THE POLITICS OF FEDERAL REGULATION
OF NATURAL GAS PRODUCERS
1938-1968

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This study attempts to show that judicial review of administrative decisions has provided the greatest degree of protection for consumers during the time that natural gas has been subject to regulation by the Federal Power Commission. The first part of the investigation deals with the activities of the regulatory agency since controls were established in 1938. It continues with a discussion of the influence of consumer and producer interests on the legislative process. The contributions of the courts to policy-making is discussed in the following section. The report concludes that more protection from the political environment could be realized by placing the major responsibility for the regulatory program in the hands of the Executive branch.
The regulation of public utilities by independent agencies has developed as a result of widespread dissatisfaction with attempts to control utility services by other means. Congress outlines the broad policies to be followed and the agencies are authorized to administer the policies on a day-to-day basis. The regulatory commission with its flexibility and its body of nonpartisan experts is considered to be a desirable means for compelling privately-owned utility firms to perform in the public interest.

In 1938 Congress passed the Natural Gas Act, which declared that the business of transporting and selling gas in interstate commerce is "affected with a public interest," and established a program of utility-type regulation for the industry. The statute charged the Federal Power Commission with determining the "just and reasonable" rates for natural gas, based on the costs of developing gas resources. Standards of service were established and entry was controlled by requiring companies seeking to construct and operate interstate facilities to secure a certificate of "public convenience and necessity" from the regulating agency.
The delegation of the Federal Power Commission of what could amount to life or death authority over the natural gas industry has led business groups to exert political pressure on the legislature and Executive officers to secure the appointment of commissioners who are sympathetic to their goals and to obtain legislation on regulatory procedure that is advantageous to their economic position. Consumer groups have found themselves at a disadvantage in attempting to compete with economic-oriented interests in their efforts to secure representation in the policy-making process though ostensibly these interests are in keeping of the Commission. They have appealed to Congress and to the regulatory agency itself and finally to the courts.

The Supreme Court gave notice in 1944 in the Hope Natural Gas decision that it would limit its interest in utility pricing and performance to consideration of the end result of regulation, not the process itself, but the courts stand ready to strike down Commission action under specific circumstances. This study will attempt to show that judicial review of administrative decisions has provided the greatest degree of protection for consumer interest during the time that natural gas has been subject to regulation by the Federal Power Commission and the courts have made more important contributions to the cause of reform of the
regulatory program than Congress or other branches of the government.

Chapter I of the study attempts to establish the background of the regulatory program in the Federal Power Commission. Chapter II continues with a discussion of Congressional action affecting the controls over the natural gas industry. Chapter III examines the restrictions on regulatory authority provided by the courts. Finally, Chapter IV includes some observations on utility problems and on the prospects for changes in the future.
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CHAPTER I

THE FEDERAL POWER COMMISSION

Early Regulation

An examination of the natural gas industry may aid in the approach to an understanding of what was at stake in the battle between producer and consumer groups in the regulatory agency. Gas was originally produced only as a by-product of oil but by the early 1950's the industry ranked among the ten largest in the entire country. Most of the nation's production is concentrated in seven states. Producing states such as Texas, Louisiana, Oklahoma, Kansas, Mississippi, Arkansas, and New Mexico supply gas to millions of residential consumers and other users.

Providing gas for the consumer involves several steps. The first step is production or gathering in which gas is drawn from the earth and gathered by a network of field pipes and processed. This is followed by transporting and distributing. Interstate pipeline companies buy gas from producers and transport it to consumer states where they sell it to local distributing companies for resale and ultimate public consumption. Some pipeline companies are also involved in the production of natural gas which they transport themselves or
sell to other pipelines. The dominant position in the industry is occupied by independent producers, that is, producers not linked to pipeline companies. Many of the firms are in the hands of large oil companies that produce gas in connection with oil or from separate gas wells.

The controversy between consumers and producers over federal regulation of natural gas concerned pipeline companies and also independent producers. Under the provisions of the Natural Gas Act the production of natural gas is exempt from regulation, as is local distribution.\(^1\) Production as well as local distribution of gas is subject to regulation under state law. The method of regulation of local distribution of gas was for the state or local service commissions to set the maximum price that the distributors could charge consumers. The standard used in the utility regulation was cost of service plus a fair return on capital investment. The regulatory agencies, however, had found that they were unable to set fair prices so long as the wholesale rates charged by the interstate pipelines were not controlled.\(^2\)

Beginning about 1940, the Federal Power Commission (FPC) undertook the regulation of interstate pipelines sales to

\(^1\)U.S. Code, XV Section 717(b) (1952).
\(^2\)Congressional Record, LXXXI (1937), 9313.
distributing companies. In regulating pipelines that owned producing property the Commission lumped the company's producing property together with its transmission property into a single rate base and allowed the pipeline to charge rates that would yield a fair return on their total property. The prices paid at the wellhead to independent producers were not regulated. The question of Commission jurisdiction over independent's sales to interstate pipelines arose frequently because of ambiguities in the wording of the Natural Gas Act, but in the beginning the agency did not attempt to regulate the independent producers on the assumption that they were meant to be included under the provisions of the Natural Gas Act calling for the exemption of "production and gathering" of natural gas from federal controls.  

Columbian Fuel Corporation Case

In 1940 the FPC faced up to the question of regulation of the independent producers for the first time in the Columbian case. With one Commissioner dissenting, the FPC decided it had no jurisdiction over producers of natural gas not otherwise engaged in interstate distribution. The legislative history of the Act convinced the majority of the Commissioners that Congress had intended to regulate only the

3 U.S. Code, XV Section 717(b) (1952).
4 Columbian Fuel Corp., 2 F.P.C. 200 (1940).
interstate pipelines and their sales for resale to local
distributing companies. But the majority qualified this,
saying that a change in their attitude might be called for
if the future showed that the independent producers were
"able to maintain an unreasonable price despite the appear-
ance of competition."\textsuperscript{5}

The Commission's ruling alarmed the industry and both
the independent producers and the pipelines sought congres-
sional amendment of the Natural Gas Act to limit the Com-
mmission's jurisdiction over sales. From 1947 to 1949, how-
ever, the producer's proposal was blocked in Congress.\textsuperscript{6} In
the meantime the question became a legal issue.

\textbf{Interstate Case}

In 1943 the FPC attempted to assert its jurisdiction
over sales of natural gas by one interstate pipeline to
another interstate pipeline within the producing state. The
regulatory agency based its decision on grounds that the sale
it sought to regulate was made by an interstate pipeline and
therefore subject to its jurisdiction under the Natural Gas
Act. The Interstate Natural Gas Company, on the other hand,
contended that the sale was not in interstate commerce and
also was "production and gathering" outside FPC jurisdiction

\textsuperscript{5}Ibid., p. 208.

\textsuperscript{6}H.R. 4051, 80th Cong., 1st Sess. (1947).
under the statute. On June 16, 1947 the Supreme Court upheld the Commission's ruling in language which seemed to say that all sales in interstate commerce for resale were subject to commission jurisdiction.

The FPC, however, was not willing to give as broad an interpretation to the law as was the Court. On August 7, 1947 the Commission issued Order No. 139 for the purpose of expelling any doubts regarding its future position on exempting independent producers from regulation. The FPC announced that it would not attempt to regulate sales of natural gas by an independent producer to a pipeline for movement in interstate commerce. The Commission explained that its rule was necessary because the previous Congress had not enacted legislation exempting independent producers from the provisions of the Natural Gas Act.

The Truman Commission

Shortly after its administrative order was issued the position of the FPC began to shift, as its membership changed, in favor of regulating the independent producers. One member resigned and this left a four man Commission evenly divided with Chairman Nelson Lee Smith and Commissioner Harrington

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7 *Interstate Natural Gas Co.*, 3 F.P.C. 416, 420 (1943).
9 FPC Order No. 139, *Federal Register*, XII (August, 1947), 5585.
Wimberly supporting producers and Commissioners Claude Draper and Leland Olds opposed. President Harry S. Truman's appointment of a man to fill the vacancy on the Commission became of crucial importance in the controversy over regulation of the nontransporting companies. It appears that Truman's attitude toward regulation was not unequivocal. He had close ties with producer state legislators who were prominent in the Democratic party, but he drew most of his support from urban and labor groups that sided with consumers.10

In 1947 Truman selected Burton N. Behling for the place on the Commission and sent his name to the Senate. No action was taken on the nomination and under pressure from consumer interests who had learned that the nominee would support the pro-industry group on the Commission, the President finally withdrew the nomination. Instead Truman nominated Thomas Buchanan. His nomination in turn was held up almost a year in the Senate because of opposition from producers. Following his confirmation their expectations were borne out and Buchanan sided with the pro-consumer group in a three to two margin against the industry.11

The victory of consumer groups in the Commission stirred producer interests to renew their efforts in the legislature.

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11 Congressional Quarterly, VI (1950), 599.
Legislation exempting producers from controls, introduced in the Eighty-first Congress by producer state representatives, was opposed by the consumer-minded members of the FPC. On August 5, 1949 the House passed a decontrol bill sponsored by Oren Harris of Arkansas but no further action was taken on it before Congress adjourned.\textsuperscript{12} A subcommittee of the Interstate and Foreign Commerce Committee, with Lyndon Johnson as chairman, held hearings in June, 1949 on the Senate version of the Harris bill which was introduced by Senator Robert Kerr of Oklahoma, a wealthy oil and gas operator.\textsuperscript{13} Commissioner Leland Olds opposed the bill and he mobilized the press to attack the pending legislation while it was being considered quietly in the Committee.\textsuperscript{14}

The Commissioner came out against the Kerr bill shortly before his term of office expired and oil and gas interests attempted to block President Truman's reappointment of Olds for a third term on the Commission. Olds had served on the Commission since the time of the Roosevelt Administration, part of that time as its chairman. When the controversy arose he did not favor regulation of the independent's prices. But he changed his mind following the Supreme Court's

\begin{itemize}
  \item \textsuperscript{12}H.R. 1758, 81st Cong., 1st Sess. (1949).
  \item \textsuperscript{13}S. 1498, 81st Cong., 1st Sess. (1950).
  \item \textsuperscript{14}Edith Carper, \textit{Lobbying and the Natural Gas Bill} (University of Alabama, 1962), p. 6.
\end{itemize}
ruling in the Interstate case, and became an outspoken proponent for regulating the producers.\textsuperscript{15}

While Old's nomination was before the Senate Interstate and Foreign Commerce Committee, President Truman wrote to the Chairman urging confirmation. Despite the President's intervention the Committee's vote was two for and ten against the nomination, and a subcommittee chaired by Senator Lyndon Johnson voted unanimously to reject it.\textsuperscript{16} Truman persisted and took the unprecedented step of attempting to make the Olds case a matter of Democratic party loyalty. The President instructed the Chairman of the Democratic National Committee to send telegrams to all state chairmen to try to influence their Senators to vote for confirmation.\textsuperscript{17} The President's efforts failed. Democratic Senators from producing states joined with Republicans in turning down the nomination by an overwhelming vote of fifty-three to fifteen.\textsuperscript{18} Truman was forced to select another nominee for the position.

Seemingly the President abandoned his efforts in behalf of consumers. He named former Senator Mon C. Wallgren of Washington to the post. A political choice with no experience

\begin{itemize}
\item \textsuperscript{15}Congressional Record, XCV (1949), 14382.
\item \textsuperscript{16}Ibid., p. 14370.
\item \textsuperscript{17}Ibid., pp. 14121-22.
\item \textsuperscript{18}Ibid., p. 14386.
\end{itemize}
in utility regulation, he was easily confirmed by the Senate by a vote of forty-seven to twelve on October 19, 1949.19

The following year the Kerr bill succeeded in passing both the Senate and House by narrow margins but on April 15, 1950, President Truman vetoed the bill on grounds that regulation of the independent producers was in the public interest, "because of the inherent characteristics of the process of moving gas from the field to the consumer."20

In rejecting the bill the President relied on the advice of three members of the FPC. In July, 1950 the agency withdrew its 1947 Order that had denied its power to regulate the independent producers. The action of the Commission was agreed upon by all its members. The Order itself was signed by members Wallgren, Buchanan and Draper, who issued a statement that they acted on the basis of Truman's veto of the Kerr bill. Commissioners Wimberly and Smith explained that they went along with the majority of the Commission only because the Order "does not accurately reflect the interpretation placed by the majority on the Natural Gas Act."21

The administrative order became a dead issue, however, when the agency decided to rule on the Phillips case which had been under investigation since October 28, 1943.

19 Ibid., p. 14992.
21 Federal Register, XV (July, 1950), 4633.
The Phillips Case

The investigation of Phillips' rates grew out of a complaint by the city of Detroit which was served with gas by the Michigan Wisconsin Pipeline Company. The pipeline company obtained its gas from Phillips and passed along rate hikes which the city claimed were excessive. The Public Service Commission of Wisconsin also intervened in the case in behalf of consumers. Three producing states intervened on the side of the company. The FPC announced that the purpose of the investigation was to determine whether Phillips operations made the company subject to regulation and whether the prices charged were unreasonable. The case gave promise that it would go a long way toward clarifying Commission jurisdiction over the producers. Phillips, a large integrated oil company, produced more gas for sale to interstate pipelines than any other independent producer. On August 16, 1951 the Commission held that Phillips' sales "though technically consumated in interstate commerce" were made during the course of "production and gathering", hence, they were exempt from regulation under the Natural Gas Act.22

Two Commissioners had changed their minds with respect to federal regulation of the independent producers since Truman's veto of the Kerr bill with the result that Buchanan was the lone dissenting member in the Phillips decision.

Chairman Wallgren who held the balance of power on the Commission shifted his position. He was joined by Commissioner Draper.

