To the Graduate Council:

I am submitting herewith a dissertation written by Charles L. Mitchell entitled "Federal Trade Commission Policy Making and Congress, 1970-1983." I have examined the final copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Political Science.

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We have read this dissertation
and recommend its acceptance:

Accepted for the Council:

The Graduate School

FEDERAL TRADE COMMISSION POLICY MAKING AND CONGRESS, 1970-1983

A Dissertation

Presented for the

Doctor of Philosophy

Degree

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Charles L. Mitchell

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To Justine G. Mitchell, my mother,

whose concern made completing

this possible.

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ABSTRACT

The Federal Trade Commission's interactions with Congress in policy making are studied in this dissertation. The extent of Congress' influence in FTC policy from 1970 to 1983 is analyzed. Antitrust and consumer policy is discussed utilizing three distinct policy phases found during the years of the study. The many attempts Congress made to affect FTC policy are reviewed. Conclusions are then presented showing the extent of congressional influence in FTC policy making.

Congress' oversight of the FTC is found to be thorough. During the years of the study, congressmen were concerned with almost all aspects of commission antitrust and consumer policy. The amount of congressional activity directed toward the FTC varied between 1970 and 1983. Reports hostile to the commission produced substantial reaction in Congress in the early 1970s. The energy crisis prompted several committees to become actively interested in the FTC. Two major conflicts over appropriations and authorization occurred which increased Congress' interest in the commission.

This study concludes that Congress substantially influenced the FTC between 1970 and 1983. In all instances, Congress did not, however, easily prevail against the commission. Sometimes years of effort were required before Congress could change an FTC policy.

Variations in congressional influence in the FTC are observed between 1970 and 1983. During the first years of the study, Congress was supportive of an activist FTC. The election of 1976 produced a

Congress that was less supportive of the commission's regulatory activities.

Authorizations and appropriations committees proved most effective at influencing policy making. A legislative veto was utilized once to prevent an FTC rule from taking effect. Confirmation hearings allowed senators to virtually instruct nominees. Oversight hearings provided congressmen an opportunity to transmit their policy views to the commission.

While this study is focused on the ways in which Congress and the FTC interact in policy making, other sources of influence on agency decisions are discussed. The Presidents' significant contributions to FTC policy are mentioned. Interest groups are found to substantially influence commission policy making.

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CHAPTER I

INTRODUCTION

The analysis presented here is directed at determining the extent and character of congressional influence in Federal Trade Commission (FTC) policy making. The problem is an interesting and important one to explore for several reasons. One is that Congress now appears to be more involved in administrative policy making than in recent decades. Administrative decisions once distant from Congress now are subject to routine oversight. Oversight has become more systematic as new, powerful subcommittees have significantly increased Congress' efforts to control policy.[1]

In recent years, there has been a significant institutional change. As power has been dispersed from committees to subcommittees, more congressmen have had access to policy making arenas. Subcommittees are now the centers for controls over agencies.[2] An associated development is that congressional surveillance of agencies also is now more likely to be multicommittee surveillance than in the past. Some analysts have maintained that an effect of the increased importance of subcomittee government and the advent of the multicommittee surveillance has been to weaken congressional bargaining power with the agencies.

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[1] Lawrence D. Dodd and Richard L. Schott, Congress and the Administrative State (New York: John Wiley, 1979), 212-214.

[2] Dodd and Schott, pp. 175-179.

The more subcommittees an agency is involved with, the less able any one subcommittee is to dominate an agency.[3]

Congressional influence upon FTC policy is important simply because the FTC is, "one of the most important" of all the regulatory agencies, according to Muris and Clarkson. The FTC's importance stems from its ability to "impose wide-reaching rules with the force of law."[4] Peter White, of the National Chamber of Commerce, has described the FTC as "the second most powerful legislative body in the U.S."[5] Consequently, the policies surrounding its work are complex, intense, and significant. Politicians interested in reducing the level of inflation champion the agency. Consumer groups fearful of big business also turn their attention to the FTC. Populists who dislike corporate power, businessmen who are threatened by anti-competitive practices, attorneys who must depend on antitrust business, and economists who question the welfare costs of monopoly, among others, become involved in FTC affairs.[6]

The considerable disagreement among political scientists about the degree to which Congress influences the FTC makes the subject of this dissertation even more interesting. There are political

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[3]Dodd and Schott, pp. 175-179.

[4]Kenneth W. Clarkson and Timothy J. Muris, The Federal Trade Commission since 1970: Economic Regulation and Bureacratic Behavior (Cambridge: Cambridge University Press, 1981), p. 1.

[5]Jean Carper, "The Backlash at the FTC," Washington Post, 6 Feb. 1970, Sec. C, p. 1.

[6]Robert Katzman, Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy (Cambridge: The MIT Press, 1980), p. 1.

scientists who have suggested that Congress virtually controls the FTC. Other political scientists write that the FTC is considerably independent of the Congress. This question is examined anew in this dissertation.

The Federal Trade Commission Act of 1914 established the FTC "composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate." No more than three of the commissioners may be of the same political party. Commissioners serve for staggered seven year terms. The President was to choose the chairman. A vacancy on the commission does not "impair the right of the remaining commissioners to exercise all the powers of the commission."[7]

Monopolies and unfair or deceptive trade practices restraining free enterprise were outlawed by the FTC Act.[8] The act established the legal authority for the agency to restrict a wide range of such practices.[9] According to Pendleton Herring, the FTC Act resulted from a belief at the time that "the right policy meant the protection of the little business man against the trusts."[10] During the agency's

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[7]38 Stat. 717, 15 U.S.C. 41-51.

[8]Mark V. Nadel, The Politics of Consumer Protection (Indianapolis: Bobbs Merrill, 1971), p. 26.

[9]Martin C. Schnitzer, Contemporary Government and Business Relations (Chicago: Rand McNally, 1978), pp. 144-145.

[10]E. Pendleton Herring, "Politics, Personalities and the Federal Trade Commission II," American Political Science Review, 28 (1934), p. 33.

early years, the FTC was "full of regulatory fervor." The original commissioners shared "the progressives' skepticism toward big business."[11]

Adjudicatory cases are resolved and trade regulation rules are promulgated by the commission. The commission staff investigates various problems subject to possible FTC action and initiates work on cases and rules. The commission must approve complaints and rulemakings.

Cases that are adjudicated begin with a formal FTC complaint being issued. A complaint can be resolved by either a consent settlement or a decision can be used to resolve the case. When a consent settlement is reached, the FTC and the party against whom the case is being brought agree to a certain course of action to resolve the case. Consent settlements usually involve some admission of guilt by the party against whom the complaint was issued. When no consent settlement can be reached, an administrative law judge may issue a decision resolving the case.

The full FTC has the option of reviewing or not reviewing decisions made by the administrative law judge. When the FTC does decide to review a case, members of the commission may well write concurring and dissenting opinions to accompany the official decision in the case. At various times, especially in important cases, members of the FTC may write opinions about decisions to issue complaints, discontinue a case, or about various issues that arise while a case is being reviewed.

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[11]Nadel, p. 26.

The FTC Act did not mean Congress, itself, gave up the prerogative of writing detailed trade regulatory provisions. Nineteen fourteen saw Congress pass the Clayton Act, "an act to protect trade and commerce against unlawful restraints and monopolies."[12] This act attempted to refine antitrust law by legislating regulations for the FTC. Price discrimination intended to lessen competition or create a monopoly was among those practices prohibited by the Clayton Act, and the FTC was assigned some of the responsibility for interpreting and enforcing the act.[13]

More legislation adopted in subsequent years broadened FTC powers. In 1936, Congress approved the Robinson-Patman Act.[14] The act amended the Clayton Act to make illegal any sale that knowingly discriminated against competitors of the purchaser by providing "any discount, rebate, allowance, or advertising service charge."[15] As a result of the new act, the FTC became concerned with the price-cutting practices of large firms that hurt small firms.[16]

The FTC's jurisdiction was expanded to include consumer protection in 1938 when Congress passed the Wheeler-Lea Act making it illegal "to disseminate or cause to be disseminated any false advertisement."[17]

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[12] 38 Stat. 730, 15 U.S.C. 12-27.

[13] A. Lee Fritschler, Smoking and Politics, Policymaking and the Federal Bureaucracy (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1975), p. 63.

[14] 49 Stat. 1526, 15 U.S.C. 13.

[15] 15 U.S.C. 13a.

[16] Schnitzer, pp. 89-90.

[17] 52 Stat. 111, 15 U.S.C. 41, 44, 45, 52-58.

This legislation prohibited "unfair or deceptive acts or practices in commerce." The Wheeler-Lea Act specifically directed the FTC to be concerned with false advertising of food, drugs, devices, and cosmetics. After the Wheeler-Lea Act was passed, most of the agency's efforts became directed at eliminating deceptive advertising. According to Fritschler, following enactment of the Wheeler-Lea Act, "antitrust activity subsided precipitously."[18]

The Cellar-Kefauver Act was passed in 1950 prohibited acquisition of "stock or other shares of capital" so as to substantially "lessen competition or to tend to create a monopoly."[19] This act closed several loopholes in the Clayton Act. This legislation prohibited one company acquiring stocks and assets in another company when lessened competition resulted. An American firm was similarly restricted from buying stock in a foreign company.

As a result of the Hart-Scott-Rodino Antitrust Improvement Act of 1976, Premerger notification requirements were established. Firms with assets exceeding $100 million were required to file certain required documents "with the FTC and the Assistant Attorney General at least 30 days prior to consumation of the proposed transaction."[20]

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[18]Fritschler, p. 68.

[19]64 State. 1125, 51 U.S.C. 18, 21.

[20]90 Stat. 1383, 15 U.S.C. 18a.

This legislation allowed the agency to obtain a preliminary injunction to prevent mergers where divestiture might later be required.[21]

In the late 1960s, criticism of the FTC became substantial. Increasing interest in consumer policy produced more public scrutiny of the FTC. The new public interest in the commission followed a belief that the agency was not performing adequately. In 1969, the Nader report and an American Bar Association report were published, both of which were highly critical of the FTC. Referring to the late 1960s, Sen. Metzenbaum in 1979 said, "the FTC was known as a moribund agency whose employees did little more than collect their paychecks."[22] Timothy Muris, Director of the Bureau of Consumer Protection in the early 1980s described the FTC in 1969 as "widely condemned" for "focusing largely on trivia."[23] Morale within the agency was low, most of the commissioners were aware of the agency's deficiencies, and many were anxious to remedy the agency's problems.

This dissertation studies policy making in the FTC in the years following the crisis in public confidence the agency experienced in the late 1960s.[24] Since 1969, important changes have occurred within

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[21]Marshall C. Howard, Antitrust and Trade Regulation, Selected Issues and Case Studies (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1983), p. 109.

[22]Howard M. Metzenbaum, "Consumerism and Congress," Vital Speeches, 46, No. 4 (1 December 1979), p. 116.

[23]Timothy J. Muris, "The Consumer Protection Mission: Guiding Principles and Future Directions," Antitrust Law Journal, 51 (1982), p. 632.

[24]Nadel, pp. 60-63.

the FTC making a study such as this timely. The FTC budget has increased significantly in the last several years. In 1970, the FTC budget was approximately $21 million, while by the end of 1979 the budget increased to nearly $70 million. The authority of the FTC also increased substantially as a result of 16 statutes enacted by Congress between 1970 and 1979.[25]

One of the most important of these was the Magnuson-Moss Act of 1975.[26] Adjudication and rule making have been practiced by the FTC almost since the agency was created in 1914. Adjudicatory proceedings are quasi-judicial in nature while rulemaking is quasi-legislative. The agency's power to make rules had, however, never been confirmed, and specified procedures for rulemaking had not been elaborated by statute. The Magnuson-Moss Act confirmed the FTC's ability to engage in rulemaking and established certain specific procedures the agency must follow in adopting rules. Following the passage of the Magnuson-Moss Act, rulemaking became a more important method of FTC policy making.[27]

Having discussed the importance of examining the extent and character of congressional influence in FTC policy making, this introduction reviews relevant political science literature. The dissertation's research questions are then outlined. Finally, this chapter presents

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[25] Clarkson and Muris, pp. 5-6.

[26] 88 Stat. 2183, 15 U.S.C. 2301.

[27] 1975 FTC Annual Report (Washington, D.C.: GPO, 1976), pp. 19-21.

how the dissertation proposes to answer these research questions. The plan of the study is, thus, introduced in Chapter I.

Congressional Influence in Agency Policy Making

"Influence," as used in this analysis, refers to congressional success in shaping FTC policy. Congress influences agency decisions in several ways, including authorizations, appropriations, confirmations, legislative vetoes, special studies, investigations, and various other miscellaneous forms of oversight. The term "oversight" as used in this discussion refers to all these various methods Congress uses to supervise agencies.

Throughout this dissertation the policy making process is discussed, therefore, before proceeding, some definition of "policy" and "policy making" is useful. James Anderson defines policy as "a purposive course of action followed by an actor or set of actors dealing with a problem or matter of concern."[28] Another definition of policy furnished by Emmette S. Redford is that it is "the substance of what happens in the universe of social action or in larger encompassing universes."[29]

As a subject, policy making has been considered from several theoretical perspectives. Some political scientists have utilized systems theory in understanding policy making. Systems theory considers policy to be the result of demands placed upon the political system

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[28]James E. Anderson, Public Policy-Making (New York: Holt, Rinehart and Winston, 1979), pp. 2-4.

[29]Emmette S. Redford, "Perspectives for the Study of Government Regulation," Midwest Journal of Political Science, 6, No. 1 (Feb. 1982), 14.

from the environment. As David Easton explained system theory, the political system reacts to inputs in the form of demands and supports producing authoritative decisions or outputs. Systems outputs or public policies may feed back into the political system by affecting the political environment and generating new demands and supports.[30]

Other political scientists theorize that policy making occurs as a result of conflict between groups, defined as collections of individuals with shared attitudes. Public policy, to the group theorist, is a reflection of the interests of the groups controlling the arena of decision. Policy changes occur as the groups dominating policy act.[31] For some, the theory that agency policy results from "interest groups struggling among themselves to maximize the incomes of their members" is called "capture theory."[32] Capture theory simply suggests that policy decisions are controlled by various interest groups.

The economic theory of public policy is in some ways a refinement of capture theory. Public policy to both group theorists and economic theorists, according to Posner, serves the private interests of "politically effective groups." Economic theory differs from group theory, however, in that economic theorists are generally committed to "the strong assumptions of economic theory." Notably, economic theorists

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[30]Anderson, p. 17.

[31]Anderson, pp. 17-19.

[32]Richard A. Posner, "Theories of Economic Regulation," The Bell Journal of Economics and Management Science, 8, No. 2 (Autumn 1974), 335-336.

believe that people rationally advance their own self-interests. Posner indicates that economic theorists insist on accounting for agency policy in terms of the forces of supply and demand and the like. Interest group theory and economic theory are similar in that the dominant group gets its way. Economic theory, however, utilizes economic reasoning to explain self-interested decisions.[33]

Elite theory is another perspective on the policy making process. Public policies, to elite theorists, are nearly the same as the values and preferences of the governing elite. Such theory emphasizes political leadership's role in policy formulation.[34]

Functional process theory focuses on the functional activities that occur in the policy process. Lasswell has suggested that seven functional categories be studied in understanding the policy process: intelligence, recommendation, prescription, invocation, application, appraisal, and termination.[35] An advantage of functional process theory is that this method of theorizing about policy making facilitates comparative studies of the policy process.[36]

Institutionalism is still another perspective for studying policy making. Legislatures, courts, executives, and political parties are the important concerns of the institutionalist. Formal structural

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[33]Posner, pp. 343-344.

[34]Anderson, pp. 19-20.

[35]Harold D. Lasswell, The Decision Process (College Park, Md.: Bureau of Governmental Research, University of Maryland, 1956).

[36]Anderson, pp. 20-21.

arrangements are usually emphasized. More recently, political scientists have been interested in the political processes within political institutions. The effect of legislative rules and structural arrangements on policy outcomes exemplifies the concerns of these theorists.[37]

These various theories of policy making indicate that there are many possible influences on agency decisions. Kenneth J. Meier discusses these influences. For Meier, regulatory decision making takes place in a "political environment." This environment is populated by Congress, the President, the courts, and nonindustry interest groups. Various factors impinge upon policy making, the most important of which are economic, and technological in character. Regulatory policy is a product of the interaction of these factors.[38] Edwin Krasnow and Lawrence Longley, in their study of the Federal Communications Commission, identified six important determiners of regulatory policy: the Federal Communications Commission, the broadcast industry, citizen groups, the courts, the White House, and Congress.[39]

The principle focus of this study is on Congress as an influence in FTC policy making. This study is thus institutionalist. Several other influences on policy making are discussed throughout this analysis. Congress is, of course, only one of several possible influences. This

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[37]Anderson, pp. 21-22.

[38]Kenneth J. Meier, unpublished manuscrupt (New York: St. Martin's Press, forthcoming), p. 2-41--2.

[39]Edwin G. Krasnow and Lawrence D. Longley, The Politics of Broadcast Regulation (New York: St. Martin's Press, 1978), p. 27.

study does not attempt to completely explain FTC policy making by looking at interactions between Congress and the FTC. Instead, the extent of one single influence on agency policy making is analyzed.

Congress and Agency Policy Making

The general literature on Congress and administrative agencies emphasizes that Congress does have a role in agency decisions. The extent of congressional influence over agency policy is, however, disputed by various political scientists. The factors that lead to Congress' involvement have been the subject of several studies.

Joseph P. Harris stated in Congressional Control of Administration that one of the most important functions of the modern legislature is control and oversight of administration. The legislative needs to ensure that policies are faithfully and efficiently carried out. Congressional influence, according to Harris, generally results in regulatory policy consistent with the intent of Congress.[40]

Emmette S. Redford agrees with Harris that administrative policy is shaped in many ways by Congress. Administration in the American polity, to Redford, "Is not a function solely of the executive branch, it is a continuing function of both the legislative and executive branches." The influence of both are important in deciding administrative policy.[41]

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[40] Joseph P. Harris, Congressional Control of Administration (Washington, D.C.: 1964), p. 295.

[41] Emmette S. Redford, Democracy in the Administrative State (New York: Oxford University Press, 1969), pp. 80-82.

Ripley and Franklin agree with Redford that Congress has much influence over regulatory decision making. Ripley and Franklin suggest that congressmen function in an "agenda-setting role in many regulatory agencies." This is an important source of congressional influence. Congress also has the ability to apply sanctions, including withholding funds, delaying authorizations, and not granting desired bills, causes agencies to pay attention to individual congressmen's wishes."[42]

Various other authors attempt to explain the extent of congressional involvement in agency decisions. Jewell and Patterson describe interest in agency decisions as a product of the role orientations of legislators. Legislators invariably respond to agencies either as agency defenders or as agency detractors. This response pattern determines whether the legislator uses his influence for or against an agency and whether he assumes responsibility for oversight activities.[43] The legislator who sees himself as an overseer can, of course, be either an opponent or defender of an agency.

Some political scientists, however, indicate that congressional involvement in agency policy making is limited. Dodd and Schott suggest that interest groups effectively protect independent agency policy, and the Congress is reluctant to intervene in agency policy making because of its relations with interest groups. It must now

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[42]Randall B. Ripley and Grace A. Franklin, Congress, The Bureaucracy, and Public Policy (Homewood, Ill.: The Dorsey Press, 1980), p. 131.

[43]Malcom E. Jewell and Samuel G. Patterson, The Legislative Process in the United States (New York: Random House, 1977), p. 448.

often rely on major corporations or interest groups as the only "reliable and direct source of information needed for policy formulation and surveillance." Congressional dependence on interest groups causes "a reluctance for members of Congress to undertake serious oversight."[44]

These various restrictions on congressional power result in what Dodd and Schott describe as inadequate congressional control. While Congress has decentralized since World War II; congressional ability to direct the agencies' policy decisions has not improved. As subsystem politics have become more important, there has actually been an aggregate decline in the amount of congressional influence they argue.[45]

This is not to say the Congress is not conducting more oversight hearings. Dodd and Schott consider Congress to be more active in oversight now. Increased activity has not, however, entailed a corresponding increase in direction and control by Congress. Paradoxically, the effect of increased congressional oversight is to reduce the bargaining power of Congress. More oversight causes an agency to bargain with several congressional committees, increasing the bargaining advantage of the agency.[46] As the number of committees concerned with a single agency proliferates, the politically adroit agency head is able "to play committees off against one another, seeking support and protection from the sympathetic committee."[47] The effect

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[44]Dodd and Schott, pp. 182-183.

[45]Dodd and Schott, pp. 184-185.

[46]Dodd and Schott, p. 271.

[47]Dodd and Schott, p. 82.

of oversight reforms has been to increase confusion and to effectively maintain the bureaucratic status quo by strengthening the maintenance and autonomy of agencies.[48]

Fritschler, like Dodd and Schott, finds Congress' potential for controlling the agencies to be limited. Fritschler believes agencies are strengthened in their relations with Congress by the complex problems of modern society. Congress must spend a substantial amount of time deciding what programs to oversee, and agencies are so productive that Congress cannot possibly oversee all their policy decisions.[49]

When Congress wants to, however, oversight activity can be used to greatly influence an agency. Fritschler explains that overseeing committees are able to "wreak havoc" upon agency programs when they choose. As a result of this potential influence, administration is "overcautious" in responding to the "wishes of a few members of Congress." While oversight usually does not carry much influence, oversight can be "devastating" to the agency that "out of bravery or ignorance defies the wishes of its small, but powerful and important congressional constituency."[50]

Ogul agrees with Fritschler that Congress does not have the ability to oversee policy in a "comprehensive and systematic manner." To Ogul, "no amount of congressional dedication and energy, no

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[48]Dodd and Schott, p. 247.

[49]Fritschler, pp. 116-117.

[50]Fritschler, pp. 117-118.

conceivable increase in the size of committee staffs, and no boost in committee budgets" would make comprehensive oversight possible. Furthermore, possibilities for oversight is limited because members have only a limited interest in performing oversight activities.[51]

Woll reaches the same conclusions as Dodd and Schott, Fritschler, and Ogul. Independent regulatory agencies, Woll claims, are "largely immune from outside pressures to reform them." Regulatory decisions remain independent because interest groups balance outside political pressures. The agencies receive "powerful support . from industry groups they regulate, as well as from labor unions." The fact that agencies draw such support from those regulated is indicative of what Woll describes as "the constant marshalling of political support" that occurs because of the political nature of American bureaucracy.[52]

Other works suggest a modest role for Congress in influencing agency policy and, instead, emphasize the importance of the Presidency. Analyzing FTC complaints issued by several presidential administrations, Moe concludes that commission performance varies "systematically across administrations." The variations that Moe observes is "consistent with gradual, partisan-directed presidential impact." These findings are explained as the result of the "various mechanisms of presidential

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[51]Morris S. Ogul, "Congressional Oversight: Structures and Incentives," in Congress Reconsidered, ed. Lawrence Dodd and Bruce Oppenheimer (Washington, D.C.: Congressional Quarterly, 1977), pp. 318-319.

[52]Peter Woll, American Bureaucracy (New York: W.W. Norton and Company, Inc., 1977), pp. 8-10.

influence" affecting regulatory decision making. Agency personnel to some extent, take on roles as "presidential actors" making policy with reference to presidential preferences without any explicit or conscious direction from the White House.[53]

The influence of the President is more direct, according to Welborn. Through appointments, Presidents were able to create majorities on regulatory commissions that favor their policies. The independent regulatory commissions are not independent from presidential influence, Welborn continues. Instead, Presidents "compelled by forces inherent in their position" have tried to exert influence over the formulation and implementation of regulatory policy.[54]

Several scholars have examined the factors causing congressmen to get involved in agency policy making. According to Ogul, when motivation is sufficient, Congress gets involved directly with agency policy. Those issues congressmen perceive as highly relevant to their political survival are the best motivations.[55] Ogul suggests congressmen involve themselves in oversight proceedings because of committee politics. Oversight decisions can affect committee structure and how congressional resources are allocated. Ogul indicates that the

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[53]Terry M. Moe, "Regulatory Performance and Presidential Administration," American Journal of Political Science, 26, No. 2 (May 1982), 221-224.

[54]David M. Welborn, "Presidents, Regulatory Commissioners and Regulatory Policy," Journal of Public Law, 15, No. 1 (1966), 28-29.

[55]Ogul, Congress Oversees the Bureaucracy (Pittsburgh: University of Pittsburgh Press, 1976), p. 181-183.

exact reasons for a congressman's oversight activity may be difficult to determine, although political reasons are important in individual cases.[56]

Constituent interests can also be used to explain why congressmen become involved in regulatory policy making. Few congressmen plan for their own reelection without processing constituents' cases effectively. Constituent service happens to sometimes "translate into legislative oversight."[57]

Ogul's analysis of the House Post Office Committee suggests interest groups are another important impetus to committee oversight activity. Such groups provide committees with information and alternatives. Committees spend much of their time hearing group complaints and exhibit a basically sympathetic attitude toward groups. Ogul concluded that interest groups "really did shape much of what the committee did and especially what the committee did not do."[58]

Scher conducted a study that attempted to identify factors influencing committee oversight of an agency. He reviewed hearings and reports from the two House committees and the one Senate committee that oversaw the seven regulatory commissions from 1983 to 1961. His study agreed with Ogul that interest groups are important in motivating oversight. Scher's findings placed more emphasis, however, on strategic political reasons as motivations for oversight.

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[56]Morris S. Ogul, "Congressional Oversight: Structures and Incentives," pp. 329-330.

[57]Ogul, Congress Oversees the Bureaucracy, p. 198.

[58]Ogul, Congress Oversees the Bureaucracy, pp. 84-85.

Scher formulated several propositions explaining when oversight was likely to occur. Congress is inclined to become involved in agency policy making when: 1) the leadership of the majority party in Congress believes it can cause sufficient embarrassment to an opposition president; 2) congressmen perceive a threat, particularly from the President to the regulatory agencies; 3) committee leadership or powerful committee members believe that constituent or group interests important to them cannot be satisfied by routine personal intercessions; 4) interests build in Congress for revising regulatory policy; and 5) committee leadership becomes convinced that oversight is strategically required to neutralize or minimize gains made by others initiating their own inquiries.

The decision to conduct oversight hearings by a congressman, according to Scher's research, is "understood by the congressman as one involving costs and gains." Congressmen rarely involve themselves in oversight unless they perceive they can gain. The political environment can be used to explain a congressman's "frequent preference for leaving the agencies alone as well as his periodic willingness to examine them closely."[59]

Aberbach, like Ogul and Scher, emphasizes the importance of interest groups and bureaucrats in mobilizing oversight. He writes that a congressman conducts oversight activities to please groups that favor him. Aberbach, like Scher, concluded that strategic concerns

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[59]Seymour Scher, "Conditions for Legislative Control," Journal of Politics 25 (1963), 540-551.

may prompt congressional interest in agency policy making. For example, oversight can be used to preempt one's opponents. Structural reasons also figured in Aberbach's explanation of oversight. A decentralized committee structure increases staff resources for oversight. Corruption, crisis, and publicity have also contributed to increased oversight.[60]

Nadel's explanation, like those of the three preceding political scientists, emphasized the importance of groups in motivating Congress' interest in agency policy. He observes that much group activity has surrounded attempts to change the legal authority of consumer agencies. Were a truth-in-lending bill pending, members of a union might, he tells us, contact every member of the subcommittee and the full committee. Groups may also seek the appointment of sympathetic administrators to positions affecting group interests. Interest groups try to use those with whom they have influence for their benefit.[61] Nadel further emphasizes the importance of activists in encouraging Congress' interest in oversight, particularly consumer activists. Proconsumer congressional action depends on consumer activists, and supporting consumer protection can be "good politics."[62]

Ripley and Franklin's analysis of congressional involvement in agency policy differs somewhat from the analysis of the other political scientists discussed. Political resources, to Ripley and Franklin,

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[60]Joel D. Aberbach, "Changes in Congressional Oversight," American Behavioral Scientist, 22 (5) (May/June 1979), 493-515.

[61]Nadel, pp. 164-173.

[62]Nadel, pp. 153-154.

determine when a congressman will become involved in agency oversight. Political resources are necessary before members of Congress attempt to influence agency policies. Some of these political resources come from the formal powers of Congress. Among these resources are the power to create or to discontinue agencies and the ability to establish jurisdictional spending limits for the agencies. Another power resource is the control Congress has over agency personnel. Personnel require statutory authorization and appropriation of funds, and top positions must be confirmed by the Senate. Intangible resources are also important. The ability to provide or withhold information, to praise or criticize publicly, and the ability to build a favorable image of the agency within government are among these intangible resources.

Political resources alone are not all that is required. Ripley and Franklin agree with Ogul, Scher, and Aberbach that motivation is also necessary. Motivation and resources must reinforce one another or "individual activity by a member or bureaucrat is much less likely."[63]

This general literature about Congress and the agencies describes congressional involvement in the policy making activities of agencies such as the FTC. Dodd, Schott and Ogul indicate that Congress' involvement with agency policy making is limited. Ripley and Franklin suggest political resources determine Congress' involvement in agency policy

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[63]Ripley and Franklin, pp. 61-66.

making. Ogul asserts congressmen get involved in agency decisions when they are concerned with political survival. Several political scientists emphasize the importance of interest groups in motivating Congress' involvement with the agency policy process. Strategic factors are important determinants of Congress' interest to Scher and Aberbach. Ripley and Franklin found political resources most important in studying Congress' interest in assisting agencies make policy. The literature generally suggests that when conditions are right, motivation high, and political resources adequate, Congress tends to become involved in attempting to influence agencies such as the FTC.

Methods for Influencing Agency Policy Making

Congress can utilize various methods to influence agency policy. The literature contains discussions of Congress' use of appropriations, changes in legislative authorization, legislative veto, appointments, and various other means of oversight.

Appropriations

Appropriations committees and subcommittees are important, as Dodd and Schott indicate, because they review all agency requests for funds. All requests for appropriations are not fulfilled each year. New appropriations requests are carefully scrutinized. Approval requires funding requests to pass through both House and Senate

committees. Appropriations hearing also question projected requirements for funds beyond the current budget.[64]

Appropriations subcommittees, according to Harris, exercise more "continuous and effective" oversight than legislative committees. Appropriations hearings are highly political with congressmen pressured on behalf of various programs both from within and without Congress. These subcommittees are staffed to provide effective review of legislative programs. Members of appropriations committees usually serve for long periods of time from safe districts.[65]

Jewell and Patterson agree that appropriations committees are important, for they have a power over purse strings that gives them a "crucial opportunity to make policy."[66] Fenno concurs, explaining that "revenue and expenditure controls represent the most effective legislative sanction over the federal bureaucracy."[67]

Keefe and Ogul describe congressional oversight through appropriation activity as "the best that Congress does." Despite being the most extensive type of oversight, appropriations oversight cannot be said to be "always impressive." Keefe and Ogul's analysis suggests

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[64]Dodd and Schott, pp. 158-159.

[65]Harris, pp. 101-102.

[66]Jewell and Patterson, p. 460.

[67]Richard F. Fenno, Jr., The Power of the Purse, Appropriations Politics in Congress and the States (Englewood Cliffs, N.J.: Prentice Hall, Inc., 1977), pp. 404-407.

that as the complexity of programs increases, the effectiveness of appropriations oversight decreases.

These authors indicate that there is a fundamental role conflict for legislators "who desire rationality, efficiency, and economy in the abstract," and "more expenditures and projects for their state or district in concrete situations." As a result, some legislators become reluctant to involve themselves in appropriations oversight. This conflict compounds the difficulty of legislative oversight of domestic programs.[68]

Recently, Congress adopted a new budget procedure. Under the old system there were neither opportunities nor incentives for comprehensive or integrated congressional budget decisions. The new budget procedure included budget committees in both the House and Senate and provided a closer review of spending decisions. Spending priorities can be better scrutinized and fragmented budget decisions reduced, but the new budget process, according to Ripley and Franklin, "has not produced substantive policy outcomes significantly different from pre-reform years." The new budgeting procedure, has, however, "succeeded in providing a more informed decision making process for congressional budgeting." Complex interrelationships between the various parts of the bureaucracy and individual committees and subcommittees still are most important in determining budget outcomes.[69]

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[68]William J. Keefe and Morris S. Ogul, The American Legislative Process, Congress and The States (Englewood Cliffs, N.J.: Prentice Hall, Inc., 1977), pp. 406-407.

[69]Ripley and Franklin, pp. 66-67.

Since the new budget procedures reduce the amount of fragmentation in congressional budget decisions, Congress' ability to control agency policy is probably increased by the reforms.

Authorization

Congress can change an agency's legislative authority as a means of influencing its performance. As Woll explains, commissions are, in reality, agents of Congress. What Congress has explicitly stated in law, a commission such as the FTC is obliged to carry out. Whenever Congress chooses, it can "preempt a policy field" simply by changing an agency's legislative authority.[70] A commission's policy making ability can be limited by restricting its statutory authority or it may be given a new direction. Simply initiating legislation may influence agency policy. Legislation is usually introduced only when there is substantial congressional interest in a question. Nadel describes "the initiation of legislation as a good indication of the locus of activism." Often the initiation of legislation is an expression of sufficient congressional sentiment to influence agency policy making. Legislation is more often initiated to influence policy in the Senate than in the House.[71]

The significance of the ability of Congress to influence agencies through statutes they change has been questioned however. Only little agency policy is directly affected by Congress' authorizing legislation.

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[70]Peter Woll, American Bureaucracy (New York: W.W. Norton and Company, Inc., 1977), pp. 86-88.

[71]Nadel, p. 151.

Most agency made policy involves matters not specifically treated by legislation prescribing the agency's authority. Mundane decisions are far more common agency outputs than policy affected by statutes. Woll indicates that the real checks on the power of agencies are political and are not accomplished by formal statutory control.[72] The statutes discussed to this point in this dissertation are sufficiently vague to support Woll's generalization.

The Legislative Veto

The general literature on congressional control of agency policy making describes the legislative veto. A legislative veto allows Congress acting by itself, without the executive, to invalidate administrative decisions. The legislative veto is most frequently used, according to Dodd and Schott, to control distributive policies. Distributive policies allocate resources for different purposes. The committee role in subsystem politics is strengthened by the legislative veto.

The 1980 FTC Improvement Act provided for a two house legislative veto of FTC actions. Use of a legislative veto was declared unconstitutional in 1982 in the Chadha Case, a Supreme Court decision about an immigration deportation proceeding against one individual.[73] Whether the Court's decision affected other laws with provisions

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[72] Woll, pp. 86-88.

[73] Immigration and Naturalization Service v. Chadra, 103 Supreme Court Reporter 2764.

for vetoing "broad regulations issued by regulatory agencies" was unclear. On June 28, 1983, nine House members urged the Court to grant a full hearing of pending FTC veto case. The congressmen's brief argued the FTC case involved "different issues from those raised in the immigration case."[74] FTC authorization and appropriation legislation continued to include provisions for a legislative veto after the Chadha decision.[75]

The legislative veto, to Dodd and Schott, is "more effective as a restraining device on Presidential direction than a serious check on agency behavior."[76] When used, the legislative veto often has been intended as a measure against executive fiat as in the 1973 War Powers Resolution and the 1974 Budget and Impoundment Control Act.[77] Only in a few cases has the legislative veto been intended to restrict agency policy making, and Dodd and Schott report that committee vetoes are not "regarded with fear and trembling" by agencies. Legislative vetoes instead promote the development of good subsystem relations by hindering the executive's ability to dominate.[78]

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[74]Steven Pressman, Congress Considers Choices in Legislative Veto Aftermath," Congressional Quarterly, 2 July 1983, 1327.

[75]"Reagan Support Fades in Key Vote of 1982," Congressional Quarterly 15 January 1983, 120-121 and Judy Sarashon, "Plan Voted on Regulation of Professionals," Congressional Quarterly, 21 May 1983, 1019.

[76]Dodd and Schott, pp. 232-234.

[77]87 Stat. 555, 50 U.S.C. 1541-1548 and 88 Stat. 332, 31 U.S.C. 665, 1400-1407.

[78]Dodd and Schott, pp. 232-234.

When there is provision for a legislative veto, a negotiating process develops between congressional committees and agencies' staffs which meet and try to reconcile policy differences short of legislative action. This negotiating process seldom occurs without the legislative veto. According to Bruff and Gellhorn, "the case studies confirm that the legislative veto power significantly alters the working relationship between Congress and the agencies." Without the veto provision, a committee displeased with an agency rule can either hold embarrassing oversight hearings or propose legislation to correct the perceived mistake. With the legislative veto, more regular and systematic examination of the substantive details of an agency's program is possible.[79]

In some instances, the legislative veto, according to Bruff and Gellhorn, is used by congressmen "as a low-cost endorsement of the oversight power of Congress without fully considering the cost to the interrupted program." The veto is obviously an easier way to alter agency policy than sponsoring legislation. Since the veto is, however, negative, it reduces incentives for a committee to report legislation affirmatively. When there is a legislative veto, there is a substantially increased chance "that no policy will be formed by Congress or by the agency."[80]

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[79]Harold H. Bruff and Ernest F. Gellhorn, "Congressional Control of Administrative Regulations: A Study of Legislative Vetoes," Harvard Law Review, 90 (1977), 1420-1421.

[80]Bruff and Gellhorn, pp. 1422-1423.

When a legislative veto can be used, agencies may avoid the veto "by abandoning rulemaking in favor of other procedures less vulnerable to congressional scrutiny for the development of policy." Adjudicatory proceedings avoid the threat of a legislative veto. Thus, the legislative veto may also decrease the number of policy questions regulatory commissions try to resolve in a quasi-legislative context.[81]

Confirmation

The power of the Senate to approve presidential nominations "is a very real source of legislative control in some circumstances." Jewell and Patterson suggest that the Senate has been more attentive to whom the President nominates to various important positions since Watergate. Partisan politics have also been assigned some responsibility for greater scrutiny.[82]

Only rarely, Woll tells us, is a Presidential appointee turned down. Appointees have the advantage of the "political strength that always emanates from the Presidency." The President is, however, "aware of the need to satisfy the Senate in the appointive process." Presidents Nixon and Ford withdrew appointments to independent regulatory commissions rather than face opposition to their nominations.[83]

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[81] Bruff and Gellhorn, pp. 1424-1425.

[82] Jewell and Patterson, pp. 454-455.

[83] Woll, pp. 221-222.

Keefe and Ogul explain the high rate of confirmation as the result of "an extensive system of prior clearance."[84]

Furthermore, according to Ripley and Franklin, confirmation hearings provide members of Congress "a very forceful way" to transmit policy preferences to a nominee.[85] Dodd and Schott report that committee members, more than making preferences known, are able to extract pledges regarding policy implementation from nominees during confirmation hearings.[86] The fight over a nomination, even when the nomination is confirmed, according to Ripley and Franklin, can affect the nature of subsequent nominations. A strong stance taken by committee members favoring a policy trend during confirmation hearings sometimes influences future nominations.[87]

Kohlmeir indicates Congress, in some instances, refuses to consent to the reappointment of a member of a regulatory commission because of his voting record. Denying reappointment is one of the most direct forms of congressional intervention in a regulatory agency's politics. Only rarely is the Senate ever given the opportunity to refuse to reappoint since the President does not normally reappoint controversial regulators.[88]

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[84]Keefe and Ogul, pp. 395-98.

[85]Ripley and Franklin, pp. 78-80.

[86]Dodd and Schott, p. 164.

[87]Ripley and Franklin, pp. 78-80.

[88]Louis M. Kohlmeir, Jr., The Regulators (New York: Harper & Row, 1969), pp. 55-58.

