(As published in: Harvard Law Review, Vol. 86, No. 8 (June, 1973)).

ADVERSE PUBLICITY BY ADMINISTRATIVE AGENCIES

Ernest Gellhorn *

WHEN the Government focuses adverse publicity on named parties, the consequences to such parties can be disastrous. Perhaps the most notorious examples of governmental abuse of adverse publicity occurred during the McCarthy era, when press releases and congressional committee hearings assailed with legal impunity the patriotism and integrity of many persons. Publicity released by administrative agencies can also have a devastating impact; in extreme instances, such as the Food and Drug Administration's announcement of botulin in certain cans of Bon Vivant soup,[1] agency publicity can financially ruin the affected party.

"Adverse agency publicity," as used in this Article, refers to affirmative measures taken by an agency which, by calling public attention to agency action, may adversely affect persons identified in the publicity. Agencies may or may not intend their publicity to have an adverse impact. In the Bon Vivant case, the Food and Drug Administration was chiefly concerned with warning the public of an imminent threat to life. In other cases, agencies such as the Equal Employment Opportunity Commission [2] or the Cost of Living Council [3] have used adverse publicity in the absence of, or in preference to, statutorily-authorized enforcement powers. The effect of both uses of adverse publicity is, however, the same: a deprivation is imposed on the affected party, without articulated standards or safeguards.[4]

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* Professor of Law, University of Virginia. B.A., University of Minnesota, 1956; LL.B., 1962.

This Article is based on a report prepared for the Administrative Conference of the United States, which was also the basis for Conference Recommendation No. 73-1 (adopted June 8, 1973), *reprinted in* 41 U.S.L.W. 2684 (June 19, 1973).

[1] *See* p. 1413 & note 134 *infra*.

[2] *See* pp. 1398-401 *infra*.

[3] *See* pp. 1403-06 *infra*.

[4] Adverse agency publicity is somewhat akin to prosecutorial discretion, which has captured center stage in the study of informal discretion. *See, e.g.*, K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293 (1972). In fact, the publicity decision is indistinguishable from prosecutorial discretion in the sense that most administrative agencies have neither developed nor even considered criteria for determining the proper scope and nature of adverse publicity.

The first part of this Article is a survey of the uses of adverse publicity by administrative agencies, based on an empirical study of the publicity practices of particular agencies. Part I draws on interviews with agency staff and "victims" of adverse publicity,[5] on perusal of numerous press releases and distribution lists, on observation of news conferences and background briefings, and on analysis of agency regulations. Part II suggests that many problems created by adverse publicity can be ameliorated by expressly developing agency policy through rules and practices which guide agency discretion in choosing when and how to issue adverse publicity. The Article also discusses the possibilities for external control by means of judicial review and statutory reform when internal controls prove inadequate.

I. The Uses of Adverse Agency Publicity

A. The Various Roles of Adverse Publicity

Administrative agencies use adverse publicity for several reasons. Publicity may inform the public as well as regulated parties about the agency's mission, policies, and performance; it may warn the public of imminent harm; and it may serve to punish or deter law violations.[6]

1. Information and Warning. — The primary function of agency publicity is to announce administrative policy or action. Its rationale is generally stated as "the public's right to know." More particularly, such agency publicity seeks to inform the public and regulated persons about government programs and policies so that they can use this information substantively (as direct users) or politically (as voters). Authoritative agency publicity may call information to public attention when it would

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Adverse agency publicity, on the other hand, should be distinguished from an agency's decision to permit public access to its records, which is governed by separate criteria contained in the Freedom of Information Act, 5 U.S.C. § 552 (1970). *See* pp. 1421–23 *infra*. *See generally* Note, *The Freedom of Information Act and the Exception for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047 (1973).

[5] Many of the insights in this Article concerning internal agency policies are gleaned from interviews with agency personnel who will not be cited in order to protect confidences and facilitate future investigations. When this is the case, no authority will be given and reliance must be placed upon the scope and thoroughness of the author's research, the accuracy of the responses he received, and, of course, his integrity.

[6] Such categorization does not, of course, imply mutual exclusivity. One release of publicity may fall into both categories. Moreover, this Article analyzes only adverse uses of publicity; many issuances of publicity, particularly where they are informational, are unlikely to have a significant adverse impact.

otherwise be ignored. In addition, publicity assists administrative enforcement, since regulated parties are likely to comply once informed of agency policy. Furthermore, publicity may aid administrative efficiency, since one news release or conference may anticipate questions which the media or others would ask. And fairness is served by providing advance notice to those affected by agency policy.

One aspect of agency dissemination of information deserves special attention: a major function assigned many agencies is to warn the public of imminent harm to health and safety, of lurking danger to individual economic well-being, or of failure to observe other statutory standards. To the extent that this warning role is controversial, it is only because of the possibility of additional, unmerited harm to the subjects of the warning.[7] It is generally accepted that warnings of serious and imminent physical or economic harm are desirable and necessary. The problem is determining when the seriousness or imminence of harm to the public justifies the risks inherent in the use of adverse publicity.

2. Sanction. — Much agency publicity identifying individuals or firms and thus likely to have an adverse impact is intended only to warn or inform the public; the harm occurs because publicity is a "gross" informational or warning tool. Occasionally publicity which informs or warns also functions to punish law violators, to deter unlawful conduct, or to force a transgressor to negotiate and settle. In such cases, the adverse publicity functions as a sanction.[8] Infrequently, agency publicity is issued solely for its sanctioning effect.[9] When the adverse impact is ancillary and unintended, the harm to the named individuals or firms is a cost of obtaining the information and warning benefit quickly and cheaply. When the impact is ancillary and intended, the harm may be offset by the need to protect the public; often other measures, if any, would be ineffective. Adverse publicity designed solely as a sanction may ultimately protect the public, but it does not carry the additional weight supporting publicity designed also to inform or warn.

[7] *See, e.g.*, p. 1413 & note 134 *infra* (FDA warning about Bon Vivant vichyssoise).

[8] The coercive effect, if any, of agency publicity depends on four factors: (1) the degree to which the public disapproves the conduct being condemned; (2) the importance of a good reputation to the person or firm against whom the publicity is directed; (3) the extent to which the adverse public impact will affect conduct beyond respondent's offensive activity; and (4) the likelihood that adverse agency publicity will reach the public.

[9] *See, e.g.*, pp. 1398–401 *infra* (discussion of EEOC). On rare occasions such publicity is malicious and issued solely for the purpose of injuring the named party. *Cf.* Barr v. Matteo, 360 U.S. 564 (1959) (allegation of malice does not override absolute immunity of government official from tort liability).

B. Agency Use of Publicity to Inform and Warn

1. The Public Health Service and the Cigarette Controversy. — On occasion the Public Health Service (PHS) [10] relies heavily on the use of adverse publicity to inform and warn the public of serious dangers to community health. As with the "Surgeon General's 1964 Cigarette Report," [11] its focus is likely to be on a particular hazard and its warning may adversely affect an entire industry. Admittedly, such publicity puts no individual firm at a competitive disadvantage, and an industry has "strength in numbers" that enables it to combat more vigorously the agency assertions. Yet the losses which may result from adverse agency publicity directed toward an entire industry are likely to be great, and concentrated public attention heightens the need for carefully conceived and well-articulated procedures.

Like most administrative agencies, the PHS is not specifically authorized to issue adverse publicity; [12] it relies on an implied authority to inform and warn the public about perils to public health. While this reliance does not seem misplaced, it does underscore the fact that Congress has not addressed the issue of PHS publicity. More serious is the fact that no HEW regulations govern publicity efforts of the type associated with the PHS Cigarette Report.[13] Indeed, no regulations authorized the issuance of such a report in the first place. Admittedly, HEW's Assistant Secretary for Public Affairs has since prepared a massive manual which sets forth bureaucratic rules governing HEW "communications programs." [14] This manual establishes an elaborate internal review and clearance procedure for press releases and news conferences, seeking to assure that HEW speaks with

[10] References to the PHS in this Article are limited to comments on its responsibility for investigating smoking, which had been in the office of the Surgeon General and which is currently in the Center for Disease Control of the Health Services and Mental Health Administration. *See* UNITED STATES GOVERNMENT ORGANIZATION MANUAL 1972–73, at 217 (1972).

[11] ADVISORY COMM. TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE, SMOKING AND HEALTH (1964) [hereinafter cited as PHS CIGARETTE REPORT].

[12] The Secretary of HEW is now authorized to issue annual reports to inform Congress of current developments on smoking and health, and also to make legislative recommendations. 15 U.S.C. § 1337(a) (1970), *as amended*, 15 U.S.C.A. § 1337(c) (Supp. 1973). The PHS is also granted ambiguous authority to release information relating to public health, including weekly reports on health conditions as well as reports of other pertinent health information. 42 U.S.C. § 247 (1970), *as amended*, 42 U.S.C.A. § 229 (Supp. 1973).

[13] HEW regulations apply to the PHS: "[u]nified direction of [PHS' constituent public health service] agencies is the responsibility of the Assistant Secretary for Health [of HEW]." UNITED STATES GOVERNMENT ORGANIZATION MANUAL 1972–73, at 215 (1972).

[14] HEW, DEPT. STAFF MANUAL: PUBLIC AFFAIRS MANAGEMENT SYSTEM, HEW TN–72.1, ch. 3–10 (1972).

one voice. But it gives no guidance on when a news release should be issued, what pitfalls should be avoided, what information should be included, or what requirements of notice and fairness should be met. And although they are no longer confidential, staff manuals are not readily available to the public.

Although the PHS campaign against cigarette smoking is in many respects sui generis, it affords an interesting illustration of how the exigencies of publicity can interact with and even control substantive policy. Government publicity first connected smoking with lung cancer in the mid-1950's, when the Census Bureau suggested that a drop in cigarette smoking was due to fear of lung cancer. Earlier antismoking publicity had been almost solely the work of medical journals and, later, of the American Cancer Society, a private nonprofit organization.[15] In June 1956, a scientific study group was formed under the Surgeon General's sponsorship, and after appraising sixteen studies, it concluded that a definite relationship existed between excessive cigarette smoking and lung cancer. One year later, the PHS officially concluded that increasing and consistent evidence had demonstrated that excessive smoking was a cause of lung cancer and undertook to educate the public about the dangers of smoking.[16]

The industry was not long in responding. As early as January 1954, it had created the Tobacco Industry Research Committee to investigate the causes of lung cancer. During its first five years the committee received over $3 million in research grants and devoted most of its efforts to countering antismoking reports. The committee contended that the alleged statistical correlation between smoking and lung cancer was insignificant and that until the causative agents could be identified, the case against smoking cigarettes could not be made.[17]

The effectiveness of the industry's campaign spurred further government action. In 1962 the Surgeon General announced, with the President's approval, the formation of an advisory committee composed of "outstanding experts who would assess available

[15] *Luther Terry Glances Back*, MEDICAL OPINION & REV., July, 1972, at 33.

[16] For recountings of the PHS effort, see PHS CIGARETTE REPORT 7–8; FTC, STATEMENT OF BASIS AND PURPOSE OF TRADE REGULATION RULE FOR PREVENTION OF UNFAIR OR DECEPTIVE ADVERTISING AND LABELING OF CIGARETTES IN RELATION TO THE HEALTH HAZARDS OF SMOKING 8–24, *reprinted in* 29 Fed. Reg. 8327–32 (1964) [hereinafter cited as FTC CIGARETTE STATEMENT].

[17] For descriptions of industry counterefforts, see HOUSE COMM. ON GOVERNMENT OPERATIONS, FALSE AND MISLEADING ADVERTISING (FILTER-TIP CIGARETTES), H.R. REP. NO. 1372, 85th Cong., 2d Sess. 3 (1958); Wegman, *Cigarettes and Health: A Legal Analysis*, 51 CORNELL L.Q. 678, 682–83 (1966); Whiteside, *The Reporter at Large — A Cloud of Smoke*, THE NEW YORKER, Nov. 30, 1963, at 67; NEWSWEEK, Nov. 18, 1963, at 61–66; N.Y. Times, Jan. 4, 1954, at 1, col. 6; *id.* at 15, col. 2.

knowledge in the area (smoking and health) and make appropriate recommendations." To enhance the prestige of its findings and to avoid charges of PHS dominance, the advisory committee's independence from the PHS was noted both in government press releases and in the PHS Cigarette Report, which the committee drafted. Nevertheless, the media realistically treated the study as a government project.[18]

What disturbed the tobacco industry more than the report's governmental source was the confusion surrounding the nature of the report and its supporting evidence. The media presented the PHS Cigarette Report to the public as the conclusion of a distinguished scientific panel which had undertaken clinical studies and collected new data.[19] In fact, the PHS Cigarette Report was not based on new or independent investigations of the causes of cancer or of the effect of smoking on health. The advisory committee conducted no experiments or clinical studies, collected and evaluated no new statistical data, and examined no smokers, nonsmokers, or cigarettes; it merely evaluated the many earlier studies which had examined the relationship between smoking and health.[20]

Although the PHS Cigarette Report and the accompanying government information releases revealed the study's limited basis,[21] the process by which the study was conducted and the procedures for its release explain the misleading media coverage. The committee operated in strictest secrecy during the two years the study was in progress. Formal meetings were held in an underground chamber in the bombproof Library of Medicine,

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[18] For accounts of the establishment of the committee, see FTC CIGARETTE STATEMENT 13–24; PHS CIGARETTE REPORT 7–8. *See also* Greenberg, *Tobacco and Health, PHS Sets Up Rules for Study Committee*, 137 SCI. 328 (1962).

[19] *See, e.g.*, NEWSWEEK, Jan. 20, 1964, at 48–50; Washington Post, Jan. 12, 1964, at 1, col. 5. *But see* N.Y. Times, Jan. 12, 1964, at 1, col. 1.

[20] This was no small undertaking, and the tobacco industry cooperated in supplying the committee with "favorable" reports. Thousands of articles on smoking and health were reviewed, and the report is a summary of the findings and studies which the committee accepted.

A scientific study which examines and evaluates a large group of prior studies may be a major event, since drawing together the results of previous experiments will often support new and stronger statements. The difficulty of making such an argument about the PHS Cigarette Report is that many of the supporting studies had already sought to link the prior literature, and some of the earlier analyses which were not constrained by a "committee format" seemed more persuasive than the PHS Cigarette Report. Even more serious is the fact that the report made no significant effort to fill in data gaps or to validate critical results where the evidence was not corroborated or the conclusions were questionable. The PHS Cigarette Report, therefore, is more properly described as a major political or public relations event in the regulation of cigarettes than as a scientific breakthrough.

[21] *See* PHS CIGARETTE REPORT 1–8.

and special keys were needed to operate the elevators leading to the meeting room. The committee secured its records in locked subterranean vaults and refused to entrust the combinations to any single committee member. When publishing the committee's findings, the Government Printing Office followed the rules governing classified documents. The report itself was released in a dramatic manner. Prepublication stories about its contents, some traceable to PHS officials, were circulated. The report was formally released on a Saturday, traditionally a slow news day, apparently to obtain maximum coverage in widely-read Sunday papers. Finally, "presidential" rules were imposed on the release of the report: each reporter received a copy as he entered the conference room and was allowed to read it, but he was then obliged to remain for the news conference. Afterwards the newsmen, in Surgeon General Terry's words, "virtually exploded" from the auditorium to get the news out. In light of this melodramatic setting, it is not surprising that newsmen lost sight of the nature of the report or its limited basis. Many members of the public were thus led to believe that the PHS Cigarette Report contained important new evidence which conclusively "proved" that cigarette smoking caused cancer.

PHS secrecy together with occasional leaks of stories — sometimes on the secrecy itself — functioned to build public interest and to create an aura of invincibility which obscured the report's limitations.[22] The secrecy was designed to increase the report's visibility and stature, but it was accomplished by sales efforts which are acceptable in the marketplace but which are of doubtful legitimacy when used by a government information office. And it was done at the "expense" of a substantial industry; cigarette sales slumped sharply after the report was released in 1964.[23]

Of course, this result was consistent with PHS policy aims. PHS had created the study committee and sponsored the report in order to warn the public of imminent peril to its health, and the report concluded that the public health was endangered by cigarette smoking. The adversely affected industry was given "due process rights" including an opportunity to be heard: it suggested members for the study panel and exercised a practical veto over some appointments; it presented evidence by submitting reports and commenting on others; and the adverse publicity did not issue until the agency had made a thorough decision based on all the available evidence. Thus, one might argue that at worst the false impression created by the PHS publicity procedures was

[22] *See Luther Terry Glances Back, supra* note 15.

[23] *See* TOBACCO RESEARCH COUNCIL, TOBACCO CONSUMPTION IN VARIOUS COUNTRIES, RESEARCH PAPER NO. 6, at 64 (2d ed. D. Beese 1968).

"harmless error," and that at best it was an act of statesmanship resulting in substantial public benefit. This argument, of course, depends primarily on one's agreement with the report's underlying findings. But even one who agrees with the aims of the PHS and its report [24] must be troubled by its deliberate attempt to oversell a narrow product.

The PHS Cigarette Report episode thus raises many of the issues involved when an agency uses adverse publicity to inform or warn. The PHS does not have law enforcement duties and its publicity was not designed as a threat or intended as a sanction. The publicity was intended solely to warn and inform and yet it had significant adverse effects on the industry involved.

2. The Federal Trade Commission. — It is not surprising that the Federal Trade Commission (FTC), as the procedural "point man" of federal administrative law, has developed the most sophisticated publicity policies and practices of the regulatory and executive agencies examined in this study. Its authority to issue press releases has been questioned and upheld,[25] and its policies are carefully articulated in continually evolving agency rules, manuals, and guidebooks.[26]

In general, FTC publicity policy is both sensible and sensitive. Although still subject to considerable external criticism and not immune from embarrassing mistakes, its policies represent a thoughtful attempt to balance administrative efficiency, the public's need for warning, and private interests. The FTC public information office has prepared a pamphlet fully advising Commission personnel and outsiders about its publicity policies,[27] and its publicity procedures serve as a guide for other administrative agencies.

Early critics of the Commission challenged, on statutory and constitutional grounds, its right to make complaints public and to hold public adjudicatory hearings.[28] These challenges were easily repulsed, and in light of the Freedom of Information Act [29] they now have a quaint ring. The more serious challenge has been to the Commission's practice, adopted in 1918, of issuing a press

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[24] For an expression of the author's views on the PHS Cigarette Report and on government regulation of cigarette advertising, see E. Gellhorn, *Braking the Cigarette Habit*, 3 J. Cons. Aff. 145 (1969).

[25] *See* FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968).

[26] *See, e.g.*, FTC, Public Information Policy Guidebook (1972) [hereinafter cited as FTC Publicity Guidebook].

[27] *Id.*

[28] *See* E. Griffiths Hughes, Inc. v. FTC, 63 F.2d 362, 363 (D.C. Cir. 1933); Attorney General's Comm. on Administrative Procedure, Monograph on Federal Trade Commission, S. Doc. No. 186, 76th Cong., 3d Sess., pt. 6, at 14 (1940).

[29] 5 U.S.C. § 552 (1970); *see* pp. 1421–23 *infra*.

release immediately upon filing a complaint,[30] copies of which are presently mailed to over 1,000 publications and to approximately 20,000 subscribers on the FTC's general distribution list. Because FTC investigations of individual firms are made public only if they lead to the filing of a complaint, press releases accompanying such complaints make up nearly all the agency's adverse publicity.[31]

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[30] *See, e.g.*, FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308, 1310 n.3 (D.C. Cir. 1968); 1925 FTC ANN. REP. 23; T. BLAISDELL, THE FEDERAL TRADE COMMISSION: AN EXPERIMENT IN THE CONTROL OF BUSINESS 83, 86–89 (1932). *But cf.* ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, MONOGRAPH ON SECURITIES AND EXCHANGE COMMISSION, S. DOC. NO. 10, 77th Cong., 1st Sess., pt. 13, at 53 (1941). *See also* FINAL REPORT OF THE ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th Cong., 1st Sess. 135–36 (1941).