A member of the Commission friendly to the industry viewpoint from the time of his selection was Harrington Wimberley. An Oklahoma publisher and politician known as Senator Kerr's man on the Commission, he had served as Kerr's campaign manager and was rewarded with an appointment to the regulatory commission in 1945. When questioned by the press about a possible conflict of interest he was quoted as saying "I don't know whether I am Senator Kerr's man or whether he's my man, I do know I am for Bob Kerr first last and all the time."\(^2^3\)

Producer interests had gained in the administrative agency the victory that had been denied to them when Truman vetoed the Kerr bill. The ruling in the Phillips decision was not inconsistent with the policy established by the Commission in its first encounter with the problem of regulating the independent producers. This led Commissioner Buchanan to assert, in his dissenting opinion, that "the Commission has made the full circuit to the Columbian Fuel decision."\(^2^4\)

Consumer groups sought relief from the Commission's adverse ruling in the courts. Several petitions for review of


the *Phillips* case were filed in the U.S. Court of Appeals for the District of Columbia. On May 22, 1953, the Circuit Court handed down a decision which reversed the agency's ruling and held that the FPC must take jurisdiction over the company's rates even though Phillips was an independent gas producer and not an interstate pipeline company. The Supreme Court, on June 7, 1954, upheld the lower court's decision. The Court was in its usual position of giving a broader interpretation to the Natural Gas Act than the agency.

Beginning in July, 1954, the FPC issued a series of Orders which required independent producers to file certificates of public convenience and necessity, froze prices in contracts between pipelines and producers at levels of June 7, 1954, and prohibited producers from entering into new agreements for the delivery of gas or from discontinuing service to interstate pipelines without prior FPC approval. Because of the Court's ruling, on November 27, 1954, the agency also reinstituted its investigation of Phillips' rates.

The Eisenhower Commission

Following the Appeals Court's ruling in the *Phillips* case, industry groups renewed their efforts to influence

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appointments to the Commission and enact amendatory legislation that would bring about decontrol. The election of a Republican to the Presidency had raised their hopes earlier, since the party traditionally opposed government regulation of business. They believed they were in a better position to appeal to the Executive branch for support in the legislature and the FPC than they had been during previous administrations.28

After he took office President Eisenhower undertook to restructure the Commission. Acting Chairman Thomas Buchanan was serving under a recess appointment on the FPC. This enabled the President to replace the consumer-minded Democrat with a Republican to create an administrative majority. Buchanan's name was withdrawn and the President appointed Jerome Kuykendall to the post; a lawyer who had represented utilities in rate cases, he had also served for a short period as the Public Service Commissioner for the state of Washington. Seaborn L. Digby was also selected. Digby, an "Eisenhower Democrat" who had been Conservation Commissioner of Louisiana before his appointment to the federal agency, was subsequently labeled one of the "firmest advocates of nonregulation" on the Commission by the oil and gas forces. Later he was replaced by John Hussey, who had succeeded Digby

28 Oil and Gas Journal, LI (November 10, 1952), 68.
on the state commission and who was also considered a stanch defender of producer interests.29

Under Kuykendall's Chairmanship four of the five members of the Commission supported decontrol legislation introduced in the House on March 2, 1955.30 Former Commissioner Buchanan appeared before congressional committees and argued against the bill. Claude Draper, a liberal Republican who had served on the Commission since 1930, was the only member who opposed the pending legislation.31 The gas bill passed the House in 1955 and the Senate in 1956. It was vetoed by President Eisenhower February 17, 1956. Even though the President favored the basic objectives of the so-called Harris-Fulbright bill, he indicated that he felt compelled to veto it because of the "arrogant" lobbying efforts in behalf of its passage by representatives of the industry.32

Kuykendall laid the groundwork for new exemption legislation introduced in the House by Representatives Oren Harris and Joseph P. O'Hara on April 10, 1957.33 His efforts to gain the support of different factions of the industry,

30Congressional Record, CI (1955), 2352.
32Congressional Record, CII (1956), 4756.
producers, pipelines and the like, for amendatory legis-
lation led Congressman Torbert McDonald of Massachusetts to
inquire about his reliance on the industry viewpoint and his
responsibility for consulting consumer groups during the
hearings on the bill. Later at the hearings for his renomi-
nation to the Commission Kuykendall defended this action:

It has been insinuated here that I would be unable to
protect the public interest or would not do it because
I talked with some people in industry, but did not talk
with some consumers' groups. . . . But it would not
have been of any value for me to consult with these
groups that Mr. McDonald says I should have consulted,
because I knew very well what their position was. They
didn't want any change in the law. They disagreed with
the House Commerce Committee. They disagreed with the
House of Representatives. They disagreed with the Sen-
ate. They disagreed with the Federal Power Commission.
They have a perfect right to do that. And they may do
that. But there would be no point in talking to these
people for the simple reason that they would not con-
tribute anything to drafting a bill because they didn't
want a bill.34

Once again lobbying activities by the industry became an issue
and the natural gas bill died in the Eighty-fifth Congress.

Because of his partisan attitude, consumer groups
attempted to block Kuykendall's reappointment to the FPC.
They were not as successful in this as their opponents had
been in the case of Leland Olds. Kuykendall was reappointed
May 1, 1957 for a five-year term. The Senate Interstate and
Foreign Commerce Committee held hearings on the appointment

34 Senate, Hearings Before the Committee on Interstate
and Foreign Commerce on the nomination of Jerome N. Kuykendall,
in June and July and approved it July 25. In spite of the vigorous opposition of consumer-minded members, the Senate confirmed his appointment on August 15, by a vote of fifty to twenty-five two months after his first term had expired.\(^{35}\)

After his reappointment, Kuykendall took the lead in 1958 in urging Congress to pass legislation to reverse the effects of the *Memphis* decision, handed down by an appeals court in 1957,\(^{36}\) which had alarmed the industry. In that case the court held that proposals by interstate pipelines for rate increases must have full Commission hearings unless there was a specific contract authorizing such increases from all customers. The gas companies feared being forced to make refunds which would have been passed on to consumers for increases that had not been approved by the Commission. In its annual message to Congress the FPC supported the industry and while they waited for the Supreme Court to review the case the Commissioners did not take steps to force the pipelines to comply with the lower court's mandate.\(^{37}\) Later that year the Supreme Court reversed the decision of the lower court and the agency returned to its earlier practice of allowing pipelines to file increases that would automatically take

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\(^{35}\) *Congressional Record*, CIII (1957), 14886.

\(^{36}\) *Memphis Light, Gas and Water Division v. FPC*, 250 F. 2d 402 (1957).

\(^{37}\) *Oil and Gas Journal*, LVI (January 13, 1958), 52.
effect though they were subject to review by the agency and possible refunds.

William Connole, a former general counsel for the Connecticut Public Utility Commission, appointed by President Eisenhower in 1955, was the only member of the FPC who advocated action by the agency in behalf of consumers. He frequently dissented from the majority viewpoint during this period and he was the lone dissenting member of the Commission in the so-called CATCO case. Later his position was vindicated by the Supreme Court. On petition of the New York Public Service Commission the Court intervened to prevent the Commission from granting an initial price to a pipeline that was substantially higher than the going price for gas in the area. The Court noted that the initial price would become the basis for future contracts in the area and it laid down policy guidelines for an "in line" pricing doctrine under which the Commission would not certify a sale under the Natural Gas Act unless its price was no higher than the previous prevailing price for uncommitted reserves in the area.38 Some interim method for regulating producers' prices was necessary. Since the Supreme Court's ruling in the Phillips case the Commission had made little, if any, progress

on producer regulation in spite of Connole's urging that a comprehensive program of regulation be established. 39

When his term of office expired on June 22, 1960, reappointment was denied to Connole in spite of the support of influential backers in the legislature and the academic community. President Eisenhower described the Commissioner as being too partisan in favor of consumers and said, "I think I can get a better man, that's all." 40 Thomas J. Donegan, a former FBI agent and member of the Subversive Activities Board, was named to replace Connole. Paul A. Sweeney, a government attorney, was also selected to fill the unexpired term of the late John B. Hussey. Neither of the men had any experience in public utility regulation. Donegan caused a furor in the Senate when he was questioned about his background and said to a reporter for the New York Times, "I've never had anything to do with utilities outside of paying my own gas bill." 41 Consumer-oriented legislators strongly opposed the nominations both of which died the following year in the Senate Interstate and Foreign Commerce Committee.

In making the appointments, President Eisenhower made it clear that he deliberately chose men who had no experience

39 Oil and Gas Journal, LVI (June 2, 1958), 70.
40 Congressional Record, CVI (1960), 9370.
41 Ibid., p. 9367.
with the industry or knowledge of the problems involved in the regulation of natural gas. He departed from his earlier practice of selecting men who had served on regulatory commissions at the state level. James C. Hagerty, the President's Press Secretary, explained that the President had concluded that members should be representative of all sections of the United States, and not one segment of the economy.⁴²

Even though the Commission was faced with a tremendous increase in its case load because of the Court's decision in the Phillips case, the Commissioners avoided taking steps to arrive at a formula for regulating the independent producers. Following the death of Commissioner Hussey, the Democrats had no representation on the Commission, and President Eisenhower was in a strong position to influence policy making. The President favored legislation freeing producers from federal controls, however, above all other methods for dealing with the problems of the agency. He expected that the initiative for securing the passage of such legislation would come from Congress and industry groups, but in the face of Eisenhower's veto of the Harris-Fulbright bill and their earlier failures to secure the passage of amendatory legislation, Congress and industry representatives became reluctant to take action. The Commission took its cue from these

⁴²Oil and Gas Journal, LVIII (May 9, 1960), 97.
groups and did not attempt to implement policy to carry out the mandate of the Court. In the meantime cases piled up in the FPC. During this period charges were made openly that the Commission could not adequately perform its duties and some other method of regulation would have to be established.43

On September 28, 1960 the Commission took steps which gave promise of aiding in clearing up some of the backlog of cases when it issued its decision in the twelve-year-old Phillips case. By this time more than rates were involved in the case. Policies to be followed by the FPC in regulating the independents were also at issue. The Commission agreed to let Phillips' proposed rates stand and announced that it would commence proceedings leading to the regulation of rates on an area or group basis rather than an individual company-by-company basis.44 No effort was made to implement the policy, however, during the Eisenhower administration.

Area Rates

In the last months of the Eisenhower Administration the FPC had reached the conclusion that the individual company-by-company method was not workable for regulating independent gas producers. The Commission noted that even with an

43 Congressional Record, CWI (1960), 9369.
increased staff, thirteen years would be required to dispose of the more than 2,000 producer rate cases pending on July 1, 1960.  

In its efforts to circumvent the administrative difficulty of dealing with producers on an individual basis, the FPC set up twenty-three producing areas and attempted to formulate guidelines for setting rates on an area basis. The Commissioners decided that there would be two price guides for each producing area, one price for new sales and the other for existing contracts. Prices on new sales would not be accepted if they did not conform to the area price for new gas. The traditional utility approach to regulation of rates would be abandoned and costs would be only a part of the criteria used for determining prices.  

Under utility-type regulation, which was the method used by the states to regulate the local distributing companies, and by the FPC to regulate prices charged by the interstate pipelines, the regulatory commissions determined each company's costs and capital, and allowed a fixed amount for return on capital, and set rates on that basis. The producers had argued that this was not a fair method because of the costs of exploration and other risk factors involved in their operations.

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46 Ibid., p. 547.
The Commission's decision in *Phillips* was affirmed in part by a court of appeals in 1961,\(^4\) and in 1963 the Supreme Court gave tacit approval to the move by the FPC to set area rates.\(^4\)

**Kennedy-Johnson Commission**

In contrast to the previous administration, the executive branch sided with advocates of regulation following the 1960 elections. John F. Kennedy was a member of the liberal Democratic faction that opposed decontrol bills such as the Harris-Fulbright bill during the time he served in the Senate.\(^4\)! From the beginning of his term of office Kennedy sought to overhaul the regulatory programs and make them more effective. On November 10, 1960 he named James Landis, a former Harvard Law School Dean who had been associated with several regulatory groups, as special assistant to affect reform in the regulatory commissions.

In a report issued in December, Dean Landis was critical of most of the regulatory agencies. He criticized their lack of established policy, their slowness to act, and their tendency to be dominated by their client groups. He was especially critical of the FPC. "The Federal Power Commission


\(^4\) *Congressional Quarterly*, XVI (1960), 839.
without question," he said, "represents the outstanding example in the federal government of the breakdown of the administrative process." Landis argued that the Commission had failed to fulfill its statutory obligations, and had sought to ignore the mandates of the courts with respect to decisions affecting natural gas regulation. He maintained that the backlog of cases stemmed largely from the agency's inaction, its attitude, and its failure to use existing powers to speed the disposition of cases.

During the 1961 session, President Kennedy sent the names of three FPC nominees to the Senate and selected a new Chairman. In January, 1960 he had named Joseph Swidler to the Commission and on September 1, 1961 he became Chairman. Jerome Kuykendall relinquished his post as Chairman and served as a member of the Commission until June, 1962. A former attorney for the Tennessee Valley Authority, Swidler occupied the post left vacant when the term of William Conole expired and the Senate failed to confirm the nomination of Thomas Donegan. Howard Morgan was confirmed June 13. He had served for two years as the Utility Commissioner of Oregon. Charles Ross, a native of Vermont, was named to the Commission in September, 1961.

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51 Ibid.
The newly appointed Commissioners were of the opinion that regulation was necessary in order to protect the public interest. It was only by means of the regulation of natural gas producers' sales to pipelines that consumers would be protected. "Without regulation, consumers would be defenseless," Chairman Swidler argued, "and principal competition between producers would be a race to see which company would be first to set new price peaks." The majority opposed any suggestion that legislation should be passed freeing producers from direct controls.

Also in 1961 Kennedy appointed Lawrence J. O'Connor to the Commission. A former official in a Houston firm which operated oil and gas properties, he was opposed by representatives of consumer states. Senator William Proxmire held the Senate floor for most of three days in a vain attempt to block his nomination. He labeled O'Connor a captive of the oil and gas industry because of his background. In spite of the opposition of the Wisconsin Democrat, the Senate confirmed the nomination on August 9 by a vote of eighty-three to twelve. The most conservative member of the Commission, O'Connor opposed expansion of FPC power in some areas but on major policy issues he usually voted with the majority.

