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PARTISAN PRESIDENTIAL CHANGE AND REGULATORY POLICY: THE CASE OF THE FTC AND DECEPTIVE PRACTICES ENFORCEMENT, 1938-1974

by

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Abstract

This brief piece of research tracks the patterns in the Federal Trade Commission's (FTC) issuance of official deceptive practices complaints and the changes that occur with partisan transitions in the White House. Generally, it is found, the FTC issues an increasing number of official complaints each year there is a Republican President and a declining number in each year there is a Democratic President. Activity during the Truman administration provides the only systematic deviation from this pattern.

A look at the literature on deceptive practices regulation provides an explanation for the overall pattern. And, a look at the historical record provides plausible explanations for both the Truman-era deviations and the question of how Presidents are able to exert their influence. Suggestions for future research by Presidential scholars are presented.

One of the major goals of the architects of our system of regulatory commissions was to insulate the administration of cer-

tain policies from political influences.¹ But, for both legal and political reasons, Presidents are active in the affairs of "independent" regulatory commissions and the commissions' areas of policy responsibility.² As Kohlmeier puts it, "the known evidence of interventions from Wilson to Nixon demonstrates that Presidents, Democratic or Republican, have not disassociated themselves from the substance of regulation."³ The President has such an influence upon the commissions that Bernstein concludes that "independence of commissions from executive control has become highly qualified."⁴ Kohlmeier is more definitive when he asserts, "the politics of regulation begins at the White House."⁵

As Presidential administrations change, particularly when the party in the White House changes, the activities or policy decisions of regulatory commissions might also be expected to change. Welborn notes:

New administrations . . . come to power with a sense of regulatory problems informed by party orientations on economic questions and stimulated by the interests to which they are sensitive. When party control changes in transition, the pressures are that much stronger.⁶

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This research seeks to outline the pattern in one particular area of regulatory activity over a thirty-seven year span and to focus particularly on the differences found when Democrats or Republicans occupy the White House. Specifically, this work looks at the changes in the Federal Trade Commission's (FTC) issuance of deceptive practices complaints when the party in the White House changes from 1938 to 1974. Although this study is narrow in scope, it suggests important and neglected lines of research for those interested in Presidential policy-making, regulatory politics in general, and the FTC in particular. Before examining these changes, however, a brief outline of the FTC's responsibilities and enforcement efforts is in order.

The FTC and Deceptive Practices

The FTC is charged with implementing the premise that "the consumer is to be assured full and accurate information which will permit him to make a reasoned choice in the marketplace."⁷ Based on this charge, the FTC took jurisdiction over advertising practices to protect the public interest. In 1931, though, the Supreme Court ruled that the FTC lacked jurisdiction over false advertising unless it could first prove that the advertising damaged competition or competitor.⁸ Only then did the public interest become an issue. The Court did suggest, however, that the Commission appeal to Congress for broader powers. Subsequently, Congress passed the Wheeler-Lea Act of 1938, which made "unfair methods *and* unfair or deceptive acts or practices in commerce" unlawful.⁹ Thus, the Commission was specifically empowered to "center its attention on the direct protection of the consumer."¹⁰

The basic means by which the FTC sought to exercise this explicit power from 1938 through 1974 was by means of the issuance of an official complaint.¹¹ Applications for complaints are filed in large numbers by businesses, consumers, and FTC staffers who allege violations of Wheeler-Lea. Only a fraction of these applications, however, is selected for action in the form of the issuance of a formal

complaint by the FTC. These are chosen at the discretion of the Commission, and thus these choices are subject to political influences.