In *Cinderella*, the District of Columbia Circuit upheld the Commission's practice of issuing a press release upon filing an adjudicative complaint. While the court could not point to any explicit delegation of authority, it relied upon § 5 of the FTC Act, 15 U.S.C. § 45(a)(1) (1970), which charges the Commission with eliminating unfair and deceptive business practices in order to protect the public, and upon § 6(f), 15 U.S.C. § 46(f) (1970), which authorizes the FTC to release information as it deems expedient in the public interest. From this statutory structure the court concluded that

> the Commission, acting in the public interest, [has authority] to alert the public to suspected violations of the law by factual press releases whenever the Commission shall have reason to believe that a respondent is engaged in activities made unlawful by the Act which have resulted in the initiation of action by the Commission. The press releases predicated upon official action of the Commission constitute a warning or caution to the public, the welfare of which the Commission is in these matters charged.

404 F.2d at 1314. One judge, while concurring in this reading of the FTC's authority, admonished the Commission to exercise its discretion in issuing releases. *Id.* at 1320–22 (Robinson, J., concurring).

[31] The FTC occasionally also uses publicity in conjunction with its formal cease-and-desist orders. That is, it requires respondents to publicize their past misdeeds by what is called "corrective advertising." *See, e.g.*, ITT Continental Baking Co., [1970–1973 Transfer Binder] TRADE REG. REP. ¶ 19,681, at 21,727 (F.T.C. 1971); Note, *Corrective Advertising — The New Response to Consumer Deception*, 72 COLUM. L. REV. 415 (1972); Note, *"Corrective Advertising" Orders of the Federal Trade Commission*, 85 HARV. L. REV. 477 (1971). While it has been asserted that this is a publicity sanction imposed by the agency, *see* Lemke, *Souped Up Affirmative Disclosure Orders of the Federal Trade Commission*, 4 J.L. REFORM 180, 190–93 (1970), these orders involve the FTC's substantive enforcement powers under § 5 of the FTC Act. Since they are subject to judicial review and are not imposed prior to an adjudicative hearing, they do not raise the same issues as does publicity of complaints.

Similar enforcement techniques have also been relied on by other agencies. *See, e.g.*, J.P. Stevens & Co., 1971 CCH NLRB Dec. ¶ 23,079. *See also* NLRB v. Express Publ. Co., 312 U.S. 426 (1941) (employer violating NLRA required to post compliance notice in conspicuous place); Bilyeu Motor Corp., 161 N.L.R.B. 982 (1966), *enforced*, 391 F.2d 928 (5th Cir. 1968). Comparable orders relating to the distinctive regulations of their agencies are also required by the Department of Agriculture and the SEC. *See, e.g.*, *In re* Mickelian Sales Co., 30 Agri. Dec. 830 (1971); SEC Release No. 34-7920, 31 Fed. Reg. 10,076–77 (1966).

The FTC rules provide for the filing of two types of complaints: one for use in consent procedures, the other for use in adjudicative procedures. The former, which are governed by Part II of the FTC's rules, are known as "Part II" or "proposed" complaints.[32] They are only tentatively approved by the Commission; before a matter in which such a complaint has been filed is assigned to an administrative law judge for hearing, the respondent is given an opportunity for extra-adjudicative settlement, usually by negotiation of a consent order.[33] Part II complaints are not only public documents, they are also regularly accompanied by Commission-approved press releases. If a proposed complaint does not produce a negotiated settlement, the matter in which it was filed is returned to the Commission for approval and issuance of an "adjudicative," or "Part III," complaint. Unless the matter in which it is filed has for some reason escaped the Part II procedure and its attendant publicity, a Part III complaint is not accompanied by a press release.[34] Thus, whenever it first becomes a matter of public information, every FTC complaint is deliberately publicized through a press release. In particularly significant cases, the Commission will hold a press conference as well.

According to the FTC, routine use of press releases and frequent use of background briefings ensure accurate, fair news coverage. Reporters have access to authoritative interpretations of agency actions by responsible FTC officials and are less likely to misread the cryptic legal language of the complaint. Moreover, such publicity practices are the most efficient means of funneling all inquiries to one place at one time. In press releases and at briefings, FTC officials scrupulously avoid comments likely to prejudice the respondent's case, and they are careful to point out that there has been no adjudication; the charges must still be proved before an administrative judge, reviewed by the Commission, and perhaps reviewed by the courts as well.[35] Many re-

[32] *See* 16 C.F.R. § 2.31 (1973); FTC PUBLICITY GUIDEBOOK 3–4.

[33] 16 C.F.R. §§ 2.31–.34 (1973). However, there are many variations on this scenario. *See, e.g.*, National Housewares, Inc., 73 F.T.C. 287 (1968) (consent order negotiated after issuance of adjudicative complaint). *See also* Seeburg Corp. v. FTC, 1966 Trade Cas. ¶ 71,955 (E.D. Tenn.) (holding that FTC did not have to grant oral hearing or access to Commission memoranda during consent negotiations).

[34] 16 C.F.R. §§ 2.34(b), 3.11 (1973); *see* FTC PUBLICITY GUIDEBOOK 2.

[35] Whenever the Commission's news release may involve a charge of a law violation or could be so interpreted, the FTC includes the following notice, highlighted by its inclusion in a black bordered box on the release:

> (NOTE: The FTC issues a complaint when it has "reason to believe" that the law has been violated. Such action does not imply adjudication of the matters alleged.)

See, e.g., FTC PUBLICITY GUIDEBOOK 26. This notice, or one similar to it, has

spondents believe, however, that FTC press releases and briefings obscure the tentative nature of the charges filed, especially in the case of Part II complaints.[36] Often the media treat the filing of a complaint as if it were a final adjudication, and the public assumes that "where there's smoke there's fire." [37]

These and other problems are illustrated by the Commission's erroneous adverse publicity regarding duPont's antifreeze Zerex. On November 25, 1970, the FTC issued a Part II complaint charging that an advertisement in which Zerex's ability to stop radiator leaks was demonstrated by punching holes in a can of the product was false and deceptive.[38] According to the proposed complaint, the advertisement both misrepresented the product's leakstopping ability and failed to warn that the antifreeze might damage a car's cooling system. Encouraged by an FTC news conference, the press gave widespread coverage to the charges.

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been included in FTC publicity releases since its news practices were challenged in FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968).

A random review of media reporting of FTC releases indicates that the notice is only occasionally included in the published report. On the other hand, most newspapers will contact the named respondent and include its denial in the story. Frequently, however, the paper also seeks out the response of FTC staff personnel. For illustration of the resulting "trial by press release," see Washington Post, Aug. 18, 1972, at D8, col. 7 (FTC complaint against Korvette alleging deception in home remodeling).

[36] One major advertising executive, whose firm produced the Zerex commercial, recently excoriated the FTC's publicity policies:

> "You wake up one morning to find that you are clobbered on the TV broadcasts and in the headlines," Tom Dillon of Batten, Barton, Durstine & Osborn (BBDO) told a conference of advertising officials. Not only is there no warning, he said, but there is a "presumption of your guilt with all the weight of the U.S. Government . . . overnight your business and reputation are damaged, and quite possibly destroyed."

NEWSWEEK, June 4, 1973, at 84, 89. The charge is inaccurate, however, if it is meant to describe current FTC practices.

Respondents also object to the FTC's refusal to permit them to reply in agency press releases or at agency news briefings to charges made against them. The objection seems a weak one, however. The FTC always informs respondents before it files charges, and advises them in advance of its intentions concerning press releases and news briefings. FTC procedures certainly do not unfairly surprise the affected parties, and fairness would hardly seem to require the agency to provide respondents with a free public platform, especially since most are large corporations fully capable of reaching the public with their side of the story. In fact, respondents often issue their own releases, hold press conferences, and counter the Commission with advertising — a public information device unavailable to the FTC. In any event, the Commission itself will publicize the firm's formal answer when filed, unless a respondent wishes otherwise.

[37] Besides being unfair to the respondent, such premature publicity may, by solidifying the agency's stance on the matter, make it difficult for the Commission to negotiate a later settlement.

[38] E.I. duPont deNemours & Co., [1970–1973 Transfer Binder] TRADE REG. REP. ¶ 19,395 (F.T.C. 1970).

National television news programs carried the story and broadcast interviews with high-ranking FTC personnel. A year later the Commission, having concluded that Zerex was an effective leakstopper and that duPont had withdrawn the damaging formula from the market before the FTC issued its proposed complaint, withdrew the most serious charges against the company and alleged only that duPont had marketed a potentially harmful product for a time without clearly disclosing the hazard.[39] The FTC held no news conference to publicize its staff's error, and the press paid little attention to the modified charges.[40]

While the problems posed by FTC publicity are in many respects typical of administrative publicity in general, since most agencies regularly publicize every significant formal action,[41] certain factors make the Commission's publicity practices for proposed complaints particularly questionable. The Zerex incident is not unique. The Commission frequently dismisses or alters Part II complaints before issuing final orders.[42] The charges publicized are tentative and often are not even finally entered as FTC complaints in the publicized form. Every com-

[39] E.I. duPont deNemours & Co., [1970–1973 Transfer Binder] TRADE REG. REP. ¶ 19,849 (F.T.C. 1971). The matter was mercifully ended in July 1972, when the FTC finally accepted a consent decree whereby duPont promised that it would not market any new automotive product unless it (1) pretests the product to determine if it can cause damage and (2) makes a clear disclosure if the answer to (1) is yes. E.I. duPont deNemours & Co., [1970–1973 Transfer Binder] TRADE REG. REP. ¶¶ 20,030, 20,075 (F.T.C. 1972).

[40] While duPont is unable to identify the injury caused by the Commission's erroneous charge — in part because the FTC complaint was filed at the end of the antifreeze selling season — it seems clear that the charges did injure the value of the Zerex trade name. Only occasionally is the "cost" of an FTC complaint readily identifiable. For example, when, on December 12, 1972, the Commission charged Xerox with unlawful monopolization, its stock dropped in value $8 that day. Wall Street Journal, Dec. 13, 1972, at 3, col. 1; *see* Xerox Corp., [1970–1973 Transfer Binder] TRADE REG. REP. ¶ 20,164 (F.T.C. Dec. 12, 1972).

[41] The FTC and CAB are two examples. *See* Letter from Charles A. Tobin, Secretary of the Federal Trade Commission, to John F. Cushman, Executive Director, Administrative Conference, June 7, 1973; Letter from Whitney Gillilland, Vice Chairman of Civil Aeronautics Board, to John F. Cushman, Executive Director, Administrative Conference, May 8, 1973.

[42] In fiscal 1972, the FTC issued 249 proposed (Part II) complaints; only 42 adjudicative (Part III) complaints were docketed. Telephone Interview with Clara Hankins, Management Analyst, FTC, Feb. 14, 1973. Former Commissioner Elman once determined that one-third of the appeals decided by the Commission in 1964 resulted in dismissals of the complaint. Elman, *A Note on Administrative Adjudication*, 74 YALE L.J. 652, 653 (1965).

Although questionable, these publicity practices do not rise to the level of unconstitutional deprivations. Courts have approved such automatic publicity and summarily rejected due process claims. *See, e.g.*, FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308, 1315 (D.C. Cir. 1968), *discussed at* note 30 *supra*.

plaint is publicized, even when publicity serves no warning function. The Commission officially publicizes alleged illegal practices, sometimes long abandoned, before the respondent has a chance to be heard. Finally, in deciding whether to focus special public attention on a particular case by holding a news conference or using other special publicity techniques, the Commission occasionally appears to be influenced as much by the desire to enhance its political position as by legitimate policy considerations.[43]

The Commission's publicity practices are not without their defenders, however. Until recently, the FTC was known to consumer groups and other critics as the "toothless old lady of Pennsylvania Avenue." Its current activist image and enhanced effectiveness are due in large part to its public relations efforts and, as the FTC's Information Officer correctly points out, a crucial factor has been the Commission's ability to supply and package "hard news." [44] Furthermore, despite frequent unsubstantiated complaints to the contrary by private attorneys, the FTC seldom uses adverse publicity as a threat or sanction. Media coverage of FTC actions probably depends on the intrinsic significance of its complaints and not on an intent to sanction by using publicity. Even the nationally televised "burning demonstration," where former Chairman Miles Kirkpatrick put a match to a dangerously flammable kerchief, was designed to warn the public about particularly dangerous goods widely distributed and available; it did not emphasize the manufacturer's or distributor's name.[45]

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[43] Similarly, one may object to publicity which endeavors to promote the career of an administrative official. *See, e.g.*, HOUSE COMM. ON GOVERNMENT OPERATIONS, AVAILABILITY OF INFORMATION FROM FEDERAL DEPARTMENTS AND AGENCIES, H.R. REP. NO. 2578, 85th Cong., 2d Sess. 28–29, 219–27 (1958) (press release on "biography and human interest features" of Sinclair Weeks, Secretary of Commerce). Such publicity may, of course, benefit the agency, as former FBI director Hoover's personal integrity reflected on the FBI, saving the image of that formerly scandal-ridden agency. *See* H. OVERSTREET & B. OVERSTREET, THE FBI IN OUR OPEN SOCIETY *passim* (1969). *But cf.* F. COOK, THE FBI NOBODY KNOWS 414 (1964).

[44] Interview with David Buswell, Information Officer of FTC, in Washington, D.C., Aug. 28, 1972; *accord*, ADVERTISING AGE, June 18, 1973, at 12, col. 3.

[45] The FTC's chronic inability to maintain file confidentiality poses another adverse publicity problem. For example, staff members upset with the Commission's decision not to investigate Volkswagen's alleged practice of selling used vehicles as new cars in the United States leaked this information to the media and some of Ralph Nader's associates. *See* E. COX, R. FELLMETH & J. SCHULZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION 85–86 (1969). The disclosure did not alter the Commission's apparent decision to close the investigative file, but it did have an adverse effect on the VW image and possibly its sales.

In this situation the issues are no different than those posed in determining whether agency records should be open to public scrutiny. *See generally* Wellford

3. The Securities and Exchange Commission. — Securities and Exchange Commission (SEC) publicity policies have not escaped controversy, sometimes for using precisely the selectivity which critics accuse the FTC of lacking.[46] To protect the investing public, the federal securities laws rely chiefly on "full public disclosure" by persons selling securities of all information relevant to the investment decision, whether favorable or unfavorable.[47] The Commission's function is to give the investing public the information it needs to decide for itself whether a particular investment is desirable; it may be said with some truth that publicity is the essence of its statutory purpose.

SEC procedures are simple and direct, especially when contrasted with the FTC two-part complaint process. The SEC issues only final complaints, nearly all of which result in subsequent Commission orders. Thus, SEC practice protects respondents from adverse publicity resulting from tentative charges likely to be withdrawn, and staff leaks to the press or competitors of regulated parties are rare.[48] Until recently, however, there was a dispute over the question of whether registrants and other regulated parties should have an opportunity to be heard before the SEC institutes proceedings against them which might result in adverse publicity. Registrants wanted the SEC to notify them of contemplated proceedings and allow them to negotiate a settlement, or at least to make their views known, before it issued a complaint which is automatically publicized.[49] In fact, as knowl-

v. Hardin, 444 F.2d 21 (4th Cir. 1971), *noted in* 85 HARV. L. REV. 861 (1972); pp. 1421–23 *infra*. To compound the issue, the FTC has recently begun to issue press releases announcing which persons sought and were granted access to FTC files under the Freedom of Information Act. *See, e.g.*, FTC News Release (Apr. 23, 1973); FTC Procedures and Rules of Practice § 4.9(b)(15), 38 Fed. Reg. 1730, 1731 (1973) (information requests by nongovernmental agencies are public information). The Commission has not announced what policy reasons justify this new publicity practice.

[46] This Article suggests that such selectivity is proper, *see* p. 1427 *infra*, but the criteria for determining what should be publicized should be made available by the agency. *See* pp. 1395–98 *infra*.

[47] The principal acts are the Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (1970); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78hh (1970); and Investment Company and Investment Advisers Acts of 1940, 15 U.S.C. §§ 80a–1 to 80b–21 (1970). Under this authority, the SEC regulates the disclosure practices of thousands of corporate issuers and exercises broad, general authority over a diverse and complex industry whose central function is creating, marketing, and trading securities.

[48] This stands in stark contrast to the ethos of the FTC, *see* note 45 *supra*, probably because of the SEC's awareness of the cataclysmic effect adverse publicity can have on the corporations it regulates.

[49] *See, e.g.*, Freeman, *Administrative Procedures*, 22 BUS. LAW. 891, 894–96 (1967); Lowenfels, *Securities and Exchange Commission Investigations: The Need for Reform*, 45 ST. JOHN'S L. REV. 575, 580 (1971).

edgeable members of the private bar were aware, the SEC permitted a potential respondent to submit his views in writing before a complaint was issued, and its staff would consider a settlement at that stage, although it could not formally negotiate until a complaint was filed.[50] While these procedures are defensible,[51] it is inexcusable that the SEC did not publish them; they were published in the fall of 1972 after a series of interviews with SEC personnel for this study.[52]

Another significant dispute concerns publicity associated with SEC disciplinary proceedings against broker-dealers.[53] Congress has authorized the Commission to make such proceedings public or private, as it chooses,[54] and in practice the Commission holds many private hearings.[55] The chief objection to the Com-

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[50] Interview with Stanley Sporkin, Assistant Director, SEC Office of Enforcement, in Washington, D.C., Aug. 15, 1972.

[51] *See* Memorandum from SEC Division of Trading and Markets to Wells Committee, Mar. 9, 1972. *See also* p. 1390 *supra* (discussing FTC practices).

[52] SEC, Securities Act of 1933 Release No. 5310 (Sept. 27, 1972). *See also* ADVISORY COMM. ON ENFORCEMENT POLICIES AND PRACTICES, REPORT OF THE ADVISORY COMM. ON ENFORCEMENT POLICIES AND PRACTICES 31 (1972) [hereinafter cited as WELLS COMMITTEE REPORT].

[53] The case for private hearings is stated in Freeman, *supra* note 49, at 891, 897. *See also* Freeman, *A Private Practitioner's View of the Development of the Securities and Exchange Commission*, 28 GEO. WASH. L. REV. 18, 24 (1959). The contrary position is argued persuasively by another practitioner. *See* Letter from Arthur F. Matthews to Wells committee, May 23, 1972, at 17–19. The Wells committee recommended to the Commission that it

> adopt a procedure whereby it would issue a formal, but non-public, reprimand in those cases where public investors have not been injured and the Commission is satisfied that the conduct which may have constituted a violation will not recur.

WELLS COMMITTEE REPORT iv, 30 (recommendation 15). Currently, the SEC publishes its decisions whenever it finds a violation, even if no sanction is imposed. *See* Ace Sec. Corp., SEC, Securities Exchange Act of 1934 Release No. 7442, at 4 (Oct. 14, 1964); Merrill Lynch, Pierce, Fenner & Beane, 31 S.E.C. 494 (1950).

[54] Securities Exchange Act of 1934, § 22, 15 U.S.C. § 78v (1970). Except for the 1933 Act, which provides that all hearings "shall" be public, 15 U.S.C. § 77u (1970), all SEC statutes provide that hearings "may" be public. *See* 15 U.S.C. §§ 77ttt, 79s, 80a–40, 80b–12 (1970).