52 Oil and Gas Journal, LXII (September 28, 1964), 40.
53 Congressional Quarterly, XVII (1961), 944.
Clearing its docket was given the highest priority by the agency's entire membership. The Chairman subscribed to the views expressed in the Landis report, and he affirmed that his strongest agreement was with the stress on the need for speeding the Commission's disposal of cases. The Commissioners made a strong effort to clarify and simplify procedures in order to trim the backlog of cases. During the early 1960's pipeline certificate and producer certificate backlogs were eliminated. In a number of these cases the FPC disallowed rate increases put into effect by the pipelines and ordered refunds to be made to consumers.

The FPC attempted to expand its jurisdiction into areas not covered by the Natural Gas Act in order to close gaps which handicapped the agency in its regulatory efforts. In 1961 the agency ruled that intrastate sales of gas or other sales outside its jurisdiction when commingled with the gas of an interstate pipeline were subject to FPC control. Natural gas lease sales were held to be gas in interstate commerce under Commission jurisdiction, despite previous rulings to the contrary.

54Oil and Gas Journal, LIX (February 6, 1961), 80.
55Congressional Quarterly, XXI (1965), 894.
The high point of Chairman Joseph Swidler's career on the Commission occurred on August 5, 1965 when the agency issued for the first time maximum rates for sales in interstate commerce of gas produced in a major gas producing area. Rates were set for gas in the Permian Basin of West Texas and New Mexico which would help to set the pattern for all twenty-three producing areas in the nation.

The rate structure established by the Commission provided one area maximum price which producers in the Permian Basin could charge interstate pipelines for gas produced from new natural gas wells. The Commission fixed a lower area maximum price as the rate producers could charge interstate pipelines for all other types of natural gas such as gas from old wells, that is wells whose production was contracted for by distributing companies prior to January 1, 1961. The higher price for new gas was granted, the FPC explained, in order to provide incentives for exploration and the development of new sources of gas.

The Commission based the final maximum rates mainly on studies of the average cost of exploration, depletion, depreciation and other economic data and allowed a twelve percent return on investment for both old and new gas. The rate which was higher than the usual rate allowed to pipeline

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58 Area Rate Proceedings, 34 F.P.C. 159 (1965).
59 Ibid., p. 188.
companies--about twice the rate allowed these firms--was granted on the basis of the greater degree of risk encountered by the producers in their operations. The FPC rejected the argument of producers that it use contract prices or other criteria as the basis of regulation. The August 5 decision was signed by the Chairman and three Commissioners. The fifth Commissioner did not participate in the case.

The ruling in the case was sharply criticized by industry spokesmen. Representatives of these groups had bargained for a uniform rate substantially higher than the rate for new gas regardless of the source of the gas. Industry groups charged that the combined views of the producers had been ignored by the Commission during the decision-making process. They made plans to appeal to the courts, along with public officials from Texas and other states located in the natural gas area, in an effort to overturn the FPC decision.

The ruling on area rates made it clear that the Commissioners believed that it was the responsibility of the agency to provide proceedings for fixing rates for the producers and that the role played by the industry would be a

60 Ibid., p. 190.
61 Oil and Gas Journal, LXIII (September 27, 1965) 13.
secondary one. These proceedings and the FPC's aggressive consumer oriented program of regulation in general brought about frequent clashes between FPC members and spokesmen for the industry. However, the Commission's opponents, along with others who took an interest in the regulatory agency's activities, agreed that tremendous progress had been made during this period.

Commenting on the reverse in the position of the agency since the time of its ruling in the Phillips case, an observer of the administrative process summed up the Commission's work in the following terms:

No longer is the Federal Power Commission the reluctant dragon that, in 1954, futilely argued its lack of jurisdiction over independent producers of natural gas. No longer is the Commission the paunchy and slowfooted governess who, in 1959, had to be remanded for letting her charges get "out of line." Since that time the Commission has rejuvenated its approach, scrapping outmoded procedures and eliminating awesome docket backlogs. . . . The Commission is literally pursuing its regulatory office to the bottom of the wells.62

The evaluation of the regulatory program was in contrast to the assessment made by Landis during the early part of the Kennedy administration.

During the time the area rate case was in process there had been a change in administrations. Shortly after the Permian Basin ruling President Lyndon Johnson undertook a

revamping of the Commission. As a representative of a producing state Johnson had played an important role in the passage of decontrol bills in the legislature and in the defeat of Leland Olds and other advocates of regulation nominated to the Commission. His idea of what a regulatory body should be also differed from the strict consumer-oriented philosophy of the previous administration in that he took the view that Commissioners should limit their activities to those of a referee between conflicting interests. Johnson often stated that regulators should not be partisans for an industry or consumer viewpoint, rather they should be judges.63

When Charles Ross's term expired in June, 1964 he was not renominated and he served nine months without reappointment. The President was aware, however, that consumer interests would make a public issue of the appointment if it was not forthcoming. Ross also had the support of influential Senators from his home state and other consumer states. Finally in March, 1965 he was reappointed and Johnson explained that he had decided that the liberal Republican could be "an impartial judge rather than a narrow consumer advocate."64

63 Oil and Gas Journal, LXIV (September 12, 1966), 73.
64 Congressional Quarterly, XX (1964), 896.
Joseph Swidler was not reappointed to the Commission and Johnson selected a new Chairman in 1966. In September Lee White, former White House Special Counsel who had been named to the Commission in February, became Chairman. White's appointment and his elevation to the Chairmanship did not change the make-up of the majority on the FPC, however. It continued to be three to two in favor of consumers with two Commissioners and the Chairman siding with these groups.

President Johnson's announcement of the reappointment of Carl Bagge in 1967 contrasted with his handling of the Ross appointment. Johnson disclosed his intention to nominate Bagge, a conservative Chicago lawyer eight weeks before the end of his term. He sent the nomination to the Senate on April 28. The Senate Commerce Committee cleared the Commissioner unanimously and without "reservation" on September 26, five months after the President nominated Bagge and two months after his term expired.

Bagge's rather moderate, independent course during his first term on the Commission had a strong appeal for the President and he was not opposed by industry or consumer groups. The appointment had been held up by senatorial courtesy at the request of Senator Everett Dirksen of Illinois. Dirksen had sponsored Bagge when he was first appointed to the Commission in 1964, but he had second thoughts later. His
efforts to block the nomination were due to Bagge's opposition to a bill pushed by Dirksen which would assure regulated gas companies affiliated with other firms of the benefits of a consolidated tax return. The persistence of the President and the support of industry groups and others convinced the minority leader that he should not make a public issue of the matter, and he cleared the way for the Committee to act on the nomination.65

Johnson appointed a majority of the members to the Commission while he served as President, but the concept that members should be judges not partisans did not bring about a radical change in the course of the agency. Chairman Lee J. White said he saw no need for such a change, perhaps in part because his philosophy of regulation did not differ very much from that of Joseph Swidler with whom he had been associated prior to the latter's appointment to the Federal agency.66 Also in a number of cases the FPC had established policy guidelines and procedures and the main task was one of consolidating and putting into effect policy set by the former Commission including the new concept of area rates. Finally, many of the major policy decisions had been affirmed by the courts and these could not be changed.

65 Oil and Gas Journal, LXV (October 2, 1967), 67.
66 Ibid., Vol. LXIV (September 12, 1966), 73.
The Commission's area rate ruling was appealed to the Tenth Circuit court and ultimately to the Supreme Court. In 1967 the lowest court upheld the ruling in principle but returned it to the Commission for reconsideration on other grounds. The Supreme Court granted review petitions in 1967 and the Court sustained the Commission's authority to set area rates on May 1, 1968 some fourteen years after it had first ordered the FPC to regulate producers' prices.

Summary

This section of the study has dealt with the development of the regulatory program and some of the pressures brought to bear on the appointive process. It has been pointed out that interest groups and their spokesmen in Congress have sought to influence the make up and the actions of the Commission. An effort has also been made to examine the role of executive officers in their efforts to shape the regulatory program through their choice of appointees to the Commission. The next section deals with Congress' attempts to revise the Natural Gas Act by means of amendatory legislation.

67 Shelley Oil Co. v. FPC, 375 F. 2d. 6 (1957).
68 Permian Basin Area Rate Cases, 20 L Ed. 2d. 312 (1968).
CHAPTER II

CONGRESSIONAL EFFORTS TO REVISE
THE NATURAL GAS ACT

Early Efforts to Amend the Natural Gas Act

In the battle between producers and consumers of natural gas, special interests focused on the legislature as the political arena which offered the greatest potential for subverting the process whereby their rivals had achieved their goals in some other branch of the government. Economic oriented interests have stirred congressmen to push for amendatory legislation that would nullify an adverse decision in the courts or the FPC. Decontrol bills have been introduced at virtually every session of Congress almost from the time of the passage of the Act. At times spokesmen for these groups in the legislature have attempted to write a "hands off" policy into the Natural Gas Act in anticipation of unfavorable decisions in other political forums.

The Commission's ambiguous language in the Columbian Fuel Corp. decision in 1940 alarmed the independent producers of natural gas even though the agency had denied that its jurisdiction extended over the nontransporting companies.
They were fearful that the Commissioners might change their minds and decide that the independents were subject to their authority. The pipeline companies joined with producers in seeking relief through amendments to the statute.\(^1\) They were angry because the FPC had combined their producing property with their transporting property and set rates on that basis.

Four identical bills were introduced in the first session of the 80th Congress which provided exemption for the independents and also relief for the pipelines. Three of the bills that originated in the House were later replaced by the Rizley bill. Introduced by Representative Ross Rizley (Democrat of Oklahoma) on February 24, 1947, the measure would prevent the Commission from exercising jurisdiction over the independent producers of natural gas and would require the agency to modify the formula used to determine the prices of the interstate firms. Under the provisions of the bill the agency was authorized to count the "fair field price" of gas as the basis of rate-making rather than base rates on a fair return on the value of the property.\(^2\)

Rizley's home state was a leading producer of natural gas and his Oklahoma law firm has had oil and gas clients

\(^1\)"Federal Price Control of Natural Gas Sold to Interstate Pipelines," *Yale Law Journal*, LIX (December, 1950), 1479.

\(^2\)*H.R. 4051, 80th Cong., 1st Sess. (1947).*
including Cities Service and Panhandle Eastern Pipeline Companies. Senator E. H. Moore, co-sponsor of the bill, was a wealthy Oklahoma oil operator.³

The House passed the Rizley bill on July 11, 1947 over the protests of consumer-minded members who argued that it would cost these groups many millions of dollars in increased gas rates.⁴ However, later that month the Senate Interstate and Foreign Commerce Committee voted six to five not to report the measure.⁵

The failure of the Rizley bill to pass the legislature was compounded by the Supreme Court’s ruling in the Interstate case. Following that decision three trade associations, the Independent Natural Gas Association of America, the Independent Petroleum Association of America, and the Mid-Continent Oil and Gas Association, issued a joint statement warning that shortages of natural gas and higher prices would result from expanded regulatory authority.⁶ Spokesmen for these groups appealed to Congress to renew its efforts to clarify the Natural Gas Act with respect to Commission jurisdiction over the independent producers. They told a

⁴Congressional Record XCIII (1947), 8751.
⁵Congressional Quarterly, VI (1950), 599.
⁶Oil and Gas Journal, XLVII (April 14, 1949) 80.
subcommittee of the House Interstate and Foreign Commerce Committee chaired by Oren Harris of Arkansas that they had no confidence in the assurance of the Commission that the agency would not assert its authority over the non-transporting companies.\(^7\)

Congressman Harris and John Lyle of Texas introduced similar exemption bills in the Eighty-first Congress.\(^8\) These measures did not include the pipeline provisions of the earlier bill; they were concerned solely with exemption for producers. The bills were assigned to the subcommittee of the Interstate and Foreign Commerce Committee chaired by Harris. A number of oil and gas state delegates were members of the legislative committees that had jurisdiction over the regulatory agency. An effort was made by Sam Rayburn of Texas, the Speaker of the House, and other congressional leaders to reserve membership on key committees to lawmakers who were friendly to the industry.\(^9\)

The subcommittee held hearings on the gas bill in April. The three consumer-oriented members of the Commission opposed the legislation before the Committee on grounds that the amendments would probably increase prices and that they would

\(^7\)Ibid.


hamper the work of the Commission and would benefit mainly large firms.10

Despite opposition from a majority of the Commissioners the Committee approved the bill sponsored by Congressman Harris by a vote of fourteen to seven and reported it on July 28.11 The Committee's report was accompanied by the majority view approving the bill and a number of separate dissenting opinions. The majority held that regulation of the prices of the independent producers was unnecessary at this time but they stated that the future could bring changes since the Committee was studying the entire field of petroleum policy for the purpose of making recommendations for a national fuel policy.12

Six Democrats on the Committee who represented consumer states submitted a dissenting report in which they maintained, along with the Commission majority, that the bill would nullify the agency's authority and bring about an increase in the price of gas. A substitute for the broader Committee bill was offered which would have exempted from Commission jurisdiction only those gas producers whose total sales did not exceed two billion feet annually.


11 Ibid.

12 Congressional Quarterly V (1949) 18-19.
According to its sponsor this bill had the approval of the majority of the Commissioners. The bill to exempt only small producers also had the support of the Administration; a spokesman for the White House had informed the Committee that the Harris' bill was not in accord with President Harry S. Truman's legislative program.\(^{13}\)

John Heselten (Democrat of Massachusetts) submitted an additional report in which he objected to the Harris bill as "peacemeal legislation" in view of the fact that the majority report had stated that they were interested in formulating a national fuel policy. Enactment of the measure, he contended, without attempting to determine its effects upon other phases of fuel resources was "unrealistic. For it might well carry with it very serious results so far as an overall public interests may be concerned in such a fuel policy."\(^{14}\)

Congressman Lyle led the debate on the Harris bill in the House which began August 4. According to the Texas Representative the issue was simple: "Should Congress or the administrative and judicial branches of government write the laws?" Lyle's argument that it was not proper for Congress to leave to the other branches the powers to determine policy was supported by Sam Rayburn who relinquished the

\(^{13}\)Ibid., p. 720.