Other Means of Oversight

There are other ways Congress may influence agency policy. Clarkson and Muris list questionnaires, investigations, hearings, and specific "ad hoc monitoring" of commissions.[89] Keefe and Ogul include required reports among the possible types of congressional oversight.[90]

Davidson describes various ways congressional hearings and investigations are important. Hearings serve to provide senators and representatives with a "great deal of useful information." Hearings also "offer useful forums for publicizing members' objectives and eliciting supportive testimony." Investigations offer even more exciting opportunities to bring issues to the public's attention, to widen the scope of conflict, and to allow congressmen more influence in making public policy.[91]

Keefe and Ogul emphasize the importance of informal congressional oversight. Unstructured interactions between administrators and legislators allow informal oversight. Informal contacts may be where most oversight occurs. Formal oversight, Keefe and Ogul suggest, can appear "ineffective and often unused" because "other less visible acts are promoting at least some of the same ends."[92]

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[89]Jewell and Patterson, p. 460.

[90]Keefe and Ogul, p. 7.

[91]Roger H. Davidson, "The Political Dimensions of Congressional Investigations," Capitol Studies, 5, No. 2 (Fall 1972), 41-63.

[92]Keefe and Ogul, pp. 407-408.

Informal oversight may also produce anticipated reactions from agencies. The law of anticipated reaction is described by Carl Freidrich. This law states that bureaucrats who anticipate their own actions will be inspected by other units of the bureaucracy or the Congress, or possibly the courts will act with a sense of responsibility.[93] Because of anticipated congressional action, agencies produce policy that conforms with congressional policy expectations. Jewell and Patterson also mention anticipated reactions. A successful bureaucrat will anticipate reactions. A successful bureaucrat will anticipate or recognize the expectations of committee members toward the agency. The bureau official whose role follows the expectations of legislators effectively "maximizes his chances of successful legislative-executive relations."[94]

In summary, the literature suggests that appropriations hearings and discussions are the most important means Congress has to influence agency policy making. Also, by altering authorizing legislation, Congress can limit or redirect agency policy making. Legislative proposals themselves can evidence enough congressional interest to influence agency decisions. The legislative veto allows Congress a direct means of turning down and otherwise affecting agency policy. Senate approval of appointments involves Congress in the selection of policy makers. Confirmation hearings provide senators the opportunity

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[93]Ogul, Congress Oversees the Bureaucracy, p. 192.

[94]Jewell and Patterson, pp. 453-454.

to tell agencies their policy preferences. While few nominees are turned down, strong stands on issues can influence future nominees. Other forms of oversight provide congressmen and the public information about the agencies. Informal oversight may be used to encourage agencies to produce policy to the liking of Congress.

Congress and the FTC

The literature concerned specifically with congressional influence on FTC policy making is somewhat limited. Several political scientists, however, have attempted to explain how Congress and the FTC interact. Although there is disagreement about the extent of congressional influence, the political science literature is still helpful in framing this study's research questions.

Several authors take the position that FTC policy making is reasonably immune from congressional influence. The complexity of FTC policy is, to Ripley and Franklin, the important variable determining the extent of congressional influence. When complex policy questions are decided in commissions such as the FTC, Securities and Exchange Commission, Federal Communications Commission, and the Federal Energy Regulatory Commission, discretion is usually large. FTC policies are sufficiently complex so that Congress is "often unable or unwilling to make specific judgments."[95]

Kenneth Clarkson agrees with Ripley and Franklin and de-emphasizes the importance of Congress in FTC policy decisions during the years

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[95]Ripley and Franklin, p. 131.

of this study. First, Congress' effective monitoring of the FTC is limited because most of the congressmen overseeing the FTC are low in seniority. The low status and "lower level of experience" combine to reduce "the effectiveness of congressional control of the commission."

Second, Congress must respond to a large number of competing interests. Bureaucrats, businesses, consumers, and taxpayers all place demands upon Congress. Congress can usually find groups that support commission policies and seldom find incentives to intervene. When a powerful interest group is involved, Congress tries to control policy so that the interest group is the winner.

Third, the incentives that exist to control FTC policy are "less than for many other agencies." the agency's budget is small. The FTC provides no subsidies, resource rights, or direct benefits to individuals or groups.

Fourth, Congress has limited power to control individual programs of the FTC and thus has little influence. From studying appropriations hearings, the author notes that information beyond budget summaries is rarely presented to either the House or Senate. Looking at questions asked the commission representative, Clarkson found that only a few different questions were asked and these sought general information.[96]

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[96]Kenneth W. Clarkson, "Legislative Constraints," in The Federal Trade Commission Since 1970: Economic Regulation and Bureaucratic Behavior, ed. Kenneth W. Clarkson and Timothy J. Muris (Cambridge: Cambridge University Press, 1981), p. 32.

Katzman generally agrees that Congress wields little influence on FTC Policy. At present, he concludes, Congress exerts little influence on the FTC through the appropriations process. He suggests Congress possibly favored the FTC in the 1970s because the appropriations subcommittee thought the commission was "performing well." The FTC's success in gaining appropriations, however, does not necessarily have to continue, according to Katzman. Recent threats to cut funds for investigations into automobiles and petroleum have shown that Congress can, when it wants, cut the FTC's appropriations requests.[97]

Quirk concurs with Katzman that the FTC has little difficulty with Congress about the budget. Utilizing data from interviews conducted between January and August 1976 he found FTC respondents to be "enthusiastic about congressional support" for the agency budget. Congress was also seen as "virtually no obstacle at all to the agency's budget growth." Respondents spoke of congressional generosity.

Several reasons for congressional support for the agency were supplied by respondents. Politicians, respondents suggested, wanted "to project the image of promoting antitrust" because antitrust is somewhat of a "sacred cow." The popularity of antitrust was seen as assisted by "public anxiety about inflation." The reasonably small size of the FTC budget was seen as another factor encouraging Congress' approval. A small budget, respondents reasoned, probably did not contain any excesses that could produce noticeable savings.

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[97]Katzman, p. 148.

Respondents did suggest that Congress reacted to agency policies in making budget decisions. Both consumer protection activities and the commission's efforts to promote competition were seen as inviting support for the agency in Congress. Those answering Quirk's questions did not indicate that Congress provided budgetary incentives for favors to industry, and no respondent suggested Congress reacted in any negative manner to FTC enforcement in general.[98]

The President's appointments to the FTC have not had difficulty in securing Senate confirmation. There has been debate on the floor of the Senate about an appointment to the FTC only one time since 1949. This high success rate, Katzman indicates, can be explained by the Senate's lack of insistence that a commissioner be highly qualified.[99]

Congress, according to Katzman, can influence FTC policy making with various other oversight activities. Oversight encourages efficient regulation and stimulates congressional interest in the agency. He suggests that a committee can direct the FTC to "a specific policy or investigation" if the committee has jurisdiction over the agency or if the issue has widespread congressional support.[100]

Fritschler, in contrast to Ripley and Franklin, Clarkson, Katzman, and Quirk, indicates Congress has much influence over FTC policy. The FTC's "aggressiveness or lack of it," according to Fritschler's

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[98]Paul J. Quirk, Industry Influence in Federal Regulatory Agencies (Princeton: Princeton University Press, 1981), pp. 104-112.

[99]Katzman, p. 141.

[100]Katzman, p. 149-50.

analysis, is a reflection of congressional attitudes toward regulation. Consumer policies exemplify how congressional interest can change the agency into an active consumer advocate. With the increased backing of a Congress ever more interested in consumer affairs, the FTC has become more aggressively proconsumer in recent years.[101]

In his analysis of the FTC, Fritschler concludes that interest groups often find that congressmen are much easier to influence than bureaucrats. When the interests they protect are adversely affected, lobbyists approach congressmen and ask how the policy process can be entrusted to policy makers who are not subject to popular control through elections. Interest groups often ask Congress to control the FTC in the name of representative government. Groups ask how they can affect policy making when policy makers are not elected, and demand that Congress intervene.[102]

Fritschler suggests that the policy making power of the FTC is checked through "its interaction and conflict with other agencies, the public interest groups, the courts, and eventually Congress." Congress, he tells us, is able to influence FTC policy because congressmen have political resources. They control appropriations and are more politically powerful than FTC members. A member of Congress can more easily give voice to a new idea. Congressmen, unlike FTC members, are advantaged in having access to the public, the White

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[101]Fritschler, p. 80.

[102]Fritschler, pp. 53-69.

House, and the cabinet. FTC bureaucrats often realize their goals by acting "in league with members of Congress."[103] Fritschler reports that on the basis of good evidence Congress' preferred image of the FTC is as the "little old lady of Pennsylvania Avenue." When the FTC becomes difficult, her sponsors in Congress like to think that they "remove her tennis shoes and put her back in the rocking chair."[104]

Richard Posner concurs with Fritschler, indicating Congress has much influence over the FTC and describing the agency as an "arm of Congress." As Posner's explanation goes, given the complexity of the federal government there are only a few key points where presidential power can be used. In those places where executive power is not effective, power instead gravitates to Congress. Congressional power is more influential than executive power in the FTC.

Posner finds evidence for this thesis in the similarity of economic interests that Congress and the FTC protect. Congress is organized in such a manner that it protects and fosters narrow economic interests, often at the expense of consumer interests. A congressman has only a few industries directly affecting his constituents in his district. Well organized interests , including trade associations, labor unions, and other pressure groups, have more influence than consumers. These two factors result in economic legislation that is more often

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[103]Fritschler, pp. 14-16.

[104]Fritschler, p. 80.

protectionist than consumer oriented. The policy output of the FTC has been described in such a manner.[105]

Michael Pertschuk, himself an FTC Commissioner, agrees with Fritschler and Posner that Congress' influence is an important factor in commission policy making. Pertschuk notes that the direction of congressional influence over commission decisions changes. Analyzing the consumer movement in Congress, Pertschuk concludes that the movement became increasingly important through the mid-1970s and was instrumental in passing numerous consumer regulatory laws.[106] After that time, Congress became more reluctant to disregard business' requests for relief from excessive regulation. Pertschuck described FTC legislation approved in 1980 as illustrating "as vividly as any congressional chronicle the triumph of business in diverting public attention and congressional outrage from consumer injury to business' hardships at the hands of the regulators.[107]

William Kovacic concurs with Fritschler, Posner, and Pertschuk that Congress is a powerful influence over FTC policy making. Kovacic observes that there was a "substantial congruency of congressional antitrust preferences and FTC antitrust programs in the 1970s." This occurred, Kovacic explains, because of "powerful legislative

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[105]Richard Posner, "The Federal Trade Commission," University of Chicago Law Review, 34 (Fall 1969), 82.

[106]Michael Pertschuk, Revolt Against Regulation, the Rise and Pause of the Consumer Movement (Berkeley: University of California Press, 1982), pp. 5-15.

[107]Pertschuk, p. 73.

influence in the commission's competition activities." During the years from 1969 to 1976, Kovacic finds congressional influence especially strong. These years saw Congress use "virtually every tool at its disposal to move the FTC toward far-reaching application of its antitrust powers." In the early 1970s Congress "stressed that the commission's well being depended upon its development of ambitious, aggressive enforcement programs. Moreover, Kovacic notes, that since 1914 the commission would not have pursued the same policies "had Congress not urged it to do so."[108]

Calvert and Weingast agree with both those political scientists who think Congress has little influence over FTC policy decisions and those who believe Congress dominates the agency. These authors suggest there is some validity to both the congressional dominance model and the bureaucratic autonomy model. From studying the agency in the 1970s one could defend either model. The bureaucratic autonomy model is tenable because the agency often overstepped its congressional mandate. Considerable bureaucratic discretion can also be found to have marked all the commission's policies in the 1970s.

The second model, the legislative control model can "provide a contrasting, but equally plausible, interpretation" for Congress' influence upon the FTC in the 1970s. This model assumes that Congress exercises much control over FTC policy making. When a drastic change

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[108]William E. Kovacic, "the FTC and Congressional Oversight of Antitrust Enforcement," Tulsa Law Journal, 17 (1982), 669.

in the membership of oversight committees occurs, the legislative control model predicts changes in agency policy soon follow. As the model predicts when the 1976 election produced a Congress with substantially different opinions about FTC policy, a major shift could be observed in commission policy.[109] Thus, Calvert and Weingast conclude that both the bureaucratic control model and the legislative control can be supported by observing the FTC in the 1970s.

The literature indicates that Congress does sometimes become involved with FTC policy; however, the extent of involvement is disputed. Some scholars indicate Congress' control of the FTC is extensive, while others suggest the FTC is only slightly influenced by Congress. When important special interests are affected by FTC policies, the literature is more in agreement with the view that Congress is likely to involve itself with FTC policy making. Appropriations, authorizations, confirmation, and oversight hearings are among congressional methods of influencing FTC policy. Overall, however, the literature about agency policy making and Congress and about FTC policy making and Congress raises as many or more questions than it answers. It is in the differences in views of those who have posed basic questions about legislative-agency relationships that this analysis is set.

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[109]Randall L. Calvert and Barry R. Weingast, "Runaway Bureaucracy and Congressional Oversight: Why Reforms Fail," Policy Studies Review, 1, No. 3 (Feb. 1982), 560-561.

Analytic Questions and Methods

This dissertation examines the many ways in which FTC policy is influenced by Congress, specifically questions explored are:

1. What is the nature of congressional activity related to FTC antitrust and consumer protection policies from 1970 to 1983?
   a. What is the scope of congressional attention?
   b. What is the intensity of interest?
   c. Is there unanimity or diversity of views and signals?
   d. What are the major centers of activity?
   e. What mix of means is used by Congress to influence policy?
2. Were there important variations in the nature of activity during this period, and if so, what accounts for them?
3. To what degree did Congress influence the general direction of commission policy?
4. To what degree did Congress influence particular FTC decisions of policy significance?
5. Were there variations over time in the direction and effect of congressional influence? If so, what were the sources of variation?
6. What was the comparative effectiveness of the various means employed by Congress in influencing FTC policy?
7. What can be said about the relative potency of congressional influence over FTC policy as compared with that of other forces, such as the presidency, that play upon the agency?

To answer these questions this dissertation first looks at the major directions FTC antitrust and consumer policy have taken during the years of this study. Important agency decisions in both policy areas are analyzed, and contrasts are drawn between the three policy phases that can be observed between 1970 and 1983.

Next, congressional actions related to the FTC are presented. There were many different actions taken by congressmen, committees, and the whole Congress during the years covered by this study. Presented together these various actions provide a useful view of how Congress goes about influencing agency policy making.

From studying congressional actions, one can determine who in Congress supports the agency and who the opponents of the agency are. Whether supporters and opponents of the FTC contribute equally to Congress' output can be determined. How active those for and against the commission have been at different times between 1970 and 1983 can be described.

This discussion gives special attention to the major attempts by opponents of the FTC to direct commission policy making. Several times during the years of this study, members of Congress have made an important effort to influence policy making at the FTC. How successful each of these attempts was is analyzed.

There are several things the following discussion does not do, however. There is no discussion of informal oversight or its effects. The congressional control of the commission that occurs because of anticipated reactions is not discussed. Undoubtedly, in some instances

the FTC is influenced by the belief that a response in Congress is likely if the commission does not follow congressional sentiment.

The analysis does not attempt to explain if a congruence of attitudes about policy exists between Congress and the commission. If much effort is made to express a position in Congress, it is assumed this effort is an attempt to influence FTC policy making. The possibility that congressmen are presenting ideas simply congruent to the FTC with no intention of affecting the agency is not considered.

Finally, this dissertation gives little attention to factors other than Congress that affect the FTC. Of course, the FTC is influenced by many other factors. Some attention is given to these factors, but this discussion is primarily restricted to how Congress affects the FTC.

The data utilized in this analysis are drawn from several sources. The documents of the FTC provide data about the policy making activities of the agency. Congressional documents are the principal source for the discussion of congressional activity affecting the FTC. Secondary sources such as the Congressional Quarterly, The New York Times, and The Washington Post are also employed, along with other scholarly analyses of the FTC and Congress.

Organization of the Study

Chapter II of this study examines FTC antitrust policy from 1970 to 1983. General objectives of antitrust policy are presented, followed by an analysis of three distinctive phases of agency antitrust

policy discernible between 1970 and 1983. Chapter III examines consumer policy in a similar fashion. These two chapters allow a presentation of FTC policy during the years of this study. Since this dissertation attempts to answer to what extent Congress has influenced FTC policy, a presentation of what the commission's antitrust and consumer policies have been is necessary. Having discussed FTC antitrust and consumer policies it becomes possible to evaluate how much congressional influence there has been. The fourth chapter analyzes congressional attempts to influence FTC policy. Chapter V addresses the central research questions posed by the study.

CHAPTER II

FTC ANTITRUST POLICIES

Antitrust policy intends to promote competition and prevent monopolies. More than this, antitrust policy can be used to protect the small business man against price discrimination that hinders his ability to compete in the marketplace. Antitrust policy may look at the affects on competitive conditions of a single merger or may consider the anticompetitive structure of an entire industry. Antitrust policy is, thus, complex and multifaceted.

FTC antitrust activity has several ultimate aims. These goals can be better understood by considering the general objectives of antitrust policy. This chapter first discusses such general objectives of antitrust policy and the FTC authority in this area. Second, the important phases of FTC antitrust policy between 1970 and 1983 are described largely in terms of general antitrust policy objectives.

General Objectives of Antitrust Policy

Four general objectives of antitrust policy are discussed by Kaysen and Turner. The first of these objectives is achieving desirable economic results. Desirable results include the efficient use of resources, economic progress and development, stability in output and employment, and a more equitable distribution of income.[1]

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[1] Carl Kaysen and Donald F. Turner, Antitrust Policy, An Economic and Legal Analysis (Cambridge: Harvard University Press, 1959), pp. 11-18.

Antitrust policy intends, as Asch describes it, "to promote economic progress and efficiency."[2] Kaysen and Turner indicate the economy can be improved by a successful antitrust policy.[3]

Antitrust policy can achieve better economic conditions in two different ways. Antitrust policy can encourage efficiency in the use of resources. Such efficiency is closely dependent on the functioning of the market. Efficiency is essentially a state in which no rearrangement of outputs or inputs can increase consumer satisfaction.[4] Elzinga defines efficiency as the "maximization of the value of total output." Efficiency can be maximized only if firms are providing goods and services "in accord with consumer preferences and are minimizing production costs in so doing."[5]

Antitrust policy can also affect progressiveness by contributing to increased output, increased output per unit, and the production of new and better final products. Progressive results can be observed at the level of the firm, the industry, and the whole economy.[6] Better products and better productivity are possible for a firm, an industry, and a whole economy.

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[2]Peter Asch, Industrial Organization and Antitrust Policy (New York: John Wiley & Sons, 1983), p. 109.

[3]Kaysen and Turner, pp. 11-14.

[4]Kaysen and Turner, pp. 11-14.

[5]Kenneth G. Elzinga, "The Goals of Antitrust: Other Than Competitive and Efficiency, What Else Counts?" University of Pennsylvania Law Review, 1253, No. 6 (1977), p. 1192.

[6]Kaysen and Turner, pp. 11-14.

A second objective of antitrust policy, according to Kaysen and Turner, is promoting the competitive process. Competition produces a desirable distribution of resources, limits business power, and creates a sense of fairness.[7] Howard describes this objective as, "to identify and remove any serious imperfections in the competitive process." That is, marketplace practices that are not consistent with the competitive process should be prohibited.[8]

Competition is very important to a free enterprise economy. A desirable allocation of resources occurs because of competition. The most efficient producers are rewarded with profits when competitive conditions are maintained.[9] Competition constrains business decisions and forces business to favor policies of long run profit maximization.[10] Furthermore, the more competition there is, the less any one firm is able to dominate the market. Increasing competition limits business power, and controlling business through the market reduces the need for direct government control.[11]

Policies to improve competition benefit those who believe they are at a disadvantage in interbusiness transactions. Thus, procompetitive policies are favored by those who would limit business power.

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[7]Kaysen and Turner, pp. 11-18.

[8]Marshall C. Howard, Antitrust and Trade Regulation, Selected Issues and Case Studies (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1983), p. 2.

[9]Howard, p. 2.

[10]Kaysen and Turner, pp. 14-16.

[11]Kaysen and Turner, pp. 14-16.

Competition also results in an impersonal market that creates a sense of fairness.[12]

The third objective of antitrust policy is fair business conduct. Fairness in the market place involves "some concept of equal treatment for those in similar situations." So, antitrust policy seeks to establish standards of "fair conduct."[13] Standards of fairness are necessary because antitrust policies that only maximize economic efficiency would yield results deemed "unfair."[14] Beyond efficiency, Asch indicates antitrust policy must "protect individual liberty and freedom of choice."[15]

Accordingly, antitrust policy must establish acceptable trade-offs between efficiency and fair conduct. Some amount of economic efficiency must be lost to effectively limit business' ability to harm small competitors. Conversely, policy that maximizes economic efficiency is costly in terms of increased business power.[16] Elzinga indicates that concern with efficiency should not be absolute, although different people "place different values on particular tradeoffs."[17] Usually, practices that could eliminate competitors from the marketplace are

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[12]Kaysen and Turner, pp. 14-16.

[13]Kaysen and Turner, pp. 11-18.

[14]Asch, p. 108.

[15]Asch, p. 109.

[16]Asch, p. 110.

[17]Elzinga, p. 1213.

disallowed. The Robinson-Patman Act has been described in this context as "special interest legislation that is superimposed on an overall procompetitive policy."[18]

Marketplace fairness involves some concept of "equal treatment for those in similar situations." This means fair treatment for all firms, big and small, operating in the market. "Equal treatment" requires that competitive conditions not be adversely affected by the disadvantages of any marketplace participant.[19] For example, a large firm is denied the ability to use market power to impose terms on a small firm.[20] Unfairness has typically taken the form of business favoring large customers and discriminating against smaller customers. Fair conduct policy has had the intent of protecting small businessmen from the big corporations. Equal treatment requirements necessitated that there be no discrimination against the small businessman.

A fourth objective of antitrust policy is limiting big business in order to create a desirable distribution of social power.[21] Concentrated economic power has traditionally been viewed as a threat to pluralist democracy, and antitrust policy attempts to redistribute business' power for this reason. Controlling the distribution of

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[18]A.D. Neale, The Antitrust Laws of The United States of America, 2nd ed. (Cambridge: Cambridge University Press, 1970), p. 471.

[19]Kaysen and Turner, pp. 11-18.

[20]Kaysen and Turner, pp. 11-18.

[21]Kaysen and Turner, pp. 11-18.

social power among business units has been rationalized by Jeffersonian ideals. According to these ideals, since business units are politically irresponsible, large, powerful business units are dangerous. These ideas undoubtedly are important parts of "the emotional substratum on which political support for antitrust policy of some kind rests."[22] Kauper has suggested that historically the U.S. has "viewed concentrated economic and political power as a threat to individual freedom of choice." Further, he indicated that our democratic pluralism might depend upon "diffuse economic power in the economy." Concentration further creates a need for centralized government regulation of economic conduct. He questioned whether centralized government regulation has been accomplished with much success.[23]

Kauper's analysis of industrial concentration and economic and political power in the U.S. is not undisputed. Demsetz terms establishing some level of industrial concentration as a "no fault" standard of antitrust violation as "exceedingly faulty."[24] Shapiro has questioned why a company that builds a better mousetrap should lose their market share to other mousetrap makers. He questioned the benefit of sharing one firm's accomplishments with "less successful competitors in an effort to make them more successful too."[25]

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[22]Kaysen and Turner, pp. 17-18.

[23]Thomas E. Kauper, "The Antitrust Bogeyman," Vital Speeches, 39, No. 10 (1 March 1973), p. 313.

[24]Harold Demetz, "The Trouble with Antitrust," Vital Speeches, 47, No. 7 (15 January 1981), p. 201.

[25]Irving S. Shapiro, "The Antitrust Syndrome, Is Bigness Bad?" Vital Speeches, 45, No. 18 (1 July 1979), p. 561.

FTC antitrust policy is directed at all four of these objectives. antitrust goals are important and meaningful, yet ambiguous, and, to a certain extent, contradictory; subject to various intepretations and applications. These are the four objectives antitrust policy makers must deal with when devising policy. Between 1970 and 1983, cases and trade regulation rules can be found that, in varying degrees, try to accomplish each of these objectives.

Furthermore, these antitrust objectives can be either complementary or competing.[26] Improving the basic economy and promoting competition can be complementary objectives of antitrust policy, since better competitive conditions improve the efficiency of the economy and a good economy fosters competition. On the other hand, improving competition and establishing fair business conditions may be conflicting objectives. Asch indicates "competition maximizes economic efficiency," but also produces results regarded as "unfair."[27] There is a concern that too much emphasis on efficiency has undesirable or unfair consequences for small businessmen. Too much attention directed to providing marketplace fairness to the small businessman may hinder achieving economic efficiency. Directing antitrust policy to price discrimination may conflict with policy to improve competition. Antitrust policy is concerned with the proper "mixture" of these four policy objectives.[28]

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[26]Robert Katzman, Regulatory Bureaucracy, The Federal Trade Commission and Antitrust Policy (Cambridge: MIT Press, 1977), p. 4.

[27]Asch, p. 108.

[28]Asch, p. 110.

FTC Legislative Authority in Antitrust

Over the years, several statutes have been approved to achieve these objectives of antitrust policy. Congress, at various times, has been concerned with each of the antitrust objectives discussed in the previous section. Responsibility for antitrust policy has been given to both the Justice Department and the FTC. This discussion considers statutes that have assigned antitrust responsibilities to the FTC.

The Federal Trade Commission Act of 1914 is the basis of FTC antitrust authority. Section 5 of the FTC Act empowers the agency "to prevent unfair methods of competition and unfair or deceptive acts or practices in, or affecting, commerce." All of the following practices are prohibited by Section 5: Price fixing, anticompetitive mergers, tie-in sales, and exclusive dealings. Practices that have been declared illegal by the Clayton Act and the Sherman Act can be prohibited using Section 5.[29] Unfair business practices that have no effect on competition also can be prohibited under Section 5.[30] Section 6 of the FTC Act allows the agency to conduct investigations. These investigations can be conducted either for enforcement purposes or for compiling economic reports.[31]

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[29] 26 Stat. 209, 15 U.S.C. 1-7.

[30] Schnitzer, pp. 144-145.

[31] Timothy J. Muris, "Statutory Powers," in The Federal Trade Commission Since 1970: Economic Regulation and Bureaucratic Behavior, ed. Kenneth W. Clarkson and Timothy J. Muris (Cambridge: Cambridge University Press, 1981), pp. 13-14.

The Clayton Act, also passed in 1914, made certain anticompetitive practices illegal. In passing the Clayton Act, Congress set out regulations for the FTC to enforce and also specified that the general prohibitions included in the act were to be elaborated on a case by case basis by the FTC.

Price discrimination was proscribed by Section 2 of the Clayton Act. Price discrimination involved a seller charging two or more buyers different prices for the same goods, and is usually used by a seller to undercut the price being offered by his rivals. The practice is objectionable because competition is eventually lessened.

Exclusive dealings and tying agreements were also prohibited in Section 3 of the Clayton Act. A seller cannot force a buyer to agree not to deal with other sellers in return for special terms. Neither can a buyer be required to purchase a second of a seller's lines to receive special favors. This is a tying agreement and is deemed harmful to competition.[32]

The merger provisions of the Clayton Act contained in Section 7 were updated in 1950 by the Cellar-Kefauver Act. This act amended Section 7 of the Clayton Act in order to close a loophole. The Supreme Court had held that mergers involving acquisition of assets were not illegal. The new act prohibited a company from acquiring stocks or assets of another corporation when lessened competition or a monopoly

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[32]Schnitzer, pp. 142-144.

resulted. An American firm that acquires a major interest in a foreign firm became subject to FTC regulation with the passage of this act.[33]

Price discrimination and price-related benefits were made illegal by the Robinson-Patman Act of 1936. This act amended Section 2 of the Clayton Act to prohibit price discrimination against small buyers in interstate commerce. The act imposed upon the seller the burden of proving cost savings in quantity sales, and the courts have "minimized the advantage of larger buyers."[34]

Chain stores were the principal target of the new act. Buying in large quantities, chain stores could demand discounts from suppliers, putting the traditional retailer at a disadvantage. The Robinson-Patman Act made such discriminatory practices illegal. When passed, the act had the support of groups such as the U.S. Wholesale Grocers, the National Food Brokers Association, and the National Association of Retail Druggists.[35]

Enforcement of the act varied with time. Authorities have been questioned if the purposes of the act are consistent with the overall policy mission of the FTC. Since the agency is supposed to improve competition, how can it also attempt to restrict competition to help small businessmen? Stone describes the "principal thrust" of the Robinson-Patman Act to be "damping down the competitive process."[36]

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[33]Schnitzer, pp. 146-147.

[34]Schnitzer, pp. 145-146.

[35]Alan Stone, Economic Regulation and the Public Interest, The Federal Trade Commission in Theory and Practice (Ithaca: Cornell University Press, 1977), pp. 93-96.

[36]Stone, p. 119.

The Neal report, submitted in 1968, recommended the act be revised because some of its features "unduly restricted the free play of competitive forces."[37] Commissioner Robert Pitofsky presents the opposing view. He contends that "sensible and balanced enforcement" of Robinson-Patman can be "consistent with the goals of the other antitrust laws, and with the consumer interest."[38]

The Hart-Scott-Rodino Antitrust Improvement Act of 1976 required that large corporations notify antitrust enforcement agencies in advance of plans to merge. Firms having net assets or sales of $100 million that plan to merge with another firm having $10 million in sales or assets, were required to report a planned merger. The act further provided for a preliminary injunction to forestall mergers where a difficult divestiture proceedings might be required later.[39]

The Hart-Scott-Rodino Act promotes the antitrust objective of protecting competition. By requiring premerger notification, the Hart-Scott-Rodino Act attempts to assure that mergers that harm competition do not occur. Advanced reporting allows injunctions before the merger and saves costly economic consequences of divestitures as well.

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[37]John D. Dingell, et al., "Dingell Report on FTC's Enforcement of the Robinson-Patman Act: 'Findings' and Recommendations," Antitrust Law and Economics Review, 3, No. 4 (1970), pp. 59-60.

[38]U.S. Congress, Senate, Commerce, Science, and Transportation Committee, Nominations of Commissioner to the FTC, 95th Cong., 2nd sess. (Washington, D.C.: Government Printing Office, 1978), p. 8.

[39]Howard, p. 109.

Congress has established the FTC's legal mandate in such a way that the agency can attempt to achieve all four of the general objectives of antitrust policy. Using Section 5 of the FTC Act, the agency can take action to improve the basic economy, to promote competition, and to redistribute the social power of big business. The Clayton Act was designed to enable the FTC to improve competition and prevent unfair business practices. The Robinson-Patman Act allows the FTC to discourage unfair business practices. The Hart-Scott-Rodino Act is designed to promote competition and prevent harm to the basic economy. FTC policies intending to accomplish all four of these antitrust objectives can be observed between 1970 and 1983.

Three Phases of FTC Antitrust Policy

Between 1970 and 1983, three phases of FTC antitrust policy can be observed. The first began immediately after the release of American Bar Association and Nader reports following Casper Weinberger's appointment as FTC Chairman on December 31, 1969. The second phase began in 1977 when Michael Pertschuk became FTC Chairman. Phase three began in 1981 with President Reagan's appointments to the FTC.

The phases of FTC antitrust policy can be described in terms of their distinctive emphasis in relation to the four objectives of antitrust policy. All the antitrust objectives are a factor in each phase; however, differences in emphasis of antitrust policy mark the phases. They are characterized in Table 1. The major emphasis in the first phase were policies to promote the competitive

Table 1

Phases of FTC Antitrust Policy
1970-1983

Phase One 1970-77	Priority Objectives: 1. Promoting the competitive process. 2. Attaining desirable economic results. Major Methods: 1. Industry-wide investigation, with a special emphasis on concentrated industries. 2. Use of economic analysis in establishing enforcement priorities. 3. Aggressive regulation.
Phase Two 1977-81	Priority Objectives: 1. Attain desirable economic results, especially the limitation of inflation. 2. Redistribution of social power from business to consumers. Major Methods: 1. Efforts focused on sectors of the economy of greatest importance for consumers. 2. Aggressive regulation.
Phase Three 1981-83	Priority Objective: 1. Attain desirable economic results. Major Methods: 1. Application of economic theory that makes antitrust violations more difficult to prove. 2. Restrained regulation.

process as to attain desirable economic results. The agency's survival was in question, and this emphasis was politically popular. Concentrated industry cases and industry-wide cases were initiated. Antitrust policy designed to improve competitive conditions continued from the 1960s.

The second phase tried primarily to direct antitrust policy toward improving the basic economy. Inflation was the number one problem that the FTC tried to attack with antitrust policy. The fight against inflation led the commission to redefine the intent of the FTC Act in regard to aiding consumers. Redistributing the social power of big business was still a commission objective, although a secondary one, in phase two. Basic antitrust policy aimed at improving competition continued.

In phase three, agency policy was directed primarily at improving competition. FTC policy became substantially more restricted in phase three, focusing on competitive problems. Concern for consumers in antitrust proceedings was less evident, and emphasis on marketplace competition more important. Some cases that were begun in phase three intended to discourage unfair business practices.

Before beginning a discussion of these three phases, antitrust policy in the years before phase one should be described. The anti-trust activities of the FTC in the 1960s were largely directed toward Robinson-Patman cases and antimonopoly cases. What Stone described as a "heavy emphasis" on enforcing the various provisions of the

Robinson-Patman Act continued through the 1960s.[40] Antitrust policy in the 1960s also opposed monopolistic practices and attempted to establish competitive conditions. As Williamson has indicated, FTC antitrust enforcement in the 1960s was virtually determined by such market-power concerns.[41] The FTC also moved against corporate mergers with a new program requiring that the agency be notified in advance of certain types of mergers.[42]

The American Bar Association and Nader reports can also be utilized in describing FTC antitrust activities in the 1960s. Lack of "goals, priorities, and effective planning controls" were cited by the American Bar Association report as serious defects in the commission's antitrust efforts.[43] The American Bar Association further cited the FTC for "crippling delay in its procedures."[44] The report is further critical of the agency's emphasis on enforcing the Robinson-

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[40]Stone, p. 63.

[41]Oliver E. Williamson, "Antitrust Enforcement: Where It Has Been; Where It Is Going," in Industrial Organization, Antitrust, and Public Policy, ed. John V. Craven (Boston: Nijhoff Publishing, 1983), p. 44.

[42]Stone, p. 63.

[43]Report of the American Bar Association Commission to Study the FTC (Chicago: American Bar Association, 1969), p. 3.

[44]Report of the American Bar Association Commission to Study the FTC, p. 34.

Patman Act.[45] The commission is charged with not allocating enough resources to actions against mergers.[46]

Edward F. Cox, President Nixon's son-in-law, was one of the authors of the Nader report. This served to enhance the credibility of the report somewhat. The Nader report found the FTC tolerant of increasing economic concentration.[47] The commission was cited by the Nader group for failing to detect violations systematically, failing to establish efficient priorities for enforcement, failing to enforce with energy and speed, and failing to seek sufficient statutory authority.[48]

Phase One--Establishing New Priorities--1970-1977

FTC antitrust policy began to change significantly in 1970. The years from 1970 to 1977 saw traditional policy objectives reordered in importance. Casper Weinberger became FTC Chairman on December 31, 1969.[49] When Weinberger became chairman, a discernable phase began and continued until 1977. During these years, there were four chairmen of the FTC, three appointed by President Nixon and one by President

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[45] Report of the American Bar Association Commission to Study the FTC, p. 67.

[46] Report of the American Bar Association Commission to Study the FTC, p. 69.

[47] Edward F. Cox, Robert C. Fellmuth, and John E. Schulz, "The Nader Report" on the FTC (New York: Baron, 1969), p. 16-7.

[48] Cox, Fellmuth, and Schulz, p. 39.

[49] "FTC Maps Change to Aid Consumers," New York Times, 9 June 1970, p. 1, col. 2.

ford; Weinberger, Miles Kirkpatrick, Lewis A. Engman, and Calvin J. Collier.

The innovation that took place was a change from a larger number of antitrust actions under the Robinson-Patman Act to industry-wide investigations and cases. Robinson-Patman Act cases usually were narrow in scope involving price discrimination. The new industry-wide cases were very broad in scope. These new antitrust policies were directed toward promoting competition and attaining desirable economic results.

The new antitrust policies were also directed at the objective of improving the basic economy. Motivated by criticisms, the agency attempted to prove that its policy was of far reaching importance to many citizens. Cases that might produce an improvement in the basic economy and spread benefits throughout the society seemed the answer. The agency's new attention to industry-wide cases was grounded in the hope of producing "economic benefits to the society as a whole."[50]

While Weinberger was FTC Chairman, the commission authorized investigations of major oligopolistic industries such as autos, steel, chemicals, and drugs.[51] Industry-wide investigations were favored by those who wanted a more activist FTC as a rational way to allocate

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[50]Wesley J. Liebeler, "Bureau of Competition: Antitrust Enforcement Activities," in The FTC Since 1970: Economic Regulation and Bureaucratic Behavior, ed. Kenneth W. Clarkson and Timothy J. Muris (Cambridge: Cambridge University Press, 1981), pp. 96-97.

[51]David Vienna, "Weinberger: Imprint of the FTC," Washington Post, 14 June 1982, sec. F, p. 1, col. 2.

resources. Opponents of industry-wide investigations have alleged they are little more than "fishing expeditions" or attempts to find violations.[52] Many of these investigations produced few if any cases and accomplished little more than data gathering.

The same antitrust policies continued with Weinberger's successors, the next two of whom were also Nixon appointees. The FTC Annual Report in 1971, while Miles Kirkpatrick was FTC Chairman, placed increasing emphasis upon "economic analysis of the relationships between industry and market structure, and conduct and competitive performance."[53] As much as 40% of the FTC budget was allocated to industry-wide cases during phase two.[54]

Not all of the FTC's antitrust cases in phase one were industry-wide, however. The agency continued deciding cases that were intended to improve competitive conditions. Some of these cases reflected the commission's concern with acquisitions that were potentially monopolistic. Other cases, notably the shopping center cases, were simply concerned with improving competitive conditions. These cases look at the competitive conditions that existed within a shopping center. They stand in direct contrast to the industry-wide approach to protecting competitive conditions.

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[52] Katzman, pp. 30-31.

[53] 1971 FTC Annual Report (Washington, D.C.: Government Printing Office, 1972), p. 4.

[54] Lieber, p. 65.

The industry-wide approach to antitrust produced some interesting cases. The Kellogg et al. case was the first FTC attack on a concentrated industry ever. Antitrust theorists, economists, and lawyers had for years fought against oligopoly without producing any cases until Kellogg.[55] On January 24, 1972, Chairman Kirkpatrick and Commissioners Paul Rand Dixon and Mary Gardner Jones voted to issue the Kellogg complaint. Commissioners David Dennison and Everette MacIntyre dissented.[56]

The Kellogg complaint was directed at the four largest cereal companies: Kellogg, General Mills, General Foods, and Quaker Oats. These four companies had 90 percent of the ready-to-eat (RTE) cereal market in 1970.[57] The complaint alleged that the RTE cereal industry had used artificial differentiation and intensive advertising to create and maintain high barriers for entry into the RTE cereal industry. As a result, consumer prices, were high and the profits the RTE cereal industry made were excessive.[58]

The FTC complaint rested on three antitrust allegations. First, the agency charged the RTE cereal industry had artificially differentiated basically similar products with extensive advertising. Trivial differences such as color and shape were emphasized while the basic

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[55]"The FTC Declares a War on Oligopoly," Business Week, 29 Jan. 1972, p. 24.

