LECTURE III

STONING THE NATIONAL NANNY:

CONGRESS AND THE FTC IN THE LATE 70's

INTRODUCTION

"The Federal Trade Commission has now agreed to consider imposing major restrictions on television advertisements aimed at young children. The primary goal of the proposal is to reduce the amount of sugar children eat. Few people, least of all thoughtful parents, will disapprove of that goal. But the means the FTC is considering . . . [including] a complete ban on advertising on programs aimed at children under 8 years of age and a ban on all ads on programs aimed at children under 12 for those sugar-coated products most likely to cause tooth decay . . . are something else. It is a preposterous intervention that would turn the agency into a great national nanny."

I need not tell you how politically wounding The Washington Post's "National Nanny" editorial was.

Its source was the "liberal establishment organ," not Broadcasting magazine, or a Washington spokesman for the Association of National Advertisers, or the American Association of Advertising Agencies. It came, as one of

the advertising trade association Washington representatives told me with mingled delight and disbelief, "not from our guys but from their guy."

Worse, its mode of political discourse was ridicule. It would have been damaging enough had the Post raised sober questions about the First Amendment implications of the contemplated advertising ban, but to trivialize the children's advertising issue was devastating -- a sign to the broadcast, grocery manufacturing, and advertising industries that the Federal Trade Commission's proceeding was fair political game -- and to any Congressmen tempted legislatively to abort the proceeding, a sign that the political risks would be minimal.

But the editorial helped undermine the Commission's political standing in an even more fundamental way: It ceded to the opponents of the rulemaking proceeding the single most powerful political symbol upon which we had depended for our political shield against Congressional interference -- the defense of the family.

From the beginning we had sought to frame the issue as an inescapable and conservative extension of the common law's ancient strictures against the commercial

exploitation of minors. Were there not limits, well within that legal tradition, upon the calculated effort to transform 3, 4, and 5 year olds in their own homes into programmed pleaders for advertised products? Nor was this concern for the family a mere rhetorical device. The Commission in launching its inquiry was indeed responding to the formal petitions and pleadings of parents, teachers, pediatricians, dentists, and others representing mainstream organizations concerned with family health and welfare.

I must confess -- and it is an especially galling confession for a regulator whose credentials should have betokened political sensitivity -- that before embarking on the children's advertising initiative, I had indeed made a rough political calculus -- and concluded that the proceeding would be relatively immune from political attack. Of course, I understood that the proceeding would be enormously threatening to the industries involved, both directly and indirectly. I knew well that there is perhaps no American industry so politically potent as the broadcasters. And I knew that they would find sympathetic ears on the Hill. But I judged that

most prudent senators and congressmen would long hesitate before enlisting on the perceived side of "junk food" advertisers against the health and well-being of the American child and family.

Though there were earlier rumblings, signs and portents, The Post editorial served jarring notice, that consumer advocates and regulators had lost our hold on the symbols of the debate -- at least in Washington. Now it was the Commission -- not amoral business -- which threatened to undermine the moral fibre and authority of the family by seeking to substitute government-imposed censorship for the appropriate discipline of the parents. Of course, once the issue was framed in these terms, there was no way we could win.

There is an intriguing parallel in this loss of the key symbol of debate with the fate of the automobile industry in the 60's at the hands of Ralph Nader, which we discussed in the first lecture.

There, as you may recall, the industry had for many years successfully symbolized automobile safety as an issue of individual responsibility. So long as crash injuries were attributable to the "nut behind the wheel," government intervention to force safety performance standards on autos lacked legitimacy.

But Nader seized the symbol! It was the failure of the manufacturer to safely package passengers within the vehicle to avoid the bloodshed caused by the "second collision" -- the contact of the passenger's body with the car's hostile interior -- that determined the severity of injury or death, Nader argued. The responsibility therefore, rested squarely with the manufacturer -- a responsibility, which Congressional investigation determined, the manufacturers had dismally neglected.

Yet the negligent design of automobiles could not have become a salient issue of public policy so long as auto safety remained an issue primarily perceived as one of individual responsibility.

Lindblom, in Politics and Markets, argues that business dominates political decision-making not only directly, through its unique political resources, but indirectly, through indoctrination, as the dominant voice in a "rigged, lopsided" marketplace of ideas.

He also observes that to win, business need not convince citizens that the policies it favors are right, but need only sow sufficient doubt and confusion to dissipate contrary public consensus and will to act.

In apparent defiance of Lindblom's thesis, as we explored in the first lecture, consumer entrepreneurial politics flourished in the late 60's and early 70's, despite business opposition, buoyed by a broad public consensus skillfully fueled and corralled by the consumer entrepreneurs.

But by the mid 1970's the pattern of congressional decisionmaking on consumer issues had began closely to conform to Lindblom's description: Right or wrong, business was getting what it wanted.

At the close of the last lecture in the waning days of the 70's and the Carter administration, we left Washington beseiged by an aroused business community poised to pounce upon offending regulators while Congress, the former keeper of the gate, had been sufficiently intimidated, denatured or bribed to stand aside or join the revolt.

One task remained for business: to clothe the regulatory revolt in the trappings of reform -- for even a willing Congress would not dare to breach the public ideology that government must serve public purposes, not private.

As we have seen, business and its neoconservative auxiliaries had pumped Washington full of the rhetoric of deregulation and regulatory reform. And indeed, much worthy and necessary reform was taking place.

It was to prove an easy step to spread the mantle of justified regulatory reform from such worthy targets as the ICC and the CAB, to the spurious reform of regulations whose essential vice was that they threatened to disturb profits or market power.

The noisesome passage of the "Federal Trade Commission Improvements Act of 1980" illustrates perhaps as vividly as any Congressional chronicle the triumph of business political enterprise in diverting public attention and congressional outrage from consumer injury to business hardship at the hands of the dreaded regulators.

I hasten to add that this lecture is not intended to serve as a case study in injured regulatory innocence. In the earlier Alma Hearn lecture (and elsewhere) I have acknowledged at unflattering length the Commission's regulatory sins. And in keeping with longstanding Commission tradition, I have been especially forthcoming in acknowledging the errors of our predecessors at the Commission.

But Congress did not act simply to curb these errors or to assure that they would not reoccur. Had they done so, such valid regulatory reforms would scarcely be evidence of undue business political influence.

Congress went further -- and almost went much further. At one time or another during the Commission's legislative travail, at least one Congressional committee or house voted overwhelmingly to abort virtually every major Commission rulemaking, case or investigation that had aroused the concern of affected industries or even individual companies. Some of these Congressional foreclosures actually became law. Others succeeded when, menaced by the imminent threat of Congressional action, the Commission itself backed down.

A procession of diverse business coalitions -- united by what a Chamber spokesman proclaimed as universal membership in the society of "Victims of the FTC" -- engulfed the Congress.

They petitioned for Congressional foreclosure of the childrens advertising inquiry, our funeral cost disclosure rule, our used car defect and warranty disclosure rule, the FTC's model state insurance cost disclosure law, the proposed rule to inhibit discrimination against small, innovative competitors and consumers through abuse of the voluntary standards system, even the Commission ruling, tediously sustained in the courts, requiring the chronically over-reaching sellers of Encycopedia Brittanica's to present a 3 x 5 inch card at the door identifying themselves, contrary to practice, as sales representatives.

Nor did analytic nicety inhibit the lobbyists from equally impassioned pleas against FTC efforts to deregulate: to strike down excessive government and private regulation. So, in the name of regulatory reform, Congress was asked to block the FTC's antimonopoly case against the Sunkist agricultural cooperative and all of our studies, rules and cases challenging overregulation of the professions.

With scattered exceptions, they shunned debate on the substance of these rules and cases. Instead, on behalf of oppressed business everywhere, they drew a collective portrait of the FTC as:

1) unelected bureaucrats defying the will of Congress (and hence the people)

2) straight-jacketers of competition, foulers of the nest of innovation and productivity (and hence contributors to the Japanese competitive menance)

3) defilers of the sanctity of state regulatory prerogatives and the time-honored traditions of ethical self-regulation, especially among the learned professions.