\(^{14}\)Ibid., p. 719.
Speakers' chair and came down on the floor to speak in favor of the bill. John Corral (Democrat of Colorado) disagreed with his Texas colleagues and argued that the "Democratic Party has a responsibility to protect the public interest . . . and the consumer." Nevertheless, when the bill came up for a vote the following day the Democrats from the leading gas producing states voted unanimously for the measure. The House passed the bill by a vote of 183 to 131. Opposition to the gas bill came mainly from lawmakers representing urban interests. Democrats and Republicans from New York, Detroit, Chicago, St. Louis, Pittsburg, Philadelphia, Baltimore and New Jersey and the larger cities in Ohio voted against the bill.\(^{15}\)

In spite of the comfortable margin of votes in favor of the Harris bill in the House no further action was taken on it before Congress adjourned. Earlier, in May, 1949, Senator Robert Kerr who succeeded to the seat of E. H. Moore introduced a bill in the Senate identical to Harris' bill.\(^{16}\) Co-sponsor of the gas bill was Senator Elmer Thomas also of Oklahoma. Oil and gas legislation that Kerr pushed had a lot going for it. In addition to his Senate duties he headed a firm that had extensive oil and gas holdings and he was a close business associate of the Phillips Petroleum Company. The industry was a source of campaign funds for Kerr and other

\(^{15}\)Congressional Record, XCV (1949), 10871.

\(^{16}\)S. 1498 81st Cong., 1st Sess. (1949).
producer state legislators and their colleagues. This was helpful in obtaining votes on issues in which they had an interest and in maintaining an influential position in the legislature. 17

A subcommittee of the Senate Committee on Interstate and Foreign Commerce headed by Lyndon Johnson of Texas held hearings on the Kerr bill. Johnson was a strong backer of the bill and some expert witnesses who appeared before the Committee as spokesmen for the industry were persons with whom he had close ties in his home state. They included officials from the Texas Railroad Commission, the agency that administers the state's oil and gas law, and representatives of the Interstate Oil Compact Commission and trade associations. Opposition to the bill came from spokesmen for labor unions, the Americans for Democratic Action and from a number of city officials. 18

Members of the Commission who spoke against the bill during the hearings were backed by the press. Although the bill was supported by the press in the producing states it was strongly opposed by nationally syndicated columnists all of whom maintained that it was against the "public

18 Congressional Quarterly, VI (1950), 602.
interest" and would favor the "big interests." In spite of the resistance of the Commissioners and the press the Committee approved the bill by a vote of seven to five.

The following year on March 16 the Kerr bill came up for a vote in the Senate. By this time opposition to the bill had increased and it touched off two weeks of debate. Early in the debate the lines were clearly drawn between Senators representing the producing states where gas originated and those from consuming states at the other end of the pipeline.

Senator Kerr led the debate on the bill. The legislation was necessary, he maintained, in order to clear up the confusion over the regulatory powers of the Commission which stemmed from the Supreme Court decision in the Interstate Case. Lyndon Johnson supported the argument of his Oklahoma colleague.

Senator Paul Douglas responded to proponents of the natural gas bill. He cited the rejection of Leland Olds renomination to the Commission and maintained that "the

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19 *Congressional Record*, XCVI (1950), A3376.
20 *Congressional Quarterly*, VI (1950), 599.
21 *Congressional Record*, XCVI (1950), 4003.
issue is now squarely joined. The issue is legislative; it is also administrative. The same groups which want the Kerr-Thomas bill passed also want to control the Federal Power Commission. The battle is joined on an administrative and appointive level, as well as a legislative level."

Because of Kerr's oil and gas holdings, Senator Wayne Morse of Oregon raised the issue of a conflict of interests during the debate on the legislation. On October 29 the Senate passed the bill over the objections of Morse and other consumer state legislators by a vote of forty-four to thirty-eight. The House concurred on March 31. During the House debate on the bill Sam Rayburn put the weight of his congressional office behind it as he had done in the case of the Harris bill. Rayburn's efforts in its behalf may have been responsible for the passage of the measure. The vote was 176 to 174 in favor of the bill.

In spite of his objections to the Harris bill its supporters expected that President Truman would sign the

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22 Congressional Quarterly, VI (1950), 600-601.
23 Congressional Record, XCVI (1950), 4304.
24 Ibid., p. 4567.
Kerr bill. He had not followed through on his commitment to the cause of consumers in his selection of a successor to Commissioner Leland Olds. In the beginning he had not opposed the measure. He was deeply obligated to Sam Rayburn, Robert Kerr and other members of his party from producing states who urged him to approve the bill. He determined, however, that enactment of the bill would be bad political strategy since it would alienate labor and other urban groups believed to be his strongest supporters and would leave him open to the charge that he favored the "big interests" that he had consistently opposed in his campaigns. Congress did not attempt to pass the bill over the President's veto.

Harris-Fulbright Bill

The industry did not engage in extraordinary lobbying operations in its efforts to secure the passage of the Kerr bill, but depended mainly on its friends in Congress. In 1953, following the appeals court decision in the Phillips case, producer interests changed their tactics and established a number of committees to work for the passage of legislation nullifying the court ruling. The industry had close ties with Washington through the American Petroleum Institute, its major trade association established earlier. Industry leaders did not make full use of the

25 Oil and Gas Journal, XLVIII (April 13, 1950), 64.
public relations facilities of the Institute, however, in order to avoid involving it too deeply in the controversy over amendatory legislation. But rather they set up special committees to press for a decontrol bill. Two groups were organized, the General Gas Committee and the Natural Gas and Oil Resources Committee. The General Gas Committee, which was headed by Maston Nixon, president of Southern Minerals Corporation of Corpus Christi, an independent oil and gas producer, began as a study committee in 1953 and was organized in 1954, after the Supreme Court ruled on the case. Contributions by corporate members amounted to over 118,000 dollars.26

Once it was organized the main purpose of the General Gas Committee was to get legislation introduced "to restore to the producers of natural gas the exemption that we thought we had in the Natural Gas Act of 1938." However, the Committee leaders looked to President Eisenhower's Advisory Committee on Energy Supplies and Resources to provide guidelines for legislation.27

In 1954 the issue of a national fuel policy was revived when the President appointed a cabinet level committee to study the nation's fuel problems headed by Arthur S. Flemming, Director of the Office of Defense Mobilization. Leaders of

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27 Ibid., p. 10.
the lobbying group assumed that the Committee's position on regulation could serve as a basis for exemption legislation. The makeup of the task force provided support for this assumption since a majority of its members and technical consultants were persons from the oil and gas industry. After a five-month study the committee issued its report on February 26, 1955. It suggested that "the federal government should not control the production, gathering or sales of natural gas prior to its entry in an interstate transmission line."\textsuperscript{28}

The Harris bill, introduced in the House on March 2, 1955, was based on these recommendations. A revised version of Representative Harris' 1949 bill, the measure was also reminiscent of the Rizley bill in that it sought to change the standard used to determine the prices paid for gas by the pipeline companies. The bill incorporated the Committee's suggestion that the government allow the interstate firms to pass along "a reasonable market price" as a substitute for the standard based on "the actual legitimate cost" of developing gas resources.\textsuperscript{29} Opponents charged that the bill was worse than decontrol legislation since it promised regulation


\textsuperscript{29} H.R. 4560 84th Cong. 1st Sess. (1955).
but could not deliver it because the standard was too vague to be enforced.30

The general reaction of industry leaders to the report of the fuel committee and the introduction of the Harris bill was that the report and the bill were satisfactory and that the chances for the passage of a decontrol bill were greatly enhanced. Prior to this the General Gas Committee and other industry organizations had nothing concrete to endorse. They had been working at the grass roots level and talking "generalities and basic principles in opposing federal regulation of producers." With the introduction of legislation they were able to turn their attention to Washington and push for the Cabinet recommendation as embodied in the gas bill.31

The lobbying group was able to bring together the diverse industry groups and rally them to the support of the Harris bill. The pipeline companies were the only interests that did not cooperate fully with the leadership. The General Gas Committee leaders attempted to get the pipelines to agree to bring direct sales to industry users under federal controls. This agreement was not forthcoming and Committee leaders feared that a bill without such a provision would

30 Congressional Record, CI (1955), 11880.
31 Oil and Gas Journal, LIII (March 7, 1955), 86.
alienate coal state representatives. The coal industry in West Virginia, Ohio, Kentucky, Pennsylvania and Missouri was in a depressed state which the industry in part blamed on the natural gas producers. According to its spokesmen pipelines sold gas at prices that were so low they undercut coal.\(^{32}\)

Virtually the entire oil industry took part in the battle because most producers were involved through the sale of casinghead gas or the ownership of gas wells. Other firms such as supply companies and banks that did business with the industry also supported the bill.\(^ {33}\) An important third force that helped promote the bill in Washington and at the grassroots level was a segment of business and civic associations that was not directly affected, but which opposed federal regulation of business in all its forms.

Three groups were active in the fight against the bill. The labor unions and municipal organizations that had been involved in the controversy from the beginning were joined by gas utility companies. None of these organizations were composed of actual gas consumers.\(^ {34}\)

The quest of industry leaders for a co-sponsor for the gas bill was successful and on April 18 Senator William

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\(^{32}\)Carper, *Lobbying and the Natural Gas Bill*, p. 11.

\(^{33}\)Ibid., p. 9.

\(^{34}\)Ibid., p. 13.
Fulbright of Arkansas introduced a bill identical to Harris' bill in the Senate.35 Hearings were held on the legislation in the House and Senate Interstate and Foreign Commerce Committees March through June.

With legislation before the House and Senate Committees, leaders of the lobbying groups sought the help of friendly committee members to preserve the Harris-Fulbright bill during the hearings and to prevent rival groups from altering the bill by means of major amendments.

The Chairman of the House Committee, J. Perey Priest of Tennessee, was on the side of the industry. He did not represent a leading producing state. But some gas was produced in the Appalachian field and the majority of the Tennessee delegation had supported the Kerr bill. Priest's name was on decontrol bills introduced in an earlier Congress. Oren Harris, the second ranking Democrat on the Committee, aided the Tennessee lawmaker in the presentation of Harris' bill. A duplicate of the Harris bill was introduced by Representative Carl Hinshaw of California, the second-ranking Republican on the Committee, thus making the effort to exempt producers from federal controls a bipartisan one.36


The General Gas Committee leaders through their "evidence committee" attempted to screen the testimony of all the industry witnesses and to unify the industry's presentation. For this reason they chose John Boatwright, Chief Economist of Standard Oil of Indiana, to direct research and prepare and coordinate material to inform and educate members of Congress and others who requested this kind of information. Boatwright testified in favor of the decontrol bills in both the House and Senate Committees. In his testimony on March 22 before the House Committee he maintained, along with Ernest O. Thompson of the Texas Railroad Commission, that continued federal controls would lead to diminishing supplies of natural gas at higher prices. Support for this point of view came from other industry representatives such as the Independent Natural Gas Users Association of America and the Northern Natural Gas Pipeline Company.

Wisconsin Attorney General Vernon R. Thompson, who had represented consumer interests in the Phillips case opposed the bill before the Committee on April 27. He characterized the Harris bill as the "greatest collection of ingenious devices so far conceived which are inimical to the interest

38House of Representatives, Hearings Before the Committee on Interstate and Foreign Commerce on H. R. 4560, p. 10.
of the consumer."\(^{39}\) Support for this position came from former Federal Power Commission Chairman Thomas Buchanan.

Opposition to the bill also came from spokesmen for the National Coal Association who urged support for a bill to grant the Commission authority to regulate prices of natural gas sold by pipeline companies to industrial users and from organized labor such as the United Mine Workers and the CIO. The most vocal opposition to the decontrol legislation came from representatives of fifty mayors and member municipalities of the National Institute of Municipal Law officers who were also active in the presentation of the case for consumers before the Supreme Court.\(^{40}\)

On June 7 the House Committee met to decide whether or not to report out the Harris bill. During the hearings the bill had been modified to meet some of the objections raised by city officials and utility companies. A Committee-approved amendment to the bill gave the Commission jurisdiction over price increases in the "favored nations" category which formerly went into effect automatically under long term contracts.\(^{41}\) Moreover, in spite of the long standing efforts of oil and gas state congressional leaders to influence membership it appeared that the pro-consumer and

\(^{39}\) Ibid., p. 1535.

\(^{40}\) Ibid., p. 1143.

\(^{41}\) Carper, Lobbying and the Natural Gas Bill, p. 13.
pro-industry factions were evenly divided on the Committee which was large and for this reason was forced to absorb urban Congressmen whose background and philosophy did not lend itself to the jurisdiction of industry groups. The Committee voted fourteen to fourteen to reject a motion to report the Harris bill favorably to the House. The next day, however, with the full membership mobilized they voted sixteen to fifteen to report the bill.\textsuperscript{42}

The Committee's report stated that the regulation of gas producers as public utilities was in the best interest of neither the consumers nor the industry. Furthermore, it added that Congress had not intended such regulation when it passed the Natural Gas Act.

Representatives John Heselten and Tolbert McDonald filed dissenting reports in which they said the Phillips decision "was a necessary complement in providing regulation from the time the gas first flows into an interstate pipeline until it reaches the ultimate consumer." They supported identical bills to exempt from federal regulation those persons who produced less than two billion cubic feet of gas a year. In another dissent Representative Staggers objected to the Harris bill because it did not include necessary provisions which would prevent rate discrimination favoring

\textsuperscript{42}H. Rept. 992, 84th Cong. 1st Sess. (1955).
industrial users of natural gas. He was the sponsor of a bill which would have incorporated these provisions.

The Senate Commerce Committee held hearings on the Fulbright bill in May and June. There was more support for the gas bill in the Senate than in the House Committee. The Senate body was smaller and it was easier for industry representatives in Congress to keep it in line. Warren Magnuson of Washington, the Chairman, opposed decontrol legislation. The bill was actively supported, however, by a coalition of conservative and oil and gas state legislators who made up the bulk of the Committee membership.