As noted earlier, Welborn's analysis suggests that these political influences may run along party lines.¹² "Common knowledge" might suggest, then, that under the relatively "pro-business" Republican Presidents, the FTC would issue fewer complaints; under the more regulation-oriented, "anti-business" Democratic Presidents, the FTC would issue more complaints. There is evidence, though, that in regard to the policy focus of this research, Republicans may be more supportive of issuing official complaints than are Democrats. Nadel notes that:

The commission became increasingly involved in false advertising cases . . . In its approach to this area, the FTC was in no way antibusiness. Rather, the aim of its policies was to protect competitors rather than consumers . . . The commission was therefore more of a participant in a system of self-regulation than an exclusive regulator itself.¹³

Stone summarizes his arguments along the same line by stating that "business sought administrative protection against conduct which was bad for the industry as a whole or which was uneconomic."¹⁴ In light of these arguments, to the extent that Republicans are pro-business, they would be expected to support FTC activity in the deceptive practices policy area. Thus, this research examines the proposition that the annual number of official deceptive practices complaints issued will vary with the party in the White House, increasing when Republican Presidents are in office, declining when Democratic Presidents are in office. If changes appear in the FTC's issuance of deceptive practices complaints corresponding to party turnover in the White House, it will suggest a relationship between the partisan occupation of the White House and the regulatory policy in the areas of deceptive practices.

Data

The number of official complaints

issued charging any form of false advertising and/or misrepresentation under Section 5 of the FTC Act as amended by Wheeler-Lea is collected by year from the “Federal Trade Commission Docket of Complaints” in the Trade Regulation Reporter published by the Commerce Clearing House. The time period covered, 1938 to 1974, includes the entire span when the issuance of official complaints was the major enforcement tool in this policy area for the FTC. Over this time span, four distinct periods of partisan control of the White House are present: 1938–1952, 1953–1960, 1961–1968, and 1969–1974.

Findings

Figure 1 graphically shows the number of official complaints issued annually. The data points show a wide fluctuation in activity from a zenith of 374 official complaints issued in 1940 to a nadir of 30 in 1947. Overall, however, there appears to be a downward trend in activity.¹⁵

More to the point of this research, however, Figure 1 is divided into four parts to reflect the partisan control of the White House during the time period covered. Additionally, trend lines are drawn for each period of partisan control to summarize the overall direction in the number of official complaints issued within each set of years.¹⁶

A comparison of the trends across periods of different partisan control of the White House reveals patterns consistent with the proposition stated earlier. The trend in the number of official deceptive practices complaints issued goes sharply downward during Democratic administrations and rises notably during Republican administrations.

After the immediate burst of activity that might be expected to follow the advent of newly clarified authority, the FTC issued significantly fewer official complaints through the Roosevelt-Truman administrations. The high and low points of activity noted earlier both came during this period. On the average, each succeeding year from 1938 through 1952 saw approximately twenty fewer official complaints issued than the previous year. This average decline is present in spite of an