[56]Kellogg Co., et al., 99 FTC 283.

[57]Kellogg Co., et al., 99 FTC 11.

[58]Stone, pp. 147-150.

similarities were concealed. The use of much advertising to promote RTE cereal created high barriers effectively preventing new competitors in the RTE cereal industry.

Second, it was charged that the Kellogg Comany had used its position as principal supplier of shelf space to interfere with the marketing efforts of other RTE cereal producers. Through its shelf space services, Kellogg told grocers what RTE cereals to select, where to place them, and what RTEs to remove from their shelves. Kellogg was also responsible for the allocations of shelf space to various RTE cereals. By performing this service, the company was able to restrict the shelf positions of Nabisco and Ralston cereals and to remove small regional producers' cereals altogether. The other major cereal companies named by the FTC in this complaint all acquiesced and benefited from the Kellogg shelf space program "protecting and perpetuating their respective market shares."[59]

Third, the commission claimed the "shared monopoly" structure of the RTE cereal industry was enhanced by a series of acquisitions, mentioning several that had occurred in the 1940s. As a result of these acquisitions, certain companies had engaged in several monopolistic practices, including refraining from challenging one another's decisions about price increases, limiting consumer directed promotions, and supplanting product innovation with product imitation. Other alleged monopolistic practices resulting from these acquisitions

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[59] Kellogg Co., et al., 99 FTC 12-14.

included blocking the entry of any significant competitors into the RTE cereal market for thirty years. The companies were further accused of maintaining a market where meaningful price competition did not exist. It was also alleged that consumers had been required to pay substantially higher prices for cereals than they would have otherwise.[60]

Exxon et al. was another important case brought against an oligopoly, this time the eight largest oil companies. The intent of the case was to affect the market structure of the industry.[61] To some extent, the Exxon complaint was the result of the political forces reshaping the FTC at the time. Comanor indicates that the complaints "must be explained in terms of the political environment of mid-1973." Both the country at large and the Congress were supportive of the Exxon complaint.[62] Several effects of oil industry acts and practices were alleged in the complaint. The FTC accused the petroleum industry of establishing and maintaining "artificial price levels for goods and services at each level" of the industry. As for competition, the commission charged, "actual and potential competition at all levels of the petroleum industry has been hindered, lessened, eliminated and foreclosed."

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[60] Kellogg Co., et al., 99 FTC 12-14.

[61] Exxon Corp., et al., 98 FTC 457.

[62] William S. Comanor, "Antitrust in a Political Environment," The Antitrust Bulletin, Winter 1982, p. 743.

The complaint also alleged that petroleum industry practices had led to what Kaysen and Turner describe as progressive problems or problems in the efficient use of economic resources. Shortages had occurred with the worst severity in the eastern U.S. where there were more independent refiners and marketers. The effect of these shortages was to eliminate significant price competition in the sale of petroleum. The oil companies were also charged with obtaining greater profits and with forcing the consumer to pay prices higher than would result from a competitively structured market.[63]

This major case sought to accomplish what had not been possible in individual cases. Using an industry-wide case, the FTC hoped to succeed in a "vertical dismemberment" of the oil industry for the benefit of consumers.[64] The FTC also favored an industry-wide case in the oil industry because such a case was "a rational way of determining how to allocate resources."[65]

Monopolistic practices pervasive in entire industries were the subject of other antitrust cases. A complaint was issued in 1971 against five major soft drink manufacturers in the Crush International et al. case. Soft drink manufacturers were accused of hindering competition by restricting the territory of their bottlers. Retailers

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[63] Exxon Corp., et al., 98 FTC 457.

[64] Liebeler, p. 86-88.

[65] Katzman, p. 30.

and customers were deprived of the right to purchase soft drinks from the bottler of their choice. The FTC complaint in Crush charged this practice "lessened competition in advertising, merchandising, distribution, and offering for sale" of soft drink syrups and soft drink products. The FTC also charged consumers "have been deprived of the opportunity of obtaining such products in an unrestricted market and at competitive prices."[66]

The concentrated industry cases during this period were, in some ways, a result of the commission's attempts to apply cost/benefit analysis to decisions. The FTC Annual Report in 1972 announced that the commission was beginning to develop "a prototype model which can measure benefits relative to the costs of alternative antitrust activities."[67] To fully implement the cost/benefit model, the FTC had to gather data. The commission, thus, began a major data gathering program in 1973. Line-of-business data was collected from various individual businesses. Large manufacturing companies were required by the program to report costs, sales, and profits by individual product lines.[68] The FTC wished to use such data to make comparisons between "meaningful economic markets and between firms within those

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[66] Crush Int'l., et al., 98 FTC 428-432.

[67] 1972 FTC Annual Report (Washington, D.C.: Government Printing Office, 1973), p. 4.

[68] Clarkson and Muris, p. 62.

markets."[69] With this data, the FTC's Bureau of Economics could analyze cost/benefit considerations for proposed enforcement and investigative actions.[70]

While influential in beginning the industry-wide approach to antitrust enforcement, the cost/benefit models failed to gain acceptance. Wesley Liebler, former director of the FTC's Policy Planning Office, concluded the commission lacked "the theory, the data, and the incentives to conduct cost/benefit estimates of its industry-wide matters."[71] The cost/benefit models were not used systematically, and cost/benefit analysis, although once touted as the answer for better decision making, was dismissed because effective data was not available.[72]

There were anticompetitive cases other than industry-wide cases in phase one. These cases promoted competitive conditions without trying to change conditions in a whole industry. The Litton Industries case decided March 13, 1973, is an example of such a case.

In 1965, Litton acquired the Royal McBee Corporation, the second largest firm in the typewriter industry. FTC alleged in a complaint issued in 1969 that Litton's acquisition of Triumph-Adler may have

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[69] 1973 FTC Annual Report (Washington, D.C.: Government Printing Office, 1974), p. 2.

[70] 1975 FTC Annual Report (Washington, D.C.: Government Printing Office, 1976), p. 3.

[71] Liebeler, p. 72.

[72] Liebeler, p. 66-67.

substantially lessened competition and "tended to create a monopoly in the sale of typewriters generally and in particular kinds of typewriters." The acquisition also restrained actual or potential competitors, heightened the already high barrier to the entry of new competitors, and denied the public the benefits of free competition.[73]

Commissioner Jones' opinion issued March 13, 1973, claimed Litton's acquisition of Triumph-Adler "eliminated a significant competitor" in a market already highly concentrated. This, the opinion decided, was a violation of Section 7 of the Clayton Act. Since the typewriter industry needed new competition, one of the leading firms in the industry could not improve its marketing position by acquiring a significant competitor. That IBM had the leading position in the electric typewriter market did not affect questions about the legality of the Litton-Triumph Alder merger. Litton was required to divest all of its stock interest in Triumph-Adler and to make no acquisition of a typewriter firm for ten years without first seeking FTC approval.[74]

The complaint in the Kaiser Aluminum & Chemical Corporation case issued April 1976 is another example of FTC policy intending to promote competition. The FTC complaint in this case charged that Kaiser's acquisition of the Lavino Division of International Minerals and Chemical Corporation may have had the effect of substantially

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[73] Litton Industries, Inc., 82 FTC 794-798.

[74] Litton Industries, Inc., 82 FTC 1014-1017.

lessening competition or creating a monopoly in relevant markets. Further, the complaint alleged that the merger eliminated substantial competition between Kaiser and Lavino. The acquisition also increased the "already high levels of concentration in the relevant markets.[75]

Phase one antitrust cases opposed exclusive territorial franchise provisions contained in brewery agreements with distributors. In the Adolph Coors Company case the FTC opposed territorial franchise agreements, price fixing, and short-term termination agreements with distributors. This complaint was issued about one month before similar complaints were issued against the soft drink industry. The Coors Company was alleged in the complaint to have suggested both wholesale and retail prices to distributors. Both price fixing and territorial restraint provisions in the Coors agreement were maintained with agreements that allowed Coors to easily terminate a distributor's contract.[76]

Commissioner Dixon in the Coors case found that the alleged territorial restrictions did prevent interbrand competition. Dixon noted that in some instances limited territories may serve useful procompetitive functions. When territorial restrictions and price fixing exist together, as in the Coors Company beer distribution plan, there can be, however, no question that the plan is illegal.[77]

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[75] Kaiser Aluminum & Chemical Corp., 93 FTC 766-771.

[76] Adolph Coors Co., 83 FTC 32-37.

[77] Adolph Coors Co., 83 FTC 192-196.

Dixon found the Coors Company guilty of "anticompetitive abuse of the termination provisions" in their agreements with distributors.[78]

The shopping center cases were intended to improve competitive processes. Instead of focusing on competition in an entire industry, these cases looked at competitive conditions in a shopping center. These cases questioned the approval clause contained in agreements that gave tenants the right to approve and disapprove of new tenants, restricted the use of leased space by restricting price, quality, or nature of products sold; and gave a tenant exclusive right to operate certain kinds of businesses.[79]

The complaint in the Tyson's Corners case alleged that City Stores had acted to "suppress, restrict, hinder, lessen, prevent and foreclose competition in the resale and trade area." City Stores was claimed to have behaved uncompetitively by disapproving other tenants, limited floor space, and by exercising control over other businesses in the center. Discount stores were effectively excluded by provisions of this lease agreement.[80]

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[78] Adolph Coors Co., 83 FTC 211.

[79] Kenneth W. Clarkson, Timothy J. Muris, and Donald Martin, "Exclusionary Practices: Shopping Center Restrictive Covenants," The Federal Trade Commission Since 1970: Economic Regulation and Bureaucratic Behavior (Cambridge: Cambridge University Press, 1981), p. 142.

[80] Tyson Corner Regional Shopping Center, et al., 85 FTC 970-973.

Antitrust cases in phase one could be divided into two types. There were the innovative industry-wide cases such as Kellogg and Exxon. These cases intended to achieve desired economic results for the whole economy. They exemplified the use of economic analysis and aggressive antitrust enforcement. Other cases opposing monopoly and promoting competitive conditions continued antitrust policies from the 1960s. These cases were intended to promote the competitive process wherever remedial action was required. The Litton and Kaiser cases exemplify cases opposing anticompetitive conditions. The shopping center cases, while new to phase one, continued familiar policies of improving competitive conditions.

Phase Two--A Bold Antitrust Policy to Aid Consumers--1977-1981

The second identifiable phase of FTC antitrust policy spanned the period from 1977 to 1981. These were the years when Michael Pertschuk, a former general counsel to the Senate Commerce Committee, was FTC Chairman. Pertschuk was President Carter's choice to be FTC Chairman. The FTC reoriented antitrust policy while Pertschuk was chairman by allocating resources in antitrust enforcement to the sectors of the economy where consumers spent the most. The high inflation being experienced accentuated consumer problems, and Pertschuk's policies intended to minimize the effects of inflation on consumers.

Pertschuk's interest in making a substantial change in antitrust policy was expressed in a speech he gave to the New England Antitrust

Conference in Boston on November 18, 1977. Here, Pertschuk said he favored a policy of "boldness of enforcement" of antitrust laws. He singled out industries that "have the most direct or significant impact upon consumers" as needing special antitrust attention. Energy, health care, professional services, food, and transportation were mentioned as candidates for more antitrust investigation. Antitrust problems were to be resolved before mergers occurred. Pertschuk indicated he planned to use Section 5 of the FTC Act to deal with "incipient problems" and "the future structure, conduct and performance of industry."[81]

Pertschuk's views were reflected in the 1977 Annual Report which identified a new focus on "the three sectors of the economy that account for some of the largest categories of consumer expenditures."[82] In the 1979 Annual FTC Report, the commission assigned top priority to policy directed at sectors of the economy "most critical to consumers."[83] At various times between 1977 and 1981, the commission focused attention on energy, health care, transportation, food, clothing, and housing.[84] New cases were begun in all these areas, and important cases like Kellogg, Exxon, and Crush were continued in phase two.

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[81]"FTC Head to Press Antitrust Actions," New York Times, 19 Nov. 1977, p. 34, col. 1.

[82]1977 FTC Annual Report (Washington, D.C.: Government Printing Office, 1978), p. 1.

[83]1979 Annual FTC Report (Washington, D.C.: Government Printing Office, 1980), p. 1.

[84]1977-1980 FTC Annual Reports.

During phase two, the FTC began numerous cases intended to remedy problems in those sectors of the economy critical to consumers. While FTC cases were divided into the various areas of the economy critical to the consumer for budgetary purposes, traditional decisions opposing monopoly and promoting competitive conditions continued to be written. A number of cases begun in phase one were decided in phase two.

The Exxon case was the most important case in the energy sector of the economy in phase two. Limited staged discovery occurred in the Exxon litigation between 1977 and 1981.[85] An investigation was also conducted to determine if there was need for the FTC to establish a trade regulation rule requiring the major oil companies to divest themselves of pipelines.[86]

Health care was another important FTC antitrust priority between 1977 and 1981. The agency decided that the self-regulation of professions had in some instances gotten out of control to the extent that members' self-interests were prevailing "over the interests of the public."[87] A complaint had been issued against the American Medical Association December 19, 1975, during phase one, alleging that the American Medical Association had prevented or hindered members "soliciting business by advertising, engaging in price competition,

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[85] 1977 FTC Annual Report, p. 4.

[86] 1979 FTC Annual Report, p. 6.

[87] Howard, p. 82.

and otherwise engaging in competitive practices." These practices were charged to have effectively stabilized or fixed the prices paid physicians. Competition between medical doctors was "hindered, restrained, foreclosed and frustrated."[88]

Commissioner Clanton wrote the opinion in the American Medical Association case when it was decided in phase two. Clanton concluded, "a disdain for competition, not false or deceptive advertising, appears to be the sole motivation for suppressing promotional activities."[89] The American Medical Association's policy against advertising seriously affected competition among health care providers. Prepaid health care providers and other alternative providers were significantly affected since they "depend heavily on advertising to announce their existence and explain their programs."[90] The American Medical Association policy against advertising had, according to Clanton's opinion, "substantial adverse effects on competition."[91]

A similar FTC decision was made against the American Dental Association, September 6, 1979. In a complaint issued January 4, 1977, during phase one, the FTC charged the American Dental Association had imposed advertising restrictions. The final order in the case

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[88] American Medical Assoc., et al., 94 FTC 703-704.

[89] American Medical Assoc., et al., 94 FTC 1007.

[90] American Medical Assoc., et al., 94 FTC 1005-1006.

[91] American Medical Assoc., et al., 94 FTC 1007-1008.

contained the same prohibitions and requirements as the American Medical Association order.[92]

In a consent order, the FTC decided that relative value scales established by medical societies were anticompetitive. In a consent order agreed to April 17, 1979, the California Medical Association agreed to cease and desist from preparation and distribution of relative values scales. The relative value scale in question set forth "in non-monetary units comparative numerical values for procedures performed and services rendered by physicians and other health care providers." The non-monetary values set forth in the scale could then be converted to monetary fees by using a dollar conversion factor. The FTC alleged such relative value scales had the effect of "establishing, maintaining, or otherwise influencing the fees" that physicians and others in the health care industry charged."[93]

Consistent with the policy of scrutinizing areas of the economy that importantly and significantly affected consumers, there were several antitrust cases in the transportation sector of the economy during phase two. Fruehauf's acquisition of Kelsey-Hayes was questioned in one important case. The complaint in this case charged the acquisition was anticompetitive because a potential competitor in the heavy wheels market was eliminated. Since Fruehauf was the most vertically integrated truck trailer manufacturer in the U.S. with all the skills

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[92] American Dental Assoc., 93 FTC 403.

[93] California Medical Assoc., 93 FTC 520-523.

needed to produce heavy duty wheels, the FTC reasoned Fruehauf was a likely potential competitor of Kelsey-Hayes.[94]

Kelsey-Hayes also produced and sold approximately 30% of the domestic market in antiskid braking devices. The FTC complaint suggested the effect of the acquisition was to "lessen competition and tend to create a monopoly in heavy duty wheels, antiskid braking devices, and truck trailers." The complaint further alleged that potential competition was eliminated in the heavy duty wheels market, and barriers to entry raised in all these markets. The acquisition, the FTC charged, also strengthened the dominant position of Fruehauf in the truck trailer market.[95]

Commissioner Dixon's opinion in the Fruehauf case upheld most of the contentions made in the complaint. Dixon wrote, "a merger between a major customer and a major supplier may restrain competition in the market for the supplier's product." Such a merger increases concentration by "foreclosing competitors of the supplier from the possible patronage of the customer."[96] The potential competitor theory did not apply, however. The "preponderance of the evidence" failed to support the inference that Fruehauf was a potential competitor of Kelsey-Hayes in the heavy duty wheel market.[97] Dixon's decision required that Fruehauf divest itself of Kelsey-Hayes.[98]

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[94] Fruehauf Corp., Inc., 91 FTC 135-136.

[95] Fruehauf Corp., Inc., 91 FTC 138-139.

[96] Fruehauf Corp., Inc., 91 FTC 221-222.

[97] Fruehauf Corp., Inc., 91 FTC 237-238.

[98] Fruehauf Corp., Inc., 91 FTC 243-245.

There were other transportation cases. Standard Oil of Ohio was found guilty of anticompetitive business practices. Standard Oil was found to have used short-term dealer leases to induce dealers to carry specific brands of tires, batteries, and accessories sold by Sohio. Two roller bearing manufacturers were found to be involved in an illegal conspiracy to divide the market. Reuben H. Donnelly Corporation was required to refrain from abuses of monopoly power and to list commuter airlines in its Official Airline Guide, the only source of such information. Rate setting activities by a movers' association were found to be illegal. An investigation of competition in the auto industry was also initiated.[99]

The food industry was another one of the industries that Pertschuk's antitrust policies had singled out for attention. Antitrust efforts against this industry included continuing extensive hearings in the Kellogg case begun in the first phase.[100]

In a new action, an FTC complaint was filed objecting to an acquisition made by Sunkist Growers, Inc. Sunkist, a producer of citrus fruits, was accused of several acts that lessened competition and created monopoly. Through the company's various practices, Sunkist had succeeded in controlling at least 70% of the total supply of western citrus packed in California and Arizona. The effect of these

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[99] 1978 FTC Annual Report (Washington, D.C.: Government Printing Office, 1979), p. 6; 1979, pp. 4-5; 1980, pp. 7-8.

[100] 1977 FTC Annual Report, p. 5.

practices had been to "increase barriers to entry, or stabilize, control, hinder, lessen, foreclose, or restrain competition."[101]

Agricultural marketing orders issued by the Department of Agriculture were of interest to the FTC in phase two. These orders are intended to stabilize food prices by regulating the flow of agriculture goods to the marketplace. Although no cases were begun, the FTC staff considered alleging that agricultural market orders assisting citrus fruits and cranberries were anticompetitive.[102]

The FTC phase two policy of scrutinizing the food industry resulted in a case against Beatrice Foods. Beatrice was ordered to divest itself of Tropicana Products. Millions of dollars made in profits since the acquisition had to be surrendered to the government.[103]

Territorial franchises in the soft drink industry held by Coca Cola and Pepsico, Inc. were ended by FTC action.[104] A FTC complaint filed against the Central California Lettuce Producers was dismissed because the Capper-Volstead Act exempted agricultural cooperatives from antitrust action. Commenting on the intent of the Capper-Volstead Act, Commissioner Collier wrote, "Congress clearly intended that cooperatives provide farmer-members with a restricted license to

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[101] Sunkist Growers, Inc., 97 FTC 443-445.

[102] Alan Berlow, "Business Wants Congress to Limit Powers of Agency," Congressional Quarterly, 11 Aug. 1979, p. 1649.

[103] Michael J. Conlon, "Beatrice Foods Told to Divest Juice Company," Washington Post, 29 Nov. 1980, sec. C, p. 7, col. 5.

[104] 1978 FTC Annual Report, p. 4.

unify and balance their combined strength and information against the corporations with which they deal."[105]

Important FTC antitrust cases were brought in the clothing sector of the economy between 1977 and 1981. Levi Strauss agreed to a consent order agreeing among other things, to cease and desist attempting to control the price at which dealers could advertise their products. The agreement ended a surveillance program Levi Strauss had maintained over its dealers. Terms of the settlement prohibited Levi Strauss suggesting retail prices for five years.[106] Another important clothing case involved Interco Inc., the manufacturer of London Fog apparel and Florsheim Shoes. The consent agreement in this case required Interco not to suggest retail prices for three years.[107]

Housing was the final sector of the economy of concern to the FTC during the second phase. The Boise Cascade Corporation, et al. case was an important FTC proceeding. Boise Cascade and four other plywood manufacturers were charged with "establishing and maintaining a system of delivered prices based on computation of rail freight rates from the Pacific Northwest." The effect of these rail freight rates, the FTC alleged, was to stabilize prices and provide certainty in plywood pricing among competitors. The FTC further contended

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[105] Central California Lettuce Producers Cooperative, et al., 90 FTC 175-177.

[106] Levi Strauss & Co., 92 FTC 175-177.

[107] Carole Shifrin, "Apparel Company Signs Agreement to Not Fix Prices," Washington Post, 17 July 1978, sec. C, p. 7, col. 4.

fixed rates reduced and hindered actual and potential competition in the plywood industry. Disincentives were created to using the most efficient producing points. Rail freight rates discouraged use of the cheapest and most efficient mode of transportation. Discrimination between customers resulted.[108]

Commissioner Dixon's opinion in the Boise Cascade case conceded that many factors influenced southern plywood prices--housing starts, weather conditions, boxcar shortages, and strikes. West Coast freight rates were still, however, deemed to have stabilized "southern plywood prices at levels they would not otherwise have achieved."[109] Dixon ordered plywood manufacturers to cease and desist from using any method of freight rate calculation other than "the actual rate of freight applicable to a given sale or purchase."[110]

In another attempt to lower housing industry costs to the consumer the FTC petitioned the Commerce Department's Patent and Trademark Office to cancel the Formica Corporation's trademark on the name "Formica." The FTC contended that Formica had become a common name for decorative plastic laminate materials used for table and counter tops. Retaining Formica as a trademark results in customers asking

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[108] Boise Cascade Corp., 91 FTC 1-6.

[109] Boise Cascade Corp., 91 FTC 97-99.

[110] Boise Cascade Corp., 91 FTC 109-111.

for Formica, not knowing the name is a trademark, and being overcharged.[111]

Other housing industry cases included several anticompetitive acquisitions cases in the asphalt and tar roofing, fiberglass--reinforced plastic panels, cement, pest control, and home appliance industries. These acquisitions were declared to have anticompetitive results and were disallowed. Discriminatory practices in the sale of mobile home lots were questioned.[112]

Cases were, of course, decided that did not neatly fit into any one of these sectors of the economy during phase two. The decision in the Kaiser case, issued May 17, 1979, and written by Commissioner Dixon, is an example of an antimonopoly case brought under Section 7 of the Clayton Act and Section 5 of the FTC Act. Dixon found Kaiser guilty of "aggrandizing its already formidable market position in several highly concentrated markets and submarkets." The effect of the merger was to increase the level of concentration in the revelant markets. The final order in the case required Kaiser to divest all assets gained from the acquisition of the basic refractories division of the Lavino Division of International Minerals & Chemical Corporation.[113]

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[111] Judy Sarasohn, "House Panel Backs Formica Corp. in FTC Dispute," Congressional Quarterly, 19 May 1979, p. 973.

[112] 1978 FTC Annual Report, p. 5 and 1979, pp. 3-4.

[113] Kaiser Aluminum & Chemical Corp., 93 FTC 849-855.

The FTC attempted to make antitrust policy serve the consumers in phase two. The FTC antitrust budget was allocated to those sectors of the economy most significant to consumers. These included energy, health care, transportation, food, clothing, and housing. Important antitrust cases were brought in each of these sectors. The important industry-wide cases--Kellogg and Exxon--were continued in phase two. Not all antitrust decisions in phase two neatly fit into one of these consumer categories. Cases like the Kaiser case, begun in phase one, produced decisions in phase two that opposed monopolistic practices.

Phase Three--An Antitrust Policy Respectful of the Marketplace--1981-1983

The third phase of FTC antitrust policy began when David A. Clanton was appointed Acting Chairman by President Reagan in March 1981. James C. Miller was named FTC Chairman in June 1981. Phase three continued through 1983. Antitrust policy during phase three was directed at establishing a policy respectful of the market. In the preceding phase, antitrust policies were directed to consumers. This phase's policies were more based on the belief that an effectively functioning marketplace would produce the most good. Again antitrust policies became oriented toward stimulating business competition. Economic theories making antitrust violations more difficult to prove were utilized in phase three. The objectives of antitrust policy became to improve the economy with less government regulation, to improve competition, and to prevent unfair business practices. The objective of redistributing the social power of big business became less important.

Both the Exxon and the Kellogg cases were discontinued during phase three. The 1981 FTC Annual Report explained that the commission, instead of favoring industry-wide cases, now preferred "more precisely defined and manageable case enforcement activities where concrete benefits to competition and consumers could be achieved."[114] In a statement concerning the dismissal of the case, Commissioner Petschuk explained, "as it now stands, it (the Exxon case) cannot serve a useful public interest." The Exxon case, Pertschuk continued, had become "unmanageable" and "the case's progress had "slowed to a crawl." Pertschuk suggested that future cases should focus on a narrower set of issues.[115]

The Kellogg case was dismissed by Administrative Law Judge Alvin L. Berman. Berman found that the FTC complaint counsel had failed to prove the existence of a conspiracy within the RTE cereal industry.[116] The commission endorsed the administrative law judge's decision by refusing to review it. Members did, however, comment on it. Commissioner Clanton wrote that unless an industry evidences collusion or predatory behavior the FTC should take no action. The commission, Clanton contended, should not seek "dissolution of an industry on the basis of the cumulative effects of multifirm behavior." A better

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[114] 1981 FTC Annual Report (Washiington, D.C.: Government Printing Office, 1982), p. 1.

[115] Exxon Corp., et al., 98 FTC 459-463.

[116] Kellogg Co., et al., 99 FTC 269.

indication is needed that "market behavior under attack cannot be justified."[117] Clanton continued that affecting industry structure as recommended in the Kellogg complaint should not be tried "in less compelling circumstances" because such action "carries with it too great a risk of wrong or imperfect judgements."[118]

Commissioner Elizabeth Bailey stated that she normally did not consider industry restructuring a proper concern of the FTC. "Industry restructuring, such as proposed here," she said, "is essentially a legislative concern." The commission, she continued, should not involve itself in industry restructuring "without a clear supportive signal from Congress."[119]

Commissioner Pertschuk wrote a dissent to the Commission's decision not to hear an appeal in the Kellogg case. The dissent noted, "it cannot be ignored that this case has been controversial and that Congress has expressed concern about it." Pertschuk questioned the propriety of congressional intervention in the Kellogg case before it had run its course. The dissent indicated that the case might have succeeded if the commission had reviewed it. In his view, the complaint's "shared monopoly" theory that control of 80% of an industry was proof of a monopoly was well supported in antitrust theory. Pertschuk further indicated that in the wake of rejection of the shared monopoly

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[117] Kellogg Co., et al., 99 FTC 275.

[118] Kellogg Co., et al., 99 FTC 275.

[119] Kellogg Co., et al., 99 FTC 288-290.

theory Congress should "brace itself for the task of spelling out in careful, responsible legislation what government's role is in dealing with the problem of oligopoly."[120]

The commission dismissed the Crush case against the soft drink industry in 1981. Since the complaint in this case had been initiated, Congress had passed the Soft Drink Interbrand Competition Act.[121] The Crush complaint was set aside because interbrand competition legislation had been approved exempting the soft drink industry from antitrust action such as this.[122]

Not all the ambitious antitrust cases from earlier phases were dismissed in phase three, however. The Sunkist case begun in phase two was resolved when the company accepted a consent agreement in May 1981. Sunkist was to divest itself of its Arizona Products Division, establishing this division as a viable competitor, and to sell citrus to its acquirer for four years. Sunkist was prohibited from acquiring any new citrus packinghouses for the same period.[123]

But policy changes were underway in regard to the evaluation of mergers. One of the most important indication was the issuance of merger guidelines on horizontal mergers. In these guidelines, the FTC indicated when horizontal mergers would be considered illegal. This was the first time such guidelines had been issued by the

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[120] Kellogg Co., et al., 99 FTC 279-283.

[121] 94 Stat. 939, 15 U.S.C. 3501, 3502, 3503.

[122] Crush International Ltd., et al., 98 FTC 445-446.

[123] Sunkist Growers, Inc., 97 FTC 450-455.

commission. They utilized various economic indicies such as the Consumer Price Index. Under the new guidelines, the agency would oppose a horizontal merger only if the various economic indicies proved a significant harm to the economy would result from the merger.[124]

The significance of the economic theories employed by the commission in assessing mergers can be illustrated by a comparison of the Tenneco and Grand Union cases, both of which rested on the potential competitor doctrine. The Tenneco case begun in 1977 was concluded with a divestiture order in 1981, the only one issued in 1981 or 1982. It concerned Tenneco's acquisition of Monroe, a shock absorber manufacturer. According to the complaint, Tenneco, through its Walker Manufacturing Company, made and distributed a full line of exhaust systems parts, hydraulic and air jacks, steering dampers (a form of shock absorber), and other parts. In 1976, Tenneco announced an agreement to acquire Monroe, a company whose business consisted mostly of the production and sale of shock absorbers. When the plan was announced, Monroe's total sales of shock absorbers were 33% of the total industry shipments. Walker's sales were approximately 0.8%.[125]

The complaint observed that concentration was extremely high in "the sale of shock absorbers to the replacement market and independent

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[124]U.S. Congress, Senate, Judiciary Committee, Oversight of Government Merger Enforcement Policy, 97th Congress, 2nd sess. (Washington, D.C.: Government Printing Office, 1982), pp. 1-6.

[125]Tenneco, Inc., 98 FTC 465-470.

aftermarket." It alleged that the acquisition would "substantially lessen competition or tend to create a monopoly" because competition, actual and potential, between Tenneco and Monroe was eliminated. Monroe's strength in the domestic shock absorber market was strengthened and Tenneco was strengthened in the exhaust systems parts market.[126]

Commissioner Dixon's opinion held that Tenneco was a potential entrant into the replacement shock absorber market. "No other firm," the opinion concluded, "raised as a potential entrant in this proceeding shared the unique combination of capabilities, interest, and incentives which established Tenneco as both a potent and highly probable potential entrant into the shock absorber market."[127]

The Grand Union Company case concerned the merger of Grand Union and Colonial Stores, two supermarket chains. The administrative law judge found that the merger was illegal because potential competition was eliminated.[128] The commission came to a different conclusion and in the process enunciated an innovation in antitrust policy. It rejected the "all or nothing" nature of the potential competitor analysis. In the past, the FTC had rejected mergers between companies where "some competitive pressure" or "comparatively little competitive pressure" existed between them, as in Tenneco. More sophisticated economic analysis, the commission said, would reveal when competition was insignificant or de minimis and thus no bar to a merger. The

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[126] Tenneco, Inc., 98 FTC 472-473.

[127] Tenneco, Inc., 98 FTC 607.

[128] The Grand Union Co., et al., "FTC Complaints and Orders," Trade Regulation Reports (Chicago: Commerce Clearinghouse), p. 22,701.

key is "reliable estimates of elasticity of demand and supply." Demand price elasticity indicates how substantially the quantity of a good sold varies with changes in price, other factors remaining constant. Cross-elasticity is when demand for one good or service varies with a change of price of a second good or service. By using cross-elasticity analysis the FTC should be able to more exactly decide if two companies are potential competitors. When cross-elasticity analysis proves little competition, mergers should be allowed. Applying cross-elasticity analysis to the Grand Union-Colonial merger, the commission found no basis for rejecting it, a result quite different from that produced by application of the potential competitor doctrine as previously employed.[129]

Robinson-Patman cases, such as the Gillette Company case, were also resolved by the FTC in phase three. This case was significant because it evidenced interest in routine Robinson-Patman Act enforcement. Gillette had offered advertising allowances that only large stores using regular newspaper ads and advertising circulars could use. Gillette agreed in a consent settlement in 1983 to make advertising allowances available to small stores for alternative promotional plans.[130]

In phase three, antitrust policy rejected the ambitious industry-wide cases such as Kellogg and Exxon. Tenneco was the only ordered

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[129] The Grand Union Co., et al., pp. 22,702-703.

[130] Gillette Co., "FTC Complaints and Orders," Trade Regulation Reports (Chicago: Commerce Clearinghouse), p. 22,742.

divestiture in the first two years of phase two. Difficult standards were established by various cases for proving anticompetitive violations had occurred. Antitrust policy favored restricted legislation.

Conclusion

These, then, are the general objectives of antitrust policy and the three phases in FTC antitrust policy that have occurred between 1970 and 1983. Between those years, the FTC made policy decisions directed at all the major objectives of antitrust public policy. Each of the three phases discussed had a different emphasis in antitrust enforcement, resulting in different policy.

The first phase saw the FTC establish new priorities in response to many critics. At this time, industry-wide cases became important and to some extent policy was directed at agency survival. The second phase saw a bolder consumer oriented antitrust policy. Cases were selected from economic sectors deemed crucial to the consumers. The benefits consumers received from antitrust cases were supposedly strengthened by using this method of selection. The third phase brought more conservative policies. Policies again became business oriented and anticompetitive violations became more difficult to substantiate. Efforts were made to improve the economy by restricting the amount of government involvement with business. Several controversial cases, including Kellogg and Exxon ended unsuccessfully. New standards making competitive violations more difficult to prove were established. During phase three, few divestitures were ordered, and Robinson-Patman Act enforcement receives greater attention.

CHAPTER III

FTC CONSUMER POLICIES

The FTC attempts to assist the consumer in the marketplace with consumer cases and trade regulation rules. This chapter discusses FTC consumer policies much as the preceding chapter discussed antitrust policy. First, the general objectives of consumer policy are set forth. Second, the years between 1970 and 1983 are analyzed in terms of three distinct phases. Cases and trade regulation rules from each phase are used to differentiate these three phases.

To discuss consumer policies, a working definition is required. Krattenmaker identifies consumer protection measures as "those government efforts that directly preserve consumers' power to voice effectively and articulately their true desires in the marketplace." Consumer policies provide consumers with information, protect them from unscrupulous practices, and the like. Antitrust actions against anticompetitive mergers and discriminatory pricing where various other supply and demand pressures intervene before the consumer is affected are excluded from this definition.[1] Instead, this definition directs our attention to policies "whose impact is designed to fall precisely upon the consumer's role."[2]

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[1]Thomas G. Krattenmaker, "The FTC and Consumer Protection: An Institutional Overview," in Protecting Consumer Interests, ed. Robert N. Katz (Cambridge: Ballinger Publishing Company, 1976), p. 108.

[2]Krattenmaker, p. 108.

A broader definition of consumer policies could be used. The antitrust cases discussed in Chapter II sought to encourage competition and hence contained an aspect of consumer policy since they had as one objective keeping down the prices that consumers pay through competition. Such a broad definition is, however, "not frequently employed in common parlance," according to Krattenmaker. A definition of consumer policies this inclusive also "is not found in the average bureaucrat's lexicon."[3]

General Objectives of Consumer Policy

Krattenmaker identifies three general areas or objectives of consumer policy. First, the consumer must be fully informed.[4] Consumer information has been defended both as a right and as a necessity for a competitively organized market economy. Some have argued that "the right to information is basic and therefore justifies itself." Consumers, essentially, have the "right to know."[5]

More commonly, providing information to consumers is defended as "essential to the efficient operation of a competitively organized market economy." Since rationality in purchasing is necessary to "maximize one's own values," consumers need information. Without

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[3]Krattenmaker, pp. 107-108.

[4]Krattenmaker, pp. 108-109.

[5]Robert N. Mayer and Franceso M. Nicosia, "Consumer Information: Sources, Audiences, and Social Effects." in Protecting Consumer Interests, ed. Robert N. Katz (Cambridge: Ballinger Publishing Co., 1976), p. 48.

adequate information, firms offering the best values will not be rewarded with "intelligent dollar votes."[6] If marketplace mechanisms are to achieve an optimal distribution of resources, consumers must be adequately informed.

First, there are consumer policies directed to inform about "characteristics of the product offered for sale or the legal rights and duties that attend the purchase of consumer goods." Krattenmaker indicates history shows policies that assure customers are "neither uninformed nor misinformed" about products are necessary. Consumers must have adequate information about the goods being sold and about "the legal rights and duties attending the purchasing of consumer goods."[7]

Mayer and Nicosia have studied the consumer related activities of federal agencies. They found five different activities of federal agencies that could be described as involved with "the flow of information to consumers." Government agencies require certain information be made available to the public. That the information is accurate and not misleading is also ensured by agencies. Government produces and disseminates consumer information of its own. Special services are provided for groups such as the aged and non-English-speaking ethnic groups. Consumer education is provided by federal agencies.[8]

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[6]Mayer and Nicosia, p. 60.

[7]Krattenmaker, pp. 108-09.

[8]Mayer and Nicosia, p. 48.

Consumer information serves several functions. Prepurchase information is important in choosing goods and services. Postpurchase information can also significantly affect the consumer, providing important information about the efficiency with which products are used and the ability to maintain them so that they may last longer. Consumer information can also affect future decisions.[9]

Krattenmaker's second objective of consumer policy is to attempt to prevent sellers from imposing terms on buyers. The market model assumes that producers and sellers do not have "superior bargaining acumen, easier access to the general legal system, or greater knowledge of, or protection from existing rules of private law."[10] Practices that unfairly favor the seller are prohibited, such as deceptive advertising, fictitious pricing, bad credit reporting practices, pyramidal marketing plans, and bait-and-switch tactics. Policies are also directed at aiding children, the poor, and the elderly and others.

The third policy objective is to sometimes "put an external 'floor' on certain forms of competitive behavior." The social costs of millions of consumer decisions, according to Krattenmaker, may be so significant that government intervenes.[11] The marketplace is sometimes thought to allow consumers to "force out unsafe products" by not purchasing them. In fact, however, consumers are "at a

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[9]Mayer and Nicosia, pp. 61-63.

[10]Krattenmaker, pp. 108-109.

[11]Krattenmaker, pp. 108-109.

tremendous disadvantage in a marketplace." Consumer decisions cannot be depended upon to remove unsafe products.[12] Consumer policies are, instead, required to remove them from the marketplace.

Krattenmaker indicates there also may be risks associated with purchasing products that are acceptable "to the fully informed, intelligent buyers and evaluating their own self-interests," but that produce "unacceptably large social costs when millions of consumers decide to run those risks simultaneously." The possibility that children's sleepwear will catch fire may be very small; however, were many people to purchase this sleepwear, the risk of many children being burned would become unacceptably high. Government would then intervene with consumer policies to prevent the sale of such children's sleepwear.[13]

Consumer policies made by the commission between 1970 and 1983 were directed at all three objectives. At different times, the policy emphasis of the commission differed. These differences in emphasis can be observed by studying the three FTC policy phases in the 1970-83 period. All FTC policy during this period was, however, made within limits of agency authority established by Congress.

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[12]R. David Pittle, "The Consumer Product Safety Commission: Its Clout, Its Candor, and Its Challenge," in Protecting Consumer Interests, ed. Robert N. Katz (Cambridge: Ballinger Publishing Co., 1976), p. 133.

[13]Krattenmaker, pp. 108-109.

FTC Legislative Authority in Consumer Policy

The 1983 Wheeler-Lea Amendment to Section 5 of the FTC Act gave the agency its first direct authority in consumer affairs. This act made unlawful "unfair or deceptive acts or practices" that affected consumers, such as false or misleading advertising. Before passage of the amendment, Section 5 only prohibited unfair methods of competition. The purpose of the amendment was "to reach that business conduct which had a direct adverse impact upon the consumer."[14] It made the consumer injured by an unfair trade practice a concern of the FTC.[15] This amendment allowed the agency to more effectively provide consumers the information they need to make good decisions in the marketplace.

