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I am submitting herewith a thesis written by Philip R. Stonecipher entitled "Regulatory Agencies and Power Politics: The Leland Olds Case Reconsidered." I recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts, with a major in Political Science.

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REGULATORY AGENCIES AND POWER POLITICS:
THE LELAND OLDS CASE RECONSIDERED

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ABSTRACT

American economic regulation by independent commission has been criticized for, among other things, a tendency for regulatory commissions to be "captured" or unduly influenced by the industries under their regulatory purview. The literature on regulation has accounted for many of the political aspects of agency/interest group interaction, but it has not accounted for the use of the political process by regulated industries as a means for forcing "recalcitrant" regulators—those who follow a course unacceptable to the industries—out of the system in an attempt to shape the regulatory policy affecting the industries. The primary purpose of this study was to expand the scope of the regulatory literature to include a consideration of the uses of such political pressure within the regulatory process.

A case study of Leland Olds, a consumer-minded utility economist who served as a Federal Power Commissioner from 1939 to 1949, was used to illustrate the hazards faced by the regulator who alienates a regulated industry on an important issue. Olds stood in the way of an objective desired by the Federal Power Commission-regulated natural gas industry, and when there appeared to be no other way for the industry to accomplish its goals, it lobbied its supporters in Congress for Olds' removal from the FPC, a task which was successfully completed when the Senate refused to confirm Olds' second reappointment to the commission in October 1949.

The major finding of this research was that Olds' Senatorial rejection represented the far end of a continuum of action pursued by a

regulated industry seeking relief from a policy it felt was not in its best interests. The gas industry first sought relief through the courts; failing there, it lobbied in Congress for legislative assistance, but it met initially with only partial success. When President Truman indicated he was opposed to the industry's objective, the industry then mustered its resources for an attack on a regulator who was believed to be a major cause of the industry's lack of total success in reaching its desired goal.

Thus far the regulatory literature has failed to account for the aspects of the regulatory process noted above. A thorough understanding of that process is needed as scholars, regulators, and politicians attempt to deal with the policy conflicts arising from agency/interest group interaction. The goal of this study was to contribute to a greater understanding of that interaction in the context of the American political process.

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CHAPTER 1

INTRODUCTION AND STATEMENT OF THE PROBLEM

The importance of the role afforded the independent commission in American economic regulation has given rise over time to a thorough examination of the regulatory process, and consequently, to a great deal of criticism of commission regulation. Since 1887, when Congress created the Interstate Commerce Commission (ICC)—the first of the "administrative tribunals"[1]—the wisdom of relying upon the independent commission for regulatory policy-making has been questioned by a number of observers concerned with several different aspects of regulatory practice. The early proponents of commission regulation defended this "administrative process"[2] on the basis that it offered the most promise in dealing with the exigencies of government in the latter part of the nineteenth century; freed from the evils of political machination, guided by a belief in the fundamental soundness of regulation by "experts," the commissions would provide fair and efficient regulation in the public interest by correcting many of the ills arising from a rapidly expanding American economy.[3]

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[1] James M. Landis, The Administrative Process (New Haven: Yale University Press, 1938), p. 1.

[2] This characterization of commission regulation is found in ibid.

[3] This is the general theme of the Landis work.

Early critics of the theory of commission regulation took issue primarily with the notion of agency independence.[4] Since the Constitution separated the locus of national power into three branches, was it not an undoing of that doctrine to vest executive, legislative, and judicial powers in a body removed from the "normal political process"?[5] Others questioned the likelihood of the commission retaining its independence in light of pressures brought to bear upon it by presidents and by regulated industries.[6] These and similar arguments later crystallized into a notion of "capture" of regulatory agencies by special (regulated) interests,[7] an inevitable result, critics held, of a Congressional desire to insulate regulatory commissions from the evils of politics.

A "naive view" of the political process is what some observers believe to be the "most serious implication of the theory of the independent commission."[8] Keeping the commissions "out of politics" has been considered an "ideal panacea for exercising governmental functions without incurring the liabilities of the political process."[9] But this activity has in reality isolated the commissions from the power bases they need to effectively regulate in the public interest, while at

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[4]Thomas K. McCraw, "Regulation in America: A Review Article," Business History Review, 49 (Summer 1975), 162.

[5]Ibid. See also Landis, p. 47.

[6]McCraw, pp. 162-163. [7]Ibid., p. 163.

[8]Marver H. Bernstein, Regulating Business by Independent Commission (Princeton: Princeton University Press, 1955), p. 146.

[9]Ibid., p. 128.

the same time not accomplishing the task toward which that activity was directed—namely, to enable the regulatory process to be free of the pressures of partisan politics. For despite Congress' efforts to the contrary, the regulatory process is indeed highly political in nature, and it is this characteristic of American economic regulation which this thesis seeks to explore.

"Public Interest" and "Capture"

The enabling statutes of the major regulatory commissions dictate the need for those commissions to regulate "in the public interest";[10] that, according to proponents of commission regulation, has been admirably accomplished by the agencies. But the "public interest" historically has been an ambiguous concept,[11] and the bias of late nineteenth century legislators toward *laissez-faire* led to the rather narrow interpretation that the public interest in regulation would result "automatically" from "the residue of the struggle among the conflicting demands of rival private parties."[12] Though *laissez-faire* no longer serves as a guide for the American politico-economic process, the regulatory literature indicates that the doctrine continues to color the practical work of most regulatory commissions in respect to the passive public interest orientation expressed above.

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[10] McCraw, pp. 161-162.

[11] Ibid., p. 160. See also Virginia Held, *The Public Interest and Individual Interests* (New York: Basic Books, 1970) for evidence of the problems in defining the "public interest."

[12] Bernstein, p. 126.

Congress has jealously viewed the regulatory agencies as arms of the legislature, and the independence it has sought for the agencies has been heavily geared toward independence from the executive.[13] This has created a political vacuum in the regulatory process,[14] since "Congress normally cannot define regulatory policy and is unwilling to let the president do so."[15] The weakness of the political position of the commissions, critics maintain, has made these agencies vulnerable to organized private interests willing to fill in that vacuum, interests that view the agencies as a mechanism for expressing their policy choices in the American governmental process. Once the public fervor for regulation of a segment of the economy dies down, the agency loses continuous political support and must attempt to serve an unorganized public interest in the face of pressures exerted by organized private interests under its regulatory purview.[16] In this type of system, critics say, it is no wonder that "instead of searching diligently for the public interest," many commissioners "prefer to sit calmly as if in judicial robes and elicit the nature of the public interest from the arguments made in formal hearings by the private parties."[17]

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[13]Ibid., p. 153.

[14]William D. Carey, "The Federal Regulatory Commissions," lecture delivered April 4, 1952 at Princeton University, quoted in Bernstein, pp. 138-139.

[15]Ibid., p. 153. For related material, see p. 151.

[16]Ibid., p. 156.

[17]Ibid., p. 157.

Capture of regulatory agencies, according to adherents of the theory,[18] is a natural, inevitable result of this type of regulatory system. Agencies are said to exhibit certain characteristics in various stages of a "life cycle"[19] as they attempt to deal with the administrative burdens left to them by their Congressional mandates. The final phase of this life cycle is a period of debility characterized as "old age"[20] with the commissions suffering from "administrative arteriosclerosis."[21] "Ignored or abandoned by an unorganized public," commissions at this stage "tend to relate their goals and objectives to the demands of dominant interest groups in the economy"[22] and thus become "captives" of regulated industries, promoting and protecting those whom they were delegated to police. In old age a commission's "primary mission is the maintenance of the status quo in the regulated industry and its own position as recognized protector of the industry."[23] For its services on behalf of the regulated groups, an agency can expect industry support if ever its bureaucratic survival were threatened, and more subtly, there is a prospect of "greener

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[18] See Bernstein and Gabriel Kolko, Railroads and Regulation, 1877-1916 (Princeton: Princeton University Press, 1965) for an explication of capture theory.

[19] Bernstein, pp. 74-102.

[20] Ibid., pp. 91-95.

[21] Louis L. Jaffe, "The Effective Limits of the Administrative Process: A Reevaluation," Harvard Law Review, 67 (May 1954), 1109.

[22] Bernstein, p. 92.

[23] Ibid.

pastures" for "cooperative" bureaucrats once their service with the agency is completed.[24]

Much of the literature on regulation, especially in political science and history, focuses on either the public interest or capture theories, or on some combination of the two.[25] As will be shown in greater detail in the following chapter, the public interest theory of American economic regulation, i.e., that commissions serve the general welfare through expert, impartial adjudication of cases and a general policing of regulated industries with respect to economic abuses, suffers critically in many respects. As indicated above, the theory is founded on the unrealistic premise that a politically sterile agency consisting of dispassionate experts will provide effective regulation via a passive interpretation of the concept of the public interest. The literature on agency capture builds a strong case against the public interest theory, providing evidence that indicates that the public interest, no matter how it is defined, is all too often left out in the cold.[26]

The point of view expressed in this thesis is that the political naivete inherent in the public interest theory renders it inadequate as an accurate description of the American regulatory process. Numerous examples can be found in the literature that document the highly political nature of the process;[27] this thesis will do likewise. The

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[24]Robert Engler, The Politics of Oil (Chicago: The University of Chicago Press, 1961), p. 318.

[25]McCraw, p. 160.

[26]See Chapter 2 for examples. [27]See Chapter 2.

literature also provides much evidence of a coziness between the regulators and the regulated, with results that prove difficult to interpret as being in the "public interest," despite the "multiple meanings and evolving redefinitions"[28] of that concept over time.

Does, then, the capture image more adequately describe the American regulatory experience? The answer contained in this thesis is a qualified "yes." Capture theory takes into account the political interconnection of the regulatory system's principal components—the agencies, the regulated industries, Congress, and the president. It more cogently explains the observed weaknesses of the regulatory process; in short, it is a better descriptive theory. But there are problems with capture theory as well. How, for example, could the ICC "be simultaneously the captive of railroad, truck, and barge transporters, when these industries had overlapping markets and were partial competitors"?[29] This and similar points raise the possibility that, like the public interest theory, capture theory alone cannot fully account for the nuances of American economic regulation.

Another of capture theory's weaknesses, and the one with which we are concerned here, is that although it describes better than public interest theory the fundamental political character of the regulatory process, it does not go far enough in explaining some aspects of the politics of regulation. The purpose of this thesis is to take the literature on regulation a step further by detailing the use of politics as a weapon in the regulatory process. It will be shown that a sufficiently powerful regulated industry can, and will, use the

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[28]McCraw, p. 160. [29]Ibid., p. 166.

political process to force recalcitrant regulators out of the regulatory system in an attempt to thwart a regulatory policy it deems, in some fashion, too costly. This tactic may be used only in extreme cases, but the literature on regulation does not account for this aspect of regulatory politics, and until it is dealt with, an understanding of the American regulatory process is incomplete.

Leland Olds and the Regulation of Natural Gas

A case study of Leland Olds, a Federal Power Commission (FPC) member from 1939 to 1949, will be utilized in this thesis to illustrate the uses of politics in regulation noted above. Olds was a consumer-oriented utility economist whose pre-FPC administrative experience included service on Franklin D. Roosevelt-commissioned projects in New York state and in Europe. His case is particularly noteworthy because of the far-reaching consequences (e.g., economic stakes) of his issue dispute with the oil and gas industry (an FPC-regulated industry), the intensity of the political climate during this issue dispute, the public involvement of a U.S. president, the conspicuousness of special interest ties to principal Congressmen involved in the dispute, and because a review of the literature indicates that the kind and degree of the actions taken against Olds were unprecedented in pre-Olds regulatory politics. In addition, the case represents the first major battle over regulation of the natural gas industry, a war waged off and on from the 1940s through the 1970s.[30] Indeed, a foremost scholar of the regulatory process has written:

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[30] President Carter's energy program contained a provision for some deregulation of natural gas. After compromising with Congress on many of his proposals, the president signed the bill with the gas deregulation provision on Nov. 9, 1978.

> No politico-economic issue has loomed larger or been fought more vigorously in the macropolitics of the nation since World War II than the issue of whether the national government should exercise jurisdiction over the prices paid by pipelines to the producers and gatherers of natural gas.[31]

The Federal Power Commission was created in 1920 "to exercise general administrative control over all water-power sites and kindred establishments that are located on the navigable waters, on the public lands, and on the reservations" of the United States.[32] In its initial form it consisted of the Secretaries of War, Interior, and Agriculture, an army engineer, and an executive secretary.[33] It was reorganized in 1930, and received its major statutory power for regulating electric utilities and interstate gas pipelines and sales from the Federal Power Act of 1935 and the Natural Gas Act (NGA) of 1938. The Gas Act was passed, with much industry support, to clear up pricing and jurisdictional problems that state agencies could not solve due to the interstate integration of much of the industry. It gave the FPC the power to regulate the transmission and sale of gas in interstate commerce, and seemed to exempt independent producers and gatherers of gas (nontransporting companies not affiliated with a pipeline company) from federal regulation. Section 1(b) of the Act stated:

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[31] Emmette S. Redford, American Government and the Economy (New York: Macmillan, 1965), p. 486.

[32] Milton Conover, The Federal Power Commission: Its History, Activities and Organization (Baltimore: Johns Hopkins Press, 1923), p. 1.

[33] Ibid., pp. 1-2.

> The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.[34]

But the complex integration of the industry posed a crucial question in regard to gas regulation: What specifically was exempted by the "production or gathering" proviso in the Act?[35] "Did 'production or gathering' include only the physical acts of drilling, lifting, and assembling the gas? Or did it include also the commercial act of sale of the gas?"[36] The problem was that if independent producers could charge the pipelines what the traffic would bear, and the pipelines were allowed to pass along such prices through the system, of what real use was regulation of interstate transmission and resale of gas?

Despite such vagueness in the Act, the Federal Power Commission, Leland Olds included, did not claim jurisdiction over the producers and gatherers' sales to pipeline companies.[37] But a series of Supreme Court decisions in the 1940s gradually increased the FPC's power and jurisdiction in this area, and the industry became disturbed by the trend.[38] Even in light of the Court's decisions, however, the FPC still did not claim the power to regulate independent producers, and a three to one majority of the commission—again, Olds included—attempted to

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[34] Federal Power Commission, <u>Natural Gas Act</u> (Washington, 1939), p. 1.

[35] Redford, p. 486.

[36] Ibid.

[37] Ibid., p. 487.

[38] Ibid.

assuage industry anxiety by issuing Order No. 139 in August 1947, assuring independent producers, in effect, that they could continue to sell their gas to pipelines without fearing action by the FPC.[39]

Soon after the issuance of Order No. 139—which did not carry the weight of law—an exhaustive investigation of the natural gas industry conducted by the FPC from 1945 to 1947 was completed, and the evidence contained therein led Olds to reverse his position in regard to regulation of the industry. Olds and Claude Draper—who cast the dissenting vote in the FPC action on Order 139—joined together in a report that criticized the "insistence by representatives of the industry . . . for a virtually unregulated market."[40] They were concerned that without strong conservation-oriented federal controls the gas supply would soon thereafter be exhausted, and also that the industry's market structure was changing from a buyer's to a seller's market due to an increase in demand for gas—a situation they believed would eventually hurt the consumer if not controlled by tight regulation.[41] The two remaining commissioners (the FPC at this time was one short of its five-member capacity) stuck to a "strict constructionist" view of the NGA's Section 1(b), and called for amendment of the Act to exempt independent producers from FPC regulation and thus clarify the FPC's regulatory role.[42]

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[39] Gerald D. Nash, United States Oil Policy, 1890-1964 (Pittsburgh: University of Pittsburgh Press, 1968), p. 217.

[40] Federal Power Commission, Natural Gas Investigation, Report of Commissioner Leland Olds and Commissioner Claude L. Draper (Washington, 1948), hereafter cited as Olds/Draper Report, p. 12.

[41] Nash, p. 219.

[42] Ibid.

The industry, losing in the courts and facing an Olds-led FPC (after his confirmation the fifth member, Thomas C. Buchanan, sided with Olds and Draper), turned to Congress for assistance. Early legislative efforts to amend the Natural Gas Act—the Priest and Moore-Rizley bills of 1947—failed to pass the Congress, and after the 1948 national elections another attempt was made, this time with the sponsorship of Sens. Robert Kerr of Oklahoma and Lyndon Johnson of Texas. Kerr, later to become Olds' chief antagonist, was a millionaire natural gas producer whose company, Kerr-McGee, was a close associate of the Phillips Petroleum Co., one of the gas industry's major independent producers. Kerr, who had expressed "unabashed admiration" for Leland Olds and his regulatory work before Olds had changed his mind on the FPC's regulatory role,[43] introduced a bill to deny the FPC the power to regulate sales of gas by one producer to another or transactions between a producer and a pipeline operator "provided neither had a controlling interest in the other."[44]

Olds, Draper, and Buchanan testified against the Kerr bill during hearings in May and June of 1949 before Lyndon Johnson's Senate Subcommittee on Interstate and Foreign Commerce, which later reported the bill favorably. Olds' vehement stand against the bill and similar legislative efforts was widely known; unfortunately for him, his second term on the FPC expired while the bill was under consideration. Truman renominated him to the FPC, and hearings on his reconfirmation began in

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[43]Nash, p. 220.

