar and nicotine in cigarette smoke, the less harmful the effects." This is the meeting referred to by Elman. For some contrary statements by Public Health Service scientists see Appendix D.

3. In the absence of such evidence, Congress should not put its official approval on "tar" and nicotine content as a measure of risk.

In the absence of any proof that "tar" or nicotine amounts are significant in terms of human health, any tar and nicotine labeling requirement might be not only misleading but dangerously so. The smoker could assume that lower "tar" and nicotine content meant a safer cigarette and may either continue a given level of smoking or increase the level of smoking. The FTC is asking for an act of Congress to "back this up".

It has been argued that there is no risk of misleading if the warning of potential hazard is also on the package or advertisement. While it is true that the smoker will be reminded that the cigarette may not be absolutely safe, he could well conclude that the cigarette is substantially safer. (See Surgeon General Stewart's warning regarding reliance on low "tar" and nicotine claims in the Wall Street Journal, July 14, 1967:

"It must be pointed out, however, that tar and nicotine represent only the health risk from the "solid" particles in cigaret smoke. The gaseous content of the smoke also constitutes a significant danger.' Removal of the tar and nicotine, he said, 'can never provide full protection. This can only come through giving up cigarets altogether or not taking up the habit in the first place.'")

It would seem that the only reason for the proposed labeling of tar and nicotine content would be to encourage reduction of that content or to allow a smoker to choose between cigarettes, for reasons of "safety". Senator Magnuson remarked on May 15, 1967, at the opening of the FTC's Cigarette Testing Laboratory: "(B)y switching to a cigarette which is low in tar and nicotine (a smoker) will have a greater likelihood of living a life free from chronic illness."

Demonstrative of the disregard for the lack of scientific evidence demonstrating any relationship between "tar" and nicotine content and human health is Commissioner Elman's recommendation that 100-millimeter cigarettes be banned in Interstate Commerce because they contain more "tar" and nicotine. The reference to increased "tar" and nicotine in such cigarettes also appears in the majority report at page 7. In a sense, this emotional reaction to the longer cigarettes demonstrates one of the big problems with the Moore paper and the whole area of tar and nicotine labeling. If tar and nicotine is important, then the "effective dosage" of tobacco smoke (which, of course, in its natural state does not contain any "tar", tar being a laboratory product), not the number of cigarettes smoked and not the length of the cigarette would be the important measurement.

P. S. Larson, Ph.D., writing in the Medical Times for April, 1960, on the "Measurement of Tobacco Smoking" has demonstrated that reports on numbers of cigarettes smoked, butt length, etc., are very questionable as a measure of "dosage". (The article refers to some figures reported by Hammond demonstrating that the average length of all the butts collected in a number of American

cities was 30.9 millimeters--Dr. Moore smoked all of the cigarettes he tested to a 23 millimeter length regardless of the cigarette's original length.) Dr. Larson refers to smokers who deeply inhale the greater part of the smoke of a very few cigarettes, ones who puff but a small part of the smoke of a very great number, etc. Larson also reported that Hilding determined that the "actual amount of the cigarette burned into the mouth varied from 2.5 to 29 millimeters". The manner of smoking as well as the amount of smoking could easily make any figures with respect to number smoked, length of cigarette--or "tar" and nicotine content--relatively meaningless.

Dr. Daniel Horn, no friend of tobacco, reported in "Dosage Patterns of Cigarette Smoking in American Adults" on the importance of distinguishing between the length of butt left by king-size and regular cigarette smokers. He criticized Dr. Hammond's method of asking people to mark the portion of the cigarette which they smoked because he used only regular cigarettes. "Thus, for example, a smoker of a king size cigarette with a filter may have difficulty in accurately judging the butt size he 'usually' leaves, if the only frame of reference provided is a picture of a regular size, non-filter cigarette." (Pages 5-6). Horn inquired (in addition to