[55] Such privacy may seem anomalous when compared with the general administrative practice of holding open hearings — particularly in the context of a statute aiming at "full disclosure" — but it is not unreasonable in light of the public's sensitivity to SEC charges against broker-dealers. Merely by making such charges public, the SEC might seriously injure a respondent, and the sanction of premature publicity might well be more severe than any penalty the Commission would impose for the violation. Moreover, even if the charges are dismissed, the respondent may suffer irreparable harm, while the public secures no corresponding benefit.

Because the Commission will hold a public hearing if all the respondents request one, *see* 17 C.F.R. § 201.11(b) (1972), there is no danger that it will engage in

mission's methods of disciplining broker-dealers is that it has unpredictably changed its publicity policies with respect to such hearings and has regularly refused to make public the criteria governing its practices. The SEC originally held all disciplinary hearings in private; then, in 1957, it began holding most such hearings in public.[56] Today, many — about one-third — proceedings are again private.[57] At no point has the Commission clearly stated the criteria upon which it decides whether to hold a public hearing; it has chosen instead to announce its policies in a few cryptic opinions. First among these was *W.H. Bell & Co.*,[58] a 1947 case in which the SEC ordered a public hearing because "information bearing on matters similar to some of the allegations . . . is already a matter of public record . . . ." [59] The Commission further explained its decision by invoking two vague tests: whether there was a public interest in the subject matter of the hearing and whether that interest outweighed the respondent's interest in privacy.[60] The SEC's next policy statement did not come until 1964, when in *J.H. Goddard & Co.*[61] it found evidence of a substantial public interest in a disciplinary hearing because of the seriousness of the charges and the extent of the trading involved.

In response to inquiries made during this study, the Commission released the following general internal guidelines:[62]

Where the statute allows, the Commission will ordinarily au-

Star Chamber tactics. On the other hand, the publicity "option" may be worse than the SEC sanction, so the protection of "going public" is likely to prove illusory. In 1964, the ABA recommended that all disciplinary proceedings be private unless the Commission determines, after allowing respondent a private hearing, that investor protection requires a public hearing. 89 A.B.A. REP. 135 (1964). The SEC has wisely rejected this invitation for a two-tiered hearing procedure. *Cf.* p. 1390 *supra* (FTC procedures).

[56] *See* Letter from Howard G. Kristol, Special Counsel to the SEC, to Ernest Gellhorn, Oct. 30, 1972.

[57] Interview with Stanley Sporkin, Assistant Director, SEC Office of Enforcement, in Washington, D.C., Mar. 8, 1973.

[58] SEC, Securities Exchange Act Release No. 4039 (Dec. 17, 1947).

[59] *Id.* at 2.

[60] *Id.*

[61] 41 S.E.C. 964, 965-66 (1964). *See also* R.A. Holman & Co., SEC, Securities Exchange Act Release No. 7770 (Dec. 15, 1965), *aff'd*, 366 F.2d 446 (2d Cir. 1966), *amended on rehearing*, 377 F.2d 665, *cert. denied*, 389 U.S. 991 (1967).

[62] Memorandum from SEC to SEC Division Directors and Office Heads, Sept. 1, 1970. In transmitting this memorandum to the author, the Special Counsel to the SEC Chairman emphasized

> that the Commission continues to make a separate determination in each case on the basis of the facts applicable to the particular case and that the factors mentioned in the earlier memoranda [*see* notes 63, 64 *infra*] continue to be relevant considerations.

Letter from Howard G. Kristol to Ernest Gellhorn, Oct. 30, 1972.

thorize private proceedings in order to avoid unnecessary publicity and to afford respondents in administrative proceedings time to discuss settlement with the staff after the proceedings are authorized, except in those cases that involve a need to alert public investors to continuing practices or acts which would operate as a fraud on such investors.

Additional staff memoranda approved by the Commission spell out the factors applied,[63] and the latest, which is generally unavailable, is reprinted in the margin.[64] As it is thus articulated,

[63] Memorandum from Philip A. Loomis, Jr., Director, SEC Division of Trading and Exchanges, to SEC Regional Offices, June 10, 1957 (forwarding SEC approved Memorandum from Philip A. Loomis, Jr., to SEC, Feb. 28, 1957); Memorandum from Thomas W. Rae, Assistant Director, SEC Division of Trading and Markets, to SEC Staff Attorneys, Office of Enforcement, Dec. 22, 1964. Special Counsel Howard Kristol advises that these are the only internal memoranda dealing with the subject that have been circulated within the Commission and approved.

[64] The criteria currently applied by the Commission are set forth in Memorandum from Stanley Sporkin, Assistant Director, SEC Office of Enforcement, Division of Trading and Markets, to SEC Regional Offices, Aug. 23, 1967, as follows:

1. All [regional office] memoranda [recommending a public or private hearing] should briefly describe the current status and nature of registrant's business. This description should cover the type of securities traded and sold (listed, over-the-counter, seasoned, speculative, etc.); the nature and scope of registrant's principal activities (trader, retailer, underwriting activities, etc.); number of employees; selling practices (telephone, advertising, personal contacts, etc.); reputation and background of registrants, including past violations and extent and nature of any public complaints; and any other relevant information which will provide the Commission with a general picture of the overall character of the registrant and its activities.
2. In making the determination as between public and private proceedings, you should consider both the factors enumerated in subparagraph 1 above as well as the overall nature and scope of the alleged violations. In particular, careful consideration should be given to the following factors:
   (a) whether the alleged violations involve any new theory or interpretation of the Federal securities acts or any rule or regulation thereunder;
   (b) the necessity of publicly disclosing to investors the existence and availability of civil remedies;
   (c) the necessity of alerting prospective and existing customers to the alleged activities of registrant. This determination must take into account whether the charged violators are still in the employ of registrant; whether registrant has taken corrective measures to insure future compliance; whether the NASD or the exchanges have taken any disciplinary action against registrant or its salesmen and if so, whether that action was publicly disclosed; whether registrant has undertaken restitution or extended other relief to aggrieved customers; whether charged violators who are still in the employ of registrant are in a position to perpetrate further violations; and the character, nature and scope of the alleged violations;
   (d) the importance of alerting the industry to the fact that the Commission has taken action with respect to the particular practices involved in the proceeding; and
   (e) the necessity of public disclosure where there is substantial indication that the respondents carried out other unlawful transactions with persons whose identities are unknown to the staff and where public proceedings might serve to uncover their identities (i.e., where books and records are incomplete and other similar situations).

   It should be clearly understood that this memorandum does not attempt

the SEC's policy reaches a sensible balance of public and private interests, and the Commission's earlier failure to disclose it is inexplicable.

C. Agency Use of Publicity as a Sanction to Bolster Statutory Enforcement Powers

1. The Equal Employment Opportunity Commission. — Historically, civil rights commissions and agencies encouraging fair employment practices have had to rely almost solely on the threat of coercive publicity to accomplish their goals. The delay of going to court and the difficulty of showing discriminatory intent have limited the value of litigation. Even when a suit is successful, civil penalties are relatively light and criminal penalties are rare.[65] More importantly, the fundamental goal of such agencies has been to improve group relations and reconcile differences. The operating assumption has been that discrimination can be eradicated only by eliminating its causes: ignorance and historical barriers to contact. Open informational avenues directly achieve these ends.[66]

Professor Rourke has succinctly summarized the importance of adverse publicity in the operation of state fair employment practice agencies:[67]

> [O]ne of the most important factors working in behalf of FEP agencies has been an unwillingness on the part of those against whom discrimination has been alleged to have the charges against them publicized at a formal hearing. In the states in which it has been possible to enact FEP laws, the publicity connected with such a hearing is in itself punishment, whatever the verdict of a hearing tribunal may be. From the point of view of a business firm it becomes a vital necessity to avoid a hearing, since public relations considerations must be given precedence over whatever estimate the firm may make of its legal position in a case. As one study of fair employment administration concluded: "embarrassment not harassment or punishment is the chief sanction."

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to promulgate any standard rule for determining whether a proceeding should be public or private. Such determinations must be made on a case by case basis taking into consideration the particular circumstances existing in each situation. However, the memorandum is designed to alert your staff to the factual matters you should consider in making your recommendation.

Special Counsel Howard Kristol notes that while this 1967 Memorandum was not specifically approved by the Commission, it is a recirculation of the 1964 Memorandum which was approved. *See* note 63 *supra*.

[65] *See* F. ROURKE, SECRECY AND PUBLICITY: DILEMMAS OF DEMOCRACY 129 (1961).

[66] Of course, an agency possessing substantial enforcement powers may be better equipped to deal with these causes.

[67] F. ROURKE, *supra* note 65, at 134.

The Equal Employment Opportunity Commission (EEOC) is the descendant both of state fair employment practice agencies and of executive agencies set up under presidential orders designed to combat discrimination through use of the government's purchasing power.[68] Since its formation in 1964, the Commission has continually sought increased enforcement powers, which Congress has only recently — and sparingly — granted.[69] As a deliberate restriction of EEOC's power to use adverse publicity as a sanction, Congress has forbidden the Commission to publish its complaints until conciliation efforts fail and formal charges have been filed.[70]

EEOC's publicity practices reflect the agency's frustration with its broad mandate and limited enforcement powers. In theory, the Commission uses publicity merely to notify employers of their duties under Title VII of the Civil Rights Act of 1964 and to inform protected persons of their rights.[71] In practice, EEOC publicity often condemns alleged violators in pejorative terms, and Commission personnel assert in unguarded moments that intemperate language is needed to gain the confidence of constituent groups.

Over the past five years, in a half-dozen cities, the EEOC has held informal public hearings, preceded by staff studies, to investigate employment practices in particular industries or geographic regions.[72] Having determined, for example, that employ-

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[68] *See Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1275–304 (1971).

[69] *See* Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 94–100 (1972). Originally empowered to investigate and mediate employment discrimination complaints, the EEOC today has power to prosecute but not to adjudicate civil actions against many employers. Equal Employment Opportunity Act of 1972, 42 U.S.C.A. §§ 2000e–5, –6(e) (Supp. 1972), *amending* Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e–2000e–15 (1970); *see* CONFERENCE COMMITTEE, JOINT EXPLANATORY STATEMENT ON H.R. 1746 TO FURTHER PROMOTE EQUAL EMPLOYMENT OPPORTUNITIES FOR AMERICAN WORKERS, S. REP. NO. 681, 92d Cong., 2d Sess. (1972) (section-by-section analysis). Only the Justice Department may prosecute actions against state and local governments.

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> Charges shall not be made public by the Commission. . . . Nothing said or done during and as part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who shall make public information in violation of this subsection shall be fined . . . .

Equal Employment Opportunity Act of 1972, 42 U.S.C.A. § 2000e–5(b) (Supp. 1972).

[71] *See generally Developments in the Law*, *supra* note 68.

[72] These hearings, which produce neither rules nor adjudicative decisions, are

ment discrimination practices in Houston were "among the worst in the Nation," the Commission invited thirty-one large employers and six local building-craft and longshoremen's unions, as well as community groups and individuals, to take part in public hearings there in June 1970.[73] According to the EEOC, "The purpose of the presence of these people was 'to tell it as they see it' . . . . It was not to receive specific charges of discrimination by these individuals against local employers or unions."[74] But the hearings did not live up to this promise. Press releases and televised news conferences pointedly noted the names of nineteen companies which declined to appear,[75] and individual Commissioners and sometimes the Commission as a whole charged specific individuals and firms with violations of Title VII, even though formal charges were not immediately filed and the supporting evidence was unclear.[76]

Such Commission practices seemingly contravene the implicit statutory limits placed on EEOC publicity and arguably exceed the limits on public investigations established by the Supreme Court in *Hannah v. Larche*[77] and *Jenkins v. McKeithen*.[78] Those cases suggest that when government officials charged with enforcement of a particular statute publicly accuse a witness of violating it, due process may require that the witness be given the right of confrontation and a chance to be heard.[79]

EEOC's trial publicity practices are no less questionable. Recently, the agency requested the Federal Communications Commission (FCC) to investigate allegations that AT&T's operating companies were engaged in "massive, deliberate, illegal discrimination [in employment] against blacks, women, Spanish-surnamed Americans and other minorities."[80] Disregarding the

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both public and publicized, and the Commission sometimes brands individuals and companies as law violators without affording them the usual procedural protections.

[73] *See* EEOC, THEY HAVE THE POWER — WE HAVE THE PEOPLE 1–3 (1970) [hereinafter cited as HOUSTON REPORT].

[74] *Id.* at 3.

[75] *See id.* at 2–3; Houston Post, June 3, 1970 § 1, at 14, col. 1. *See generally* EEOC, PRESS COVERAGE OF HEARINGS ON DISCRIMINATION IN EMPLOYMENT, HOUSTON, TEXAS (1970).

[76] *See* HOUSTON REPORT 13–27; *Hearings Before EEOC, Utilization of Minority and Women Workers in Certain Major Industries* 250–72 (1970).

[77] 363 U.S. 420 (1960) (voting registrars not entitled to cross-examine, during nonpublic informational hearing, witnesses accusing them of discriminatory practices).

[78] 395 U.S. 411 (1969) (state commission conducting public hearings and making findings of criminal law violations abridged due process rights when it deprived accused witness of confrontation and cross-examination).

[79] *But cf. Developments in the Law*, *supra* note 68, at 1237 n.244.

[80] *In re* American Tel. & Tel. Co., 27 F.C.C.2d 151, 158 (1971). The FCC denied EEOC's original petition seeking to intervene as a party in AT&T's rate increase hearing, *id.* at 159, but it did order a hearing to explore whether AT&T's

fact that the agency was a party to the resulting FCC hearing, the EEOC issued a newsletter stating that the agency's trial counsel regarded AT&T's practices as "the most staggering and unbelievably overt [sex] discrimination I've ever encountered." [81] According to the EEOC publication, the trial counsel also said that the Bell System is "in the dark ages with regard to sex discrimination. It isn't a matter of a neutral practice having a disparate effect — it's plain disparate treatment." [82] EEOC's vivid trial memorandum in the case was published in the *Congressional Record*,[83] and over 4,000 copies were distributed by the Commission.

Although EEOC admits that it has never examined its publicity policies nor announced publicity guides or regulations, it argues that its present practices are necessary to maintain public confidence, to inform constituent groups, to obtain needed evidence, and to encourage private suits. Admittedly, EEOC charges do not carry criminal penalties, and its counsel may therefore have lesser obligations than those imposed on criminal prosecutors.[84] Nevertheless, EEOC's "trial-by-press" tactics seem objectionable and unnecessary.[85]

2. The Environmental Protection Agency. — Typical of many recently-created regulatory agencies, the Environmental Protection Agency (EPA) is a conglomerate of several preexisting bodies with interindustry jurisdiction. Its functions have at various times been performed by such governmental bodies as the Atomic Energy Commission, the Council on Environmental Quality, and the departments of the Interior, HEW, and Agriculture.[86] Even now, the EPA must share many of its powers with state or regional authorities, acting only when they fail to do so. The EPA cannot bring criminal actions directly, but must refer its findings to the Department of Justice for prosecution.[87]

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employment practices violated FCC antidiscrimination policies. *See In re* Petitions Filed by the EEOC, 27 F.C.C.2d 309 (1971). The issue has been settled by agreement. *See* NEWSWEEK, Jan. 29, 1973, at 53; note 83 *infra*.

[81] EEOC Newsletter, Aug. 1971, pt. 2, at 3.

[82] *Id.* at 4.

[83] *See* 118 CONG. REC. E1243–72 (daily ed. Feb. 17, 1972). AT&T responded to the EEOC charges in kind, accusing it of "hyperbole of monstrous proportions." AT&T, News Release 1 (Aug. 1, 1972), *quoting* Memorandum of AT&T at 16, No. 19143 (F.C.C. 1972); *see* Wall Street Journal, Aug. 2, 1972, at 13, col. 3. The case has now been settled by agreement. AT&T will pay approximately $15 million in back wages and confer about $23 million in raises to about 50,000 of its employees.

[84] *See* 28 C.F.R. § 50.2 (1972).

[85] For an eloquent statement of the obligation of government lawyers in administrative proceedings, see L.G. Balfour, 69 F.T.C. 1118, 1128 (1966) (Commissioner Elman, dissenting).

[86] Reorganization Plan No. 3 of 1970, § 2, 84 Stat. 2086.

[87] *See, e.g.*, Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92–500, tit. III, § 309, 86 Stat. 816, *amending* 33 U.S.C. §§ 1151–75 (1970).

Because it lacks significant formal enforcement powers, the EPA has relied primarily on persuasion in dealing with other governmental units and private parties. The agency obviously uses publicity to enhance its political stature, to inform the public about its actions, to pressure other governmental units into action, and to punish and deter law violators. Press releases relating to enforcement actions perform some or all of these functions simultaneously.

In contravention of the Justice Department's policy of releasing only essential information during pretrial stages,[88] the EPA routinely issues press releases and frequently holds news briefings whenever it refers a matter to the Department for possible prosecution. An outstanding example of this interagency conflict occurred in September 1971, when the EPA sought to revitalize the Refuse Act.

Section thirteen of the Rivers and Harbors Act of 1899,[89] popularly known as the Refuse Act, makes it illegal to deposit refuse into navigable waters without first obtaining a permit from the Secretary of the Army, who acts on the recommendations of the Army Corps of Engineers.[90] However, the Refuse Act long went unenforced; the Corps of Engineers did not even adopt permit procedures until the EPA announced its intention to seek legal action against polluters who did not obtain permits by July 1, 1971.[91] When the deadline passed, the EPA directed each of its ten regional offices to select ten firms not meeting the deadline. Next, it reduced this list of one hundred to a group of thirty-five representing "a cross section of industrial polluters throughout the United States." EPA Administrator William Ruckelshaus then announced that he had asked the Justice Department "to take legal action under the Refuse Act." EPA's general counsel held an hour-long press conference during which he suggested "that in many of the cases or in perhaps all of them, criminal suits will be filed . . . ." [92] Not surprisingly, the press emphasized the likelihood of criminal action in reporting the story. In fact, however, the EPA had little evidence to support most of its charges, and the Justice Department did not institute any proceedings in thirty of the cases and brought criminal actions in only three of the remainder.[93] Justice Department officials were

[88] *See* 28 C.F.R. § 50.2 (1972).

[89] 33 U.S.C. § 407 (1970).

[90] The Corps of Engineers now operates in consultation with the EPA. *See* Exec. Order No. 11,574, 3 C.F.R. 309 (1973), 33 U.S.C. § 407 (1970).

[91] *See id.*

[92] EPA Assistant Administrator for Enforcement and General Counsel John R. Quarles, Jr., Press Conference Concerning Permit Program, Sept. 23, 1971, at 2.

[93] *See* Interview with Martin Green, Chief, and Alfred Ghiorzi, Ass't Chief,

undisguisedly disturbed by the EPA's publicity practices.

Although a notorious example, the "thirty-five polluter" episode was hardly an isolated one. In April 1972, the EPA's regional office in Philadelphia announced that it was recommending action against four firms that were polluting Baltimore Harbor.[94] Although he later brought successful criminal prosecutions against the firms, the United States Attorney for Maryland was "furious" at the EPA's flagrant violation of district court rules against pretrial statements by parties involved in criminal cases.[95]

Changes in statutory enforcement powers against polluters may reduce the EPA's felt need to deter through adverse publicity. The 1972 Amendments to the Water Pollution Control Act [96] have supplanted the Refuse Act, under which many EPA complaints arose, and the new penalties relate more closely to the seriousness of violations. Of course, if public interest in environmental causes wanes, the pressure for rigorous enforcement and the concomitant use of adverse publicity will also subside. But even if ecology remains an important issue, there is nothing unique about Refuse Act prosecutions or environmental lawsuits involving criminal actions which should distinguish the procedures for their publicity from other criminal actions for business crimes, and the problem of trial and punishment by publicity therefore will remain.[97]

3. The Cost of Living Council. — Created during periods of crisis amid calls for patriotic cooperation, and invariably viewed as temporary establishments which will disappear when the emergency passes, agencies administering wage and price controls tend to rely on the publicity sanction without regard for the standards

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Pollution Control Section, Land and National Resources Division, Dep't of Justice, in Washington, D.C., Aug. 14, 1972; Letter from Robert McManus, Staff Attorney to EPA, to John F. Cushman, Executive Director, Administrative Conference, May 3, 1973.