"False advertising" as defined by Wheeler-Lea was advertising, other than labeling, that was in a material sense false or misleading. Deceptive advertising could be prosecuted under the amendment without proving that competition had been restrained. The act did not allow consumer suits for either compensatory or punitive damages. An advertiser using a fraudulent ad can only be told to cease-and-desist. The Wheeler-Lea Amendment has no provisions for further punitive action by the FTC.[16]

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[14]Marshall C. Howard, Antitrust and Trade Regulation, Selected Issues and Case Studies (Englewood Cliffs, N.J.: Prentice-Hall, 1983), p. 213.

[15]Martin C. Schnitzer, Contemporary Government and Business Relations (Chicago: Rand McNally, 1978), p. 372.

[16]Schnitzer, p. 372.

Several statutes have given Congress the authority to formulate consumer policy in several product and service areas. Labeling statutes were passed for wool products in 1939, for fur products in 1951, and for textile fiber products in 1958. The FTC has the responsibility for issuing rules to enforce each of these acts.[17]

The FTC became responsible for the enforcement of several new statutes between 1970 to 1983. The Truth in Lending Act went into effect in 1970 "assuring a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[18] Full implementation of the Fair Packaging and Labeling Act also occurred requiring labels that enabled "consumers to obtain accurate information as to the quantity of the contents" facilitating "value comparisons."[19] Under provisions of this act more than 5,000 packages of consumer commodities were examined. Notice of noncompliance went to those responsible for 1,864 different packages in 1970.[20]

Other new legislation affected the commission. The Fair Credit Reporting Act became effective in 1972 to ensure that consumer credit reporting agencies exercise their "responsibilities with fairness, impartiality and a respect for the consumer's right to privacy."[21]

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[17] Howard, p. 214.

[18] 82 Stat. 146, 15 U.S.C. 1601.

[19] 80 Stat. 1296, 15 U.S.C. 1451.

[20] 1970 FTC Annual Report (Washington, D.C.: Government Printing Office, 1971), pp. 13-14.

[21] 84 Stat. 1128, 15 U.S.C. 1681.

The FTC was authorized by this law to protect consumers from credit agencies that were keeping some types of adverse information. This act also gave the FTC the ability to assist consumers in correcting erroneous information kept by credit agencies.[22] The Energy Policy and Conservation Act required the FTC to establish labeling standards identifying the energy consumption of different appliances.[23]

The 1975 Magnuson-Moss Warranty--Federal Trade Commission Improvement Act strengthened the FTC's ability to resolve consumer questions with rulemaking. Trade regulation rules could establish "unfair or deceptive acts or practices in or affecting commerce." The Magnuson-Moss Act further provided for rules to "define with specificity unfair or deceptive acts or practices," making Section 5 more explicit. The act established procedures for the FTC to use in formulating trade regulation rules.[24]

The FTC could make trade regulation rules before the Magnuson-Moss Act was passed. These rules, however, amounted to nothing more "than a declaration that a certain practice would be considered unfair or deceptive." Using pre-Magnuson-Moss rules the commission had to proceed with enforcement on a case by case basis.[25] The new act

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[22] 1972 FTC Annual Report (Washington, D.C.: Government Printing Office, 1973), p. 3.

[23] 89 Stat. 871, 42 U.S.C. 6294.

[24] Howard, p. 214.

[25] Alan Stone, Economic Regulatiion and the Public Interest (Ithaca, N.Y.: Cornell University Press, 1977), p. 71.

changed FTC consumer strategy by making trade regulation rules "the basic building blocks" of FTC consumer policy. As a result of implementation of this act, the FTC began making trade regulations at an accelerated rate.[26] The rulemaking provisions of Magnuson-Moss assisted the commission with all three of the objectives of consumer policy. Trade regulation rules allowed information to be more effectively provided for consumers, gave the commission the ability to better equalize the power of the buyer and seller in the marketplace, and facilitated the agency in removing unacceptable products from the marketplace.

The Magnuson-Moss Act contained several provisions for consumer warranties as well. The act required sellers to disclose the terms of a product's warranty before the sale. "Simple and readily understood language" was required for warranties. Manufacturers had to conspicuously designate if a warranty was a "limited" warranty or a "full" warranty. The act established certain minimum requirements for a full warranty.

The Magnuson-Moss Act improved the legal remedies that consumers can pursue for defective products.[27] Successful consumer plaintiffs can be reimbursed for both attorneys' fees and court costs.[28] The

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[26] 1975 FTC Annual Report (Washington, D.C.: Government Printing Office, 1968), pp. 19-21.

[27] George L. Priest, "Special Statutes: The Structure and Operation of the Magnuson-Moss Warranty Act," in The Federal Trade Commission Since 1970: Economic Regulation and Bureaucratic Behavior (Cambridge: Cambridge University Press, 1981), pp. 247-248.

[28] Priest, p. 254.

warranty provisions of the Magnuson-Moss Act strongly improved the consumer's position against the seller in the marketplace.

Until 1973, the FTC had responsibility for the Flammable Fabrics Act.[29] This act allowed the government to restrict the sale of fabrics when there was sufficient risk of fire. It was realized that without regulation, many consumers would take risks society finds unacceptable and purchase potentially dangerous fabrics. Government restricts the sale of flammable fabrics to eliminate the unacceptable risks from mass consumption decisions of consumers. The Flammable Fabrics Act is an example of legislation that allows government to put a floor under unacceptable competitive behavior.

Congress transferred the FTC's jurisdiction in flammable fabrics to the Consumer Products Safety Commission in 1973. The new commission took over the FTC's responsibilities in this area. FTC personnel that had been assigned to enforcing the Flammable Fabrics Act were transferred to the new commission at that time.[30]

The FTC's legal authority to make consumer policy is found in those statutes discussed in this section. Policy directed at all three of the objectives of consumer policy is possible with these statutes. Consumer statutes are more specific than antitrust legislation, and commission discretion in this policy area is less. There are, however, differences in how the FTC enforces consumer legislation.

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[29] 67 Stat. 1111, 15 U.S.C. 1191.

[30] 1973 FTC Annual Report (Washington, D.C.: Government Printing Office, 1974), p. 10.

The next section discusses how between 1970 and 1983, FTC consumer policy utilized these statutes in different ways.

Three Phases of FTC Consumer Policy

Consumer policies of the FTC do not always have the same emphasis. One can discern three definite phases of FTC consumer policies between 1970 and 1983 as depicted in Table 2. The first phase began following the American Bar Association and Nader Commission reports in 1970 and continued until 1977. Several steps were taken to rebuilt the public's confidence in the FTC as a consumer protection agency. There was a reorganization of the agency to expedite consumer cases and rulemaking. Innovative remedies were applied in advertising cases. Rulemaking became more important under the Magnuson-Moss Act. Cases were brought under the new Truth in Lending Act and Fair Packaging and Labeling Act. To a major extent in this phase consumer policy was directed toward the objectives of helping provide consumers enough information to make sound marketplace decisions and providing consumers the legal remedies to strengthen their position in the marketplace. In phase one, consumers were also protected from goods and services that were dangerous.

Phase two from 1977 to 1981 was a period of increased consumer activism. As in the antitrust area, cases were selected and rulemaking begun substantially on the basis of where consumers spent the most money. Trade regulation rules continued to grow in importance relative to case-by-case adjudication. Innovations in advertising case remedies

Table 2

Phases of FTC Consumer Policy
1970-1983

Phase One 1970-77	Priority Objectives: 1. Generally strengthening the consumer protection role of the commission. 2. Improving consumer information. Major Methods: 1. Reorganization of consumer protection functions. 2. Implementing new consumer protection functions. 3. Development of industry-wide trade regulation rules. 4. Application of innovative remedies in advertising cases. 5. Aggressive regulation.
Phase Two 1977-81	Priority Objectives: 1. Generally strengthening the consumer protection role of the commission. 2. Increasing consumer power in the marketplace. Major Methods: 1. Development of industry-wide trade regulation rules. 2. Further innovation in advertising case remedies. 3. Aggressive regulation.
Phase Three 1981-83	Priority Objectives: 1. Moderating the commission's role in consumer protection. 2. Placing greater reliance on the marketplace and the judgement of consumers for the protection of their interests. Major Methods: 1. Discontinuance of trade regulation rules. 2. Restrainted regulation.

continued. Consumer policies in this phase were aimed at the same objectives as in phase one except with greater determination.

Phase three, beginning in 1981 and continuing through 1983, saw the FTC less interested in actively asserting the interests of consumers through regulation. Controversial rulemakings begun during phase two were discontinued. Few new consumer protection cases were instituted. FTC consumer policies were concerned with giving consumers basic, truthful information. The emphasis in advertising cases was on providing consumers enough information to make marketplace decisions. No longer did the commission insist on advertising substantiation. Phase three found the FTC pursuing less actively than before all three of the objectives of consumer policy.

Before looking at these three phases, FTC consumer policies in the 1960s when Paul Rand Dixon was chairman should be described. The 1963 FTC Annual Report identified the purpose of the agency as helping "reputable businessmen maintain a free, fair, and honest marketplace for the ultimate benefit of the consumer."[31] Much, although not all, FTC consumer policy was made on a case-by-case basis in the 1960s. The 1968 FTC Annual Report explained that the commission used Industry Guides when a problem could be resolved with "clear understanding of the law's requirements." When the agency needed to take firmer action, trade regulation rules that could be relied upon in prosecuting cases were approved. When possible, formal assurances

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[31] 1963 FTC Annual Report (Washington, D.C.: Government Printing Office, 1964), p. 1.

that illegal actions would be discontinued were accepted. Formal orders were utilized only when the commission was confronted with "hard-core violations."[32]

Tackling consumer problems on a case-by-case basis produced numerous interesting cases. One of the most famous of these cases was the Colgate-Palmolive Company case. The complaint in this case, issued January 8, 1960, objected to a Colgate-Palmolive advertisement intending to show Rapid Shave could shave sandpaper. The advertisement in question used sand on glass or plexiglass to simulate sandpaper in place of authentic sandpaper.[33]

Commissioner Philip Elman's December 19, 1961, decision in the case concluded that the ad created a deceptive impression. Elman defined the responsibility of the commission in deceptive advertising cases to be "protecting the trusting as well as the sophisticated, the casual as well as the vigilant, the naive as well as the sophisticated." Colgate-Palmolive was found guilty of false, misleading, and deceptive advertising.[34]

The Montgomery Ward case decided July 26, 1966, was concerned with warranties. Montgomery Ward was alleged to have sold automotive equipment, including remanufactured engines and shock absorbers, by advertising that the products were unconditionally guaranteed. These

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[32] 1968 FTC Annual Report (Washington, D.C.: Government Printing Office, 1969), pp. 2-3.

[33] Colgate-Palmolive Co., et al., 59 FTC 1452-1454.

[34] Colgate-Palmolive Co., et al., 59 FTC 1460-1464.

guarantees proved to be subject to limitations and conditions.[35] Commissioner Mary Gardner Jones held that the advertisement implied an unconditional warranty and thus was deceptive.[36]

The bait and switch cases from the 1960s were also good examples of the case-by-case approach to consumer problems. In the Household Sewing Machine case, the FTC found Household guilty of bait and switch practices. Salesmen for Household Sewing Machine called on customers, showing them an old sewing machine in bad condition and saying this was the advertised machine. Next prospective buyers were presented with a higher priced sewing machine in superior condition, effectively disparaging the advertised product. Thus, Household frequently did discourage the advertised sewing machine and was able to sell a more expensive sewing machine.[37]

The FTC in the 1960s also evidenced other concerns with the plight of the consumer, especially those consumers in the Washington, D.C. area. A far ranging series of hearings on consumer problems was held in November and December 1968. These hearings called witnesses including various spokesmen from government, the consumer movement, business, and universities.[38] The announced purpose of the hearings

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[35] Montgomery Ward & Co., Inc., 70 FTC 52-54.

[36] Montgomery Ward & Co., Inc., 70 FTC 68.

[37] Household Sewing Machine Co., Inc., et al., 76 FTC 209-210.

[38] "Consumer Agency of Frauds Sought," New York Times, 14 Nov. 1968, p. 47, col. 1; "FTC Hears Appeal on Consumer Help," New York Times, 23 Nov. 1968, p. 34, col. 4; "Retail Unit Says Business Can Protect the Consumer," New York Times, 3 Dec. 1968, p. 22, col. 6; "Educate U.S. Consumer, FTC Urged," Washington Post, 14 Nov. 1968, sec. A, p. 26, col. 5.

was to reach "a more informed decision as to what further action the commission may take in the consumer protection field."[39]

In the 1960s, FTC consumer policies tried to assist the businessman and keep the marketplace honest. Industry guides, trade regulation rules, and cases were all used. Cases such as Colgate-Palmolive, Montgomery Ward, and Household Sewing Machine assisted the agency in establishing consumer policy on a case-by-case basis.

The American Bar Association report concluded that FTC efforts to remedy marketing frauds against consumers had been inadequate. Those efforts were described as "piecemeal" and lacking "study and planning." The American Bar Association report even accused the FTC of being more concerned with protecting competitors practicing deception than with helping consumers.[40] The report noted the commission was failing to put the bite into deceptive advertising enforcement bringing only about seven false advertising cases each year.[41] Deceptive labeling enforcement was found to be dominated by trivial cases because the commission relied exclusively on requests by mail for these cases.[42]

The Nader report also found that the FTC was not aggressive in initiating consumer complaints.[43] This report found the FTC to be

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[39]John D. Morris, "FTC Opens Consumer Study Disavowing 'Antibusiness Show,'" New York Times, 13 Nov. 1968, p. 59, col. 2.

[40]Report of the ABA Commission to Study the FTC (Chicago: American Bar Association, 1969), p. 37.

[41]Report of the ABA Commission to Study the FTC, p. 43.

[42]Report of the ABA Commission to Study the FTC, p. 39.

[43]Edward F. Cox, Robert C. Fellmuth, and John E. Schultz, "The Nader Report" on the FTC (New York: Baron, 1969), pp. 39-43.

weak at requesting either new consumer legislation or more appropriations, possibly because the commission's consumer protection record was not very strong.[44] The FTC's extensive use of voluntary enforcement tools was further criticized by the Nader report.[45]

In the late 1960s, these two critical reports appeared and began to raise questions about the commission's policies. More attention began to be given to what the FTC should be doing but was not.

Phase One--Increasing Consumers' Faith in the Marketplace--1970-1977

During the phase from 1970 to 1977, the major emphasis of FTC policy was to increase the consumer's faith in the marketplace. Under pressure from critics, the commission tried to expedite the handling of consumer complaints. New methods of choosing consumer cases were introduced. Trade regulation rules were issued to improve the consumer's position in the marketplace. Innovative remedies were begun in advertising cases. Generally, the FTC was improved as a consumer protection agency in phase one. Casper Weinberger served as FTC chairman for seven months at the beginning of phase one before taking another position in the Nixon administration. While at the FTC, Weinberger emerged as "an advocate of strong regulatory policies to enforce consumers' rights in the marketplace."[46]

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[44] Cox, Fellmuth, and Schultz, pp. 88-92.

[45] Cox, Fellmuth, and Schultz, pp. 61-70.

[46] John D. Morris, "FTC Shows Spirit of Toughness under New Chief," New York Times, 2 March 1970, p. 19, col. 1.

While Weinberger was FTC chairman, his most important accomplishment in consumer policy was the reorganization of the FTC. This reorganization made the commission more effective in aiding consumer causes. He abolished the Bureaus of Restraint of Trade, Deceptive Practices, Field Operations, Textiles and Furs, and Industry Guidance. The Bureau of Consumer Protection replaced these bureaus. Weinberger explained that his reorganization plan was intended to "expedite" complaints, to remove several bureaucratic "layers of review and analysis," and to "increase the consumer's faith in the marketplace."[47] After this reorganization, a single officer, the Director of the Bureau of Consumer Protection, was fully responsible for the administation of the FTC consumer action, whether it be a proceeding by rule-making or adjudication.[48]

Weinberger also added much to the method of analysis used in selecting consumer cases. Since the FTC had been criticized by the American Bar Association report, he chose a method of case selection that made the case selection decision more easily defensible. The 1970 FTC Annual Report explained that possible cases were studied from several standpoints. Cases were considered because of the danger to the public health or safety; how many consumers were adversely affected; whether any particular segment (the poor, the elderly, the retired) was more affected than others; and what magnitude of economic loss

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[47]David Vienna, "Shakeup Ordered at FTC," Washington Post, 9 June 1970, sec. A, p. 1, col. 1.

[48]1970 FTC Annual Report, p. 1.

was being incurred. Evaluating cases in this way, the FTC decided whether commission resources shold be committed to pursuing a matter.[49] This new method of case selection can be contrasted with case selection in the 1960s. In the 1967 FTC Annual Report, the commission described screening "both old and new to give priority to the most significant."[50] After 1970, case selection decisions were more defensible and used more exact standards.

Succeeding FTC chairmen also contributed ideas about how consumer cases should be selected. Miles Kirkpatrick, like his predecessor, favored a revitalized FTC. After becoming FTC chairman, he expressed the belief that "the FTC will become increasingly a factor to be reckoned with in the days ahead."[51] Under his leadership, the FTC continued analyzing cases in terms of the number and kinds of consumers affected, potential economic and social loss, geographical dispersion, and probable effectiveness of a commission order. Kirkpatrick's method of case selection placed more emphasis on the probable success of FTC action than had Weinberger's. In this way, Kirkpatrick hoped to make "rational choices among the many competing demands" and to achieve "maximum return for each invested tax dollar."[52]

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[49] 1970 FTC Annual Report, p. 1.

[50] 1967 FTC Annual Report (Washington, D.C.: Government Printing Office, 1968), p. 2.

[51] Yale Bozen, "Advertising, the Consumer and Inflation," Vital Speeches, 38, No. 11 (15 March 1972), p. 356.

[52] 1972 FTC Annual Report (Wastington, D.C.: Government Printing Office, 1973), p. 2.

The Bureau of Economics was given a larger role in devising consumer policy while Calvin J. Collier was FTC chairman. Economic impact statements for all planned trade regulation rules were prepared by the Bureau of Economics. Collier relied more on formal economic analysis from within the bureaucracy than his predecessors. These analyses provided information about the social costs and benefits of policy altneratives.[53]

Several important trade regulation rules were promulgated by the FTC during this period. Trade regulation rules issued after January 1975 had to be formulated according to the procedures established by the Magnuson-Moss Act. Phase one rules had two basic objectives, to provide the consumer with better information with which to make marketplace decisions and to improve the consumer's ability to deal reasonably with the seller.

The Guides for Private Vocational and Home Study Schools, promulgated May 16, 1972, intended to protect consumers' interests in these study programs. This rule covered privately owned schools that offer residence or correspondence study but do not offer at least a two year program of accredited college level studies acceptable toward a bachelor's degree. It aimed to prevent deceptive claims about the accredition of these schools, their facilities, services, and instructors' qualifications. Enrollment qualifications or limitations could not be misrepresented. The use of terms such as "diploma,"

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[53] 1976 FTC Annual Report (Washington, D.C.: Government Printing Office, 1975), p. 21.

"degree," and "certification" were considered deceptive unless such a degree had been approved by the appropriate state educational agency or a nationally recognized accrediting agency.

The rule banned certain types of advertising and deceptive sales and pricing practices. Information had to be provided about the school's policy for make-up work, requirements for additional texts and equipment, and use of school facilities. Some description of the placement services had to be provided.[54]

The FTC promulgated the Use of Negative Option Plans by Sellers in Commerce Rule February 22, 1973. Sales practices that significantly disadvantaged the consumer were prohibited. Negative option plans were prohibited unless they complied with certain requirements. Buyers could not be required to turn down or receive a monthly selection unless the terms of the sales plan were conspicuously disclosed. The seller was required to provide the buyer adequate and timely notification before sending any selection. Sellers using a negative option plan were obliged to accept and credit any returned selection. The sellers were also obliged to guarantee buyers postage to return merchandise. When circumstances existed that made it impossible for the seller to provide the agreed to goods, the seller was obliged to notify the buyer. The buyer then had to be given certain options.

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[54] Code of Federal Regulation (Washington, D.C.: Government Printing Office, 1983), vol. XVI, part 254, pp. 103-108.

After completing his contract, the buyer was provided the opportunity to request the seller discontinue him from the plan.[55]

There were several other trade regulation rules promulgated by the FTC in phase one. These rules either better informed the consumer or allowed him new legal remedies. The FTC produced rules about amplifiers for home entertainment products, decorative wall paneling, household furniture, wigs, feather and down products, testimonial advertising, and the book industry. Rules were produced by the agency that further elaborated the Fair Packaging and Labeling Act, and the Fair Credit and Reporting Act.[56] A trade regulation rule was promulgated in 1971 requiring minimum octane ratings be posted; however, several gasoline trade associations challenged the rule in U.S. District Court succeeding in preventing the rule taking effect.[57]

In addition to accelerated rulemaking a major emphasis on consumer policy in this phase was to apply innovative remedies in consumer protection cases. Several new requirements were first developed during this time.[58] Some of the innovation may have come from

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[55] Code of Federal Regulations (Washington, D.C.: Government Printing Office, 1983), vol. XVI, part 425, pp. 229-231.

[56] Code of Federal Regulations (Washington, D.C.: Government Printing Office, 1983), vol. XVI.

[57] U.S. Congress, House, Interstate and Foreign Commerce, Energy and Power Subcommittee, Petroleum Marketing Practices, 95th Congress, 1st sess. (Washington, D.C.: Government Printing Office, 1977), p. 255.

[58] Stone, p. 174.

Kirkpatrick's liking of "novel and imaginative legal twists" that effectively increased the FTC's power in advertising cases.[59]

Corrective advertising was one of the new remedies tried in phase one.[60] In some instances, the FTC ordered companies to spend a percentage of their advertising budget for corrective advertising. Corrective advertising was called the FTC's "scarlet letter" punishment.[61] It was seen as rebuilding public confidence in the FTC.

A good example of a corrective advertising case is the ITT Continental Baking Company case. The advertising campaign that resulted in this FTC order had advertised Profile Bread and had recommended the Profile Bread Plan to lose weight. The weight conscious customer had been advised to eat two slices of Profile bread before lunch and dinner to help curb the appetite. The FTC alleged the ads in question were "false, misleading, and deceptive" as defined by the FTC Act.[62]

Having conducted surveys of consumer attitudes toward Profile bread, ITT had reason to believe its ads were deceptive. Erroneous and mistaken beliefs learned in these ads misled consumers into purchasing substantial quantities of bread. The FTC claimed the advertising in question had caused "prejudice and injury to the public" and to Profile's competitors.[63]

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[59] Bozen, p. 356.

[60] Stone, p. 174.

[61] Bozen, p. 356.

[62] ITT Continental Baking Co., Inc., et al., 79 FTC 248-251.

[63] ITT Continental Baking Co., Inc., et al., 79 FTC 251-252.

ITT Continental Baking was ordered to cease and desist disseminating these deceptive ads. The FTC further ordered the company not to advertise Profile bread for one year unless conditions imposed by the FTC were met. The FTC required that 25% of the expenditure for each media in each market be devoted to corrective advertising.[64] Corrective advertising was required to effectively remove any misimpressions left with the public by the original advertising.

Ocean Spray Cranberries is another interesting and illustrative corrective advertising case. Ocean Spray had advertised that cranberry juice had more food energy than other beverages. The complaint alleged, in fact, that both "orange and tomato juices are nutritionally and economically more suitable for use at breakfast than cranberry juice." The complaint continued that while Ocean Spray has more calories (the measure of food energy) than orange or tomato juice, Ocean Spray contained a "substantially smaller variety and quantity" of nutrients. The calories that Ocean Spray does have, the complaint specified, are derived from "sugar and other added sweeteners."

The FTC further objected to Ocean Spray advertising its product as a juice. The complaint indicated that Ocean Spray "is not a juice and is diluted with water so that the predominant ingredient is added water." The complaint alleged these various advertising claims constituted "false advertisement." The result of these ads, the complaint specified, was prejudice and injury to the public and Ocean Spray's competitors. These ads were thus "unfair methods of competition."[65]

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[64] ITT Continental Baking Co., Inc., et al., 79 FTC 254-255.

[65] Ocean Spray Cranberries, Inc., et al., 80 FTC 975-980.

The FTC order in this case required that Ocean Spray cease and desist and provide corrective advertising. Either one in every four ads or 25% of Ocean Spray's media expenses had to be directed at correcting erroneous information from previous ads.[66]

The Pfizer Inc. case, decided July 11, 1972, began another new advertising requirement--substantiation. Advertising substantiation was a major policy innovation because the advertiser was required to anticipate that proof of his advertising claims would be required. This case involved Un-Burn, a sunburn treatment. Pfizer, in its advertisement for Un-Burn, made claims concerning the product's ability to quickly relieve sunburn pain. The FTC decided that the claims made for Un-Burn were unsubstantiated. The case is a significant one because in this case the FTC resolved the basic issue in the advertising substantiation doctrine, that an affirmative product claim made without "a reasonable basis" is "an unfair practice in violation of the FTC Act."[67]

In writing the Pfizer opinion, Commissioner Kirkpatrick observed that products were becoming highly complex and technical in nature. These products are such that the consumer cannot "ascertain the truthfulness of affirmative product claims prior to buying and using the product." Detailed investigation by consumers is impractical, and consumers can often not determine the validity of product claims.

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[66] Ocean Spray Cranberries, Inc., et al., 80 FTC 981-983.

[67] Pfizer, Inc., 81 FTC 73-74.

This argument, in and of itself, is innovative because it suggests the complexity of modern products requires consumers be provided product information. Usually, providing the consumer with information is justified because the consumer needs information in the marketplace to make reasonable decisions. The Pfizer complaint argued the consumer needs information because of the disequality of power between buyer and seller. Given the "imbalance of knowledge and resources between a business enterprise and each of its customers," it is an unfair market practice to make claims about products without first substantiating those claims. The consumer, "as a matter of marketplace fairness," is entitled to rely upon the manufacturer having a "reasonable basis" for making a claim.[68]

Substantiation of advertisement was also a major issue in the National Commission on Egg Nutrition case, decided July 20, 1976. In this case, several positive, scientific claims made by the National Commission on Egg Nutrition on behalf of the egg were questioned. The FTC alleged the National Commission on Egg Nutrition's nutritional claims were false.[69]

Commissioner Dixon refused to allow the National Commission on Egg Nutrition to claim that First Amendment rights to free speech protected their advertisement.[70] The National Commission on Egg Nutrition's advertisements were deceptive because they indicated the

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[68] Pfizer, Inc., 81 FTC 61-63.

[69] National Commission on Egg Nutrition, et al., 88 FTC 95-96.

[70] National Commission on Egg Nutrition, et al., 88 FTC 177-179, 195-201.

consumer need not review any other evidence about eggs. The consumer should make his decision after reviewing all the evidence available on eggs.[71] Using the designation "national commission" was found to be sufficiently deceptive to require a clarifying disclosure.[72] The organization was required to stop making false claims about the positive effects of consuming dietary cholesterol or eggs."[73]

Phase one saw the FTC reorganized to improve the commission as a consumer protection agency. Improved methods of case selection were introduced to more effectively utilize the agency's resources. Numerous trade regulation rules were approved to require better information for the consumer and to help equalize the consumer's power in the marketplace. New policies for corrective advertising and advertising substantiation were developed.

Phase Two--Consumer Activism--
1977-1981

A second phase in FTC consumer policies can be identified between 1977 and 1981. Consumer policies at the FTC during phase two attempted to more aggressively reach and assist the consumer. Budget decisions began to be made on the basis of how consumers spent their dollars. Industry-wide consumer investigations were conducted. Trade regulation rules became more important. Substantiation and corrective advertising continued to be required. FTC cases enforced the new consumer statutes

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[71] National Commission on Egg Nutrition, et al., 88 FTC 186-187.

[72] National Commission on Egg Nutrition, et al., 88 FTC 187-190.

[73] National Commission on Egg Nutrition, et al., 88 FTC 203-205.

enacted in phase one. Pertschuk oriented the FTC toward "activism" in consumer affairs with these consumer policies.[74]

In phase two, the FTC began making budget allocation decisions so that the agency's expenditures were divided as consumers divided their personal expenditures.. As in the antitrust area, the emphasis was placed on the energy, health care, transportation, food, clothing, and housing sectors. Decisions about new and continuing cases and rulemaking were analyzed in terms of these six areas.[75]

The FTC began the new budgeting method for perhaps two reasons. First, the commission was concerned with the high level of inflation present in the country. The 1978 Annual Report of the FTC explained that consumer protection efforts were directed to "where inflation has done the most damage to the consumer's pocketbook."[76] Second, the agency changed its budgeting procedure because of Pertschuk himself. Pertschuk described his position as FTC Chairman as "the fulfillment of an adult fantasy to lead the FTC as a legion in the consumer crusade."[77]

The agency did not, however, take on a total consumer orientation, despite all the innovations and the bold rhetoric. Some of the factors that restrained the decisions of the commission in earlier decades

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[74]Karen DeWitt, "Commission Embroiled in New Activism," New York Times, 3 Dec. 1978, p. 4, col. 5.

[75]1978 FTC Annual Report (Washington, D.C.: Government Printing Office, 1979), pp. 3-7.

[76]1978 FTC Annual Report, p. 1.

[77]Michael Pertschuk, Revolt Against Regulation, The Rise and Pause of the Consumer Movement (Berkeley: University of California Press, 1982), p. 1.

still affected policy making. According to Pertschuk, the FTC of the seventies" was still sharply constrained in its consumer initiatives by its instinctive deference to the privileged--and essential--role of business in our economy."[78]

Several industry-wide consumer investigations were conducted by the FTC during phase two. Investigations of this type were important in gathering information useful to the commission in decisions about cases and rulemaking. In some instances, what was learned in FTC investigations was either made available to Congress or to the public. A major investigation was begun into "the structure, conduct and performance of the automobile industry."[79] Other investigations were conducted into the adequacy of cost information to prospective life insurance purchasers; the possibility of prohibiting the non-substitution of generic drugs; abusive practices in auto repair, travel, home insulation, and the nursing home industries; the usefulness of test preparation services; and buying clubs.[80]

The FTC began an industry-wide investigation of advertising directed toward children in 1977. This came to be known as the "Kid-Vid" controversy. To many, this investigation epitomized the agency's increased activism and involvement with consumer problems. A rulemaking procedure to ban advertisements of highly sugared products to audiences

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[78] Pertschuk, pp. 55-56.

[79] 1978 FTC Annual Report (Washington, D.C.: Government Printing Office, 1980), p. 6.

[80] 1977 FTC Annual Report (Washington, D.C.: Government Printing Office, 1979), p. 1.

comprised of a high percentage of children was suggested as a result of this investigation. The FTC alleged that such advertising encouraged children to consume sugared products harmful to their health.[81] The Washington Post, somewhat outrageously, suggested the FTC be called the "national nanny" for this investigation.[82]

Many trade regulation rulemakings were begun based upon the Magnuson-Moss Act authority. Trade regulation rules became more important as means for enunciating consumer protection policy during phase two and individual cases became less important.[83]

Implementation of the Magnuson-Moss Act continued as the "dominant focus of law enforcement efforts" in consumer protection during phase two.[84] The 1978 Annual Report of the FTC explained that rules were promulgated "only where market failure or abuses were industry-wide, and only in the simplest, least burdensome and most market-oriented fashion."[85]

Trade regulations rules were made in some of the sectors of the economy the commission had identified for special attention. In the energy area, rules were promulgated to provide consumers more information. The Rules for Using Energy Costs and Consumption Information

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[81]Alan Barlows, "Business Wants Congress to Limit Powers of Agency," Congressional Quarterly, 11 Aug. 1979, p. 1649.

[82]"The FTC as National Nanny," Washington Post, 1 March 1978, sec. A, p. 22, col. 1.

[83]1978 Annual Report of the FTC, pp. 3-7.

[84]1977 Annual Report of the FTC, p. 1.

[85]1978 Annual Report of the FTC, pp. 12-13.

Used in Labeling and Advertising for Consumer Appliances Under the Energy Policy and Conservation Act were approved November 19, 1979.

This rule required consumer appliances to be labeled with estimated annual energy costs, energy efficiency ratings, and related information. Energy information had to be supplied in printed matter displayed or distributed with products and in catalog descriptions. Labels were required specifying energy consumption, energy efficiency, or energy cost. Advertising also had to mention energy consumption, energy efficiency, or the cost of energy consumed by consumer appliance products. Refrigerators, freezers, dishwashers, water heaters, room air conditioners, clothes washers, and furnaces were covered by this rule. The FTC designed the prototype label that was to be used for appliance energy labeling. Testing procedures were established and penalties established for not labeling appliances.[86]

The Octane Posting and Certification Rule was another phase two industry-wide energy related trade regulation rule that sought better information for the consumer. This rule, promulgated March 30, 1979, required that octane ratings be posted on gasoline pumps. A testing method for determining octane was established. Refiners, importers, and producers were required to use the test method. The retailer was required to post labels conspicuously on each gasoline dispenser. The

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[86] Code of Federal Regulations, 1983 (Washington, D.C.: Government Printing Office, 1983), vol. XVI, part 456, pp. 172-183.

rule specified the precise layout and type styles to be used in the label.[87]

In the health care sector of the economy, the FTC issued a trade regulation rule on Advertising of Ophthalmic Goods and Services on June 2, 1978. This rule forbade reducing, limiting, or burdening the dissemination of information on ophthalmic goods and services. Restrictions on advertising these goods and services by state or local government entities were prohibited. One of the purposes of the rule was to allow the dissemination of information about ophthalmic services "in a fair and nondeceptive manner to prospective purchasers."[88] This rule significantly changed the amount of information consumers had available in purchasing opthalmic goods and services.

Other trade regulation rules issued in phase two fit neatly into none of the important sectors of economy the commission had identified. The Proprietary Vocational and Home Study Schools Rule, approved December 28, 1978, is an example. This rule was an extension of a similar rule approved in phase one. One of the consumer policy's objectives is to attempt to improve marketplace decisions of consumers via better information. This rule was intended to assure that prospective students in vocational and home study schools had sufficient information before choosing among educational plans. Vocational and home study schools were required to include information with their

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[87] Code of Federal Regulations, 1983, vol. XVI, pp. 198-201.

[88] Code of Federal Regulations, 1983, vol XVI, pp. 280-283.

enrollment, about cancelling the contract, and about getting a refund. Disclosure of the school's graduation rate and placement rate was also required. Information about the number and percentage of graduates earning different gross salaries had to be provided, and substantiation was required for any specific general job or earnings claim.[89]

Consistent with the increased importance of rulemaking following the Magnuson-Moss Act, many other trade regulation rules were approved during phase two. In the housing sector, there were three rules, a home insulation rule, a nursery industry rule, and a mirror industry rule. In the clothing area a metallic watch band industry rule and a hosiery rule were approved. A luggage industry rule and a rebuilt automotive parts industry rule were promulgated in the travel sector of the economy.[90]

In advertising cases, the substantiation standards established in phase one continued in use in phase two. Corrective advertising requirements also continued to be imposed. Additionally in phase two, the FTC began requiring that advertisers make affirmative disclosures of characteristics consumers should know about products, including potentially harmful ingredients.

The Porter & Dietsch case is a good example of a phase two consumer case that required both advertising substantiation and affirmative

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[89] Code of Federal Regulations, 1983, vol. XVI, pp. 253-262.

[90] Code of Federal Regulations, 1983, vol. XVI.

disclosures. Porter & Dietsch, an advertising agency, "prepared and placed for publication advertising material" for X-11 tablets, a weight reduction plan.[91] The FTC complaint alleged that Porter and Dietsch's advertising contained misleading, deceptive and, thus, false advertising. The complaint asserted that the consuming public was misled by false claims about X-11 tablets into buying "substantial quantities" of X-11 tablets.[92]

X-11 tablets could not produce weight loss unless diet was restricted. Each box of tablets contained a diet that was highly restrictive of calories and choice of foods. For weight loss to occur, the consumer had to adhere to this diet plan. There was "no reasonable basis" to conclude that substantial weight loss would occur without the diet plan.[93]

Other important disclosures should also have been made. The advertising did not specify that people with high blood pressure, heart disease, diabetes or thyroid disease should not use the product unless they consulted a physician. There was no disclosure in the advertising of the highly restricted caloric diet.[94]

Commissioner Collier, in writing his opinion, focused on whether there was reasonable substantiation for the advertising at the time

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[91] Porter & Dietsch, Inc., et al., 90 FTC 771-775.

[92] Porter & Dietsch, Inc., et al., 90 FTC 775-776.

[93] Porter & Dietsch, Inc., et al., 90 FTC 775-776.

[94] Porter & Dietsch, Inc., et al., 90 FTC 775-776.

the advertisements were made. Porter & Dietsch produced some studies conducted after the ads in question were disseminated, but no studies were completed before the time the ads first appeared. Collier concluded there was no reasonable basis for belief in advertising claims when the advertisement were disseminated. Affirmative disclosure of the potential hazards to health were required in the FTC order as was disclosure of the diet plan that accompanied the X-11 tablets.[95]

There were FTC cases about consumer credit practices in phase two. The Equifax case is an important case that examined a consumer credit reporting firm's illegal credit practices. This case determined questions about the use of unfair, false, misleading, and deceptive practices in consumer credit investigation and reporting.

Equifax was charged with gathering information under false pretenses. Clients were falsely informed that Equifax conducted thorough in-person interviews with friends, neighbors, and associates of the consumer. Such interviews were only conducted over the phone. Unsolicited follow-up credit reports were sent to Equifax's customers. The FTC alleged the follow-up reports were illegal under the Fair Credit Reporting Act. The Fair Credit Reporting Act was also violated by Equifax's practice of reporting information more than seven years old.

"Maximum possible accuracy" of information was not assured by Equifax. The Fair Credit Reporting Act required that a credit reporting service adopt reasonable procedures to ensure the accuracy of their

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[95] Porter & Dietsch, Inc., et al., 90 FTC 884-889.

reports. Credit information was not disclosed as required to the consumer. Equifax refused to reinvestigate disputed information. The consumer was not told that he had the right to require the credit agency to provide each previous recepient with a statement prepared by the consumer.[96]

Commissioner Pertschuk concurred with the administrative law judge's initial decision against Equifax.[97] The administrative law judge concluded that Equifax's practices were "to the prejudice and injury of the public," were "unfair and deceptive acts and practices, and unfair methods of competition" in violation of the FTC Act. Equifax was found guilty of violating the Fair Credit Reporting Act.[98] Equifax was required to cease and desist and to bring its practices up to the standards of the Fair Credit Reporting Act.[99]

In phase two, FTC consumer policy became significantly more activist as the agency began allocating funds to cases in a manner that corresponded to the way in which consumers spent their dollars. Pertschuk went much further than his predecessor in transforming the agency into a consumer protection agency, making more use of trade regulation rules to establish industry-wide consumer standards. Advertising cases continued requiring advertising substantiation and

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[96] Equifax, 96 FTC 844-853.

[97] Equifax, 96 FTC 1111-1112.

[98] Equifax, 96 FTC 1034.

[99] Equifax, 96 FTC 1111-1115.

corrective advertising. The FTC began examining advertisements for affirmative disclosures in phase two. Consumers received more information and had their legal rights in the marketplace protected with FTC cases. Together these policy changes produced a FTC much more actively involved with consumer problems than the FTC had been during phase one.

