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Esther Peterson to Senator James O. Eastland, 11 July 1977

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July 11, 1977

Dear Senator Eastland:

Attorney General Griffin Bell recently addressed himself to the legal effects of the consumer agency bill. In doing so, he rejected claims that the legislation raises constitutional questions of separation of powers or unlawful delegation of authority.

Specifically, Attorney General Bell concludes that the consumer agency would not wield unprecedented power to seek judicial review nor would it be outside the bounds of adequate checks and balances.

Because I believe that his comments will be useful to you in analyzing this important consumer bill, a copy is enclosed.

Once again, if you have any questions about the bill, please do not hesitate to call me at 456-6590.

Sincerely,

Esther Peterson
Special Assistant to the President for Consumer Affairs

The Honorable James O. Eastland
United States Senate
Washington, D.C. 20510

Enclosure
This letter is in response to your request for the views of the Department of Justice on S. 1262, the Consumer Protection Act of 1977. The bill would establish in the executive branch an independent Agency for Consumer Advocacy to be headed by an Administrator appointed by the President with the advice and consent of the Senate. The central thrust of the bill is to authorize the Administrator to intervene or participate in ongoing federal agency proceedings or activities that may "substantially affect" an interest of consumers and -- to the extent that any person would by law have the right -- to initiate or intervene in a federal court action involving the review of agency action that, again, may affect an interest of consumers. At issue is whether reposing this authority in an executive branch agency creates constitutional problems and whether an agency with this authority would disrupt or adversely affect the functions of other governmental agencies or departments.

First, it is argued that the provision allowing the agency to sue other federal agencies somehow violates the constitutional requirement of a "case or controversy" before the jurisdiction of a federal court can be invoked. However, the fact that a dispute
involves two components of the executive branch is not enough in and of itself to preclude a federal court from exercising juris-
diction. See United States v. Nixon, 418 U.S. 683, 693 (1974); Chapman v. Federal Power Commission, 345 U.S. 153, 156 (1953). Because the Administrator is to represent the interests of consumers there will be, in our opinion, sufficient adversari-
ness to satisfy the requirements of Article III under the holdings in Nixon and Chapman; put a little differently, in exercising his authority under the Act the Administrator would not be engaged in an "intra-branch" dispute.

The second constitutionally related question is raised by charges that the new Agency would not be subject to the normal checks that govern executive branch operations. The Administrator is appointed by the President with the advice and consent of the Senate. The Agency's authority will be grounded in an Act passed by Congress and will have been subjected to standards and restrictions expressly approved by the legislative branch. This process follows the constitutionally acceptable manner of creating, selecting and controlling executive branch agencies and the heads thereof. Mention must also be made, of course, of the continuing congressional involvement in the agency's affairs through the appropriation process.

To put the powers and responsibilities of the proposed agency in perspective one has only to refer to what the Agency could and could not do under the Act. Most importantly, it would have no regulatory power. No new rules, regulations or standards of conduct will be promulgated by the Agency. Its role in the administrative and judicial process is generally limited to participating -- in the same manner, to the same extent and under the same rules as apply to a private party -- in the rulemaking and adjudicatory actions of other agencies and the review of those actions by the courts. The Agency could not issue cease and desist or other adjudicatory orders. Its power to affect the decision making or regulatory process of other federal agencies is thus limited to an advocacy role on behalf of consumers. Contrast this role to the vast regulatory powers of other executive branch departments and agencies and it is apparent that S. 1262 does not raise constitutional problems of separation of powers or the unlawful delegation of authority.
Next, as the foregoing discussion illustrates, the proposed Agency would not unduly disrupt or adversely affect other government departments or agencies. It is nothing new for one agency to formally intervene in the proceedings of another. For example, the Antitrust Division of the Department of Justice regularly intervenes in other agency proceedings in furtherance of its congressional mandate to promote competition. Suffice to say that the creation of an agency to assert the consumer perspective in agency or court proceedings is not extraordinary or out of line with governmental initiatives on behalf of other constituencies such as labor, businessmen or farmers.

It also seems appropriate to respond to the questions that have been raised concerning how the consumer interest will be determined. The bill defines "consumer" as a user (for personal, family or household purposes) of goods or services. This is a common sense definition that establishes a sufficient standard, in my opinion, to indicate the nature of the proceedings with which the Agency will be concerned as well as the positions it will advocate. That the Agency may on occasion be faced with arguably conflicting "consumer interests" and be forced to make what may be difficult choices or refrain from participating at all is not a troublesome prospect. Other executive branch agencies must make similar decisions and determinations on an almost daily basis.

I appreciate the opportunity to present this Department's views in support of S. 1262.

Sincerely yours,

Griffin B. Bell
Attorney General