[44]Ralph K. Huitt, "National Regulation of the Natural Gas Industry," in Public Administration and Policy Formation, ed. Emmette S. Redford (Austin: University of Texas Press, 1956), p. 92.

September 1949 before substantially the same Johnson-led subcommittee that had approved the Kerr bill three months earlier. During the hearings some articles Olds had written in the 1920s were resurrected in an attempt to prove Olds had communist sympathies. The subcommittee unanimously agreed that Olds was unfit to be a federal regulator, despite ten years of service on the FPC and strong support for him from consumer groups and President Truman. The full Committee on Interstate and Foreign Commerce voted ten to two against Olds; the full Senate concurred by a vote of fifty-three to fifteen.

Several months after Olds' Senate rejection, the Kerr bill passed both houses of Congress, only to be vetoed by Truman. No attempt was made to override the veto since the measure had passed the House by a narrow margin of 176 to 174.

It should be noted here that the second major attempt to accomplish what the Kerr bill could not—the Harris-Fulbright measure—was vetoed by President Eisenhower when Sen. Francis Case (R-S.D.) made public the fact that he had rejected, three days before a vote on the bill, a $2,500 campaign contribution from a Nebraska lawyer representing the Superior Oil Company of California, which desired approval of the bill.[45] Eisenhower favored the measure but felt compelled to veto it since it appeared that the natural gas lobby had attempted bribery to effect the bill's passage.

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[45]See Edith Carper, "Lobbying and the Natural Gas Bill," in Case Studies in American Government, eds. Edwin A. Bock and Alan K. Campbell (Englewood Cliffs: Prentice-Hall, 1962), pp. 217-219.

The Problem and Its Significance

This thesis, with the Olds case as evidence, will detail a continuum of action pursued by a regulated industry attempting to mitigate or control a regulatory policy it felt was not in its best interest. When it appeared in the Olds case that the FPC would no longer follow a regulatory policy the industry could live with, the industry took its case to court; failing there, it lobbied in Congress for a legislative restriction of the FPC's regulatory mandate, where it met with partial success initially. When Truman threatened a veto of the Kerr bill, the industry attempted to influence the outcome by discrediting its opposition to the point of attacking a man personally in the interests of ridding the FPC of a regulator with whom it could not deal effectively. What is significant here is the continuum of action pursued and the extent that political pressure was employed for the gain of the regulated industry.

In the literature on regulation, capture theory accounts for most of the political activity that occurred in the Olds case. But as previously indicated, it has not gone far enough; it has not fully accounted for action against regulators taken by interests as a method for shaping the regulatory policies affecting them. The capture literature indicates that special interests in the regulatory process do not normally have such a difficult time putting their stamp on regulatory policy.[46] The Olds case thus provides an excellent

[46] See, for example, Gabriel Kolko, The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916 (London: The Free Press of Glencoe, 1963).

opportunity to examine political aspects of the regulatory process that heretofore have been left untreated. It can provide at least tentative answers to the following: What might happen if a regulated industry cannot "put its stamp" on a regulatory policy it deems vital, in some form, to its interests? What methods does it have at its disposal to influence policy pursued by a regulatory agency? What are the limits upon its actions as it seeks to attain an important objective?

There is no evidence available to indicate that the FPC before the Kerr bill debate was a captured agency in the strictest meaning of the term, and much to indicate that it was not.[47] A strong compatibility of interest between an agency and a regulated industry does not necessarily mean capture. In the Olds case there was certainly an interest compatibility between the agency and the gas industry before Olds changed his mind on the FPC's regulatory role. The early commission majority and the industry basically saw eye-to-eye on major issues—the industry, for example, did not want the FPC to regulate gas producers, and until 1947 neither did the FPC. Harrington Wimberly, who served on the commission with Olds and who was a member of the minority favoring a strict interpretation of the Natural Gas Act, "was an Oklahoma publisher and politician whose services as Kerr's campaign manager were rewarded with this [FPC] appointment in 1945."[48] Wimberly was once quoted in a Fortune magazine interview as saying: "I don't know whether I'm Senator Kerr's man or whether he's my man. But it is

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[47]See Chapter 3.

[48]Engler, p. 321.

well known that I am for Bob Kerr first, last, and all the time."[49] As will be shown in Chapter 3, some segments of the gas industry itself were instrumental in the drive for federal regulation of the industry and in the final form of the resulting legislation. While these examples may indicate a good deal of industry influence in the regulatory process, there is no evidence readily available to indicate that the industry pulled the FPC's strings in the early years following the passage of the Gas Act.

Before Olds became a "threat" to the industry, there was little real need for the industry to capture the FPC or attempt to force the agency into line. But the case will be made here that the oil and gas industry, in its efforts to rid the FPC of Olds and to influence the course of policy then to be pursued by the commission, was attempting, in effect, to control the agency on its own terms, the principal element of capture. In short, if the commission was not going to play "right," then the industry would have to teach it the rules of the game. The primary political significance of the Olds case is that the FPC under Olds attempted its own rules changes, and Olds was disqualified because of it.

This thesis, then, will accomplish several objectives: (1) It will add to the conventional wisdom concerning the regulatory process by detailing the use of politics as a weapon in that process, a weapon which, in the Olds case, was the far end of a continuum of action

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[49] Wimberly's quote is found in ibid. After his service with the FPC, Wimberly represented the Pacific Northwest Pipeline Corp. and the El Paso Natural Gas Co. before the commission. See ibid., p. 322.

pursued by an industry attempting to shape regulatory policy; (2) Using the Olds case as a point of departure, it will examine relative strengths and weaknesses of the theory of agency capture; (3) It will illustrate the role voluntarily "captured" Congressmen can play in the politics of regulation; and (4) It will provide historical clarification (e.g., Which segment of the industry had the most to gain from ridding the FPC of Olds? Was Olds a communist?) that so far has been lacking in the Olds case.

The relations between societal groups seeking to advance their interests and the administrative agencies "created to put into effect public purposes" give rise to what has been characterized as "the most difficult problems in public administration."[50] In light of a more active regulatory environment today, taking into account the increased number, apparent power, and political accessibility of consumer groups, it seems imperative that a thorough understanding of the regulatory process is needed as scholars, regulators, and politicians attempt to deal with the policy conflicts arising from agency/interest group interaction. The goal of this thesis is to contribute to a greater understanding of that interaction in the American regulatory process.

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[50] Emmette S. Redford, Administration of National Economic Control (New York: Macmillan, 1952), p. 220.

CHAPTER 2

REVIEW OF THE LITERATURE

The Regulatory Literature

Most of the literature on American economic regulation relevant to this thesis—particularly that of political science, history, and journalism[1]—falls under either the "public interest" or "capture" heading. Each of these interpretations of commission regulation have held sway over the regulatory literature of respective historical periods—public interest theory from the 1880s to the 1950s, capture from the 1950s to the present. Capture-oriented criticism of the regulatory process existed long before the theory was afforded a high level of credence, however, and there is now some indication that capture theory too has lost appeal in recent years.[2] Many researchers have thus decided that neither public interest theory nor capture are adequate models of regulatory behavior.[3] This thesis also will examine

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[1]These three disciplines account for most of the literature relevant here; it should be noted also that economics and law have contributed a great amount to the literature as well, but these disciplines will be treated only where pertinent. For a summary of major points offered by economics and law, see McCraw, pp. 171-179.

[2]For example, see ibid., pp. 179-180.

[3]See, for example, Lee Benson, Merchants, Farmers & Railroads: Railroad Regulation and New York Politics, 1850-1887 (Cambridge: Harvard University Press, 1955), and George J. Stigler, "The Theory of Economic Regulation," Bell Journal of Economics and Management Science, 2 (Spring 1971), 3-21; for a general discussion of this research, see McCraw.

certain assumptions associated with the theory of agency capture and will provide some broad conclusions concerning the applicability of the theory to the types of problems presented by the Olds case.

The public interest concept of commission regulation. The "public interest" historically has been a cumbersome concept, laden with a variety of meanings dependent upon the occupational interest of the observer and the period of reference.[4] Part of the conceptual problem is that it has meant different things at different times; one scholar has suggested that his colleagues have not only disagreed on a definition of the public interest, but "they disagree as well about what they are trying to define: a goal, a process, or a myth."[5]

> Generally it has come to mean some criterion or desideratum by which public policy may be measured, some goal which policy ought ideally to pursue and attain. But just whose standard it is to be remains the problem. It may variously be an ethical imperative (such as natural law), some superior standard of rational and "right" political wisdom, or the goals or consensus of a large portion of the electorate. Or it may be some amalgam, some almost mystical balance of narrower interests in which the final product appears to be considerably greater than the sum of its "selfish" parts.[6]

Despite the vagueness of the concept, the public interest has long served as an "almost mystical" guide for legislators attempting to shape policy. Following efforts by many states to regulate their own economies,[7] Congress began in the nineteenth century to designate

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[4]For a sampling of the various positions taken concerning the public interest, see Carl J. Friedrich, ed., The Public Interest (New York: Atherton Press, 1962); see also Held, especially pp. 203-226, for an examination of recent research on the topic.

[5]Frank J. Sorauf, "The Conceptual Muddle," in Friedrich, p. 185.

[6]Ibid., p. 184.

[7]Bernstein, pp. 19-21.

certain industries as "affected with a public interest" due to the nature of the services they rendered and their proclivity toward "natural monopoly" or corruption arising from the accumulation of economic power.[8] Until 1934 this criterion was used as a justification for federal regulation of these industries as opposed to others not so "affected." In that year, however, the U.S. Supreme Court in its Nebbia decision "rejected the idea that price fixing was possible only in a special category of industries . . . and somersaulted to the view that price control was within the discretion of legislative bodies."[9] With that ruling the scope of the public interest was widened considerably.

The states' efforts in the last century to regulate the business of interstate industries—notably railroads—within their boundaries were largely ineffective due to the statutory limitations on state control. Stirred principally by agrarian reform groups which denounced the monopolistic abuses of the railroads,[10] Congress capped a twenty-year legislative battle for federal regulation of the railroads by passing the Interstate Commerce Act in 1887.[11] The Act established the first federal independent regulatory commission—the ICC—which was "hailed by agrarian and middle-class groups as the

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[8]McCraw, p. 160.

[9]Redford, American Government, p. 366; Nebbia v. New York, 291 U.S. 502 (1934).

[10]Bernstein, pp. 18, 20.

[11]Robert E. Cushman, The Independent Regulatory Commissions (New York: Oxford University Press, 1941), pp. 40-41, cited in Bernstein, p. 22.

protector of individual private enterprise."[12] Though later criticized from all sides, the ICC and the commission form of regulation at the time represented a high priority given the public interest in the formation of government policy.[13]

The commission idea developed as a result of political and economic problems arising primarily from rapid American economic growth in the latter part of the nineteenth century.[14] Since existing executive departments and the courts proved unable to handle the increasingly technical character of economic life at that time, an independent commission staffed by experts in a particular regulatory field offered promising possibilities for creative, efficient regulation with a "capacity to handle difficult and technical regulatory problems."[15] The commission "offered some hope of achieving . . . an expertness that would enable Congress and the courts to function more effectively."[16] As the commission form took root, Progressive reformers in the early twentieth century pressed for more independent regulatory agencies because they appeared to be the best means for keeping necessary economic regulation out of politics, which the Progressives considered "essentially evil and venal."[17] "Escape from politics became a panacea to purify and uplift the political process"

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[12]Ibid., p. 21.

[13]This view is forcefully challenged by Kolko in both his Railroads and Regulation and The Triumph of Conservatism, as well as by Benson and others. These views will be examined in the following section.

[14]Bernstein, p. 26.

[15]Ibid., p. 27.

[16]Ibid.

[17]Ibid., p. 36.

for the Progressives,[18] and as long as expert regulators could remain aloof from partisan politics, regulation could "overcome privilege, restore decency, and save industry from its own avarice and self-destruction."[19]

As criticism of the commissions mounted concerning their "administrative absolutism"[20] and their tendency to be overly influenced by the regulated industries,[21] the public interest concept of commission regulation became almost an apologia for the existence of the commissions and their performances as regulatory bodies. Joseph B. Eastman, a distinguished member of the ICC during the 1920s and Federal Coordinator of Transportation from 1933 to 1936, was a prominent advocate of the independent regulatory commission. In a 1927 address to the American Political Science Association, Eastman noted the logic of establishing an independent commission to handle problems too time-consuming and complex for constant Congressional oversight.[22] He defended the independent status of the commissions and criticized the meddling of presidents who attempted to use the appointments process to influence the outlooks of the commissions.[23] As coordinator of transportation Eastman maintained that "public regulation of transportation, in view of the many conflicting interests, must be

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[18]Ibid. [19]Ibid. See also pp. 37-39. [20]Ibid., p. 54.

[21]The possibility of agency capture had long been recognized; one of the earliest statements concerning capture of a federal regulatory agency was made during debate on the Interstate Commerce Act in 1886, from Cushman, pp. 45-61, quoted also in Bernstein, p. 25.

[22]Quoted in ibid., p. 51. [23]Ibid.

administered by a permanent, independent, and nonpolitical body. . . ."[24] Later, in opposing a federal department of transportation, he said ". . . if independent, nonpolitical control over planning, prevention, and coordination is desired, as it should be, the Commission is the logical body for this work."[25]

The "outstanding theoretical elaboration of administrative regulation" and the "most eloquent celebration . . . ever written" of the commission form was offered in 1938 by James M. Landis, a draftsman of the Securities Act and the Securities and Exchange Act, a member at various times of the Federal Trade Commission, the Securities and Exchange Commission, the Civil Aeronautics Board, and once dean of the Harvard Law School.[26] Much of Landis' book, The Administrative Process, is a defense of commission regulation against charges that the commissions constituted a "headless fourth branch of government" that did an injustice to the American tripartite system, and that the agencies possessed too much discretionary power. Landis viewed the commissions and administrative law as logical and necessary outgrowths of "the inadequacy of a simple tripartite form of government to deal with modern problems."[27] Perhaps because of his New Deal philosophy and because of the problems arising from the Great Depression, Landis was one of the most eloquent theoreticians of a dual responsibility of

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[24] Federal Coordinator of Transportation, Second Report, Senate Document No. 152, March 10, 1934, 73 Cong., 2 sess., p. 37, quoted in Bernstein, pp. 61-62.

[25] Federal Coordinator of Transportation, Third Report, House Document No. 89, January 23, 1935, 74 Cong., 1 sess., pp. 28-29, quoted in Bernstein, p. 62.

[26] McCraw, p. 162.

[27] Landis, p. 1.

regulatory agencies; with Eastman and others, Landis recognized that the agencies' tasks were not only of a policing nature, but also of a managerial, sometimes promotional character as well.[28] Some "ailing" industries required greater governmental assistance in the form of stabilization and promotion, and Landis recognized that administrative power, "though it may begin as an effort to adapt and make efficient police protection within a particular field, moves soon to think in terms of the economic well-being of an industry."[29] Though Landis seemed to view this in 1938 as a legitimate function of the regulatory commission, it was this tendency that capture theorists later held was a root of the problems that plagued the regulatory process.

Perhaps the greatest advantage of regulatory commissions, according to Landis, was their expertness and the ability to utilize that expertness in a consistent manner in technical matters. One of the reasons for resorting to the administrative process in regulation was an inability of the judicial process "to make the necessary adjustments in the development of both law and regulatory methods."[30] The courts did not have the time or expertise required for consistent adjudicatory policy in the regulatory sphere. Nor did they always decide cases fairly:

> The test of the judicial process, traditionally, is not the fair disposition of the controversy; it is the fair disposition of the controversy upon the record as made by the parties.[31]
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> . . . .
>
> The ultimate test of the administrative is the policy

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[28]Ibid., pp. 22-23.

[29]Ibid., pp. 15-16.

[30]Ibid., p. 30.

[31]Ibid., p. 38.

> that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making.[32]

On the same note, Landis applauded the power of independent investigation possessed by the regulatory commissions, a power the courts did not enjoy.

Landis recognized the vagueness of the public interest standard written so extensively into regulatory law.[33] But such phraseology at least assisted in creating "the frame of reference within which the administrative is to operate, and to pose the objective that was intended to be reached."[34] He concluded that, with expertness and greater flexibility than either Congress or the courts as its main virtues, the administrative process served the public interest well, and was a good—and inevitable—device for meeting the expansive needs of modern democratic government. Far from constituting a somewhat uncontrollable "fourth branch of government," the regulatory agencies have an essential place in the American governmental process:

> The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes. . . . If the doctrine of the separation of power implies division, it also implies balance, and balance calls for equality. The creation of administrative power may be the means for the preservation of that balance, so that paradoxically enough, though it may seem in theoretic violation of the doctrine of the separation of power, it may in matter of fact be the means for the preservation of the content of that doctrine.[35]

Prominent politicians during this period also defended the public interest concept of commission regulation. In what one scholar

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[32] Ibid., p. 39.

