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The American
Antitrust Institute

COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE

WORKING GROUP ON IMMUNITIES AND EXEMPTIONS

July 15, 2005

INTRODUCTION

These are the comments of a Working Group on Immunities and Exemptions established by the American Antitrust Institute for purposes of responding to the AMC's request for public comments. These comments reflect a consensus of the Working Group, but it should not be assumed that all agree with every statement or position herein. The Working Group is chaired by Warren Grimes (Southwestern University School of Law) and the other members are Darren Bush (University of Houston Law Center), Steve Calkins (Wayne State University Law School), Peter Carstensen (University of Wisconsin Law School), Craig Corbitt (Zelle, Hofmann et al.), Albert Foer (AAI), Joseph Goldberg (Freedman, Boyd et al.), and Jonathan Rubin (AAI).[*]

A. General Immunities & Exemptions

1. In what circumstances, and with what limitations, should Congress provide antitrust immunities and exemptions? In your response, please address the following questions:

> *a. What generally applicable methodology, if any, should Congress use to assess the costs and benefits of immunities and exemptions?*
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> *b. Should Congress analyze different types of immunities and exemptions differently? Are those that do not protect core anticompetitive conduct (e.g., price fixing) preferable to those that exempt all joint activities? Are those that eliminate, for example, treble damages, but retain single damage liability acceptable? For example, does the National Cooperative Research and*

[*] Professors Grimes and Bush drafted the comments. Members of the working group participated in pre-drafting discussion and, to varying degrees, by suggesting the inclusion of additional material and editorial changes and corrections.

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Production Act, 15 U.S.C. §§ 4301-06, provide a helpful alternative approach to blanket exemptions?

c. Should Congress subject immunities and exemptions to a "sunset" provision, thereby requiring congressional review and action at regular intervals as a condition of renewal?

d. Should the proponents of an immunity or exemption bear the burden of proving that the benefits exceed the costs?

These questions are addressed collectively in the material that follows.

There are unique aspects to each of the statutory and non-statutory exemptions to the antitrust laws. If antitrust were a sufficiently principled but also malleable framework, perhaps none of these exemptions would be necessary. The more troublesome feature of all of these exemptions is that they may be not only unnecessary but harmful to competition and the values that it serves. An indirect indicator of the potential harm from these exemptions is the manner in which they come into being. As described below, many of these exemptions are a product of special interest pressure within the legislature.

It may be possible to devise a methodology for measuring the costs and benefits of exemptions. Such a framework might at least aid the Congress in focusing on the critical questions to be asked and answered before determining whether to enact special interest legislation. Any such methodology, however, speaks only indirectly to the political component underlying the enactment and retention of statutory exemptions.

The Political Realities Underlying Statutory Exemptions to the Antitrust Laws – Many statutory exemptions are the product of intense lobbying by an industry that does not want to be subject to antitrust scrutiny. The lobbying campaign that leads to an exemption is often sparked by a law enforcement decision deemed threatening to the industry. Examples include the adoption of the McCarran Ferguson Act after the Supreme Court decided United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) or the adoption of the Soft Drink Interbrand Competition Act after the FTC decided Coca Cola et al., 91 F.T.C. 517 (1978). When issues such as these come before the Congress, there is typically intense lobbying by the proponents of the exemption.

Public choice theorists have sought to explain a democratic government's vulnerability to powerful economic interests.[1] When legislative outcomes affect an industry's profitability, the industry may spend substantial sums to lobby the legislature to achieve a desired outcome. An outcome favorable to a powerful industry may be

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[1] For a description of public choice theory, see Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987).

antithetical to consumer or broader social interests, yet those broader social interests may be under-represented next to the focused entreaties of the powerful industry. Public choice theorists point out that consumers individually seldom have enough at stake to lobby the legislature, so that their point of view may not be adequately heard. Organized consumer groups may be heard, but the financial resources that they can muster usually fall well short of those that will be expended by the industry.

Public choice theory focuses on economic incentives that may motivate a member of the legislature. The theory does not explain all legislative or administrative determinations.[2] When citizen interest in a particular issue has depth and breadth, that interest may provide legislators with sufficient information and incentive to resist the demands of a powerful economic interest group. But issues involving antitrust exemptions generally will not be closely followed or well understood by the average voter. To the extent the issues are understood, the financial stake may be insufficient to justify the time and expense of lobbying the legislature. An example is the enactment of the Soft Drink Interbrand Competition Act in 1980. The maneuvering leading to enactment of this legislation is described in Prof. Grimes' statement appended to these comments. The strongest advocates for this bill were individual soft drink bottlers and their national trade association, who collectively had strong voices in most of congressional districts that House and Senate members represented. Support also came from unions representing employees of those bottlers, and, somewhat more tepidly, from the major soft drink firms (Coca Cola, Pepsi Cola, etc.). The legislation, by authorizing elimination of intrabrand competition within a bottler's territory, seemed likely to raise the prices that consumers paid for soft drinks. But no individual consumer, or cohesive and active group of consumers, spent enough on soft drinks to warrant spending substantial funds to lobby the Congress on this issue. Thus, there were no private interests actively lobbying against this legislation. Members of the House Judiciary Committee staff that organized hearings on the proposed legislation had to solicit witnesses who would present the public interest side of the issue. The list of witnesses who spoke against the legislation is telling. They included Presidential Inflation Adviser Alfred Kahn, representatives of the Antitrust Division of the Justice Department and the FTC, Consumers Union (publisher of Consumer Reports), and a few law professors who teach antitrust law. While these witnesses testified eloquently about the probable negative effects of the legislation, they had no significant funds to contribute to the campaigns of legislators whose votes would ultimately enact the exemption.