Phase Three--A Consumer Policy Favoring Less Regulation--1981-1983

A third phase in FTC consumer policy began in 1981. In March 1981, David Clanton became Acting FTC Chairman, to be succeeded by James C. Miller in June 1981. During this third phase, FTC consumer policies were less oriented toward consumers. Controversial rulemakings begun during phase two were discontinued, and few new complaints were issued. Basically, those consumer cases that were decided suggested a reluctance to go beyond providing consumers with truthful information. The FTC's lack of interest in active consumer regulation in phase three stands in definite contrast to the activism of phase two. Commenting on the FTC's lack of aggressiveness in the period after he stepped down, Pertschuk said the agency had been seized by "the slows."[100]

After becoming chairman, Miller, a former economics professor, indicated "a great appreciation for the marketplace," recognized the need for some regulatory relief, and generally suggested that he adhered to more conservative ideas than many of his predecessors.[101]

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[100] Pertschuk, p. 1.

[101] Karen DeWitt, "Nominee as FTC Head," New York Times, 27 June 1981, p. 29, col. 4.

Miller described his own administration of the FTC as "inclined less toward bold new dimensions than toward making sure that the FTC carries out the law well and makes the programs work well."[102]

Several new ideas influenced consumer policies during this third phase. The new FTC chairman made known that he looked less favorable on industry-wide regulation.[103] Chairman Miller further indicated that he did not favor the FTC's advertising substantiation program because the doctrine prevented the consumer from learning useful product information.[104] Advertising substantiation required advertisers to scientifically prove product claims before advertising the claims. Miller thought an adequate amount of information about products more important than advertising substantiation.[105] Timothy Muris, Director of the FTC's Consumer Protection Bureau, suggested "truthful and useful information" was being suppressed by ad substantiation.[106] Miller set out to get more information from various groups about the effect of advertising credibility in hopes of improving the FTC's ad substantiation program.[107] He intended to improve ad substantiation

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[102]Miller, p. 614.

[103]"Nominee Cites Plans for FTC," New York Times, 25 July 1981, p. 29, col. 6.

[104]Michael deCourcy Hinds, "New Chairman of Trade Panel Asks Rule Shift," New York Times, 27 Oct. 1981, p. 1, col. 4.

[105]Michael deCourcy Hinds, "Agency Critics Seeking Sign of FTC Direction," New York Times, 5 April 1982, sec. D, p. 1, col. 4.

[106]Muris, pp. 630-631.

[107]James C. Miller, "Luncheon Address," Antitrust Law Journal, 51 (1982), p. 613.

by distinguishing between "performance claims which require substantiation, and subjective claims, which do not."[108] This signaled an increasing reluctance to require advertising substantiation.

Consumer policy in phase three was importantly shaped by rule-making decisions. The "Kid-Vid" controversy, begun during the second phase, was ended in phase three. The commission staff came to oppose the investigation into children's advertising, claiming the only effective remedy was banning ads, a step dismissed as impractical.[109] The staff recommended that the "Kid-Vid" rulemaking proceeding be discontinued, and it was in September 1981.[110]

In phase three, the FTC agreed to a trade regulation rule requiring used car dealers to list the major known defects in used cars. This rule was consistent with the basic phase three policy of providing the consumer with adequate and truthful information. The Used Motor Vehicle Trade Regulation Rule required that a dealer attach a sticker to used cars sold, stating the major known defects and informing the customer if there was, or was not, a warranty.[111] Using provisions of the 1980 FTC Authorization Act, both House and Senate passed

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[108] Miller, p. 615.

[109] A.O. Sulzberger, "A Bleak Mood Prevades FTC," New York Times, 26 May 1981, sec. D, p. 1, col. 5.

[110] Robert D. Hershey, Jr., "Reagan's Antitrust Explosion," New York Times, 10 Jan. 1982, sec. III, p. 1, col. 2.

[111] "FTC Rule on Used Car Sales Provides First Major Test of Congress' Veto Power," Congressional Quarterly, 7 Nov. 1981, p. 2180.

vetoes of the Used Motor Vehicle Trade Regulation Rule preventing it from being put into effect.[112]

The FTC approved the Funeral Industry Practices Rule on September 24, 1982. This rule provided consumers adequate information about funerals, and required funeral directors to provide price information about each of the funeral goods and services used in disposal of human bodies. Persons inquiring about funerals had to be furnished information about the price of embalming, transportation of remains, use of facilities, caskets, outer burial containers, immediate burials, and direct cremations.

Funeral providers were further required to furnish price information for funeral goods and services over the telephone. Printed or typed price lists had to be given to people who inquired in person about funeral arrangements or services. A different price list had to be provided for caskets and outer burial containers. This trade regulation rule further specified certain information that needed to be included in these price lists and the format used for price lists.

Various misrepresentations were also identified. A funeral provider could not claim that a state or local law required embalming when the law did not. The funeral provider was required to disclose that embalming was not required. To represent that a casket was required for cremation was made a deceptive practice. Failing to disclose that outer burial containers were not required by state law was not allowed.

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[112]Judy Sarasohn, "FTC's Car Rule Falls Victim to First Congressional Veto," Congressional Quarterly, 29 May 1982, p. 1259.

The funeral rule made requiring a casket other than an unfinished wood box for direct cremation an unfair practice or deceptive act. The providing of some funeral services could not be conditional on providing other services. Various restrictions were placed on goods and services provided without prior family approval.[113]

A trade regulation rule concerning the care labeling of wearing apparel was also approved in phase three. This rule required care instructions describe regular care procedures for wearing apparel. This rule made not disclosing regular care procedures to a purchaser an unfair or deceptive act or practice.[114]

Cases were also of some importance in phase three. The basic truthfulness of advertising was an important subject of FTC action between 1981 and 1983. The Kroger case, decided September 25, 1981, is an important phase three deceptive advertising case. This case questioned the validity of Kroger's price comparison ads. The emphasis placed on the consumer receiving basic truthful information to make good consumer decisions gave this case policy significance.

Kroger conducted price surveys represented to the consumer as the "Kroger Price Patrol." The results of this price survey were advertised to show the number of Kroger's prices that were "lower than" and "higher than" competitors prices. This advertising implied

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[113] Code of Federal Regulations, 1983, vol. XVI, part 453, pp. 273-280.

[114] Code of Federal Regulations, 1984, vol. XVI, part 423, pp. 234-289.

that the Price Patrol Survey was a methodologically sound survey when, in fact, this was not the case. In fact, Price Patrol advertisements did not disclose that meat, produce, and house brands were not included in the price survey.[115]

Commissioner David Clanton's opinion in the case concluded these surveyes were inadequate for Kroger's advertising claims because of "the systematic exclusion of certain categories of products to which the survey results were generalized." Also Kroger did not adequately ensure that those who selected the sample survey were not in a position to bias the results.[116]

A dissenting opinion in the Kroger case, was written by Commissioner Patricia Bailey. The dissent indicated,"I fear the majority opinion will chill the development of useful comparative price advertising." Comparative price advertising is "extremely useful to the public," particularly "in times of high inflation." While the majority feared consumers lacked the ability to understand a survey such as this, the dissent concluded "daily grocery shoppers are at least as capable as business executives" in evaluating surveys like the Price Patrol.[117]

In a case against Volkswagen of America, the FTC held that the automobile company was guilty of unfair and deceptive practices because of an incorrect warning statement in the owner's manual.

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[115] The Kroger Co., 98 FTC 639-642.

[116] The Kroger Co., 98 FTC 745-746.

[117] The Kroger Co., 98 FTC 769-772.

This was a significant consumer case because the issue of the disequality of buyer and seller was clearly defined. The FTC disapproved of a Volkswagen automobile owner's manual containing erroneous information. In this case, settled by a consent order on May 24, 1982, Volkswagen was held responsible for diesel engine damage that resulted from an erroneous warning statement in the automobile owner's manual.

In the owner's manual for 1977-1980 model year vehicles, Volkswagen recommended the owner should change the oil filter by hand. The owner's manual instructed the owner not to use a wrench to tighten the filter. Volkswagen however, sent revised, contradictory installation instructions sent to dealers for changing these oil filters.

When an unusual number of Volkswagens and Audis equipped with diesel engines sold after 1977 experienced oil filter leaks resulting in costly engine problems, Volkswagen failed to notify owners of the likelihood of oil filter leaks and revise installation instructions. Volkswagen customers continued to pay for engine repairs because Volkswagen did not disclose the new oil filter installation instructions.[118]

Volkswagen agreed to include a careful warning about the dangers of improperly installed oil filters in owners' manuals subsequent to 1982. Compensation was offered to owners of 1977-81 Volkswagens and

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[118] Volkswagen of America, Inc., 99 FTC 446-448.

Audis for engine damage due to oil filter leaks. A search of warranty complaints for the names and addresses of owners who had complained about and not received reimbursement for diesel engine oil filter leaks was required.[119]

A plan for nationwide arbitration was agreed to in a consent settlement with General Motors in phase three. This case is similar to the Volkswagen case in that the FTC's concern is the disequality that exists between buyer and seller. General Motors agreed to establish such an arbitration plan to resolve owners' complaints about engine and transmission failures. This consent settlement resolved a 1980 FTC complaint alleging General Motors had failed "to notify customers of serious problems or defects."[120]

The consent settlement enabled General Motors customers who had unsatisfied complaints about engine or transmission problems to contact the nearest Better Business Bureau and "arrange for a hearing with an impartial, trained, volunteer arbitrator." This hearing was to be held within 60 days at the customer's convenience. Customers were allowed to bring witnesses, including their own mechanics, to substantiate their claims. General Motors was required by the consent order to mail notices to all customers having complaints informing them of the arbitration program.[121]

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[119] Volkswagen of America, Inc., 99 FTC 449-455.

[120] General Motors Corp., "FTC Complaints and Orders," Trade Regulation Reports (Chicago: Commerce Clearinghouse), p. 22,590.

[121] General Motors Corp., p. 22,590.

In another phase three unfair and deceptive marketing case, the FTC found AMREP Corporation guilty of misrepresenting land values. This case again was a case where the FTC objected to the consumer not being provided enough information to make a good market decision. AMREP, sellers of undeveloped land, represented their lots as "excellent, low-risk investments." The FTC found instead that there was very probably no local demand for the land in question, only a limited resale market, and that there would be no resale market "until well into the 21st century, if ever."[122] The order in the case required AMREP to cease and desist from making these claims and allowed provisions for buyers to obtain restitution.[123]

Conclusion

Consumer policies have been directed at informing the consumer, preventing a seller from imposing terms on the buyer, and putting a floor under unacceptable market conditions. The FTC's consumer policy at any one time was some mix of these policy objectives. Especially the first two of these objectives were important in each of the three phases of consumer policy discussed in this chapter. The determination and method the agency used to achieve the objectives did, however, vary from phase to phase between 1970 and 1983.

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[122] AMREP, "FTC Complaints and Orders," Trade Regulation Reports (Chicago: Commerce Clearinghouse), p. 22,798.

[123] AMREP, p. 22,833.

In the first phase, there was a reorganization of the agency to facilitate effective handling of consumer cases and rulemakings. Substantiation of advertising was required, and in some instances decisions called for corrective advertising. New types of cases were begun as the agency began enforcing the Truth in Lending Act and the Fair Packaging and Labeling Act.

The second phase saw the FTC's purpose redefined as a consumer agency. Consumer expenditures were used to guide the way in which the commission allocated funds for cases and rulemakings. More extensive use of trade regulation rules gave the agency the opportunity to involve itself as never before in industry-wide consumer policy making. Advertising substantiation and corrective advertising continued, and affirmative disclosure requirements for advertising were begun.

The third phase saw a return to more conservative policies. Controversial rulemakings that had been begun during phase two were discontinued. The FTC indicated its disinterest in consumer protection in phase three by initiating few new cases. The elaborate concern with advertising substantiation that had been present in earlier phases was no longer important. Consumer cases and rulemakings in phase three were instead concerned with providing consumers with adequate information for marketplace decisions.

CHAPTER IV

CONGRESS INFLUENCES THE FTC

Members of Congress continually express interest in FTC Policies. Motivated by concern for political survival, interest in congressional politics, allocation of resources, constituent interests, and the like, congressmen try in various ways to influence FTC decisions. Congressmen have numerous opportunities to attempt to influence FTC policy making. Agency funding requests and nominations are subject to approval. Legislation can be proposed changing the FTC's authority. Oversight hearings can be held. Since a legislative veto of FTC actions was approved in 1980, resolutions can be introduced disapproving of FTC policy.

Some efforts within Congress are intended to express congressmen's policy interests. Other actions are designed to result in decisions that directly restrict or instruct the commission. In the following chapter, the success of both kinds of efforts will be analyzed and evaluated.

Several congressional committees have jurisdiction over the FTC. The appropriations and authorization committees are important throughout the years between 1970 and 1983 in both House and Senate. Some of the most important controversies about the commission occur in these committees. Appropriations requests are reviewed by the Senate Appropriations Committee and the House Appropriations Committee. Authorization legislation may

be reviewed in different committees although the most important authorization committee in the Senate is the Senate Commerce, Science, and Transportation Committee formerly the Senate Commerce Committee. In the House most FTC authorizing legislation is reviewed by the House Energy and Commerce Committee, a successor committee to the House Interstate and Foreign Commerce Committee.

The Senate Judiciary Committee contributes to FTC Policy making by reviewing proposed legislation concerning antitrust and overseeing the commission's antitrust function. The House Judiciary Committee performs a similar function in the House. Energy policy, of much recent interest, has been reviewed by the Senate Energy and Natural Resources Committee. Before this committee was organized in the 96th Congress, the Senate Interior Committee performed this same function. The House Interior and Insular Affairs Committee has shared responsibility for energy policy in the House.

The leadership of most of these committees has changed over the years of this study. In the Senate, when the Republicans gained the majority in 1980 all the committee chairmen changed, of course. House committee leadership has changed over the years, too. There have, however, been some important congressmen who have held control of these influential committees for many years. Senator Warren Magnuson (D., Washington) controlled the Senate Commerce Committee for many of the years of this study. Senator Henry Jackson (D., Washington) was in charge of the Senate Energy and Commerce Committee for all but two of the Congresses between

1970 and 1983. In the House, Republican Peter Rodino (D., New Jersey), chairman of the House Judiciary Committee, and Republican Harley Staggers (D., West Virginia), chairman of the House Interstate and Foreign Commerce Committee, were influential in FTC Policy making for many years as chairmen of their respective committees. Tables 3 and 4 more completely illustrate the important Senate and House committees affecting FTC Policy and their leadership.

Before congressional efforts to influence antitrust and consumer policy are analyzed during the three phases utilized in Chapters II and III, it would be appropriate to describe relations between Congress and the agency at the end of the 1960s. There was considerable congressional criticism of the FTC following the release of the American Bar Association report and the Nader report. The American Bar Association report, according to Kovacic, "became a congressionally accepted standard for measuring the commission's antitrust performance."[1] Senator Edward Kennedy (D., Massachusetts), chairman of the Senate Judiciary Subcommittee on Administrative Practices and Procedures, emphasized this point during an FTC oversight hearing the day the American Bar Association report appeared. Sen. Kennedy indicated that the problems identified

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[1]William E. Kovacic, "The FTC and Congressional Oversight of Antitrust Enforcement," Tulsa Law Review, 20, No. 5 (1982), p. 630.

Table 3

Important FTC Senate Committees[a]

Senate Appropriations Committee	Chairman Richard Russell, 91st (D., Georgia) Allen J. Ellender, 92nd (D., Louisiana) John L. McClellan, 93rd-95th (D., Arkansas) Warren Magnuson, 96th (D., Washington) Mark O. Hatfield, 97th-98th (R., Oregon) Ranking Minority Member Milton Young, 91st-96th (R., North Dakota) William Proxmire, 97th (D., Wisconsin) John Stennis, 98th (D., Mississippi)
Senate Commerce Committee[b]	Chairman Warren Magnuson, 91st-95th (D., Washington) Howard Cannon, 96th (D., Nevada) Bob Packwood, 97th-98th (R., Oregon) Ranking Minority Member Norris Cotton, 91st-93rd (R., New Hampshire) James Pearson, 94th-95th (R., Kansas) Bob Packwood, 96th (R., Oregon) Howard Cannon, 97th (D., Nevada) Ernest F. Hollings, 98th (D., South Carolina)
Senate Judiciary Committee	Chairman James Eastland, 91st-95th (D., Mississippi) Edward Kennedy, 96th (D., Massachusetts) Strom Thurmond, 97th-98th (R., South Carolina) Ranking Minority Member Roman Hruska, 91st-94th (R., Nebraska) Strom Thurmond, 95th-96th (R., South Carolina) Joseph R. Biden, 97th-98th (D., Delaware)

Table 3 (Continued)

Senate Interior Committee[c]	Chairman Henry Jackson, 91th-96th (D., Washington) James McClure, 97th-98th (R., Idaho) Ranking Minority Member Gordon Allot, 91st-92nd (D., Colorado) Paul Fannin, 93rd-94th (R., Arizona) Clifford Hansen, 95th (R., Wyoming) Mark Hatfield, 96th (R., Oregon) Henry Jackson, 97th (D., Washington) J. Bennett Johnston, 98th (D., Louisiana)

[a]Official Congressional Directory, 91st-98th Congresses (Washington, D.C.: U.S. Government Printing Office).

[b]From the 95th Congress, the Senate Commerce, Science, and Transportation Committee.

[c]From the 96th Congress, the Senate Energy and Natural Resources Committee.

Table 4

Important FTC House Committees[a]

House Appropriations Committee	Chairman George Mahon, 91st-95th (D., Texas) Jamie Whitten, 96th-98th (D., Mississippi) Ranking Minority Member Frank Bow, 91st-92nd (R., Ohio) Elford Cederberg, 93rd-95th (R., Michigan) Silvio Conte, 96th-98th (R., Massachusetts)
House Interstate and Foreign Commerce Committee[b]	Chairman Harley Staggers, 91st-96th (D., West Virginia) John Dingell, 97th-98th (D., Michigan) Ranking Minority Member William Springer, 91st-92nd (R., Illinois) Samuel Devine, 93 d-96th (R., Ohio) James Broyhill, 97th-98th (R., North Carolina)
House Judiciary Committee	Committee Chairman Emmanuel Celler, 91st-92nd (D., New York) Peter Rodino, 93rd-98th (D., New Jersey) Ranking Minority Member William McCulloch, 91st-92nd (R., Ohio) Edward Hutchinson, 93rd-94th (R., Michigan) Robert McClory, 95th-97th (R., Illinois) Hamilton Fish, Jr., 98th (R., New York)

Table 4 (Continued)

House Interior and Insular Affairs Committee	Committee Chairman Wayne Aspinall, 91st-92nd (D., Colorado) James Haley, 93rd-94th (D., Florida) Morris Udall, 95th-98th (D., Arizona) Ranking Minority Member John Saylor, 91st-93rd (R., Pennsylvania) Joe Skubitz, 94th-95th (R., Kansas) Don Clausen, 96th (R., California) Manuel Lujun, 97th-98th (R., New Mexico)

[a]Official Congressional Directory, 91st-98th Congress.

[b]From the 97th Congress, the House Energy and Commerce Committee.

in the American Bar Assocation report had been exposed before and that the time had come to do something about them or consider abolishing the agency.[2]

There were also congressional reactions to the Nader report. Republican Joe C. Evins (D., Tennessee) asked Dixon to comment on the Nader study. Dixon chose to enter a prepared statement about it in the proceedings. In his statement, Dixon referred to the FTC study as a Nader group's "1968 summer vacation 'smear' project." Dixon especially objected to the study's failure to refer to a single positive accomplishment of the FTC.[3] This was not the only congressional reaction to the two critical studies. For several years, as various committees evaluated the FTC's work, reference was made to these two reports.

The FTC had not been immune from congressional ire before the issuance of these critical studies. The cigarette health warning label controversy is an example of the tense relations that sometimes developed. Legislation was approved in 1965 that required a mild health warning on cigarette packages and that prohibited government agency regulation of the cigarette industry.[4] In May 1969, at about the end of this legislation's authority,

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[2]Kovacic, p. 631.

[3]U.S. Congress, House, Appropriations Subcommittee, Independent Offices and Department of Housing and Urban Development Appropriations Bill, 1970, 91st Congress, 1st session. (Washington, D.C.: Government Printing Office, 1969), pp. 379-383.

[4]A. Lee Fritschler, Smoking and Politics, Policymaking and the Federal Bureaucracy (Englewood, Cliffs, N.J.: Prentice-Hall, 1975), p. 38.

the FTC issued a notice that rulemaking would be held to devise more forceful health warnings for cigarette packages and advertising. These rulemaking hearings were to begin July 1, 1969.[5] Before the end of May 1969, the House Interstate and Foreign Commerce Committee reported a bill to prevent federal regulatory agencies issuing rules against cigarette advertising.

The bill reported was a six year extension of the 1965 Federal Cigarette Labeling and Advertising Act.[6] The legislation that finally emerged from conference committee, strengthened the health warnings on cigarette packages.[7] Furthermore the FTC had to give Congress six months' notice before beginning any rulemaking concerning cigarettes.[8]

Phase One--1970-1977

The FTC appeared to devise policy responsive to its various critics including congressional critics during Phase One. The agency was encouraged by Congress to become a more aggressive, efficient, and effective regulator. Few congressmen opposed a more vigorous FTC, at least on the record. However, several particular agency initiatives drew congressional fire.

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[5]Fritschler, pp. 161-162.

[6]79 Stat. 282, 15 U.S.C., pp. 1331-1339.

[7]"Cigarette Labeling," Congressional Quarterly, 13 June 1969, p. 1026.

[8]Fritschler, pp. 161-166.

General Direction

Throughout phase one Congress tried in various ways to encourage the FTC to revitalize and improve its policy efforts. This encouragement sometimes took the form of suggestions and criticisms, and in some instances praise. Throughout phase one, the Congress closely followed the changes that were taking place at the FTC.

When Casper Weinberger appeared before the Senate Appropriations Subcommittee shortly after becoming chairman in 1970, Senator John Pastore (D., Rhode Island) asked about the "caustic and critical appraisal made of the FTC" by the American Bar Association report that had recently appeared. More specifically, he was asked about the "conscientiousness of the personnel" at the FTC. Senator Pastore indicated his concern with the FTC's new policy directions by asking if the conditions identified by the American Bar Associatoin report had been "ameliorated." Weinberger responded that the FTC was working to correct the conditions cited by the American Bar Association.[9]

The Senate Commerce Committee held oversight hearings in May 1974 that further evidenced real congressional interest in the reforms begun at the FTC. The committee questioned FTC Chairman Engman about the agency's policies, and encouraged the commission

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[9]U.S. Congress, Senate, Appropriations Subcommittee, Hearings On Independent Offices Appropriations, 91st Congress, 2nd session. (Washington, D.C.: Government Printing Office, 1970), p. 487.

in the new efforts recently begun. Senator Frank Moss (D., Utah) indiciated he was pleased the FTC had begun to more fully utilize the powers Congress had granted the agency.[10]

All congressional comment on the FTC in phase one was not favorable, however. In 1974, a House Commerce Subcommittee headed by John E. Moss (D., California) produced a report that was critical of the agency. The agency was accused of lacking strong leadership and of not being a strong consumer protector. With rapidly increasing consumer prices, the Moss Subcommittee report found the FTC should have increased its output of consumer actions.[11] It accused the FTC of making fewer investigations, bringing fewer cases, and issuing fewer rules despite a steadily growing staff.[12] This report indicated that the commission received too many directives from Congress. Further, the committee report found that inconsistent congressional direction produced confusion at the FTC. The report particularly cited conflicting advise given the commission by appropriations committees as a cause of ineffective policy.[13]

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[10]U.S. Congress, Senate, FTC Oversight, 93rd Congress, 2nd session. (Washington, D.C.: Government Printing Office, 1974), pp. 292-299.

[11]"Report on Oil Firms," Congressional Quarterly, 14 July 1973, p. 1893.

[12]"A Study Says FTC Fails the Consumer," New York Times, 4 November 1974, p. 10, col. 4.

[13]David Burnham, "FTC Criticized in Panel Report," New York Times, 11 November 1974, p. 17, col. 1.

Even with criticism such as this, congressional attitude toward the agency during phase one was, overall, favorable. This can be seen in how Congress, until about 1976, was primarily supportive of FTC appropriations requests. In 1975, forty-five senators sponsored legislation that intended a more than double the amount of money allocated for antitrust enforcement. This action, taken predominantly by liberal Democrats, was indicative of the support that FTC received during these years.[14] Between 1969 and 1976, the agency "attained perhaps its greatest level of congressional respect." Increased respect for the agency was reflected in an FTC appropriation that more than doubled.[15]

This legislation would also create a special three year authorization for antitrust and more than double the funds received for antitrust by the FTC. The amendment authorized the hiring of 25 additional staff members at "supergrade" salary levels." This legislation was approved by the Senate by a voice vote December 12, 1975. No further action was taken on the bill.[16]

Congress sometimes rewarded the agency's innovations with praise, too. In October 1976, the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign

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[14]"Pressure Building for New Antitrust Laws," Congressional Quarterly, 12 July 1975, p. 1487.

[15]Kovacic, p. 652.

[16]"Antitrust Legislation," 1975 Congressional Quarterly Almanac (Washington, D.C.: Congressional Quarterly, Inc., 1976), pp. 577-579.

Commerce praised the FTC by describing the FTC as "one of the more effective regulatory agencies" with "the potential to make major contributions to curb inflation and to increase consumer protection."[17] This report differed substantially with the 1974 House Commerce Subcommittee report that found the commission's consumer policies weak. The new report on the FTC explained that the agency had again become effective because since the FTC's reorganization in the early 1970's the agency had been "able to attract well qualified professionals."[18]

The report noted the FTC had "made progress in allocating its resources according to degree of importance."[19] Certain inherent tensions between the FTC and public acceptance of the agency were still found. The commission's dual role as prosecutor and judge, the report concluded, reduced the FTC's "credibility, status, and effectiveness."[20] In regard to investigation such as Exxon, the study concluded the agency was correct in bringing "cases that cover a whole range of possibly anti-competitive practices

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[17]U.S. Congress, House, Interstate and Foreign Commerce Committee, Oversight and Investigation Subcommittee, Federal Regulatory Reform, p. 11.

[18]U.S. Congress, House, Interstate and Foreign Commerce Committee, Oversight and Investigation Subcommittee, Federal Regulation and Regulatory Reform, p. 11.

[19]U.S. Congress, House, Interstate and Foreign Commerce Committee, Oversight and Investigation Subcommittee, Federal Regulation and Regulatory Reform, p. 61.

[20]U.S. Congress, House, Interstate and Foreign Commerce Committee, Oversight and Investigation Subcommittee, Federal Regulation and Regulatory Reform, p. 74.

within an entire industry." The report did, however, indicate that the structure and rules of the FTC "severely hampered" prosecution of such cases.[21]

This study found that more rulemaking would "enhance the commission's effectiveness." The "critical question" the report identified in rulemaking was "the choice of target industries and consumer problems." It found the Bureau of Consumer Protection to be seriously deficient in failing "to plan where future resources should be placed."[22]

Despite the favorable evaluation of the agency, several commission deficiencies were identified. The length of time antitrust cases were delayed was one such deficiency. Failure of the Bureau of Consumer Protection to make adequate use of rulemaking in its work was another. Difficulty in obtaining information from corporations without protracted litigation, not using the power of injunction effectively, off-the-record meetings with prospective respondents, possible conflict of interest in certain cases because of employees' former positions, and the commission's

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[21]U.S. Congress, House, Interstate and Foreign Commerce Committee, Oversight and Investigation Subcommittee, Federal Regulation and Regulatory Reform, p. 77.

[22]U.S. Congress, House, Interstate and Foreign Commerce Committee, Oversight and Investigation Subcommittee, Federal Regulation and Regulatory Reform, pp. 78-83.

small legal budget compared to the legal budgets of the companies were all mentioned as possible agency weaknesses.[23]

These congressional efforts intended to assist the commission to continue the improvements begun at the first of the period. Through regular hearings, legislative proposals, and oversight members of Congress tried to spur the FTC to greater activity. While most agreed the agency was improving, some basic problems were still identified.

Another source of general policy direction are confirmation hearings for nominees to the FTC held by the Senate Commerce Committee. During phase one, in all the confirmation hearings senators tried to impress upon the nominees the importance the Commerce Committee placed on improving and revitalizing the FTC.

Weinberger's confirmation hearing is a good example of the Commerce Committee trying in earnest to redirect the commission. Senator Magnuson (D., Washington) was chairman of the committee when Weinberger was confirmed in November 1969. Throughout the hearing, the committee attempted to encourage the nominee to make important improvements in the agency. Magnuson asked Weinberger to "help maintain the right kind of morale by recruiting strongly and expanding the existing FTC programs in order to perform the job well."[24]

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[23]U.S. Congress, House, Interstate and Foreign Commerce Committee, Oversight and Investigation Subcommittee, Federal Regulation and Regulatory Reform, p. 109.

[24]Kovacic, p. 632.

Senator Magnuson indicated that members of the Commerce Committee wanted to "see that the American public gets their dollar's worth out of a dollar spent in the marketplace."[25]

Miles Kirkpatrick's confirmation hearing was similar to Weinberger's. In both hearings, the Commerce Committee emphasized a concern that the agency continue improving. When Kirkpatrick was confirmed in August 1970, Senator Magnuson complimented Weinberger for the good he had done as FTC chairman. Weinberger had, as Magnuson described, begun building a "more talented and resourceful" staff and "rewarding initiative rather than undistinguished time serving." Magnuson further approved of Weinberger's having established an office and system of setting priorities that "maximized the commission's impact on the marketplace."[26] When asked to comment on Chairman Weinberger's performance, Kirkpatrick answered he intended to "carry forward" and perhaps add some new initiatives of his own.[27]

The same emphasis on continuing to improve and revitalize the agency was found in Engman's confirmation hearing in 1973. Senator Norris Cotton (R., New Hampshire) spoke favorably of Engman's two predecessors, Weinberger and Kirkpatrick, describing

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[25]U.S. Congress, Senate, Commerce Committee, Hearings On Nominations, 91st Congress, 1st session. (Washington, D.C.: Government Printing Office, 1970), pp. 6.

[26]U.S. Congress, Senate, Commerce Committee, Hearings On Nominations, 91st Congress, 2nd session. (Washington, D.C.: Government Printing Office,, 1970), pp. 1-2.

[27]U.S. Congress, Senate, Commerce Committee, Hearings On Nominations, 91st Congress, 2nd session, p. 172.

them as "strong and imaginative" and as "reaching out with innovative programs to restore competition."[28] Senator Cotton further told Engman the FTC needed "some kind of injection to pep it up so it would fulfill its mission."[29]

Senator Ted Stevens (R., Alaska) told Engman he hoped he would become "a real zealot in terms of consumer affairs." Stevens continued that Engman should be so much the consumer activist that "big business people will complain to us that you are going too far." An occasion such as Engman's confirmation hearings, according to Kovacic, "left the commission's leaders with little doubt about the basic direction the commission should pursue."[30]

Antitrust Policy

In phase one, Congress expressed interest in antitrust policy in various ways. Congress accepted the various reports' conclusion that the FTC was not active enough in antitrust. Congressional efforts in phase one were directed at encouraging the agency to adopt more aggressive antitrust policies.

Members of Congress encouraged the FTC's interest in concentrated industry cases, although these cases were not without

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[28]U.S. Congress, Senate, Commerce Committee, Nominations--February-March 1973, 93rd Congress, 1st session. (Washington, D.C.: Government Printing Office, 1973), pp. 4-5.

[29]Kovacic, pp. 634-635.

[30]Kovacic, pp. 634-635.

their critics. The FTC's line-of-business program was approved with some restrictions. For example, Congress was concerned during phase one, with what the agency was not doing in the energy field. Congress exempted some special interests from the anti-trust laws. Enforcement of the Robinson-Patman Act was the subject of congressional inquiry.

Congressional interest in concentrated industry cases was especially evident when Kirkpatrick testified before the Senate Committee on Appropriations in 1971. Senator Gale McGee's (D., Wyoming), for example, reminded him that for more than a decade lawyers and economists had favored a shift "away from market behavior toward market structure." Industries, McGee continued, that are highly concentrated are "recommended candidates for antitrust remedies." After Kirkpatrick discussed an FTC study of concentrated industries that was then in progress, McGee asked Kirkpatrick to tell the committee what the FTC needed to complete this study in "the shortest time possible." Kirkpatrick responded that a budget expansion would be required to allow a group of economists to work full-time. Besides personnel, some outside assistance would also be required. With the personnel and assistance requested, Kirkpatrick indicated these studies should be completed within two years.[31]

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[31]U.S. Congress, Senate, Appropriations Committee, Consumer Protection Appropriations, 92nd Congress, 1st session. (Washington, D.C.: Government Printing Office, 1971), pp. 2678-2679.

Elizabeth Hanford's confirmation hearing in October 1973 also precipitated a discussion of concentrated industries. Hanford was asked whether reducing economic concentration was a "valid objective of government policy." She replied that "increased concentration without corresponding economic efficiency is undesirable."[32] Stephen Nye was asked about economic concentration by Senator Moss during his confirmation hearings in 1974. Nye indicated he thought economic concentration could be dealt with "adequately" with present antitrust laws.[33]

When David Clanton was confirmed as FTC commissioner in July 1976, he was asked to answer written questions about government policy toward "reducing economic concentration in industries dominated by a handful of large corporations." Clanton responded that he thought government antitrust agencies "should be especially diligent in carrying out their responsibilities" where "large, highly concentrated industries and giant conglomerates are concerned."[34]

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[32]U.S. Congress, Senate, Commerce Committee, Nominations--September--December, 93rd Congress, 1st session. (Washington, D.C.: Government Printing Office, 1971), pp. 2678-2679.

[33]U.S. Congress, Senate, Commerce Committee, Nominations--February--May, 93rd Congress, 2nd session. (Washington, D.C.: Government Printing Office, 1974), pp. 112-117.

[34]U.S. Congress, Senate, Commerce Committee, Nominations--July--September, 94th Congress, 2nd session. (Washington, D.C.: Government Printing Office, 1976), p. 15.

In these first years of phase one, influential elements in Congress interested in a revitalized FTC encouraged the agency to pursue economic concentration cases. Economic concentration also continued as a matter of concern within Congress after the election of 1976. At an antitrust oversight hearing before the Senate Judiciary Committee's Subcommittee on Antitrust and Monopoly in 1977, Senator Paul Laxalt (R., Nevada) stated he thought economic concentration constituted "as big a threat to the individual liberties of Americans as anything that I can perceive."[35] The overall tenor of these hearings was expressed in Senator Kennedy's opening statement. Kennedy suggested the purpose of the hearings was to assist responsible agencies of government aid our competitive economic system.[36]

In addition to supporting the FTC's investigatory emphasis, there was considerable support in Congress for strengthening the agency's capacities through legislation. Senator Hugh Scott (R. Pennsylvania) and Representative Peter Rodino (D., New Jersey) sponsored the Antitrust Improvements Act in 1975. This proposed legislation would have required large companies to notify the government 30 days in advance of intent to merge. Penalties for failure to comply with FTC subpoenas and orders would be

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[35]Kovacic, p. 655.

[36]U.S. Congress, Senate, Oversight of Antitrust Enforcement, 95th Congress, 1st session. (Washington, D.C.: Government Printing Office, 1977), p. 10.

increased by this bill.[37] Testifying on behalf of this legislation, Engman indicated that premerger information was needed to accomplish antitrust actions "before it is too late."[38]

Another bill was reported by the Senate Commerce Committee and the Senate Judiciary Committee that sought to improve the federal government's antitrust powers. This legislation would have created special three-year authorizations for FTC antitrust work. The hiring of 25 new agency staff members at a "supergrade" salary would have been authorized. The purpose of these "supergrade" positions was to attract government litigators sufficiently talented to match those employed by private industry.[39]

The Hart-Scott-Rodino Act of 1976 finally emerged from these various attempts to strengthen the FTC. Companies were required by this act to notify the FTC in advance of merger plans. Premerger notification provided the FTC with new sources of data to use in planning and evaluating enforcement programs.[40] This legislation's path through Congress was unusual. Two attempts were made to filibuster the bill in the Senate, and a last minute

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[37]Prudence Crewdson, "Pressure Building for New Antitrust Laws," Congressional Quarterly, 12 July 1975, pp. 1487-1490.

[38]U.S. Congress, Senate, Judiciary Committee, Antitrust and Monopoly Subcommittee, The Antitrust Improvement Act of 1975, 94th Congress, 1st session. (Washington, D.C.: Government Printing Office, 1975), p. 71.

[39]"Antitrust Funds," Congressional Quarterly, 6 December 1975, p. 2642.

[40]Kovacic, p. 660.

move was made to defeat the bill in the House. The final version of the bill was drafted informally, not in a conference committee, to avoid a third filibuster attempt. Legislation finally approved was described as the "most important antitrust law in decades."[41]

Line-of-Business Reports

The line-of-business reporting system was described during House Appropriations Subcommittee hearings in 1972. Representative Jamie Whitten (D., Mississippi) asked Chairman Kirkpatrick to explain the contemplated business reporting system. The line-of-business reports proposed by the FTC would require large manufacturing companies to report financial data including costs, sales, and profits of individual product lines.[42] The commission wanted better data to conduct cost/benefit analysis of prospective cases. Kirkpatrick explained a second purpose of the reports was to improve the quality of the Quarterly Financial Report. With these reports the FTC could assign sales and profit information to the different industries within a diversified firm. With this new information the agency could produce better reports,

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[41]"Major Antitrust Enforcement Bill Passed," 1976 Congressional Quarterly Almanac (Washington, D.C.: Congressional Quarterly, Inc., 1977), p. 431.

[42]Kenneth W. Clarkson and Timothy J. Muris, The FTC Since 1970, Economic Regulation and Bureaucratic Behavior (Cambridge: Cambridge University Press, 1981), p. 62.

include new subjects in studies, and develop reliable industry profit data.[43]

The FTC's line-of-business program was approved in phase one although not without Congress imposing some restrictions. In 1974, the House Appropriations Committee approved the FTC's full request of $305,000 for the program; however, the committee imposed certain limitations. Instead of allowing the FTC to collect data from the country's top 500 corporations, the House committee limited data collections to 250 of the top 500 firms to be selected at random. The committee further limited the FTC's use of the data collected to statistical purposes only and prohibited public disclosure in other than aggregate form. There was concern that line-of-business data might become available to business competitors. Congress' restricted the program to protect business from such possible harm.[44]

The Senate approved the entire FTC "line-of-business" program without restrictions.[45] An amendment proposed by Senator Roman Hruska (R., Nebraska) would have required that during the first

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[43]U.S. Congress, House, Appropriations Subcommittee, Agriculture--Environmental and Consumer Protection Appropriatos for 1973, 92nd Congress, 2nd session (Washington, D.C.: Government Printing Office, 1972), p. 478.

[44]"House Votes Agriculture-Environment Funds," Congressional Quarterly, 29 June 1974, p. 1715.

[45]"$13.6 Billion Agriculture Funds Bill Cleared," Congressional Quarterly, 3 August 1974, pp. 2055-2056.

year of the program companies provide only information on sales or receipts. This amendment was defeated 36-51.[46]

A conference committee resolved the differences in the House and Senate versions. The Senate provision allowing the FTC to interview 500 companies was retained. The House requirement that restricted line-of-business data to statistical studies was also kept in the bill that emerged from the conference committee.[47]

The following year, a Senate Appropriations Subcommittee wanted information about the FTC's implementation of the line-of-business reports program. The questions asked of Engman in this hearing were intended to evaluate the success of the program before new appropriations were made. Engman was asked to explain what use was being made of the reports. The senators wanted to know why only two-thirds of the firms requested complied and completed the line-of-business reports. Engman indicated a new, less complicated form was being readied in hopes of improving cooperation.[48]

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[46]"Senate Floor Action," 1974 Congressional Quarterly (Washington, D.C.: Congressional Quarterly, Inc., 1975), pp. 125-126.