On May 20, Senator Pat McNamara (Democrat of Michigan) raised the issue of lobbying in the Committee hearings and said that industry representatives had made "scurrilous and slanderous" attempts to influence members of the committee. He referred to an incident in which a member of the General Gas Committee had circulated at the Committee hearings a press release critical of a Detroit official who gave testimony against the bill. In spite of the charges of undue influence levelled against the industry during the hearings,

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43 Ibid.

44 Senate, Hearings Before the Committee on Interstate and Foreign Commerce on S. 1853 (Washington, 1955).

45 Ibid.
the Fulbright bill was combined with the amended Harris bill and voted out 11 to 4 by the Committee on June 26.46

On June 26 another milestone was reached when the House Rules Committee approved the Harris bill. The Committee, which was chaired by Howard Smith of Virginia, a close friend of Speaker Sam Rayburn, approved the bill by a vote of six to five with one member not voting.47

On July 28, the Harris bill came to the floor of the House and passed that same day by a margin of six votes. Seventy-six Republicans and 136 Democrats opposed the measure. The majority of the Democrats voted against the bill but members of the party from Texas, Oklahoma, Florida and Arkansas voted unanimously for the amendment to the Natural Gas Act.48 As was the case with earlier legislation representatives who opposed unregulated gas rates came from districts that were substantially more urban than those districts whose representatives opposed the measure. Of the Congressional delegates representing districts classified as urban outside the major producing areas almost a hundred voted in opposition to the bill as compared with

48 Congressional Record, CI (1955), 11930.
twenty-five Congressmen from urban districts who voted in favor of the legislation.49

When the Harris bill passed the House the leaders of the General Gas Committee had cause for celebration, for they viewed the Rules Committee and the House as the major obstacles in the way of the bill. On August 1 the president of the Committee wrote to R. F. Windfohr, a member of a Fort Worth oil producing firm and chairman of the organization's steering committee, crediting Sam Rayburn with the passage of the bill in the Rules Committee and the House and predicting the rapid passage of the Fulbright bill in the Senate under the leadership of Majority Leader Lyndon Johnson:

... I think the industry owes a debt of gratitude to the Speaker. Without his solid support, the Harris bill could have been killed on the rules vote, and certainly I feel sure that he was good for more than the six-vote majority. Quite frankly I am terrifically pleased that the Harris bill has passed the House. With Lyndon's improvement in health and with only 96 Senators to hold the pulse and discuss the logic of the Fulbright bill, I feel our task in the Senate is not so tough. This work in the Senate can be done bodily, without a lot of fanfare and notoriety and with Lyndon's leadership, we should be able to send the gas legislation to the White House in the first month of the next session.50

The proponents of the Fulbright bill did not plan to try to get a measure as complex as it was and of such a controversial nature through the Senate in the few remaining

49 Congressional Quarterly, XII (1956), 790-91.
days of the 1955 session. Their strategy was to launch the bill early in 1956. Consequently, in the fall of 1955 the battle shifted to the states where lobbying groups resumed their efforts at the grass roots level to influence public opinion and win over opposing Senators. These activities were carried out by members of the General Gas Committee. But the second lobbying group, the General Gas and Oil Resources Committee, worked just as actively to rally popular sentiment for the bill, and it was endowed with even greater resources.

Another Texas oil man, L. F. McCollum, president of Continental Oil Company of Houston, was Chairman of the Natural Gas and Oil Resources Committee. The Committee worked at the grass roots level to inform the public of the problems facing the industry should the Supreme Court's mandate be enforced. More than a million dollars was spent on a publicity campaign to further its objectives. A fund of almost two million dollars was collected from the member oil and gas firms. About eighty percent of the contributions came from twenty-six large companies.\(^5\)

The best organized groups on the side of consumers were the Council of Local Gas Companies made up of distributing firms and the Mayor's Committee which was composed of the mayors of several northeastern cities. They were joined by labor

\(^5\) Congressional Quarterly, XII (1956), 746.
groups and the National Institute of Municipal Law Officers. The total resources of these interests amounted to about $96,000.\textsuperscript{52}

When the 1956 session began Majority Leader Lyndon B. Johnson put the Harris-Fulbright bill first on the Senate Calendar. Both Johnson and Price Daniel of Texas spoke in favor of the bill during floor debate. The Majority Leader argued that the Senate cannot let the Supreme Court write its laws. Moreover, the issue, according to Johnson, was "free enterprise versus socialism." "If we wish to follow our democratic free enterprise system, we can say, 'we, the Senate can entrust to reasonable men the duty of setting prices,' or if we wish to follow the socialistic theory, we can say 'natural gas ought to be publicly owned anyway, and we will give you six percent on your invested capital.'\textsuperscript{53} Price Daniel maintained that the Phillips decision placing natural gas producers under Commission jurisdiction "has resulted in chaos and confusion." Considering the producers of natural gas to be utilities, the Senator said, could "ensnarl the whole economy."\textsuperscript{54} Johnson and Daniel were aided by other oil and gas state Senators such as William Fulbright

\textsuperscript{52}\textit{Congressional Quarterly}, XII (1956), 745.
\textsuperscript{53}\textit{Congressional Record}, CII (1956), 767.
\textsuperscript{54}\textit{Ibid.}, pp. 760-762.
and "Mike" Monroney of Oklahoma in their efforts to present the industry side to the Senate.

In an attempt to counter the claims of the pro-industry group, Senator Paul Douglas outlined the aims of the gas bill and its consequences for consumers:

The pipeline companies get their gas from two sets of sources, namely, first, the so-called independent producers -- approximately 79 percent or roughly four-fifths of the gas destined for interstate resale comes from this source, second from wells which the pipelines or their affiliates own -- these furnish about 21 percent or one-fifth of the total supply. . . . Even the big producers admit that under the present law the Federal Power Commission can control the price at which the second type of gas is charged into the system, namely gas coming from the wells which the pipelines or their subsidiaries own. The Kerr bill of 1949-50 did not propose to change this feature of the law but aimed to free from regulation the sales of the non-transporting producers. But the present Harris-Fulbright bill, like its grandparent, the Moore-Rizley bill, aims, however, to abolish effective regulation for both sources of gas, merely requiring the pipeline companies to charge in the gas they produce at a reasonable market price, which, if it means anything means the prevailing price paid to the so called non-transporting producers. Since the latter price will be unregulated under the Fulbright bill, this means that the chargeable price of the gas produced by the pipelines will, also, in effect, be unregulated.\(^5\)

Support for Douglas's position came from Senators John Pastore of Rhode Island, Charles Potter of Michigan, and William Partell of Connecticut all of whom were members of the Senate Commerce Committee and had opposed the bill there. Senator Pat McNamara of Michigan took issue with the party

\(^5\)Congressional Record, CTI (1956), A252-55.
leadership and maintained that the gas bill was a "complete contradiction of the basic principles of the Democratic party."  

Some Republican members of the Senate also took opposing sides on the question of regulation of gas prices. Senator Margaret Chase Smith of Maine said she was not convinced that federal regulation had impoverished producers or discouraged exploration as some spokesmen for the industry claimed. "The real purpose of the bill," she contended, "is to clear the way for a price increase." In contrast to the position of Senator Smith, Senator Styles Bridges of New Hampshire joined in the fight for the bill. He was the only New England Senator to vote in favor of the Kerr bill and some observers of the legislative process took the view that the position of the powerful member of the Republican Policy Committee could be explained in part by the fact that he was contact man for funds for his party.

Political money became an important issue in the Senate debate when, on February 3, Senator Frances Case (Republican of South Dakota) reported that an effort had been made to influence his vote on the bill by means of a $2500 contribution to his campaign fund. The contribution was made by an

56 Ibid., p. 1654.
57 Ibid., p. 2093.
associate of Elmer Patman, a lobbyist for Superior Oil Company. Patman was a cousin of Texas Representative Wright Patman and a former employee of the Texas Railroad Commission. Case explained that the proffered "bribe" had influenced him to vote against the bill whereas he had originally planned to support it. William Fulbright, Lyndon Johnson, and other producer state Senators attacked Case on the floor of the Senate accusing him of bad faith and deliberately timing his report to influence the upcoming vote on the bill.59

A select committee to investigate the Case episode was established following the adoption of a resolution sponsored by Senator Johnson and Minority Leader William Knowland of California. The Senate leadership was thus able to by-pass the Committee on Privileges and Elections headed by Thomas Hennings of Missouri. An opponent of the oil and gas forces, he had long sought an investigation of the influence of these groups on legislation and elections.60

Following the resolution calling for an inquiry the gas bill came up for a vote. When it appeared that it would pass, opponents of the measure switched their tactics and attempted to improve it through amendments. A proposal was made for a "fair and equitable" standard as a substitute for the "reasonable market price" which the Harris-Fulbright

60 Ibid., p. 20010.
bill made the measure of the price the pipelines were to pay producers. None of these efforts were successful.

On February 6, without waiting for the report of the select committee, the Senate approved by a 53 to 38 vote the Harris-Fulbright bill and sent it to the President. Fourteen Republicans teamed with 24 Democrats to vote against the measure. 61

On February 14 Eisenhower vetoed the bill because of the lobbying connected with it. The President said he supported the principles of the measure but lobbying efforts by a small segment of the industry were "so arrogant and so much in defiance of acceptable standards of propriety as to risk creating doubts among the American people concerning the integrity of governmental processes. 62 Congress did not attempt to pass the bill after the President had rejected it.

Harris-O'Hara Bill

The organized groups that focused their activities around the Harris-Fulbright bill were not reconstructed after the President's vote of the measure, but a new bill was introduced in 1957 in the eighty-fifth Congress. Again the legislation lost any chance of passage through the lobbying efforts of persons associated with the industry.

61 Ibid., p. 2096.
62 Ibid., p. 2793.
Following the 1956 election, President Eisenhower in his budget message to Congress January 16, 1957 indicated that he still favored the principles of the Harris-Fulbright bill.

Legislation freeing gas producers from public utility-type regulation is essential if the incentives to find and develop new supplies of gas are to be preserved and sales of gas to interstate markets are not to be discouraged to the detriment of both consumers and producers, as well as the national interest.\(^6\)

Some who had pushed the earlier bill were reluctant to become involved in the controversy again. Senator Fulbright refused to sponsor another bill. "If the President wants a bill he can find his own sponsor for it."\(^6\) However, Oren Harris, the other former sponsor who had attained the post of chairman of the Interstate and Foreign Commerce Committee, was more agreeable. A bill was drafted which Representative Harris characterized as a "compromise" measure. It was co-sponsored by Congressman Joseph O'Hara (Republican of Minnesota). The President announced his general support of its principles as did the chairman of the Federal Power Commission. On July 19 the Commerce Committee reported the exemption bill and it was cleared by the Rules Committee July 31, shortly before Congress adjourned.\(^6\)

\(^6\)Congressional Quarterly XIII (1957), 665.

\(^6\)Ibid.

In 1958 Congress convened with the gas bill pending on the House Calendar. But the bill expired following the disclosure February 11 by the *Washington Post* of a $100,000 fund raising dinner staged by Texas Republicans in honor of House Minority Leader Joseph W. Martin (Republican of Massachusetts) who was expected to muster the necessary votes to pass the measure. According to the newspaper story, Jack Porter, a Texas oil man and Republican National Committeeman, sent out letters January 30 urging oil and gas industry representatives to buy tickets for the dinner in Houston since a large war chest was necessary in order to insure passage of the bill:

Joe Martin has always been a friend of Texas, especially of the oil and gas producing industries. He mustered two-thirds of the Republican votes in the House each time the gas bill passed. . . . As Speaker of the 83rd Congress, he led the fight for the adoption of the tidelands ownership bill. It was up to Joe Martin to muster at least 65 per cent of the Republican votes in order to pass the gas bill this year. He had put members from Northern and Eastern consuming areas on the spot politically, because the bill is not popular due to the distortion of facts by newspaper columnists and others.

As a result of the publicity surrounding Peter's activities the gas bill did not come to the floor of either house.

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In 1961, following the Commission's announcement of its intentions to establish rates on an area basis, Congressman Harris drafted a new bill. The bill called for some producer regulation. It included a provision that small producers be exempt from controls. Rates for the remaining producers would be regulated not on the basis of cost of service but under the concept of a fair and reasonable market price that was also a provision of the Harris-Fulbright bill. The bill would have nullified the area pricing order of the Commission and it would have had to return to the practice of dealing with the industry on a company by company basis. No group took the lead in seeking the passage of the legislation even though Harris as head of the Interstate and Foreign Commerce Committee was in an advantageous position to push the legislation. Producers were reluctant to support it and President Kennedy made no efforts in its behalf in spite of the fact that he had originally sponsored the proposal to exempt small producers from regulation.

Summary

A number of amendatory bills that have been introduced in the legislature since the passage of the Natural Gas Act have been considered in this section of the study. Some of the influences of pressure groups on the legislative process

have been examined including the effects of political money and public relations activities. The contributions of the courts to the regulatory program are discussed in the final section of the study.
CHAPTER III

INTERVENTION BY THE COURTS

Early Legal Developments

It was the activities of the courts in the policy area of natural gas regulation that set the stage for the passage of the statute authorizing federal regulation of the industry. During the early days of the industry the states attempted to regulate natural gas. But the first state laws were challenged in the courts and declared invalid.\(^1\) This was followed by a series of legislative acts and test cases. Finally the Supreme Court in *Henderson v. Thompson*\(^2\) expressly held that a state could regulate the production and use of natural gas in the interest of conservation.

A result of this action was that the industry was subject to regulation in the two local phases of its operations but the interstate pipelines that linked the two were not covered. Attempts by the states to regulate the interstate firms failed when the Supreme Court in two decisions declared that the companies were engaged in interstate commerce, and sales made to local distributors were not subject

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\(^1\) *Texas Civil Statutes*, Art. 6049a, Sec. 8a (Vernon, 1948).

\(^2\) 300 U.S. 258 (1937).
to state regulation. With the states powerless to control the interstate firms, consumer interests sought Congressional action to close the gap in regulation created by the decisions of the Court.