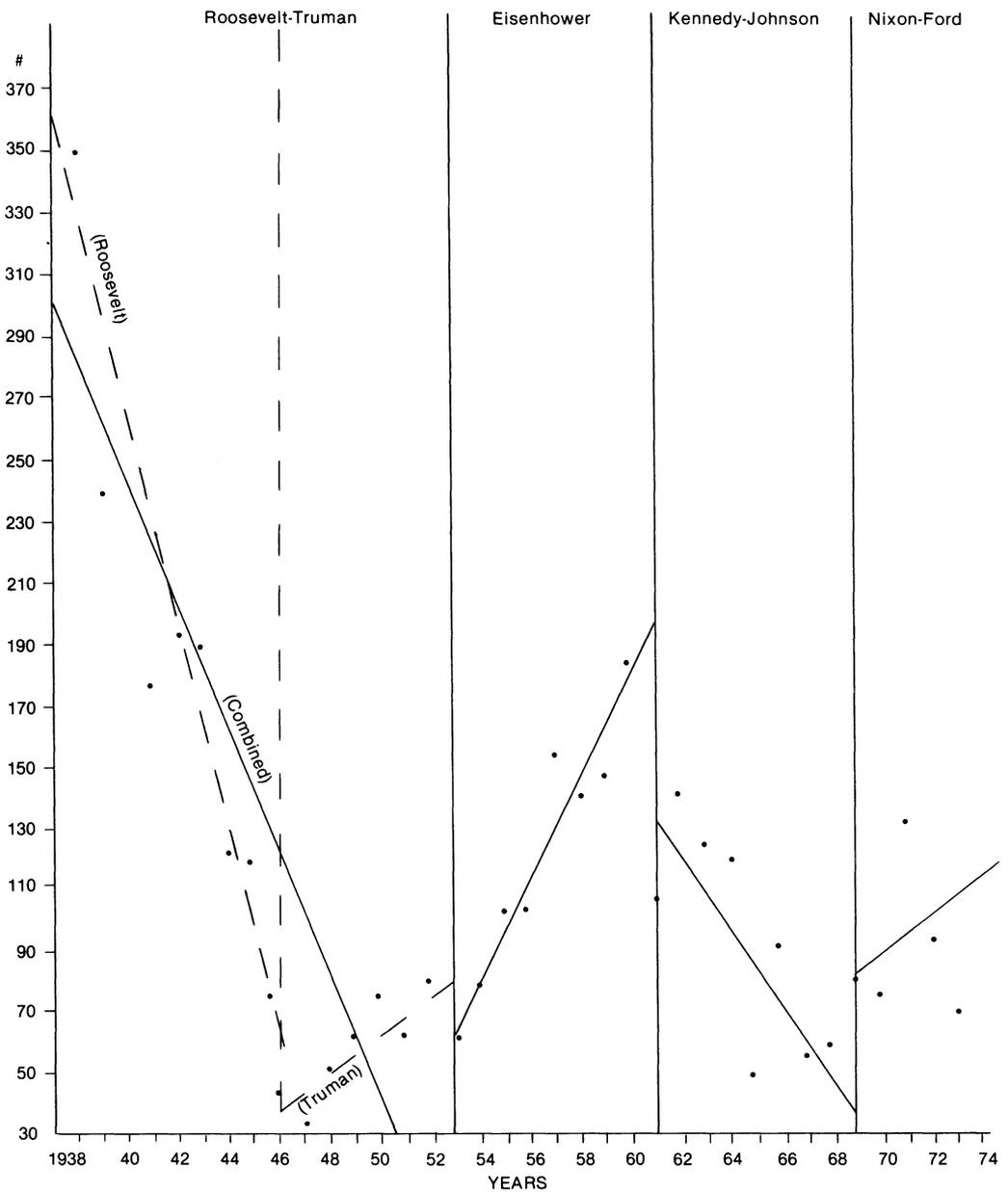
upward trend found at the end of this Democratic era when Truman held office. If one separates the Roosevelt and Truman years, the average decline during the Roosevelt years is approximately thirty-three official complaints per year and the average increase during the Truman years is approximately seven cases per year. Thus, while the findings hold with the expectation for Democratic Presidents, FTC activity clearly deviates from expectations during the Truman administration. During that time the trend in activity is more like what is expected during Republican administrations.

The Eisenhower Republican era produces a significant upward trend in official complaints issued as per the expectations. On the average, the FTC issued approximately sixteen more complaints during each year of the Eisenhower administration than it had in each previous year. Furthermore, the data points cluster very closely around the trend line and exhibit none of the divergence noted during the Roosevelt-Truman era. It should be noted, however, that the upward trend during the Eisenhower era is much sharper than the trend noted during Truman’s tenure. However “Republican-like” the FTC activities were when Eisenhower took office, they were transformed even more away from the Roosevelt Democratic pattern during Eisenhower’s time in the White House.

The downward trend during Democratic administrations is reestablished during the Kennedy-Johnson period. The FTC issued an average of eleven fewer complaints in each succeeding year of this time span. Furthermore, although the data points do not cluster as tightly around the trend line as they did during the Eisenhower era, there is no apparent break in the trend between the Kennedy and Johnson administrations as was found between the Roosevelt and Truman years. By the end of this period the number of FTC official deceptive practices complaints issued had fallen to a level unseen since the advent of the Eisenhower administration.

Finally, the Nixon-Ford administrations (through 1974) produce the charac-

Figure 1
Official Deceptive Practices Complaints Issued by the FTC, 1938-74



teristic Republican upswing. The increase averages, however, only approximately six official complaints issued per year. This is far below the trend noted during Eisenhower's terms and is more in line with what was observed during the Truman years.