[47]"House Votes Agriculture-Environment Funds," Congressional Quarterly, 29 June 1974, p. 1715.

[48]U.S. Congress, Senate, Appropriations Subcommittee, Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies Appropriations for Fiscal Year 1976, 94th Congress, 1st session (Washington, D.C.: Government Printing Office, 1976), pp. 577-580.

The FTC sought approval for line-of-business reports to improve the commission's effectiveness with better data. Congress approved most of what the agency sought. This same cooperation could be found in the energy policy area in phase one.

Energy

When the Energy Crisis confronted the country, Congress looked to the FTC for answers. Antitrust policy was directed at attempting to alleviate the crisis. The agency was requested to quickly complete its investigation of the petroleum industry, and legislation was suggested to give the agency much new power over the industry. Other legislation required the FTC to evaluate the effects of other agencies' policies on energy competition. The FTC had received congressional requests for various energy studies including studies about gasoline marketing, natural gas supplies, the substitutability of oil, coal, natural gas, or uranium as electric utility fuels; mergers in the petroleum industry, and the effect of petroleum industry structure upon product prices. When gasoline and fuel oil shortages became critical in 1973, virtually every major congressional committee involved with energy policy directs the FTC to make energy the commission's most important antitrust priority.[49] Many of these requests were included in the FTC energy industry study.

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[49]Kovacic, p. 636-637.

The Energy Crisis provoked criticism of the FTC in the appropriations committees. In 1973, Representative Mark Andrews (R., North Dakota) commented during proceedings of the House Appropriations Subcommittee that the country had for six months been "smack up against an energy crisis." Confronted with this crisis, Andrews accussed the FTC of "sitting fat, dumb, and happy and doing nothing about it." He wanted the FTC to expedite the release of a petroleum industry study at once.[50]

There were Senate requests also for the results of the FTC energy industry study. Among those seeking the FTC study was Senator Jackson (D., Washington), chairman of the Senate Interior Committee. Commenting on the FTC's withholding of the oil industry report, Jackson said, "I want action--we've waited too long."[51] He eventually obtained the study himself from the FTC.[52] Having obtained the report, Senator Jackson, on July 12, 1973, released it over the objections of FTC Chairman Engman. Releasing the report, Engman claimed, would be inconsistent with the FTC's responsibility to "proceed judiciously and responsibly" in determining if there was a need for commission action. Titled

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[50]U.S. Congress, House Appropriations Subcommittee, Consumer Protection Appropriations for 1974, 93rd Congress, 1st session (Washington, D.C.: Government Printing Office, 1973), p. 101.

[51]"Jackson Asks FTC to Probe Gas Crisis," Washington Post, 2 June 1973, Sec. A, p. 4, col. 6.

[52]Carole Shifrin, "Jackson Would Urge U.S.-Owned Pipeline," Washington Post, 10 July 1973, Sec. D, p. 8, col. 5.

"Preliminary Federal Trade Commission Staff Report on Its Investigation of the Petroleum Industry," the report found a lack of competition throughout the industry. It accused the major oil companies of attempting to increase profit by restricting output.

In 1975, the Interstate and Foreign Commerce's Subcommittee on Energy and Power held hearings on energy policy. James T. Halverson, Director of the FTC's Bureau of Competition, testified explaining what the commission was doing in the energy field. According to Halverson, one-fourth of the Bureau of competition's total resources were being spent in the energy field. The FTC efforts in energy were directed toward different components. First emphasis was on completion of the as yet uncompleted investigation of the petroleum industry scheduled for the end of calendar year 1975. Second, petroleum industry cases that had already entered the adjudicatory phase--notably Exxon--were of importance.[53]

Energy studies were still of interest to Congress in 1977. During House Appropriations Subcommittee hearings that year, Representative Neal Smith (D., Iowa) reminded FTC Chairman David Collier that the FTC's energy investigation reports had yet to be received. Smith further asked when the reports could be

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[53]U.S. Congress, House, Interstate and Foreign Commerce Committee, Subcommittee on Energy and Power, Energy Conservation and Oil Policy, 94th Congress, 1st session (Washington, D.C.: Government Printing Office, 1977), p. 1845-1846.

expected. Collier indicated the energy studies, first promised by the end 1975, would instead be completed in fiscal 1977.[54]

As the largest energy case, the Exxon case was of much interest to Congress. The House Appropriations Committee expressed its displeasure with how slowly the Exxon case was proceeding. In June 1974, the House Appropriations committee voted to strip $1 million from the budget intended for the antitrust case against the eight major oil companies. These funds were to have been spent attempting to restructure the oil industry.[55]

Elsewhere in Congress, committees tried to line up support for the Exxon case. In confirmation hearings, nominees were asked if they were or were not for the case. When Stephen Nye's was confirmed to be FTC commissioner in May 9, 1974, Senator John Tunney (D., California) asked if the nominee supported the budgetary requests the FTC had made to pursue the Exxon case. Nye indicated that he very definitely did.[56]

While Congress initially had encouraged the FTC to move against the petroleum industry, as litigation dragged out

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[54]U.S. Congress, House, Appropriations Subcommittee, Department of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1978, 95th Congress, 1st session (Washington, D.C.: Government Printing Office, 1977), p. 193.

[55]Washington Post, 19 June 1974, Sec. E, p. 1, col. 3.

[56]U.S. Congress, Senate, Commerce Committee, Nominations--September--December, pp. 33-36.

congressional support continued to wane. Congress was reluctant to support a ten or fifteen year legal action against the oil companies. When the Exxon case was not resolved, Congress tried to remedy the problem with legislation. The Petroleum Industry Competition Act was proposed to quickly resolve the problem identified in Exxon. This legislation would given the FTC substantial authority over the divestiture of petroleum company assets.[57]

Two energy related acts extended the FTC's competition advocacy responsibilities. This legislation required the commission to analyze the anticompetitive effects of policies devised by other government agencies. The Emergency Petroleum Allocation Act of 1973 required the FTC to "monitor the emergency program for mandatory allocation of petroleum upon the President's request."[58] The Deepwater Ports Act of 1974 similarly required the FTC to review any port license to determine if the license "would adversely affect competition, restrain trade, promote monopolization, or otherwise create a situation in contravention of the antitrust laws."[59]

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[57]"Energy and Environment," Congressional Quarterly, 19 June 1976, p. 1548.

[58]91 Stat. 4-10, 15 U.S.C. 717.

[59]91 Stat. 177, 33 U.S.C. 1524.

Food

The FTC's regulation of the food industry was of considerable interest to Congress throughout phase one. The Kellogg case begun in January 1972 was both encouraged and questioned. Several committees requested that the commission look at the effect of food industry structure on food prices. Special concerns were manufacturing and retailing. In 1973, Representative Rodino (D., New Jersey), chairman of the House Judiciary's Subcommittee on Monopolies and Commercial Law, indicated that with prices rising the FTC had "tremendous areas of responsibility" with regard to food. Rodino was commenting on FTC inaction when he suggested antitrust enforcement had "lacked vigilance" in the food industry and that "consumers are not being well served by the food industry."[60]

Influential congressmen urged the commission to make the entire food industry an investigative priority. Senator Jackson contacted the FTC directly about rising food prices in June 1974. He requested a food industry investigation directed at discovering the distribution of income between the farm, processing, and retail levels. The FTC announced on July 1, 1974, that an industry-wide investigation of the retail food industry looking at the relationship among food prices and market concentration was to begin.[61]

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[60]Kovacic, p. 637.

[61]"All Are Blamed as Reasons for the Meat Price Dilemma," Congressional Quarterly, 20 July 1974, p. 1909.

While most influential members of Congress favored a more aggressive FTC policy toward the food industry, congressmen whose districts were adversely affected spoke out in opposition. When Rand Dixon appeared before the House Appropriations Subcommittee in 1971, Representative Mark Andrews suggested that concentration in the cereals industry was not causing high prices.[62] During the same hearings a year later, Andrews questioned how the consumer would benefit from "all this hocus-pocus" going on in the Kellogg case.[63]

Special Interests

Congress has often found the incentives sufficient to intervene in FTC policy making when special interests are regulated by the commission. The newspaper and soft drink industry requested Congress exempt them from antitrust regulation in phase one. Legislation was passed exempting the newspaper industry while the soft drink industry's effort at exemption was unsuccessful.

The Newspaper Preservation Act of 1970 declared the Public Policy of the U.S. to be to "preserve the publication of newspapers" by exempting joint operating arrangements entered into

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[62]U.S. Congress, House, Appropriations Subcommittee, Consumer Protection Appropriations for 1972, 92nd Congress, 1st session (Washington, D.C.: Government Printing Office, 1971), p. 222.

[63]U.S. Congress, House, Appropriations Subcommittee, Consumer Protection Appropriations for 1974, p. 125.

"because of economic distress."[64] The newspaper industry had objected to antitrust laws being applied against daily newspapers by the FTC, arguing that exemption from the antitrust laws was necessary to help financially troubled newspapers survive. The industry succeeded in getting such a law approved in 1970. The purpose of this act was to exempt some forms of cooperation between newspapers from antitrust action by the FTC. This law exempted agreements made if only one of the newspapers involved was likely "to remain or become a financially sound publication."[65]

The soft drink industry sought legislation amending the FTC Act of 1914 to allow exclusive territorial arrangements for soft drink manufacturers. Hearings were began in the Senate Judiciary Antitrust Monopoly Subcommittee on August 8, 1972. A bill was introduced after the FTC in July 1971, issued complaints against seven national brand soft drink syrup manufacturers for illegally issuing licenses that restricted bottlers to specified districts.[66]

On June 11, 1973, the Senate voted to permit exclusive territorial arrangements for soft drink manufacturers.[67] This

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[64]84 Stat. 466, 15 U.S.C. 1801-1804.

[65]"Congress Clears Newspaper Preservation Act," Congressional Quarterly, 17 July 1970, p. 1784.

[66]"Soft Drink Franchises," Congressional Quarterly, 19 August 1972, p. 2080.

[67]"Soft Drink Franchises," p. 1545.

legislation sought to allow soft drink franchises that restricted the bottler's territory and that guaranteed no same brand competition within the franchise's territory. The soft drink industry did not get the antitrust exemption they sought until 1980.

The Robinson-Patman Act

When enforcement of the Robinson-Patman Act virtually ceased in phase one, there was no general outcry in Congress. This was possibly because President Ford had singled out the Robinson-Patman Act as a statute that restricted competition and increased prices.[68] Important congressmen did, however, still question if the FTC was adequately enforcing the Robinson-Patman Act. During hearings in 1974 before the Special Investigations Subcommittee of the House Interstate and Foreign Commerce Committee, Representative Harley Staggers (D., West Virginia) made note that the FTC's enforcement of this statute had been declining. In 1960, there were 130 Robinson-Patman complaints and 45 orders; in 1965, 13 complaints and 21 orders; in 1969, 8 complaints and 9 orders; and in 1973, 3 complains and 4 orders. Representative Staggers questioned whether this decrease constituted "an administrative abolition of the law."[69]

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[68]Stone, p. 100.

[69]Kovacic, p. 636.

In 1976, during his confirmation hearing, Collier was asked to explain what his plans were to enforce the Robinson-Patman Act. Senator Moss questioned if Collier shared the "antipathy toward enforcing this act" that dated back to when Weinberger was FTC Chairman. Collier responded that the Robinson-Patman Act raised difficult questions of proof and was more expensive on a case by case basis than action under Section 5 of the FTC Act.[70]

Congress in phase one basically encouraged the more aggressive antitrust policies begun after Weinberger became FTC Chairman. Congressmen were especially concerned with FTC activity in energy and foods. Exemptions to antitrust legislation were considered. The status of Robinson-Patman Act enforcement was reviewed. Where constituent or special interests were directly affected there were opponents to the new antitrust policies.

Consumer Policy

Congress directed much attention to FTC consumer policy during phase one. Following the criticism the FTC received in the late 1960s, Congress attempted to make the agency into a more vigorous protector of consumers. Congress encouraged the agency to utilize existing laws more effectively, and several new laws added to the commission's role and authority in this area.

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[70]U.S. Congress, Senate, Commerce Committee, Hearings on Nominations, 94th Congress, 2nd session (Washington, D.C.: Government Printing Office, 1976), p. 100.

Several aspects of consumer policy were of particular congressional interest. These included advertising substantiation, the investigation of children's television advertising, and credit practices. The Magnuson-Moss Act was passed formalizing the commission's rulemaking authority and establishing warranty standards.

In several instances, attempts were made within Congress to generally improve the FTC as a consumer protection agency. In 1973, several congressmen tried to influence the President to nominate a proconsumer FTC Commissioner. Twenty-six congressmen sent a letter to President Nixon urging him to name a "forceful consumer advocate" to the FTC. Representative Bob Eckhardt (D., Texas) who circulated the letter said that the consumer's voice must be carried inside the FTC.[71] Subsequently, President Nixon named Elizabeth Hanford, deputy director of the President's Office of Consumer Affairs, to the FTC.[72]

Several times legislative proposals were introduced to create a FTC Bureau of Consumer Redress. First proposed in 1974 the Bureau of Consumer Redress would devise a model state consumer redress system and distribute funds to states that established such a system. The federal government was to provide as much

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[71]"Consumer Advocate Urged," New York Times, 27 July 1973, p. 17, col. 1.

[72]"People and Business," New York Times, 1 November 1973, p. 65, col. 1.

70% of the funds for this plan. This plan, the Consumer Controversies Resolution Act, gained the approval of the Senate Commerce Committee. In testimony, the FTC indicated that, while the agency approved the goals of the legislation, the commission had no experience administering grants.[73] Similar legislation was proposed in 1976, 1977, and 1978 and approved by the Commerce Committee in 1976 and 1978.[74] Congress never approved legislative proposals to create a Bureau of Consumer Redress.

Advertising

Throughout phase one there was strong support in Congress for stronger FTC policies regulating advertising. Legislation was introduced to improve the truthfulness of advertising. The commission was encouraged to begin an investigation of children's television.

The Truth in Advertising Act was introduced in the Senate by Senator George McGovern (D., South Dakota), and Senator Moss, and by Representative John Dingell (D., Michigan) in the House. It required advertisers to privide documentation on the safety, performance, and efficienty of any advertised product to consumers.

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[73]"Consumer Controversies," Congressional Quarterly, 23 November 1974, p. 3163.

[74]"Consumer Controversies," Congressional Quarterly, 14 August 1976, p. 2206 and 4 June 1977, p. 1111 and "Consumer Business Disputes," Congressional Quarterly, 15 July 1978, p. 1816.

Information was to include descriptions of research and testing, comparisons, technical names, and comparative prices.[75] The advertising standards put forward in this legislation closely paralleled advertising substantiation standards being developed in FTC decisions. The Senate Commerce Committee held hearings on the advertising documentation legislation on May 16 and 18, 1972.[76]

FTC Chairman Kirkpatrick opposed the Truth in Advertising Act. In testimony before the Senate Commerce Consumer Subcommittee, Kirkpatrick suggested the benefits of the legislation were uncertain when compared to the costs. He asked the committee to defer action until the FTC had a better opportunity to evaluate its own advertising substantiation program. The Truth in Advertising Act was not given further consideration.[77]

The FTC's own advertising substantiation program came under question as its implementation continued. In 1974, Representative Whitten (D., Mississippi) questioned how the FTC had responded to an earlier suggestion by his House Appropriation Subcommittee that the advertising substantiation program be made more "useful

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[75]"Deceptive Advertising: Pressure for Change," Congressional Quarterly, 1 April 1972, p. 727.

[76]Washington Post, 19 June 1974, Sec. E, p. 1, col. 3.

[77]"Truth in Advertising," 1972 Congressional Quarterly Almanac (Washington, D.C.: Congressional Quarterly, Inc., 1973), p. 698.

to the average consumer." Possibly, the Office of Consumer Affairs and Consumer Product Information Coordinating Center could be used to make information obtained through the program available to the consumer. Engman responded that the commission was trying to somehow "stimulate direct public use of materials submitted" to the FTC for advertising substantiation.[78]

House Appropriations Subcommittee hearings in 1977 questioned what the FTC was doing to enforce its advertising substantiation doctrines. Representative Clarence Miller (R., Ohio) questioned FTC Chairman Collier about how deceptive advertising cases come to the commission's attention. Collier explained the FTC mostly relied on an ad monitoring system. In answer to a question by Miller, Collier mentioned that the FTC had 23 people monitoring advertising and was reducing this number to 19 the next year.[79]

Children's television advertising was another phase one advertising issue. In March 1973, the Senate Select Committee on Nutrition and Human Needs held hearings on children's television advertising. The suggestion considered was whether the children should be protected from some advertising directed at them. Banning some children's advertising would have been a major activist

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[78]U.S. Congress, House, Appropriations Subcommittee, Consumer Protection Appropriations for 1975, 93rd Congress, 2nd session (Washington, D.C.: Government Printing Office, 1975), p. 686.

[79]U.S. Congress, House, Appropriations Subcommittee, Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1978, 95th Congress, 1st session (Washington, D.C.: Government Printing Office, 1977), p. 195.

move in consumer policy. These hearings came soon after the FTC issued a complaint against the major cereal companies charging shared monopoly. The major companies, important childrens' television advertisers, declined to testify because they claimed the hearings conflicted with the FTC complaint that had been issued against them. Senator McGovern, committee chairman, described these hearings about "nutrition, education and health and diet questions" as only indirectly related to the FTC complaint in the Kellogg case.[80]

More hearings about broadcast advertising and children were held in July 1975. Again, these hearings urged a more activist FTC advertising policy. During these hearings before the House Committee on Interstate and Foreign Commerce's Subcommittee on Communications, Representative Torbert MacDonald (D., Massachusetts) questioned Engman about the extent of the FTC authority to regulate children's advertising. Engman explained that the FTC can regulate unfair and deceptive advertising. Unfair and deceptive advertising directed at children, Engman described, as "understandably an area of special concern." Both Anglo-American common law and our statutes have protected children from "their own vulnerability,"

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[80]"TV Food Advertising," Congressional Quarterly, 10 March 1973, p. 546.

he continued.[81] In phase two the FTC did begin a Kid-Vid investigation similar to the one suggested in these hearings.

Labeling and Consumer Education

Congress was interested in strengthening and improving FTC efforts in labeling and consumer education in the first phase. Congress applauded FTC consumer education programs. New legislation required that energy and octane ratings be presented to consumers.

Congressmen sometimes encourage FTC policies they like by providing agency spokesmen a soapbox from which to present their policy views. When Kirkpatrick appeared before the House Appropriations Subcommittee in 1972, Representative Jamie Whitten gave Kirkpatrick an opportunity to present a description of the FTC's consumer education program. Whitten questioned why the FTC was involved in consumer education. Kirkpatrick responded that more than legal techniques can be used to keep the "marketplace competitive and fair." Consumer education can be used to provide "information to consumers to enable them to avoid unfair and deceptive practices in commerce."[82]

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[81]U.S. Congress, House, Interstate and Foreign Commerce's Subcommittee on Communications, Broadcast Advertising and Children, 94th Congress, 1st session (Washington, D.C.: Government Printing Office, 1975), pp. 288-294.

[82]U.S. Congress, House, Appropriations Subcommittee, Consumer Protection Appropriations for 1973, 92nd Congress, 2nd session (Washington, D.C.: Government Printing Office, 1972), pp. 480-481.

The commissions' legislative authority in labeling was substantially changed by the Congress in phase one. The Energy Policy Conservation Act was passed in 1975 requiring manufacturers of large appliances to label their products with energy information.[83] The Senate Commerce Committee in 1975 originally reported legislation that would require manufacturers to label large household appliances and automobiles with energy information.[84] A similar energy measure passed the House.[85] This legislation had the goal of achieving an improvement of 25% in energy efficiency before 1980[86]. The version of this legislation finally approved only required that household appliances be labeled.

Fair Credit Reporting

Fair credit reporting was another area in which there was congressional concern. Legislation was considered to strengthen FTC authority over credit bill practices. This, like other consumer legislation, considered this phase attempted to bolster the agency's ability as a consumer protection agency. Suggesting this legislation conveyed to the commission that there was a locus of activity within Congress interested in more consumer

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[83]91 Stat. 276, 42 U.S.C. 6249-6309.

[84]"Appliance Labeling," pp. 1439-1440.

[85]"Consumer Notes," Congressional Quarterly, 27 September 1975, p. 2048.

[86]"Appliance Labeling," Congressional Quarterly, 5 July 1975, pp. 1439-1440.

activism at the FTC. In testimony, Engman, FTC Chairman, said he thought a fair credit billing law was "essential if the promise of the original Truth in Lending Act to improve the consumer credit marketplace is to be fulfilled." The Senate Banking, Housing and Urban Affairs Subcommittee held hearing May 21-24, 1973, on bills to establish fair credit billing practices.[87] The Senate passed this legislation 90-0 on July 23, 1973. The House, however, took no action on the measure, and the legislation died at the end of the 92nd Congress.[88]

On July 27, 1976, legislation outlawing unfair debt collection practices passed the House 239-162. This proposed law was to be enforced by the FTC. Under the provisions of the proposed bill, collectors could not harass consumers with repeated telephone calls at work or at unusual hours, use abusive language or threats, or impersonate court officials.[89] Legislation protecting consumers from debt collectors was not approved by both House of Congress until 1977, however.

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[87]"Senate Reports Supplemental Appropriations Bill," Congressional Quarterly, 26 May 1973, pp. 1325 and 1341.

[88]"Consumer Credit Protection," 1973 Congressional Quarterly Almanac (Washington, D.C.: Congressional Quarterly, Inc., 1974), p. 410.

[89]"Debt Collection Practices," Congressional Quarterly, 31 July 1976, p. 2081.

The Magnuson-Moss Act

In March 1973, hearings were begun in the House Commerce subcommittee on legislation that would eventually become the Magnuson-Moss Act. This legislation was a Congress initiated attempt to improve the FTC's ability as an effective consumer protection agency. The Magnuson-Moss Act, as eventually passed by the Congress, authorized the FTC to establish requirements for written warranties on products costing more than $5. Different minimum standards were established for "full" and "limited" warranties. Under the new law, consumers were allowed to file suit in federal court for damages for failure to comply with warranties. Class action suits by consumers were also allowed.[90] Rulemaking procedures were established and persons affected by FTC rules were allowed 60 days to seek judicial review. The act enlarged the FTC's jurisdiction from activities "in commerce" to those "affecting commerce."[91] The agency was authorized to fund public participation in FTC proceedings.[92]

The FTC supported the Magnuson-Moss Act's warranty provisions and opposed establishment of formal rule making procedures.

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[90]"Consumer Warranties," p. 50.

[91]"Consumer Warranties," p. 50.

[92]U.S. Congress, Senate, Judiciary Committee, Administrative Practice and Procedure Subcommittee, Public Participation in Federal Agency Proceeding Act of 1977, S. 270, 95th Congress, 1st session (Washington, D.C.: Government Printing Office, 1977), pp. 2-7.

Testifying before the commission, FTC Chairman Engman said the commission "generally endorses" the requirement that warranties for goods costing $5 or more conform to certain standards.[93] Engman did not favor the new procedures for rule-making the act would establish. The Magnuson-Moss rulemaking procedures Engman termed as "an undue restriction on our flexibility." The FTC, Engman explained, had expertise in procedural matters and should retain flexibility" to "insure fair treatment."[94]

Some opponents of the legislation objected to provisions setting forth rulemaking procedures. To some critics, the procedures "would elevate FTC commissioners to the status of lawmakers." Walter W. Vaughan of the Consumer Bankers Association suggested that affirming the FTC rulemaking authority would transform the commission "into a super powerful agency with authority to act as legislator, administrator and judge over virtually every aspect of American business in the consumer retail marketplace."[95]

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[93]U.S. Congress, House, Interstate and Foreign Commerce Committee, Commerce and Finance Subcommittee, Consumer Warranty Protections--1973, 93rd Congress, 1st session (Washington, D.C.: Government Printing Office, 1978), p. 62.

[94]U.S. Congress, House, Interstate and Foreign Commerce Committee, Commerce and Finance Subcommittee, Consumer Warranty Protections--1973, pp. 64-65.

[95]"Federal Trade Commission," Congressional Quarterly, 24 March 1973, p. 666 and "Trade Commission Powers," Congressional Quarterly, 31 March 1973, pp. 737 and 786.

In 1973, the Senate Commerce Committee, for the third time since 1970, reported a similar bill that would establish minimum standards for consumer warranties and strengthen the consumer protection powers of the FTC. Cosponsored by Senator Magnuson (D., Washington) and Senator Moss, this legislation required that where warranties were offered they must meet certain minimum requirements and prohibited dealers disclaiming implied warranties.[96]

The Senate version of the warranties bill strengthened the FTC by allowing the agency to seek temporary and permanent injunctions and to intitiate court action seeking redress for consumers affected by fraud. It did not contain, however, the provision reaffirming the FTC's rulemaking authority.[97] The Senate passed the Magnuson-Moss bill on September 12, 1973, by a voice vote.[98]

The provision included in the Senate bill passed in September 1973 allowing the FTC to seek injunctions was approved as an amendment to the Alaska pipeline bill before Magnuson-Moss was finally approved. On July 11, 1973, the Senate voted 78 to 11 to attach an amendment to the Alaska pipeline bill allowing the FTC to go into Federal court and seek injunctions against the

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[96]"Consumer Product Warranties," Congressional Quarterly, 22 September 1973, p. 2540.

[97]"Warranties: A Bill Reported in Senate for Third Time," Congressional Quarterly, 19 May 1973, p. 1226.

[98]"Consumer Products Warranties," p. 2540.

continuation of anticompetitive practices.[99] Before the FTC could itself go into federal court, however, the agency was required to negotiate and encourage the Justice Department to initiate a proceeding. If, however, the Justice Department failed to act after ten days, the FTC could go to court with its own attorneys.[100] These provisions became law in October 1973.[101]

The House Interstate and Foreign Commerce Committee reported a version of Magnuson-Moss on June 13, 1974.[102] It expanded the FTC's jurisdiction from acts and practices "in" interstate commerce to those "affecting" interstate commerce.[103] It contained standards for all warranties on products costing more than $5. In regard to rulemaking, the FTC was authorized to restrict "unfair or deceptive acts or practice" by rule. The bill required the commission to hold hearings of some sort, required an economic impact statement for each proposed rule, and allowed persons adversely affected to appeal decisions to the courts.[104] It

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[99]"Senate Votes to Expand FTC Power," New York Times, 11 July 1973, p. 25, col. 2.

[100]"Consumer Warranty Bill Curbs FTC Powers," Congressional Quarterly, 22 June 1974, p. 1655.

[101]"Consumer Warranty Bill Curbs FTC Powers," p. 1655.

[102]"Consumer Warranty Bill Curbs FTC Powers," p. 1655-1656.

[103]"Legislative History," U.S. Code Congressional and Administrative News, 93rd Congress, 2nd session (St. Paul, Minnesota: West Publishing, 1975), p. 7726.

[104]"Consumer Warranty Bill Curbs FTC Powers, p. 1655-1656.

was passed by the House by a 384-1 margin. The House and the Senate bills had similar warranty provisions. The House bill, however, contained rulemaking provisions absent from the Senate version.

The Senate bill allowed consumer to file suit for injuries. The House bill established rulemaking procedures. The Senate legislation let the FTC go into court; the House versions required the FTC to use Justice Department lawyers. The House required either full or limited warranties for goods costing more than $10. The Senate required warranties for goods costing $5 or more.

The conference committee accepted the House provisions on formal rulemaking. The conference version of this legislation also specified when the FTC could represent itself in court.[105] The conference substitute for the House rulemaking amendment added provisions for funding public participation in rulemaking proceedings.[106] The final version of the bill required either full or limited warranties on goods costing more than $5.[107]

Final action on the Magnuson-Moss Act came on December 19, 1974. The House cleared the conference report on the bill by

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[105]"Consumer Warranties," 1974 Congressional Quarterly Almanac (Washington, D.C.: Congressional Quarterly, Inc. 1975), p. 331.

[106]"Legislative History," p. 7768.

[107]"Consumer Warranties," Congressional Quarterly, 4 January, 1975, p. 331.

a voice vote. The Senate had approved the conference report on the bill the day before by a 70-5 vote.[108]

In phase one, the FTC received strong messages from Congress that it should become more aggressive in antitrust enforcement and in consumer protection. Each time a FTC member, especially one who was to serve as chairman, was confirmed, the Senate Commerce Committee exhorted the nominee to continue the changes in the agency begun following the American Bar Association and Nader reports. There were congressional opponents of the Exxon and Kellogg cases, however, generally Congress supported the commission's interest in concentrated industry cases. The FTC's request for a line-of-business reporting system was approved, although with some restrictions. Premerger notification legislation was approved. The commission's efforts in energy were strongly encouraged by Congress. Legislation was approved exempting the newspaper industry from some antitrust legislation. Lack of enforcement of the Robinson-Patman Act resulted in some comment from congressmen.

Congress did a significant amount to remake the FTC as a consumer protection agency in phase one. Several statutes were approved expanding the commission's consumer protection responsibilities. New legislation required energy and octane labeling. The FTC was encouraged by the Magnuson-Moss Act to use industry-wide trade regulation rules to formulate consumer policy. The

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[108]"Consumer Warranties," p. 50.

same legislation established consumer warranty standards for all goods costing over $5. Several legislative proposals communicated to the commission that important committees and congressmen favored the FTC becoming a more active consumer protection agency.

Phase Two--1977-1981

In phase two, as has been shown, FTC policies became somewhat more explicitly consumer oriented than in phase one. Those sectors of the economy most important to consumers became priority areas for FTC activity, especially rulemaking initiatives. But Congress was less enthusiastic in its support for FTC action than in phase one. At the beginning of the period, Congress did approve some legislation expanding the FTC's authority. However, in the latter part of phase two there was considerable controversy in Congress over the agency's performance. Of particular importance was the conflict over a proposal that FTC rules be subjected to a two house legislative veto, and the efforts of a conservative coalition of senators to prevent the FTC from continuing several controversial actions.

General Direction

The 1976 elections produced a more conservative political climate in Congress for the FTC. The FTC's regular authorization legislation was blocked in 1977, 1978, and 1979 and was not approved until the FTC Improvement Act of 1980 was passed with

provisions for a two house legislative veto. In 1979 and 1980 FTC appropriations were questioned. Many amendments were offered to appropriations bills that would stop rulemaking in progress. Hearings continued to urge the use of cost-benefit analysis in case selections, and hearings were held around the country questioning the performance of FTC's regional offices.

The major phase two controversy about the FTC was set in the reauthorization of the commission and focused on the legislative veto. In 1977 and 1978, attempts to pass a regular authorizations bill failed as the House and Senate disagreed over adding legislative veto provisions. The House favored a one house legislative veto. The Senate opposed any legislative veto.

Several reasons for the support given the veto in Congress can be found. Supporters of the veto favored making the FTC accountable to Congress and reducing unnecessary federal regulation. First, Representative Elliott H. Levitas (D., Georgia) sponsor of the legislation, described the legislative veto as "an end to government by bureaucratic fiat."[109] Second, business groups like the National Association of Manufacturers and the U.S. Chamber of Commerce favored the legislative veto.[110] Third, some congressmen disliked the agency. Senator James McClure

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[109]"House, Senate Advance Bills to Curb FTC," 1979 Congressional Quarterly Almanac (Washington, D.C.: Congressional Quarterly, Inc., 1980), p. 343.

[110]Alan Berlow, "Business Wants Congress to Limit Powers of Agency," Congressional Quarterly Weekly Reports, 11 August 1979, p. 1647.

(R., Idaho) noted the FTC "doesn't think there is anything too far afield to investigate."[111] Senator Orin Hatch indicated he thought the commission was "one of the most obstreperous and politically motivated agencies in government." Hatch continued that the agency used rulemaking "to badger, bludgeon and exort" concessions from business.[112]

On November 27, 1979, the House voted 321 to 63 to allow a one house legislative veto. This was the fourth time the House had voted to approve a legislative veto plan.[113] The House passed bill also forbade the FTC from petitioning the patent office to cancel the Formica trademark. Amendments to prevent FTC regulation of funeral homes and agricultural cooperatives were approved. The agricultural cooperatives amendment was designed to halt a two year long FTC case against Sunkist Growers, Inc. The House passed authorization bill was for three years.[114]

The Senate approved legislation by a vote of 77 to 13 on February 7, 1980, that contained provisions for a two house legislative veto. This legislation specifically ended the FTC

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[111] Berlow, p. 1648.

[112] Berlow, p. 1648.

[113] A.O. Sulzberger, "House Votes, 321 to 63, to Allow Congress to Veto FTC Ruling," New York Times, 28 November 1979, p. 1, col. 1.

[114] :House, Senate Advance Bills to Curb FTC," 1979 Congressional Almanac (Washington, D.C.: Congressional Quarterly, Inc., 1980), p. 344.

proceeding on children's television advertising. Amendments to exempt professional groups from antitrust regulation and to add restrictions to the use of public participation funds were defeated. The Senate bill provided for a two year authorization.[115]

House and Senate conferees eventually agreed to a three year authorization bill, the FTC Improvements Act of 1980, including a two house legislative veto.[116] The compromise legislation allowed the funeral industry investigation, the children's television investigation, and actions against agricultural cooperatives to continue. The final version of the bill required that the FTC not petition to cancel a trademark because it may have become generic.[117]

While Congress was wrangling over authorizations, there was also conflict about FTC appropriations in phase two. After the election of 1976, the FTC did less well in appropriations politics. Several senators who had advocated revitalizing the FTC, including Philip Hart (D., Michigan), Vance Hartke (D., Indiana), Mike Mansfield (D., Montana), Gale McGee, Frank Moss, John Pastore, and John Tunney, were no longer in the Senate. Kovacic suggests that after 1976, Congress had "a stronger inclination to review new proposals more critically" and was

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[115]"FTC Funds Bill with Legislative Veto Clears," 1980 Congressional Quarterly Almanac (Washington, D.C.: Congressional Quarterly, Inc., 1981), pp. 234-235.

[116]94 Stat. 374, 15 U.S.C. 45.

[117]"FTC Funds Bill with Legislative Veto Clears," pp. 233-234.

"more likely to listen sympathetically to claims that the agency had errored in its choice and execution of competition programs."[118]

Between 1976 and 1980, the FTC's appropriation increased from $47.6 million to $67.7 million, a 42% increase. Although this was a substantial enlargement, the rate of growth was less than that of the previous four year period. In 1972, the FTC's appropriation was $25.1 million, and the increase between 1972 and 1976 was 90%. The FTC's 1970 appropriation was $21.0 million which increased 127% by 1976.[119] The additional funds that were appropriated in the 1976-80 period were sufficient to keep up with rising costs and to allow some minor changes in existing FTC programs, but not to encourage major expansion of programs.

In 1979, the House Appropriations Committee tentatively approved a plan that would have cut the FTC's budget from $65.3 million to $59.5 million. This action was intended to prevent the commission from engaging in industry-wide rulemaking. Eighteen rulemakings in progress would be stopped by this measure. These included rulemakings directed at the funeral industry, used cars, children's television advertising, hearing aids and mobile homes. Several antitrust actions also would have been stopped by this proposal including the investigations of the eight largest oil companies and the automobile industry. The subcommittee plan

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[118] Kovacic, p. 653.

[119] Kenneth Clarkson, "Legislative Constraints," in The FTC Since 1970: Economic Regulation and Bureaucratic Behavior, ed. Clarkson and Muris (Cambridge University Press: Cambridge, 1981), pp. 20-21.

would have stopped the cancellation of the Formica trademark and ended the FTC's ability to investigate agricultural marketing orders. The pending antitrust action against Sunkist Growers, Inc. would also have been discontinued.[120]

At this same time the House Appropriations Subcommittee nearly voted to ban any further funding of the Exxon case.[121] The FTC's efforts to regulate professionals and unfair advertising were also questioned in appropriations proceedings.

The chairmen of the House and Senate Judiciary Committees protested the House Appropriations Subcommittee's action. Representative Peter W. Rodino, Jr. and Senator Edward Kennedy claimed the subcommittee's moves against the FTC were "a very serious and improper interference" in regulatory proceedings. Rodino and Kennedy sent their protest to Representative Jamie Whitten, chairman of the House Appropriations Committee.[122]

The 1979 appropriations conflict was resolved with a continuing resolution that provided appropriations for the FTC until March 15, 1980. This continuing resolution prohibited implementation of any new regulations, final rules, and investigations until the

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[120]R.O. Sulzberger, "FTC Facing Challenge; House Unite Backs Curbs," New York Times, 15 September 1979, p. 6, col. 1.

[121]Kovacic, p. 666.

[122]Ward Sinclair, "Rodino, Kennedy Protest Hill Plan Against the FTC," Washington Post, 17 September 1979, Sec. R, p. 9, col. 1.

regular FTC appropriation was approved. This resolution was approved by the House on November 9, 1979, and by the Senate on November 14, 1979.[123]

Stopgap legislation was approved on March 26, 1980, to continue funding the FTC until April 30, 1980. This new resolution transfered $12.1 million from the International Communication Agency, which includes the Voice of America. One May 1, 1980, the Congress hurriedly passed another emergency funding resolution. The House and Senate had yet to resolve their differences about the FTC appropriations bill. This resolution transferred $7.6 million from the State Department's contribution to international organizations. The FTC did have to close, however, for one day, May 1, until this funding legislation was approved.[124]

The House finally approved the 1980 FTC appropriation on May 30, 1980. The Senate did not take action on the same legislation until June 3, 1980. This resulted in the FTC being closed two days, June 2 and 3. President Carter signed the appropriations bill on June 4, 1980.[125]

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[123]"Second 1980 Continuing Resolution," 1979 Congressional Quarterly Almanac (Washington, D.C.: Congressional Quarterly, Inc., 1980), pp. 280-281.

[124]"FTC Funds Bill with Legilative Veto Clears," 1980 Congressional Quarterly Almanac (Washington, D.C.: Congressional Quarterly, Inc., 1981), p. 233.

[125]"FTC Funds Bill with Legislative Veto Clears," p. 233.

Again in 1980, the FTC was the subject of controversy during appropriations hearings. Representative John Slack (D., West Virginia) questioned Chairman Pertschuk about the good to the economy accomplished by the FTC appropriation. He asked the chairman if an across-the-board budget cut for the regulatory agencies would be effective in reducing the "burden on American business as well as fighting inflation." Pertschuk responded "No," but agreed all proposed regulations should be evaluated as possibly too burdensome.[126]

The late 1970's saw appropriations hearings encourage the FTC to "refine its system for selecting priorities and choosing enforcement programs." Cost-benefit studies were recommended for choosing future cases and investigations. Appropriations committees in both House and Senate favored the FTC's use of these studies.[127] These hearings indicated that the FTC should continue using the new standards for case selection begun in phase one.

In June 1977, the Senate passed the Interim Regulatory Reform Act. This law would have required seven major federal regulatory agencies to make a comprehensive review of the laws they administered. Where desirable, the commissions were then to propose changes in

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[126]U.S. Congress, House, Appropriations Subcommittee, Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1981, 96th Congress, 2nd session (Washington, D.C.: Government Printing Office, 1980), p. 150.