[33] Ibid., pp. 66-67.

[34] Ibid., p. 67.

[35] Ibid., p. 46.

identifies as a "typical statement of the fundamentalist view of the commission,"[36] House Speaker Sam Rayburn said in an address on the role of Congress in 1941, "Far from undermining the constitutional authority of the Congress, delegation of authority to administrative agencies is one of the surest safeguards to effective legislative action."[37] Saying he was proud to have participated in the creation of many of the major regulatory agencies, Rayburn added that Congress did not have "the time to go into the finer technicalities of a rate structure or granting the right to a railroad to issue new securities, whether in the form of stocks or bonds."[38] Accepting "without question the view of the commission as a creature of Congress, independent of the president, impartial and objective in the performance of its duties,"[39] Rayburn said that the administrative process "removes rather than creates the danger of dictatorship by providing means of making democracy work under the complex conditions of modern life."[40]

In a 1949 restatement of the case for commission regulation, the Hoover Commission Task Force report on the agencies weighed the advantages and disadvantages of the commission form of regulation to that time. It identified impartiality, the commissions' multi-headed character, expertness, and continuity of policy as principal advantages,[41] and after setting these against the agencies' weaknesses the Task Force, as well as the entire Hoover Commission, decided that

[36] Bernstein, p. 67.

[37] Quoted in ibid.

[38] Ibid.

[39] Ibid.

[40] Ibid.

[41] Cited in ibid., p. 70.

the independent commission "has an essential place for certain types of government regulation."[42]

Advocates of the public interest concept of commission regulation have in general accepted the wisdom of agency independence and have praised the commissions for their usually expert handling of complicated economic problems. Most analyses of regulatory agencies during this period affirmed also the nonpolitical character of the administrative process.[43] But beginning in the 1950s, long-maintained criticisms of the regulatory agencies—particularly that they were actually tools of the regulated interests—received a level of respectability in scholarly works that until that time had been lacking on a major basis. To these theorists the public interest concept of regulation was blind to the realities of the regulatory process. This body of literature will now be examined.

The literature on agency capture. Early criticism of the commissions was generally limited to specific problems of regulatory practice and for many years lacked cogent, widespread intellectual support. The railroads and other regulated industries at least publicly stated various forms of opposition to the work of the commissions, but several scholars have provided studies indicating that the railroads in particular, and big business in general, did not oppose the

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[42]Task Force on Regulatory Commissions of the Commission on Organization of the Executive Branch of the Government, Task Force Report on Regulatory Commissions (Washington, 1949), p. 28, quoted in Bernstein, p. 71.

[43]Ibid., p. 129.

commission idea and in reality fostered its development.[44] Fears that the regulated industries would gain the upper hand in the agency/ industry relationship were stated at least as early as the passage of the Interstate Commerce Act of 1887, though it appears that such criticism did not at the time gain the backing of a wide intellectual following. Many lawyers and judges expressed skepticism concerning administrative jurisprudence.[45] But these and similar arguments apparently did little at the time to alter the basic faith in the commission form of regulation.[46]

One of the first significant intellectual critiques of the regulatory commissions was contained in Croly's The Promise of American Life, first published in 1909.[47] Croly, one of the foremost political theorists of the Progressive Era, was one of the few Progressives who did not place complete faith in the device of the regulatory commission.[48] He cited as one reason for his skepticism the ability and willingness of the large railroads to use the state railroad commissions for their own ends:

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[44]For example, see Kolko, Railroads and Regulation; Kolko, The Triumph of Conservatism; and Benson.

[45]See, for example, the views of Justices Brewer and Holmes, quoted in Bernstein, pp. 30-32 and pp. 39-40, respectively. In the 1930s the American Bar Association criticized administrative judicial discretion, or "administrative absolutism"; see ibid., pp. 53-54.

[46]Ibid., p. 71.

[47]Herbert Croly, The Promise of American Life, ed. Arthur M. Schlesinger, Jr. (Cambridge: Harvard University Press, 1965).

[48]Bernstein, p. 43.

> Inter-state railroad companies usually exercised a dominant influence in those states under the laws of which they had incorporated; and this influence was so beneficial to them that they were quite willing for the sake of preserving it to subsidize the political machine and pay a certain amount of blackmail. . . . They arranged that the state railroad commissioners should be their clerks, and that taxation should not press too heavily upon them. They were big enough to control the public officials whose duty it was to supervise them; and they were content with a situation which left them free from embarrassing interference without being over-expensive.[49]

Croly did not condemn commission regulation completely; the public interest, he felt, had been "neither recognized nor promoted" during the growth of the American industrial system, and though the commission represented only the promise of better things and was "merely an evidence of good will," any legislation "which seeks to promote this neglected public interest is consequently to be welcomed."[50] "As initial experiments in the attempt to redeem a neglected responsibility, they [the commissions] may be tolerated; but if they are tolerated for too long, they may well work more harm than good."[51]

Objections to the commissions' judicial procedures, their operating efficiency, and similar administrative tasks seem to have guided critical comment through the 1930s and 1940s. Though the first collection of studies that together could be termed a body of regulatory literature was produced during this period, the majority of the research concerned ways of improving the administrative efficiency of the commissions, were historical treatments of the various agencies,

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[49] Croly, pp. 352-353.

[50] Ibid., p. 361.

[51] Ibid.

or dealt with economic, legal, or organizational problems.[52] It was not until the 1950s that fundamental criticism of the classic case made for the independent regulatory commissions received an intellectually respectable form in a theory of agency capture.

A full-scale exposition of capture theory, and the first influential synthesis of capture-oriented criticism of the regulatory commissions, was offered in 1955 by Marver H. Bernstein under the title Regulating Business by Independent Commission. Though others at this time were questioning the public interest concept of regulation and were forming their own capture-type theories, Bernstein's work became the cornerstone in the theory's intellectual foundation. While recognizing that each major regulatory commission had characteristics unique to its own development, Bernstein felt that the history of the commissions revealed a "general pattern of evolution more or less characteristic of all."[53] This general pattern—his "life cycle" of the regulatory commissions—consisted of four periods in the life of a commission: gestation, youth, maturity, and old age.[54] Not all agencies, he said, experience each stage of development, and some may linger at one stage or another longer than others. But these differences only "add an element of reality to the evolution of commission regulation," and "do not invalidate generalizations about the administrative history of regulation."[55]

Bernstein described gestation as the period of mounting distress that culminates in the passage of a regulatory statute.[56] Requiring

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[52]See Bernstein, Chapter 2. [53]Ibid., p. 74.

[54]Ibid. [55]Ibid. [56]Ibid., pp. 74-77.

perhaps twenty years or more, this period is characterized by: (1) The organization of groups to press for public policy to eradicate the source of the problem, and/or the recognition by already established groups that the problem requires their attention; (2) A widening of membership and strengthening of resources by the groups in interest, accompanied by demands upon Congress to correct the problem; (3) Perhaps articulate agitation for reform if the distress felt is acute, countered by opposition groups fighting to maintain the status quo; and (4) The hammering out by Congress of what is, in essence, a legislative treaty between the warring factions—legislation providing some form of regulation but lacking clarity or specificity.[57] The pro-regulation groups, bent on achieving the enactment of a regulatory statute, are preoccupied with obtaining "immediate relief from an intolerable situation" and not with assisting in the development of a working policy for the newly created regulatory agency.[58] Also, the statute is likely to be out of date at the time of passage since it is geared toward remedying "old" abuses expressed at the beginning of the lengthy struggle for legislation. The rapidity of technological change coupled with the act's inadequacy when passed presages a long fight over the agency's attempts to keep abreast, in policy terms, with industrial change.[59]

Bernstein's second phase—a commission's youth—usually begins with an "aggressive, crusading spirit" on the part of the new agency.[60] The agency finds that it must formulate its policy under pressures

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[57]Ibid., pp. 74-76.

[58]Ibid., p. 76.

[59]Ibid., pp. 76-77.

[60]Ibid., p. 80.

exerted by regulated groups that are well organized, but at this stage, especially if it still has Congressional and presidential support, it will attempt to resist such pressures in order to serve the public interest.[61] Before it can get down to serious regulatory business, however, the agency must usually wait until the validity of its enabling statute is passed upon by the Supreme Court, and thus the first years of its life are spent in litigation which defines the scope of the commission's power.[62] After this initial court challenge, the agency normally finds that public support for it has waned, and for a number of reasons it begins to lose its youthful vigor.[63] One of these reasons, Bernstein says, is the influence of regulated groups on the outlooks of the commissioners:

> Various social opportunities may be open to commissioners who are or may become sympathetic to the position of the regulated groups. The chance to secure an executive post with a firm subject to regulation may urge a certain kind of restraint upon the commissioners. This is not to suggest that there is a conspiracy between the regulated and the regulator but rather a more subtle relationship in which the mores, attitudes, and thinking of those regulated come to prevail in the approach and thinking of many commissioners.[64]

In maturity the agency becomes accustomed to its lack of consistent public and political support and attempts primarily to settle conflict among the parties in interest.[65] The need for expert assistance from the regulated industries, the need for their compliance with policies, and the subtle synthesis of outlook of the commissioners and their counterparts in regulation help to transform the agency from

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[61] Ibid., pp. 79-80. [62] Ibid., p. 81. [63] Ibid., pp. 82-83.

[64] Ibid., p. 83. [65] Ibid., pp. 86-87.

policeman to industrial manager, and regulation takes on a more positive approach.[66] The commission becomes interested in its own welfare, and since by this time it is an accepted part of the business system and can be used by the regulated industries as a forum for influencing government policy in their behalf, the regulated groups also have a stake in the agency's good health. The result is a type of symbiosis, and, "It is unlikely that the commission, in this period, will be able to extend regulation beyond the limits acceptable to the regulated groups."[67]

With old age comes "final debilitation."[68] The commission has little desire to upset the working agreement established with the regulated industries, and without constant political support it loses the remainder of its creativity and vigor in pursuit of the public interest; its "passivity deepens into debility," and its primary mission is to ward off any attack on the status quo.[69] Opposition in Congress makes it difficult for the agency to secure adequate funding, since opponents believe that additional funds will not make the agency any more public interest-minded.[70] "Administrative apathy" sets in, and the agency becomes fully a captive of the regulated groups.

Bernstein criticizes the assumption held by public interest advocates of regulation that the regulatory commissions are to be guided in their search for the public interest by their legislative mandates. Their enabling statutes usually offer "only the most general guide to the goals of regulatory policy," and the public interest is

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[66]Ibid., p. 87. [67]Ibid. [68]Ibid., p. 93.

[69]Ibid., p. 92. [70]Ibid., p. 93.

thus normally conceived "as a balancing by a commission of the interests involved in regulation"[71]—a type of _laissez-faire_ approach. Since it has no clear-cut definition of the public interest, and since its resources are weak compared to the strength of the regulated groups, the agency tends to be guided by the special interests' view of the public interest, and the public interest may thus "become more private than public."[72]

Bernstein concludes that, for a number of reasons,[73] the regulatory commissions are seriously defective as agents of the public interest:

> Commissions have proved to be more susceptible to private pressures, to manipulation for private purposes, and to administrative and public apathy than other types of governmental organizations. They have lacked an affirmative concept of the public interest; they have failed to meet the test of political responsibility in a democratic society; and they tend to define the interests of the regulated groups as the public interest. The effectiveness of regulation of business by commission hangs by a thin thread. As a method for ordering economic relations in society short of governmental ownership and operation, it has not proved itself.[74]

Other works challenging the classic concept of the regulatory commission appeared at approximately the same time as the publication of Bernstein's book. The notion of "clientalism"—in Bernstein's words, the "repeated identification of the public interest with a particular private interest"[75]—was developed by Samuel P. Huntington in

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[71]Ibid., p. 154. [72]Ibid. See also p. 157.

[73]See ibid., Chapter 10. [74]Ibid., p. 296.

[75]Ibid., p. 270.

the early 1950s.[76] Louis L. Jaffe in 1954 saw several basic factors limiting the planning and managing "potentialities of the administrative process."[77] One of these factors, which Jaffe said "are inherent in our industrial organization, in our conceptions of regulation, and in our political machinery,"[78] is that "regulated and client groups exert an effective pressure on the administrative agency in proportion to the importance of their economic function and their organizational cohesion."[79] And in 1955, in the first of many works on the struggle for federal railroad regulation, historian Lee Benson opted for what could be termed a "pluralistic capture" interpretation of the railroad regulation movement.[80] In this view the struggle for regulation of the railroads was carried on by several interest groups—including the railroads themselves—which stood to gain economically from such legislation, and none of which was prompted by a concern for the public interest.[81]

The 1960s and early 1970s witnessed a proliferation of capture-oriented criticism. Most studies described contemporary conditions of various regulatory agencies or of the entire regulatory framework, and the combined result indicated that the public interest frequently assumed a subordinate role to the interests of the

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[76] Samuel P. Huntington, "Clientalism: A Study in Administrative Politics," Diss., Harvard University, 1950, cited in Bernstein, pp. 270-271. See also Samuel P. Huntington, "The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest," Yale Law Journal, 61 (April 1952), 467-509.

[77] Jaffe, p. 1107. [78] Ibid. [79] Ibid.

[80] Benson, Merchants.

[81] See McCraw's interpretation, pp. 166-167.

regulated groups. In 1960, Landis, who had eloquently stated the classic view of the commission in his Administrative Process twenty-two years before, admitted that the regulatory agencies had many serious problems requiring immediate attention, and that, "Spectacular instances of executive, legislative and industry interference with the disposition of matters before the agencies have been uncovered" since the end of World War II.[82] FPC Commissioner Howard Morgan, in a letter to President Kennedy in 1963, wrote that he did not wish to be reappointed to the commission because:

> Ordinary men cannot administer (the regulatory) laws today in the face of pressures generated by huge industries. . . . The big problem in the regulatory field is not influence peddling and corruption as that word is commonly understood. . . .
>
> But abandonment of the public interest can be caused by many things, of which timidity and a desire for personal security are the most insidious. This commission, for example, must make hundreds and even thousands of decisions each year, a good many of which involve literally scores and hundreds of millions of dollars in a single case. A commissioner can find it very easy to consider whether his vote might arouse an industry campaign against his reconfirmation by the Senate.[83]

Until the early 1960s the traditional historical view of commission regulation—even Bernstein's—held that business elements almost always strongly opposed federal regulation in their sphere of influence, and that only after a lengthy period following the passage of a regulatory statute did animosities toward such regulation subside. Historian Gabriel Kolko, however, presented an impressive body of

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[82] James M. Landis, Report on Regulatory Agencies to the President-Elect, Committee Print, U.S. Senate, Committee on the Judiciary, 86 Cong., 2 sess. (Washington, 1960), p. 1.

[83] Morgan's letter of January 23, 1963 is quoted in Louis M. Kohlmeier, Jr., The Regulators (New York: Harper & Row, 1969), p. 82.

evidence in his The Triumph of Conservatism and Railroads and Regulation, 1877-1916 to support an alternative thesis: "The dominant fact of American political life at the beginning of this century was that big business led the struggle for the federal regulation of the economy."[84] Of all the politico-economic options "abstractly available" to government leaders at the turn of the century, the majority of solutions to problems chosen were those advocated by "concerned business and financial interests."[85] The Progressive Era, to Kolko, was really conservative in the sense "that there was an effort to preserve the basic social and economic relations essential to a capitalist society."[86]

Kolko redefined "progressivism" as a movement for "political rationalization" of industrial conditions based on "the assumption that the general welfare of the community could be best served by satisfying the concrete needs of business."[87] Rationalization—not in the sense of improving efficiency and output, but rather an organization of the economy to take into account the socio-political sphere and to provide security for maintaining stability and long-term profit[88]—was the key to major economic interests' attempts to control federal regulation. The means of achieving this rationalization—and consequently stability (elimination of cutthroat competition), predictability (ability to plan economic action with greater accuracy), and security (protection from political attacks by democratic elements)—was what Kolko termed

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[84]Kolko, The Triumph of Conservatism, pp. 57-58. (Both Kolko works have been cited previously.)

[85]Ibid., p. 2.

[86]Ibid.

[87]Ibid., pp. 2-3.

[88]Ibid., p. 3.

"political capitalism," simply the "utilization of political outlets" to attain these ends.[89] As for those "political outlets," Roosevelt, Taft, and Wilson—despite progressive labels—were "sufficiently conservative" to respond positively to business leaders' views on the direction of federal intervention in the economy should take.