4) tramplers on the due process of corporate citizens

5) Beastly Burdeners of business and, of course,

6) National Nannies.

The National Nanny charge, was at least, arguable; the others were almost wholly spurious.

At least until these lectures are printed, complete with exhaustive and compelling footnotes, you'll have to take my word for the essential fraudulence of these charges, though I am scarely alone in that judgment.

But whether fraudulent or not, it was manifest that business had succeeded in seizing back the symbols of debate from the consumer advocates, undermining the legitimacy of much regulation, at least in the minds of Congress, and disarming the preexisting public consensus supporting consumer regulation.

> "Overregulation is already enough of a problem in the nation. Productivity is being harmed, inflation is running rampant, either we are going to take a stand against unnecessary federal regulation or we aren't.

Thus spoke Congressman Russo in impassioned defense of the productivity of funeral directors -- their productivity sorely threatened by the possibility that they might be required to tell the truth and list their prices.

And so it went.

The strategy and struggle of the FTC and its allies, roughly grouped in the Consumer/Labor Coalition, to retrieve those symbols of debate and save the Commission from evisceration, forms the rest and residue of this lecture.

* * *

A procession of companies and industry trade associations under investigation by the Commission was invited to vent their grievances against the FTC during 7 days of "over-sight" hearings in the Fall of 1979 scheduled by the reconstituted leadership of the Senate Commerce Committee under full Committee chairman Howard Cannon and Consumer Subcommittee chairman Wendell Ford.

Though an occasional token consumer representative was allowed to cite business abuses and consumer injury in support of Commission proceedings or even criticize the

Commission for excessive diffidence to business concerns, the Senate members husbanded their indignation for FTC transgressions as viewed through business lenses. At the close of the hearings the management of the Commission was given an opportunity to respond to the testimony. While defending the Commission against what we considered to be spurious charges, we did not shrink from confessing error. There were, to be sure, other business criticisms than those I have selected. In particular, much criticism was fairly directed at the overbroadness and potential burdensomeness of rules proposed by the Commission in the blush of enthusiasm for rulemaking following the passage of the Magnuson-Moss Act in 1974 which, for the first time, had authorized the FTC to address consumer injury through broad industrywide rules.

We had learned. In response to Congressional (and other) concerns, we had taken both formal and informal steps to curb unduly threatening, premature rule proposals. In addition, we embraced regulatory reform amendments before the committee, which had been proposed earlier by the administration on a government-wide basis, designed to assure earlier and greater business participation in the formulation of proposed rules, and to strengthen the due process guarantees in the rule making process. We reaffirmed that endorsement.

But we also recalled for the committee's benefit that not a single criticism throughout the days of industry testimony had been leveled at any final action taken or rule promulgated and implemented by the Commission. No witness had testified that the Commission had ignored valid industry objections in formulating any final rule. So that even those criticisms which were arguably valid had either been cured or were in the process of being cured.

As I was preparing my own testimony to be presented at the close of the Senate oversight hearings, seeking to be responsive but to defend the Commission against those charges which were, at best crudely distorted, I chanced to talk with Ralph Nader on the telephone. I unburdened myself to him of my own frustration at the dignity accorded by the committee to such attacks, as one industry witness after another had implanted in the minds of Senators, themselves willfully ignorant of the evolution or justification of each of the Commission proceedings, a tapestry of FTC arrogance and disdain for due process and reasoned discourse which could only prejudice even the most dispassionate member. I wanted desperately to express my own sense of outrage and anger at the distortions of the Commission's record, and I told Ralph that I intended to do so.

He listened and then cautioned me. They have put you on the defensive, he said. You will spend your whole time denying the charges, and in so doing, no matter how persuasive your facts, you will still reinforce the defensive image of an agency responding to indictment by Congress.

"What you must do is to return to the specific cases of consumer injury, of human lives damaged, of families victimized by the practices which led to these Commission proceedings. You have to rekindle the flame of public outrage. You have to redirect the focus from the Commission to those industries and practices which victimized the consumer."

As I testified, I defended the Commission as best I could; but then I turned to cite the voices and the pain of real people who had been victimized in the marketplace. I told of a Connecticut woman, who had desperately sought an inexpensive cremation for her husband, forced to pay for an expensive casket because the funeral director falsely told her that an elaborate casket was legally required for cremation. I told of the victims of the misrepresentations of used car dealers, of the Los Angeles working woman who lost her savings and job by buying a cosmetically

doctored wreck, soberly representated as sound and reliable transportation, of the seventy-nine year old Grand Rapids, Michigan woman, who was sold a hearing aid for $485 which did not work and in fact could not work, because her ear was clinically dead, yet the dealer refused to refund her money. I told of the small business-man from Connecticut who told our presiding officer that he was excluded from a major share of the market for his guage equipment, though it was as good if not better than its competitors, because the ANSI standards had been structured to force the sole use of his competitors product.

The committee was no longer listening.

There might have been just grounds for committee criticism of past Commission implementation of its rulemaking powers -- and perhaps as well for committee report language enjoining the Commission to exercise caution before proposing new rules, though the Commission was firmly committed to doing just that. But there was in the record of those oversight hearings nothing to justify the wholesale rewriting of the Federal Trade Commission Act.

Yet the committee members enthuasiastically embraced one legislative prefrontal lobotomy or another, a crude rewriting and gerry-rigging of the Federal Trade Commission Act -- the basic FTC charter -- which had stood for four decades essentially unchanged as a fundamental pillar of the nation's commitment to honesty and fair dealing in the marketplace.

* * *

What had become of the "consumer movement" which had evoked such loathing and fear in the collective Chambers of Commerce only a decade earlier? Where were James Wilson's triumphant consumer entrepreneurs of yesteryear?

Gone with the Berkeley free speech movement and the Beatles?

Not quite.

There still remained to be played out a second act to the "Perils of the National Nanny" in which consumer advocacy does not quite win out over its business and Congressional tormentors, but doesn't quite prove impotent either.

In the first scene of the second act, the National Nanny undergoes a role change, learns better to play -- and look -- the part of modest and law-abiding regulator, responsive public servant, arm of Congress. Then the threadbare but spirited and united consumer/labor coalition led by the militant elderly emerges to defend the FTC. The media's steadily rising threshhold of indignation is finally breached by the venality of the business lobbies and the supineness of Congress and finally in a dramatic finale, the President, Jimmy Carter, faces down the Congressional conferees in a confrontation set in the Theodore Roosevelt room of the White House, just as the Commission lies gasping for appropriations.

(While at that very hour of that very morning, unknown to all present but the President, the C-140 transport planes were launched on their fateful Iranian rescue attempt)

But first, the Commission -- and most especially its chairman -- had to redeem as best it could the consequences of its early political imprudence and the dismal state of its Congressional relations.

It had become painfully evident that the new Commission leadership which took office in the spring of 1977 had been cruelly afflicted with that chronic omnipotence which seizes each new administration in turn (not least, the present one).

In my own case this illusory sense of political security, which accompanied an equally illusory notion of a political mandate, was compounded by the warm glow of my 14 years as a faithful servant of the Senate Commerce Committee, especially its powerful and benign Chairman Senator Magnuson. I was also much impressed with those press accounts which cited, as among my undoubted qualifications, manifest political skills.

As a consequence we had first turned our energies to the task of administering the Federal Trade Commission as if it were -- an independent agency.

As the Chinese poet/philosopher Lao-tse chided, there are lessons we "know but never learn." Heady with the scent of high office, I heard the eloquent siren call of Franklin Roosevelt trumpeting the independent agencies as "tribunes of the people..." champions of the public against "private greed."

And I promptly forgot the heady power surges I had experienced as a staff member on the Senate Commerce Committee, forcing attentive and responsive commissioners and their emissaries to bend to the will of Congress as we shaped it, embodied for the moment in the then liberal majority of its oversight committees.