[127]Kovacic, p. 654.

their legal authority to Congress.[128] This law required the FTC to report any changes in legislative authority deemed desirable to Congress. The House did not act on this legislation.[129]

The House Government Operations Committee held hearings in several cities in May and June of 1979 on FTC efforts to reduce inflation, one of the major goals the agency set for itself in phase two. In one hearing held in Chicago, Representative Benjamin Rosenthal (D., New York) asked Paul Turley, Chicago Regional FTC Director, what he had done in "the four areas that occupied 80% of the average citizens budget; that is housing, food, health care, and energy." Turley mentioned various cases the FTC in Chicago had pursued in each of these areas. Representative Rosenthal pointedly asked if Turley had done anything about fuel oil, gasoline, or hospital costs. Turley replied that the agency had done nothing about fuel oil and gasoline and had only conducted investigations about hospital costs.[130]

Overall, it seems quite evident that the FTC enjoyed substantially less support from Congress in phase two than in phase one.

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[128]"Regulatory Reform," Congressional Quarterly, 18 June 1977, p. 1228.

[129]"Regulatory Reform," 1977 Congressional Quarterly Almanac (Washington, D.C.: Congressional Quarterly, Inc., 1978), p. 551.

[130]U.S. Congress, House, Government Operations Committee, Adequacy of the Administration's Anti-Inflation Program, 96th Congress, 1st session (Washington, D.C.: Government Printing Office, 1979), pp. 521-522.

Important controversies occurred over agency authorizations and appropriations. The confirmation hearings held in phase two also reflected to some extent the differences between Congress and the FTC.

The first confirmation hearing in phase two was that of Michael Pertschuk who had for thirteen years been counsel to the Commerce Committee before President Carter appointed him to the FTC.[131] The hearing began with Senator Magnuson complimenting Pertschuk's diligent service with the Commerce Committee. The remainder of the hearing allowed Pertschuk to explain his views on what FTC policy should be.[132] Pertschuk revealed himself to be an activist on regulatory issues, commenting in written answers to questions about ways the FTC could assist in controlling inflation and unemployment. He wrote that the commission could "substantially aid the consumer in stretching his or her shrinking dollar." The FTC could do this by policing advertising and labeling information; preventing price fixing and illegal market structures; and by assuring price and quality are "subjected to the rigors of competition, not the inflationary impact of monopoly and oligopoly."[133]

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[131]U.S. Congress, Senate, Commerce Committee, Nominations--March, 95th Congress, 1st session (Washington, D.C.: Government Printing Office, 1977), p. 75.

[132]U.S. Congress, Senate, Commerce Committee, Nominations--March, 95th Congress, 1st session, p. 57.

[133]U.S. Congress, Senate, Commerce Committee, Nominations--March, 95th Congress, 1st session, p. 60.

In response to questions at the hearing by Senator John Durkin (D., New Hampshire), Pertschuk expressed his desire for an activist FTC. During questioning, Senator Durkin said, "I'm optimistic that the FTC is on the verge of a new era of agressively, efficiently, and sensibly representing the consumer in this country." Pertschuk responded, "I believe that, and that's what I'm going to try to do."[134] Pertschuk also told the committee that he favored the commission placing less emphasis on "laborious, seemingly endless" antitrust litigation. Instead he favored increasing the importance of rulemaking. He promised to remain sensitive to the "burdens which commission action can impose upon business."[135]

Senator Ernest Hollings (D., South Carolina) said he had read four articles that all indicated Pertschuk was Nader's man. Hollings asked Pertschuk if Nader was going to "take you to lunch everyday and tell you what to do?" Pertschuk answered making reference to one of his written answers in which he said government servants should "scrupulously avoid even the appearance of collusive relationships."[136]

When Robert Pitofsky's confirmation hearing was held in June 1978, he was asked about the Robinson-Patman Act. Pitofsky

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[134]U.S. Congress, Senate, Commerce Committee, Nominations--March, 95th Congress, 1st session, p. 85.

[135]"People and Business," New York Times, 7 April 1977, Sec. D, p. 7, col. 1.

[136]U.S. Congress, Senate, Commerce Committee, Nominations--March, 95th Congress, 1st session, p. 82.

indicated he thought a "sensible and balanced enforcement" of the act was "consistent with the goals of the other antitrust laws, and with the consumer interest."[137] Senator Robert Griffith (R., Michigan) pointed out to Pitofsky that he thought the FTC should be doing more to enforce the Robinson-Patman Act. Small businessmen are interested in the act, Griffith explained. The FTC should, Griffith continued, use time and staff to help consumers "in a way that is meaningful and produces some response within a reasonable period of time."[138]

When Patricia Bailey was confirmed as FTC commissioner in October 1979, her responses indicated that she was speaking to a Senate Commerce Committee that favored less regulation. Replying to written questions, Bailey said she believed the FTC's ad substantiation program had been effective. She answered that she thought corrective advertising was "a two-edged sword" that should be used carefully. Asked by Senator Packwood (R., Oregon) about antitrust, Bailey described antitrust laws as not "laws of economics," but "social" instead. Bailey indicated antitrust laws expressed "the social and political views of the way our

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[137] U.S. Congress, Senate, Commerce, Science, and Transportation Committee, Nomination of Commissioner to the FTC, 95th Congress, 2nd session (Washington, D.C.: Government Printing Office, 1978), p. 8.

[138] U.S. Congress, Senate, Commerce, Science, and Transportation Committee, Nomination of Commissioner to the FTC, p. 21.

people feel about the way this society ought to work." In answering Packwood's question she would not, however, say that size, per se, was wrong."[139]

The phase two confirmation hearings reflected a shift in attitudes toward regulation. Following Pertschuk's hearing in 1977, nominees increasingly were answering Commerce Committee members who were against the trend toward activist regulation begun in the early 1970s. In this sense, confirmation hearings were affected by the same trends as the authorization and appropriations conflicts.

Antitrust Policies

During the second phase, Congress tried to influence FTC antitrust policy in several directions. Senator Kennedy, who favored an activist antitrust policy, introduced legislation intended to promote business competition. Opponents of FTC antitrust policy introduced legislation that would have the FTC bring all its cases in federal court. The agency acquired important new competition advocacy responsibilities. The soft drink industry secured exemption from some antitrust regulation in phase two.

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[139]U.S. Congress, Senate, Commerce, Science, and Transportation Committee, Nomination--FTC, pp. 14-15.

Antitrust Improvements

The Senate Judiciary Committee's Antitrust and Monopoly Subcommittee held oversight hearings on antitrust enforcement in May 1977. This hearing advocated mroe FTC antitrust activity in contrast to the authorization and appropriations conflict occurring in this phase. Kennedy questioned FTC chairman Pertschuk about the agency's effectiveness in antitrust endeavors. Kennedy wanted to know when premerger notification regulations would be ready, how the agency decided to allocate its funds, and where in the agency policy was made.[140] Kennedy indicated he thought that it was "absolutely essential" for the commission to look into "the potential antitrust and consumer protection problems in energy supply and conservation."[141] The percent of the FTC's budget spent on the Exxon case was also a concern of Kennedy who noted 30% of the Bureau of Competition's budget going to this one case. Kennedy asked if the agency could use more funds, and Pertschuk replied government agencies always need more resources.[142]

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[140]U.S. Congress, Senate, Judiciary Committee, Antitrust and Monopoly Subcommittee, Oversight of Antitrust Enforcement, 95th Congress, 1st session (Washington, D.C.: Government Printing Office, 1977), pp. 10-12.

[141]U.S. Congress, Senate, Judiciary Committee, Antitrust and Monopoly Subcommittee, Oversight of Antitrust Enforcement, p. 14.

[142]U.S. Congress, Senate, Judiciary Committee, Antitrust and Monopoly Subcommittee, Oversight of Antitrust Enforcement, p. 17-18.

In the same hearing, Senator Paul Laxalt (R., Nevada) questioned if the FTC had enough resources to establish an early warning system to detect antitrust violations and if the FTC could get together with other government agencies and establish such a system. Pertschuk indicated he had met with economists who believed such a system was possible. On the basis of his own knowledge, Pertschuk indicated he was uncertain of the possibilities of such a plan.[143]

In March 1979, Kennedy introduced the Small Business Protection Act in the Senate. This act was intended to deal with the problem of conglomerate mergers. According to Senator Kennedy, the act was necessary because of concern for the "social and political fabric of a nation committed to pluralism and individual freedom of choice."[144] The Kennedy sponsored legislation would establish an absolute ban on mergers between corporations with assets or annual sales in excess of $2 billion. A conditional ban on mergers between companies having assets and annual sales of more than $350 million would also be established. The Judiciary Committee staff estimated that the bill would affect the 800 largest corporations in the United States and that had the proposed law

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[143]U.S. Congress, Senate, Judiciary Committee, Antitrust and Monopoly Subcommittee, Oversight of Antitrust Enforcement, p. 18.

[144]Edward M. Kennedy, "Political Diversity and Conglomerate Mergers: The Small Business Protection Act," Antitrust Law and Economics Review, 10, No. 4 (1978), p. 47.

been in effect, 66 mergers would have been affected between 1960 and 1978.[145] Senator Kennedy introduced another bill in 1978 that would prohibit the nation's sixteen largest oil companies from acquiring any firm with $100 million or more in assets.[146] These two pieces of Kennedy legislation served to inform the FTC that there was still substantial and influential interest in Congress that the agency do all possible to maintain competitive conditions. Neither bill became law, however.

Those with reservations about the FTC's antitrust activities were also active in proposing legislation. In 1979, Senator Orrin Hatch (R., Utah) introduced a bill that required the FTC to bring all antitrust cases in the federal district courts. Senator Howell Heflin (D., Alabama) introduced legislation that would have eliminated the FTC's ability to order divestiture or other forms of structural relief in non-merger cases such as Exxon and Kellogg.[147] Had either or these bills become law, the FTC's authority in prosecuting antitrust would have been substantially weakened. In proposing these acts, Hatch and Heflin were probably trying to encourage a less aggressive FTC antitrust policy.

The line-of-business data collection program was sustained by Congress in the late 1970s. Originally approved in phase

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[145]Charles W. Hucker, "Kennedy Seeks Limitations on Conglomerate Mergers," Congressional Quarterly, 17 March 1979, pp. 485-86.

[146]Kovacic, p. 656.

[147]Kovacic, p. 666.

one, the line-of-business program was restricted from the beginning. Concern was expressed in oversight committees about delays lawsuits caused the program. No legislation to expedite date collection was passed, however.[148] The same doubts that originally restricted this program evidently had not been resolved.

Energy

The Congress in 1978 further expanded the FTC's competition advocacy responsibilities with several new statutes. When the agency contributes analysis as a competition advocate, it utilizes the knowledge and expertise found within the agency to assess how public policy being planned would affect competition. The new laws were the Outer Continental Shelf Lands Act Amendments of 1978, the National Energy Conservation Policy Act of 1978, and the Power Plant and Industrial Fuel Use Act of 1978.[149] Each of these acts required the FTC to present procompetitive analyses from time to time to facilitate the formulation of good public policy by other government agencies.[150] The Outer Continental Shelf Lands Act Amendments of 1978, for example, required the Attorney General to consult the FTC about possible

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[148]Kovacic, p. 654.

[149]92 Stat. 322-338, 15 U.S.C. 2801-2806; 92 Stat. 634-670., 43 U.S.C. 1331; 92 Stat. 3206, 12 U.S.C. 1451; 92 Stat. 3289, 15 U.S.C. 796.

[150]Kovacic, pp. 656-7.

anticompetitive consequences of oil leases before he issues them.[151] Besides expanding the FTC's jurisdiction, these laws encouraged the commission's involvement in formulating procompetitive policy. Darius Gaskins, Jr., Director of FTC's Bureau of Economics, testified before the House Ad Hoc Committee in favor of the Outer Continental Shelf legislation. He said the law being considered would insure "the public receives the maximum benefits from Outer Continental Shelf resources."[152]

The Petroleum Marketing Practices Act of 1978 required that octane ratings be certified and posted on service station pumps.[153] Refiners would be required to determine their gasoline's octane rating and then to display octane ratings on gasoline station pumps. Car manufacturers would be required to display the proper octane requirements. The same legislation protected gasoline station owners from the arbitrary cancellation of their franchises.[154] Testifying in favor of this act Christian White of the FTC's Bureau of Competition indicated the FTC had "for many years endorsed

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[151] 43 U.S.C. 1331-1337.

[152] U.S. Congress, House, Ad Hoc Select Committee on Outer Continental Shelf, Outer Continental Shelf Lands Act Amendments of 1977, 95th Congress, 1st session (Washington, D.C.: Government Printing Office, 1977), p. 662.

[153] 92 Stat. 332-338, 15 U.S.C. 2801-2806.

[154] "Measures to Prevent Unfair Gas Station Franchise Cancellation Are Reported," Congressional Quarterly, 22 April 1978, p. 966.

the idea of posting octane information on gasoline pumps." He noted that the FTC had promulgated a trade regulation rule requiring octane ratings be posted in 1971, but that this rule was still being challenged in the courts and "its enforcement postponed."[155] White also indicated the FTC favored "making sure franchisers are treated fairly."[156]

In 1978, Representative John E. Moss, Chairman of the House Commerce Committee's Oversight Subcommitte, requested that the FTC investigate allegations that Shell Oil Company was committing antitrust violations. Shell allegedly required franchised gas stations to buy a fixed amount of leaded gasoline in order to obtain any unleaded gasoline. The purchase of leaded gasoline was required even when the station did not have enough of a market to sell the leaded gasoline. Moss further noted that there were shortages of unleaded gasoline in some areas of the country. Representatives Toby Moffett (D., Connecticut) and Andrew Maguire (D., New Jersey) joined Moss in requesting that the FTC investigate these antitrust allegations.[157] No FTC case was brought subsequently

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[155]U.S. Congress, House, Interstate and Foreign Commerce Committee, Energy and Power Subcommittee, Petroleum Marketing Practices, 95th Congress, 1st session (Washington, D.C.: Government Printing Office, 1977), p. 255.

[156]U.S. Congress, House, Interstate and Foreign Commerce Committee, Energy and Power Subcommittee, Petroleum Marketing Practices, p. 388.

[157]Larry Kramer, "3 Congressmen Ask FTC Antitrust Probe of Wholesale Gasoline Practices by Shell," Washington Post, 20 November 1978, Sec. A, p. 4, col. 1.

against Shell Oil for these practices although Shell was among the respondents in the Exxon cases which was considering similar abuses of power by the big oil companies.

Special Interests

A successful attempt to allow exclusive soft drink licenses was made in 1980. The FTC's complaint in the Crush case had contended this practice was illegal. The soft drink industry had tried for several years to secure legislation exempting it from the antitrust allegations made in the case. When this legislation was passed, the Crush case was still pending. A discharge petition was required to get this legislation out of the House Judiciary Committee's Monopolies and Commercial Law Subcommittee. Representative Sam B. Hall (D., Texas) obtained the 218 signatures required on the discharge petition.[158] On June 17, 1980, the House Judiciary Committee reported the bill. The House eventually passed the soft drink bill 377-34, on June 24, 1980, and the Senate passed similar legislation on May 15, 1980 by voice vote.[159] This legislation repeated a frequently

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[158]"Enough Signatures Obtained on Discharge Petition for Soft Drink Bottlers' Bill," Congressional Quarterly, 7 June 1980, p. 1571.

[159]"Bottlers Protected on Antitrust Suits," Congressional Quarterly, 28 June 1980, p. 1815 and "Bottlers' Bill Clears," Congressional Quarterly, 5 July 1980, p. 1888.

made point: from time-to-time if sufficient political pressures build, Congress will assist special interests adversely affected by FTC rulings.

Members of Congress both encouraged and suggested restrictions of antitrust policy in phase two. Those who favored a more active antitrust policy added procompetitive responsibilities to the agency's jurisdiction, and advocated more active procompetitive policies. Opponents of the agency suggested legislation that would restrict what the FTC could do in antitrust. The soft drink industry gained an antitrust exemption. Consumer policy in phase two similarly interested both those in Congress who wanted a more and a less aggressive FTC, and those who sought a less aggressive agency.

Consumer Policy

Congress was involved in several FTC consumer questions in phase two. Hearings were held concerning children's advertising. Oversight of the implementation of the Magnuson-Moss Act was conducted. Labeling requirements were also changed, and fair credit reporting practices were a concern.

Advertising

In 1978, the Senate Appropriations Subcommittee wanted to know more about the children's television investigation. Senator's comments indicated the subcommittee to some extent was uncertain about this rulemaking. Senator Lowell Weicker (R., Connecticut)

asked Michael Pertschuk to comment on the Washington Post's description of the FTC as a "National Nanny" in reference to the children's television investigation. Pertschuk replied that the FTC had done no more than institute a rulemaking in this area to hear public comment on staff proposals. Senator Earnest Hollings (D., South Carolina) questioned the credibility of the FTC for bringing such a "borderline case up here" with serious problems like inflation unsolved.[160] Senator Hollings thus suggested he did not think the FTC should waste its time on an investigation into children's television advertising. Senator Hollings again expressed this same opinion in 1980 when he indicated he thought advertising was only 10% of the problem. The other 90% of the problem was children's programming. As Hollings defined the problem, the question should be transferred to the Communications Subcommittee. A decision should then be made as to whether and to what degree government should become involved in children's programming.[161]

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[160] U.S. Congress, Senate, Appropriations Subcommittee, Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1979, 95th Congress, 2nd session (Washington, D.C.: Government Printing Office, 1978), pp. 1700-1704.

[161] U.S. Congress, Senate, Appropriations Subcommittee, Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1981, 96th Congress, 2nd session (Washington, D.C.: Government Printing Office, 1980), p. 397.

The Magnuson-Moss Act

In 1979, four years after the Magnuson-Moss Act went into effect, the Senate Commerce, Science, and Transportation Committee's Subcommittee for Consumers held oversight hearings on how the act had been implemented. Senator Howard Cannon (D., Nevada) acknowledged the FTC's rulemaking authority had "generated considerable controversy," and that "legitimate concern" had been expressed about rulemaking. Cannon saw the oversight hearings as an opportunity to examine these "many issues and controversies."[162] In holding this hearing, the subcommittee was attempting to direct the FTC rulemaking along lines intended by the Magnuson-Moss Act. Some senators took advantage of the hearing to criticize rulemaking as envisaged by Magnuson-Moss.

Senator John Danforth (R., Missouri) used the hearing to explain how Congress had reacted to the American Bar Association Report critical of the FTC. In so doing, he essentially exhorted the agency to continue reforms begun in the first phase. Congress had, according to Danforth, for ten years "supported the extensive efforts of the commission to change its course." From 1972 to 1976, the agency had requested annual budget increases of 11%. The Congress "pushed the agency" to a budget growth rate of 19%

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[162]U.S. Congress, Senate, Commerce, Science, and Transportation Committee, Consumers Subcommittee, Oversight of the FTC, 96th Congress, 1st session (Washington, D.C.: Government Printing Office, 1979), p. 2.

per year. Congress continually increased the FTC's jurisdiction "leading up to the Magnuson-Moss Warranty FTC Improvement Act in 1974." These years were an "age of activism," and Congress encouraged "more and more consumer-oriented legislation." The FTC's responsibilities increased in energy and credit reporting, and antitrust and consumer cases with novel theories were begun.[163]

Senator Harrison Schmitt (R., New Mexico) was not as supportive of the FTC's expanded power as Danforth. Schmitt did not favor as aggressive regulation as Danforth. Schmitt emphasized the fact that rules are "basically a legislative act." The FTC, he continued, "may be the second most powerful legislative body in the country" because it has the power to overrule all State laws, commissions, and supreme courts on commercial questions. Having delegated so much power to the agency, Congress must reserve "the power to oversee and possibly disapprove those rules when an agency strays too far afield."[164]

The House Interstate and Foreign Commerce Committee's Subcommittee on Oversight and Investigations held hearings on rulemaking by administrative agencies. Since the Magnuson-Moss Act was, as described by Representative Albert Gore (D., Tennessee),

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[163]U.S. Congress, Senate, Commerce, Science, and Transportation Committee, Consumers Subcommittee, Oversight of the FTC, pp. 3-4.

[164]U.S. Congress, Senate, Commerce, Science, and Transporttaion Committee, Consumers Subcommittee, Oversight of the FTC, pp. 5-6.

"the most important innovative experiment in rulemaking in recent history," the committee began its rulemaking oversight hearings with a consideration of the FTC's funeral industry rulemaking then in progress. The purpose of this two day hearing was to determine if the rule was needed and to ask how effective Magnuson-Moss rulemaking procedures were. The hearing considered the impact of abuses by funeral directors, whether these practices were widespread, and if there were state laws regulating funeral directors. Next, the effectiveness of the rulemaking process itself was assessed with testimony from participants in the proceedings.[165] This hearing communicated to the FTC the subcommittee's concern an adequate need exist before rulemakings are initiated.

Transportation

House Appropriations Subcommittee hearings in 1980 disussed the FTC automobile industry investigation. Representative Neal Smith (D., Iowa) learned that $690,000 had been budgeted for 16 positions to conduct the investigation in 1980.[166] Pertschuk's

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[165]U.S. Congress, House, Interstate and Foreign Commerce Committee, Oversight and Investigations Subcommittee, Funeral Industry: FTC Proposed Rulemaking, 96th Congress, 2nd session (Washington, D.C.: Government Printing Office, 1980), pp. 1-2.

[166]U.S. Congress, House, Appropriations Subcommittee, Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1981, 96th Congress, 2nd session (Washington, D.C.: Government Printing Office, 1980), p. 171.

general statement to the hearing indicated the FTC staff was "redrafting the investigational resolution" to reflect a narrower scope. The focus of the auto investigation was on violations of antitrust laws and in particular on "whether economic efficiency or illegal exclusionary conduct accounts for the continuing dominance of the market leaders."[167]

The Used Oil Recycling Act of 1980, passed by Congress on October 1, 1980, affected an FTC ruling on recycling lubricating oil.[168] Since 1964, the FTC required re-refined oils be labeled "Made from Previously Used Oil." This legislation reversed this ruling and allowed re-refined oil to be sold without being labeled as used. Representatives James J. Florio (D., New Jersey), chairman of the House Commerce Subcommittee on Transportation, defended the legislation because used oil is a "valuable resource that has been grossly underutilized."[169]

Fair Credit Reporting

A bill to protect consumers from debt collectors passed both House and Senate on September 8, 1977. Legislation such as this was introduced in 1973 but was not passed. The House had passed

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[167]U.S. Congress, House, Appropriations Subcommittee, Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1981, pp. 144-145.

[168]94 Stat. 2055, 42 U.S.C. 6363.

[169]Andy Plattner, "Congress Gives Boost to 'Recycled' Motor Oil," Congressional Quarterly, 11 October 1980, p. 3110.

debt collection abuse legislation in 1976 by a 77 vote margin, but in 1977 this legislation cleared by only one vote, 199-198. After the legislation underwent major revisions in the Banking Committee, the Senate passed the legislation by a voice vote. The Senate removed a provision for a $100 minimum award and several provisions specifically prohibited various credit practices.[170]

This legislation authorized the FTC to control debt collection practices. Consumers were protected from late night calls, harassment, and threats of violence. Department stores, banks, and businesses that collect their own debts were not within this legislation's jurisdiction.[171] By expanding the FTC's jurisdiction in consumer affirs, the Congress again encouraged the commission to become a more important proconsumer force.

In phase two Congress became increasingly critical of the FTC. Many supporters of the commission left Congress in 1976, and the subsequent years found opponents of the FTC more numerous and vocal. Important conflicts with the agency occurred in authorization and appropriations proceedings. A two house legislative veto was finally included in an authorization bill. Opponents

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[170]Harrison H. Donovan, "Abusive Debt Collection Practices Banned," Congressional Quarterly, 1 October 1977, p. 2076.

[171]Donovan, p. 2076.

of an aggressive FTC tried to require the agency to use the federal courts for cases and attempted to restrict the agency's jurisdiction in antitrust. New competition advocacy responsibilities were assigned to the FTC. The soft drink industry secured legislation exempting it from certain provisions of the antitrust laws.

Reaction within Congress to consumer policy issues was mixed. The Kid-Vid rulemaking became a controversy that elicited comment from Congress. Serious efforts were made to block several rulemakings. At the same time, Congress was promoting more consumer action at the FTC. Fair credit reporting legislation that protected consumers against debt collectors was approved. Legislation changed the requirements for labeling used oil. In phase two, Congress would still support FTC consumer initiatives; however, there was substantially more congressional criticism of agency consumer policy.

Phase Three--1981-1983

Phase three saw an FTC that was considerably less activist than the agency in either of the two proceeding phases. President Reagan, a Republican, was elected President in 1980 and the Republicans gained a majority in the Senate. A period of regulatory inactivity followed this political change. During two full years, 1981 and 1982, the commission ordered only one divestiture. Consumer cases were similarly few in number. Several of the controversial FTC actions begun in earlier phases was discontinued in phase three.

General Direction

In phase three, various attempts were made by members of Congress to prevent the FTC from adopting a passive approach to antitrust and consumer policy. Hearings questioned plans to close regional offices, and plans to cut the FTC's budget were discussed. Whether the commission was or was not enforcing the laws entrusted it was also debated. Oversight hearings held in 1982 questioned whether the FTC was effectively pursuing the responsibilities Congress had assigned to the agency.

When the House Energy and Commerce Committee reported the FTC authorization bill on August 18, 1982, the measure contained several commission restrictions. The legislation would necessitate that the FTC prove a condition was causing a substantial harm to the consumer before taking any action. The FTC was prohibited from investigating or prosecuting agricultural cooperatives. A two house legislative veto was retained. On the House floor an amendment offered by Representative Thomas Luken (D., Ohio) that would prevent the FTC from regulating professionals was approved by a vote of 245-155.[172] An FTC authorization bill including this provision to prevent the commission from regulating professionals was approved by the House on December 1, 1982.[173]

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[172]"Authorization," 1982 Congressional Quarterly Almanac (Washington, D.C.: Congressional Quarterly, Inc., 1983), p. 348.

[173]"Authorization," 1982 Congressional Quarterly Almanac, p. 348.

The Senate Commerce Committee reported its version of the FTC authorization bill on May 28, 1982. The Senate bill had been approved in committee over the objections of Senator Robert Packwood, the committee chairman, and Senator Howard Cannon, the ranking minority member. Senator Ted Stevens (R., Alaska), proposed an amendment barring the FTC from regulating professions licenses by the states. Steven's amendment was accepted by the Commerce Committee by a 10-5 vote. The Senate bill included provisions preventing the FTC from regulating ads that were unfair and limiting the commission's ability to restrict unfair business practices. Actions against agricultural cooperatives were prohibited and the two house legislative veto was extended.[174]

A parliamentary maneuver by Packwood prevented the authorizations bill from being considered in the Senate before the end of the session. Packwood commented, "There just wasn't enough time to bring it (the authorization bill) up on the floor for lengthy debate."[175] When the 97th Congress ended no new FTC authorizing legislation had been passed. New FTC legislation was not approved in 1983. The conflict about whether the commission should regulate professionals continued.

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[174]"Authorization," 1982 Congressional Quarterly Almanac, p. 348.

[175]U.S. Congress, House, Energy and Commerce Committee, Oversight and Investigations Subcommittee, FTC Oversight, p. 129.

Conflict about the FTC was not restricted to authorization legislation. Opponents and proponents of the commission also fought over the FTC's appropriation in phase two. Those who favored a vigorous FTC along phase one and two lines used Senate Appropriations Subcommittee hearings to question commission plans to close regional offices. When acting FTC Chairman Clanton appeared before the Senate Appropriations Committee in 1981, Senator Lowell Weicker asked if the agency planned to close regional offices and if Clanton was in favor of closing these offices. Clanton suggested that the "major elements of the regional office structure" should be kept, acknowledging across the board budget cuts would require a careful allocation of funds.[176] Clearly with fewer regional offices the agency's ability to establish effective antitrust and consumer policy would be lessened.

Plans to cut the agency's budget also were tried in appropriations proceedings. Senator Robert Kasten (R., Wisconsin) offered an amendment in 1981, during Senate Appropriations Subcommittee hearings, to cut the FTC appropriation $10 million from $71.9 to $61.9 million, Senator Weicker was quick to present an analysis questioning the effect of such a move. His staff analysis indicated that a $61 million budget would result in closing four of the FTC's ten regional offices and a lay-off of

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[176] U.S. Congress, Senate, Appropriation Subcommittee, Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1982, 97th Congress, 1st session (Washington, D.C.: Government Printing Office, 1981), p. 324.

more than 100 people, and then "dramatically curtail antitrust enforcement in general."[177] The committee eventually trimmed the FTC budget from $71.9 million to $68.1 million.

Senator Weicker questioned, during 1982 Senate Appropriations Subcommittee hearings, whether the FTC was enforcing the laws entrusted to the agency. Weicker indicated that he did not believe FTC Chairman Miller was committed to carry out the agency's legal mandates. From Miller's public statements, Weicker inferred lack of support for the FTC's authorizing legislation. Congress, he continued, could repeal the FTC's authorizing legislation, but the commission was not going to be closed by the "back door." Miller affirmed that he had "no anticipation of trying to close down the agency."[178] In this hearing, Weicker emphasized that Congress had some expectation that laws assigned an agency be enforced. Subsequent to this confrontation, the FTC again began ordering divestitures and generally showed some more interest in making antitrust and consumer policy. FTC opponents tried to restrict the regulation of professionals when the agency's appropriations bill was considered. The regular appropriations bill was not approved because there had been no authorization

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[177] "State, Justice, Commerce," Congressional Quarterly, 14 November, 1981, p. 2227.

[178] U.S. Congress, Senate, Appropriations Subcommittee, Department of State, Justice, and Commerce, the Judiciary and Related Agencies Appropriations for Fiscal Year 1983, 97th Congress, 2nd session (Washington, D.C.: Government Printing Office, 1982), p. 887.

legislation approved. The FTC had to be funded instead with a continuing resolution.[179]

While this resolution was being considered, Senator James McClure offered an amendment that would deny the FTC the funds to regulate professionals. Senator McClure described the 1980 FTC Improvement Act as a signal to the commission to "restrain the scope of FTC activities." McClure continued that he did not believe "our message has been understood."[180] Opponents of the exemption for state-regulated professional groups, notably Senator Warren Rudman (R., New Hampshire), stayed firm in their opposition to moves to restrict the FTC. Rudman offered a motion to table the McClure amendment that passed 59-37.[181] The conference committee succeeded in putting together a continuing resolution to fund the FTC that did not restrict the commission's ability to regulate professionals.

Other members of Congress were unsatisfied and intended on seeing the FTC's activities even further restricted. Bills were introduced that would allow the Office of Management and Budget to analyze all economic impact statements devised by the FTC in rulemaking. Other proposed legislation would require the agency

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[179]Sarasohn, "Business Stymied in Efforts to Curb FTC," p. 3159.

[180]"Commerce, Justice, State Funds Bill," Congressional Quarterly, Inc., 22 October 1983, p. 21.

[181]Judy Sarasohn, "Business Stymied in Efforts to Curb FTC," pp. 3159-3160.

to show substantial harm to the consumer before beginning a rule making.

There was another FTC authorization crisis in phase three. Having failed to influence the appropriations bill opponents of regulation of professionals turned their attention to the FTC authorizations bill. In 1982, a dispute over an amendment preventing the commission from regulating state regulated professional groups resulted in the defeat of the regular authorization bill.

The effectivesness of the agency in phase three was questioned by the Oversight and Investigations Subcommittee of the House Energy and Commerce Committee in oversight hearings held in December 1982. Representative Dingell, chairman of the committee, stressed his conviction "that vigorous evenhanded enforcement of the laws entrusted to the administration" was the FTC's "best hope for future success in the Congress and with the public." That, Dingell said, would result in consumers being best protected. Dingell questioned if the FTC under Miller had achieved its stated goal of providing consumers a "bigger bang for their buck." The purpose of this hearing was to allow the FTC to account for why there was so little commission activity in 1982.[182]

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[182]U.S. Congress, House, Energy and Commerce Committee, Oversight and Investigations Subcommittee, FTC Oversight, 97th Congress, 2nd session (Washington, D.C.: Government Printing Office, 1983), p. 1.

The same oversight hearings had testimony from FTC Commissioner Clanton. The commission, Clanton indicated, had "realized that rulemaking isn't the answer for a lot of problems." Instead, the FTC was returning to case-by-case enforcement. Clanton explained that the backlog of cases had resulted in a dropoff in issuing new complaints. Fewer complaints and consents were issued allowing the commission to reassess where it was going.[183]

Opponents of the FTC introduced several plans to effectively restrict the agency in phase three. These various plans, although not approved, communicated to FTC that there was activity in Congress opposed to aggressive antitrust regulation. Representative George Danielson (D., California) introduced a bill in 1981 that would give the Office of Management and Budget the power to review the FTC's analysis of the economic impact of a proposed rule. Danielson's proposal was based on a belief that good public policy requires an outside authority, the Office of Mangement and Budget in this case, to supervise the agency's economic analysis. Murray Weidenbaum, chairman of the Council of Economic Advisers, was among those who believed that cost-benefit analysis was important to regulatory reform. Weidenbaum had said, "For each new rule proposed, the regulatory agency

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[183]U.S. Congress, House, Energy and Commerce Committee, Oversight and Investigations Subcommittee, FTC Oversight, p. 61.

should be required to demonstrate at least a reasonable relationship between the costs imposed and benefits produced--and to demonstrate they have chosen the most efficient (least costly) method of achieving those benefits."[184]

The same pattern of mixed messages was evident in confirmation hearings. James C. Miller appeared before the Senate Commerce Committee July 24, 1981, for his confirmation hearing. Senator Katsen in his opening remarks, accused the FTC of "regulatory overkill." Katsen further stated, "the need to eliminate needless regulations" and to prevent the FTC's adverse effects on "useful economic activity." "Changes at the FTC" was clearly what Katsen expected. About Miller, Katsen said, "It is people like Jim Miller who are going to help."[185]

Miller's answers to questions elaborated a conservative theory of regulation. Advertising, he indicated, should be free of deception and fraud. Regulation should not, he said, protect "a few gullible people" at the expense of cutting off "useful information that would flow to people who were a bit more sophisticated."[186]

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[184]Laura B. Weiss, "Reagan, Congress Planning Regulatory Machinery Repair," Congressional Quarterly, 7 March 1981, pp. 410-411.

[185]U.S. Congress, Senate, Commerce Committee, Nominations--FTC, 97th Congress, 1st session (Washington, D.C.: Government Printing Office, 1981), pp. 1-2.

[186]U.S. Congress, Senate, Commerce Committee, Nominations--FTC, 97th Congress, 1st session, p. 6.

Miller also criticized the FTC's antitrust record and suggested that some of the commission's actions were "misdirected." He told the Senate Commerce Committee that the agency should give more attention to horizontal antitrust cases and not as much to "bigness-is-bad theories." His comments indicated he did not favor concentrated industries cases, and he also promised on confirmation to make a "thorough evaluation" of the federal government antitrust laws and their enforcement.[187]

Several Republican members of the Commerce Committee suggested that Miller's nomination might result in too much change in FTC policy. Senator John Danforth indicated the nomination should be held up because the administration was demonstrating "a singular lack of interest in the enforcement of antitrust laws." Senator Robert Packwood and Senator Slade Gordon similarly questioned Miller's nomination. These senators emphasized that changes in antitrust policy should be made by Congress, not by Miller at the FTC. The Commerce Committee eventually voted to confirm Miller as chairman by a vote of 16 to 1 with Senator Gordon as the only dissenter.[188]

One of President Reagan's nominees to the FTC had to be withdrawn in phase three because of Senator Cannon's objectives.

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[187]Merrill Brown, "FTC Nominee Calls Agency 'Misdirected' on Antitrust Efforts," Washington Post, 25 July 1981, Sec. D, p. 7, col. 5.

[188]Merrill Brown, "Reagan Antitrust Policy Hit," Washington Post, 1 August 1981, Sec. D, p. 7, col. 2.

When the Commerce Committee considered F. Keith Adkison's nomination, allegations were made that Adkinson had used a former position as a Senate aide to promote his own financial interests.[189] On March 29, 1982, President Reagan withdrew Adkinson's nomination because it became clear he did not have enough votes in the committee to recommend the confirmation.[190]

When George Douglas was confirmed as FTC commissioner in December 1982, Senator Katsen asked if he was "out to dismantle the FTC." Douglas replied, "Nothing could be further from the truth," and explained he saw the purpose of the FTC being to "insure the effectiveness of competition in the marketplace."[191] Senator Wendell Ford (D., Kentucky) asked the nominee if he proposed any changes in FTC activities. Douglas responded that over the last ten years the FTC had "perhaps been overly ambitious" or guilty of "coercive paternalism in protecting consumers in the marketplace."[192]

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[189]U.S. Congress, Senate, Commerce Committee, Nominations-FTC, 97th Congress, 1st session, p. 27.

[190]"Nomination Withdrawn," Congressional Quarterly, 3 April 1982, p. 745.

[191]U.S. Congress, Senate, Commerce, Science, and Transportation Committee, Nominations--Federal Trade Commission and Civil Aeronautic Board, 97th Congress, 2nd session (Washington, D.C.: Government Printing Office, 1982), p. 4.

[192]U.S. Congress, Senate, Commerce, Science, and Transportation Committee, Nomination--Federal Trade Commission and Civil Aeronautic Board, pp. 5-6.

When Terry Calvani's confirmation hearing was held in November 1983, Senator Heflin (D., Alabama) asked if Calvani had any feelings about the FTC entering into matters traditionally regulated by the states. He indicated he had "a distinct preference for local regulation whenever it is possible." Calvani further said he would bring to the commission "a healthy skepticism for regulation."[193] The committee's majority prepared written questions that were presented to Calvani. Asked about state regulated professions. he replied the FTC should have the same authority over them that the commission has over other business entities.[194] The committee's minority members questioned him about enforcement of the Robinson-Patman Act. He suggested attention should be directed to "the competitive injury requirements in price discrimination cases."[195]

Antitrust Policy

The authorization and appropriation conflict in phase three centered on restricting the FTC's ability to use the antitrust laws to regulate professionals. Congress, however, was divided

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[193]U.S. Congress, Senate, Commerce, Science, and Transportation Committee, Nominations--October-November, 98th Congress, 1st session (Washington, D.C.: Government Printing Office, 1983), pp. 15-16.

[194]U.S. Congress, Senate, Commerce, Science, and Transportation Committee, Nominations--October-November, p. 19.

[195]U.S. Congress, Senate, Commerce, Science, and Transportation Committee, Nominations--October-November, p. 20.

over whether the FTC should have a more or less aggressive antitrust policy. Influential congressmen expressed the opinion that the FTC's antitrust policy was not aggressive enough. The effectiveness of guidelines the commission established for horizontal mergers were also questioned.

When the fiscal 1982 appropriations bill was considered, the members voted 85-0 to accept an amendment by Senator Strom Thurmond (R., South Carolina) declaring the consensus opinion of the Senate that the Justice Department and the FTC should vigorously enforce antitrust laws. Senator Thurmond's resolution was a substitute for one proposed by Senator Howard Metzenbaum (D., Ohio) that said the current series of mergers was "typing up substantial amounts of credit to the detriment of small business" and "contributing to the intolerably high level of interest rates." Mobil Corporation's attempt to take over Marathon Oil Company was a special concern of Metzenbaum's.[196]

A joint hearing of the Senate Commerce, Science, and Transportation Committee and the House Energy and Commerce Committee was held in 1981 to assess the affect of Mobil Oil's proposed purchase of Marathon Oil Company. Senator Packwood, Commerce, Science, and Transportation Committee Chairman, indicated Congress

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[196]"State, Justice, Commerce," Congressional Quarterly, 14 November 1981, p. 2227.

had the right and the responsibility to investigate "public policy concerns such as this merger" to determine the adequacy of the antitrust laws.[197]

Senator Cannon was interested in whether this merger would result in a wave of mergers producing a concentrated market. Another concern of Cannon's was whether consumers would benefit from the new oil discoveries. With regard to the FTC Cannon said he encouraged the commission "to investigate thoroughly this merger activity as well as any similar proposals to determine potential anticompetitive efforts."[198]

Representative Dingell, chairman of the House Energy and Commerce Committee, suggested that Mobil Oil might be trying to reassemble the Standard Oil trust broken up in 1911. He indicated he was displeased that the administration was not using the Justice Department against such mergers. Instead, Dingell accused the administration of endorsing greater oil profits, favoring elimination of windfall profits taxes, and doing nothing to block increasing market concentration in oil. Congress, Dingell said, should direct its attention to the concentration of wealth and "the economic and political powers of the major oil companies."