Regulation of the interstate transporting firms did not come without a struggle. It took sponsors of federal regulation some fourteen years to achieve their goal. Following the passage of the Natural Gas Act, the battle continued over its interpretation. The essential question was whether section 717(b) of the Act establishing the jurisdiction of the Federal Power Commission over the natural gas industry should be construed so as to exempt independent producer's sales from federal regulation. These provisions read as follows:

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

The narrow interpretation of the Act by the Federal Power Commission in the Columbian case to the effect that


5Columbian Fuel Corp. 2 F.P.C. 200.
the nontransporting producers were exempt from regulation under the production and gathering provisions were not immediately challenged in the courts. When the question arose as to federal jurisdiction over companies engaged in both the production and transporting of natural gas, the Supreme Court upheld the findings of the regulatory agency. The Commission was first confronted with this difficulty in FPC v. Hope Natural Gas Co.\(^6\) A West Virginia corporation, Hope was a subsidiary of Standard Oil of New Jersey and some of the pipelines to which it delivered gas were affiliated with the company. In response to complaints filed by public utility commissioners in consuming states, the Federal Power Commission conducted hearings and as a result ordered Hope to lower its rates in interstate commerce.

The Supreme Court upheld the rates imposed by the Commission. Justice William O. Douglas speaking for the Court said:

The primary aim of this legislation was to protect consumers against exploitation at the hands of the natural gas companies. . . . Moreover the investigations of the Federal Trade Commission had disclosed that the majority of the pipeline mileage in the county used to transport natural gas, together with an increasing percentage of the natural gas supply for pipeline transportation, had been acquired by a handful of holding companies.\(^7\)

One of the major issues decided by the Court was raised by the state of West Virginia. Spokesmen for the state

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\(^6\) 320 U.S. 591 (1944).

\(^7\) Ibid., p. 610.
contended that the rate order of the Commission was unfair to West Virginia and had the effect of depressing the value of the state's gas. The Court said in answer to the argument advanced by the producing state:

> We cannot find in the words of the Act or in its history the slightest intimation or suggestion that the exploitation of consumers by private operators through the maintenance of high rates should be allowed to continue providing the producing states should obtain indirect benefits from it.8

The Court did not depart from this position when similar contentions were advanced by producing states in subsequent litigation.

The question of the method that could be legally employed in rate regulation also arose in the Hope case. Under section 717 of the Natural Gas Act the Federal Power Commission was directed to ascertain the "just and reasonable rate" for gas in interstate commerce. But the Act did not provide any guidelines as to how the rate was to be determined.10

In the famous decision in Smyth v. Ames9 dealing with the activities of the Interstate Commerce Commission, the Court had established a "rule of reasonableness" for rate-making that generated a large body of judicial and administrative interpretations. In that case it held that the

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8 Ibid., pp. 607, 612.
9 169 U.S. 466 (1898).
10 U.S. Code, 15 Section 717 (1952).
rate established by the Commission must yield a fair return on the "fair value" of property devoted to public use. Several rules for the determining of "fair value" were given.

Only two of the criteria were found to be useful, (1) original cost less depreciation, and (2) reproduction cost less depreciation. The Court provided no answer to the question of which standard should be used by the commissions. But prior to the 1930's the majority of the business-oriented Court accepted the principle of reproduction cost new less depreciation since that standard was advantageous to the owners during a period of rising prices.12

In the Hope case, the Commission, in its exercise of its power under the Natural Gas Act, ordered the company to lower its wholesale rates in order to bring about a reduction in its operating revenues. In making the calculation the Commission used the "actual legitimate cost" of developing the gas resources as the rate base. This was not considered to be evidence of "fair value" but was a substitute for the earlier concept.13 The Court of Appeals set aside the Commission's order mainly on grounds that the

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11 Ibid., pp. 546-7.
agency had failed to take into account the current or reproduction cost of the company's property in setting the rates.

In upholding the Commission the Supreme Court broke with its earlier procedures and agreed to accept administratively-determined rates and in the process supported a standard that did not require natural gas consumers to bear the burden of inflation. The Court expressly rejected the reproduction cost formula and observed that "it is the result reached not the method employed that is controlling." It is "not theory but the impact of the rate order which counts." "If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end."\(^{14}\)

In *Colorado Interstate Gas Co. v. FPC\(^{15}\)* the Court upheld an extension of federal power in the area of production. The case was similar to Hope; the difference was that the firm under consideration was the pipeline company and the affiliate was the producing company. The Commission had included the production costs of the affiliate within the rate base of the regulated transmission property. Justice William O. Douglas gave the opinion of the Court upholding the Commission's action.

\(^{14}\)Ibid., p. 602.

\(^{15}\)324 U.S. 581 (1946).
Then in the Interstate case\textsuperscript{16} in a unanimous decision the Court ruled that all sales of natural gas in interstate commerce were subject to regulation, and exemptions based on production and gathering were to be "strictly construed."\textsuperscript{17} Interstate was clearly subject to the agency's jurisdiction because of its pipeline business. The company also produced gas, some of which it sold to other pipelines. The Commission ruled that it had jurisdiction over all sales and refused to make a distinction between the company's production and transporting operations. The Court supported the findings of the agency:

\textit{... By the time the sales are consummated, nothing further in the gathering process remains to be done. We have held that these sales are in interstate commerce. It cannot be doubted that their regulation is predominantly a matter of national, as contrasted to local concern. All the gas sold in these transactions is destined for consumption in states other than Louisiana. Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of cost which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed.\textsuperscript{18}}

Two states, Texas and Oklahoma, appeared as amicus curiae in the case and made the same argument that West Virginia made in the Hope case. Referring to what it had said in the earlier case on the subject the Court explained:

\textsuperscript{16}\textit{Interstate Natural Gas Co. v. FPC, 331 U.S. 682 (1947).}
\textsuperscript{17}\textit{Ibid., p. 691.}
\textsuperscript{18}\textit{Ibid., pp. 692-93.}
"It is not sufficient to defeat the Commission's jurisdiction over sales for resale in interstate commerce to assert that in the exercise of the power of rate regulation in such cases, local interests may in some degree be affected."19 The Court also said:

Clearly, among the powers thus reserved to the states is the power to regulate the physical production and gathering of natural gas in the interest of conservation or any other consideration of legitimate local concern. It was the intention of Congress to give the states full freedom in these matters. Thus, where sales though technically consumated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the state of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach. But such conflict must be clearly shown.20

Since the Interstate case dealt with a pipeline company its significance for the independent producers was not immediately apparent. Nevertheless, it had the effect of alarming the oil and gas interests and they stirred Congressmen from the producing states to introduce exemption bills in the legislature. The apprehension of the owners increased when the Commission issued its order on October 28, 1948 calling for an investigation of the Phillips Petroleum Company.

19 Ibid., p. 691.
20 Ibid., p. 690.
While the inquiry was underway, the Supreme Court ruled on two other cases. In *FPC v. Panhandle Eastern Pipeline Co.*\(^{21}\) the Court handed down a decision that was regarded by some as an indication that sales by independent producers would be excluded from federal controls. Justice Reed, speaking for the Court, maintained that Congress in the Act did not intend to use its constitutional powers to the limit and regulate the entire natural gas field. The transfer of undeveloped gas leases was held to be "an activity relating to the production and gathering of natural gas and beyond the coverage of the Natural Gas Act."\(^{22}\) Justice Hugo Black dissented. He was joined by Justice William O. Douglas and Wiley Rutledge. Black contended that the majority's findings constituted a sterilizing interpretation "of the exemption to Commission authority appearing in the Act."\(^{23}\)

This was followed by a decision in *Cities Service Gas Co. v. Peerless Oil and Gas Co.* in which the court upheld an Oklahoma statute establishing a minimum price on gas produced within its boundaries.\(^{24}\) This was the only type of price regulation the producing states had undertaken and in this case the Court upheld the statute against challenges

\(^{21}\)337 U.S. 498 (1949).

\(^{22}\)Ibid., p. 502-3.

\(^{23}\)Ibid., p. 517.

\(^{24}\)340 U.S. 179 (1950).
made on the basis of the Fourteenth Amendment and the Commerce clause. The regulatory agency was not a participant in the case and the Court declined to consider whether or not the Commission was authorized under the Natural Gas Act to regulate field prices on sales by independent producers. 25

The answer to this question came a year later from the Commission rather than the courts when it ruled in the Phillips case that the agency did not have jurisdiction over the prices of the independents. The Commission found that "sales are so closely connected with the local incidents of production and gathering as to render rate regulation by the Commission inconsistent or a substantial interference with the exercise by the affected states of their regulatory functions." 26

The Commission ruling in the Phillips case was, of course, not acceptable to consumer interests. Several petitions for review of the case were filed in the United States Court of Appeals for the District of Columbia. Arguing for reversal of the decision were the State and Public Service Commission of Wisconsin; the County of Wayne, Michigan and the cities of Detroit, Kansas City (Missouri), and Milwaukee. Supporting the Commission's decision, along with the Phillips

25 Ibid., pp. 188-189.

Company, were the State and Oil Conservation Commission of New Mexico, the Corporate Commission of Oklahoma and the Railroad Commission of Texas. Here as in the Federal Power Commission the battle line was clearly drawn between consumer and producer interests.

On May 22, 1953 the Circuit Court handed down a decision which reversed the Commission's ruling and held that the agency should fix Phillip's rates for its sales. The Court determined that the company's sales occurred after the completion of production and gathering in line with the Supreme Court's holding in the Interstate case. At the same time the court appeared to take the view that Commission jurisdiction extends without exception to all sales of gas in interstate commerce for resale.

The Phillips Petroleum Case

It was clear that with so much at stake, the final chapter in the controversy between producers and consumers of natural gas would not be written by the Circuit Court and that its decision would be appealed to the Supreme Court. Legal scholars assumed that the high court would ultimately rule on the issue since the questions raised were thought to

27 Wisconsin v. FPC, 205, 2d 706 (1953).
28 Ibid.
29 Ibid., p. 710.
have importance beyond the facts and participants in that particular case.  

This was a guiding principle in the judicial philosophy of Chief Justice Vinson. But this policy ran counter to his efforts to reduce the burden on the Court. At all events, on November 8, 1953, the Court refused to review the decision of the lower court, denying petitions for certiorari filed by Phillips and the other litigants that had participated in the Circuit Court case on the side of producers. Later that year the Chief Justice died and Earl Warren of California was appointed to the Court, and on January 8, 1954, with only Justice Hugo Black dissenting, the Court reversed itself and granted the petitions for certiorari.

Once certiorari was granted in the case, both sides concentrated their efforts on securing a favorable decision. The argument that the consumer is captive of the industry, and that lack of competition could result in high prices was the most persistent reason given for regulating rates by spokesmen for consumer interests. Phillips lawyers not only

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insisted that the production or gathering exemption incorporated in the Act applied to them, but undertook to counter the assertion of opposing attorneys that their prices were not competitive.

Phillips admittedly was a natural gas company within the scope of the jurisdiction granted the Commission by the statute. The Company sold gas that it produced and that it bought from other producers to pipeline companies which ultimately resold the gas to distributing companies in some fifteen consuming states. But Phillips claimed to qualify under the exemption in section 717(b) of the Act for "production or gathering." Phillips lawyers contended that this exemption should be interpreted to mean that no direct regulation of any kind of the business of production or gathering, including sales, was authorized in the Act, or if only the process of production or gathering was specifically exempted, Phillips sales were too closely related to the process to be regulated. 33

The Company's lawyers maintained that the argument that "regulation is necessary to protect consumers against excessive prices ... has no basis in fact. There is sufficient evidence in the record to negate any assertion that Phillips' prices are now excessive or exorbitant." 34 According to spokesmen for the industry "the nature of the business is such

34 U.S. Code, 15 Sec. 717(b).
as to be carried on by a large number of business units."\(^35\)

John Ben Shepperd, who held the office of Attorney General in Texas, and legal representatives of Oklahoma filed a brief in support of the argument of petitioners. They maintained that regulation as decreed by the Circuit Court "would substantially conflict with state regulatory powers."\(^36\)

Vernon W. Thompson, Attorney General of Wisconsin, entered a brief in support of Commission jurisdiction over the independent producers. Council for consumer groups claimed that the natural gas producers "have a monopoly."\(^37\) They took the view that consumers should not be subject to the "arbitrary whim of some company" not subject to either federal or state controls as to the price at which it sells its gas. They further contended that the findings of the Commission, the agency that purported to regulate prices in the interest of consumers, were entitled to no weight in the case.\(^38\)


\(^{36}\) 347 U.S. 672, 98 L Ed, 1039.

\(^{37}\) 347 U.S. 672, Testimony, pp. 3667-70.

\(^{38}\) 98 L. Ed. 1041.
A useful technique for getting the policy position of both sides before the Court was the amicus curiae brief. Attorneys on the side of industry groups filed amicus briefs for five producing states in addition to those that appeared as litigants in the case. Legal representatives of trade associations and individual oil and gas companies also entered briefs in support of arguments of petitioners in the case. Among the attorneys giving evidence for the industry was Ira Butler, a well known member of the Fort Worth bar who served as legal adviser for the Interstate Oil Compact Commission and the Gulf Oil Company. During a personal interview with Butler it was established that he did not attempt to coordinate his work with that of industry lobbying groups that were active in Fort Worth at that time, notably the General Gas Committee. 39

Four nonproducing states entered amicus briefs that appeared to be coordinated with the oral arguments of the briefs filed by Wisconsin. The city of Minneapolis filed an amicus brief together with eleven other cities that were members of the National Institute of Municipal Law Officers. 40 This organization had been active on behalf of consumer interests since the time of the debate over the Rizley bill and

39 Statement by Ira Butler, Attorney, Fort Worth, Texas, July 17, 1970.
40 98 L. Ed. 1042.
James Lee, an attorney for the Institute, took part in oral arguments before the Court.