[94] For an account of the conflict between the Department of Justice and the EPA, including the Baltimore Harbor episode, see Washington Post, Nov. 24, 1972, at 1, col. 1. Environmentalists have also criticized EPA publicity, but not because of its unfairness. Their concern, rather, has been with the reluctance of EPA and the Department of Justice to rely on formal criminal and civil sanctions, since they often view polluters as insensitive to the "public interest" and unaffected by adverse publicity. *See generally* D. ZWICK & M. BENSTOCK, WATER WASTELAND (1971) (Nader study group report on water pollution).

[95] *See* Washington Post, *supra* note 94. Such disputes have encouraged Justice Department and EPA officials to seek a procedural compromise. According to some Justice officials, the EPA has now agreed not to issue premature press releases, although EPA administrators assert that they have merely promised to avoid reference in such releases to possible criminal actions.

[96] Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, *amending* 33 U.S.C. §§ 1151–75 (1970).

[97] *Cf.* pp. 1400–01 *supra* (EEOC publicity).

of fairness observed in other situations.[98] The recently established Cost of Living Council (CLC) and its wage and price boards have been no exceptions.

Although the most thorough and scrupulously fair administration of economic controls was probably that of the Office of Price Administration (OPA) during the Second World War, it was not beyond criticism. Perhaps the most serious criticism leveled against OPA was that it sometimes filed charges merely to call public attention to its program and to coerce compliance rather than to try the allegations in court.[99] In response, one newspaper even refused to report OPA charges until proceedings reached the trial stage.[100] The same practice permeates the current control program. Not only has the CLC used publicity rather than formal sanctions to coerce parties within its acknowledged sphere of competence, but it has also used publicity to extend its control to parties not covered by its enabling statute and regulations. For example, the President's Phase I announcement and subsequent executive order did not freeze stock dividends, although it did "request" that corporations not increase dividends above the rate of the prior quarter.[101] When six large firms seemingly disregarded the President's request and announced increased dividends, the CLC reacted with immediate publicity.[102] It sent telegrams to the chief executives of the companies asking them to meet with CLC leaders Connally, Rumsfeld, and McCracken four days later in Washington. The meeting was to be closed, but the telegrams were widely publicized, and Acting Council Chairman McCracken read their text at a televised news conference. As the Council's press officer recounts, CLC called the chief executives of the six firms the day after the telegrams were sent and asked if they had been received; if not, they were read over the phone. The executives were also told that the telegrams would be released with great fanfare that afternoon, and,

[98] For a vivid account of the use of publicity as a sanction in enforcing economic controls during the Depression, see A. SCHLESINGER, JR., THE AGE OF ROOSEVELT: II. THE COMING OF THE NEW DEAL 114–16, 119–20 (1959). *But cf.* J. CHAMBERLAIN, N. DOWLING, & P. HAYS, THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES 121 (1942) (ineffectiveness of NRA Blue Eagle as a means of encouraging compliance through *favorable* publicity).

[99] *See* F. ROURKE, *supra* note 65, at 126.

[100] *See* M. CLINARD, THE BLACK MARKET 86–87 (1952).

[101] *See* Exec. Order No. 11,615, 3 C.F.R. 199 (expired 1972); Speech by President Richard M. Nixon, Aug. 15, 1971, in 2 ECON. CONTROLS REP. ¶ 8365, at 8389. Although Congress had authorized the President to control dividends, *see* Economic Stabilization Act Amendments of 1971, tit. II, § 203(a)(2), 85 Stat. 743, he chose not to do so. The Council's authority therefore did not extend to dividend control.

[102] Cost of Living Council, News Release 1 (Sept. 4, 1971).

incredibly, that there would be no practical chance of rebuttal.[103]

CLC's pressure tactics succeeded, and the Washington meeting was almost an afterthought. When it ended, five of the firms issued a joint statement, with Treasury Secretary Connally's benediction, announcing that they had agreed to cooperate with the President and rescind dividend increases. Secretary Connally branded the action of the holdout Florida Telephone Corporation a "disheartening . . . demonstration of recalcitrance."[104] Four days later he announced that the company had agreed to comply.

The coercion directed against the six firms was part of a larger plan to hold down corporate dividends, and the press release which revealed the contents of the six-firm telegram also announced that another telegram had been sent to 1,250 of the nation's largest corporations reminding them of the President's determination to hold down dividends and asking for a return telegram confirming their willingness to cooperate with the dividend freeze. When coupled with the publicity "administered" to the six "offenders," this warning had the desired effect: there were no further dividend increases during the period. In terms of its own budget, CLC had achieved compliance at an extremely low enforcement cost. On the other hand, the effort to control dividends was entirely ultra vires in terms of the President's original "freeze" order.[105]

In a crisis situation such as that in which the Council has operated since its inception, such publicity practices may be necessary to secure compliance and maintain public confidence. It would seem, however, that the Council has not sufficiently explored alternative means of obtaining summary results that are

[103] Interview with William J. Greene, Assistant Director of CLC for Congressional and Public Affairs, in Washington, D.C., Aug. 11, 1972.

[104] Cost of Living Council, News Release 2 (Sept. 9, 1971). In fact, the Council had misread the earlier dividend announcements, since its release conceded that two of the six firms had not declared a dividend increase. Secretary Connally's confession of error did not receive the same publicity as the original telegrams, however.

[105] On occasion, the Council has also used seemingly adverse publicity not as a sanction but as an instrument of political compromise. An example concerned the dispute in August 1971 over the freeze of Texas schoolteachers' salaries. It seems clear that Texas Governor Smith, despite his noisy defiance of the CLC, intended to resist the freeze only long enough to curry favor with a portion of the Texas electorate. The Council's "adverse" publicity, which strengthened the Governor's position at home, was apparently given in exchange for his ultimate agreement. On another occasion, the Council used adverse publicity to save face before itself backing down. Under its regulations, the Council was powerless to deny price increase requests made by automobile manufacturers in the summer of 1972, yet it was politically inexpedient to permit an uncontested increase in an election year. The Council thus issued adverse press releases to demonstrate its zeal before abandoning the fight. *See* N.Y. Times, Aug. 15, 1972, at 1, col. 6.

still fair.[106] The maxim often ascribed to the Council — "when in doubt, put it out" — is admirable when applied to general policy questions, but may be unfair and unnecessary when publicity is directed against individual firms.[107]

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[106] *See generally* Freedman, *Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1 (1972).

[107] The SEC was once another notorious dispenser of adverse publicity as a sanction. To ensure that purchasers of securities receive adequate and accurate information, the Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (1970), relies chiefly upon the registration statement which an issuer must file with the SEC and which contains, among other things, the prospectus which will be used to sell the securities. 1 L. LOSS, SECURITIES REGULATION 179–84 (2d ed. 1961). As originally conceived, the statutory framework gave the SEC an enforcement arsenal in which the chief weapon was the stop order — a formal means of prohibiting, by preventing the registration statement from becoming effective, the sale of regulated securities for which a deficient statement had been filed. Early in its history, the SEC asserted its right to publicize a stop order by issuing public findings and a complete opinion even though a registrant had stipulated its deficiencies and consented to the order. *See, e.g.*, Oil Ridge Oil & Ref. Co., 1 S.E.C. 225 (1935). *See also* Continental Distillers & Importers Corp., 1 S.E.C. 54, 57 (1935). In one case, for example, the Commission believed a published decision, with its attendant adverse publicity, was necessary when the registrant had engaged in clearly fraudulent activities:

> Despite the registrant's consent to the issuance of a stop order, the nature of this case, in essence, an enterprise to deal in an irresponsible fashion with the small savings of city and county school teachers, makes it not only desirable but imperative to file these findings and this opinion, so that the untruthfulness and the unfairness of the registrant's officers should be a matter of public record.

National Educators Mut. Ass'n, 1 S.E.C. 208, 210 (1935). Clearly, such publicity was intended to punish the registrant and to deter others from similar conduct, although these do not seem to be the purposes for which Congress designed the stop order.

Formerly, the SEC also made frequent use of the threat of adverse publicity that is connected with a formal complaint in order to regulate security issues. Since a similar power is now used to oversee broker-dealer actions, it is worth noting. Professor Rourke described the Commission's use of publicity:

> Only rarely has the SEC found it necessary to hold a public hearing in connection with its regulation of the marketing of securities. Fear of the adverse publicity connected with the public airing of a complaint has been a sufficient pressure to bring about compliance with SEC suggestions for alterations in the language of a prospectus. This is so, of course, largely because successful flotation of an issue of stock demands absolute confidence in the integrity of the product offered for purchase by investors. Any publicity as to the existence of doubt regarding the truth of claims made in a prospectus would almost certainly have a fatal effect upon the sale of the securities concerned.

F. ROURKE, *supra* note 65, at 131.

Under current procedures, the power to grant or deny acceleration of the filing date performs the same function. Because the mere threat that acceleration will be denied is usually enough to ensure compliance, registrants are seldom in a position to seek judicial review of the Commission's action. The procedural safeguards, if any, on the use of such threats must be imposed upon the staff by the Commission itself. *See* J. LANDIS, THE ADMINISTRATIVE PROCESS 109–10 (1938); Friendly, *Address to A.B.A. Section of Corporation, Banking, and Business Law*, 22 BUS.

D. Mixed Cases: Agency Use of Publicity Both to Inform and Warn, and as a Sanction

The preceding sections separate for heuristic purposes instances of agency publicity which fall either into the category of information and warning, or into the category of sanction. In fact, however, many agency uses of publicity simultaneously warn and sanction. The issuance of publicity by the Food and Drug Administration in connection with its voluntary recall program and by the National Highway Traffic Safety Administration in connection with its statutory defect notification program exemplify the common situation in which publicity serves to warn at the same time that it ensures compliance.

1. The Food and Drug Administration and Dangerous Foods. — Publicity by the Food and Drug Administration (FDA) serves its most important and accepted function in warning the public of imminent perils to health and safety. Originally established to protect the public against poisonous preservatives and dyes in foods and against cure-all claims for worthless and dangerous patent medicines, the FDA today has general authority to protect the consumer from dangerous, mislabeled, and ineffective foods, drugs, medical devices, and cosmetics.[108] Its ability to protect the consumer depends on identification and speedy removal from the market of products known to be, or reasonably suspected of being, defective. The statute explicitly gives the FDA two basic tools for removal of defective products: seizures[109] and injunctions.[110] Both depend on court approval and are costly to administer, time-consuming, and, if the food processor is uncooperative, often ineffective.[111] In order to encourage industry cooperation, and because the FDA has no authority to detain products temporarily while it investigates them, it has developed a technique known as the "voluntary recall":[112] on discovery of a health hazard, private firms — at the FDA's request or on their own

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LAW. 900, 902 (1967); pp. 1423–32 *infra*. Most observers accept this situation, however, because they believe it is necessary to the performance of the SEC's statutory function, and because the denial of acceleration or the threat of it is regularly preceded by careful investigation. *See* ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, *supra* note 30, at 54.

[108] Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. §§ 301–92 (1970).

[109] *Id.* § 334.

[110] *Id.* § 332.

[111] *See* COMPTROLLER GENERAL OF THE UNITED STATES, LACK OF AUTHORITY LIMITS CONSUMER PROTECTION: PROBLEMS IN IDENTIFYING AND REMOVING FROM THE MARKET PRODUCTS WHICH VIOLATE THE LAW, B-164031(2), at 18–25 (1972).

[112] *See* 21 C.F.R. § 3.85 (1972); HOUSE COMM. ON GOVERNMENT OPERATIONS, RECALL PROCEDURES OF THE FOOD AND DRUG ADMINISTRATION, H.R. REP. NO. 92-585, 92d Cong., 1st Sess. 3 (1971) [hereinafter cited as HOUSE RECALL REPORT].

initiative — take steps to remove the unsafe products from the market. Since such removal cannot be required by law, the FDA ensures compliance by threatening seizure, injunction, and the issuance of publicity. Of these, the threat of publicity is usually the most potent persuader.

The FDA is one of the few agencies granted specific statutory authority to issue adverse publicity.[113] Without recourse to this power it is doubtful whether the agency could perform the functions expected of it today. Nevertheless, the FDA's use of adverse publicity in the recall program has been highly controversial.

The controversy can be traced to the 1959 cranberry episode, a public announcement which was in effect an involuntary recall. In the cranberry episode, the FDA issued a national public warning for the first time,[114] with consequences so devastating to the industry that henceforth the mere threat of a public announcement functioned to help enforce a voluntary recall procedure. On November 9, 1959, a day still known as "Black Monday" in the industry, Secretary of Health, Education, and Welfare Arthur Flemming held a news conference at which he urged the public not to buy cranberries grown in Washington and Oregon, saying they might be contaminated with a chemical weed killer, aminotriazole, that had been found to cause cancer in laboratory rats.[115] Although the Secretary admitted he had no information suggesting that cranberries from other states were dangerous, he would not say they were safe. Answering a reporter's question, the Secretary stated he would not be eating cranberries that Thanksgiving. Not surprisingly, most of the nation followed suit. Since cranberries are purchased primarily for the holiday season, virtually the entire crop remained unsold, even though 99 percent of it was subsequently "cleared" and marketed as government "approved." [116]

[113] 21 U.S.C. § 375 (1970); *see* p. 1411 & note 125 *infra*.

[114] In 1957, the FDA had issued warnings in connection with the Hoxsey cancer cure. But those warnings were in rebuttal to the defendant's extravagant claims for a worthless and dangerous device and appeared to fall within the intent of § 705(b) of the Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. § 375(b) (1970). *See* Hoxsey Cancer Clinic v. Folsom, 155 F. Supp. 376 (D.D.C. 1957); J. YOUNG, THE MEDICAL MESSIAHS: A SOCIAL HISTORY OF HEALTH QUACKERY IN TWENTIETH-CENTURY AMERICA 286–88 (1967).

[115] This description is based on numerous interviews, a review of the FDA files, subsequent congressional committee hearings, and contemporaneous newspaper reports. *See also Hearings on Dep't of Agriculture Appropriations Before the House Subcomm. of the Comm. on Appropriations*, 86th Cong., 2d Sess., pt. 5, at 7, 34, 45–46 (1960).

[116] An undated internal FDA document made available to the author summarized the impact as follows:

The FDA tested and cleared a total of 33.6 million pounds of cranberries

In retrospect, the Secretary's action seems, at best, questionable. Given a sufficient dosage of aminotriazole, laboratory rats had indeed contracted cancer of the thyroid. But as the scientist who carried out the experiments noted, it would have taken years for a consumer to ingest enough contaminated cranberries to reproduce the laboratory results.[117] Moreover, even if the situation required a wholesale removal of the product, the issuance of a public warning, particularly one accompanied by such inflammatory statements, may not have been justified. The industry was cooperating and, to the extent that its self-policing program was deficient, seizures or injunctions would have been preferable remedies. Nor did the Secretary's action take account of the cost to the industry of the unsold crop.

With the aid of enormous political pressure, the cranberry growers quickly convinced Congress that they were entitled to assistance and compensation. Congress first provided emergency loans; later it indemnified the growers at market prices, at a cost of approximately $9 million.[118] It was, by any standard, an ex-

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found free of aminotriazole. Thirty lots totalling over 300,000 pounds were found to be contaminated and were seized. Lots which were cleared and passed, either by FDA or by independent laboratories using approved methods, were authorized to bear labels stating that they had been cleared by the U.S. Government.

. . . .

In early January 1958 [*sic*] the cranberry industry advised USDA that as of December 31, 1959, approximately 21.5 million dollars worth of cranberries had become surplus.

See also Hearings, *supra* note 115, at 8–9.

[117] According to Dr. Boyd Shaffer, an American Cyanamid Company scientist who carried out the experiments, the results were not applicable to humans: a human being "would have to eat 15,000 pounds of [contaminated] cranberries a day for many years" to sustain any ill effects. N.Y. Times, Nov. 12, 1959, at 20, col. 5. *See also* Austern, *Sanctions in a Silhouette*, in W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 672 (4th ed. 1960); N.Y. Times, Nov. 11, 1959, at 29, cols. 2–3.

[118] The facts are summarized in a recent internal FDA memorandum, *see* note 116 *supra*:

From January 8 to February 10, 1969 [*sic*], USDA designated the major cranberry producing states as areas where the Farmers Home Loan Administration could make emergency loans to eligible cranberry growers. During the six-month period ending June 30, 1960, the Farmers Home Loan Administration loaned about $333,000 to 30 cranberry growers.

On March 30, 1960, the White House announced the establishment of a program to make indemnity payments to cranberry growers who, through no fault of their own, had sustained losses in cranberries harvested in 1959. No payments were to be made for cranberries found to be contaminated. The indemnity payments were financied [*sic*] under the authority of the USDA to encourage the domestic consumption of agricultural products by purchasing and diverting them from normal channels for use by needy persons (7 U.S.C. § 612c).

After eliminating claims not eligible for payment under the program, USDA paid approximately 8.5 million dollars to 12 claimants, representing 1,215 growers, for about 1.13 million barrels of cranberries. Of these 1.13 million barrels, about 518,000 were sold commercially by the growers (who had received from USDA a maximum indemnity payment of $8.02 a barrel);

pensive news conference.[119]

As this first recall illustrates, widespread publicity warning that a food is dangerous to public health has an immediate and perhaps irreversible impact. The public's sensitivity, at least to food hazards, has a low threshold.[120] Publicity identifying food dangers is therefore a potent weapon, and used carefully and selectively it can be efficient and effective. Hence, FDA procedures safeguarding recalls are all-important.

FDA recalls fall into two categories, and the agency's use of publicity varies accordingly.[121] Serious, or Class I, recalls involve immediate threats to consumer health; less significant, or Class II, recalls involve potential threats to health and safety, economic harm, or other statutory violations. While all are noted weekly in the FDA's "public recall list," only public warnings issued by the Commissioner of Food and Drugs are given extensive media coverage, and these are limited to Class I recalls.[122]

Recognizing that Congress has not expressly authorized the recall program, the FDA nevertheless makes several arguments in support of its use of adverse publicity as a coercive device for removing defective products from the market in Class I recalls. Since the program was developed in response to the practical limitations of the seizure action, representatives of the FDA occasionally assert that its recall program is merely an interstitial supplement to its formally-authorized sanctions. More frequently, the same argument is asserted in a somewhat more sophisticated fashion. The FDA argues that its authority is implicit in its statutory framework: that the agency's mandate to protect consumers from adulterated, misbranded, and illegally-marketed products carries with it an implied authority to take all reasonable steps, not otherwise denied, to carry out that discretion.[123] The

about 555,000 barrels were destroyed under USDA-State supervision; and about 58,000 barrels were accounted for by dehydration or spoilage.

See also Hearings, *supra* note 115, at 11; 106 CONG. REC. 9862–63 (1960).

[119] FDA recalls have expanded gradually since the cranberry episode. Initially applied only when the defective product posed a serious hazard to health, the recall program was broadened, first to include less serious health violations and economic injury, and then even minor short-weight breaches. *See* HOUSE RECALL REPORT 3. The size of the program has increased along with its scope. Ten years ago, FDA recalls effected averaged fewer than 100 products per year; in fiscal 1970, about 1400 recalls were instituted. *Id.* at 3, 9. The number of court-ordered seizures and injunctions has decreased proportionately. *Id.* at 8.

[120] This is in contrast with the public's relative indifference to dangers of automobiles. *See* pp. 1416–18 *infra*.

[121] *See* 21 C.F.R. § 3.85 (1972).