I knew, but hadn't learned, that the FTC served two masters -- the public interest and the Congress. The public interest was a malleable absentee master, but the Congress held the whip.

And I did not fully comprehend that the former liberal and consumer-oriented Democratic majority of the Commerce Committee had been decimated by death, retirement, and election, and had been succeeded by a manifestly more conservative majority in a manifestly more conservative political environment.

We had not taken the time to pay elemental respects to the members of the House Appropriations Subcommittee and other Congressional leaders and members in whose hands the Commission's fate would rest.

And since we did not trouble to assure the Congressmen and Senators that our sole object in life was to carry out the will of Congress, the lawyer-lobbyists, the Washington business representatives, the local broadcasters and other leading businessmen were more than content to be left the task of characterizing this new Commission leadership for the benefit of the members of Congress.

For their communications, unlike the Commission's much maligned rulemaking procedures are not designed to present a balanced picture. When the lawyer-lobbyist comes around to his friends on the House Appropriations Committee to seek extraordinary action to deny funds for continuation of the Commission's children's advertising rulemaking inquiry, his need and purpose is to foment blind outrage -- not balanced deliberation.

When Senator Danforth observes that "everywhere" he goes in Missouri, "every Kiwanis or Rotary luncheon," he hears complaints about the Federal Trade Commission, this select constituency has formed his sense of the agency and its leadership. And as Congressmen compare notes with each other, an unflattering portrait of the Commission emerges, of an agency and its arrogant chairman, heedless and contemptuous of Congress.

The shaping of this image was not retarded by an unfortunate tendency to fulsome rhetoric in the chairman's speeches and interviews. I had had the good sense not to make any speeches during the first four months of my chairmanship so that I might think about the work of the Commission before pronouncing upon it. It was a policy that, in retrospect, might fruitfully have been extended indefinitely, but at least tempered with humility and deference to Congress from the unelected bureaucrat.

In November following the midterm Congressional elections and what was then perceived as a chill wind of conservatism, I paid a visit to Congressman Ben Rosenthal, Chairman of the House Government Operations Committee's Consumer Subcommittee, a long-time consumer leader. The Commission had already received an unexpected bruising at the hands of the Appropriation Subcommittee and the full house. I asked for counsel.

"Get up here. Let them see that you are not crazy. And it would help if you would make yourself a few friends -- the House is a very personal place."

So, in the fall of 1978, we gathered together our best array of legislative talent (it is not prudent for a public agency to refer to its legislative liason staff

as its lobbyists), which consisted essentially of the chairman (though the other Commission members were to prove deeply loyal to the Commission and legislatively resourceful) the Commission's general counsel, Mike Sohn, a former partner in the elegant Washington firm of Arnold and Porter, clear and forceful (and as forensically intimidating as any industry hired gun), strategically resourceful, and possessed of an uncommonly unyielding backbone.

There was the Commission's Assistant General Counsel for legislation (i.e. the chief lobbyist), a deceptively youthful and disarming Stanford Law School graduate, Bill Baer, who held as strong a grasp of the Congressional players' motivations as of the substance of the issues and took wicked pleasure in disarming hostile Congressmen and outflanking Robert Bird (not, fortunately, the then Senate majority leader, but the sometime heavy handed lobbyist for General Mills). There was Kathleen Sheekey, former lobbyist for the Consumer Federation of America, disarming, ingratiating, keenly attuned to shifts in Congressional winds. Not a lawyer, Kathleen earned quickly the trust and respect of the Commission's lawyers. Congressmen and their staffs just naturally wanted to help Kathleen.

Kevin Cronin, a lawyer who had worked on legislation with Esther Peterson (the president's consumer advisor), brought an informed anxiety to the group's deliberations. Through a network of Hill friendships and relationships which he cultivated assiduously, Kevin was the preeminent intelligence gatherer, the first to sound the alarm. And he was an essential antidote to my own chronic pollyannish view of the world, especially Congress.

There was also Mark Lutes, a young student, who had not quite entered law school when he signed on for brief service as an intern with the legislative staff and remained to spend months of 14 and 15 hours days in the Commission's defense.

This was the Commission's "army of lobbyists." By invidious comparison, the Washington Star reported that those industries affronted by the childrens' advertising proceeding alone had raised a "war chest" of 16 million dollars to fight the proceeding. One day, over the phone, as we were gingerly comparing notes on the legislative situation, Tom Boggs, the industry's coordinator off-handedly mentioned that he was

scheduled to meet that very afternoon with fellow-representatives of 32 separate companies and associations banded together to lobby against the children's advertising proceeding.)

This modest group shared a keen commitment to the Commission's work, believed deeply in its justness. None of them was easily given to panic, at a time when panic would have been an appropriate response. But they also shared the lobbyist's professional delight in achieving impossible objectives through indirection, the lobbyist's pre-eminent skill of motivating people not in an exchange relationship to want to help, and a competitive instinct that refused to be intimidated by the vast array of lobbying resources available to business.

So we set about shamelessly to woo Congress, day after day, week after week, starting with the very day in December, 1978, that the new Congressmen opened their offices, to pay respect to the new members (especially those who had expressed interest in our oversight committees). Of course we laboriously courted the key members of the Commerce Committee and the Appropriations committees and the judiciary committees and the Rules committee and the small business committees.

We learned to watch for trade association and other Congressional receptions at which we might be able to exchange civilities with as many as 10 to 15 or even 20 Congressmen and their staffs in one setting. Early evenings were thus set aside for the cultivation of Congress -- and in the early mornings there were frequent breakfasts in the House dining room. We did not confine these visits to potential supporters. It was at least equally important to meet with hostile members. We had learned that it is less pleasurable for a Congressman to characterize as monstrous even a bureaucrat with whom he had dined and discussed the foul state of Washington's weather and who had at least attempted to respond to his concerns or to those of his constituents.

I would not place too heavy an emphasis on the potential rewards from such "personal diplomacy." But these efforts did serve to vent some of the spleen of Congressmen genuinely outraged at what they had been told of the Commission's character.

And we took pride in contributing to some modest conversions. One such was Congressman Joseph Early (D) of Worchester, Massachusetts.

* * *

Joe Early is not a name which shakes the political firmament with the reverberations of a Kennedy or an O'Neill, but Congressman Joe Early of the 3rd District of Massachusetts, senior member of the House Appropriations Subcommittee on Commerce, Labor and Justice, suddenly loomed very large and menacing in the path of the Federal Trade Commission in March 1979.

As we glossed over the names of the members of the Subcommittee in preparation for the hearing, we noted that Early was both a Democrat and from Massachusetts, a state noted for its liberal Congressional delegation; we assumed he would be generally supportive of the Commission and its programs. It was only one of a great number of such assumptions that I was to learn to regret.

To be sure, we had scheduled courtesy calls with the members of the Subcommittee a few days before the hearing. With an unmistakable air of bureaucratic noblesse oblige, I made the rounds. The effort was transparently ingratiating and perfunctory. Congressman Early was pleasant enough but not forthcoming; since it had taken me nearly a year to pay my respects, he had learned all he cared to know about the FTC elsewhere. He would see me at the hearing.

The hearing was an unrelievedly dismal event. I arrived with a supporting platoon of budget officers, counsel, program managers, administrators, buoyant with the self-important sense of mission befitting the Chairman of a great regulatory agency. The Subcommittee Chairman was bored and distracted, which initiated my precipitous deflation. The Republican members like picadors delivered several skillfully inserted barbs and twisted.

But none of these preliminaries matched the venemous sarcasm and contempt which my appearance evoked from Mr. Early.

He began by suggesting that the Commission's budgetary description of its work force in terms of "work years" (the feminist inspired substitute for "man years") rather than number of positions, was a crude fraud. I was utterly baffled by the arcane debate and, though our budget experts whispered explanations in my ear, the more I spoke, the more convinced Early evidently became that the documents before him bore all the earmarks of a surreptitious bureaucratic raid on the U.S. Treasury.

He mocked, he scorned, and then he turned to the gravamen of his complaint.