On June 7, 1954, the Supreme Court upheld the lower court in a three to five decision and ruled that Phillips' sales were subject to Commission jurisdiction. The Court rejected the Commission's interpretation of the Act and held that Phillips sales neither occurred during production and gathering nor were they so closely related to those processes as to warrant exemption. Chief Justice Earl Warren voted with the majority along with Justices Hugo Black, Stanley Reed and Felix Frankfurter. Justice Sherman Minton wrote the opinion for the Court. Justices Harold Burton and Tom Clark dissented along with Justice William O. Douglas. Justice Robert Jackson did not participate in the Phillips decision.

According to Justice Minton,

The statutory language, the pertinent legislative history, and the past decisions of this Court all support the conclusions of the Court of Appeals that Phillips is a "natural-gas company" within the meaning of that term as defined in the Natural Gas Act and that its sales in interstate commerce of natural gas for resale are subject to the jurisdiction of and regulation by the Federal Power Commission.

He referred to previous Supreme Court decisions involving Colorado Interstate Gas Company, Interstate Natural Gas

\footnote{41}{Ibid., p. 1035.}
\footnote{42}{Ibid., p. 1045.}
Company and others, which he argued,

... supply a ready answer to the determination of the Commission and also to petitioners' suggestion that "production or gathering" should be construed to mean the "business" of production and gathering, with the sale of the product considered as an integral part of such "business." We see no reason to depart from our previous decisions, especially since they are consistent with the language and legislative history of the Natural Gas Act.43

The majority sought additional support in the law's disjunctive grant to the Commission of jurisdiction over natural gas companies engaged in "transportation or sale." The Court said that had Congress intended to limit Commission jurisdiction to interstate pipelines it would not have used the disjunctive expression of transportation or sales, but the conjunctive form transportation and sales. Thus, buttressing its decision with the statutory language, the Court affirmed that the agency had always had jurisdiction over the sales of wholesale gas in interstate commerce:

In general, petitioners contend that Congress intended to regulate only the interstate pipeline companies since certain alleged excesses of these companies were the evil which brought about the legislation. If such were the case, we have difficulty in perceiving why the Commission's jurisdiction over the transportation or sale for resale in interstate commerce of natural gas is granted in the disjunctive. It would have sufficed to give the Commission jurisdiction over only those natural-gas companies that engage in "transportation" or "transportation and sale for resale" in interstate commerce if only interstate pipeline companies were intended to be covered....

43 Ibid., p. 1047.
Rather, we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the sales of all wholesales of natural gas in interstate commerce, whether by pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company.\textsuperscript{44}

The Court further explained that the ruling was necessary to fulfill the aim of Congress in the Act which was to protect "consumers against exploitation at the hands of natural gas companies."\textsuperscript{45} Referring to the legislation discussed earlier, the Court said "attempts to weaken this protection by amendatory legislation exempting natural gas producers from federal regulation have repeatedly failed and we refuse to achieve the same result by a strained interpretation of the statutory language."\textsuperscript{46}

Justice Frankfurter wrote a separate concurring opinion. Justice Douglas dissented along with Clark and Burton. Douglas contended that the intent of Congress in the Act was not the regulation of sales by independent producers to interstate pipelines, but only sales made by the operators of such pipelines. He was of the opinion that "there is much to be said in terms of policy" for the position of those favoring regulation. But "if that ground is to be taken, the battle should be won in Congress, not here. Regulation of

\textsuperscript{44} Ibid., pp. 1047-1048.
\textsuperscript{45} Ibid., p. 1049.
\textsuperscript{46} Ibid.
the business of production and gathering of natural gas involves considerations of which we know little and with which we are not competent to deal." 47

Justice Clark, a native of Texas, also took a broad view of the exemption under the Act and argued that Congress expressly provided that it should not apply to sales by independent producers. "Language could not express a clearer command." If this was the intent of Congress, "then it left for state regulation only a mass of empty pipe, vacant processing plants and thousands of hollow wells with scarecrow derricks, monuments to this new extension of federal power. 48

In part Clark's argument was drawn from a brief submitted by a lawyer member of the groups with which he identified prior to his judicial appointment. Ira Butler who represented Gulf Oil Company and who filed a brief in behalf of producers in the Phillips case, mentioned during a personal interview that his brief was relied on by Clark in his dissenting opinion. "He paid tribute to it and quoted one whole section." 49

The strong language of Clark's dissent was widely quoted by spokesmen for the industry when the battle shifted once more to the legislature. Nonetheless, the Court's majority

47 Ibid., p. 1052.
48 Ibid., p. 1052-54.
ruling in the Phillips case established for the first time that the Natural Gas Act gave the Commission the authority to regulate the field prices of independent producers. As a result the regulatory Commission's duties were expanded to include a much larger segment of the industry.

Area Rate Cases

Following the Supreme Court's decision the FPC reopened its investigation of Phillips' rates. The slow progress of the case through the Commission and the courts began anew. Initially, the industry challenged the overall authority of the FPC to regulate producers. With that issue settled by the Court's ruling in the Phillips case, the challenge narrowed down to specific rulings on the regulatory methods used by the Commission. While the Phillips case was in progress the Courts ruled on other issues.

In 1958 the Supreme Court agreed to review the decision of the District of Columbia Appeals Court in the Memphis case. The Court accepted appeals from the Federal Power Commission and major pipeline companies. In a five to three decision the Court overturned the decision of the lower court and held that an interstate pipeline company does not need advance customer approval for a proposed rate increase if a fixed rate had not been specified by contract.\footnote{United Gas Pipeline Co. v. Memphis Light Gas and Water Division, 358 U.S. 949 (1958).}
appeal industry groups had argued that having to make refunds for rate increases that had not been approved by the Commission would decrease their operating funds and curtail or halt expansion. In the majority opinion written by Justice John Marshall Harlan the Court pointed out that Congress had intended the Natural Gas Act not only to protect the public from excessive prices but also to protect the legitimate interests of natural gas companies. He added that the gas consuming public has a "vital stake" in the financial stability of such companies.

Justice Douglas wrote a dissenting opinion in which he maintained that the decision reduced the Natural Gas Act to a "shambles" so far as the consumers are concerned, for it "turns the real regulation over to the pipeline companies."51 Joining Douglas in the dissenting opinion were Chief Justice Earl Warren and Justice Hugo Black. Justice Tom Clark did not take part in the ruling.

Producer interests along with the pipelines viewed the Memphis decision as a victory for a "sensible interpretation of the Natural Gas Act and sane regulation of the natural gas industry." The language of the decision encouraged industry leaders in their hopes that the Commission would be inclined to take steps toward "realistic" regulation of producers'  

51 Ibid.
prices and away from the utility approach. The producers were generally unhappy with the Commission's efforts to establish area pricing announced in its 1960 ruling in the 

Phillips case. The attitude of the majority of the justices of the Supreme Court toward area pricing was revealed in 1963 when the Court reviewed the Commission's 1960 disposition of the Phillips case in which the agency announced the adoption of an area pricing method for future cases. The Court sustained the ruling of the FPC by a five to four vote. The majority agreed with the findings of the Commission that the traditional method of regulation was not workable for regulating independent producer's rates. The Court expressed the hope that the area approach would prove to be the ultimate solution to the problem of producer regulation. The Court observed that the establishment of temporary area price guidelines had helped to stabilize prices and this lent support to the notion that the Commission might be heading in the right direction. The Court did not rule on the legality of the area pricing approach but it gave encouragement to the agency to continue along the course it had been following.

52 Oil and Gas Journal, LVI (December 15, 1958), 61.
55 Ibid.
The majority opinion was written by Justice John Marshall Harlan. He was joined by Justice William O. Douglas, Potter Steward, Byron White and Arthur Goldberg. A dissenting opinion was written by Justice Tom Clark. It was concurred in by Chief Justice Earl Warren, and Justices Hugo Black and William T. Brennan Jr. In it Clark pointed up the "serious legal questions" involved in the implementation of the area rate policy which could cause "additional delay, delay and delay until the inevitable day when there is no more gas to regulate."56

The Commission's first area rate opinion issued in 1965 setting ceiling prices for gas produced in the Permian Basin was appealed to the Court of Appeals for the tenth circuit which upheld it in principle but returned it to the Commission for reconsideration of the basis on which the rates were set. The court held the FPC had the authority to adopt area prices but the court maintained that it had insufficient evidence to determine if the prices were fair. The court said the regulatory agency failed to determine the revenue requirements for the industry in the Permian Basin and that the FPC improperly used quality standards to lower gas prices. The Commission had determined "a fair relationship between the price the consumer pays and the costs that producers incur in the Permian Basin." But the Supreme Court had held

56 Ibid.
in the Hope case that the end result of prices set by the FPC must be that producing companies receive sufficient returns to meet revenue requirements. 57

The Supreme Court faced up to the question of the legality of the area pricing method of natural gas producer regulation when it agreed to review the ruling of the Commission and the lower court. In this instance the basic method of area pricing was not opposed by the parties in the case. Producers shifted their position and attacked, not area pricing, but the details of its application by the Commission in the Permian Basin decision. The agency and consumer interests urged the adoption of the Commission's ruling without change. The major producer groups, on the other hand, asked the High Court to go along with the appeals court ruling. They questioned whether the specific rates set would return revenue requirements. The producers asked the Supreme Court to direct the Commission to go back and determine these requirements and fix rates that would yield sufficient revenues to meet them. 58

On May 1, 1968, the Court upheld the Commission's test case in a seven to one decision in which Justice William O. Douglas dissented. 59 Justice John Marshall Harlan wrote the

57 Skelly Oil Co. v. FPC, 375, F. 2d. 6, 35 (1967).
58 Oil and Gas Journal, LXV (December 11, 1967), 74.
59 Permian Basin Area Rate Cases, 20 LE d 2d, 312 (1968).
opinion for the Court. The Court disregarded representations of participants involving objections to the rate structure. It found no merit in the partial reversal of the Commission's 1960 ruling by the circuit court of appeals.

In the majority opinion Justice Harlan stressed the narrow limits of court review and the wide latitude of Commission discretion. "We have heretofore emphasized that Congress has entrusted the regulation of the natural-gas industry to the informed judgement of the Commission," he wrote, "and not to the preferences of reviewing courts."

"A presumption of validity therefore attaches to each exercise of the Commission's expertise," he continued, and those who would challenge the Commission's findings must undertake "the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." The courts, he maintained, "are without authority to set aside a rate selected by the Commission which is within a 'zone of reasonableness'."60

The FPC decision was proper, Justice Harlan maintained, and contrary to the ruling of the lower court, it must be sustained in full. There was no constitutional objection to area rate making and a generous construction of the Natural Gas Act supported the Commission's contention that it had the authority under the statute for area rate making.

60 Ibid., p. 336.
Nor did the FPC exceed its statutory authority in the rates it ordered. "We are in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes," the Justice wrote. "We have concluded that the various segments of the Commission's rate structure did not separately exceed or abuse its authority," he continued.

Justice Douglas dissented in the case as he did in the original Phillips decision. Justice Tom Clark who had dissented in the earlier ruling on area prices as well as the original Phillips case was no longer on the Court. Justice Thurgood Marshall did not take part in the ruling.

In his dissenting opinion Justice Douglas did not object to area rate making in principle. However, he did not believe the parties involved in the case at hand were given sufficient protection. The FPC orders rested on a broad basis, and they offered no specific findings as to each company involved. "The area rate orders challenged here are based on averages," he wrote, "no single producer's actual costs, actual risks, actual returns are known."

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61 Ibid., p. 344.
62 Ibid., p. 362.
63 Ibid., p. 371-72.
Douglas reasoned in this case as he had in the earlier Phillips decision that the Courts were not qualified to deal with the complex problem of the regulation of the independent producers of natural gas. "If the task of regulating producer sales within the framework of the Natural Gas Act is as difficult as the present case illustrates, he continued, "perhaps the problem should be returned to Congress." The majority was not deterred by the difficulties Douglas mentioned.

The Court granted certiorari in the original Phillips case in the complex Permian Basin cases in spite of its heavy work load. The majority decision supporting the position of consumer interests in the litigation was in line with the policy position established in earlier rulings. In both the Phillips decision and the Permian Basin cases the opinions were written by conservative Justices who might have been expected to vote in favor of business interests.

Summary

In this chapter an effort has been made to establish the significance of the role of the courts in the regulatory program. The policy position of the Supreme Court in a number of earlier cases as well as decisions handed down in recent years has been analyzed. Also an attempt has been made to access some of the influences of pressure groups and individuals on the High Court.

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64 Ibid., p. 378.
CHAPTER IV

CONCLUSIONS

Commission regulation of natural gas rates has been a matter of controversy from the time of the passage of the Natural Gas Act. Much of the criticism has been inspired by the nature of Commission functions. Industry groups have generally opposed all forms of regulation as detrimental to their interests for most of the period of federal regulation. The Commission has received little sympathy from consumer advocates, on the other hand, who would like the government to go still further in protecting the public interest. The Landis report on Commission regulation typifies the hostility voiced against the agency by a person of professional objectivity who does not directly represent either of the groups concerned with regulation.

One of the main reasons given by partisan groups and other critics for poor commission performance is the political environment in which it operates. The Commission has not been successful in resisting pressures from the executive and legislative branches of the government. Political decisions have tended to distort what should be non-partisan determinations of what constitutes the public interest.

In Constitutional theory the regulatory agency is an extension of the legislative branch of the government. The
Commissioners make law on a day-to-day basis in a technical area where Congress cannot legislate effectively. Osten-sibly, their expertise gives the Commissioners the right to be independent of the Executive.

As is the case with the courts, however, Presidents attempt to name to the Commission men who will perpetrate their political philosophy. They are not always successful in this. The Senate must pass on nominations. Moreover, since the Commissioners do not serve at the pleasure of the President they do not owe any loyalty to his program. But they must, if they are to continue in office, give some thought to their renomination. They do not enjoy the degree of freedom that judges possess in their decision making because of their life-time tenure.