> Political leaders, such as Roosevelt, Wilson, and their key appointees, held that it was proper for an industry to have a decisive voice or veto over the regulatory process within its sphere of interest, and such assumptions filled many key businessmen with confidence in the essential reliability of the federal political mechanism, especially when it was contrasted to the unpredictability of state legislatures.[90]

The primary reason major economic interests resorted to the federal political mechanism was because rationalization—despite the traditional historical view—was not, and apparently could not have been, accomplished by business alone; according to Kolko, the view that American industry was so centralized and monopolized as to be able to effect such rationalization simply is not true.[91] Despite mergers and corporate growth in both absolute size and economic power during this period, "the dominant tendency . . . at the beginning of this century was toward growing competition,"[92] and the inability to control internecine competition through pools and other methods led major economic interests to the device of political capitalism. "Ironically, contrary to the consensus of historians, it was not the existence of monopoly that caused the federal government to intervene in the economy, but the lack of it."[93]

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[89]Ibid. [90]Ibid., p. 283. [91]Ibid., p. 4.

[92]Ibid. [93]Ibid., p. 5.

To Kolko, there was little question in the minds of key economic leaders concerning the advisability of federal regulation, nor was there much philosophical sentiment against federal control in favor of laissez-faire; "there was, rather, the question of what type of legislation at what time."[94] The evidence he offers goes far toward supporting his conclusion that major economic interests were mostly successful in determining the scope of federal regulation during this period, a period which established a precedent for future regulation:

> Important business elements could always be found in the forefront of agitation for such regulation, and the fact that well-intentioned reformers often worked with them—indeed, were often indispensable to them—does not change the reality that federal economic regulation was generally designed by the regulated interest to meet its own end, and not those of the public or commonweal.[95]

Others continued to lend respectability to capture theory, perhaps because it seemed "more tough-minded, easily grasped, and above all more descriptive of what seemed to be going on within the regulatory agencies."[96] Emmette S. Redford updated his 1952 discussion of "the problem of the interest groups" by entertaining in a 1965 work the effects of "interest associations" in regulatory administration.[97] In a journalistic treatment Kohlmeier utilized his ten years of experience as a Washington reporter for the Wall Street Journal to describe, among other things, the nature of industry pressure on the regulators; he concluded that regulation "has not worked."[98] And in

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[94]Ibid., p. 60. [95]Ibid., p. 59. [96]McCraw, p. 162.

[97]See Redford, Administration of National, Chapter 9, and Redford, American Government, Parts 4 and 5.

[98]Kohlmeier, p. 265. See also Chapter 6.

perhaps the most sensational of all capture-oriented studies, Ralph Nader's "Raiders" offered several exposés of agency/industry relationships that indicated the public interest was often forgotten in the regulatory process.[99] Though the studies may have been "immature" and "predictable," similar conclusions were reached in other works, and by the 1970s it appeared that the public interest "as a credible standard for interpreting regulatory behavior had few defenders."[100]

Capture theory has also been reflected in a body of literature in political science offering an anti-pluralistic interpretation of the American governmental process.[101] The pluralistic view of a state "composed of a plurality of voluntary associations so guided by an unseen providence that their interaction constitutes the public good,"[102] is, in the opinion of the anti-pluralists, a tragically inaccurate reflection of modern American government. Their concern is with the growing number of "large-scale organizational power blocs"

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[99] See, for example, Edward F. Cox, Robert C. Fellmeth, and John E. Schulz, "The Nader Report" on the Federal Trade Commission (New York: Richard W. Baron, 1969); Robert C. Fellmeth, The Interstate Commerce Omission: The Public Interest and the ICC (New York: Grossman Publishers, 1970); and Mark J. Green, ed., The Monopoly Makers: Ralph Nader's Study Group Report on Regulation and Competition (New York: Grossman Publishers, 1973).

[100] McCraw, p. 164.

[101] For example, see Henry S. Kariel, The Decline of American Pluralism (Stanford: Stanford University Press, 1961); Grant McConnell, Private Power and American Democracy (New York: Alfred A. Knopf, 1966); Theodore J. Lowi, The End of Liberalism: The Second Republic of the United States (New York: W. W. Norton, 1979); and William E. Connolly, ed., The Bias of Pluralism (New York: Atherton Press, 1969).

[102] Kariel, p. 2.

that have succeeded in exploiting public power for private gain and that today "comprise most of the public order and occupy much of the public mind."[103] These private power blocs "require new credentials of legitimacy" because "they are not that wonderful and wholly legitimate conglomeration of little groups . . . traditionally identified with Americanism."[104] A conclusion of the anti-pluralist argument is that the public interest, "far from emerging automatically from the inter-group struggle," is "simply lost in the shuffle."[105]

The Olds Literature

The secondary "literature" on the Olds case consists in large part of a number of short references used for illustrative purposes in works of broader scope. With certain exceptions these references merely repeat the basic facts of the Olds story and provide little or no commentary or factual embellishment. In fact, only one work concerned primarily with the circumstances of the Olds case has appeared since Olds' Senate rejection in 1949.[106] In addition, some scholars writing of certain aspects of regulation of the natural gas industry have included more detailed discussions of the Olds case.[107] As such, however, there is really no "body" of literature on Olds other than the primary sources.

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[103] Ibid. [104] Ibid. [105] McCraw, p. 178.

[106] See Joseph P. Harris, "The Senatorial Rejection of Leland Olds: A Case Study," American Political Science Review, 45 (September 1951), 674-692. This article was later reprinted in substantially the same form as a chapter in Joseph P. Harris, The Advice and Consent of the Senate (Berkeley: University of California Press, 1953).

[107] For example, see Nash, Chapter 10; see also Huitt.

Primary sources relied upon most in this work are the Congressional Record, the Senate subcommittee hearings on the Kerr gas bill, Olds' 1949 reconfirmation hearings before the Senate Subcommittee on Interstate and Foreign Commerce, two reports stemming from the FPC's Natural Gas Investigation (the Olds/Draper and Smith/Wimberly reports), and various Federal Power Commission documents.

Critique of the Literature

As stated previously, the public interest concept of commission regulation does not adequately account for American regulatory behavior. It is politically naive, its faith in the expertness of commissions has been weakened by the appointment of unqualified personnel to agencies for political purposes, and there is much in the literature to indicate that the independence of regulatory commissions, rather than freeing them from evil influences, is instead responsible for driving a wedge between the agencies and the public. The public interest theory is an expression of an ideal, of what the regulatory agencies should be; it is not an accurate reflection of what is, or even, of what has been.

The literature on agency capture—particularly the writings of Bernstein and Kolko—more closely approximates an accurate description of the kind of regulatory behavior that occurred during the Olds dispute. Bernstein, for example, has described a "pattern of attacks" on the regulatory agencies that resembles the "continuum" of action taken by the industry during the Olds case. Bernstein's pattern consists of: (1) an initial effort by the industries to prevent

Congress from passing regulatory legislation,[108] or failing that, the industries will attempt to mold the final legislation into a more acceptable form through intense lobbying; (2) an attack via the courts on the agency's wide judicial discretion; (3) an industry call for "a definition of the requirements of fair procedure to protect adequately the interests of private parties,"[109] a tactic that has "reflected a desire to utilize legal rules to inhibit the initiative and competence of the agencies";[110] and (4) a propaganda campaign waged by regulated industries to influence public opinion against commission regulation, an attack that is later tempered somewhat as the industries come to realize that commission regulation can be beneficial to them.[111]

Bernstein's pattern accounts for the uses of Congress and the courts by regulated industries attempting to influence the regulatory process. But it stops short of including attacks on regulators as an industry option in such a process. Neither does the remainder of the capture literature (nor the public interest literature, of course) anywhere identify this as a tactic that can be employed by an industry to influence regulatory policy. The primary purpose of this thesis is to expand the scope of the regulatory literature to account for such action.

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[108] Kolko disagrees with Bernstein on this point; he and others have indicated that industries frequently desire regulatory legislation and work behind the scenes for its passage. See Kolko, The Triumph of Conservatism.

[109] Bernstein, p. 97. [110] Ibid.

[111] The foregoing discussion is a paraphrase of ibid., pp. 95-99.

Bernstein's work has been criticized for, among other things, lack of documentation and free generalization,[112] both of which are valid. Likewise, Kolko has been criticized on a number of fronts,[113] and the many journalistic forays into capture-oriented criticism of regulatory practices suffer in a number of respects. But for all the weaknesses of their presentations, at least one major conclusion arrived at collectively by the principal capture theorists has been borne out time and again by a great number of studies in recent years. That conclusion is that the American form of commission regulation, considered in light of the circumstances of its birth and the socio-political environment in which it has evolved, tends toward agency/industry efforts to control, mitigate, or otherwise influence regulatory policy for industry benefit. In some instances this may mean effective control of a public agency by a special interest group (or a number of interest groups), and/or a lack of real concern for the general public interest—the "thread of continuity at the heart of regulatory ideology."[114] The combined results of studies carried out in several disciplines in the last two decades indicate that capture

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[112] See, for example, McCraw, p. 178.

[113] For an example of criticism of Kolko's work, see Robert U. Harbeson, "Railroads and Regulation, 1877-1916, Conspiracy or Public Interest?" Journal of Economic History, 27 (June 1967), 230-242; see also McCraw, p. 165.

[114] Ibid., p. 161.

theory—despite its many infirmities[115]—is not far off the mark as a description of actual regulatory behavior.

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[115] A detailed discussion of the strengths and weaknesses of capture theory has been reserved for Chapter 4, where a consideration of the Olds case can be combined with such a discussion for the purpose of drawing some broad conclusions concerning the issues raised in this work.

CHAPTER 3

THE OLDS CASE

Introduction

If one were to write a novel of political intrigue and wished to include such classic literary devices as conflict, dramatic action and dialogue, a complex plot, and a logical, well-developed climax, no better model could be found than the story of Leland Olds' career as a Federal Power Commissioner. The Olds case's resemblance to a novel is striking. For example, a collision course between the ultimate "hero" and "villain" is carefully laid out as the reader examines the motivations of the principal characters; there is an element of suspense as it becomes apparent that one of the "brothers" in the story feels compelled to turn on the other, and the jilted one seeks revenge; there is constant foreshadowing of a likely victory by the jilted one over his disloyal sibling; and there is a slight sense of sadness on the reader's part as it becomes evident that the father (played by President Truman) cannot reconcile his two sons. One of the sons even becomes bitter at the father for showing favoritism toward the other—the "prodigal son" technique. And, like all good novels, there is a moral to the Olds story, characteristically enunciated by a "wise one" in dialogue earlier in the script:

> Courage is not implicit in public service. It is very difficult to be a courageous public servant. The courageous ones are the ones who are decapitated, the

> ones who are amenable, the ones who go along, those are the ones who have no difficulty with their confirmations.[1]

Olds' Senate rejection in 1949 was one element of a conflict with roots in the 1938 passage of the Natural Gas Act. In simple terms the conflict centered on one important question: Did the NGA give the federal government the right to regulate—through the FPC—arm's length sales of gas by independent natural gas producers?[2] The industry and its supporters in Congress insisted adamantly that it did not. Olds and two co-members of the FPC, along with numerous federal courts and the U.S. Supreme Court, maintained that it did. When vagueness in the Act precipitated pressure upon Congress to clarify the statute in the industry's interests, Olds, speaking for the FPC majority, vigorously and eloquently opposed resulting bills to that effect. When his reconfirmation hearings came up during Congressional consideration of one such bill (the Kerr measure), the opportunity to rid the FPC of Olds was seized by the industry and its supporters.

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[1]Testimony of Anne X. Alpern in U.S. Congress, Senate, Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce: Nomination of Leland Olds, 81 Cong., 1 sess. (Washington, 1949), p. 215; hereafter cited as Olds Hearings.

[2]Arm's length sales are defined in S. 1498 (the Kerr bill) as sales "by any individual, partnership, association, or corporation not standing in such relation to the buyer by reason of voting-stock, common officers or directors, or other evidence of affiliation, that there is liable to be such an absence of independent bargaining in transactions between them as to be contrary to the public interest." See U.S. Congress, Senate, Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce on S. 1498, 81 Cong., 1 sess. (Washington, 1949), p. 2; hereafter cited as Kerr Bill Hearings. An independent producer is generally defined as a nontransporting company not affiliated with an interstate natural gas company. The term "independent" has nothing to do with the size of a company; some large oil and gas concerns, like Phillips Petroleum and Standard of Indiana, were, at the time of the Olds case, independent producers.

The problems that existed at this time between Olds and the industry were not likely to be solved through the normal "give-and-take" of regulatory politics. When Olds changed his mind in the autumn of 1947 on the regulatory role of the FPC, he did so after reviewing evidence of an extensive FPC investigation of the natural gas industry, and after the Supreme Court had decided in its Interstate case that the type of regulation Olds desired was indeed within the purview of the Gas Act;[3] thus, Olds was thoroughly convinced that regulation of sales by independent producers was not only necessary, but legally and otherwise "right."[4] He testified at hearings on a gas bill early in 1949 that the FPC majority would continue to believe that gas sales by independents should be regulated until that majority became a minority through an FPC personnel change.[5] The positions at this time, then, were clear-cut; the Olds-led majority indicated that it was not going to back down, and neither was the industry willing to concede such a vital point to the FPC. With an uncooperative relationship then existing between the FPC and the industry with respect to this issue, and taking into account Olds' background and the economic importance of federal regulation of such sales to the gas industry, it is safe to say that the type of give-and-take political solutions that normally occur in the regulatory process were here out of the question.

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[3]Interstate Natural Gas Co. v. Federal Power Commission, 331 U.S. 682 (1947). A discussion of the case appears later in the chapter.

[4]Nash, pp. 219-220.

[5]See testimony of Hayden W. Head in Kerr Bill Hearings, p. 118.

Olds was a substantial impediment to independent producers' desires for a nonregulation status under the Natural Gas Act. When a number of court cases in the 1940s gradually increased the FPC's regulatory power in this area, the producers became alarmed and pressured the FPC to stay out of independent production sales regulation.[6] The FPC responded by issuing its Order No. 139,[7] but when the Interstate case was decided shortly thereafter, Order 139 offered little comfort to the industry. Olds soon afterward brought his considerable regulatory expertise into testimony before Congress in opposition to the Moore-Rizley, Lyle, Harris, Kerr, and similar bills that would have exempted independent producers from FPC regulation. The Moore-Rizley bill failed to pass the Congress, and Olds' subcommittee testimony in 1949 on the Lyle, Harris, and Kerr bills had a dampening effect also on the potential success of those bills. In July 1949 Olds requested an appointment to see Truman, where, due to the timing of his request, it can be assumed that the Kerr bill was a topic of conversation.[8] Olds was also rumored to be the ringleader of the pro-regulation FPC majority.[9] Olds, then, in the producers' viewpoint, "stood out as the bête-noire of the FPC and as a serious obstacle to limitation of its jurisdiction."[10] This would tend to explain why key Congressional leaders allowed the full Senate to vote

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[6]See Olds' testimony in ibid., pp. 250-251.

[7]See Chapter 1.

[8]Nash, p. 222. Less than a month later, and seven months before a vote on the Kerr bill, Truman let it be known that he opposed the Kerr measure. See ibid., pp. 221-222.

[9]Ibid., p. 223.

[10]Ibid.

on Olds' nomination, rather than just tabling it, which is the usual method of reporting nominations negatively:[11]

> An adverse report on Olds by the Senate would probably mean his exit from government service, since the President would not be likely to appoint him to any other post requiring confirmation, such as the National Security Resources Board for which Olds said he had been considered. Were the nomination merely tabled, the President might give Olds a recess appointment after Congress adjourned, raising the question of confirmation again [the] next year.[12]

There is little evidence readily available on the Olds case that would prove, without a doubt, that "the oil and gas industry" was responsible for Olds' Senate rejection. But contemporary newspaper and periodical accounts—from both sides of the issue—as well as a great number of the principals involved in the Olds reconfirmation hearings were thoroughly convinced that prime responsibility for the attack on Olds fell upon the industry. The "literature" on Olds, however, has yet to include a detailed examination of the case to determine, for example, if Olds was ousted by industry pressure, and if so, what segment of the industry was primarily responsible? In the following pages a considerable amount of circumstantial evidence is presented to support the contention that the producers of natural gas—many of them major oil companies—led the fight against Olds.

Olds' background. Since Olds' earlier professional life and personality characteristics play important parts in the late-40s fight against him, a short biographical review is necessary for a thorough

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[11]"Olds Nomination to FPC Faces Close Vote on Floor of Senate," The Oil & Gas Journal, 48, October 13, 1949, p. 64.