Discussion

In sum, the proposition advanced earlier that the volume of official deceptive practice complaints issued by the FTC would decline during Democratic administrations and rise during Republican ad-

ministrations is generally confirmed. The years of differing partisan control reveal clear trends in the data. The views of Nadel and Stone concerning this particular area of regulation appear to be confirmed. Likewise, Welborn's idea of the importance of partisan change in the White House is confirmed in these policy outputs. Nevertheless, at least two items remain for discussion. First, how can one explain the uncharacteristic upward trend during the Truman years? Second, how do partisan changes in the White House lead to policy output changes?

To address these questions we focus on "the principal tool of presidential influence . . . the appointing process"¹⁷ and examine the relevant historical record provided by Graham and Kramer.¹⁸ Their valuable work offers plausible answers to both questions. First, Graham and Kramer note that "Truman inherited an inbred and moribund FTC"¹⁹ which he was forced to change, in spite of his interest in the status quo, because of death, resignation, and rejection of a continuation by the U.S. Senate of incumbent Commissioners.²⁰ In essence, then, the answer to the first question appears to be that it was impossible for the trend established during the Roosevelt years to continue. Any further diminution of activity would have meant total inactivity. Therefore the appointment of almost any living person to the FTC by Truman was bound to interject a noticeable amount of energy. In this sense the upswing in FTC activity during the Truman years may be viewed as a natural return to a minimal level of activity that might be expected from a body with the FTC's responsibilities. By appointing commissioners with at least a "modicum of competence,"²¹ Truman slightly revived a comatose commission in which "Roosevelt, by all accounts, lost interest."²²

Furthermore, Truman is responsible for a reform that suggests an answer for the second query. Truman's Reorganization Plan 8 of 1950 provided for the chairmen of the regulatory commissions to be "appointed by the President and serve at his pleasure."²³ Thus, each partisan Presidential transition included in this analysis

was accompanied by a change in the chairmanship of the FTC. The FTC, more than any of the other regulatory commissions, has given general executive powers to its chairman and thereby increased his powers.²⁴ It seems plausible to argue, then, that even though Presidents may not be acutely concerned with the FTC or deceptive practices enforcement, the different orientations of Democratic and Republican Presidents in this regulatory policy area lead them to name different types of chairmen who can then exercise their executive powers to effect policy outputs consistent with partisan preferences.

Implications

This work suggests several potentially profitable lines of research for scholars interested in the Presidency, policy making, and regulation. First, it is clear that the President does have an influence on what the FTC does in deceptive practices enforcement. Other commissions and other areas of policy responsibility could be examined to ascertain whether or not Presidential influence is more broadly manifest.

Of course, broader examinations could also try to assess the relative impact of other actors in the policy process vis-a-vis the President. Those who subscribe to Seidman's position that "these commissions have been transformed into arms of Congress"²⁵ would certainly expect some impact from that branch of government. A comparison of Presidential and Congressional influences could add to the literature which seeks to ascertain whether the President or Congress is "closer" to these "independent" commissions.²⁶

Likewise, those who see the intended subjects of regulation as "owning," unduly influencing, co-opting, or "capturing" the regulatory commissions²⁷ might seek to measure group impact on regulatory policy vis-a-vis the President's. This could lead to a more explicit description of how interest groups work through and influence Presidential policy making on these matters.

In sum, this work suggest that Presidential scholars might be well advised to seek patterns and changes in policy out-

puts as indicators of Presidential effect. By examining policy outputs over time, as is done here with official deceptive practice complaints, the actions of individual Presidents can be placed in context, and important forces, such as partisanship, will emerge as explanatory variables. Even when such broad explanations are not possible, tracking policy outputs over time could alert scholars to important changes which occurred and focus efforts for those seeking to explain the historical import of particular Presidents.