[122] Interview with Robert Brandenburg, Director, FDA Compliance Regulations Policy Staff, in Rockville, Md., Aug. 15, 1972; *see* FDA, REGULATORY PROCEDURE MANUAL chs. 5-00–10A.18, 5-00-40 (1971).

[123] The Supreme Court recently demonstrated a willingness to recognize the

FDA can point to the usual vague grants of authority in its enabling act in support of these arguments.[124]

The primary justification for the recall program and the adverse publicity on which it relies, however, is the FDA's express statutory authority to publish reports and publicize hazards connected with foods and drugs. Section 705(b) of the Food, Drug, and Cosmetic Act of 1938 authorizes the FDA to "disseminate information" warning the public about foods and drugs that may cause "imminent danger to health or gross deception of the consumer." [125] Because the FDA limits publicized recalls to Class I cases involving "present threats to the safety of consumers," it contends that the recall program is appropriate to the statutory design.[126] The statute does not require the FDA to hold hearings before issuing publicity, nor need the agency seek judicial approval as required for seizure of defective goods.[127] In fact, the present recall procedure may be more restrained than section 705(b) would require. The agency relies primarily upon communications to manufacturers and their distributors, while a strict reading of the statute arguably permits unrestrained agency warnings whenever public health is imperiled or gross deception is possible, even when the Act is not violated.[128]

Congressional and industry critics have nonetheless sharply condemned the recall procedure and the arguments on which it is based. Congressmen have pointed out that injunctions and seizures are the only authorized sanctions and have asserted that even assuming the proposition that the FDA needs more power,

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most tenuous grounds for FDA authority over drugs. *See* Weinberger v. Hynson, Westcott & Dunning, Inc., 41 U.S.L.W. 4848 (U.S. June 18, 1973).

[124] *See* 21 U.S.C. § 371(a) (1970).

[125]

> The [FDA] may also cause to be disseminated information regarding food, drugs, devices, or cosmetics in situations involving, in the opinion of the [FDA], imminent danger to health or gross deception of the consumer.

Id. § 375(b).

[126] Interview with Robert Brandenburg, Director, FDA Compliance Regulations Policy Staff, in Rockville, Md., Aug. 15, 1972.

[127] *See* Hoxsey Cancer Clinic v. Folsom, 155 F. Supp. 376 (D.D.C. 1957) (FDA permitted to release adverse publicity without prior hearing); J. YOUNG, *supra* note 114, at 386–88. *See also Developments in the Law — Deceptive Advertising*, 80 HARV. L. REV. 1005, 1115 (1967):

> Since, in contrast to section 705(a), the [FDA's] power of publicity under this section requires no prior judicial determination of a violation, section 705(b) represents a potentially independent administrative sanction.

But see Austern, *Is Government by Exhortation Desirable?*, 22 FOOD, DRUG, COSM. L.J. 647, 650 (1967), where it is argued that Congress granted the FDA only limited power of publicity.

[128] All recalls, on the other hand, are limited to products in violation of the Act. *See* 21 C.F.R. § 3.85(d)(1) (1972).

the necessity does not justify such an arrogation of authority.[129] Section 705(b), some critics argue, is limited to emergencies such as those posed by accidental, poisonous contaminations of a food, drug, or cosmetic.[130] Furthermore, it can be argued that if recalls were part of the legislative design, Congress would have authorized them specifically as it did, for example, when it regulated motor vehicles.[131] Finally, recall procedures are not precisely articulated. When the FDA finally adopted regulations to govern recalls, long after the program had become the agency's chief enforcement weapon, they did not define "the circumstances under which a recall rather than seizure action is to be initiated and the rights of those adversely affected by recalls."[132] A committee of Congress has aired charges that recalls, uncontrolled by statute and limited only by vague regulations, are frequently misused and that adverse publicity is applied as a sanction in inappropriate cases.[133] While industry critics, like those in Congress, have argued that recalls are essentially ultra vires and are in any event less effective than seizures, businessmen have been primarily concerned with the overwhelming and uncontrollable impact of FDA publicity.[134]

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[129] *See* HOUSE RECALL REPORT 3. *See also Hearings on FDA Oversight of Food Inspection Activities of the Federal Government Before the Subcomm. on Public Health & Environment, House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess., ser. 92-51 (1971); *Hearing on Recall Procedures of the Food and Drug Administration Before the Subcomm. on Intergovernmental Relations of the House Comm. on Government Operations*, 92d Cong., 1st Sess. (1971). For a comment critical of the unfairness of congressional oversight of the FDA, see Austern, *Drug Regulation and the Public Health: Side Effects and Contraindications of Congressional Committee Post Hoc Judgments*, 19 FOOD, DRUG, COSM. L.J. 259, 269-71 (1964).

[130] *See* Austern, *supra* note 117, at 673. *See generally* Austern, *supra* note 127, at 647, 650.

[131] *See* pp. 1416-17 *infra*. As in the case of auto recalls, removal under FDA supervision is not classified as a recall and no public release is issued when none of the defective food products have left the direct control of the manufacturer or primary distributor. 21 C.F.R. § 3.85(d)(2) (1972).

[132] HOUSE RECALL REPORT 3.

[133] *See Hearings on FDA Oversight*, *supra* note 129.

[134] *See, e.g.*, Hagan, *Recalls — Legal Considerations*, 27 FOOD, DRUG, COSM. L.J. 344 (1972); Kasperson, *Food, Drug and Cosmetic Law Section Recall Panel, id.* at 349; Markel, *Problems in the Administration and Enforcement of Food Laws*, 25 FOOD, DRUG, COSM. L.J. 429, 435-38 (1970); Thompson, *Problems Relating to Enforcement of Food and Milk Laws and Regulations: Industry Viewpoint*, 26 FOOD, DRUG, COSM. L.J. 288, 292-93 (1971).

The uncontrollable impact occurs because agency publicity directed toward one product or practice of a large, multiproduct enterprise may result in public rejection of other products. For example, FDA recalls of canned beans by Stokely-Van Camp allegedly had a significant impact on sales of other Stokely products. Washington Post, June 25, 1972, at K4, col. 2. *See also* note 142 *infra*. And when

In its subsequent handling of what at first appeared to be an identical incident involving Campbell Soup Company's chicken-vegetable soup, the FDA apparently sought a more restrained approach. In late August 1971, Campbell discovered botulin in a test can of its soup and began an immediate recall of 4,799 cans after notifying the FDA.[139] The company announced that it would refund all purchases. The campaign reached 92 percent of all customers in the affected areas and cost Campbell $5 million. Although Campbell and the FDA both publicized the warning, little adverse effects resulted, largely because the FDA's subsequent announcements commented favorably on Campbell's compliance with the recall program.

Superficial distinctions can be made to explain the differing actions taken by the FDA in the Bon Vivant and Campbell cases. The Bon Vivant soup had actually caused death and illness; the Campbell's soup had not. Campbell discovered the defect in its own product and voluntarily reported it to the FDA. However, it has been asserted that because the company was a small, family-owned producer, less able to defend itself than an industry giant like Campbell, the FDA made an example of Bon Vivant in order to demonstrate its tough stance in favor of consumer protection.[140] Such arguments might be plausible if the FDA had offered no other reasonable explanation for the differences in the cases. The difference in treatment was, however, carefully and persuasively explained by Dr. Charles Edwards, the Commissioner of the Food and Drug Administration.[141]

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[139] *See Hearings on FDA Oversight*, *supra* note 129, at 165–83, 221–25, 235. For descriptions of the Campbell episode, see HEW, Release No. 71–52 (Aug. 31, 1971); N.Y. Times, Aug. 23, 1971, at 1, col. 2.

[140] *See, e.g., Hearings on FDA Oversight*, *supra* note 129, at 459–69; Collier, *supra* note 134, at 16–17; Kasperson, *supra* note 134, at 352–53 (1972); Washington Post, June 25, 1972, at K1, col. 1.

[141]

> In both the Bon Vivant and Campbell situations, we required the firms to recall all suspect codes if they had not already started to do so. In each case, we commenced a surveillance of the recall. The extent of the recalls differed because the circumstances were different. In the Bon Vivant situation, we found by intensive investigation that one can sealer was not functioning properly and one retort (cooker) was undercooking. Normally the firm's records would reveal exactly which can codes or products were produced using the defective equipment.
>
> This would enable the agency and the firm to selectively recall suspect products. In the Bon Vivant case, these production defects were coupled with .a totally unreliable recordkeeping system, and a finding of abnormally high percentages of defective cans throughout the entire line. This being so, we were compelled to consider all cans produced by Bon Vivant as suspect.
>
> In the Campbell situation, inspection showed the equipment to be functioning properly. The records were shown to be reliable, and the percentage of defective cans confined to certain products. It was these products, therefore, that were recalled.

Hearings on FDA Oversight, *supra* note 129, at 127.

In its subsequent handling of what at first appeared to be an identical incident involving Campbell Soup Company's chicken-vegetable soup, the FDA apparently sought a more restrained approach. In late August 1971, Campbell discovered botulin in a test can of its soup and began an immediate recall of 4,799 cans after notifying the FDA.[139] The company announced that it would refund all purchases. The campaign reached 92 percent of all customers in the affected areas and cost Campbell $5 million. Although Campbell and the FDA both publicized the warning, little adverse effects resulted, largely because the FDA's subsequent announcements commented favorably on Campbell's compliance with the recall program.

Superficial distinctions can be made to explain the differing actions taken by the FDA in the Bon Vivant and Campbell cases. The Bon Vivant soup had actually caused death and illness; the Campbell's soup had not. Campbell discovered the defect in its own product and voluntarily reported it to the FDA. However, it has been asserted that because the company was a small, family-owned producer, less able to defend itself than an industry giant like Campbell, the FDA made an example of Bon Vivant in order to demonstrate its tough stance in favor of consumer protection.[140] Such arguments might be plausible if the FDA had offered no other reasonable explanation for the differences in the cases. The difference in treatment was, however, carefully and persuasively explained by Dr. Charles Edwards, the Commissioner of the Food and Drug Administration.[141]

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[139] *See Hearings on FDA Oversight*, *supra* note 129, at 165–83, 221–25, 235. For descriptions of the Campbell episode, see HEW, Release No. 71–52 (Aug. 31, 1971); N.Y. Times, Aug. 23, 1971, at 1, col. 2.

[140] *See, e.g.*, *Hearings on FDA Oversight*, *supra* note 129, at 459–69; Collier, *supra* note 134, at 16–17; Kasperson, *supra* note 134, at 352–53 (1972); Washington Post, June 25, 1972, at K1, col. 1.

[141]

> In both the Bon Vivant and Campbell situations, we required the firms to recall all suspect codes if they had not already started to do so. In each case, we commenced a surveillance of the recall. The extent of the recalls differed because the circumstances were different. In the Bon Vivant situation, we found by intensive investigation that one can sealer was not functioning properly and one retort (cooker) was undercooking. Normally the firm's records would reveal exactly which can codes or products were produced using the defective equipment.
>
> This would enable the agency and the firm to selectively recall suspect products. In the Bon Vivant case, these production defects were coupled with a totally unreliable recordkeeping system, and a finding of abnormally high percentages of defective cans throughout the entire line. This being so, we were compelled to consider all cans produced by Bon Vivant as suspect.
>
> In the Campbell situation, inspection showed the equipment to be functioning properly. The records were shown to be reliable, and the percentage of defective cans confined to certain products. It was these products, therefore, that were recalled.

Hearings on FDA Oversight, *supra* note 129, at 127.

The FDA's restraint in the Campbell case, however, hardly signaled the end of the agency's troubles with the recall process. On the contrary, recent recalls indicate that the problems raised by the 1959 cranberry episode still remain.[142] The decision to initiate a recall with a public warning sometimes appears to result more from consumer-group and other pressures than from the persuasiveness of scientific data.[143] Of course, this problem is as much a question of the substance of FDA regulation as one of the particular enforcement procedures chosen, but where the substantive policy is uncertain, the case for "going public" with information likely to injure a firm or industry is less persuasive than it might otherwise be.

The FDA probably cannot escape its duty to issue public warnings to protect consumers from poisonous foods. However, it appears that it also cannot resist the temptation of using such warnings to operate an extrastatutory recall program. Recognizing the need to broaden the variety of enforcement powers available to the FDA, the General Accounting Office recently recommended to Congress not only that the agency be given statutory recall powers, but also that it be authorized to detain suspected dangerous products.[144] FDA licensing and testing are

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[142] So basic a question as the appropriate level of testing required before a public warning is issued has not been resolved. For example, on October 29, 1971, the FDA issued an urgent warning alerting the public that Stokely-Van Camp's "Finest French Style Sliced Green Beans" might be contaminated with botulin after the Center for Disease Control in Atlanta reported that a Marine captain and his son presumably had contracted botulism after eating the green beans. HEW, Release No. 71-66 (Oct. 29, 1971). Although only the son's tests were positive, the warning was widely publicized. It was then discovered that the positive test results were caused by antibiotics taken by the son for a cold a week earlier, and not by botulism. The FDA warning was rescinded. HEW, Release No. 71-67 (Nov. 1, 1971). Stokely-Van Camp officials charge that this "false recall" cost the company millions of dollars in unjustified damages. *See* Washington Post, June 25, 1972, at K4, col. 2. FDA Commissioner Charles C. Edwards contended, however, that public warnings should always issue when life or serious injury is threatened:

> "In dealing with life or death problems like botulism, there are times when the public interest demands action before the scientific case is complete. The decision always must be made in favor of consumer protection."

HEW, Release No. 71-67 (Nov. 1, 1971). Another and probably more accurate explanation for the recall is that the FDA bowed to pressure from Florida health officials.

[143] The recent destruction of the swordfish industry on the basis of questionable scientific data is an example. *See* Note, *Health Regulation of Naturally Hazardous Foods: The FDA Ban on Swordfish*, 85 HARV. L. REV. 1025, 1026-33 (1972). Nor is this a unique example. Similar recent controversies include FDA action on monosodium glutamate, DES, and cyclamates. *See, e.g.*, Wall Street Journal, July 2, 1973, at 1, col. 4 (new studies contradict cancer evidence on which FDA banned sweeteners).

[144] *See* COMPTROLLER GENERAL OF THE UNITED STATES, *supra* note 111, at 1-4

alternative, though not necessarily preferable, solutions.[145] Such authorization may allow the FDA to protect the public without resorting to damaging publicity; clearly the FDA should seriously explore these and other alternatives.[146]

2. The National Highway Traffic Safety Administration and Defect Notifications. — Concerned with increasing highway traffic accidents, appalled by the number of deaths and injuries to motorists, and aroused by Ralph Nader's book on auto safety followed by General Motors' snooping into Nader's private life, Congress approved legislation in 1966 to create and enforce motor vehicle safety standards.[147] Today the National Highway Traffic Safety Administration (NHTSA), a division within the Department of Transportation, carries out this mission. The Administration investigates safety defects, writes safety standards, and ensures manufacturer compliance. Although manufacturer violations can lead to civil penalties and injunctions enforceable by criminal contempt, the statutory scheme relies primarily on compliance with announced safety standards by automobile manufacturers and on direct notice from manufacturers warning dealers and purchasers of defects and advising them of needed repairs.[148]

In many respects, NHTSA vehicle defect notification campaigns are indistinguishable from FDA food recalls. NHTSA relies primarily on the automobile manufacturer to warn the owner that the product is defective; NHTSA itself ordinarily issues warning publicity only if the defective product is no longer within the manufacturer's control. But unlike the FDA recall process, NHTSA's defect notification procedure is statutorily authorized.[149] The authorization does not, however, entirely clar-

(recommending that the FDA be granted power to obtain access to production and distribution information, power to detain suspected or known defective products, and power to enforce recalls). The Department of Agriculture already has similar inspection and detention authority for poultry and meat. 21 U.S.C. §§ 451–70, 601–95 (1970); *see* Cody, *Food Recalls*, 27 FOOD, DRUG, COSM. L.J. 336, 343 (1972).

[145] *Cf.* S. Peltzman, The Benefits and Costs of New Drug Regulation, 1972 (paper delivered to the Center for Policy Study, University of Chicago, to be published in the *Journal of Political Economy*).

[146] In addition, testing standards should be reviewed and recall procedures further defined, and the use of publicity likely to have adverse consequences should be more selective. *See* p. 1427 *infra*. For a discussion of statutory authorization, see pp. 1424–25 *infra*.

[147] National Traffic & Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381–1431 (1970). *See generally* Note, *Federal Motor Vehicle Safety Legislation*, 29 OHIO ST. L.J. 177 (1968).

[148] 15 U.S.C. § 1402 (1970). For NHTSA's authority to establish standards, see *id.* §§ 1392, 1397, 1403.

[149] *Id.* § 1402; *cf.* pp. 1410–11 *supra*.

ify the agency's publicity powers. An express grant of defect notification power, particularly in the absence of explicit publicity power such as that given the FDA,[150] might limit the agency's authority to requiring manufacturer notification. NHTSA argues, however, that it has implied authority to issue publicity not only to inform the public about safety defects, but also to warn car owners who might not otherwise be reached.[151] But this use of public warnings also serves as a sanction to deter manufacturers from future quality control failures. Furthermore, the threat of publicity serves to coerce manufacturers to fulfill their statutory recall duties.

Consumer groups complain that NHTSA does not impose sufficiently rigorous notification requirements on manufacturers and that the agency's own publicity efforts are ineffective. The automobile industry, on the other hand, complains that premature agency publicity releases and information leaks deny manufacturers a fair chance to reply to charges or investigate alleged defects.[152]

Despite these criticisms, auto makers are generally more pleased with NHTSA's publicity procedures than food producers are with the FDA recall system. This is probably due in large measure to the inherent differences in the products. Because the public apparently perceives food contamination to be a much greater danger than automobile safety defects, NHTSA publicity is likely to have less adverse effect on regulated parties than FDA publicity, even though the incidence and significance of likely harm from auto safety defects usually exceeds that resulting from contaminated food. The causes of public insensitivity to NHTSA publicity are not entirely clear. Perhaps it is because the public has concluded that unsafe cars are inevitable while unhealthy food is not. Differences in the markets may also explain some of the differences in the impact of the agency warnings. Competitive pressures in the food processing industry probably exceed those in the automotive or tire industries,[153] and the consumer's oppor-

[150] 21 U.S.C. § 375(b) (1970); *see* p. 1408 *supra*.

[151] Interview with Richard Dyson, Assistant Chief Counsel, NHTSA, in Washington, D.C., Aug. 29, 1972.

[152] The industry's "unfair surprise" argument is, however, unpersuasive, since the news media regularly seek the manufacturer's response before releasing a story, especially in important cases. Moreover, manufacturers are frequently aware of NHTSA's conclusions before they are made public; in fact, auto makers sometimes participate in the Administration's tests and frequently negotiate with the agency on the scope of formal notice. In any event, although the fairness of administrative procedures theoretically should not depend on the wealth of those an agency regulates, most automobile manufacturers are economically powerful enough to counter NHTSA publicity.

[153] *See* R. Lipsey & P. Steiner, Economics 266–68 (3d ed. 1972).

tunity to react to adverse publicity by shifting his purchases is correspondingly greater with respect to the food industry. Moreover, unit prices are much lower for food than for automotive or tire products, the lifespan of food products is much shorter, and consumer loyalties and brand differentiation among food products are considerably lower.[154] Thus, even if consumers were not indifferent to NHTSA publicity, its immediate impact might be limited.