[12]Ibid.

understanding of the Olds case.[13] Olds was born in 1890 in Rochester, N.Y., and attended public schools in Amherst, Mass., where his father was a mathematics professor at Amherst College (later to become college president). Olds himself entered Amherst in 1908, and he graduated Phi Beta Kappa in 1912. During his high school and college years he became interested in the conservation movement inspired by Theodore Roosevelt and Giffort Pinchot, and he also became interested in the effects of industrialism upon society. A devout Christian Scientist, he learned through church work in various cities of the plight of the poor and of the hazardous working conditions then existing in industrial plants. After college graduation he felt a need to find some pursuit "which would have some effect toward mitigating the evil of poverty and establishing [Christian] service as a principal [sic] of life."[14] He was concerned that the social principles of Christianity were being "sacrificed to the worship of Mammon" and that what was needed was a return to a society based on the teachings of Jesus contained in the Sermon on the Mount.[15]

After college he worked for a year in a social settlement on Boston's south side. He learned there "a great deal about the impact of our industrial economy on the urban poor and particularly upon the children growing up in the slums of our big cities," and he also discovered that poverty was "pretty much accepted as a necessary concomitant of our economic system" and that little was being done to mitigate the

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[13]The following account is taken from Olds' testimony in Olds Hearings.

[14]Ibid., p. 109. [15]Ibid.

problem.[16] During this period he took a course in sociology at Harvard; shortly afterward he entered Union Theological Seminary in New York, where he remained for two years hoping that organized religion would prove to be the best means for satisfying his aims in life. While in seminary training he served as a minister in a small church in a low-wage section of Brooklyn, where his experience, he said, indicated that he might accomplish more through teaching.[17] The following two years Olds spent in graduate study in history and the social sciences at Columbia University.

Beginning in 1917 Olds assisted in the preparation of several reports for the federal government on labor practices, effects of industrialism, etc., in both this country and in England. He taught European history at Amherst briefly during 1918, but was called back to Washington to participate in the administration of the National War Labor Board. His association there with labor leaders Frank P. Walsh and W. Jett Lauck led to lengthy service in the interests of the labor movement, and he received first-hand experience of labor's problems in the 1920s in field work in the Midwest. He later headed a newly established research bureau in the railway employees department of the American Federation of Labor, where he remained until 1922 when he became industrial editor of the Federated Press, the only labor news service existing at the time.

Some of the more than 1,800 articles Olds wrote in this capacity from 1922 to 1929 constituted the evidence behind the charges of

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[16] Ibid.

[17] Ibid.

communist sympathy presented against him in his 1949 Senate hearings. As will be shown in greater detail later in this chapter, Olds then was opposing the exploitation of resources and labor and the lack of social responsibility of the large corporations of the 1920s, which seemed to him to be most interested in the amount of profit to be made. Olds later said that he was only "making an effort to shock people into seeing" that the capitalistic system as it was functioning during the 1920s "was full of the kind of injustice, . . . instability, . . . [and] insecurity that ultimately has led civilization to decay."[18] Many of Olds' writings pointed ominously to an impending economic collapse. But his problem, as far as his FPC reconfirmation was concerned, was that he had praised Russian social progress at the time, though he consistently maintained that he never was a communist or believed in the communist system. Another problem that Olds encountered later was that some of his articles had appeared in The Daily Worker—a communist newspaper—which was a subscriber to the Federated Press, along with approximately seventy other labor-oriented papers.[19]

When the Federated Press could no longer financially support Olds' column, Olds journeyed to New York and became involved in a general investigation of public utility regulation in that state. When the Power Authority of the State of New York was established in 1931, Olds was selected to be chief of staff under the title of executive secretary, a post he held until his appointment to the FPC. During this period Olds' knowledge of hydroelectric power played an important

[18] Ibid., p. 124.

[19] Ibid., p. 132.

part in negotiations with Canada in the St. Lawrence Seaway Project.[20] He also participated in a mission sent to Europe by President Roosevelt to study cooperative enterprise. For his loyal service and excellent career record, Roosevelt appointed him to his first term on the FPC in 1939.

Conditions Leading to the Natural Gas Act

Natural gas for many years was an unwanted by-product of petroleum production. Geologically, it is responsible for the natural "push" which brings crude petroleum to the surface, but before technological advances made natural gas a valuable energy resource in its own right, it was flared in the field or, where possible, re-pumped into the oil reservoir to lift more crude to the surface. In the 1920s and 1930s, however, improvements in pipeline technology—particularly electric welding techniques—made long-range pipeline networks feasible, an essential advance since most of the proven reserves were in the Southwest and the most lucrative markets on the two coasts.[21] The pipeline, it should be noted, is an important element of the industry; without it, producers do not have a market for their gas, since there is practically no other way to transport the fuel (liquification offered an alternative means of transportation, but only after 1964), and at the time of the Olds case it furnished "virtually the only storage facilities for gas."[22] The characteristics of gas as a fuel commodity

[20] On the importance of Olds' work on this project, see, for example, the testimony of Adolf A. Berle, Jr., in Olds Hearings, pp. 18-21.

[21] Nash, p. 210.

[22] Huitt, p. 55.

necessitated technological integration of the production-transportation-distribution system, which in turn provided pressures for economic integration, since operating costs at each level of the system were great.[23]

As alluded to above, there are three component parts of the gas industry: production, transportation, and consumer distribution. These segments of the industry, however, did not always exist independently of each other; the pressures for integration had produced large corporate combinations by 1935, the year Congress began considering legislation to regulate the interstate aspects of the industry:[24]

> The oil producer, perhaps prevented by state law from venting his gas, had shared in the building of pipe lines. The pipe-line interests, seeking security for their investments, had leased acreage and bought utilities. Utilities, in turn, had joined pipe-line ventures and entered production. . . . Competition existed in production, especially in new fields, but increasing control by large groups was characteristic of mature fields. In pipe-line transportation service, territories were staked out by the dominant groups, with strong pressure against "raiding" (i.e., competing) in a proscribed area.[25]

Thus, the characteristics of the gas industry from its nascent years onward "dictated cooperation rather than competition among rival companies."[26] And since consumers—once they connected with a gas line for service—could not "shop around" for alternate service, the industry tended toward conditions of natural monopoly.[27]

The states, beginning with Oklahoma in 1915, attempted to regulate the intrastate aspects of the rapidly expanding industry.[28]

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[23]Ibid., pp. 56-57. See also Nash, p. 211.

[24]Huitt, p. 57. [25]Ibid. [26]Nash, p. 211.

[27]See Huitt, pp. 55-58. [28]Nash, p. 211.

Most of the states' regulatory efforts were geared to conservation,[29] since attempts to apply financial controls were "frustrated by the intricate, multistate structure of the holding company."[30] More importantly, the states ultimately discovered that their regulatory authority over the rates charged to consumers was limited—and largely ineffective—due to the interstate integration of the industry.[31] Without the power to regulate the rates charged distributing utilities by interstate pipeline companies, effective state regulation was limited basically to conservation of gas.[32]

A growing consumer demand for natural gas, especially after 1930, and an emerging importance of the industry in terms of national economic stability underscored the need for effective regulation of the industry in the public interest.[33]

> In 1940 total U.S. production was 2,660.2 billion cubic feet; in 1955, 9,405.4 billion cubic feet. The major producing states of the Southwest (Texas, Louisiana, Oklahoma, New Mexico, and Kansas) accounted for only 1,818.3 billion cubic feet in 1940, but in 1955 produced 8,037.5 billion cubic feet. Between 1930 and 1960, residential as well as industrial consumption increased more than tenfold.[34]

The problems state officials experienced in regulation of the industry led many of them in the early 1930s to pressure Congress to fill in the gaps in regulatory legislation.[35] The gas industry was "not at all unfriendly to the idea of federal regulation."[36] It

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[29] Ibid., p. 212. [30] Huitt, p. 58. [31] Ibid.

[32] Ibid. For a discussion of the "jurisdictional limits of state power" and "state regulatory efforts," see ibid., pp. 58-63.

[33] Nash, p. 211. [34] Ibid., p. 210. [35] Ibid., p. 212.

[36] Ibid.

"promised uniformity and standardization in the interstate transmission of gas; this would . . . promote stabilization of the industry."[37] It also "promised an escape" from what the industry "often considered onerous stipulations of state agencies."[38] By 1935 the pressures upon Congress were strong enough for Sam Rayburn, then chairman of the House Committee on Interstate and Foreign Commerce, to direct a subcommittee to develop a gas regulation bill. Headed by Rep. Clarence Lea, the subcommittee utilized the services of the FPC staff, along with the special expertise of Federal Power Commissioner Clyde Seavey,[39] and the result was a bill Lea introduced in the House March 6, 1936. When he sent the bill to the House for consideration, he also sent copies to "all state public service commissioners as well as to a special legislative committee of the American Gas Association"[40] for suggestions. "They raised no serious criticisms, but did ask for a few minor changes."[41] The bill made slow progress through Congress due to a general lack of interest at the time, but it was finally signed by Roosevelt on June 21, 1938.

The NGA gave the Federal Power Commission the "responsibility for regulating certain carefully delimited activities of the industry in the public utility tradition."[42] That "tradition" included the use

[37]Ibid., pp. 212-213.

[38]Ibid., p. 213.

[39]Ibid.

[40]Ibid., pp. 213-214.

[41]Ibid., p. 214. See also Dozier A. Devane, "Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938," George Washington Law Review, 14 (December 1945), 39-40.

[42]Huitt, pp. 63-64.

of two powers common to utility legislation: rate regulation, and the power to grant certificates of convenience and necessity for facilities used in serving the public.[43] The legislative history of the Act indicates that it was "designed largely to supplement state regulation";[44] thus, the FPC was given the power to regulate the interstate transmission of gas and sales of gas in interstate commerce for resale, but was prevented from regulating direct sales to industrial customers, local distribution, or production and gathering.[45] The exemption clause, Section 1(b),[46] seemed clearly—to some—to prevent regulation of field prices charged to pipelines by independent producers.[47] But, as Leland Olds and the courts later maintained, the wording in the Act could also be interpreted to allow such regulation.

The First Years Under the Natural Gas Act

When the Natural Gas Act was passed, utility regulation was conducted on the "fair value" principle handed down by the U.S. Supreme Court in Smyth v. Ames in 1898.[48] The Court maintained then that the fairness of rates charged to consumers must be determined by "a fair return upon the fair value of the property being used for the convenience of the public."[49] The Court listed several criteria to be used in determining the "fair value,"[50] but it was so vague in other aspects of its decision that "the regulator never knew upon what ground a rate

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[43]Ibid., p. 64. [44]See Nash, pp. 214-215. [45]Huitt, p. 64.

[46]See Chapter 1. [47]Nash, p. 215. [48]169 U.S. 466 (1898).

[49]Huitt, p. 64. [50]Ibid.

might be set aside, and the regulated was encouraged to resort to endless litigation."[51] Justice Brandeis said the rule was unworkable—as it so proved through the years—and offered an alternative method, the "prudent investment" theory.[52] Prudent investment, or "actual legitimate cost," was described later by the FPC as such:

> The rate is determined by starting with the original cost of properties dedicated to serve the public, deducting therefrom the accrued depreciation, as determined by the Commission, and adding to the result a reasonable allowance for working capital.[53]

The FPC was thoroughly committed to the prudent investment method, and attempted—for twelve years—to get the Court to sanction its use of the rule.[54] In the _Hope_ case,[55] decided in 1944, the Court sustained the commission's use of the method, and the unworkability of the _Smyth vs. Ames_ fair value principle was finally replaced by the "administrable"[56] prudent investment theory.

The FPC's commitment to the prudent investment method was one of the elements of federal regulation that caused independent producers to be "chilled with fear"[57] when later the Olds majority expressed a

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[51] Ibid., pp. 64-65. [52] Ibid., p. 65.

[53] Federal Power Commission, _First Five Years Under the Natural Gas Act_ (Washington, 1944), p. 7, quoted in Huitt, p. 75. The "reasonable allowance" came to be normally a 6 to 6.5 percent return.

[54] See ibid., pp. 65-67.

[55] _Federal Power Commission v. Hope Natural Gas Co._, 320 U.S. 591 (1944). For a discussion of the _Hope_ case, see Huitt, pp. 67-80.

[56] See ibid., pp. 75-76.

[57] Testimony of O. C. Bailey in Olds Hearings, p. 225.

desire to regulate arm's length gas sales. Prudent investment regulation normally limited a company to a 6 to 6.5 percent return on investment, a figure that the producers held was much too low due to the high-risk nature of the search for oil (and the gas accompanying it).[58] But as an attorney who represented an independent producer indicated at Senate hearings on the Kerr bill in 1949, producers were not only concerned with a low return on a high risk, but also with the great deal of profit that could be made if they were allowed to sell gas at a rate comparable to other fuels[59]—an "intrinsic value," or what-the-traffic-will-bear computation.

> When you bear in mind the fact that gas, on a comparable B.t.u. yardstick with oil, would compare with oil at 36 cents a barrel, say, then we realize that the price of gas is too low and that it must increase as a matter of economics. . . .[60]

It must be noted that at the time oil was selling for approximately $2.65 per barrel.[61]

Like its activity in winning Court approval of prudent investment, the FPC in the first years following passage of the Gas Act became embroiled in a great deal of litigation as it "sought to clarify the scope of its jurisdiction over diverse segments of the natural gas industry."[62] Beginning with the <u>Columbian Fuel</u> case in 1940,[63] the issue of federal regulation of the price that pipelines

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[58]See, for example, the testimony of Hayden W. Head in Kerr Bill Hearings, pp. 120-121; see also Huitt, p. 83.

[59]Kerr Bill Hearings, p. 131. [60]Ibid.

[61]Testimony of Ernest O. Thompson in ibid., p. 67.

[62]Nash, pp. 214-215. [63]Docket No. G-143, 2 FPC 200 (1940).

paid producers for their gas was frequently before the commission for consideration.

Cases concerning jurisdiction over producers. The Columbian Fuel Corp. was determined by the FPC to be an independent producer exempt from jurisdiction under the Gas Act since it produced gas and sold it at the end of its gathering lines. Since the FPC was barred from the regulation of production and gathering, and since the company did not transport the gas further than the terminuses of its lines, it seemed clear that its sales should not be subject to the Act. Olds sided with the majority; but Commissioner John W. Scott dissented on the ground that since Congress had intended by passing the NGA to fill in the gaps where the states could not act, and since, to him, this was a sale in interstate commerce, the mere fact that the company was also engaged in production and gathering activities did not provide reason to exempt their sales to pipelines.[64]

In the Billings case,[65] decided the same year, the FPC ruled that the Billings Gas Co., because it transported its gas beyond the ends of its gathering lines, was subject to FPC jurisdiction and federal regulation.[66] A comparison of Columbian Fuel and Billings indicated then that the FPC had apparently decided that jurisdiction over sales should attach when gas is transported by a producer beyond the gathering

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[64]Huitt, p. 87.

[65]Docket Nos. G-152, 153, 154, 2 FPC 288 (1940).

[66]Huitt, p. 87.

lines.[67] But a court of appeals ruled in the Peoples case[68] two years later that such sales to pipelines were in interstate commerce regardless of whether they occurred before or after the gas itself moved in interstate commerce,[69] thus affirming, in one respect, Commissioner Scott's dissent in the Columbian Fuel case.

As was indicated earlier in the chapter, pipeline companies often engaged in production activities, producing all or part of their gas supply either directly or through an affiliated company. Because such companies transported gas in interstate commerce, they were declared to be natural gas companies subject to FPC jurisdiction under the Gas Act. In dealing with such companies, the FPC normally included the original cost of production and gathering facilities in the rate base and allowed a "fair return" on that computation.[70] The Colorado Interstate Gas Co. and the Canadian River Gas Co., which were not affiliated but operated as a unit, tested the FPC's right to include production properties in a determination of a rate base, arguing that it was a violation of Section 1(b) of the NGA.[71] The Supreme Court sustained the commission's method,[72] making a distinction between regulation of production and gathering and including production facilities in a rate base computation.[73]

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[67] Ibid.

[68] Peoples Natural Gas Co. v. Federal Power Commission, 127 F. 2d 153 (1942).

[69] Huitt, p. 88. [70] Ibid., p. 81. [71] Ibid., pp. 81-82.

[72] Colorado Interstate Gas Co. v. Federal Power Commission and Canadian River Gas Co. v. Federal Power Commission, 324 U.S. 581 (1945).

[73] Huitt, pp. 81-82.

The most important of the jurisdictional cases was the Interstate decision,[74] handed down by the Supreme Court in 1947. Interstate Natural Gas Co. produced gas in Louisiana and also bought gas from other producers. It mixed the gas in its gathering lines and then transported it intrastate to points where it was sold to three interstate pipelines. The FPC claimed jurisdiction over the sales since the gas moved beyond the ends of the gathering lines, but the company contended that the sales were part of the gathering process and thus exempt under Section 1(b).[75] The company added later the claim that the sales were not in interstate commerce, even though it had earlier obtained a federal court order preventing state regulation by the Louisiana Public Service Commission because it was engaged in interstate commerce.[76] Chief Justice Vinson, writing for the Court, "had no doubt" that such sales were in interstate commerce.[77] After reviewing the legislative history of the NGA, he said further that since Congress had intended to fill the gaps where the Court in a number of earlier decisions had held that the states could not act, such sales were then subject to federal regulation. He went on to say:

> It cannot be doubted that their [the sales'] regulation is predominantly a matter of national, as contrasted to local concern. All the gas sold in these transactions is destined for consumption in States other than Louisiana. Unreasonable charges exacted at this stage of the

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[74]Cited earlier in this chapter. The decision is reprinted in Kerr Bill Hearings, pp. 508-511.