"The FTC doesn't do anything for consumers. All you ever do is promise, talk, and study. What has the FTC ever done to benefit the citizens of Worcester?"

I fumbled and grasped and sputtered, and as I struggled desperately to recall some dramatic consumer beneficence which the Commission had bestowed on the citizens of Worchester, he rose with a gesture conveying eloquently the limits of tolerance breached and strode out of the hearing.

His absence improved matters only momentarily as the other committee members, stimulated by Early's example, returned to the attack with reverberating ferocity.

I lay awake that night seeking an appropriate scheme of vengeance upon Joe Early of Massachusetts, but by dawn had grasped the essential principles that it never pays to arouse a senior member of one's appropriations sub-committee. And so the next morning instead, we set about to reclaim the heart and mind of Joe Early.

We made discreet inquiries with staff members of the Massachusetts delegation and learned, somewhat to our surprise, that while Early was a notorious fiscal curmudgeon,

he was widely viewed as fair (though skeptical), very hard-working and fiercely independent of the Speaker, as well as of lobbyists. We also learned, though, that Early had indeed been visted by his friend Tom Boggs, son of the former House Majority Leader, the prominent Democratic fund-raiser and likeable, disarming champion of the oppressed sugar, broadcast and cereal interests.

We sent for a three day supply of the Worcester Telegram and poured through its pages studying the ads (including the classifieds) until we had identified fifteen specimens of advertising which bore tangible evidence of the benefits to Worcester citizens of Commission actions. (They included discounts on Levi's, which could not have occurred until the Commission challenged Levi Strauss's retail price-fixing policies; and price discounts and competition among optometrists, which had been prohibited by the self-regulatory schemes of the optometrists until the Commission challenged such prohibitions as unfair restraints on competition).

I wrote a long deferential letter to Congressman Early, citing the FTC inspired improvements each of these ads and the tangible benefits for Worchester citizens. We learned later that he was pleased with the letter (and

since Congressmen are accustomed to receiving computer customized letters from the great federal bureaucracy, he was especially pleased at the assurances by our Congressional relations staff that I had really written the letter myself).

Through a mutual friend I wheedled an invitation to the Annual St. Patrick's Day Stag Party given by lawyer Paul McGowen to honor Speaker O'Neill and his friends. I went and drank green beer and drank to the health of every member of the Massachusetts delegation.

I had only a brief opportunity to exchange pleasantries with Joe Early but had the great good fortune to meet Jim Shannon, a shrewd but committed young Congressman from Lowell, Mass., who uttered rare and welcome words of support and encouragement for the Commission's work. I told him of our earlier travails with Joe Early, and he readily volunteered to arrange a dinner for the three of us in which I could add my own strokes to Tom Bogg's lopsided portrait of the Commission -- and at the same time show myself to be possibly human.

Kathleen Sheekey sought out Congressman Early's key staff people, especially those who followed the Commission

for him. She kept them alert to Commission activities which affected their constituents and through them stayed attuned to their concerns, or to the "bad vibes" generated by constituents or peripatetic lobbyists.

And our Boston regional director Lois Pines initiated a lively and successful small business conference in Worcester, designed to let small businessmen vent in person their frustrations and sense of helplessness with the dreaded regulators in person -- an event which Congressman Early could comfortably co-sponsor and appropriately take credit for, a choice forum for decrying the dangers of insensitive or unduly burdensome regulations.

In 1980, the House Subcommittee on State, Justice, and Commerce held its annual Appropriation Hearing for the FTC. A chastened and respectful Chairman cited extensive evidence of the Commission's sensitivity to and responsiveness to the concerns of this Committee and of the Congress. Congressman Early responded first: "I have been a critic of some of the FTC activities in the past, but I [now] believe much of what the agency does is of value to the public . . . . Any regulatory agency is supposed to be controversial and if controversy is doing a good job, you are our Eric Heiden. I believe you are

going in the right direction . . . . I am particularly impressed with your regulatory analysis. You have been sensitive to unnecessary and overly burdensome regulation without comprimising the public's interest . . . . The job you are doing with your limited budget is important and the right way to go."

But such agency lobbying could, at best, serve limited objectives.

Congressman Early and a few other members, when exposed to both sides of the issues, did make an effort to weigh them fairly. They were prepared to listen and took pride in preserving their independence from the lobbyists. Most did not. Indeed many House members had made commitments to the first business advocate through their door. Former Congressman John Murphy of New York told me after listening sympathetically to my arguments in support of the extreme modesty and rationality of our funeral rule, "Well, we're gonna give this one to Marty (Russo) as a going away present (from the House Commerce Committee)." (Congressman Russo having just been appointed by the House Leadership to the Ways & Means Committee).

Other members were equally candid. I called upon an old friend, a good liberal, who had gone down the line with the Commission in past battles. "I was afraid you would ask me that," he said. "Ask me anything else. For ten years my campaign treasurer has been a leading funeral director in

the state. I can't help you. I won't talk, and I'll vote late, but that is all I can do."

Another congressman explained the pressures he was feeling this way:

> "You know, it is very difficult for a politician to take a position against the funeral directors. They can help you or kill you. He can arrange for you to sit next to the window or the back of the room and when you're at a funeral parlor for one funeral and you see another one going on, if you ask them who they are, he can tell you all about it and you can take another trip. The funeral directors have got a lot of time... They are big joiners. They join the Kiwanis, the Rotaries and they are very active in the community so then everybody knows them."

No matter how persuasive our later arguments might have been, they came too late. We could change their minds, but not their votes.

Agency lobbying by its very nature, since it consists in substantial measure of the display of agency deference, cannot be delegated by the

agency's chief executive to staff; thus it quickly runs up against the physical limitations of one person's time and energy.

At best we, with dogged effort, had made modest progress toward counteracting the effects of our own neglect. We would never rank high among any congressman's favorite agencies (especially since we made no grants, contracted for little more than paper and pencils, and gave mostly pain to constituent businessmen). But at least we had treated the raw edge of Congressional antipathy.

After the vote by the Senate Commerce Committee in October, but well before the Senate floor debate on the Committee-proposed amendments in February 1980, we attempted to meet with as many Senate members as possible and paid equal court to key staff members who tend to play a more central role in the shaping of Senate attitudes.

By the time of the full Senate debate the attacks on the Commission, though hardly lacking in enthusiasm, at least focused on substantive issues. Largely absent was the harsh and personal demonology which had characterized the earlier House floor debates.

But we could have made passionate love to Congress 24 hours a day and still have been swept along in the anti-regulatory tidal wave. By the Fall of 1979 or the Spring of 1980 it should have been plain to even an amateur Congress-watcher that any bill or amendment which bore the label of regulatory reform or perhaps more appropriate, of "regulatory revolt," would carry the House by a 2 to 1 vote, the Senate by a 3 to 2 vote.

To be sure, there remained in both Houses remnants of consumer leadership. The House Commerce Committee enjoyed a fortuitously disproportionate core of unreconstructed consumer advocates -- both members and staff, among them the Chairman of the Consumer Subcommittee, James Scheven. He and his small but spirited entrepreneurial staff were to be pressed beyond endurance by the lobbyists and their congressional supporters, but they would not yield. And, by their resourcefulness, they more than once converted pending disaster to advantage. There were supportive members of the Senate, too, but perhaps none so committed or so prepared to spend unflagging energy in defense of consumer rights as Howard Metzenbaum of Ohio. And it was energy, more than votes, which was in shortest supply, though there were a handful of others who

would be supportive and willing to take the lead in defense of specific proceedings.

For the Commission to survive, essentially undiminished, a reprise of entrepreneurial politics was indeed essential. And it did take place, largely because two other key elements of the earlier entrepreneurial politics survived, though diminished: skillful consumer advocates and responsive press.

With Congressman Scheuer and his staff and Evelyn Dubrow, the near legendary lobbyist for the International Lady Garment Workers Union as catalysts, the consumer advocates draw together in an informal coalition whose formal title was only slightly less overbearing than the Chamber of Commerce's counterpart Coalition of "victims of the FTC," the Consumer/Labor Coalition to Save the FTC.