average number of cigarettes smoked per day, the "tar" rating of the brand, and the portion of the cigarette actually smoked) whether or not the person inhaled, if so how deeply he inhaled, whether he inhaled almost every puff, a few puffs of each cigarette or a few puffs of some cigarettes. Horn refers to a "possibility" that changes in cigarettes combined with changes in the way in which people smoke might produce a level of exposure which is "tolerable" for many people. He added, however, that it "would remain for research, of course, to determine what would be the 'tolerable' level for how many, of which people, under what conditions" and stated that "until such levels of 'toleration' are determined the control task must remain basically oriented to persuading as many people as possible to stop their cigarette smoking completely or not to start in the first place." (Horn's report was delivered at the American Public Health Association meeting in San Francisco November 2, 1966.)

In proposing "tar" and nicotine labeling, the FTC is departing from its present regulatory policy of prohibiting claims of product differences where there is no evidence that these differences are related to safety or efficacy of the product.

The FTC has moved to halt "deceptive" aspirin advertising on the ground that false claims of comparative speed, strength and duration of relief are being made when the products are essentially the same. Now comes the FTC to require cigarette companies to state "tar" and nicotine content notwithstanding the lack of scientific evidence that this would be a distinction with a difference.

C. There is no evidence that filter smokers are being deceived nor that labeling "tar" and nicotine content would avoid any claimed "deception".

The Commission appears to be citing the Moore article for the proposition that filter advertising is misleading because it implies that filter cigarettes are somehow less hazardous and contends that claims such as "mildness" can best be rebutted by requiring "tar" and nicotine labeling. This, the Commission says in footnote 30, is particularly important because some filter cigarettes contain more tar and nicotine than regular cigarettes--even of the same brand. The FTC did agree that the 28 cigarettes with the lowest tar content were all filter type but claimed that since some of the filter cigarettes had more "tar" and nicotine than non-filters people were being deceived.

Some criticisms of the Moore report which have been made include the following:

1. The sample was far too small and not representative for any purpose (generally 12 cigarettes of each brand);

2. Actual results may have varied by several milligrams from those given (a reported "tar" level of 33 milligrams could in fact have been 30 milligrams or 36 milligrams);

3. Moore attempted to smoke each cigarette to a butt length shorter than possible for 90% of U. S. Filter cigarettes (the procedure set up was for smoking to 23 millimeters of butt length even though filter cigarettes cannot be smoked to 23 millimeters--when the Commission held a public hearing with respect to average butt length on November 30, 1966, no witness testified to an average butt of less than 30 millimeters--in a word, some of the filter results were higher than would occur in normal smoking because Moore and his people burned the cigarette right into the filter);

4. Moore's results would have been strikingly different if he had also reported results on a "per puff" basis

(one brand would have come out 19 places lower in the ranking, for example);

5. The results were distorted by the method of handling, treating and storing the test cigarettes (the manipulations performed would not have been approved by the Federal Trade Commission under bases established by it in connection with its own laboratory).

The FTC has complained that cigarette advertising has led people to believe filters are safer--but it has been the FTC that has encouraged that reduced tar and nicotine be stressed as important, not the cigarette companies.

V. The Commission's Last Two Recommendations For Legislation Go Far Beyond Its Competence And The Limits of Its Jurisdiction.

In recommending increased appropriations to the Department of Health, Education and Welfare for the education of the public as to the health hazards of smoking, the Commission provides no information as to whether the present educational program is inadequate. Certainly it is not within the province of the Federal Trade Commission to advise Congress on what appropriations it should

make to the Department of Health, Education and Welfare. Similarly, the recommendation for appropriations for research under the direction of the National Institutes of Health on the development of less hazardous cigarettes deals with a matter entirely outside the scope of the Commission's administrative competence.

Secretary Gardner commented during the Hearings before the House Subcommittee on HEW Appropriations earlier this year with respect both to the anti-smoking educational programs of the department and the question of developing a less hazardous cigarette. He indicated that the anti-smoking programs had not "worked very well so far" and that some of the people in his department thought the tobacco industry should be persuaded "to pursue the kinds of research that will result in a safer cigarette". In response to a reference to cigarette advertising, Congressman Flood stated: "They could not have bought the advertising you fellows got free on radio, television, and press. You did not have to spend any money; it was a-natural. -It was all over the place." Secretary Gardner responded, "When we recommended publishing the tar and nicotine content, again we got an enormous newspaper coverage."