[75]Huitt, p. 89.

[76]See ibid. See also the Interstate decision in Kerr Bill Hearings, pp. 509-510.

[77]Ibid., p. 509.

> interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed.[78]

Through a gradual process over the first nine years of FPC administration of the Act, the courts had interpreted the FPC's regulatory authority to include regulation of the field prices producers charged pipelines for their gas. The courts had maintained throughout that such sales were conducted in interstate commerce and were not a part of the production and gathering process, which the FPC was barred from regulating. Even though it apparently had the power to regulate field prices, the FPC—until Olds changed his mind in 1947—had consistently maintained that it had no desire, nor felt it necessary, to regulate sales made in the field.[79] But the commission's reassurances to that effect provided little comfort to the industry; after the <u>Interstate</u> decision, and especially after Olds' change of heart, the producers began to pressure Congress for legislation to exempt independent producers from federal regulation.[80]

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[78] Ibid., p. 511.

[79] Nash, p. 215. For an extensive explanation of the FPC's views on this issue, see the Kerr Bill Hearings.

[80] One example of the industry's involvement in such legislative pressure is cited by Nash (p. 220): "Some of the large oil companies that also had valuable gas properties saw [Sen. Robert] Kerr as their spokesman. A good example was Alvin Richards, attorney for the Pure Oil Company, who was of considerable help to Kerr in drafting legislation to exempt independent natural gas producers from FPC jurisdiction."

The "Problem" Years

Leland Olds was a party to the FPC's pre-1947 lack of interest in regulating independent producers' field sales. In 1940 he agreed with the majority in the Columbian Fuel case—the first case in which the question arose—that that company's sales were not subject to FPC jurisdiction. But he maintained later that he had always interpreted the NGA to have given the FPC jurisdiction over such sales; one reason it was never exercised, he said, was because conditions in the industry until approximately 1947 constituted a buyer's market, which was an adequate check against runaway prices.[81] As for his concurrence in the Columbian Fuel case, Olds in explaining his stand at the Kerr bill hearings pointed to a "significant paragraph" in the majority's opinion in that case:

> Future experience with the administration of the Natural Gas Act may reveal that the initial sales of large quantities of natural gas which eventually flows in interstate commerce are by producing companies which, through affiliation, field agreement or dominant position in the field, are able to maintain an unreasonable price despite the appearance of competition. Under such circumstances the Commission will decide whether it can assume jurisdiction over arbitrary field prices under the present act or should report the facts to Congress with recommendations for such broadening of the act and provision of additional machinery as may appear necessary to close this gap in effective regulation of the natural gas industry.[82]

The majority opinion, he said, confused "jurisdiction" with "administration."[83] The jurisdiction was there, but the necessity of administering it was not.

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[81] See Olds/Draper Report. [82] Kerr Bill Hearings, p. 249.

[83] Ibid.

Less than a month after the Supreme Court handed down its Interstate decision, two bills to exempt independent producers were introduced in Congress.[84] One, sponsored by Rep. J. Percy Priest, received the unanimous endorsement of the FPC;[85] the other—the Moore-Rizley bill—was opposed by the FPC because it was too restrictive.[86] The House did not act on the Priest measure but instead passed the Moore-Rizley bill; however, the Senate did not act on the latter, so the Eightieth Congress adjourned without approval of exemption legislation.[87]

On August 7, 1947, the FPC promulgated its Order No. 139, designed to calm producers' fears of possible FPC regulation. In part, the order stated:

> The Commission gives its assurance to independent producers and gatherers of natural gas that they can sell at arm's-length and deliver such gas to interstate pipe lines and can enter into contracts for such sale without apprehension that in so doing they may become subject to assertions of jurisdiction by the Commission under the Natural Gas Act.[88]

The order was passed by a three to one majority (at this time the FPC was one short of its capacity), with Claude Draper dissenting. Draper's dissent was based on his belief that the Interstate case, duly interpreted by the courts, had given the FPC the power to do what it said in its order it would not do. He said that "it is now too late for the Commission to issue any order which might be interpreted to constitute

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[84]Nash, p. 218. [85]See Kerr Bill Hearings, pp. 91-92.

[86]See ibid. See also Nash, p. 218. [87]Ibid.

[88]The order is reprinted in Kerr Bill Hearings, pp. 79-81. The quotation is found on p. 79.

a legal limitation upon its power,"[89] and that the FPC "should hesitate to do by rule what the Congress has failed to do by law."[90] Olds' concurrence in the FPC's order was his last official action in favor of exempting independent producers from regulation.

The FPC's natural gas investigation and Olds' change of mind. In 1945 the FPC began an extensive investigation of the natural gas industry to examine, among other things, production and distribution practices and state conservation policies.[91] The investigation included testimony given at public hearings conducted by the FPC in several cities, and by the time of its completion in 1947 it consisted of approximately 15,000 pages of evidence. The information contained therein convinced Olds and Draper that the conditions in the industry had changed to such an extent that to relinquish the power to regulate field sales would endanger the public interest.[92] This was entirely in line with the majority opinion in the Columbian Fuel case; the conditions that the opinion said would cause the FPC to have to decide if it could assume jurisdiction over independent producers had indeed come to pass, and the Interstate decision, Olds said later, made it clear that the jurisdiction did exist.[93] Olds and Draper set forth their views in a report published in 1948;[94] the remaining commissioners,

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[89] Ibid., p. 80. [90] Ibid., p. 81. [91] Nash, p. 216.

[92] For a summary of conclusions Olds and Draper reached from their review of the evidence and their recommendations based on those conclusions, see Olds/Draper Report, pp. 6-14.

[93] Kerr Bill Hearings, p. 250.

[94] Olds/Draper Report, cited previously.

Nelson Lee Smith and Harrington Wimberly, also reviewed the evidence and stated in a separate report that the Natural Gas Act should be amended to provide clear language exempting independent producers from federal regulation.[95]

The testimony of natural gas interests in the investigation, the Olds/Draper report said, indicated that they resented "being brought under effective regulation."[96] Also, there had been a "concerted drive by the combined oil, gas, and pipe-line interests" during the investigation to convince the FPC that all field price regulation—including that of pipeline companies also engaged in production—should be virtually abandoned.[97] The FPC's right to regulate the prices pipeline companies paid themselves for gas that they produced had been generally accepted; had such companies been allowed to "pay" themselves a "fair field price" and then pass such prices through the system, effective regulation would have been almost impossible. But, the report added, these pipeline/production companies had convinced "independent producers, royalty owners, landowners, and even State officials" that FPC regulation of field prices of pipeline-produced gas tended to unnaturally depress all field prices.[98] What the industry—especially the producers, pipeline-affiliated and independent—made

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[95]Federal Power Commission, Natural Gas Investigation, Report of Commissioner Nelson Lee Smith and Commissioner Harrington Wimberly (Washington, 1948).

[96]Olds/Draper Report, p. 6.

[97]Kerr Bill Hearings, pp. 250-251; Olds/Draper Report, p. 117.

[98]Ibid.

clear during the investigation, the report said, was that it desired "a virtually unregulated market for natural gas at virtually unregulated prices."[99] The industry maintained that the price of gas should be determined by the "intrinsic value" of the commodity, a value determined by market demand.[100]

But as Olds pointed out later in the Kerr bill hearings, gas prices could not be allowed to rise to a comparable value with oil or coal—which were unregulated industries—because the gas industry, as opposed to oil and coal, was a utility with quasi-monopolistic characteristics.[101] Congress, he added, had so determined when it passed the Natural Gas Act. Moreover, had the industry not been regulated and the price of gas allowed to rise in relative position to oil and coal, gas consumers would have had to pay approximately $500 million more annually.[102] That figure, Olds said, represented the maximum limit of "probable price adjustment . . . if natural gas companies are permitted to charge 'what the traffic will bear.'"[103]

Until the investigation's evidence convinced him otherwise, Olds had been operating under the assumption that the conditions in the industry constituted a "buyer's market" because of a relatively low demand in relation to supply; but over the years of administration of the Gas Act, reduction of rates through FPC regulation had greatly increased the market for gas, so much so that conditions by 1947 constituted a "seller's market."[104] These changing conditions, Olds said,

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[99]Ibid., p. 12. [100]Kerr Bill Hearings, p. 233.

[101]Ibid., p. 231. [102]Ibid., p. 233.

[103]Ibid. [104]Ibid., p. 225. See also p. 233.

had allowed unregulated independent producers to continually get more for their gas; the investigation indicated that field prices had been rising steadily from approximately 1941 on.[105] One constraint on run-away prices was FPC regulation of pipeline-produced gas.[106] But there was much evidence generated in the investigation to indicate that the producing end of the industry was becoming dominated by a small group of independents that threatened "to reduce the effectiveness of competition as a determinant of field prices."[107] And since, for a number of reasons, increasingly more gas was being bought by pipelines from independents,[108] FPC regulation of pipeline-produced gas was no longer an adequate check on prices.

At the Kerr bill hearings in 1949, Olds summarized the investigation's statistical evidence that led him to change his mind in regard to regulation of independent producers' field sales. He said that there were approximately forty million consumers of natural gas (including all household members), and that "a disproportionate share of any material price increases" would be borne by households and small businesses.[109] The six producing states of Texas, Louisiana, California, Oklahoma, West Virginia, and Kansas in 1947 produced 86 percent of all marketed production in the country,[110] and a report of the American Gas Association showed that 88.8 percent of proven

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[105] Ibid., p. 220. The producers were also including "escalator" and "most-favored-nation" clauses in their more recent contracts with interstate pipelines; see ibid., pp. 223-224.

[106] Ibid., p. 233. [107] Ibid., p. 282. [108] Ibid., p. 107.

[109] Ibid., pp. 202-203. [110] Ibid., p. 202.

recoverable reserves in the United States as of January 1, 1949 were located in the seven states of Arkansas, Kansas, Louisiana, Mississippi, New Mexico, Oklahoma, and Texas, with Texas alone accounting for 55 percent of the total reserves.[111] Forty-one interstate pipeline companies operated in that seven-state area, and an analysis of the sources of their gas supplies indicated that 26 percent was produced by the companies, 12 percent was produced by their affiliates, and 62 percent was purchased from independents.[112] But because it was more advantageous to the pipelines to contract for gas with independent producers rather than acquiring gas acreage and producing gas themselves, the proportion purchased from independents was rapidly increasing.[113] And, Olds added, the industry's contention that the production of natural gas was carried on "by thousands of small independent producers in keen competition with each other . . . just does not present a true picture of the regulatory problem in the industry."[114] In fact, he said, approximately 90 percent of the independents in the seven Southwestern producing states and 97 percent of all independent producers in the country could be exempted from federal regulation "without substantially affecting the regulatory situation."[115]

Rather than a great number of small companies "keenly competing," Olds said, the situation was actually that "a relatively few large oil and gas companies dominate the production branch of the natural-gas

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[111]Ibid., p. 206. [112]Ibid.

[113]Ibid., pp. 207-208. See also pp. 284-285.

[114]Ibid., p. 283. [115]Ibid., pp. 283-284.

industry."[116] In terms of gas acreage owned or leased, the list of those large companies included Phillips Petroleum, Cities Service Oil Co., Skelly Oil Co., and Standard of Indiana Oil & Gas Co.[117] The list of producers making the largest sales in 1947 to pipelines in the seven Southwestern producing states included Phillips, Humble Oil & Refining Co., Standard of Indiana, Skelly, Continental Oil Co. (Conoco), Gulf Oil Corp., Sun Oil Co. (Sunoco), Shell Oil Co., The Texas Co. (Texaco), and the Pure Oil Co.[118] As further evidence of the problem, Olds said, an estimate of industry conditions for 1952 indicated that many of these companies would continue to dominate production sales to interstate pipelines.[119]

Olds demonstrated at the Kerr bill hearings the effects of a hypothetical five-cent gas price increase (per thousand cubic feet) on the value of holdings of the dominant independent producers in two of the country's largest gas fields, the Panhandle and Hugoton fields in Texas. Phillips Petroleum was the largest holder of reserves in each field, controlling 20 percent of Panhandle and 15 percent of Hugoton.[120] The five-cent increase would mean an additional $390 million in the worth of Phillips' reserves in both fields; for Standard of Indiana, the second largest holder of reserves in the fields, the increase would mean approximately $225 million in additional value.[121] According to evidence contained in the gas investigation, on which Olds' illustration

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[116]Ibid., p. 283. [117]Olds/Draper Report, p. 147.

[118]Kerr Bill Hearings, p. 365.

[119]Ibid., p. 285. [120]Ibid., p. 282.

[121]Ibid., pp. 282-283. See also Olds/Draper Report, p. 147.

was based, five companies controlled almost 75 percent of the Panhandle field, and seven companies controlled more than 50 percent of Hugoton.[122] In consideration of this and similar evidence, Olds said that such large companies were "in a position to reap large fortunes" if they were able to "fix the price of natural gas which they own," and that the ultimate loser in such an event would be the consumer.[123] "The bill under consideration (the Kerr measure) would, therefore, benefit primarily large enterprises," he said.[124]

Olds made known his change of heart in Congressional testimony in February 1948. At this time, it should be noted, the FPC was split evenly over the issue of field price jurisdiction, so the impending appointment of the fifth commissioner took on added importance. In the summer of 1948 Truman nominated Thomas C. Buchanan of Pennsylvania—a consuming state—to the post, also giving him an immediate recess appointment in order that the commission would no longer have to operate at less than full strength. The addition of Buchanan—whose confirmation was held up in the Senate for a year before ultimate approval was given—tipped the balance in favor of the Olds/Draper line, and for the first time there existed a real possibility that the FPC would attempt to regulate all arm's length transactions in the field.

The issue received little attention through the remainder of 1948, a lack of activity due in part to a preoccupation with the national elections.[125] But early in 1949, what came to be known as the Lyle and Harris bills were introduced in Congress for the purpose

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[122]See Kerr Bill Hearings, p. 283. [123]Ibid., p. 288.

[124]Ibid. [125]Nash, p. 220.

of exempting independent producers from federal regulation. Olds, speaking for the FPC majority, testified against both bills, and neither made it through the legislative process. On April 4, 1949, Oklahoma's Sens. Robert Kerr and Elbert Thomas introduced what became S. 1498, the Kerr bill; it received "strong support" in the Senate from Lyndon Johnson and Russell Long.[126]

Sen. Edwin C. Johnson (D-Colo.), chairman of the Senate Committee on Interstate and Foreign Commerce, appointed Lyndon Johnson to chair a subcommittee to conduct hearings on the bill, which began in May 1949. The remaining members of the subcommittee were Francis J. Myers (D-Pa.), Ernest W. McFarland (D-Ariz.), John W. Bricker (R-Ohio), and Clyde M. Reed (R-Kan.). The subcommittee heard testimony in favor of the bill from many producer representatives, mostly from the Southwest, and testimony against the bill by Olds, Draper, Buchanan, and city officials who represented large numbers of consumers. The bill's proponents made much of Olds' "philosophy" and change of mind,[127] and set forth their reasons for seeking a nonregulation status under the Gas Act. Olds took issue with a number of assertions made by the proponents, providing the subcommittee with contrary evidence in such instances,[128] and gave lengthy, detailed testimony supporting the FPC majority's contention that the Natural Gas Act need not be amended in any respect. He cited

[126] Ibid., p. 221.

[127] For example, see the testimonies of Sen. Robert Kerr and Hayden W. Head in the Kerr Bill Hearings.

[128] Olds' picture of the industry differs so much with the image projected by the bill's proponents that Olds' entire testimony in the Kerr Bill Hearings should be reviewed in this regard.

a great deal of evidence contained in the FPC's natural gas investigation that, to the majority, warranted such a position, and he said that he believed that once a producer contracted to sell gas to an interstate pipeline, the producer assumed a utility status by "taking advantage of the assurance of a market which is made available by the supply to a utility system."[129] He said that this was the crux of the issue dispute with the independent producers, who abhorred the utility designation and the "prudent investment" regulation it would bring. As for his change of mind, he said that it had taken the FPC's gas investigation and several court interpretations "to show what the entire situation was,"[130] and that accounted for his assuming diametrically opposite positions in regard to the issue.

The subcommittee's predilection toward the Kerr bill and hostility toward the bill's opponents were evident throughout the hearings. In general, committee consideration afforded the bill's proponents stood in sharp contrast to, for example, the treatment given Olds.[131] Only Myers of Pennsylvania consistently "defended" Olds. Johnson generally guided the questioning in favor of the bill, making frequent slighting references to Olds' change of mind—at one point characterizing such a change as an "amazing situation."[132] Reed, from the producing state of Kansas, said at one point during testimony of a bill proponent that, "I have always been of the opinion that it is

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[129] Ibid., p. 211. [130] Ibid., p. 213.