Another possible explanation for the relative consumer indifference to NHTSA warnings may be "notice saturation": NHTSA warnings stream forth constantly, affecting almost every make and model of automobile; the agency gives about the same publicity to all defects, regardless of their seriousness, and most defect notices are no longer newsworthy. In contrast, FDA warnings are relatively few, at least when compared with the number of firms and products in the industry, and they do draw public interest when the number of potential victims is substantial or the possibility of injuries is severe. In short, NHTSA's diligence may have dissipated rather than heightened public interest.[155]

There are also differences between the publicity procedures of the FDA and of NHTSA. Motor vehicle defect notifications often occur months after the defect is first suspected, and they are usually preceded by lengthy and thorough testing in which the manufacturer has a chance to participate. NHTSA ordinarily notifies the public that a model is being investigated or has failed a performance test in interim monthly announcements or a special consumer protection bulletin. After NHTSA first announces a serious defect by this method, as it did in the case of Corvair heaters and Chevrolet engine mounts, it gathers substantial evidence, notifies the manufacturer, and runs preliminary tests. Only then is the focused warning publicity issued. The automobile manufacturer is therefore unlikely to be the victim of erroneous agency publicity.[156]

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[154] *See* J. BAIN, INDUSTRIAL ORGANIZATION 236–40 (2d ed. 1968). *See also* FTC, ECONOMIC REPORT ON THE INFLUENCE OF MARKET STRUCTURE ON PROFIT PERFORMANCE OF FOOD MANUFACTURING COMPANIES (Staff Report 1969); UNITED STATES NAT'L COMM'N ON FOOD MARKETING, TECHNICAL STUDIES NOS. 4, 6–8 (1966); Collins & Preston, *Concentration and Price Margins in Food Manufacturing Industries*, 14 J. INDUS. ECON. 226 (1966).

[155] *Cf.* p. 1427 *infra*. A related factor is the nature of the investigation. Contaminated foods involve scientific examination, and few consumers feel in a position to challenge the FDA's conclusions. Automobile defects, on the other hand, usually involve mechanical problems concerning which many consumers believe themselves competent — or at least rate the government agency less highly. In actuality, the contrary attitudes would be more realistic, since FDA warnings may follow only preliminary testing whereas NHTSA notices are usually preceded by extensive testing and consultation.

[156] There are, however, occasional vigorous disputes between the agency and

Although NHTSA enjoys a statutory "recall" program FDA lacks, it also resorts to the extrastatutory measure of adverse publicity both to warn the public and to coerce compliance with its recall program. Representatives of NHTSA admit that it has not subjected its publicity program to rigorous examination. No rules or regulations govern the agency's publicity. However, internal checks and procedures have developed from custom, habit, and natural bureaucratic caution. Not insignificant, undoubtedly, is the existence of effective industry pressure on the agency. Probably fearing that it will jeopardize the effectiveness of its substantive program with irresponsible publicity, NHTSA generally acts cautiously, and there has evidently been little abuse in its adverse publicity practices.

II. The Control of Adverse Agency Publicity

A. The Need for Control [157]

Adverse publicity causes concern for two primary reasons. First, it imposes a deprivation on private persons or firms without

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the manufacturers it regulates over the content of press releases issued by each. NHTSA, for example, objected to Ford Motor Company's advertisements regarding the ineffectiveness of air bags as a passive restraint, and it issued counterpublicity. Or a manufacturer's recall may fail to mention that it was precipitated by an NHTSA investigation or it may be worded too benignly; the agency then frequently issues a "reactive" release announcing its own views. NHTSA also concedes that some of its releases have contained errors — especially as to whether the recommended repair would be accomplished under the manufacturer's warranty or at the owner's expense. Interview with Richard Dyson, Assistant Chief Counsel, NHTSA, in Washington, D.C., Aug. 29, 1972.

[157] *See generally* F. Rourke, *supra* note 65, at 13–17; Note, *Disparaging Publicity by Federal Agencies*, 67 Colum. L. Rev. 1512, 1513–18 (1967).

There is, of course, another more basic question which also deserves consideration — namely, whether government agencies should issue any publicity, either adverse or favorable. The information publicized by an agency is wanted only by some; publicity is not usually desired by those adversely affected, a view shared as well by many others who cannot use it. Thus, adverse agency publicity designed to inform seems justifiable only if the agency can distribute the information more efficiently than private organizations to those wanting it or if it serves some other public purpose. On the other hand, it seems clear that many agency publicity functions already duplicate private information systems, which are supported by those willing to pay for the information. *See generally* A. Alchian & W. Allen, University Economics: Elements of Inquiry 35–49 (3d ed. 1972). In addition, a market system has the advantage of permitting each consumer an opportunity to "vote" his preference by choosing to buy or not to buy the service. Competitive pressures in this "information market" would maximize resource allocation (since the information supplied would be determined by demand) and minimize cost (since specialization in information services and competition would increase efficiency and reduce prices). *See id.* at 199–232, 311–48. Those unwilling to pay the publicity charge would not be forced to shoulder the cost. In addition, they would be free of government coercion, since individuals would not be required to support an

the due processes of law normally associated with government action encroaching upon property or persons. Formal orders from administrative agencies are preceded by notice with an opportunity for hearing, and the orders are often supported by a reasoned decision.[158] But usually no protection other than the common sense and good will of the administrator prevents unreasonable use of coercive publicity. Furthermore, judicial review cannot undo the widespread effects of erroneous adverse agency publicity. The result is that the person or industry named may be irretrievably injured by inaccurate, excessive, or premature publicity.[159]

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unwanted service. *See generally* M. FRIEDMAN, CAPITALISM AND FREEDOM 7–36 (1962). Equally significant would be the desirable by-product that the existing tort system of private remedies would be available to compensate for abuses. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 111–16, 128 (4th ed. 1971) (defamation and injurious falsehood). Moreover, since government immunity and the absolute tort immunity of government officials, *see id.* at 970–92, are inapplicable in the private sector, many of the fairness and all of the procedural questions raised in this Article would disappear.

It can be answered that agency publicity serves an overriding public purpose. Nonpurchasers should be warned or informed where their welfare requires it. Moreover, agency information should not be restricted to the wealthy or the specially interested; the Government has an obligation to protect the disadvantaged or ignorant as well as the affluent. Nor is it clear that an effective and efficient private information market is a practical possibility.

[158] Agencies ordinarily are required to give notice and an opportunity for a hearing before entering a formal administrative order that adversely affects a private interest. *See* Administrative Procedure Act §§ 5–8, 5 U.S.C. §§ 554–57 (1970). *See also* Greene v. McElroy, 360 U.S. 474, 496–97 (1959); Administrative Procedure Act § 4, 5 U.S.C. § 553 (1970) (rulemaking authority); E. GELLHORN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 133–34 (1972).

Since most objections to agency publicity disappear when it issues after a hearing is held, the comments and recommendations offered in this Article generally relate to adverse publicity disseminated before the named respondent has had an opportunity to show that the release is inaccurate or before the agency has made a deliberate decision; only occasionally are they directed against excessive publicity.

At one time it was strenuously argued that pretrial press releases were also prejudicial because they demonstrated agency prejudgment. *See, e.g.*, Note, *supra* note 157, at 1513–14. However, as the combination of functions within administrative agencies was accepted and the concept of institutional separation understood, this objection generally disappeared. And current channels for judicial review adequately protect the fairness of agency hearings. *See, e.g.*, Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964), *vacated and remanded on other grounds*, 381 U.S. 739 (1965).

[159] For example, in the cranberry episode, *see* pp. 1408–10 *supra*, as a Washington attorney has noted, there was

> great economic loss, and perhaps lasting injury, without any hearing or review on the facts . . . No lawyers . . . were consulted, and no administrative procedures were even considered. . . . Never forget that the publicity sanction — that omnibus condemnation by press release — goes forward without formal evidence, without any opportunity for hearing, without counsel and, of course, without the remotest possibility of court review.

Austern, *supra* note 117, at 672–74. Nor is compensation by private bill or executive

Second, agencies sometimes use adverse publicity as an unauthorized sanction, as the CLC has done to enforce its Phase I dividend restraint policy.[160] Such use can damage an agency's stature in the eyes of the regulated industries. Furthermore, agency reliance upon publicity as a sanction may stunt the development of legal sanctions and leave novel doctrines untested.[161] By resorting to ad hoc methods of coercion, agencies circumvent the visibility of legislative approval of sanctions and may even frustrate the legislature's intent to limit their power to coerce.[162]

In this section of the Article, standards will first be proposed whereby agencies can control and legitimize their uses of adverse publicity. Second, new avenues for judicial scrutiny of adverse publicity will be suggested, although admittedly the primary responsibility must fall on the agencies' internal controls, which alone operate before publicity issues. Finally, legislative measures for reform will be discussed, including greater specificity in delegations of authority to agencies and reform of the Federal Tort Claims Act.

B. Controls on Publicity and the Freedom of Information Act

Before proposing methods for controlling the use of agency publicity, one must distinguish such controls from agency information practices that permit public access to agency records in

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action necessarily adequate protection; it covers only readily identified losses and offers a salve only for the powerful and persistent.

[160] *See* pp. 1404–05 *supra*. *See generally* Part I. *C. supra*.

[161] *See generally* Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777, 820–45 (1971); *cf.* Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. PA. L. REV. 39, 42 (1971): "[T]he regulatory approach [of concern] adopted by the FCC, although expeditious in the short run, has . . . delayed the development of an adequate methodology of regulation, and resulted in a conspicuous failure to formulate visible and consistent standards." If ultimately subject to court review, preliminary exploration of novel methods outside the formal administrative process is not as objectionable. *Compare* ITT Continental Baking Co., [1970–1973 Transfer Binder] TRADE REG. REP. ¶ 19,681, at 21,727 (F.T.C. 1971) (consent decree requiring that respondent counter weight-reducing claims of prior Profile Bread advertisements), *with* Firestone Tire & Rubber Co., [1970–1973 Transfer Binder] TRADE REG. REP. ¶ 20,112 (F.T.C. Feb. 16, 1973) (adjudicative rejection of request for corrective advertising order). The concern, however, is that publicity may be such a significant in terrorem threat that no respondent can challenge the lawfulness of the agency policy which it implements. *See, e.g.*, Mulford, *"Acceleration" Under the Securities Act of 1933 — A Postscript*, 22 BUS. LAW. 1087 (1967); Mulford, *"Acceleration" Under the Securities Act of 1933 — A Reply to the Securities and Exchange Commission*, 14 BUS. LAW. 156 (1958); *cf.* FINAL REPORT OF THE ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th Cong., 1st Sess. 134–35 (1941) (Federal Alcohol Administration).

[162] *See, e.g.*, p. 1399 *supra* (EEOC authority).

accordance with the Freedom of Information Act.[163] The latter involves a question of the availability of government information to the public. Agency publicity, on the other hand, involves affirmative action on the part of an agency or its personnel to bring information or activities to the attention of the public. The difference is particularly significant where the agency's affirmative steps cause or increase the harm suffered by the person identified.[164]

With regard to the interests under the Freedom of Information Act, Congress has mandated that high priority be given to openness in government. However, this policy still places the primary burden of requesting and obtaining the information on the person seeking it; only reasonable requests are honored and the party desiring the information must pay for extensive searches as well as all copying costs.[165] The congressional mandate with respect to publicity is quite different. Most government agencies lack explicit authorization to issue adverse publicity,[166] and what authorization one can find limits the uses to which publicity may be put.[167] Furthermore, questions of access arise at a different point in agency proceedings than questions of publicity. Adverse agency publicity frequently occurs either at an investigatory point when there is no significant interest in public access,[168] or at a point when the complaint is already in the public domain.[169] The main concern is therefore with fairness to the parties adversely affected. Access to information, on the other hand, seeks to uncover information on which investigation is complete but which has not yet

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[163] 5 U.S.C. § 552 (1970).

[164] For example, the fact that EEOC's complaint before the FCC is a public document does not justify sensationalistic publicity applying public pressure on AT&T, just as EEOC's abuse of public FCC hearings is no reason for holding private proceedings. *See* pp. 1400–01 *supra*.

When media coverage closely follows agency activities, affirmative publicity measures may be unnecessary because mere freedom of public access to information performs the same function. *See, e.g.*, pp. 1394–97 *supra* (SEC publicity). In such a case, the issues involved in the Freedom of Information Act cannot be disentangled from adverse publicity issues.

[165] FTC Procedures and Rules of Practice §§ 4.8(b)–(c), 38 Fed. Reg. 1730 (1973). There is effectively a self-screening process which operates to limit public access to agency records. In fact, some critics claim these obstacles are too strong. *See generally* Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS — CIV. LIB. L. REV. 1 (1970).

[166] *See, e.g.*, pp. 1398–401 *supra* (EEOC); pp. 1403–06 *supra* (CLC).

[167] *See, e.g.*, pp. 1411–12 *supra* (FDA).

[168] Adverse agency publicity often involves unevaluated file data, *see, e.g.*, pp. 1408–09 *supra* (FDA cranberry episode), tentative charges, *see, e.g.*, p. 1390 *supra* (FTC Part II complaints), or charges for which no legal sanctions exist, *see, e.g.*, pp. 1404–06 *supra* (CLC publicity).

[169] *See, e.g.*, pp. 1394–98 *supra* (SEC).

been publicly disclosed.[170] Then, the main concern is with confidentiality and protection of governmental processes.

C. Internal Controls

Many of the problems of agency publicity appear amenable to internal control.[171] In the process of preparing publicity guidelines such as the Department of Justice's publicity rules [172] and the FTC's public information pamphlet,[173] an agency is forced to examine its practices and decide whether, when, and how adverse information should be publicized.[174] But even where agencies such as the FTC have articulated their standards for the use of adverse publicity, there is great need for reform. Extant internal guidelines generally ignore the questions of whether alternative sanctions or other methods of publicity are available, whether additional steps should be taken to assure the accuracy

[170] Public access is seldom permitted to investigatory files, and even then the decisions seem questionable. *See, e.g.*, Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971), *noted in* 85 HARV. L. REV. 861 (1972). Only occasional requests for access involve significant fairness issues, and even less frequently do these raise serious due process questions. *See generally* E. GELLHORN, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U. CHI. L. REV. 113 (1968).

[171] This is not to say that legislative and judicial relief should not be available. In fact, it will be recommended in this Article that courts undertake review of agency publicity more freely and that Congress amend the Federal Tort Claims Act to permit compensation for victims of adverse publicity on a regularized basis rather than by private bill. *See* C. HORSKY, THE WASHINGTON LAWYER 78 (1952); W. GARDNER, *The Administrative Process*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 138–39 (M. Paulsen ed. 1959); Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. PA. L. REV. 702, 718 (1972). *See generally* Section *D*, infra. But even these suggestions are offered primarily because of their likely effect on general administrative practice, not for the specific relief permitted injured parties. Judicial review can be an effctive check on the administrative process precisely because it can affect policies and practices as well as provide limited relief to specific parties.

[172] 28 C.F.R. § 50.2 (1972).

[173] FTC PUBLICITY GUIDEBOOK.

[174] The development of agency policy and its presentation in written regulations is not always an unmixed blessing, however. Committing a bad policy to paper may hinder its demise, and obscure regulations supply only a semblance of policy. Written rules may become rigid and thus an excuse for not rethinking the question of how to exercise reasonable discretion. *Cf.* Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A.L. REV. 1, 29 (1971). Nevertheless, staff size, personnel turnover, and short memories, as well as fairness to those subject to the procedure, generally require that administrative agencies rely on regularized policy procedures. The evidence seems to indicate that agencies which have not reduced their publicity policies to writing have not infrequently abused their powers; and agencies which have developed articulate programs are among those whose publicity practices seem more praiseworthy. *Compare* pp. 1388–93 *supra* (FTC procedures), *with* pp. 1398–401 *supra* (EEOC procedures).

of the publicity, or whether fairness for the victim of publicity can be improved by providing a forum for a reply or time for rebuttal. By resolving such issues, an agency can avoid abuse without rendering publicity techniques ineffective.

1. Publicity Policy. — Several substantive questions should be resolved in the rules an agency writes to govern publicity. Among these are the questions of whether to issue publicity at all, at what point in the agency's actions the publicity should be released, and how to control the contents of the publicity.

(a) General Guidelines for Deciding Whether to Issue Adverse Publicity. — *(i) Agency Authority.* — The first question which an agency should address is whether a proposed use of publicity is statutorily authorized. Agency authority is important not only because agencies are theoretically confined to their delegated powers, but also because the acceptability and effectiveness of an agency's substantive programs can be defeated by resort to procedures whose legitimacy may be challenged, thereby diverting attention from the object of the agency's concern. Such authorization is not to be found in the typical agency mandate to "make public . . . information obtained by it . . . as it shall deem expedient in the public interest" [175] or in the power to "make rules and regulations for the purpose of carrying out the provisions of this . . . title." [176]

The problem is particularly acute when publicity functions to bolster an agency's enforcement powers. This study has shown that agencies frequently use adverse publicity to supplement their formal and informal sanctions.[177] Publicity is quicker and cheaper; it is not presently subject to judicial review or other effective legal control; and it involves the exercise of pure administrative discretion. Publicity also helps to fill gaps between an agency's statutory goals and its statutory enforcement powers.[178] However, the "need" for additional administrative enforcement power should not be resolved by an agency's arrogating such power to itself without congressional approval.[179]

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[175] Federal Trade Commission Act § 6(f), 15 U.S.C. § 46(f) (1970).

[176] *Id.* § 6(g), 15 U.S.C. § 46(g).

[177] *See, e.g.*, pp. 1404–06 *supra* (CLC). For many agencies publicity serves simultaneously as an authorized warning or distribution of information to the public and as unauthorized coercion against private parties; the FDA's use of publicity in its recall program is paradigmatic. *See* pp. 1407–16 *supra*. In such cases it would be an abdication of the agency's statutory duties to refuse to issue publicity on the ground of its unauthorized impact. However, when faced with such a dilemma, agencies must carefully weigh the impact upon their own credibility and prestige which may result from excessive use of publicity which achieves unauthorized ends.

[178] *See, e.g.*, pp. 1398–401 *supra* (EEOC).

[179] The best solution would be for Congress to face the choice of extending agency sanctions or of authorizing publicity as a sanction. *See* p. 1435 *infra*.

Not infrequently, the agency's mandate is dispositive of whether it should issue any adverse publicity. For example, publicity seems peculiarly appropriate for implementing the SEC's statutory scheme.[180] On the other hand, the mandate to the EEOC emphasizes private conciliation; and adverse publicity, particularly where it serves to coerce compliance with EEOC goals, seems contrary to the legislative intent.[181] If it appears in a particular case that the use of adverse publicity is at least colorably authorized by statute, several other criteria should be considered before the agency determines to use it. Of these, the most important are the need for publicity, the availability of less harmful alternatives, the likelihood that the information is accurate and will be effective, and the degree of unwarranted harm that might result.

(*ii*) *Need.* — What regulatory function is served by adverse publicity? If an FDA release, such as that regarding Bon Vivant vichyssoise,[182] warns the public about an immediate peril such as the danger of contaminated food, the need for speed and widespread notice to fulfill the FDA's statutory purpose is clear. The scope and the nature of public harm that may result if adminis-

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[180] *See* p. 1394 *supra*.

[181] *See* p. 1399 & note 70 *supra*. The proper role of publicity depends on the agency's function and authority. Thus the 1941 Attorney General's Report, in connection with the Federal Alcohol Administation's "indiscriminate use" of press releases to publicize every order instituting disciplinary proceedings against permit holders, concluded that the FAA

> relied upon threatened adverse publicity as an extra-legal sanction to secure observance of its commands, even when the validity of its dictates was not free from doubt.
>
> Such abuse of the power to publicize proceedings must be unqualifiedly condemned.
>
> The Committee notes its belief that there is rarely any strong justification for prior publicity in the cases which here arise. The sanctions provided by the statute, particularly the power to suspend the permit, should, if utilized, provide sufficient discouragement to the potential lawbreaker. Only rarely is it necessary to take rapid action in order to safeguard the public health or to prevent gross deception of consumers . . . .