The Surgeon General, Dr. Stewart, in testifying before the House Subcommittee concerning the Public Health Service anti-smoking program campaign, under the direction of the National Clearinghouse for Smoking and Health, stated that they were asking for the same amount of money in 1968 "as we had in 1967". The Surgeon General advised the Subcommittee that while he would "see the Clearinghouse growing some" he did not think it would ever be "a tremendously large organization". A substantial proposal to step up Clearinghouse activities was not recommended. Recommendations concerning increased expenditures for an activity that is a part of the Public Health Service, particularly when no increase in appropriations was asked by HEW, indicate that the Federal Trade Commission is far out of its proper area.

The same is true with respect to the recommendation concerning development of a "safer" cigarette. While a "safer" cigarette program has been considered by the Public Health Service (see HEW, Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 1967), Surgeon General Stewart stated that there was no such program in the budget. A plan for a "systematic research program" that will involve tobacco and health is outlined at pages 676 and 677 of Part V of the Hearings. Dr.

Paul Kotin, head of the new Division of Environmental Health Sciences, confirmed that tobacco and health was only one aspect of an overall program extending to many areas of environmental health. He was particularly interested in studies "that take into account more than a single exposure to a single agent" and stated: "A person drives home. He comes from perhaps a dusty occupation. He stops behind a bus which is emitting a fair amount of fumes and he comes home and there are many chemical agents that have been sprayed around the house to kill an insect, and so on. We really do not know that the effect of multiple sequential exposure is."

In addition to the program being administered by Dr. Kotin, the Department of Agriculture has a substantial research project underway and work is going forward in the National Cancer Institute and the National Heart Institute.

To simply concentrate on developing a "safer" cigarette, as the Federal Trade Commission recommends, is to pursue confirmation of a preconceived idea. The recommendation for research is not only beyond the competence of the Federal Trade Commission but is scientifically unsound.

VI. The Arguments Presented By the Federal Trade Commission Are Generally Unsupported By Data And Are Obscure, Irrelevant Or Contrived.

The Federal Trade Commission has tended to make some rather meaningless statement and then take the position that it has said something highly significant. It stressed, for example, that about three quarters of the industry's advertising budget was spent on filter cigarettes. This demonstrated the industry's interest in capitalizing on the sale of filter cigarettes. The Federal Trade Commission did not mention that practically all new brands introduced are filter brands and that it is the introduction of new brands that requires above average advertising expenditure. Somehow the Commission makes this sound very bad even though the advertising is competitive and for the purpose of increasing share of market.

A recent quotation in the Wall Street Journal from a talk by Paul Rand Dixon is difficult to square with the FTC's urging upon Congress (1) a punitive statement with regard to cigarette smoking which would eliminate most advertising (and consequently directly interfere with competition) and (2) a requirement that the companies label and advertise the amounts of "tar" and nicotine which their cigarettes contain, a practice which was itself

labeled deceptive by the FTC until last year. Mr. Dixon stated (to the American Advertising Federation meeting in Washington): "I think that those of you who entertain these fears (of new curbs) might sleep better nights if you would only realize that, far from nibbling at free enterprise, the FTC is every bit as anxious as you are to maintain our competitive system in its fullest vigor. The only curbs we have in mind are those which will halt unfair methods of competition and false and deceptive practices, including false advertising."

Commissioner Elman has relied on and cited an estimate of the United States Public Health Service "that as many as 300,000 people may die prematurely each year because they have smoked cigarettes." This figure has been thrown around recklessly by various persons from time to time and a rebuttal is attached hereto as Appendix \_\_\_\_.