[131] For example, see the exchanges in ibid., pp. 237-244, and pp. 252-253. See also the subcommittee's treatment of Claude L. Draper in ibid., pp. 385-410.

[132] Ibid., p. 177. For another example, see pp. 213-217.

impossible to successfully consider and apply public-utility rules to the production and gathering of natural gas," including, by implication, regulation of producers' field sales.[133] The subcommittee ended its hearings June 8, and on June 24 Johnson submitted the group's unanimous recommendation that the Kerr bill be approved.

Early in June Truman renominated Leland Olds for a third term on the FPC. Olds' term was to expire June 22, but Truman had had to wait to send Olds' nomination to the Senate because Buchanan's confirmation had been delayed. At this time Sen. Johnson of Colorado was preparing to report the Kerr bill for full Senate consideration, assuming that Truman, since he supported the Priest bill in 1947, approved of the measure.[134] Johnson was "greatly incensed," then, when he discovered on August 1 that Truman opposed the Kerr bill.[135]

Olds' reconfirmation hearings. For several months no action was taken on Olds' nomination, and had there not been considerable editorial comment and administrative pressure to begin hearings, it was likely that the issue would have remained undecided for a year or so, as in the case of Buchanan's nomination.[136] In September 1949, however, Sen. Johnson (Colo.)—since, unfortunately for Olds, the Committee on Interstate and Foreign Commerce had jurisdiction over such nominations—appointed Lyndon Johnson to chair a subcommittee to conduct hearings on

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[133] Ibid., p. 121. [134] Nash, p. 222.

[135] Ibid. See also Congressional Record, 81 Cong., 1 sess. (August 4, 1949), p. 10736. For a discussion of behind-the-scenes efforts to get Truman to oppose the Kerr bill, see Nash, p. 222.

[136] Ibid., pp. 223-224.

Olds' reconfirmation. The subcommittee was packed against Olds. Not one of the five members of the committee who earlier voted in opposition to a favorable report on the Kerr bill was appointed to the subcommittee; instead, Edwin Johnson appointed himself and the six others who had voted for the bill.[137] Francis Myers of Pennsylvania, who had supported Olds in the Kerr bill hearings, also was not placed on the subcommittee. As The New Republic commented, the committee leadership "even brought in [John] Bricker and [Homer] Capehart. If we were a defendant in Russia and saw such a mackerel-eyed bunch as that looking down at us from the bench we'd start writing confessions quick."[138] The magazine also said that Kerr was "behind the attempt" to block the Olds nomination, and that Kerr had "made no secret of his aim to unseat Olds and amend the Natural Gas Act to the liking of the Big Five [independent gas producers]."[139]

In addition to Lyndon Johnson, Edwin Johnson, Bricker, and Capehart (R-Ind.), the subcommittee consisted of McFarland and Reed, who sat on the Kerr bill subcommittee, and Herbert R. O'Conor (D-Md.).

> To persons familiar with their records, it was apparent that the Committee began its hearings unfriendly toward Olds and opposed to the policies which he advocated. Every member of the subcommittee (with the exception of Senator Reed of Kansas, who died in the autumn of 1949) voted for the Kerr bill when it came before the Senate

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[137] "Reward for Service," The New Republic, 121, October 10, 1949, p. 9.

[138] "Washington Wire," The New Republic, 121, October 10, 1949, p. 3.

[139] "Reward for Service," The New Republic, p. 9.

> the following year. The composition of the subcommittee . . . greatly affected the course of its hearings.[140]

On the second day of the hearings, Lyndon Johnson introduced—with a glowing tribute to his record in World War II—Rep. John E. Lyle of Texas' Fourteenth Congressional District.[141] Lyle said it was his "unpleasant task" to oppose Olds because he had discovered through some research that here was a man who had not believed "in our Constitution, our Government, our Congress, our representative form of government, our churches, our flag, our schools, our system of free enterprise."[142] He said that he "received a shock" when he discovered the truth about Olds' past, and that he "could not believe that a man with the background and philosophy of Leland Olds could have been permitted to take public office and to serve in a responsible position for so long a time."[143] He went on to say that after reading some of the articles Olds had written during the 1920s,

> . . . I can understand Mr. Olds, can understand his manner of doing things, his easy turn-about without reason, his easy advocacy of either side of a question, using the same artful, deceitful, and sly tactics so evident from his writings which I have assembled.[144]

To Lyle, Olds' change of mind on regulation of independent producers—the circumstances of which Olds had carefully explained at the Kerr bill hearings—was evidence of a type of deceit of which only communists were capable. But after introducing his charges of communist sympathy against Olds, he also mentioned that Olds had earlier opposed Lyle's

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[140] Harris, "Senatorial Rejection," p. 681.

[141] Olds Hearings, p. 28.

[142] Ibid., p. 29.

[143] Ibid., p. 31.

[144] Ibid.

own bill to exempt independent producers from FPC jurisdiction and that Olds had done "a complete turn-about and launched a bitter and vicious attack" on the bill and its proponents.[145]

To support his twenty-six charges of Olds' alleged communist-oriented philosophy,[146] Lyle introduced into the record fifty-four photostatic copies of articles from The Daily Worker, the Federated Press Labor Letter, and Industrial Solidarity, the publication of the Industrial Workers of the World.[147] The impression was created that Olds wrote for these publications instead of a labor service to which these—and almost seventy other labor union papers—subscribed. It must be noted here that some of the same charges against Olds were brought up in his 1944 reconfirmation hearings, but that they were dismissed at that time.[148] Indeed, the chairman of the subcommittee that heard Olds' nomination in 1944 said, "I do not think that anyone believed Mr. Olds was a Communist. I do not think that the Senator from Oklahoma (E. H. Moore) believes that Mr. Olds is a Communist."[149] But upon hearing Lyle's charges in 1949, McFarland said he was "shocked beyond words";[150] Reed said that Olds was "a full-fledged, first class

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[145] Ibid., p. 30.

[146] The twenty-six charges can be found in ibid., pp. 33-35.

[147] The articles are found in ibid., pp. 35-99.

[148] Harris, Advice and Consent, p. 187.

[149] Congressional Record, 78 Cong., 2 sess. (September 12, 1944), p. 7692, quoted in Harris, Advice and Consent, p. 187.

[150] Olds Hearings, p. 101.

Communist";[151] and Edwin Johnson, in the Senate debate on Olds' nomination, said, "Personally, I regard Leland Olds as a warped, tyrannical, mischievous, egotistical chameleon, whose predominant color is pink."[152]

Due to a lack of space, a detailed examination of the charges against Olds and his replies to them is not possible here. But to summarize, Olds in supplemental testimony answered each charge made against him,[153] and he said that though he realized his writings were radical, he was writing for a labor audience and was only attempting to shock people into recognizing the abuses of laissez-faire capitalism and of the "high-pressure finance era of the twenties."[154] From personal experience he knew that the labor movement at that time was being vigorously opposed by large corporations that, he said, lacked a sense of social responsibility; "I was against the kind of open-shop capitalism which cracked workers over the head if they sought to organize in the big mass-production industries."[155] He said also, "simply and categorically," that he never was a communist, that he had always been loyal to his country, and that he was "a profound believer

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[151]"Senator Reed Hits Olds as Communist," The New York Times, September 29, 1949, p. 12.

[152]Congressional Record, 81 Cong., 1 sess. (October 12, 1949), p. 14359.

[153]A short head-to-head comparison of excerpts from the articles cited by Lyle and Olds' comments on them can be found in Olds Hearings, pp. 340-347. See also Harris, Advice and Consent, pp. 186-187, in this regard.

[154]Olds Hearings, p. 116. See also p. 134.

[155]Ibid.

in democracy."[156] He added that the New Deal had corrected many of the problems prevalent during the Age of Normalcy. He pointed out that Lyle misrepresented his statements by referring to headlines over his articles—with which he had no connection—and that Lyle was attempting "to build up a chain of evidence largely based upon quotations of single sentences, inferences, and innuendoes."[157] He said that Lyle was applying a 1940s context to a much different time period. Such radical writing as his, Olds said, was needed then "to shock the American people . . . out of the social and political lethargy resulting from the get-rich-quick fever of speculation which covered a sick capitalism with a glow of health."[158]

> I have always been American in my allegiance and I have always sought a program of reform within the framework of the American Constitution and as a natural evolution of the American tradition. I have again and again expressed the belief that social change comes differently in each country in accord with its own past and not in accord with some theoretical pattern. The only program which I feel can be applied generally throughout the world is a moral program and is found in the teachings of Jesus.[159]

The subcommittee heard from numerous producer representatives—mostly from the Southwest—in opposition to Olds. But representatives of large oil and gas companies—which Olds had singled out as the primary beneficiaries of exemption legislation—were "significantly absent in the line-up of opposing witnesses."[160] The interest of these large companies in the jurisdiction issue and in Olds' reconfirmation cannot be denied; in hearings on the Moore-Rizley bill in February 1948,

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[156]Ibid., p. 291. [157]Ibid., p. 292.

[158]Ibid., p. 291. [159]Ibid.

[160]Harris, Advice and Consent, p. 188.

the director of Humble Oil testified in favor of the bill, as did the president of El Paso Natural Gas Co., the vice president of Phillips Petroleum, and the vice president of Consolidated Natural Gas Co.—all large interests in the gas industry.[161] In earlier hearings on similar gas bills, Hines Baker, executive vice president of Humble Oil, testified in favor of passage, as did the president of the Chicago Corp.,[162] which was second only to Phillips Petroleum in sales to pipelines in the seven Southwestern producing states in 1947.[163] But at Olds' hearings in 1949, not a single representative of a large oil and gas concern appeared to express his views, perhaps indicating a desire on the part of the large-interest corporate hierarchies to avoid negative publicity.

The testimony of Olds' opponents in general constituted an attack on a "philosophy" of nationalization of the oil and gas industries that Olds did not advocate as a Federal Power Commissioner. Frequent references were made to Olds' "theory" being carried out to "its logical conclusion," in which case all manner of evils would come to pass.[164] In large part the testimony was concerned with Olds' alleged communist sympathies, and not with his record of ten years as a federal power

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[161] U.S. Congress, Senate, Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce on H.R. 4051, 80 Cong., 1 sess. (Washington, 1948), p. iii.

[162] U.S. Congress, House of Representatives, Hearings Before the Committee on Interstate and Foreign Commerce on H.R. 2185, H.R. 2235, H.R. 2292, H.R. 2569, H.R. 2956, 80 Cong., 1 sess. (Washington, 1947), p. iii.

[163] Kerr Bill Hearings, p. 365.

[164] For example, see the letters and telegrams in opposition to Olds' nomination in Olds Hearings, pp. 9-11.

commissioner.[165] In addition, Olds was subjected to personal abuse by opponents which one scholar identified as "language seldom heard in nomination hearings."[166] One opponent called Olds "a traitor to our country, a crackpot and a jackass wholly unfit to make rules or regulations or to sit in judgment on any matter pertaining to privately owned property. . . ."[167] Another accused Olds of "inherent instability,"[168] referred to him several times as a "fraud," and added that, "Mr. Olds is boring from within; Mr. Olds is a termite; Mr. Olds is gnawing away the very foundations upon which this government exists."[169]

Those appearing in Olds' behalf included representatives of electric co-ops, academic circles, labor organizations, the National Grange, and city officials representing large numbers of gas consumers. They testified to Olds' intelligence; his loyalty to the public interest, to democracy, and to private enterprise; his selflessness in his work; his philosophy of public regulation that had allowed the electric utilities and oil and gas companies to prosper while maintaining low rates for the consumer; his courage in standing up to powerful special interest pressures; his integrity (one said he was "completely

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[165]Nash, p. 224. See also Harris, Advice and Consent, p. 188.

[166]Ibid.

[167]Testimony of William N. Bonner in Olds Hearings, p. 259.

[168]Testimony of Hayden W. Head in ibid., p. 280.

[169]Ibid., p. 281.

incorruptible"[170]); and to his "absolute sincerity."[171] They said that Olds had contributed greatly to the theory and practice of public interest regulation in this country, and they compared him to such an esteemed regulator as Joseph B. Eastman of the ICC; and almost all of them testified to their belief that the oil and gas industry was attempting to smear Olds to thwart effective regulation. Editorial comment also expressed this viewpoint.[172] In fact, the editorial comment in Olds' favor was so strong that the members of the subcommittee felt Olds was responsible for a press attack upon them.[173]

The subcommittee voted unanimously to reject Olds' nomination. While the matter was pending before the full committee, Truman sent a letter to Edwin Johnson in further support of the nomination, saying that Olds had earned the enmity of "powerful corporations" for his effective utility regulation.[174] He added that those corporations "now seek to prevent his confirmation for another term. . . . We cannot allow great corporations to dominate the commissions which have been created to regulate them."[175] But despite Truman's support, the full

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[170] Testimony of Ordway Tead in ibid., p. 15.

[171] Testimony of John C. Beukema in ibid., p. 16. Beukema's testimony is a good representative example of the type of praise given Olds by his supporters during the hearings.

[172] See, for example, the editorial views of both "conservative" and "liberal" papers reprinted in Congressional Record, 81 Cong., 1 sess. (October 11, 1949), pp.

[173] Harris, Advice and Consent, p. 184.

[174] Reprinted in Congressional Record, 81 Cong., 1 sess. (October 4, 1949), p. 13759, quoted also in Harris, Advice and Consent, p. 189.

[175] Ibid.

committee voted ten to two to reject Olds with only Myers and Warren Magnuson (D-Wash.) voting for confirmation.

Truman, after the committee reported to the Senate, attempted to stir up Democratic Party grass roots support for Olds by asking the national party chairman to instruct the state parties to support Olds.[176] Truman's attempt to make a party issue of the appointment ired senators and brought unfavorable comment from the press,[177] and it is possible that it hurt, rather than helped, Olds' chances before the full Senate.

The Senate debate on Olds' nomination began on October 12 with Edwin Johnson speaking in opposition. He told his fellow senators of Olds' association with the Federated Press, and he said that when he first read Olds' articles it had made him "heartsick."[178] Olds through his writings had "persistently and adroitly . . . sowed the seeds of revolution in this country," the senator said, and he added that Olds had been "slippery and evasive" in his subcommittee testimony, choosing not to "modify his vile statements."[179] He insisted that Olds had not changed "his offensive views regarding capital one iota," and that it was his opinion that a person who possessed "this kind of warped mind is so far out of step with America that he is not qualified to . . . regulate our great utility industries."[180] Sen. Johnson, it should be noted, was a member of the subcommittee that conducted hearings in 1944

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[176] Ibid.

[177] Ibid., p. 190.

[178] Congressional Record, 81 Cong., 1 sess. (October 12, 1949), p. 14357.

[179] Ibid.

[180] Ibid.

on Olds' nomination for a second term; similar charges were raised against Olds at that time, but Johnson nevertheless voted to confirm him.[181]

The principal speech against Olds was made by Lyndon Johnson. The senator accused Olds—despite his career record—of being unqualified for the job and "without practical experience."[182] He said that Olds' record "is an uninterrupted tale of bias, prejudice, and hostility, directed against the industry over which he now seeks to assume the powers of life and death,"[183] but he offered no substantiation for his charges. He said that Olds had conducted "snide and petty smears" against his colleagues on the commission and had attempted "to force the Commission staff into a goose-step march under the whip of his deliberate public abuse," also charges not supported by any evidence in the record.[184] Several times during the reconfirmation hearings Johnson had accused Olds of "changing the law" with respect to the Natural Gas Act, despite the fact that Olds' change of mind was supported by an interpretation of the U.S. Supreme Court. In a similar vein Johnson concluded his remarks in the Senate debate by saying that the issue was clear-cut: "Shall Congress write the law, or shall Leland Olds write the law? Shall we have a commissioner or a commissar?"[185]

Olds' chief defenders in the debate were Sens. Paul Douglas of Illinois, Wayne Morse of Oregon, Hubert Humphrey of Minnesota, and William Langer of North Dakota. Morse pointed out to his colleagues that Olds, Draper, and Buchanan were only carrying out the intent of

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[181] Ibid. [182] Ibid., p. 14380. [183] Ibid.

[184] Ibid., p. 14381. [185] Ibid., p. 14385.

Congress as expressed in the Natural Gas Act and interpreted by the Supreme Court.[186] He said further:

> The oil and gas interests have tried unsuccessfully to have the law amended so that the Commission cannot regulate their sales of gas to interstate pipe lines. They know that they cannot get such legislation enacted, so I believe that they are now engaged in a last-ditch effort to accomplish the same result by opposing the reappointment of a Commissioner who refuses to interpret the act and circumscribe his powers and obligations to the public in accordance with the purposes of those interests.[187]

Langer added that most state utility commissions had said that "they have had excellent cooperation from the FPC and that Olds in particular has . . . made regulation by both State and Federal agencies more efficient."[188] He pointed out that the same charges of communist sympathy had been brought against Olds in 1944 and had been dismissed then as unfounded. He said those twenty-five-year-old charges were being "dug up and dusted off again" in an attempt to discredit "an honest, sincere, and capable public servant who has given the best years of his life in attempting to bring about an equitable regulation of public-utility rates" in the public interest.[189] He added that "during the extensive hearings . . . not one iota of information was brought out which reflected on the record of this man as a public-power commissioner."[190] "The case against Leland Olds," he said, "smells strongly of oil."[191]

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[186]Ibid., p. 14360. [187]Ibid., pp. 14360-14361.