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[197]U.S. Congress, Joint Hearings, Senate Commerce, Science, and Transportation Committee and House Energy and Commerce Committee, Proposed Purchase of Marathon Oil Company by Mobil Oil Corporation, 97th Congress, 1st session (Washington, D.C.: Government Printing Office, 1971), p. 2.

[198]U.S. Congress, Joint Hearings, Senate Commerce, Science, and Transportation Committee and House Energy and Commerce Committee, Proposed Purchase of Marathon Oil Company by Mobil Oil Corporation, p. 8.

Programs should then be developed that insure competition and "distribution of profits fairly across all segments of American industry."[199]

The House Energy and Commerce Committee's Oversight and Investigation Subcommittee FTC oversight hearing in 1982 provided congressmen another opportunity to question the FTC about anti-trust policy. Representative Robert Whittaker (R., Kansas) described the hearing as allowing the FTC an opportunity to assist the committee in "determining the priorities of the agency."[200] Representative Ron Wyden (D., Oregon) questioned what the FTC was doing to protect the consumer from anticompetitive practices in Alaska. He questioned if the FTC had filed the competitive analyses required by the Outer Continental Shelf Lands Act before the Interior Department awarded offshore drilling leases. Chairman Miller informed the committee the FTC had reviewed the leases.[201]

Horizontal Merger Guidelines

The Senate Judiciary Committee questioned FTC Chairman Miller in July 1982 concerning the new horizontal merger guidelines established by the agency. Miller explained that the commission

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[199]U.S. Congress, Joint Hearings, Senate Commerce, Science, and Transportation Committee and House Energy and Commerce Committee, Proposed Purchase of Marathon Oil Company by Mobil Oil Corporation, p. 4-5.

[200]U.S. Congress, Senate, Energy and Commerce Committee, Subcommittee on Oversight and Investigations, FTC Oversight, p. 3.

[201]U.S. Congress, Senate, Energy and Commerce Committee, Subcommittee on Oversight and Investigations, FTC Oversight, p. 3 and p. 115.

had focused on horizontal mergers because "of the greater competitive implications of this class of mergers." The FTC, he continued, should be involved "in developing and articulating merger enforcement policy."[202]

Senator Metzenbaum questioned how the FTC is new horizontal merger guidelines could produce adequate antitrust enforcement. The FTC had suggested that a 5% price increase need be shown likely as the result of a merger before the FTC would take action. Metzenbaum told the commission that such guidelines would not produce adequate antitrust enforcement. He specifically questioned the effectiveness of the new guidelines in oil company mergers. Metzenbaum thought the new FTC merger guidelines might be "a totally unrealistic method for analyzing the effects of mergers." The agency should instead, Metzenbaum indicated, investigate how the oil companies are "the major factor" in pushing up prices affecting the Consumer Price Index.[203]

Special Interests

The malt beverage industry prevailed upon Congress in phase three for passage of the Malt Beverage Interbrand Competition

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[202]U.S. Congress, Senate, Judiciary Committee, Oversight of Government Merger Enforcement Policy, 97th Congress, 2nd session (Washington, D.C.P Government Printing Office, 1982), pp. 3-4.

[203]U.S. Congress, Senate, Judiciary Committee, Oversight of Government Merger Enforcement Policy, p. 9.

Act. This act would be similar to the interbrand competition act Congress had passed for the soft drink industry in phase two. The purpose of the proposed law would be to exempt agreements between brewers and distributors from the antitrust laws if there was competition between brands.[204] As Senator Proxmire explained, this law would put "the brewing industry on the same footing as the soft drink industry."[205]

FTC Chairman Miller reported that the FTC "strongly opposed" this proposed law. He noted that present antitrust laws permitted exclusive procompetitive territorial arrangements. The anticompetitive exclusive territorial arrangement would benefit from the act's passage. This law could, Miller concluded, affect "the ability of antitrust enforcement to preserve this nation's free market economy."[206] This bill has not been approved by Congress as of the present time.

In phase three, members of Congress tried both to urge the FTC to do more antitrust enforcement and attempted to block

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[204]U.S. Congress, House, Judiciary Committee, Monopolies and Commercial Law Subcommittee, Malt Beverage Interbrand Competition Act, 97th Congress, 2nd session (Washington, D.C.: Government Printing Office, 1982), p. 1.

[205]U.S. Congress, Senate, Judiciary Committee, Malt Beverage Interbrand Competition Act, 97th Congress, 2nd session (Washington, D.C.: Government Printing Office, 1982), p. 3.

[206]U.S. Congress, House, Judiciary Committee, Monopolies and Commercial Law Subcommittee, Malt Beverage Interbrand Competition Act, p. 106.

regulatory efforts. A determined effort failed to exempt professional groups from FTC antitrust regulation. A resolution encouraged the FTC to enforce the antitrust laws. Congress, itself, indicated interest in the Marathon and Mobil merger. Commission antitrust guidelines were questioned as ineffective. The malt beverage industry tried to gain an antitrust exemption. Congress' reaction to FTC consumer policy was similarly mixed in phase three.

Consumer Policy

Congressional involvement in FTC consumer policy was more marked in phase three. The 1980 FTC Improvement Act allowed a two house legislative veto of FTC action, and twice disapproval resolutions were tried against trade regulation rules. A disapproval resolution was approved in both houses of Congress effectively blocking a trade regulation rule requiring used car dealers to list known defects. An unsuccessful attempt was made to pass a resolution disapproving the funeral industry rule. A house committee urged the FTC to investigate the insurance industry.

The Used Car Rule

Before the Supreme Court declared the legislative veto unconstitutional, Congress vetoed one FTC action. On November 5, 1981, Senator Larry Pressler (R., South Dakota) introduced a disapproval resolution in the Senate Commerce Committee directed

at the FTC rule requiring disclosure of major defects in used cars. Pressler had 35 cosponsors for his resolution. Besides trying to block the used car rule, the disapproval resolution served notice on the FTC that Congress would not accept every trade regulation rule the agency produced.

The FTC claimed the used car rule was necessary because of a "pattern of deceptive practices." The National Automobile Dealers Association opposed the FTC's used car rule because the rule was insensitive to "the plight of the retail franchised automobile dealer," given current economic conditions.[207] The Senate Commerce Committee approved this resolution 12-4, thus disapproving the FTC's used car rule on December 10, 1981.[208]

During the Senate Commerce Committee's Consumer Subcommittee hearings, Senator Pressler defended Congress's ability to use its legislative veto and supported his resolution disapproving the Used Car Rule. Many regulations, Pressler stated, are "beyond the intent of this legislative body." The Used Car Rule was, to Pressler, a frustrating regulation that could cripple small businesses. Pressler noted that nearly 10% of franchised

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[207]Judy Sarasohn, "FTC Rule on Used Car Sales Provides First Major Test of Congress' Veto Power," Congressional Quarterly, 7 November 1981, p. 2180.

[208]"FTC Used Car Rule," Congressional Quarterly, 12 December, 1981, p. 2475.

automobile dealers had been forced out of business in South Dakota in the last year.[209] Representative Gary Lee (R., New York) introduced a companion resolution in the House Energy and Commerce Committee. It was approved by the committee December 11, 1981 by a vote of 27-14.[210] A parliamentary maneuver by Senator Robert Packwood, an opponent of the legislative veto resolution, prevented Congress from acting on the legislation in 1981. The FTC rule was to have gone into effect after December 20, 1981; however, proponents of the veto voted with Packwood to delay action by continuing congressional consideration of the rule.[211]

On March 29, 1982, the Senate Commerce Committee approved a second resolution disapproving the used car rule. This time the vote was 12-5.[212] The same disapproval resolution was begun in the House. The House Energy and Commerce Committee, on May 5, 1982, approved the disapproval resolution 26-14.[213]

The Senate voted on May 18, 1982, to block the FTC's used car rule. The Senate vote was 69-27 in favor of the disapproval

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[209] U.S. Congress, Senate, Commerce Committee, Federal Trade Commission Used Car Rule Hearings, 97th Congress, 1st session (Washington, D.C.: Government Printing Office, 1981), p. 7.

[210] "FTC Used Car Rule," p. 2475.

[211] Judy Sarashon, "Strong Congressional Drive to Veto FTC Used Car Rule Sidetracked by Senate," Congressional Quarterly, 19 December 1981, p. 2489.

[212] "FTC Used-Car Rule Veto Again Supported by Panel," Congressional Quarterly, 3 April 1982, p. 746.

[213] "Used-Car Rule," Congressional Quarterly, 8 May 1982, p. 1083.

resolution.[214] The House, similarly, voted 286-133 to disapprove the used car rule on May 26, 1982.[215] This disapproval resolution accomplished the legislative veto made possible by the 1980 FTC Improvement Act.

The House and Senate resolution's disapproval of the FTC's Used Car Rule was Congress' only legislative veto of an FTC action. After this legislative veto, the Supreme Court issued a decision that left the legality of such legislative vetoes in question. A resolution that would disapprove the funeral industry rule was, however, introduced in the House subsequent to the Court decision.

The Funeral Rule

A disapproval resolution was introduced in the House Commerce, Transportation and Tourism Subcommittee by Representative Marty Russo (D., Illinois) to veto the funeral industry rule. This rule was, Russo claimed, promulgated without sufficient evidence.[216] The FTC's conduct during the funeral proceedings was alleged to have been "clearly inappropriate." Russo noted that these

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[214]Judy Sarasohn, "Senate Overwhelmingly Acts to Block FTC Used-Car Rule," Congressional Quarterly, 22 May 1982, p. 1187.

[215]Judy Sarasohn, "FTC's Car Rule Falls Victim to First Congressional Veto," Congressional Quarterly, 29 May 1982, p. 1259.

[216]Judy Sarasohn, "Congressional Interest Flags on Veto of FTC Funeral Rule," Congressional Quarterly, 7 May 1983, p. 893.

rulemaking procedures had been criticized by the Administrative Conference of the U.S. and the American Bar Association.[217]

The procedures used in the funeral industry rulemaking may have violated the Magnuson-Moss Act. Russo contended no one was able to question the FTC on the issues. This, Russo continued, was "in direct violation of the legislative history of the Magnuson-Moss Act." The agency staff "vigorously sought out" consumer groups favorable to the rule and give them public participation funds. No groups against the rule were contacted.[218] The deadline for congressional veto action passed without any action being taken in either House or Senate on this disapproval resolution.[219]

No other attempts have been made to veto FTC actions since the FTC Improvement Act of 1980 was passed. Congress did try to direct what the FTC did in phase three in other ways, however. For example, an investigation of the insurance industry was encouraged.

The Insurance Industry

FTC policy can also result from suggestions made by congressional committees. For various reasons a congressional committee

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[217]U.S. Congress, House, Committee on Energy and Commerce, Disapproving the FTC Funeral Rule, 98th Congress, 1st session (Washington, D.C.: Government Printing Office, 1983), pp. 6-7.

[218]U.S. Congress, House, Committee on Energy and Commerce, Disapproving the FTC Funeral Rule, p. 7.

[219]"FTC Funeral Regulation Veto," Congressional Quarterly, 14 May 1983, p. 968.

may request the agency to investigate an industry. When the insurance industry's lobbing campaign against unisex insurance legislation that would prohibit using gender to set policy premiums, benefits, coverage, and conditions caused too much dissatisfaction in the House Energy and Commerce Committee, the committee asked the FTC to investigate the industry.

This House committee approved a resolution on May 12, 1983, that asked the FTC to investigate insurance practices. The committee wanted the FTC to determine if insurance purchasers knew enough about insurance before making a purchase. Representative John Dingell, committee chairman, and Representative James Florio had supported this resolution.[220] A resolution such as this usually succeeds in directing at least some FTC attention to the industry in question; however, no FTC action against the insurance industry was begun by the end of 1983.

In phase three, some members of Congress encouraged the FTC to be more activist. Those who favored retaining the aggressiveness developed in phase one opposed many attempts to curtail the commission's functions and urged greater activism. Attempts to reduce the number of regional offices were opposed. Drastic budget cuts were resisted. Influential senators requested that the FTC enforce the antitrust laws assigned the commission.

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[220]Steve Pressman, "Critics Attack Industry Drive Against Unisex Insurance Bills," Congressional Quarterly, 9 July 1983, p. 1402.

Efforts to prevent the FTC regulating professionals were blocked. A resolution was passed exhorting the agency to enforce the antitrust laws. The effectiveness of new merger guidelines were questioned as likely to lead to weakened enforcement. The commission was asked to investigate the insurance industry.

Opponents of the FTC were also active in phase three. Attempts were made to substantially reduce the agency's budget. The FTC's regular authorization bill was not passed in 1982 because of an attempt to exempt professionals from FTC antitrust regulation. Legislation was introduced requiring the agency to submit its economic impact analysis for trade regulation rules to the Office of Management and Budget and requiring the agency to prove substantial harm to the consumer before beginning an action. Miller in his confirmation hearing made known he did not share his predecessor's liking for concentrated industry cases. A disapproval resolution was approved in the House and Senate which vetoed the FTC's Used Car Rule. A disapproval resolution was introduced that opposed the funeral rule. Legislation was introduced exempting the malt industry's exclusive francises from the antitrust laws.

Conclusion

This chapter has reviewed all of the major attempts Congress made between 1970 and 1983 to shape FTC policy. The various methods which Congress used in efforts to influence agency policy making included appropriations, changes in legislative authority,

the legislative veto, appointment hearings, and other methods of oversight. The actions of influential elements in Congress through opinions expressed, committee action, and legislation have all been discussed.

Phase one saw vigorous congressional involvement in the FTC's affairs following several reports which questioned the agency's effectiveness. New legislation was proposed to redesign the agency as a more effective consumer advocate. The Congress passed antitrust exemptions for the newspaper industry and considered such legislation for the soft drink industry. Congress approved provisions to strengthen the agency and to improve efficiency. The Magnuson-Moss Act strengthened the FTC's rulemaking ability. During confirmation hearings, the Senate Commerce Committee encouraged more vigorous FTC policies and carefully charged each appointee to be chairman to see that the commission fulfilled its mission as established by Congress.

In phase two, Congress became more critical of FTC actions. Congress became more conservative following the 1976 election, and fewer advocates of liberal FTC policies could be found. Some measures were approved, however, expanding the agency's power. A controversy toward the end of phase two concerning establishing a legislative veto made it impossible to secure a normal FTC authorization bill. Amendment after amendment attempting to restrict the FTC was added to this authorizatin legislation. A two house legislative veto plan was eventually approved during phase two.

In phase three, the FTC's opponents within Congress continued to attempt to restrict the agency. More liberal members of Congress evidenced concern that FTC policies were too conservative. A legislative veto of the FTC's Used Car Rule succeeded before the Supreme Court declared legislative vetos to be unconstitutional. The FTC's budget was restricted during the third phase. Congress nearly passed legislation in phase three that would have prevented the FTC from regulating state regulated professional groups.

CHAPTER V

CONGRESS' INFLUENCE ON FTC POLICY MAKING

The FTC's policy making and interactions with Congress have been discussed throughout this dissertation. The question of the extent of congressional influence over policy making within the FTC is as yet, however, unresolved. The preceding chapters have presented evidence of Congress' attempts to influence agency policy making. This chapter reaches conclusions showing how extensively FTC policy is influenced by Congress.

Chapters two and three analyzed commission policy by discussing antitrust and consumer policies made by the agency between 1970 and 1983. Substantial differences in FTC policies during these years helped create the three phases used in this discussion. The complaints, decisions, and opinions produced by FTC adjudicatory cases were used as examples of agency policy. Trade regulation rules were studied. Administrative decisions about agency reorganization and budgeting provided further data concerning FTC policy between 1970 and 1983.

Congress' major efforts to influence the FTC were reviewed in chapter four. Appropriations proceedings, efforts to change the FTC's legal authority, the legislative veto, appointment hearings, and various other forms of oversight were all discussed. Efforts to direct antitrust and consumer policy were reviewed phase by phase.

Chapter five concludes this discussion of policy making interactions between Congress and the FTC. The research questions presented in the first chapter are answered utilizing the data from the intervening chapters. From this analysis, the nature, variation, and effect of congressional influence on FTC policy making over time can be observed. The sources of variations in congressional influence on the agency between 1970 and 1983 will be discussed. The effectiveness of various means utilized by Congress to affect agency decision making are compared. The effect of other influences on agency policy making, such as the Presidency and interest groups, are contrasted with Congress' influence.

Nature of Congressional Activity Directed at the FTC

The nature of congressional activity directed to influence FTC consumer and antitrust policy has been described in the preceeding chapters. The scope of congressional concern with the FTC was fairly inclusive between 1970 and 1983. Many aspects of antitrust and consumer policy came under congressional scrutiny. The FTC's emphasis in antitrust policy was a continual concern of Congress throughout the years of this study. Some congressmen wanted concentrated industry cases; others, Robinson-Patman cases; and still others, a restrained antitrust policy that promoted competition. Controversies over consumer policy similarly touched on all the issues before the commission. How the FTC enforced the deceptive advertising statutes and questions about industry

wide rulemaking were both important concerns of Congress. Congress' oversight of the FTC was thorough.

The literature generally suggests that Congress must be sufficiently motivated to conduct oversight. This study instead finds that oversight is systematic and probing. Each year the appropriations committees and the authorization committees review the FTC's accomplishments and deficiencies. Other committees, including those conducting oversight investigations, periodically review the agency's policy making. The literature's emphasis on adequate incentives for oversight fails to emphasize how much routine oversight is conducted each year.

The intensity with which Congress attempted to direct the FTC from 1970 to 1983 varied, although at times congressional interest in the commission was high. Congress' original reaction to the ABR and Nader reports was significant. The energy crisis provoked much congressional interest, as did the Magnuson-Moss Act. The authorization-appropriations conflicts in phases two and three evidenced considerable congressional interest in the FTC. The disapproval resolution vetoing the Used Car Rule similarly indicated intense interest in the commission.

In other instances, individual members of Congress became very interested in the FTC. Whenever legislation of any kind was proposed, there was a group of congressmen that was intensely following the commission's decisions. Nadel suggested the initiation of legislation is "a good indication of the locus of activism"

on the issue in Congress.[1] This reasonably corresponds to the importance this research has attributed to the initiation of legislation.

The signals that Congress sends to the FTC about policy are not always unanimous. Often times conflict between congressmen and even conflict between committees creates confusion in the messages received by the FTC from Congress. During phase three, opposing forces on FTC issues in Congress fought to a virtual stalemate. One can find examples where committees take distinctly different views on the same question. In phase two, the House Appropriations Subcommittee and the House and Senate Judiciary Committees conflicted with one another as to how aggressively the FTC should enforce the antitrust laws. Phase one is probably when Congress was most in agreement in attempting to direct FTC policy. There was a remarkable degree of unanimity in Congress in phase one that the FTC should be revitalized. Hearings reinforced new policy trends at the commission and new legislation expanded the agency's jurisdiction.

The literature indicates that power in Congress is more decentralized now. Decentralization of power is another factor that produces a confusing mix of signals from Congress to the agency. This study found many centers of power within Congress all trying to influence the FTC.

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[1]Mark V. Nadel, The Politics of Consumer Protection (Indianapolis: Bobbs Merrill, 1971), pp. 86-88.

Several important committees tried to affect FTC decision making during these years on a wide variety of concerns. The appropriations committees in both House and Senate were important influences throughout this period. In the first phase, appropriations committees encouraged the revitalization of the commission following the ABR and Nader reports on the commission. All requests for new programs as well as continuing requests were reviewed by these committees. The energy crisis provoked a flurry of activity in the appropriations committees. Efforts were made in the House Appropriations Committee to take funds away from the commission for the Exxon case. In the two phases, opponents of the commission utilized the appropriation proceeding to attempt to restrain the commission. Each appropriation bill after 1976 faced numerous amendments intended to curtail FTC activity.

This study's findings are consistent with the literature describing the importance of the appropriations committee. As the literature suggests, appropriation committees get involved with everything and accomplish much oversight. The complexity of oversight hearings could, however, possibly be questioned since little is discussed in much detail.

The FTC authorization committees became actively involved in FTC policy making between 1970 and 1983. The Commerce, Science, and Transportation Committee, formerly the Commerce Committee, considered FTC authorizing legislation in the Senate. In the House, the Energy and Commerce Committee, until 1980 the Interstate

and Foreign Commerce Committee, performed roughly the same function. Nominations to the FTC commissioner were confirmed in the Senate Commerce Committee. Major new legislation, notably the Magnuson-Moss Act, began in these two committees. The second and third phases saw major conflict about the agency's authorization. In phase two, a conflict about adding a legislative veto to the FTC authorization bill remained unresolved for almost three years. Many amendments attempting to restrict the commission were offered to the authorizing legislation. A similar fight in phase three prevented regular authorizing legislation from being approved.

Woll might possibly have been explaining how the authorization committees in this study functioned when he wrote of the committees' ability to "preempt a policy field" with a single decision.[2] The authorization committees discussed in this study were definitely interested in so affecting the FTC. The literature, however, questions how substantially new statutes affect agency policy making. The research reported here indicates that in phase one the FTC was effectively revitalized by new statutes.

The Judiciary Committees in both the House and Senate were involved in agency policy making. Using economic concentration as an antitrust standard was discussed in the Senate Judiciary Committee as were various other proposals for reforming the antitrust laws. The House Judiciary Committee actively suggested

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[2]Peter Woll, American Bureaucracy (New York: W.W. Norton and Company, Inc., 1977), pp. 86-88.

antitrust priorities to the FTC. Special exemptions to antitrust laws were considered by the judiciary committees. When the appropriations committees threatened agency funding in 1979, the chairmen of the judiciary committees protested. The Senate Judiciary Committee questioned the FTC's horizontal merger guidelines.

From the literature's emphasis on the increasing importance of multicommittee surveillance, one might have expected to find more committees involved with the FTC. The literature indicated subcommittee politics were now very important. This study, however, found little evidence to substantiate the conclusion that individual subcommittees compete for influence on FTC issues.

Congress used various means to influence agency decision making between 1970 and 1983. In some instances formal decisions of Congress affected the commission. Statutes were passed changing the FTC's legal authority. Nominations were approved in a prescribed manner. Resolutions were used to convey the sentiments of Congress to FTC policy makers. Other measures taken by less than the whole Congress were also important. Committees chose to hold hearings to emphasize the importance of various issues thought important. Committee votes indicated significant sentiment for and against various concerns. In some instances, influential members of Congress themselves prevailed upon the commission. Legislation was often introduced to acquaint the FTC with significant sentiment for or against an issue.

The literature is most extensive on the formal methods Congress uses to control the FTC. Actions by committees and individual members to control the commission are not adequately discussed in the literature. The research presented here finds legislation, confirmations, and resolutions important in directing the commission's policy making. Other actions by members of Congress are also discussed as significant in the internal politics of Congress. Committee votes, unsuccessful legislative proposals, and requests of the agency by congressmen can be important in creating trends and movements within Congress that eventually shape the action the FTC takes.

Variations in Congressional Activity

This dissertation considers what variations occurred in the nature of congressional activity between 1970 and 1983 and accounts for these differences. When the American Bar Association and Nader reports were released, a reaction spread throughout Congress. Various influential congressmen and committees sought to revitalize the FTC. The result was an extensive involvement with commission policy.

The Energy Crisis resulted in several committees becoming actively interested in the FTC. When the public demanded an explanation for energy shortages, congressmen and committees requested the FTC to provide answers. This all resulted in new levels of interest in the commission's energy policy.

An important variation occurred as major conflicts over appropriations-authorization began in the second and third phases. After the election of 1976, there was a major conflict each time FTC appropriation and authorization legislation was considered. In both phases, regular legislation failed to be approved. Continuing resolutions had to be used to fund the agency. Opponents of an aggressive FTC attempted to attach amendments to both appropriations and authorization legislation that would restrict the commission.

Several senators who had been for an activist FTC were no longer in the Senate following the election of 1976.[3] Congressional sentiment in favor of an aggressive agency was lessened, and there were more congressmen who favored restricting the FTC. Congressmen opposed to the FTC attempted to restrict the FTC by influencing appropriations and authorization legislation.

The Degree Congress Succeeded in Influencing FTC Policies

Some conclusions are possible as to the degree Congress succeeded in influencing FTC policies. Congress substantially influenced the FTC during the years of this study. In all instances, Congress was not, however, easily able to prevail on the commission. In many different matters, Congress was able

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[3]William E. Kovacic, "The FTC and Congressional Oversight of Antitrust Enforcement," Tulsa Law Review, 20, No. 5 (1982), p. 655.

to change an FTC policy only after years of effort. Table 5 provides a summary of Congress' interaction with the FTC.

Table 5 shows Congress' successes and failures in directing the FTC. What the table does not show adequately, however, is how Congress has contributed to the phases of antitrust and consumer policy discussed in the preceeding chapters. In the first phase, the concerted action of Congress to make a more activist FTC changed the direction of commission policy and helped transform a lethargic commission into an aggressive antitrust and consumer agency. The significant encouragement the FTC received in the first phase carried over, producing an even more activist agency in the second phase. A reaction against the activist FTC began after 1976 and produced a commission espousing policies of restrained regulation in the third phase.

Most of the literature indicates that Congress has much influence over FTC policy making. Redford writes that politics external to an agency affect the agency's internal politics.[4] This aptly describes how Congress rather successfully influenced FTC policy from 1970 to 1983. Ripley and Franklin observe that Congress can influence regulatory agencies by setting their agendas.[5] Through various hearings and legislative proposals

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[4]Emmette S. Redford, Democracy in the Administrative State (New York: Oxford University Press, 1969), pp. 80-82.

[5]Randall B. Ripley and Grace A. Franklin, Congress, The Bureaucracy, and Public Policy (Homewood, Illinois: The Dorsey Press, 1980), p. 131.

Table 5

Congressional Actions Directed at the FTC

Support for Major FTC Initiatives	Phase One 1. Efforts to revitalize the FTC a. Increased appropriation b. Cost/benefit analysis c. Concentrated industries cases 2. Line-of-business reports 3. Hart-Scott-Rodino Act 4. Energy studies 5. Competition advocacy 6. Food industry investigation 7. Energy labeling 8. Fair credit reporting 9. Warranty provisions of the Magnuson-Moss Act Phase Two 1. Cost/benefit studies 2. Antitrust to protect competition 3. Competition advocacy 4. Cost octane ratings Phase Three 1. Antitrust to protect competition 2. Protection of the consumer
Rejection of FTC Policy Initiatives	Phase One 1. Newspaper Preservation Act 2. Magnuson-Moss procedures for rulemaking Phase Two 1. The legislative veto 2. Exempting agricultural cooperatives 3. Cancellation of the Formica trademark 4. Soft drink interbrand competition Phase Three 1. The Kellogg Case 2. The Exxon Case 3. The Kid-Vid Investigation

Table 5 (continued)

Major Unsuccessful Efforts Opposed to FTC Policy Initiatives	Phase One 1. More Robinson-Patman Act enforcement 2. Soft drink interbrand competition Phase Two 1. The Used Car Rule 2. The Kid-Vid Investigation 3. Bringing cases in federal courts 4. The Kellogg and Exxon Case Phase Three 1. Funeral industry rulemaking 2. Regulation of professionals 3. Efforts to get FTC economic analysis reviewed by other agencies 4. Malt beverage interbrand competition

Congress did much to influence the FTC's agenda. Clarkson's observation that several structural features inhibit Congress from controlling FTC policy could not be substantiated.[6]

This research found little evidence to support Dodd and Schott's conclusion that the interest groups protect the independence of agency decisions.[7] Where interest groups did influence the policy making process they were against the commission's decisions. No evidence was found that involvement in independent regulatory policy making was costly in terms of alliances congressmen formed with interest groups.

Congress' Influence on FTC Decisions of Policy Significance

Congressional influence on important FTC decisions of policy significance is evident from this research. Congress' contribution to the basic decision to revitalize the FTC after 1970 is a good example. Reaction in Congress to the Nader and American Bar Association reports required the agency to devise more effective policy. Congress continued to monitor the reforms taking place within the FTC in the years that followed, providing both direction and new legislation that added to the commission's jurisdiction.

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[6]Kenneth W. Clarkson, "Legislative Constraints," in The Federal Trade Commission Since 1970: Economic Regulation and Bureaucratic Behavior, ed. Kenneth W. Clarkson and Timothy J. Muris (Cambridge: Cambridge University Press, 1981), p. 32.

[7]Lawrence D. Dodd and Richard L. Schott, Congress and the Administrative State (New York: John Wiley, 1979), pp. 182-183.

The Magnuson-Moss Act is a significant example of the extent of Congress' contribution to FTC policy making. This legislation established procedures for agency rulemaking, strengthening it as a basic building block of consumer policy. The act's warranty provisions also improved the commission as a consumer protection agency. The FTC favored the warranty provisions of Magnuson-Moss and opposed the legislation's new procedures for rulemaking. Congress' contribution to FTC decisions could be seen in other legislation that changed the agency's authority.

The results of this study agree with the literature that indicates Congress can easily reach the important decisions of an agency. While the literature tends to discount Congress' capacity for systematic and thorough oversight, important agency decisions are discussed differently. Fritschler, for example, speaks of the ability an oversight committee has to "wreak havoc" upon an agency's programs.[8] Congress' ability to reach decisions with policy significance between 1970 and 1983 supports this conclusion.

Not all FTC decisions of policy significance are directed by Congress, however. When in phase three the FTC opted for restraint in regulation, Congress was not directly involved. When those policies went into effect, sentiment in Congress as to what

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[8]A. Lee Fritschler, Smoking and Politics, Policymaking and the Federal Bureaucracy (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1975), p. 63.

the agency should be doing was nearly divided between congressmen who favored a more activist agency and congressmen who would like the FTC to be more restrained. The difficulty the commission had experienced gaining its authorization and appropriation in the preceeding phase no doubt contributed to the new direction in policy.

Variations in Direction and Effect of Congress' Influence

When Congress' involvement with the FTC from 1970 to 1983 is analyzed, variations in the direction and effect of congressional influence are evident. Until the election of 1976, most of Congress' efforts were directed at encouraging the agency to become more activist. Except for reactions from congressmen whose constituents were directly affected by the agency and special interest groups adversely affected by the commission, congressional reaction was almost completely supportive of a revitalized agency.

The 1976 election resulted in a Congress that was not as supportive of aggressive regulation. After 1976, the FTC had a more difficult time with Congress. Authorization and appropriations become more difficult to secure, more legislation was proposed to limit the FTC's jurisdiction, and questions in various hearings revealed more conservative. Essentially, after 1976 the conflict within Congress over the FTC became a significant factor in the agency's relations with Congress. This conflict changed the effect of congressional influence from encouragement and direction to simple oversight.

Congress' involvement with the agencies is discussed in the literature as politically motivated. Congressmen are described as becoming involved with oversight because of constituents or because of their own interests in congressional politics. Such a model of congressional influence expects that as the partisan competition of Congress changes, there will be variations in the direction and effect of Congress' influence.

Most Effective Means of Congressional Influence

The menas which Congress used to influence the commission were not equally effective. The ability to change the legal authority of the FTC was Congress' most importance source of influence. The important new legislation that was approved between 1970 and 1983 substantially remade the FTC. The contributions that new areas of jurisdiction made to the commissions' overall effectiveness in antitrust and consumer policy cannot be underestimated.

Congress' ability to direct agency policy making through authorization legislation is not adequately considered in the literature. Woll suggests formal statutes do little to direct an agency.[9] Congress' ability to revitalize the FTC with several consumer-oriented statutes in phase one conflicts with Woll's conclusion.

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[9]Woll, pp. 86-88.

Nearly everything the FTC did was reviewed on a year-to-year basis by the appropriations committees. Harris describes appropriations subcommittees as providing more "continuous and effective" oversight than other committees.[10] The research reported here agrees with Harris and other authors who emphasize the importance of the appropriations committees. The oversight these committees performed made them a significant influence in commission policy making. Katzman noted that few FTC budget requests were refused and concluded Congress exerts little influence on the agency through the appropriations process.[11] This study concludes that appropriations committees review all facets of commission policy making each year and have considerable influence. That few budget requests have been refused does not adequately prove that appropriations committees lack influence with the FTC. Actions by appropriations committees also evidence attempts to influence the FTC. Controversial expenditures were often questioned and sometimes either the House or Senate would pressure the commission by voting against one certain program or another.

In one instance, the legislative veto proved an effective means of overruling FTC policy. When both House and Senate

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[10]Joseph P. Harris, Congressional Control of Administration (Washington, D.C., 1964), pp. 101-102.

[11]Robert Katzman, Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy (Cambridge: The MIT Press, 1980), p. 148.

passed disapproval resolutions, the FTC's Used Car Rule did not take effect. The Supreme Court, however, questioned the legality of the legislative veto in the Chadha Case, and whether Congress' use of a legislative veto to block FTC actions was legal appeared doubtful. Bruff and Gellhorn suggest that a legislative veto would result in more complex policy negotiations between Congress and the commission.[12] The decision in Chadha possibly prevents the new legislative veto changing interactions between the FTC and Congress.

Confirmation hearings gave senators on the Commerce Committee an opportunity to virtually instruct nominees as to how the FTC should be run. Ripley and Franklin conclude that such hearings give Congress "a very forceful way" to communicate policy views to nominees.[13] This study agrees, at least in some instances. While the senators did not make known their own views as to what FTC policy should be in each confirmation hearing, many confirmation hearings were clearly efforts to influence the nominees' policy views.

Oversight hearings conducted by various committees further studied FTC policy making and implementation. The exact effect of oversight hearings was difficult to determine. Davidson's

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[12]Harold H. Bruff and Ernest F. Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes," Harvard Law Review, 90 (1977), pp. 1420-1421.

[13]Ripley and Franklin, pp. 78-80.

analysis of the hearings found them important in transmitting information to congressmen and to the public and in allowing more congressmen influence, thus widening the scope of conflict.[14] Agency policy making was affected by oversight hearings in a manner somewhat similar to what Davidson describes. These hearings also produced anticipatory reactions. The agency undoubtedly made decisions with an awareness of congressional oversight hearings.

Other Sources of Influence in FTC Policy Making

FTC policy making from 1970 to 1983 cannot be analyzed without noticing the important contributions of other influences. The President is undoubtedly one such significant influence. Nixon's administration provided an important impetus to the revitalization of the FTC. Ford effectively discontinued the enforcement of the Robinson-Patman Act. The FTC's consumer activism and concern with inflation was to some extent the result of the Carter administration's appointment of Pertschuk. Reagan's FTC nominees favored restrained regulation and reshaped the agency's policies in that direction. The literature agrees with these findings. Welborn suggests Presidents influence the formulation and implementation of regulatory policy.[15] Moe concludes that agency

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[14]Roger H. Davidson, "The Political Dimensions of Congressional Investigations," Capitol Studies, 5, No. 2 (Fall 1972), 41-63.

[15]David M. Welborn, "President, Regulatory Commissioners and Regulatory Policy," Journal of Public Law, 15, No. 1 (1966), 28-29.

personnel accept roles as "presidential actors" and design policy as the White House would want without any explicit direction.[16]

Interest groups should also be mentioned as an influence on FTC policy making. Consumer groups were unquestionably a major influence on the aggressive FTC policies of phase one. Business groups including the Chamber of Commerce contributed substantially to the more restrained regulation of phase three. The literature concurs that interest groups are important in regulatory policy making. Krasnow and Longley's analysis of the Federal Communication Commission includes interest groups among the determiners of regulatory FCC policy.[17] Meier discusses interest groups as among the influences from the "political environment" that affect regulatory decision making.[18]

Conclusion

FTC policy making has been influenced by Congress differently in each of the three phases studied in this dissertation. The first phase saw Congress closely directing the development of a newly expanded FTC. The agency studied

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[16]Terry M. Moe, "Regulatory Performance and Presidential Administration," American Journal of Political Science, 26, No. 2 (May 1982), 221-224.

[17]Edwin G. Krasnow and Lawrence D. Longley, The Politics of Broadcast Regulation (New York: St. Martin's Press, 1978), p. 27.

[18]Kenneth J. Meier, unpublished manuscrupt (New York: St. Martin's Press, forthcoming), p. 2-41--2.

industry wide antitrust problems and became an important consumer agency. Congress' involvement with the agency was extensive and many different means of influence were utilized to bring about desired changes. The commission that existed at the end of 1977 was far different from the FTC of 1970.

The second phase, 1979-81, saw further expansion of FTC functions. During this period, the FTC attempted boldly to solve consumers' problems. After the 1976 election, Congress became more critical of the FTC. The Congress made a determined effort toward the end of phase two to restrain the FTC's actions. Phase two saw less cooperation between the Congress and the FTC than in the preceeding phase. The FTC continued to become more involved with antitrust and consumer problems even after the sentiment in Congress had changed in 1976. The last years of this phase were a virtual battle between the commission and Congress, with Congress attempting to impose restrictions on the FTC. Congress cannot be said to have directed FTC policy making in phase two.

Phase three saw an FTC that favored limited regulation. A new FTC chairman produced policies that were practically responses to the congressional critics of the previous period. The sentiments of Congress toward FTC policy were mixed. Some members of Congress were concerned that the FTC was no longer fulfilling the responsibilities Congress had given the commission. Other members of Congress wanted to further restrict

the agency's regulatory activities. One trade regulation rule was successfully vetoed by Congress. Conflicts occurred over appropriations and authorization legislation. Evidence of cooperation between the FTC and Congress in the third phase proved difficult to find. Neither those who favored an aggressive FTC nor those who would restrict the commission, were pleased with the FTC's performance. Phase three saw the commissions' policy making least directly influenced by Congress.

The FTC exhibited varying amounts of independence from Congress between 1970 and 1983. During these years, one can find examples of close policy cooperation between Congress and FTC. Congress extensively controlled FTC policy in phase one with appropriations and confirmation hearings and with new legislation that changed the commission's authority. Examples of virtually no cooperation can also be found. The conflicts over appropriations and authorizations in the second and third phases illustrate this. The extent the FTC looks to Congress for policy direction clearly can be shown to vary during these years.

Reviewing all three phases, Congress appears to have considerable influence over the direction of FTC policy. If the Congress cannot control individual FTC decisions one year, Congress does not have the ability to decide how decisions are made at the FTC over the next several years. The conflict

between the FTC and Congress in phase two illustrates this. When Congress is unable to control the FTC at once, over several years opponents of the commission succeed in instituting their ideas about regulations. Whether the FTC expands anti-trust enforcement and becomes an aggressive consumer agency or functions in a minimal role is substantially influences by Congress.

The FTC's interactions with Congress are continual. Many efforts are made by congressmen each session to influence the decisions made at the FTC. Congress always succeeds in influencing the FTC to some extent. When there were special reasons such as hostile reports, Congress has been able to extensively control the commission. The FTC is more independent from the Congress at other times, and several years can be required for congressional ideas to reach FTC policy makers.

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