In the past, consumer advocates had not readily joined forces in defense of a regulatory agency. Indeed, much of their most successful work had consisted of virulent attacks on the gross inadequacies of the various regulatory agencies, including the FTC. Their level of trust of any government agency was generally as high as

their confidence in the public interest commitment of General Motors. In this case, however, Congress brought us together. One benign by-product of the intemperate attacks by business and its Congressional spokesmen on the Commission was its utility in convincing consumer representatives that the FTC was indeed worth saving.

The Coalition contained few new entrants, but displayed the enthusiasm and the teamwork characteristic of embattled allies "back to back in a knife fight." There was the Consumer Federation of America, of course, but without Carol Foreman (who had become Carter's Assistant Secretary of Argiculture for Consumer Affairs) and Congress Watch, without, however, Joan Claybrook (who had become Carter's National Highway Traffic Safety Administrator). With a number of "workers" (lobbyists prepared to spend at least some time "working the Congress"), the coalition drew its greatest support from organized labor (perhaps 10-12 representatives at any given time). It is, of course, fashionable to decry the petrification of idealism in the mature labor movement. But the fact is that the labor lobbyists brought a deep sense of commitment to a task which was, after all, theoretically secondary to their principal institutional responsibility of

defending against the encroachment of workers' rights and economic well-being. Mike Gildea, a young assistant to the chief lobbyist for the AFL-CIO, served as principal coordinator for the coalition with a generous and selfless spirit that infused the work of the group -- a quality rare enough among the not infrequent jealousies, petty rivalries (institutional and personal) which afflict the world of the Washington lobbyist, profit and non-profit alike. And there were groups representing the organized voice of the nation's elderly, the National Council of Senior Citizens, traditionally the most aggressive advocate for the elderly, joined the increasingly militant American Association of Retired Persons.

The elderly were, not unsurprisingly, most deeply concerned about Congressional efforts to abort the funeral price disclosure rule, but there were also a number of other Commission initiatives (from rights for nursing home patients to policing of unfair discrimination against the elderly in consumer credit, such major Commission initiatives as the mobile home warranty enforcement rulemaking and our effort to require a cooling-off period for hearing aid sales) which had convinced the leadership of these organizations that the FTC provided a

first line of defense against economic exploitation of the elderly. Perhaps most important, for a large majority of the elderly, consumer issues -- defending the purchasing power and integrity of the marketplace in which they buy -- replace wage and income enhancement issues as the primary economic concern. Among them are many who are informed and active, often drawing upon the mature skills of past professional life. They have the time and motivation to shop carefully so that they are among those consumers most able to take advantage of mandated information disclosure and truthful price competition. In self-defense against the ravages of inflation, they have become increasingly militant in the political defense of their economic rights.

The coalition served to shore up the hemorrhaging support for the Commission on the Hill. To those inclined to support the Commission, they provided reassurance that there was at least modest institutional support for that position. For those Congressmen and Senators inclined to support their business constituents but not deeply committed to the FTC legislation as a holy jihad against the heathen regulators, the Coalition served for the first time to suggest that other constituents than

business cared about the fate of the FTC and that others were watching.

The elderly in particular began, after the House vote to kill the funeral rule, to write their Congressmen, not in inundating volume, but in sufficient numbers and with such evident spontaneity and genuineness of outrage that members were becoming aware that a vote for their friendly local funeral director might not be entirely costless.

But the Coalition, despite its working harmony and commitment, simply lacked sufficient lobbying leverage to reverse the anti-regulatory sentiment. The Coalition first came together in an all-out, unified effort to defeat the Russo anti-funeral rule amendment on the House floor, in October 1979. Although the Coalition was active and aggressive in the days preceeding the House vote, the amendment had not yet attracted significant media attention, and the Coalition had not had time to help stimulate the expression of grassroots concern by the day of the vote. Ironically, their lobbying efforts against the funeral amendment were actively supported by a number of lobbyists for other business interests such as the coalition

against the children's advertising proceeding coalition which (correctly) saw the funeral rule as adding risky politically charged negative freight to the FTC bill, perhaps endangering the whole. Despite this unlikely coalition the amendment passed by a 2 to 1 margin.

* * *

The Commission's own role as participant in the consumer/labor coalition remained necessarily vague and delicate. When it comes to lobbying Congress, agencies, like small children, are expected to speak only when questioned. Direct lobbying, that is the use of appropriated funds directly to influence Congress, is barred by criminal statute. Though no one has been prosecuted in the 60 year history of that statute, it does tend to chill the more aggressive agency efforts to generate support on its behalf. (Viewers of the Defense Department's relationship with the defense contractors and Congress may be surprised to learn of its existence.)

Still, in the best of all possible worlds, the bureaucracy ought not to be spending the taxpayers' money to justify their powers or existence. Moreover, to be perceived as lobbying

certainly tends to undercut the very legitimacy of the agency's effort to portray itself as a humble and dutiful public servant responding to the will of Congress.

But we did have a key role to play within the coalition. Kathleen Sheekey, especially, universally trusted from her days as a lobbyist for the Consumer Federation, served as its communications center, making certain that each member of the coalition was (and felt) informed of legislative developments and even individual Congressional tremors and the tactical plans for each key member.

The Commission staff, who were the only truly expert resource available to the coalition, was called upon to provide "appropriate material" responsive to Congressional and other inquiries, which of course were judiciously balanced and subversively adversary (though scrupulously designed to withstand hostile scrutiny).

And we participated as a full, if silent partner in shaping the coalition's strategy.

The essential strategic task was plain. The Coalition had to develop a media strategy to generate and stimulate critical attention to the

Congressional effort to "cripple" the Commission -- the more outraged and intemperate the better. For the more that raucous media attention could be focused on the essential corruption of the legislative process, the less stomach its more skittish and weakly committed members would have for pressing forward with the dismantling of Commission proceedings. A strong showing of diverse media support for the Commission would equally serve to demonstrate to the White House, especially to the President's political advisors, that defense of the Federal Trade Commission, even in a time of apparently prevailing anti-regulatory sentiment, was a popular cause.

The Coalition found itself possessed of certain media assets, among them the pungency of the funeral rule amendment.

We had been perhaps insufficiently grateful at the time, but the Russo Amendment proved to have been an unintented political gift. It simply would not go down quietly.

Paul Turley, the Director of the Commission's Chicago Regional Office (who had come to the Commission via the ministry), is uncommonly sensitive to the real-world concerns and attitudes of consumers. He remarked to me, shortly after House adoption of the Russo amendment, that no consumer issue evoked from general audiences such spontaneous support as the funeral rule -- or such spontaneous outrage as the amendment to kill the rule. He contrasted that reaction with his audience's more ambivalent response to the Commission's effort to police misrepresentations in used car sales. While it is true that -- justly or not -- consumers have lower confidence in the representations of used car salesmen than almost any other trade, many believe that their own familiarity and wariness with the used car transaction arms them to defend themselves. But the same consumers understand full well that the unique and debilitating circumstances of the funeral transaction leave them naked to exploitation. Even the arch-conservative Heritage Foundation in its transition blueprint to the new Reagan administration for the dismantling of government -- (especially regulation) found favor with the Commission's funeral rule. It stated "[as there] is no effective of adequate marketplace remedy available to a bereaved family when a funeral home

refuses to provide them with an itemized bill, or when it induces them to purchase an unwanted package of goods and services,...the issuance of prohibiting trade regulatory rules is justified."

Fairly or unfairly the funeral director is not to be found among choice American role models. Such devastating critiques as Jessica Mitdford's The American Way Of Death or the Evelyn Waugh novel, The Loved One translated into a popular film parody of funeral practices, augmented the faintly disreputable public aura surrounding funeral practices, despite the industry's desperate reach for respectability as professional "grief counselors."

In shaping the final funeral rule the Commission had performed its tasks carefully and prudently, pruning the rule down to its bare essentials: truth and the simple disclosure of an itemized price list.