[188]Ibid., p. 14368. [189]Ibid.

[190]Ibid., p. 14366. [191]Ibid., p. 14368.

The full Senate vote against Olds was fifty-three to fifteen. The entire contest over the jurisdictional issue, one scholar has said, "illustrates the point that interests which are sufficiently threatened" by a government policy "will shop from one counter to another in government to obtain a favorable decision."[192]

> It illustrates that appeal will be made from administrative substructures, and even from the judiciary, to macropolitics when the issues appear to be really vital. There is no escape from politics when the stakes are worth the cost.[193]

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[192] Redford, American Government, p. 489.

[193] Ibid.

CHAPTER 4

CONCLUSIONS

Post-Rejection Congressional Activity

Before drawing any conclusions concerning the Olds case, a postscript pertaining to legislative activity after Olds' Senate rejection is in order. Within a week after the refusal to confirm Olds, Truman sent to the Senate the name of a close personal friend, Mon Wallgren, for consideration for the FPC job. Wallgren had earlier been nominated by Truman for the National Security Resources Board, but after opposition to the nominee developed in the Senate, Truman withdrew Wallgren's name. It took the Senate Committee on Interstate and Foreign Commerce only three hours after the nomination was made to decide unanimously that Wallgren would be a good replacement for Olds.[1]

In March 1950 the Kerr bill came before the Senate; it was considered "to the exclusion of virtually all other business."[2] Lyndon Johnson, as in the Olds debate, was the keynote speaker on behalf of the bill, and his principal opposition, as before, were Sens. Paul Douglas and Hubert Humphrey. The Senate passed the bill by a comfortable margin, but Speaker of the House Sam Rayburn felt that the vote in the House would be so close that he took to the floor himself to argue for passage.[3] His assumption was correct; the bill passed the

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[1]"Wallgren, Mead Named to U.S. Jobs," The New York Times, October 19, 1949, pp. 1, 3.

[2]Nash, p. 227.

[3]Ibid., p. 229.

House by a vote of 176 to 174. All eyes turned to Truman, who was heavily pressured by both sides.[4] On April 15, 1950, Truman vetoed the bill, noting in his veto message the monopolistic characteristics of the gas industry as opposed to competing fuel industries, such as oil and coal.[5] Since consumers could not move from one producer to another in search of lower prices, Truman said, and since likewise pipelines could not be easily moved from producer to producer, there were characteristics in the natural gas industry that "impose natural limitations upon effective competition among sellers."[6] He also noted that competition "is further limited by the degree of concentration of ownership of natural gas reserves."[7] In short, the message followed the line of reasoning of Olds' argument in the Senate subcommittee's hearings on the bill in 1949. But though Kerr blamed Olds for Truman's decision on the bill,[8] there were indications that other individuals had more direct responsibility for the opposition pressure upon the president.[9]

Summary and Conclusions

Leland Olds—at least to his supporters—was an "extraordinary regulator" who did much to further the cause of fair and efficient public utility regulation in this country. The testimonial given him by the proponents in the reconfirmation hearings painted a picture of Olds as perhaps one of the greatest regulatory minds in the history of

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[4] For a discussion of behind-the-scenes efforts to get Truman to veto the bill, see ibid., pp. 229-230.

[5] "Text of the President's Veto of Natural Gas Bill," The New York Times, April 16, 1950, p. 51.

[6] Ibid. [7] Ibid. [8] See Nash, p. 231. [9] Ibid.

the country. But Olds was not only a good regulator, they said, he was a man of "sterling and unimpeachable character" as well.[10] His intelligence, sincerity, indefatigable work on behalf of efficient regulation,[11] fairness, geniality, and countless other traits mentioned during the hearings earned him the utmost respect from many of those who knew him and worked with him. Some of the nation's well-known regulatory experts, such as James C. Bonbright of Columbia University, Adolf A. Berle, Jr., and Morris L. Cooke, testified glowingly to Olds' achievements in the field of utility regulation. Most had known Olds for many years—working with him during his tenure on the New York State Power Authority, on the St. Lawrence Seaway Project, and while he was a Federal Power Commissioner—and they were unanimously appalled at the charges of communism lodged against him. No man, they said, was more dedicated to his country, to democracy, and to private enterprise than Leland Olds. One of the proponents, who had known and worked with Olds for twelve years, said at the hearings:

> Mr. Chairman, I am a lifelong Republican. I am a firm believer in the profit system, or the so-called free enterprise system. I have devoted 32 years of my life to the chamber of commerce field in defense of that system and in combating those who advocate national socialism and would destroy the American way of life. If I believed for a single moment that Mr. Olds was a Socialist or Communist, or in any way unfaithful to the American ideal of representative government, I would terminate our friendship.

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[10] Olds Hearings, p. 14.

[11] Interview with Alex Radin, executive director of the American Public Power Association, Washington, D.C., April 30, 1980. Radin said Olds was a "workaholic" who frequently put in sixteen hours a day; Olds enjoyed the "grubby work of pulling out figures" and was dedicated to doing his "homework" well.

> When you live with a man intimately, when he visits your home, you cannot help but form some estimate of his character and obtain some idea of his philosophy of life. All my contacts with Mr. Olds persuade me that his liberalism is of the Jeffersonian type. . . .[12]

Such comments were not uncommon at the hearings. In short, the record indicated that Olds was rejected because he was too consumer-minded for the oil and gas industry, even though much evidence was presented to indicate that the gas industry (and the electric utilities) had prospered under FPC regulation and that Olds was primarily responsible for "bringing about large-scale financial and accounting rehabilitation of a substantial segment of the industry."[13] His writings of the 1920s provided a convenient late-1940s vehicle for ousting Olds, since "there was little in Olds' record which the committee could openly attack."[14] Thus, the primary reasons for Olds' rejection by the Senate were his opposition to the Kerr bill,[15] and the importance of nonregulation of arm's length sales to the gas producers; indeed, one estimate held that up to $10 billion in additional profits to the producers were hanging in the balance.[16]

The charges of communist sympathies raised against Olds were adequately answered by him during the hearings. In light of Olds'

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[12] Testimony of John C. Beukema in Olds Hearings, p. 16.

[13] Testimony of Claude L. Draper in ibid., p. 195. See also other proponents' testimony in ibid., as well as the Kerr Bill Hearings, especially p. 304.

[14] Harris, "Senatorial Rejection," p. 687.

[15] Ibid., p. 678.

[16] Congressional Record, 81 Cong., 1 sess. (October 11, 1949), p. 14213.

strong religious orientation, his testimony and the testimony of respected professionals who had known him for a number of years, the dismissal of similar charges by the Senate in 1944, and the fact that nothing in his career record after his association with the Federated Press pointed to anything more than "old-fashioned liberalism,"[17] it is safe to say that Olds was no communist. Fortune magazine, which sides philosophically with the country's business interests, admitted in an article in 1952 that the oil and gas industries "did unquestionably set out to drive Leland Olds from the FPC when he sought to enlarge its area of control over natural gas."[18] And, the article continued, "there were disgraceful efforts, without proof, to tag him as a Communist."[19] In addition, when Sen. Edwin Johnson, near the end of the reconfirmation hearings, learned of an FBI investigation of Olds' background and attempted to get J. Edgar Hoover to release to the subcommittee the results of the investigation, Hoover said that Johnson would first have to get the approval of the attorney general.[20] Atty. Gen. J. Howard McGrath said the material was confidential, so Johnson asked Olds if he would help the subcommittee secure a report of the investigation.[21] Olds replied:

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[17]The characterization of Olds as "just an old-fashioned liberal" is found in "Olds Says He Fought to Defend Consumer," The New York Times, October 16, 1949, p. 72.

[18]John Osborne, "Natural Gas and the Authoritarian 'Liberals,'" Fortune, 45 (May 1952), 195.

[19]Ibid. [20]Olds Hearings, pp. 329-330.

[21]Ibid., p. 330.

> Mr. Chairman, I would like to have you have anything that would be helpful to you in reaching a proper conclusion. I have no personal objection to your seeing a copy of the said report . . . and I have no objection to anyone knowing whatever facts are available about my life.[22]

Because of the economic importance of nonregulation to the independent producers; the conspicuous absence during the Olds hearings of large oil and gas producers known to have a great interest in the passage of nonregulation legislation; the testimony of producers and other industry representatives during the natural gas investigation, the Kerr bill hearings, and the Olds hearings; the fact that of the fifteen opposing witnesses at the Olds hearings, "all came from gas-producing areas and all were directly or indirectly connected with the gas industry";[23] the associations of Lyle, Bricker, Kerr, and Lyndon Johnson with the oil and gas industry; and the editorial opinions of numerous newspapers and magazines, as well as reports by columnists and "investigative reporters" of the day,[24] it is contended here that the producers of natural gas, pipeline-affiliated and independent alike, led the fight against Olds, with other segments of the industry supporting the producers from the periphery. At the Kerr bill hearings Olds himself alluded to the pressures of the "combined oil, gas, and pipeline interests" during the FPC's gas investigation to get the FPC to stay out of independent production sales regulation, and also to their

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[22]Ibid. [23]Harris, Advice and Consent, p. 187.

[24]In addition to the articles cited in Chapter 3, see also "The Enemies of Leland Olds," The New Republic, 121, October 17, 1949, p. 5; "The Shape of Things," The Nation, 169, October 15, 1949, pp. 358-359; and Marquis Childs, "Washington Calling," The Washington Post, October 7, 1949, p. 24.

desire "to secure amendments which would have emasculated the Natural Gas Act and largely destroyed the effectiveness of its rate regulation."[25] Representatives of pipeline/production companies testified at the Kerr bill hearings that the wording of the Kerr bill should be changed to exempt all gas producers from regulation, not just independents.[26] Many oil producers expressed the fear that the FPC would attempt to regulate oil production.[27] As for the industry associations of some of the principal characters in the fight against Olds, Robert Kerr was a "millionaire oil and gas man" whose company, Kerr-McGee, was a "close business associate" of Phillips Petroleum.[28] Lyndon Johnson represented the largest gas producing state in the country, a state that contained 55 percent of the nation's total gas reserves.[29] John Bricker, who sat on the Senate subcommittee during the Olds hearings, was a member of a law firm that represented East Ohio Gas Co., which was owned by the Consolidated Natural Gas Co., a

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[25]Kerr Bill Hearings, pp. 250-251.

[26]See testimony of C. Huffman Lewis and the written statement of Robert P. Patterson in ibid., p. 461 and p. 453, respectively.

[27]See, for example, the testimony of Hayden W. Head in ibid., beginning p. 105. In 1946, in hearings before a Senate special committee investigating petroleum resources, Alfred Jacobsen, president of the Amerada Petroleum Corp., testified in behalf of the industry as to "the fear prevalent in many in the oil-producing industry that the Federal Power Commission will endeavor by means of a flank attack on the industry to secure direct or indirect control of oil production. . . . They have asked a lot of questions about production and production methods and production costs. It just looks very suspicious and we are afraid of it." See U.S. Congress, Senate, Hearings Before a Special Committee Investigating Petroleum Resources: The Independent Production Company, 79 Cong., 2 sess. (Washington, 1946), p. 423, quoted in Engler, p. 129.

[28]Ibid., p. 321.

[29]See Chapter 3.

large gas interest.[30] And Rep. John Lyle, Olds' accuser at the hearings, represented a Texas oil and gas district in Congress and later retired to a law practice where he represented oil and gas interests.

> Part of his income in 1959 came from $29,000 in legal fees from the Panhandle Eastern Pipeline Company. He has used his floor privileges as an ex-member of the House to oppose natural gas regulation. In 1958 he registered as a lobbyist for Shell.[31]

Before 1947, there was certainly a "coziness" in the working agreement between the FPC and the industry, but there is no evidence readily available that would support a contention that the FPC was a captured regulatory agency. It was noted in Chapter 1 that Harrington Winberly, one of Olds' associates on the FPC, had received a patronage appointment to the commission for his work as Robert Kerr's campaign manager. It was also noted in the last chapter that the Natural Gas Act, while it was being drafted, had received the approval of a special legislative committee of the American Gas Association, and that the FPC, before Olds changed his mind in 1947, had indicated time and again (e.g., Order No. 139, the Priest bill) that it had no desire to regulate arm's length sales by independent gas producers. After his Senate term began in 1946, Kerr expressed "unabashed admiration" for Olds;[32] until Olds' change of mind, "their views on federal regulation of the natural gas industry were similar and clashed on no important issue."[33] But, on the other hand, testimony during the Olds reconfirmation hearings pointed to the FPC's responsibility for

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[30]Engler, p. 328.

[31]Ibid., p. 322.

[32]Nash, p. 220.

[33]Ibid.

approximately $40 to $50 million in rate reductions annually,[34] a figure that the natural gas companies subject to FPC jurisdiction may not have liked, but one that was apparently accepted as a consequence of regulation. Olds' supporters also testified in the hearings to his vigorous effort to provide efficient regulation that was fair to both the consuming public and to the utility industries, and to Olds' "incorruptibility" and his courage in standing up to special interest pressures. These examples illustrate that the working agreement between the FPC and the oil and gas industry was such that there was no real need for the industry—before 1947—to attempt to capture or control the FPC—there was a working balance. Indeed, why should the industry attempt capture when the pre-1947 FPC continually abdicated authority which the courts gradually made available to it?

It is contended here, though, that the circumstances in 1949 led the oil and gas industry to apply pressure on Congress for Olds' removal from the FPC, an action that constituted an attempt to control the commission—the principal element of capture—and shape the regulatory policy affecting the gas industry. After losing in the courts and failing to get either the Moore-Rizley or Priest bills passed in 1947, the industry looked upon Olds' change of mind and Buchanan's appointment to the FPC a short while afterward as together forming "the straw that broke the camel's back." Since Olds' background indicated that he would not yield on the issue (and thus could not be "controlled" by the industry), since he was the key to the FPC majority favoring

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[34]See, for example, the testimony of Anne X. Alpern in Olds Hearings, p. 210. See also Harris, "Senatorial Rejection," p. 680.

regulation of arm's length sales, and since there apparently was no better way to effect the changes and provide the relief the industry desired (for example, Draper's term would not expire until 1951, Buchanan's until 1953; also, the passage of the Kerr bill was by no means certain), the attack on Leland Olds was a determined effort by the industry and its supporters in Congress to make the FPC much more industry-minded[35]—an effort toward capture.

The Olds case and the literature on regulation. It has been shown thus far that the actions taken against Olds were part of an industry attempt to shape regulatory policy, and that the actions constituted the far end of a "continuum of action" pursued by the oil and gas industry in this regard. It has also been indicated that the literature on regulation has not accounted for such activity in the regulatory process. In addition to these points, it is possible here to draw some broad conclusions concerning the Olds case's contributions to the literature on regulation. They are:

1. The Olds case affirms the capture literature's emphasis on the highly political nature of the regulatory process, indicating also (though the literature does not) that the political process can be turned against regulators who have "too much" of an orientation toward the public interest.

2. The regulated industry, because of its day-to-day contact with the regulatory agency, its position as principal supplier of

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[35]Engler refers to a "public relations man" employed by the oil and gas industry being "credited with directing the campaign to block the nomination of Leland Olds," but he offers no additional documentation. See p. 474.

statistical material needed by the agency, and its well-organized nature (among other things), is in a position to influence the outlook of the commission. The public interest in regulation largely depends on the willingness of commissioners to resist accepting outright the industry's view of the public interest, on the strength of presidential and/or Congressional support for the agency, and on the presence of a group(s) to represent the consuming public.

3. Congress in general and the Senate in particular are in positions to play important roles in determining the degree of the public interest orientation of individual commissioners.

4. The circumstances of the Olds case indicate that capture theory—as opposed to public interest theory—provides a much more adequate description of actual regulatory behavior.

5. A strong compatibility of interest does not always mean capture. A popular perception of capture is of an all-embracing control, and any activity of a regulatory agency geared toward assisting an industry is often seen as proof-positive of a capture situation. Actually, there is a delicate balance between the agency and the industry with respect to regulation, and the system—as Bernstein and Kolko have maintained—is responsible for the necessity of compromise between the public interest and special interests. The system is also responsible, however, for circumstances that encourage capture.

6. Capture is not automatic, and neither is the serving of the public interest. The agencies have limited powers to regulate in the public interest. As the system is established, there are flexible boundaries within which the agencies can act. But they are timid—and

with good reason. As the Olds case illustrates, "sitting regulators, if they want their jobs, had better stay on the right side of industry issues."[36]

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[36] Kohlmeier, p. 60.

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