President Harry S. Truman made a valiant effort to secure the renomination of Leland Olds, a man who shared his pro-consumer attitude toward regulation of the industry. The Senate rejection of Olds pointed up the fact that regulators if they valued their jobs had to stay on the right side of industry issues and producer-state Senators. President Dwight D. Eisenhower did not encounter a similar degree of opposition in his efforts to get the Senate to ratify the renomination of a pro-business Chairman of the Commission.
Following the elections of 1960, President John F. Kennedy and later President Lyndon B. Johnson succeeded in appointing to the Commission, as vacancies occurred, men who shared their philosophies. They were not identical even though both Presidents were Democrats. Kennedy favored tough and expansive regulation of the industry. His attitude was inspired largely by his basic political philosophy and the fact that he had represented a consumer area in the Senate. For the most part the men he appointed to the agency shared his objectives. President Johnson was more conservative regarding property rights and he had had close ties to the leaders of the oil and gas industry operating in his home state for many years. He used his appointive powers in an effort to soften and curtail regulation.

Presidents of both parties have used the agency for patronage even while trying to turn regulation in more liberal or conservative directions. For example, President Truman abandoned his fight to name a consumer advocate to the Commission when the Senate refused to ratify the renomination of Leland Olds and repaid a political debt by appointing former Senator Mon Wallgren to the post. Wallgren occupied a swing position on the Commission. The result was a turnabout in the direction of the agency and a decision in the Phillips case against extending its powers over producers.
President Eisenhower's habit of discharging obligations by naming men to the Commission who were lacking in experience and knowledge about the problems of utility regulation became a focal point for criticism concerning his administrations' relations with the agency. The result was that the Senate, which was controlled by the Democrats, refused to ratify his last two nominations to the regulatory agency.

By law no party may have a majority of more than one among the members of the Commission. President Eisenhower was able to find in the opposite party men who shared his goal of lax regulation. President Kennedy was equally successful in his search for liberal Republicans who identified with consumer groups to nominate to the vacancies that occurred on the Commission that were designated for the opposing party.

Unlike the regular members of the Commission the Chairman serves at the President's pleasure and each time the White House changes hands the Chairmanship also changes hands. Eisenhower's choice for Chairman was forced to serve the remainder of his term as a regular member following the election of Kennedy and the appointment of a new Chairman. He was in turn displaced by President Johnson's man on the Commission. The extension of Presidential power over the Chairmanship was made the members of the agency more concerned with politics. Politics has claimed their attention.
to the detriment of the expertise that supposedly is the touchstone of regulation.

In its efforts to influence appointments to the Commission Congress has further eroded the expertise of the agency. The legislative branch has not played an important role in policy-making since the passage of the Natural Gas Act. But the agency is dependent on the legislature for appointments and additional legislation among other things. From the time of the defeat of Leland Olds for a third term on the Commission, producer-state lawmakers have known that it was easier to influence administrative decision-making through appointments than to secure the passage of amendatory legislation. They have generally been more successful than their rivals in bringing pressure to bear on the selection of Commission members.

Individual Congressmen representing industry groups have played an important role in the legislature during most of the period of the controversy over regulation of the gas producers even though Congress as a body has shown little concern for the agency. Leaders of these groups were convinced that they could count on the loyalty of lawmakers from natural gas states and the effective presentation of their case in Congress. The industry is a dependable source of campaign funds and other benefits. In part, because of their influence with the industry, Senators and
Representatives from producing states are often influentially situated in the legislature. This was illustrated when oil and gas state legislators succeeded in passing the Kerr Bill even though it was strongly opposed by members of the Federal Power Commission as well as consumer-state spokesmen and the press who labelled it a special interest bill.

Following the introduction of the Harris-Fulbright Bill, lobbying groups on both sides of the issue spent more than two million dollars in seeking to affect the outcome of the legislation. The campaign contribution offered Senator Case, that raised a public furor and led to the Presidential veto of the bill, was insignificant in comparison to the money that was spent in public relations efforts and the thousands of hours of lobbying in the legislature and at the grass roots level in behalf of the pending legislation.

Representatives of industry organizations believed that their efforts were successful in obtaining the passage of the natural gas bill in the legislature and that it was the over-zealous activities of a few individuals that precipitated the President's veto of the measure. Along with their intensive lobbying efforts, which far outweighed those of their opponents, supporters of the bill also gave a great deal of credit for their success in the Congress to
the efforts of oil and gas state lawmakers such as Sam Rayburn and Lyndon Johnson. It was their on-going relationship with these congressional leaders that led to the appointment of committee members subject to the jurisdiction of these groups. Legislators who supported their cause were able to steer the bill through the Senate even after charges of undue influence and attempted bribery had been raised by its opponents following the Case incident.

The efforts of Republican and Democratic leaders to enact the Harris-Fulbright bill and earlier measures gave evidence that gas legislation raised issues that were placed ahead of party loyalty. The loyalties that prevailed were regional rather than party loyalties. Neither President Truman nor the liberal Democrats were able to hold their party in line when the issue was raised. The congressional delegations of the gas-producing states voted almost unanimously for the Kerr bill and the Harris-Fulbright bill. States which do not rank high in gas production but which have some reserves supported both measures regardless of the party affiliations of legislators. Support for these elements also came from conservative-minded legislators and Congressmen representing rural interests whose constituencies were not directly affected by natural gas regulation.
The industry's contacts with Minority Leader Joe Martin and other consumer-state representatives pointed up the fact that consumer groups cannot usually count on the same degree of loyalty from their congressional delegations as producer interests. They are loosely structured groups with diverse interests. Legislators cannot rely on their organized support or their generosity with campaign funds. Consequently, these groups often do not have effective representation in the legislature. Consumer-state spokesmen made important contributions to the understanding of the problems involved in natural gas regulation during House and Senate debates. But in spite of their efforts and their superior numbers in the Congress they have been unsuccessful in their attempts to prevent the passage of decontrol bills. Compromise bills such as measures freeing small producers from controls that would relieve the pressure on the Commission were introduced frequently. Representatives of states where coal is the major industry joined with consumer groups and attempted to secure the passage of legislation that would benefit their states and aid in the conservation of natural gas. None of these bills, however, were seriously considered by the legislature.

It appears that the dominant role played by lawmakers representing narrow-based interest groups, with the support
of other congressional elements, has had a sterilizing
effect on policy making in the area of natural gas regu-
lation. Congress as a body has made little or no effort to
initiate policy. For the most part the work of the legis-
lature has consisted of attempts by individual members to
nullify decisions made in other branches of the government
that were unfavorable to the industry, such as the Interstate and Phillips decisions of the Supreme Court.

By the late 1960's legislative activity appears to
have reached a standstill. Producer-state representatives
have continued to introduce amendatory bills, but the
Harris-O'Hara bill introduced in the House in 1957 seems
to have marked the end of a period during which industry
leaders were optimistic about the changes of decontrol
legislation. They have been reluctant to give their full
support to such measures in the manner of the Harris-
Fulbright bill. One reason for this is that new attempts
to pass decontrol bills can be expected to raise the long-
dead-but-not-forgotten specter of the Case bribery attempt.

Furthermore, beginning in the early 1960's when the
area rate decisions were announced by the Commission and
the reforms were carried out by the Kennedy Administration,
consumer groups could point to a workable program of
regulation. This has strengthened their case against
decontrol.
More importantly, producer-state legislators have found that they cannot usually count on the support of the President in securing the passage of controversial natural gas legislation. They have believed for a long time that a decontrol bill could be passed only if the President encouraged it. Presidents have backed away from outright support of special interests because of their responsibilities to their broader constituency even when they have been in sympathy with the goals of business groups as was the case with President Eisenhower.

Seemingly, the activities of the Courts in policy-making have led to the creation of a legal position in support of regulation of producers that would require a major intervention by Congress and the executive office to change. The Executive branch has generally deemed it imprudent to provide this kind of support. Policy-making has been stalemated except for the contributions of the agency and the courts.

One of the main outside influences shaping the regulatory program has been that of the courts. It was the Supreme Court that originally decided, despite opposition from the Commission, that the independent producers should be brought under controls.

During the early days of government regulation when the agency was extending its power over the producers of
natural gas, the Supreme Court tended to give broad scope to the agency's decisions. Rather than seek to undermine its jurisdiction, the Court viewed itself as a partner with the agency in the regulatory program. This was evident in its deference to the Commission's findings concerning the question of what standard should be used in determining rates.

Justice Douglas viewed this as a controlling philosophy on the Court. In his dissenting opinion in the *Phillips* case and the *Permian Basin* cases he took the view that the solution of the problem of the extent of Commission jurisdiction over the independent producers was not a task for the Court. Douglas did not believe that the Court was competent to deal with the problem of regulating the production of natural gas and that it should not intrude in this area but that it should permit Congress and the Commission to assume these duties for which they are better fitted.

However, the majority of the Court saw their main task as one of balancing competing interests and as a corollary of this helping to maintain the Commission's independence from regulated groups. According to the Court the basis of its ruling in the natural gas case was to fulfill the aim of Congress in the statute which was to "protect consumers from exploitation at the hands of natural gas companies." The Court had maintained this position against the arguments of producer states and in support of the regulatory agency in
the earlier cases. In the Phillips case the Court determined that the agency itself was not interpreting its powers broadly enough to protect this aim and adjusted its argument accordingly only to swing around and take a position favoring administrative discretion in the Permian Basin cases. The Courts have encouraged the agency to expand its powers and to develop novel methods of regulation. The area pricing technique is a result of the combined efforts of the agency and the courts. It has enabled the agency to create a more effective regulatory program for carrying out the mandate of the Court and to establish policy positions and ground rules for the guidance of future Commissioners.

The effects of narrow interests have been modified by the intervention of the courts which have usually given a broader interpretation to the Natural Gas Act and to the role of the Commission than the agency itself. The work of the FPC during the Kennedy Administration indicates that with Executive leadership and the help of the courts the agency can become more responsive to the public sector.

Despite the body of criticism directed against the agency, Commission regulation is not likely to be abolished, though it may be modified. The system of controls has developed as a response of government to the needs of the people. Growth in population, urbanization, industrial production and consumer influence has increased the demands
made on the agency. The need for a clean fuel to protect the environment, and the rapidly developing shortage of energy supplies would seem to call for an expanded regulatory program dealing with questions concerning the allocations of resources as well as rates.

Recommendations directed toward the improvement of the performance of the Commission have come mainly from non-partisan members of the academic community such as Dean Landis. It has been suggested that some protection from the political environment could be realized by placing the Commission in an appropriate department within the executive branch of the government, or by the delegation to the President of powers which would enable him to exercise more direct control over the agency. The Commission would thus be in a better position to develop the broad perspective necessary for making and coordinating policy, and to avoid too close an attachment to the natural gas industry. Also the agency would be more likely to gain the public support and the resources that would enable it to withstand pressures from these groups.

President Kennedy's active interest in Commission regulation pointed up the potential for reform along these lines, though his administration ended quickly and inconclusively. Presidents of both parties have not isolated themselves from the substantive issues of the Commission.
However, Kennedy was the lone President during the period of federal regulation who attempted to find ways to improve the agency.

Efforts toward public financing of elections would help to mitigate the need for industry management to make large donations to political campaigns which are passed along to consumers. In any event it appears that the influence of political money in the executive branch could be more easily controlled than in the legislative branch through public scrutiny.

The fact that rate-making would become even more the subject of partisan politics as some candidates would champion tight controls while others would favor lax regulation would perhaps be offset by the location of the regulatory program in an office more accountable to the public at large than is the Congress. Furthermore, one of the main contributions of the courts in this area of policy-making is that they have provided legitimacy for consumer groups and enabled them to become stronger and better organized. It is not unlikely that they would be able to defend their interests fairly effectively, in the near future, in a national forum.

The executive branch could play an important role in fostering an educational program conducted by the agency to counter the partisan propaganda of interests groups and
to explain the function of the Commission. In addition to the need to develop public support and understanding there is also the need to maintain flexibility which can better be served by making the agency accountable to the executive branch rather than to Congress.

This means among other things the ability to adjust to changing economic and technical conditions. A new technology or the emergence of different forms of utility organizations such as publicly owned facilities may permit regulation of rates to be modified in favor of more reliance on competitive forces. Conversely, change may indicate that other activities such as direct sales of natural gas to industrial users and intrastate sales should be given public utility status.

Finally, the agency needs the help of an enlightened and supportive Executive in order to formulate a standard of the public interest. As James Landis mentioned the Commission has no established criteria for judging policy-making and other activities that can be compared to the visible goal of industry groups which is oriented toward profits. Research into public needs and the technical characteristics of the industry, as well as the general economy, would help the agency develop guidelines to serve as a framework within which to evaluate the factors that
bear on the public interest as well as the ramifying effects of Commission decisions.

Congress has paid lip service to the concept of a national fuel policy from time to time, but it is inherently incapable of formulating policy guidelines or itself regulating the industry. If Congress could perform these functions it would not have been necessary to create the regulatory program and place it in the hands of the Commission. In part Congress established the program in order to remove the regulation of natural gas from politics and substitute independent expertise for political partisanship. Intervention in the policy-making area by individual lawmakers has usually intensified the politics of regulation and denied the independence and expertise of the Commissioners. Congress could aid the Commission in its functions as an independent body by creating a code of ethics to be used as a guideline for members in their efforts to influence Commission actions or decisions in behalf of constituents.

It appears that for the present time the most effective redress of the existing imbalance of power between consumer and producer groups will depend on the continuation of the policy of review of Commission decisions by an independent judiciary. Judicial review of the agency's performance is a slow and cumbersome process.
However, during the period of federal regulation of natural gas, the courts have frequently proven to be more independent in relation to industry groups subject to government regulation than Congress and the regulatory agency. Justice Tom Clark appears to have been influenced in his dissenting opinions, to some degree, by the expectations of groups with which he identified prior to his appointment to the bench. But for the most part, justices are not influenced by particular groups on a consistent basis as may be the case with legislators and members of the Commission. Consequently, the Court may serve as an independent appellate body for consumer groups that are not able to gain access to the agency or the legislature. These groups have been more successful in attaining their objectives in the courts than in other branches of the government in the manner of civil rights groups and other minority interests.
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