Finally, while funeral directors have their own peculiar advantage in attaining political access, they, unlike cereal manufacturers, do little advertising either in newspapers or the broadcast affiliates of newspaper conglomerates.

Three basic, simple media themes emerged:

1) reinforcement of the image of the Commission as dutiful public servant.

2) the lawlessness of Congressional interference with on-going trials, inquiries, and proceedings being carried out by the Commission faithfully under due process established by the Congress itself. It was Mike Sohn, the Commission's general counsel, who argued persuasively that the Commission's most politically potent argument against the Congressional actions rested upon the illegitimacy of Congressional interference into pending trials and administrative proceedings. This argument unmasked a Congress so eager to do the bidding of lobbyists, that they could not restrain themselves until the Commission or the courts had completed -- and perhaps cured -- their concerns. This theme side-stepped the necessarily elaborate and perhaps diversionary defense of the merits of each of the proceedings under attack, from the Children's Advertising and Standards and

Certifications proceeding (which was particularly complicated) to the Funeral Rule proceeding.

This strategic theme had the added virtue of disarming those White House staff members who had displayed discomfort with the Children's Advertising Proceeding and gave indications of a readiness to sacrifice it as legislative ballast. This theme also left room for the defense of individual proceedings such as the Funeral Rule proceeding which was easily understood, but did not require that the Commission's supporters defend or endorse the substance of each and every threatened rule proposal.

3) The struggle between the more aggressive members of the coalition and the usual (but truly deserving) villains: the insidious business lobbyists and their toadies in Congress. That the theme of lobbying villains, long a mainstay of consumer, environmental, and other public interest entrepreneurial politics, retained its vitality was

> indicated by those public opinion polls which showed that, while there might have been growing minority concerned about over-regulation, there was an overwhelming majority of the American public concerned about the perceived influence of business on government decision-making.

There were the generic lobbies: "the funeral lobby," "the cigarette lobby," "the sugar lobby," "the cereal lobby," "the broadcast lobby," the "used car lobby," and the professionals lobbies such as the American Medical Association, closely associated throughout its long legislative tradition with mean-spirited causes.

Then there were the individual lobbyists who could serve to personify the back-door manipulation of the legislative process, the undemocratic influence of economic power and privilege and the unwholesome link between generous campaign funding sources and industry supportive votes. Among them:

1) Tom Boggs, the son of the former house majority leader and virtuoso lawyer lobbyist and principle fund raiser for the Democratic Senatorial campaign committee chaired by Consumer Subcommittee Chairman Wendell Ford;

2) Wilbur Mills, who had appeared in a cameo role in the Commerce Committee oversight hearings, sitting, in deference to Congressional protocol, on the dais with the Committee members and staff while representing Encyclopaedia Britannica.

3) John Filer, the majestic president of AETNA and the American Counsel on Life Insurance, friend of the President and leader of Businessmen for Carter. His firm had delivered to the Senate Commerce Committee members artful if disingenuous briefs "establishing" the Commission's illegitimacy in conducting its study of life insurance cost disclosure -- an issue which even AETNA had never

raised prior to the opening of the opportunity to quash any future insurance activity by the Commission.

* * *

Throughout October and November 1979 we alternated between gloomy resignation and panic. The Appropriations committees were threatening to withhold all funding from the Commission until an authorization bill had been enacted.

The House version of the FTC's authorization bill contained a one-house legislative veto provision for all future FTC rules, a provision excising the Commission's trademark authority (the Formica amendment) and amendments terminating the Commission's funeral rule and the Commission monopolization case against the Sunkist Agricultural Cooperative.

The Senate Commerce Committee's modestly entitled "FTC Improvements Act" bestowed legislative indulgances upon the life insurance industry, the broadcasters and their allies in children's advertising, cigarette advertisers, and the industries who sought to avoid FTC scrutiny of the voluntary standards process.

In November 1979, Congress adjourned before the Senate had taken up the Commerce Committee's "FTC Improvements Act." We were convinced that only a "media blitz" could save the Commission from dismemberment once Congress reconvened in January 1980.

As obnoxious as were the Senate Commerce Committee FTC amendments, there were growing signs that when the Senate reconvened and took up the bill, virtually every other business which found an FTC proceeding uncongenial would find willing Senate sponsorship for a remedial amendment. Indeed the Republican Steering Committee staff (aggressively pursuing its own vision of economic libertarianism) had extended a blanket invitation to business through the Chambers of Commerce and other conservative organizations to come forward with private business relief amendments, for which the Committee staff volunteered to find enthusiastic sponsorship.

For if the cereal companies and life insurance industry had found legislative relief at the hands of the Commerce Committee, who, in fairness, could deny freedom from FTC vexation to the doctors, dentists, lawyers, mobile home manufacturers, used

car dealers, funeral directors, over the counter drug manufacturers, etc.?

The labor and consumer organization members of the Coalition engaged in open and aggressive efforts to gain access to the media, such as the flamboyant press conference at the Capitol two weeks before the House vote on the Russo funeral amendment, which included Esther Peterson and Bess Myerson, spokesmen for the elderly, and Congressional and consumer leaders. While this and other efforts were too late to evoke a sufficient public response to affect that particular vote, they contributed to the growing media portrait of Congress toadying to the lobbies.

At the FTC our own contribution was in a lower key and necessarily less visible. But it was no less energetic. Through our press office we made certain that the background documents that we had prepared reached the hands of any reporter, columnist, or editorial writer who might have been tempted to write sympathetically about the Commission's plight, while the Coalition circulated joint letters and statements less circumspectly denouncing Congress and the business lobbies. Though it was indeed a stressful time I found ample time to "make myself available" to editorial writers.

But not to reporters. For some time it had been the unflattering consensus of my colleagues on the Commission that a silent if not invisible Chairman was the most potent antidote to charges of intemperate, biased Commission leadership (as biased, Menken wrote, as a scream from the dentist's chair!).

Besides, my posture toward Congress had to be one of chastened submissiveness, not the stuff of successful press conferences; besides, a statement from the commander of the Alamo portraying its defenders as the lone, heroic, embattled outpost of virtue would be unseemly (and unconvincing).

There were non-FTC spokesperson's with access to the media, such as Senator Metzenbaum, Congressman Eckhart and Congressman Scheuer -- who performed study, heroic -- and lonely -- service in defense of principle and the FTC in Congress. They were not only articulate and forceful, but spoke with legitimacy, as elected people's representatives, not unelected bureaucrats. The public defense of the Commission was best left to others.

This rule was partially breached (though not without misgivings) for several television "opportunities." A potentially sympathetic segment of

60 Minutes recounting the Commission's trials and tribulations was in the offing which would not go forward unless I agreed to participate. Ralph Nader had also urged me to accept an invitation to appear on the Phil Donahue Show, while Bill Moyers was exploring a one-hour documentary on the Commission and its adversaries. To the skeptical among us, I swore to abjure such outbursts as my inappropriately macho vow back in the early days of innocent omnipotence that Congress would have "to break my arm" before I would yield up the Children's Advertising proceeding. I would conform to an unwavering posture of injured innocence and humility -- a humility I may add that by that moment in my tenure was both genuine and earned.

* * *

The first press response was a rolling barrage of editorials fortunately aimed -- not at the FTC -- but at Congress -- beginning with the weighty cannons of the press: The Washington Post and The Washington Star, The New York Times and Philadelphia Inquirer, The Los Angeles Times. It was followed by nearly a hundred editorials throughout the country in papers as philosophically and geographically diverse as the Honolulu Star Bulletin and Charleston (West Va.) Gazette.

There followed in January, February, and March of 1980 the several major television programs on the conflict. The Donahue Show proved a remarkable experience. Donahue, a great showman, is nonetheless not afraid to respect his audience of eight million, mostly non-working women, with serious complex issues. He was not entirely sympathetic. Indeed, as I began to warm to the friendly response of the studio audience (especially reacting to the funeral directors lobbying efforts), I soon began to expand confidently on the unalloyed virtues of the FTC, whereupon Donahue punctured the euphoria with a quick series of informed, troublesome questions.