FINAL REPORT OF ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th Cong., 1st Sess. 135 (1941). On the other hand, the Committee did not disapprove of the SEC's publicity policies, *see id.* at 182–83, and its monograph on the Commission explained why the SEC's policies were justified in the normal case:

> First, it is abundantly clear that the [Securities and Exchange] Commission takes extraordinary precautions before instituting decisive proceedings . . . Under these circumstances, the danger of harm by publicity to a respondent who might ultimately be found innocent seems remote. Second, there are affirmative considerations of policy which support the policy of publicity. Where, after its careful preliminary researches, the Commission is of the opinion that violations exist, it would seem to be contrary to the intent of the acts that the Commission should keep this secret and permit investors, for whose protection the acts were passed, to continue to be defrauded.

ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, MONOGRAPH ON SECURITIES AND EXCHANGE COMMISSION, S. DOC. NO. 10, 77th Cong., 1st Sess., pt. 13, at 53–54 (1941).

[182] *See* p. 1413 *supra*.

trative publicity is not issued is another way of stating the regulatory need. However, if the function were merely to inform the public about FDA vigilance and the resulting safety of foods and drugs, there would seem to be little reason to identify particular products or firms, at least prior to formal adjudicative determination. Where there is considerable doubt whether Congress intended the agency to warn the public against a product or firm, the use of so gross a warning or informational tool as adverse publicity should be seriously questioned. Thus, for example, it is difficult to justify the ruination of an entire cranberry crop on the ground of evidence such as that facing the FDA in 1959.[183]

(*iii*) *Alternatives.* — Can the interests served by adverse publicity be protected in less harmful but equally effective ways? If an FTC complaint relates to a continuing practice or advertisement — for example, the Zerex advertisement — the respondent should be allowed the alternative of discontinuing the challenged activity pending the litigation.[184] Because adverse publicity is usually a deprivation not subject to effective judicial control, it should usually be a sanction of last, not first, resort. If statutorily authorized, other remedies such as injunctions, seizures, and summary administrative actions should be considered before indiscriminate adverse publicity is employed.[185]

(*iv*) *Accuracy and Effectiveness.* — How reliable is the information on which the agency publicity is based and what is the likelihood that it will effectively influence the public? Mistakes such as the Cost of Living Council's dividend announcement [186] or the FTC's accusations against Zerex [187] are costly to the agency's prestige and program as well as to the injured person.

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[183] *See* pp. 1408–09 & note 117 *supra.*

[184] *See* E. Gellhorn, *supra* note 170, at 142. This suggestion is also appropriate where past practices have already resulted in distribution of the allegedly defective product or resulted in public deception, and the charge is disputed. In such cases, the agency announcement is unlikely to return the warned consumer to the status quo ante. For example, the FTC did not expect purchasers of Zerex antifreeze to replace their radiator coolant several months into the winter season merely because the Commission announced that the product might cause harm to some automobile radiators. And if the FTC's recent experience with attempting to show the "lingering effect" of deceptive advertising is indicative, its adverse publicity cannot be justified as countering past practices. *See, e.g.*, ITT Continental Baking Co., [1970–1973 Transfer Binder] TRADE REG. REP. ¶ 20,182 (F.T.C. 1972).

[185] Moreover, the manner and type of agency publicity may be viewed as a spectrum of alternatives. That is, a more restrained announcement or the inclusion in the agency announcement of respondent's reply may alleviate the harm and increase the accuracy of the disseminated news, yet still satisfy the administrative policy justifying the release. *See* p. 1430 *infra.*

[186] *See* pp. 1404–05 *supra.*

[187] *See* pp. 1391–92 & notes 38–40 *supra.*

The public warning about Stokely-Van Camp's green beans,[188] which turned out to be harmless, not only cost the company millions of dollars, but also reduced the credibility of the FDA.

Moreover, when publicity is not selectively issued, it is likely to be ineffective. Typical are NHTSA's announcements of recalls [189] and the FTC's automatic press policy for Part II complaints.[190] In a technical sense, the present policy assures that the public is informed of every FTC complaint and may, if necessary, take warning from it. In reality, the public is drowned in a sea of notice and a benumbed press ignores many of the FTC's warnings, even those which raise significant issues of public safety, such as the announcements of flammable-fabric actions. The FTC's problems might be avoided or minimized if the Commission adopted a policy of selective publicity. The FTC could limit the use of publicity to cases in which it was necessary to warn the public about imminent danger and to significant actions requiring explanation to prevent misunderstanding.

The chief arguments in favor of the present automatic-publicity policy — that it ensures accurate news coverage by explaining technical legal charges and enhances administrative efficiency by funneling all press inquiries to the Information Office — are no less applicable to selective publicity. Reporters' inquiries would still be directed to the Information Office, and material now released automatically could be kept on file and made available as requested. To prevent misunderstandings, the agency might still hold news conferences to explain novel cases such as those in which the FTC seeks a corrective advertising order or applies a new monopoly theory.[191]

(*v*) *Harm.* — What is the likelihood and scope of injury which might result from agency publicity? Publicity concerning

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[188] *See* note 142 *supra.*

[189] *See* pp. 1416–19 *supra.*

[190] *See* p. 1390 *supra.* The defense bar is highly critical of the FTC's automatic publicity policy. *See* ABA Administrative Law Section, *The Twelve ABA Recommendations for Improved Procedures for Federal Agencies*, 24 AD. L. REV. 389, 410 (1972).

[191] Opponents of such a reform may make several arguments, but none is particularly persuasive. It is true that the present automatic publicity policy permits the Public Information Office no discretion to decide when to issue a press release concerning a complaint, while the selective policy would. But the difference is illusory, because under the present policy, the Information Officer decides which complaints will receive special publicity such as a news conference. Admittedly, a selective publicity policy might give a greater appearance of agency bias merely because some complaints were publicized and others were not. But any agency publicity gives an appearance of partisanship, and the appearance is heightened when the charges publicized are tentative and are changed before an adjudicative hearing is held.

some types of agency activity is likely to be so prejudicial that it should almost never issue. For example, where agency adjudications are similar to judicial trials, the well-developed rules applicable to trial publicity by lawyers should apply.[192] The EEOC practice of "trial by handout" demeans the adjudicative process and its participants and may render procedural protections at a subsequent hearing irrelevant. As a general rule, agency publicity regarding adjudications should be kept to the barest minimum, at most announcing the commencement of the proceeding, the interim decision by the hearing officer, the final agency action, and the result of judicial review. Where investigations are regulatory or preprosecutorial and look toward subsequent adjudication, the usual practice follows the grand jury precedent of keeping such proceedings confidential.[193] Obviously, publicity as a sanction has no place here; in fact, there seems to be little justification for holding such hearings in public.[194] Informational or legislative-type investigations, on the other hand, serve a different purpose. They are designed to inform the agency, and sometimes the public, as part of the development of agency policy, rules, or legislative proposals. They are invariably public, and this practice was specifically approved by the Supreme Court in *FCC v. Schreiber*.[195]

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[192] *See* ABA Special Comm. on Evaluation of Ethical Standards, Code of Professional Responsibility, Canon 7, EC 7–33, DR7–107 (Final Draft 1969). *See generally* ABA Advisory Comm. on Fair Trial-Free Press, ABA Project on Minimum Standards for Criminal Justice: Fair Trial-Free Press (1966); Reardon, *The Fair-Trial-Free Press Standards*, 54 A.B.A.J. 343 (1968).

[193] *See, e.g.*, 16 C.F.R. § 2.8(c) (1973) (FTC investigational hearings normally not public); 1 K. Davis, Administrative Law Treatise § 3.13 (1958). For a review of grand jury procedure, see 8 J. Wigmore, Evidence § 2360 (McNaughton rev. 1961); Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455 (1965). *See also* Fed. R. Crim. P. 6(e).

[194] *See* E. Gellhorn, *supra* note 170, at 117–23.

[195] 381 U.S. 279 (1965).

> [P]ublicity tends to stimulate the flow of information and public preferences which may significantly influence administrative and legislative views as to the necessity and character of prospective action.

Id. at 294. Chief Justice Warren's reference to publicity, however, relates to that generated by public hearings, not by administrative press release.

Of grave concern, however, is the occasional tendency of agencies to use such proceedings to ventilate charges against individuals or companies without affording the accused a reasonable opportunity for rebuttal. *Cf.* Maslow, *Fair Procedure in Congressional Investigations: A Proposed Code*, 54 Colum. L. Rev. 839, 861–70 (1954). One answer, of course, would be to allow the charged party an opportunity to confront his accusers, to challenge unfavorable evidence, and to present an affirmative case. In general, this approach defeats the purpose of informational hearings; they would simply become adjudications. *See* Hannah v. Larche, 363 U.S. 420, 443 (1960); Note, *The Distinction Between Informing and Prosecutorial Investigations: A Functional Justification for "Star Chamber" Proceedings*, 72 Yale L.J. 1227 (1963). Rather, such charges do not deserve to be aired in public. Either the hearings should be confidential or such charges ruled out of order. The re-

Where agency action concerns a serious and continuing problem of public health, safety, or economic harm, speed may be critical. On the other hand, so is accuracy, since an erroneous announcement may be nearly as harmful as the threat of peril which motivates the warning. Unless the public "need" for an immediate announcement is substantial, the ideal procedure would be to postpone agency publicity which is likely to have a significant and adverse impact until the named respondent has had an opportunity for a hearing. In some cases, consideration of the likelihood of harm from the publicity would indicate that it is so minimal as to legitimate the use of adverse publicity. Thus, for example, criticism from NHTSA has so slight an impact on an industry which can easily protect itself that NHTSA should have greater leeway to issue adverse publicity.[196] However, this is not to say that NHTSA should rely on more, rather than less, publicity. Of course, consideration of the potential injury should not be limited to those singled out in the news announcement. As the cranberry episode demonstrates, adverse publicity may have many spillover effects which should be considered in an agency's decision.[197]

In sum, the four factors of need, alternatives, accuracy and effectiveness, and harm should be considered together in determining whether authorized adverse publicity should issue. This analysis suggests that inflexible publicity policies are unlikely to be desirable, unless one can reasonably assume that the importance of the various factors does not shift within a category of cases. As Professor Davis has rightly suggested,[198] the appropriate response to administrative abuse is not to discard discretion, but rather to structure, check, and confine it through agency rules and regulations. Where adverse publicity supplements or is a substitute for other agency sanctions,[199] and therefore constitutes a sanction, the agency should be careful to satisfy itself that these basic standards are met.

(*b*) *The Content of Adverse Publicity.* — Once a decision is made that some publicity should be forthcoming, the question of

formed rules of several congressional committees, developed after the stresses of the McCarthy era, provide a useful guide. *See, e.g.*, JOINT COMM. ON CONGRESSIONAL OPERATIONS, RULES ADOPTED BY THE COMMITTEES OF CONGRESS, 92d Cong., 1st Sess. 158, 171 (Comm. Print 1971) (defamatory or accusatory statements to be received in executive session).

[196] Correspondingly, in such cases the publicity is less likely to serve any unauthorized purposes. On the other hand, the victim's ability to withstand the injury — its deep pocket — would not seem to be a principled basis for deciding whether adverse publicity should issue, unless wealth redistribution is a regulatory function.

[197] *See* pp. 1408–10 & note 134 *supra*.

[198] K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY chs. 3–5 (1969).

[199] *See, e.g.*, section I. *D. supra*.

its content arises. Agency rules regarding the content of press announcements should vary depending upon the complexity of the agency action, the sophistication of the likely audience — of both the immediate reporters as well as the ultimate readers or viewers — and the possibility of harm. Regulations should indicate such guidelines as whether a pleading should be reprinted or summarized and whether and from whom further information should be made available. Agency rules should also indicate the proper tenor and format of publicity announcements.[200] For all agency publicity, factual, nonpejorative descriptions of agency action should be the inflexible rule.[201] In addition, all agencies should follow the FTC practice of prominently featuring in every appropriate release the tentative nature or limited basis of the charge.[202]

2. Publicity Procedures. — Unless implemented with sensitivity, these publicity policies provide only limited protection. Beyond familiar exhortations that administrative regulation cannot rise above the quality of an agency's personnel, a few procedural guides may be appropriate. First, publicity generally should issue from only one agency source. The media should not be encouraged to interview staff members in charge of litigation or investigations; if background information is available, the SEC's approach of limiting disclosure to facts not for quotation or attribution [203] seems appropriate. For example, any reform of FTC publicity policy should take account of the Commission's present practice of permitting the staff to meet informally with the press to discuss nonconfidential matters.[204] Insofar as such discussions relate to charges against individual respondents, the practice seems objectionable. In fact, most of the legitimate respondent grievances uncovered by this study arose out of ad hoc staff responses to press inquiries. Such informal interchanges assure neither accuracy nor uniformity, and the FTC should amend its Operating Manual to require that staff members refer

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[200] *See, e.g.*, FTC PUBLICITY GUIDEBOOK 3–13.

[201] The SEC, for example, has surmounted the problem of overstatement which once plagued its press releases. *See* Gilligan, Will & Co. v. SEC, 267 F.2d 461, 468–69 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959); Silver King Mines, Inc. v. Cohen, 261 F. Supp. 666 (D. Utah 1966). In order to minimize misstatement, SEC announcements append the official Commission document to the release, which only summarizes the SEC's action in the barest manner. *See* SEC, MANUAL OF ADMINISTRATIVE REGULATIONS § 161.04 (1966).

[202] *See* note 35 *supra*.

[203] Interviews with Ronald F. Hunt, Secretary to the SEC, in Washington, D.C., Aug. 2 & 15, 1972. *See also* SEC, MANUAL OF ADMINISTRATIVE REGULATIONS § 161.06(B)(2) (1966).

[204] FTC, OPERATING MANUAL ch. 10.4 (1971).

all press inquiries to the Information Office. To the extent that it could be made enforceable,[205] such a requirement would enhance the effectiveness of the more fundamental changes already suggested.

Second, agency publicity procedures should be reviewed periodically. When policies are new, all problems cannot be anticipated. And established policies may not be working or may have become unnecessarily rigid. For example, administrative efficiency and fairness might be served by the FTC's adoption of a one-step complaint procedure [206] which allows respondents to negotiate a settlement within tight time limits, before charges are filed and publicized.[207] The Commission's public relations fiasco in the Zerex antifreeze case would not have occurred if a one-step procedure had been used.

Third, where feasible, an agency might consider creating an internal appeal procedure whereby the private party complaining of adverse agency publicity could seek redress. This suggestion is tendered cautiously, because agency processes are not enhanced merely by burdening them with another layer of administrative procedures.

Finally, intermediate approaches such as those suggested by the Consumer Product Safety Act [208] are also possible. That is, each agency should consider the feasibility of providing that where practicable, parties to be subjected to proposed adverse publicity be given advance notice and an opportunity to comment to the agency upon the press announcement before its release. When an adverse disclosure is inaccurate or misleading, the agency should provide specific procedures for issuing a retraction,

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[205] In fact, of course, the Commission has a history of being unable to control itself. For example, in the celebrated Sherman Adams-Goldfine affair of the 1950's, the then chairman of the FTC, Edward F. Howrey, disclosed confidential information in clear violation of several statutes. *See* HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, INDEPENDENT REGULATORY COMMISSIONS, H.R. REP. NO. 2711, 85th Cong., 2d Sess. 46–50 (1959). *See also* 15 U.S.C. §§ 46(f), 50 (1970); 18 U.S.C. § 1905 (1970); 44 U.S.C. § 3508 (1970).

[206] *Cf.* 17 C.F.R. § 202.5 (1972) (SEC enforcement activities). This suggestion would require an abandonment of the Commission's Part II complaint procedure. An informal procedure advising respondent of the nature of the complaint, assuring the reasonable accuracy of the facts asserted therein, and allowing an opportunity for brief settlement negotiations would still seem advisable in many instances; it should not be accompanied by a Commission press release, however.

[207] Settlement negotiations might still be permitted after the complaint was filed, at the discretion of the administrative law judge, but they should not be automatically available as a delaying device. This recommendation would rewrite 16 C.F.R. § 2.34(d) (1973), which generally denies any opportunity for settlement after a complaint is issued.

[208] Consumer Product Safety Act §§ 5(a)(1), 6(b)(1), 15 U.S.C.A. §§ 2055(a)(1), 2056(b)(1) (Supp. 1973).

if requested, in the same manner (if feasible) in which the original publicity was disseminated.

D. External Controls

1. Judicial Review. — Courts have generally avoided reviewing adverse agency publicity. At first, they concluded that they could not even determine whether agency publicity was authorized.[209] But later, courts overcame this difficulty on the general theory that administrative agencies may not lawfully exercise power unless it is delegated to them. Thus, when agency press releases have been challenged, the first legal issue is invariably a determination of the agency's authority to issue them. If not authorized, adverse agency publicity may be enjoined upon a showing of injury not otherwise compensable at law.[210]

However, in the few legal tests to date, courts have generously construed statutory authority to issue press releases, even if their effect is admittedly punitive. As long as the publicity can be justified as being within the agency's express or implied authority to inform or warn the public, the press release is allowed.[211] Yet little attention has been focused on agency authority to use publicity wholly or in part as a sanction. The case authority is not dispositive even of basic questions. Either the arguments against agency authority have proven too much, or the cases have involved complex scientific questions which cloud the issue of authority.[212] The ratio decidendi of the decisions tend to be quite narrow, and the courts have rightly been hesitant to deny agencies necessary discretion. If the issue of an agency's use of publicity to add to its statutory enforcement powers were clearly

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[209] *See* Hearst Radio, Inc. v. FCC, 167 F.2d 225 (D.C. Cir. 1948); Kukatush Mining Corp. v. SEC, 198 F. Supp. 508 (D.D.C. 1961), *aff'd*, 309 F.2d 647 (D.C. Cir. 1962).

[210] *See, e.g.*, Bristol-Myers Co. v. FTC, 424 F.2d 935, 940 n.21 (D.C. Cir. 1970); B.C. Morton Int'l Corp. v. FDIC, 305 F.2d 692 (1st Cir. 1962); Silver King Mines, Inc. v. Cohen, 261 F. Supp. 666 (D. Utah 1966).

Without such review, administrative action which impairs private rights might result in an improper constitutional invasion or action beyond an agency's statutory authority.

[211] *See, e.g.*, FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968), *discussed at* note 30 *supra*. *See generally* Barr v. Matteo, 360 U.S. 564, 575 (1959). The cases are collected and capably discussed in Lemov, *Administrative Agency News Releases: Public Information Versus Private Injury*, 37 GEO. WASH. L. REV. 63 (1968); Note, *supra* note 157, at 1518–25. The only significant case law development in the intervening 5 years is the comment in *Bristol-Myers* "regret[ting the lower court's] broad dictum suggesting that an agency could never be enjoined from publicizing its activities." Bristol-Myers Co. v. FTC, 424 F.2d 935, 940 n.21 (D.C. Cir. 1970).

[212] *See, e.g.*, cases cited note 210 *supra*.

defined, however, a court could more readily review the question of its authorization.[213] Furthermore, little or no consideration has been given to whether agencies could accomplish their information and warning functions with less harmful alternatives,[214] particularly since the cases often deal with severe and imminent perils to public health.[215] Yet where the case for publicity is not compelling and the authority to use publicity coercively is doubtful, it would seem appropriate for a court to scrutinize the administrative authority closely.