Commissioner Elman's recommendation that 100-millimeter cigarettes be banned in Interstate Commerce makes about as much sense as banning the sale of cigarettes by the carton. His reasoning, presumably, would be that if one pack is bad ten may be deadly and that by selling them in quantities of 200 rather than

twenty it could somehow be expected that a person would be more exposed than if the quantity was limited. It would be interesting to know if Commissioner Elman would agree that five puffs of a 100-millimeter cigarette would probably give less "tar" and nicotine than if a person cut 30 millimeters off and then took five puffs.

The FTC has converted a lack of mention of health hazards into assurances of safety. Perhaps their greater feat of verbal legerdemain appears at page 22. They mention a filter cigarette as advertising "for good taste every time" and then say that "it is not always clear whether it is the lasting quality of the taste or the lasting quality of an implied immunity to the ill-effects of smoking, which is being promoted." If that example makes the head twirl, try, as other examples of this "ambiguity" the following: "Taste extra coolness every time you smoke" and "Right any time of the day . . . any time you light up." (The FTC apparently couldn't find any ads that amounted to an assurance of safety and decided to "assuage" its own "anxiety" by re-defining the English language.)

The FTC gave the industry practically no credit for the

Cigarette Code and condemned it for using people who were "just over 25 years old" (The Cigarette Code requires that persons depicted as smokers be at least 25 years of age and shall not be made to appear less than 25 years of age) and sponsoring advertising that may "appeal" to young people. The Commission mentioned three network television programs carrying cigarette commercials that had an audience at least 45% of which was composed of persons under 21. It did not mention that R. J. Reynolds, sometime prior to the issuance of the FTC report, gave up sponsorship of the Beverly Hillbillies (notwithstanding its substantial nationwide audience) because the 45% mark prescribed by the Code was reached.

#### VII. Conclusion

Throughout the report, the Commission has offered opinions and suggested policies in relation to matters which are neither within its competence nor its legal jurisdiction. The separate statement by Commissioner MacIntyre properly criticizes the Commission's report for attempting to deal with matters in the area of sociology, education and philosophy, pointing out that these are matters that would best be left to the agencies of government

expected to report on education and social problems. He goes on to say:

"I know what the policy of the Federal Trade Commission is in its determination to eliminate unfair and deceptive acts and practices in advertising. My position of adherence to that policy is clear. It should be kept in mind that when that policy has been fulfilled, the Commission has acted to the limits of its jurisdiction under existing law regarding the matters involved here. Also, it is my view that when other public policy matters entrusted to other agencies are involved, such as health, education, social problems and related matters, the Federal Trade Commission should defer to the judgment of such agencies regarding their needs and the program of the President in the discharge of their responsibilities. This is the usual practice of the Federal Trade Commission in reporting on needs for legislation."

In preparing its report, the Trade Commission has . . .  
entirely taken the view that it has a blanket mandate to protect the health and safety of consumers. The entire report is framed in corrective action to reduce the presumed hazards of cigarette smoking rather than corrective action to eliminate any false or deceptive practices in advertising or promotion, the latter being the only matters within the jurisdiction of the Commission.

The concurring statements of Commissioners Elman and

Jones are concerned with policy matters completely outside the scope of Federal Trade Commission jurisdiction and expertise. In suggesting that the Commission recommend to Congress that cigarette advertising be banned entirely on television and radio, these Commissioners purport to make an evaluation of the hazard to health claimed to be presented by cigarette smoking. Since these Commissioners can claim no medical or scientific expertise, their opinions on this subject should carry no weight. Furthermore, the action which they recommend is completely unrelated to the jurisdiction of the Trade Commission and, accordingly, not appropriate for recommendation by the FTC.

Commission Elman's recommendation that the "super-king-size" cigarettes be banned from Interstate Commerce as too dangerous for human consumption is yet another subject which is entirely outside the scope of competence of the Federal Trade Commission.

The Commission's obvious excesses highlight its lack of objectivity and disregard for its true functions. Its recommendations smack of a disregard for facts and a strong desire to acquire the authority to impose a harsh and unwarranted regulatory policy on the tobacco industry by eliminating advertising, requiring

a label overstating the scientific evidence relating to risk and dictating product development.