The program evoked several thousand letters to the Commission and Congress, which is, of course, not an avalanche of mail compared to various organized letter-writing campaigns. But to the Congressman who could say prior to the House vote on the Russo amendment that he had never heard from a single constituent in support of the Commission, even a dozen throughtful and spontaneous letters could give pause.

The Bill Moyer's show was, not surprisingly, the most thoughtful and probing. But 60 Minutes,

which is, of course, the Big Bertha of public affairs programming, had a truly transformative impact.

While both 60 Minutes and the Bill Moyer's Journal gave me an opportunity to defend the Commission, it was the extensive self-portrait of Congress through film and tape clips of the Commerce Committee members in session, championing one special economic interest after another in self-righteous high dudgeon, and the fatuousness of much of the House funeral debate which served far more eloquently to strip the veneer of regulatory reform from the Congressional posturing.

The portrait of the conflict that emerged in both print and broadcast media was not flattering to the Congress. The Commission was seen not as "The National Nanny" but the honest cop on the consumer beat, punished for daring to question powerful economic interest; the faithful public servant victimized by corrupt lobbyists, not sincere conservatives, and/or corrupt or posturing Senators and Congressmen easily manipulated by special interests. What had earlier been portrayed by critics as an arrogant, zealous Chairman and Commission now appeared as an earnest and responsive

watch dog notable for its temerity in taking on special interests; reasonable, but unyielding and unrepentent; an agency modest, not arrogant, taking to heart the tasks assigned to it by that very Congress.

Instead of the Tyrannosaurus Rex of the regulatory agencies, the FTC was portrayed by cartoonists such as Herblock hat in hand, head slightly bent, standing humbly before gross inquisitors who held the Commission "guilty of acting like a regulatory agency," or as the pathetic victim of the torturer's lash, "Still want to help all those common people?" Perhaps most painful to the pride of the Congressmen involved was Herblock's caricature of the Congress as a ventriloquist's dummy in the lap of the special interests.

Sixty Minutes aired a little over a week before the Senate debate on the FTC Bill. That debate was scheduled to begin on Thursday, the very day that President Carter had tentatively agreed to appear before the "Consumer Assembly," the annual gathering of consumer and labor organizations in Washington. Our strategy and our lobbying of the White House was designed to stimulate a firm and timely Presidential veto threat.

We had enjoyed strong support from Esther Peterson, the President's Consumer Advisor, an old and true ally, and from the President's domestic advisor Stuart Eisenstadt. We had enjoyed uncommon support from the President himself. But we knew also that the President was in the midst of the bitter primary campaign and that his political advisors would in large measure determine the extent of his involvement.

We had forwarded a steady stream of favorable editorials and clippings to every White House staff member who might have some say in shaping the President's speech. We had been striking a responsive chord in the White House, but 60 Minutes galvanized White House staff support for both the President's appearance and an unequivocal stand in support of the Commission. As Ann Wexler, the President's counselor for political affairs commented the day after 60 Minutes ran: "When the President speaks about the FTC, 40 million people will know what he is talking about, who until this week had barely hear of the FTC."

The drafts of the President's speech grew progressively stronger. Indeed he added emphasis himself, and he received from that otherwise tepid

audience a standing ovation when he vowed "to veto any bill which would cripple the FTC."

One industry lobbyist with whom I talked that week acknowledged that Congressional sentiment for punishing the FTC had "peaked." Indeed, when the Senate took up the FTC bill, the stack of special interest amendments which had been introduced and pending for weeks to stop those cases or proceedings not already targeted for extinction in the Commerce Committee Bill were either withdrawn or defeated. There was a spirited -- though losing -- fight on behalf of the Magnuson-Packwood amendment to preserve the Children's Advertising and Standards proceedings.

The committee leadership also faced a floor challenge by Senator Metzenbaum and others to the committee's determination that the Commission should undertake no studies of insurance industry abuses. These amendments failed (as we expected they would since the Commerce Committee and its leadership were united in opposing all amendments) though the Commission's authority to complete its "medi-gap insurance study" was restored.

The tenor of the Senate debate was far removed from that of the House. There were strong words

of support for the Commission and attacks on the special interest aroma of the Commerce Committee bill. The committee leaders, especially Ford and Danforth, were defensive throughout the debate.

For the next three months the fate of the legislation rested in the hands of a Senate-House Conference Committee. In the beginning there was strong sentiment among a majority of the House conferees for dropping all special-interest amendments for a compromise which would impose some form of legislative veto on Commission rulemaking, though there was potential deadlock on the issue of whether such a legislative veto could be exercised by only one body, as in the House-passed Bill, or had to be voted by both. Even conservative members, such as North Carolina Republican James Broyhill, had become uneasy with media challenges to the legitimacy of Congressional interference with ongoing cases and rulemaking proceedings.

Senator Wendell Ford, however, the de facto Chairman of the Senate conferees was not prepared to yield. He had consistently opposed a legislative veto, but favored direct action by Congress to restrict the Commission's activities. And he believed that he could forge an alliance among

industry groups. He reasoned that if the conference committee adopted every special interest amendment contained in either House or Senate bill, the combined political support of groups favoring each of these provisions would furnish sufficient votes either to intimidate the President or override any veto.

Crucial to Ford's control of the Senate conferees was Senator Danforth, the ranking Republican member of the committee, whom Ford had carefully and deliberately involved as a partner in the shaping of the Senate bill.

Danforth was stung by the press characterization of the legislation. He carried around with him one of the Herblock cartoons, as published in the St. Louis Post Dispatch. He was open, he said, to reasonable compromise. But Senator Ford held him fast to their joint venture and the compromise which would have preserved the Commission's proceedings faded.

Enter Ralph Nader. In a series of forays into Kentucky and Missouri, stimulating consumer groups and directly attacking Ford and Danforth, Nader was neither subtle nor reasonable, nor did he try to be, in characterizing the conflict.

Attacking Ford in Kentucky, Nader cited a recent tragic fire in which more than a hundred people were burned. One theory was that the fire had been caused by aluminum wiring. Testimony before the Commission in its voluntary standards proceeding had shown that the standard-setting process which had approved the uses of aluminum wiring had been so dominated by the aluminum industry as to preclude adequate consideration of the hazards of aluminum. Ralph Nader was careful not directly to accuse Ford of causing the fire; but a story which appeared in the Louisville Times was not so punctilious.

In Missouri the St. Louis Post Dispatch had focused editorial attention on Danforth as the critical vote in determining whether the FTC would be crippled. Nader and the Missouri Public Interest Research Group, an affiliated consumer advocacy organization, attacked Danforth, citing the apparent conflict of interest between Danforth's votes undermining the Commission's children's advertising proceeding and his economic interest in Ralston Purina, an advertiser of children's cereals.

Ford and Danforth cried foul. Ford called me, consumed with indignation that Nader could suggest an association between his opposition to

the standards proceeding and the death of 138 Kentuckyans. I felt compelled to issue a statement decrying as unfair any suggestion that Ford's position on standards could have contributed to the fire.

Wendell Ford believed, told all who would listen and doubtless believes to this day that I controlled Nader in every word and that I could snap my fingers and produce nationwide editorials. It was hardly pleasant to be the target of such fulsome Congressional wrath. Yet despite Ford's threats of vengence these illusions of our power to manipulate the media served as one of the very few deterrents in our efforts to restrain the Ford strategy of forging a coalition of corporate "victims" of the FTC.

Danforth was also outraged. He considered Nader's assertion that his votes were related to his family wealth and connections to Ralston Purina unjust and unfounded attacks upon his integrity. He resented the cartoonists' caricatures of his role and that of his colleagues as compliant handymen for corporate lobbyists. (Indeed, Danforth had strongly defended the Commission's antitrust authority.) I have no doubts that these sentiments

were genuine. I am equally certain that these attacks caused Danforth for the first time to pause to view the FTC legislation from other than the perspective of the Kiwanis and Chamber of Commerce, the affected companies and industries.