Practical reasons also explain the judicial reluctance to review use of adverse publicity. Effective review is almost impossible when no record exists, standards are vague, and administrative claims of efficiency are difficult to evaluate. Nor are courts prone to oversee administrative action when they are powerless to prevent the injury or to remedy the harm. Injunctions seeking to prevent repetition of an adverse release may close the door, but only after the primary injury has accrued. The doctrines of

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[213] It could be argued that the Administrative Procedure Act requires that an agency have specific authority to issue publicity. Section 9(a) of the APA provides that "A sanction may not be imposed . . . except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b) (1970). To sustain this argument, publicity must be viewed as a "sanction." Several points support this position. First, adverse publicity has all the attributes of a sanction. Second, "sanction," as defined in § 2(f) of the APA, covers such diverse acts as the "imposition of [a] penalty" and the "destruction . . . of property." 5 U.S.C. § 551(10)(C)-(D) (1970). Even if it were argued that the issuance of an adverse press release is not itself the destruction of property or the direct imposition by the state of a penalty, the effect on the victim is indistinguishable from a direct penalty. This distinction between direct and indirect imposition of a penalty dissuaded one state court, however, from invalidating a statute conferring authority on a state agency to publish names of employees violating minimum wage requirements. Vissering Mercantile Co. v. Annunzio, 1 Ill. 2d 108, 121, 115 N.E.2d 306, 313 (1953). Third, the original uncodified — and governing — language of § 2(f) speaks of the "imposition *of any form* of penalty." 60 Stat. 238 (1946) (emphasis added). *See also* LEGISLATIVE HISTORY, ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 248, 79th Cong., 2d Sess. 274 (1946), *quoted at* note 221 *infra*.

However, establishing that an adverse press release is a sanction within the meaning of the APA does not mean that the release is therefore ultra vires. It must still be shown that the press release "sanction" was not "authorized by law" as required by § 9(a). It is on this issue — of explicit or implicit "authority" — that most decisions concentrate. *See, e.g.*, FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968). And none have suggested that the APA requirement that administrative actions be "authorized by law" imposes a standard of legislative authority. On the other hand, it does not appear that the "authority" argument has ever been asserted by relying upon the APA in this manner.

[214] *See* FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308, 1316–17 (D.C. Cir. 1968) (Robinson, J., concurring) (majority's rationale ignored the issue of alternatives).

[215] *See, e.g.*, p. 1413 *supra* (FDA Bon Vivant episode).

sovereign immunity and absolute privilege usually insulate agencies and their officers from liability.[216] And in any event, the mere bringing of a lawsuit may create the very injury the plaintiff seeks to avoid or have compensated.[217]

These arguments are not, however, dispositive. Judicial review, provided by statute, of adverse agency publicity need not be tied to final agency action.[218] That is, the standards for issuing adverse publicity, the procedures for assuring its accuracy, and the refusal to retract or explain ambiguous or erroneous publicity can be reviewed independently of any review of the agency's substantive action. Moreover, review of these procedural issues is thus not delayed until they are mooted. And the devices of a "John Doe" complaint, sealed pleadings, in camera hearings, etc., familiar in judicial proceedings for sensitive matters,[219] would avoid unnecessary injury to parties adversely affected.

2. Statutory Reform. — Three specific statutory reforms can be suggested: specific legislative authorization and direction for adverse agency publicity; express statutory authority for limited judicial review of agency publicity practices and procedures; and amendment of the Federal Tort Claims Act to allow compensatory relief for victims of unfair and harmful agency publicity.[220]

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[216] *See* p. 1437 & note 233 *infra*.

[217] This is not to say that judicial review is not desirable. One concern is that adverse publicity is chosen as the course of least resistance whereby an agency can avoid the rigors and costs of judicial inspection because it has no guidelines. *See* H.R. REP. NO. 585, 92d Cong., 1st Sess. (1971) (FDA recall procedure). *See also* pp. 1420–21 & note 161 *supra*.

[218] There is not at present a statute providing for direct judicial review of agency practices. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 164–65 (1965); Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 443–46 (1970). *See also* p. 1436 *infra*.

[219] *See, e.g.*, Doe v. Bolton, 410 U.S. 179, 184 & n.6 (1973) (abortion decision); Roe v. Wade, 410 U.S. 113, 120–21 nn.4, 5 (1973) (abortion decision); Annot., 62 A.L.R.2d 509 (1958). *See generally* Mellinkoff, *Who is "John Doe"?*, 12 U.C.L.A.L. REV. 79 (1964).

[220] Theoretically one might also urge Congress to exercise direct control over abusive adverse agency publicity. Such control standing alone would not be effective, however, since Congress' power over agency programs and appropriations is a crude legislative weapon unsuited for supervising specific agency practices. Expansive judicial interpretations of agency authority and the pressure of other legislative responsibilities have contributed to the decline of congressional direction for administrative agencies. *See generally* H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION AND STANDARDS (1962). And the usual technique of congressional oversight — the exposure of administrative misdeeds through public investigations and reports — seems inappropriate in this context and unlikely to be effective. If external controls are to be imposed, then, they must come primarily from the courts, with an assist from the legislature in opening additional avenues for judicial scrutiny and protection.

Each recommendation builds on experience in analogous fields where similar issues of administrative control were raised. However, no one proposal is dependent on adoption of another.

(*a*) *Authority for Adverse Agency Publicity.* — There is solid precedent for specific legislative authorization and direction of adverse agency publicity. In enacting the Freedom of Information Act, Congress announced a policy favoring full disclosure of government information.[221] And in creating the Consumer Product Safety Commission, the legislature specifically required the agency to "collect, investigate, analyze, and *disseminate* injury data, and information, relating to the causes and prevention of death, injury, and illness associated with consumer products." [222] But before publishing damaging data the Commission must, if it is practicable, notify the manufacturer of the damaging information, allow it a reasonable opportunity to supply the Commission with further information, and take reasonable steps to insure its information is accurate and its publicity fair.[223] Moreover, if the adverse disclosure is either inaccurate or misleading, the Commission must, "in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information." [224]

Legislative amendment of each agency's enabling act would probably be too cumbersome a method for providing this direction. Since the principles enunciated in the Consumer Product Safety Act seemingly apply to all agency publicity, the Administrative Procedure Act (APA) should be amended to (1) authorize agencies to disseminate adverse information when they determine that reasonable need for disclosure exists and after its accuracy is assured and (2) to require a retraction if the disclosure is ma-

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[221] 5 U.S.C. § 552 (1970). *See also* S. Doc. No. 248, 79th Cong., 2d Sess. 274 (1946) (legislative history of APA discussing § 9(a), which limits sanctions imposed by agencies):

> In short, agencies may not impose sanctions which have not been specifically or generally provided for them to impose. . . .
>
> One troublesome subject in this field is that of publicity, which may in no case be utilized directly or indirectly as a penalty or punishment save as so authorized. Legitimate publicity extends to the issuance of authorized documents, such as notices or decisions; but, apart from actual or final adjudication after all proceedings have been had, no publicity should reflect adversely upon any person, organization, product, or commodity of any kind in any manner otherwise than as required to carry on authorized agency functions and necessary in the administration thereof. It will be the duty of agencies not to permit informational releases to be utilized as penalties or to the injury of parties.

[222] Consumer Product Safety Act § 4(a)(1), 15 U.S.C.A. § 2054(a)(1) (Supp. 1973) (emphasis added). *See also* National Commission on Product Safety Act § 3(e), Pub. L. No. 90–146, 81 Stat. 466 (1966).

[223] Consumer Product Safety Act § 5(b)(1), 15 U.S.C.A. § 2055(b)(1) (Supp. 1973).

[224] *Id.*

terially erroneous, substantially misleading, or clearly excessive.

(*b*) *Statutory Authorization for Direct Judicial Review.* — Expansion of opportunities for judicial review of agency publicity by granting direct but limited statutory review of publicity practices and procedures is consistent with increasing judicial oversight of informal administrative action.[225] But it can be questioned whether there is a significant function for judicial review to perform — in contrast to the grant of injunctive relief or other extraordinary remedies already available under principles of nonstatutory review — which warrants its authorization. A brief analysis suggests an affirmative answer. First, injunctive and other relief is extremely limited. Most victims of adverse publicity cannot show the likelihood that they will be victimized again by similar agency publicity. As a consequence, adverse agency publicity generally is not enjoinable. Second, there are many situations where review would be desirable. EPA announcements [226] or EEOC releases [227] are examples of agency publicity which might be made more responsible by occasional judicial review. Third, review could easily be accomplished without interfering with the agency action which triggers the release. Judicial review of adverse publicity, independent of other administrative action, would perform its usual function in administrative law of assuring that agency procedures meet minimum standards and comply with the agency's own rules as well as legislative directions. For example, judicial examination of FDA recall procedures,[228] which have never been tested, is sorely needed. Such review need not interrupt any particular recall, although it might result in general changes of FDA processes.[229] At first, it might seem difficult to frame a judicial order directed only toward the publicity, especially where the injury has already occurred. But such orders could require an agency retraction or explanation of prior publicity or, like agency cease-and-desist orders,[230] direct an agency to modify its publicity procedures to meet named criteria. This suggested form of relief would supplement but not supplant injunctive or other relief already available.[231] The APA should

[225] *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), *noted in* 85 HARV. L. REV. 315 (1971).

[226] *See* pp. 1401–03 *supra*.

[227] *See* pp. 1398–401 *supra*.

[228] *See* pp. 1407–16 *supra*.

[229] The standard that should be applied on review is beyond the scope of this Article. Several possible standards appear to be available. The five criteria suggested for agencies, *see* pp. 1440–41 *infra*, might be applied by a review court. Or the courts could apply the standard of cost-benefit analysis used when injunctive relief is sought. *See* Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir. 1970).

[230] *Cf.* Silver King Mines, Inc. v. Cohen, 261 F. Supp. 666 (D. Utah 1966).

[231] *But see* Lemov, *supra* note 211, at 78 (Congress "should prohibit injunctions preventing the release of [warning] information").

be amended accordingly to permit this limited, direct judicial review of adverse agency publicity practices and procedures.

(*c*) *Expansion of the Federal Tort Claims Act.* — By adopting the Federal Tort Claims Act [232] (FTCA), Congress recognized that persons injured through government actions should, as a matter of policy, be entitled to the same protections and redress available to victims of private torts. The anomalous doctrine of sovereign immunity [233] was waived for "negligent or wrongful" acts.[234] Injury from adverse agency press releases was explicitly excluded from government liability since immunity was not waived for "[a]ny claim arising out of . . . libel, slander, misrepresentation, [or] deceit." [235] Congress apparently sought to move slowly in opening the doors to liability. It did not want to burden the courts with potentially fraudulent actions or to expose the public treasury to exaggerated claims, especially where the advantage might lie with the claimant.

The experience under the FTCA for over a quarter of a century now establishes that courts can discourage needless litigation and that they do limit awards to reasonable amounts.[236] Moreover, when adverse agency publicity causes severe damage likely to be costly, as it did to the entire cranberry industry, political pressures may result in legislative compensation.[237] Amendment of the FTCA to allow routine recovery for less powerful victims of administrative publicity thus seems desirable as a matter of simple equity and unlikely either to overburden the courts or to overwhelm the treasury.[238]

Of course, this does not mean that care should not be used in drafting the amendment. For example, because of constitutional limitations,[239] there is no counterpart in private tort law for this

[232] 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401–02, 2411–12, 2671–78, 2680 (1970).

[233] *See Recommendation No. 9: Statutory Reform of the Sovereign Immunity Doctrine*, 1 RECOMMENDATIONS & REP. OF THE AD. CONFERENCE OF THE U.S. 190 (1970); Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1484–93, 1508–13, 1523–31 (1962); Cramton, *supra* note 218; Davis, *Sovereign Immunity Must Go*, 22 AD. L. REV. 383 (1970).

[234] 28 U.S.C. § 1346 (1970).

[235] *Id.* § 2680(h).

[236] *See* 1 L. JAYSON, HANDLING FEDERAL TORT CLAIMS ch. 10 (1970).

[237] *See* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 332–33 (5th ed. 1970); 1 L. JAYSON, *supra* note 236, at § 21; W. Gellhorn & Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U. L. REV. 1325, 1328–42 (1954). *See also* p. 1409 & note 118 *supra*.

[238] The inadequacy of private legislative relief is well documented. *See generally* W. GELLHORN & C. BYSE, *supra* note 237, at 331–34; W. Gellhorn & Lauer, *Congressional Settlement of Tort Claims Against the United States*, 55 COLUM. L. REV. 1 (1955).

[239] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

action, at least if a showing of malice is not required. Amendment of the FTCA, as urged here, would hold the Government liable for damages in situations where a private individual would not be liable. This result is somewhat contrary to the original purpose of the Act,[240] but not inconsistent with its overall aim;[241] and the constitutional protection afforded private citizens against defamation actions by government officials does not seem applicable in reverse.[242] Moreover, the procedures which have been developed for FTCA actions[243] seem admirably suited to controlling private actions concerning abusive or excessive government publicity.

If the FTCA is to be amended, as recommended here, several issues need resolution. The primary reason for allowing monetary recovery is not vindication but compensation. This suggests that relief might be extended only to persons or groups that have suffered substantial injury from erroneous, misleading, or patently excessive publicity directed at them. Perhaps a showing of minimum injury, such as the requirement that at least $10,000 be in controversy to invoke federal diversity jurisdiction,[244] might be applied to prevent frivolous or petty suits, although no such limitation otherwise exists in the FTCA. Alternatively, if exorbitant judgments are a significant concern, a maximum recovery might be imposed on these actions. But neither limitation seems particularly desirable. The costs of litigation are likely to eliminate minor suits, and it seems anomalous at best to amend the Act to counter injustice yet limit the relief available in the most serious cases. Moreover, an appropriate limitation against insubstantial claims could be accomplished by placing substantive limits on the type of claim recognized; liability should be imposed only where adverse agency publicity indentifies the claimant and is

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[240] The FTCA limits the liability of the United States "to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674 (1970).

[241] *See, e.g.*, S. REP. NO. 1011, 79th Cong., 2d Sess. 25 (1946) (efficient use of congressional time); W. Gellhorn & Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722, 726–30 (1947) (adequate compensation for injured persons). *See also* Gottlieb, *The Federal Tort Claims Act — A Statutory Interpretation*, 35 GEO. L.J. 1 (1946).

[242] *Cf.* Kalven, *If This Be Asymmetry, Make the Most of It!*, THE CENTER MAGAZINE, May/June 1973, at 36.

[243] *See* 1 L. JAYSON, *supra* note 236, at chs. 15–17 (compromise and settlement; practice and procedure; administrative claims).

[244] 28 U.S.C. § 1332 (1970). The $10,000 requirement also purportedly applies to federal question cases, 28 U.S.C. § 1331 (1970), but particular statutes grant jurisdiction without regard to the amount in controversy in most areas that would otherwise fall under the general federal question statute.

materially erroneous, substantially misleading, or clearly excessive.

The usual rules applicable to tort claims under the FTCA seem appropriate for such suits, with perhaps a few modifications. The burden of establishing both liability and damages should rest with the claimant. However, unlike the general rule in libel suits, damages should not be presumed. Liability should be conditioned on the claimant's establishing that the adverse publicity was (a) directed at it, (b) materially erroneous, substantially misleading, or clearly excessive, and (c) not remedied by the final administrative action. Regarding the underlying agency action, it should be obvious that liability is not established — nor even a prima facie case made out — by the fact that the administrative decision ultimately favored the claimant. Dismissal or abandonment of administrative action frequently occurs for legitimate reasons, and that decision should not be influenced by the possibility of tort liability. On the other hand, a final administrative determination which effectively supports the adverse publicity should preclude any tort claim; amendment of the FTCA should not open an avenue for collateral attack on the administrative action. Moreover, agency investigatory, adjudicatory, or rulemaking proceedings should continue to be absolutely privileged; the amendment here relates only to adverse agency publicity calling attention to agency action.[245] Finally, the claimant should bear the burden of establishing that it was the adverse agency publicity which caused his injury, if the question arises.

The decision to permit access to agency records, as encouraged by the Freedom of Information Act, would not be affected by amendment of the FTCA to allow recovery for adverse publicity. Such claims would be limited to injuries inflicted by active publicity; the tort action would not review discretionary decisions to open government files. On the other hand, relief should not be so constricted that only written news releases or false charges would be the basis of recovery.[246] If the amendment were so limited the revision of the Act would permit only illusory relief.

This recommendation is consistent with persistent scholarly condemnation of the general FTCA exception denying recovery to victims of most deliberate torts.[247] If careless agency action is the basis for recovery, it is irrational that the same misguided

[245] Of course, the immunity should also extend to accurate and not excessive descriptions of such agency proceedings.

[246] *But see* Lemov, *supra* note 211, at 81.

[247] *See, e.g.*, W. Gellhorn & Lauer, *supra* note 237, at 1341: "No persuasive reason has ever been advanced for their having been excluded from the reach of the Tort Claims Act." *See also* 3 K. Davis, Administrative Law Tteatise § 25.08 (1958, Supp. 1970); L. Jaffe, *supra* note 218, at 256.

action is not the basis for relief merely because it was deliberate. The clumsiness and injustice of the current system seems patent. As the 1959 cranberry episode indicates, it is not unusual for victims of government error to seek and obtain relief by "private legislation." And where the appropriate level of compensation is unclear, Congress frequently waives sovereign immunity and assigns that determination to an agency or the Court of Claims, which in effect relies upon FTCA principles in granting relief.[248] This double-layered procedure is time-consuming and costly, and unfair to those without political influence. For example, in a seemingly simple case where the FDA had admittedly made a costly error in asserting that a spinach grower's crop was contaminated by a nonexistent pesticide, it took plaintiffs almost seven years and over $20,000 in legal fees and expenses to present their claim to Congress and the courts.[249] An amendment of the FTCA might measurably reduce the current cost of compensating victims of agency mistakes, as well as promote justice. No better support can be secured for any recommendation.

III. Conclusion

In studying the adverse publicity of administrative agencies, one is constantly reminded that little attention has focused on its use and almost no effective controls have been developed to stop its abuse. Not only have agencies failed to structure and confine their uses of publicity, but they also have not even considered when adverse publicity is appropriate or desirable. Consequently, the first contribution of this Article is to articulate the criteria by which agency use of adverse publicity should be measured. An agency should issue publicity which may have a significant adverse impact on a private party only when:

(1) the agency is authorized explicitly by statute or implicitly by the regulatory scheme to make public announcements;

(2) the publicity is necessary to serve a legitimate agency function such as warning or informing the public;

(3) there is no less harmful alternative that would be effective;

(4) the information or statements made in the publicity release are likely to be accurate and correctly understood; and

(5) the benefit from the publicity to the regulatory

[248] *See, e.g.*, Mizokami v. United States, 414 F.2d 1375 (Ct. Cl. 1969).

[249] *Id.* The claimants finally recovered these costs as well as their damages of about $280,000. *Id.* at 1383.

> program and the public is substantial or at least worth the risk of harm likely to result.

This standard specifically does not adopt the frequent suggestion that the regulatory benefit merely outweigh the harm[250] on a cost-benefit analysis. This is not to suggest that public health and safety cannot be stated in quantitative terms. It is to suggest, however, that the regularity and fairness of agency actions have a value independent of the costs and benefits visible in a particular decision.

This Article has not attempted to address the question of whether the distribution of information and warnings should be left entirely to the private sector,[251] or the extent to which media practices would result in the same injuries even if agency publicity policies were reformed. Instead, because adverse publicity may serve a legitimate function and its use will in any event continue and probably increase, the major focus has been on its control, both internal and external. The most significant possibilities for reform are within the agencies themselves; further extension of judicial review and control is primarily justified by its corrective impact on agency practices.

Adverse agency publicity is a powerful and often unruly nonlegal sanction. When misused it can destroy reputations and businesses, impair administrative performance, and abuse public confidence. When carefully controlled it can be the touchstone of accurate, efficient, and fair administrative regulation. The controls recommended in this Article seek to channel agency publicity toward these goals.

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[250] *See, e.g.*, FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308, 1316 (D.C. Cir. 1968).

[251] *See* note 157 *supra*.