Notes

1. David M. Welborn, "Presidents, Regulatory Commissioners and Regulatory Policy," *Journal of Public Law*, Vol. 15, No. 1, 1966, p. 3; Grant McConnell, *Private Power and American Democracy*. New York: Vintage Books, 1966, p. 289.
2. Marver H. Bernstein, *Regulating Business by Independent Commission*. Princeton: Princeton University Press, 1955, pp. 109-113; Emmette S. Redford, "The President and Regulatory Commissions," *Texas Law Review*, Vol. 44, 1965, pp. 288-321.
3. Louis M. Kohlmeier, Jr., *The Regulators*. New York: Harper & Row, 1969, p. 46.
4. Bernstein, *op. cit.*, p. 131.
5. Kohlmeier, *op. cit.*, p. 36.
6. David M. Welborn, *Governance of Federal Regulatory Agencies*. Knoxville: University of Tennessee Press, 1977, p. 73.
7. Dorothy Cohen, "The Federal Trade Commission and the Regulation of Advertising in the Consumer Interest," *Journal of Marketing*, Vol. 33, January, 1969, p. 40.
8. *FTC v. Raladam Company*, 51 S. Ct. 597 (1931).
9. Emphasis added. For a brief account of the legislative politics of Wheeler-Lea, see Alan Stone, "The FTC and Advertising Regulation: An Examination of Agency Failure," *Public Policy*, Vol. XXI, Spring, 1973, pp. 203-234.
10. *Pep Boys—Manny, Moe and Jack, Inc. v. FTC*, 122 F. 2d 158 (1941)
11. The primacy of the issuance of an official complaint as an enforcement tool ended with the passage of the Magnuson-Moss Act (PL 93-637) which President Ford signed into law in January, 1975. This Act directed the FTC to engage in more rule-making than had previously been the case, deemphasizing official complaints as an enforcement tool.
12. *Supra*, fn. 6.
13. Mark V. Nadel, *The Politics of Consumer Protection*. Indianapolis: Bobbs-Merrill, 1971, p. 27.
14. Stone, *op. cit.*, p. 221.
15. A simple bivariate regression of number of official complaints over time indicates an average decline of 3.13 complaints per year ($r^2 = .20$) over this span. However, this figure obviously masks the surges and declines apparent in a visual examination of the data points and does not reveal the full richness of the data.
16. The trend lines are estimated using multiple interrupted time series analysis as demonstrated by Michael S. Lewis-Beck and John R. Alford, "Can Government Regulate Safety? The Coal Mine Example," *American Political Science Review*, Vol. 74, September, 1980, pp. 745-756. The equation, available from the authors, explains 73 percent of the variance, and the Durbin-Watson statistic (1.90) reveals no significant autocorrelation problem.
17. Bernstein, *op. cit.*, p. 109.
18. James M. Graham and Victor H. Kramer, *Appointments to the Regulatory Agencies: The Federal Communications Commission and the Federal Trade Commission (1949-1974)*. Committee on Commerce, 94th Cong., 2nd Sess., April, 1976.
19. *Ibid.*, p. 3
20. *Ibid.*, p. 3-4.
21. *Ibid.*, p. 5.
22. *Ibid.*, p. 2.
23. *Ibid.*, p. 10.
24. Welborn, *Governance, op. cit.*, pp. 21-22.
25. Harold Seidman, *Politics, Position and Power*, 3rd ed., New York: Oxford University Press, 1980, p. 259.
26. For an argument regarding Presidential influence see Joseph Stewart, Jr., James E. Anderson and Zona Taylor, "Presidential and Congressional Support for Independent Regulatory Commissions: Implications of the Budgetary Process," *Western Political Quarterly*, Vol. XXV, September, 1982, forthcoming.
27. For example, see Edward F. Cox, Robert C. Fellmeth, and John E. Schulz, *The Nader Report on the Federal Trade Commission*. New York: R. W. Baron, 1969; Fellmeth, *The Interstate Commerce Omission*. New York: Grossman, 1970; Mark J. Green, ed., *The Monopoly Makers*. New York: Grossman, 1973; Green with Beverly C. Moore, Jr. and Bruce Wasserstein, *The Closed Enterprise System*. Washington, D.C.: Center for the Study of Responsive Law, 1972; and Kohlmeier, *op. cit.*