On April 24th, Carter invited the conferees to the White House. Ford opened the meeting by complaining to the President that the personal attacks on him by Ralph Nader had caused him sleepless nights, and that "there isn't going to be any FTC if Ralph Nader is not turned off." The President, who had himself been the increasingly frequent target of Nader's outrage, replied with a wan smile, "You know I don't control Ralph Nader." The President then spelled out his bottom line issue by issue and he promised that a bill which fell below that line in any of its particulars would be vetoed. The Senate conferees backed down.

CONCLUSION

The funeral rule proceeding was allowed to continue essentially unobstructed. The Commission's antitrust case against Sunkist would go forward. The Children's Advertising proceeding would (theoretically) be allowed to continue, to the extent that the practices involved came within the relatively broad confines of deception law, but not of unfairness law. The Standards and Certification proceeding was allowed to continue in modified but significant form. Only the lone Formica petition failed utterly to escape Congressional interment. The Commission was permitted to undertake future insurance studies (but only at the request of a majority of either Senate or House Commerce Committee) and to continue to complete its study of so-called medigap abuses. Commission rules henceforward would be subject to Congressional veto, but only upon action by a majority of both houses of Congress. We rejoiced. The National Nanny had emerged from the crucible with her basic facilities, if not her pride, intact.

That night, we gathered around the TV set to watch the evening news accounts of the White House meeting -- and witnessed a stunning event.

The conference committee leaders, Senators Cannon and Ford and House Chairman Staggers, had emerged from the conference with the President and mounted the White House press podium to announce the compromise with appropriate pomp and sanctimony.

A reporter asked what precisely would be the impact of the suspension of the Commission's authority over unfair advertising. Cannon and Ford hesitated momentarily. Suddenly Senator Robert Packwood, the ranking Republican member of the Commerce Committee shouldered his way to the microphone: "I'll tell you what stopping the Commission's unfairness authority means," he spoke bitterly: "You're going to have a generation of kids with rotten teeth and cancerous lungs because of this bill; henceforth any ad that is unfair, alluring, any ad directed at our children that you can't prove is false is going to be allowed."

"Three principal groups want this bill changed -- the advertising industry itself, sugar and tobacco, they're getting their way." Senators Cannon and Ford melted away.

Packwood's outrage chilled our brief-lived euphoria. Subdued, we reflected on the lessons we

had learned from our bruising legislative journey. There were precious few grounds for rejoicing.

True, toward the end we had succeeded in narrowing the lobbying gap between us and our business adversaries. Most important, with the unyielding support of the President, we had preserved intact the Commission's basic authority. But that ended the short list of consolations.

For Senator Packwood's outrage served as a bittersweet reminder that only three years earlier we had confidently relied on just such spontaneous moral outrage to inhibit Congress from entanglement with the Children's Advertising proceeding.

But the broadcast, cereal and sugar industries had demonstrated a deft capacity to deflect and leech such outrage in both the media and Congress, and it was they who had successfully seized or confused the symbols of debate.

Thus, business had succeeded in neutralizing the single unique political weapon which had made the entrepreneurial politics celebrated by Wilson possible: an unambiguous citizen outrage focussed upon a consensual legislative remedy.

The outrage successfully fanned and focused in the 1960's by Ralph Nader on the automobile companies' neglect of safe design, and by Warren Magnuson on the cotton textile manufacturers' neglect of child burnings and channeled into a political energy behind the passage of remedial legislation, had dissipated.

In its place there existed a cacophony of conflicting claims on public outrage which succeeded in restoring Lindblom's stated condition for business dominance of public decision-making: citizen confusion and ambivalence.

The FTC Improvements Act which emerged from the Congress was in all its provisions a Businessman's Relief Act. It contained generally two categories of provisions: The first category, primarily reflecting the Carter administration's own legislative proposals could fairly be considered regulatory reform measures, such as assuring advance notice of contemplated rulemaking to the affected business and the opportunity to educate agencies on the impact of contemplated remedies. Such provisions may well have been justified, but they nonetheless evidence Congress' priority responsiveness to business, not consumer concerns.

The second category of provisions, of which we have offered the essential flavor, can only be regarded as spurious regulatory reforms: naked political sorties by the affected industries to evade public accountability for commercial abuse and consumer injury.

This from the Congress which, for more than a decade, had consistently urged the Commission to undertake these very same initiatives, and in general had flogged the Commission for its attention to trivia and lack of responsiveness to consumer interests.

When after ten years of concerted effort by five succeeding Commission chairmen to make the Commission responsive to these demands, the resulting rules and cases began to bite, American business came down with an aggravated case of regulatory distemper -- from which Congress caught acute legislative amnesia and promptly administered curative leeches to the Commission.

As for the Commission's last minute reprieve, it should have been clear then as it was to become later, that Commission initiatives which theoretically survived because of press attention or Presidential

intervention would yet be still-born, that for better or worse there is no such thing as an independent agency. The Commission of the 1980's would reflect the implied as well as the express will of Congress just as had the Commission of the 1970's.

Therefore it was not surprising that Commission staff working on the children's rulemaking proceeding subsequently discovered that though there was substantial evidence of the deceptive nature of children's advertising, no feasible remedy was available and the proceeding should therefore be closed. The Commission agreed.

Nor is it surprising that the Commission has not yet requested authority from the Commerce Committee of either House to resume its insurance studies.

Or that the Commission found that cigarette warnings in advertising were grossly inadequate and should be replaced by a series of rotating warnings, but hesitated to propose such warnings as a rule - nor that no new monopolization cases have been brought against any agricultural cooperative.

No longer were Congressmen and Senators fearful of being labelled "tools of the special interests" or anticonsumer. They had acquired a new arsenal of self-protective rhetoric, the rhetoric of indignation at the depravity of "over-zealous regulators," of the undermining of productivity and of excessive cost burdens passed on to consumers, of regulatory overkill, and unelected bureaucrats tying the hands of American business in the fight to the competitive death against the Japanese industrial menace.

These epithets provide a respectable cover of rhetorical outrage for any Congressmen who chose to serve the interests of any industry, whether local or generously forthcoming with campaign financing. The odds, from our vantage point, appeared overwhelming. Business-stimulated congressional outrage, whether justly provoked or spurious, was treated with equal respect and gravity by Congress and, in large part, by the media as well.

That there were indeed genuine and distressing examples of each of these flaws in various government regulatory programs -- flaws which most assuredly had to be addressed through oversight and genuine

regulatory reform -- cannot obscure the fact that these fashionable epithets were grossly abused and manipulated by business lobbies, who sought nothing more patriotic than to be left alone, regardless of the merits of regulatory intervention.

The only controversial Commission initiative which to this date survived substantially intact is the funeral rule and that can be attributed to the persistence of uniquely favorable conditions:

1) The rule itself is clear, simple, understandable to laymen, and involves the extremely conservative proposition that the arrangers of funerals ought to have basic price information.

2) There exists a strong, articulate, politically awakening constituency among the elderly.

3) Opposition comes from an industry which to be sure has political access through its individual members, but nevertheless remains a small, atomized business isolated from the main business community. Not even the Chamber of Commerce undertook

to support the funeral directors' cause. Wilson would surely place the funeral directors' industry as one rating relatively low in public standing and legitimacy.

4) There exists broad media and popular consensus on the rightness and fairness of the proposed rule.

5) There was universal and unqualified media condemnation of the Congressional effort to terminate the rule as lobby-inspired.

Yet as of this date, even the funeral rule faces the likely prospect of congressional veto.

That a change of significant proportions had taken place in congressional reaction to the competing demands of producers and consumers between the mid-60's and the late 70's is hardly a revelation. I've sought to document and indicate some of the peculiar qualities of that change.

In the next and final lecture, I'd like to explore the future opportunities and limits of consumer entrepreneurial politics and explore some possible alternative future political strategies for consumers.