There are a number of pragmatic lessons to be drawn from the enactment of statutory exemptions. One is that enforcement officials should be sensitive to political issues when making potentially controversial or marginal enforcement decisions. Although the agencies should not hesitate to bring meritorious cases, the manner in which

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[2] For criticism of public choice theory, see Abner J. Mikva, *Foreword to Symposium on the Theory of Public Choice,* 74 VA. L. REV. 167 (1988). Also see Albert A. Foer, *The Politics of Antitrust in the United States: Public Choice and Public Choices*, 62 U. PITT. L. REV. 475 (2001).

cases are brought (civil versus criminal) and the nature of the remedy sought (for example, a phased in remedy may allow an industry to adjust with fewer economic consequences) could lessen a well-predicted political backlash.

There is a link between the current methods for financing Congressional campaigns and the clout of special interests that seek a statutory antitrust exemption. Special interests seeking an antitrust exemption bring substantial funds to the table and use those funds freely to support the campaigns of those who support the exemption. When an industry or a group of firms is genuinely threatened by an enforcement decision, one could expect the industry to carry substantial political power into any ensuing legislative debate. The industry's First Amendment rights to make known its concerns should be beyond question. The question is the degree of that influence and whether the industry's views should be allowed to overwhelm those who speak for the broader public interest. Meaningful campaign finance reform might lessen the clout of these groups and bring more balance to legislative deliberations.

Congressional rules that require legislative due process could be helpful. Statutory exemptions should be adopted only after full hearings that allow all points of view to be weighed. Rules of the House or Senate that prevent an exemption from being added as a rider to appropriations bill or as an amendment to other substantive legislation would be helpful. These steps will allow more careful deliberation and consideration of broader public interest concerns.
Congressional procedural rules may not be helpful in addressing antitrust exemptions that arise indirectly from regulatory statutes that make no express reference to the antitrust laws. See the discussion in on page 5 of these comments.

Congress should consider adding sunset language and requiring a revisiting of the exemption when the exemption expires - Congress has on occasion added to an antitrust exemption bill language that sunsets the exemption after a prescribed period and provides for a commission to study whether it should be renewed. This type of language, for example, was added to the Shipping Act of 1984, granting antitrust immunity for agreements entered into by ocean shipping conferences. The benefits of such provisions, however, are limited. Once an exemption is on the books, the path of least resistance for Congress is to renew the exemption. Sunset provisions and study commissions may increase awareness of the issues and lead to tinkering around the edges, but it is very difficult to repeal a statutory exemption once it is part of the U.S. Code. Notwithstanding the sunset provision and a dutifully reporting study commission, the 1984 Shipping Act exemption remains a part of the law.

Courts should construe all antitrust exemptions narrowly - Once on the books, the courts should construe special interest exemptions narrowly. Among the advocates for a narrow construction canon is Judge Frank Easterbrook, who has written in support of a rule that legislation reflecting private interests be narrowly construed.[3] Of course, there

[3] Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

are many judicially adopted canons of construction. Attorneys on opposite sides of an interpretive dispute are usually able to cite multiple canons that support their preferred construction. Adventitious application of canons that favor a particular party's position will not foster sound judicial analysis or confidence in the legal system. But well-conceived and carefully applied canons can be of great assistance to courts awash in conflicting contention. A canon that calls for narrow construction of antitrust exemptions rests on the fundamental importance of competition policy for assuring consumer welfare and on an understanding of the likelihood that, as described by public choice theory, powerful economic interests can skew or undermine legislative due process or overwhelm voices for the public interest.

In regulated industries there are four principal forms of exemption from judicial enforcement of the antitrust laws:

a) the "filed rate" (or Keogh[4] doctrine)
b) the primary jurisdiction doctrine (including doctrines of "preemption"), which is not an immunity but a doctrine of jurisdictional allocation,
c) implied "regulated industry" immunity, and
d) "regulatory quasi-immunity," which also is not an immunity, but an irrebuttable presumption determinable on a motion to dismiss that an antitrust violation cannot occur for regulation-specific reasons.

These various types of judicially recognized antitrust exemptions are addressed more fully in the AAI Working Group's comments on regulated industries.

Any antitrust exemption that arises indirectly out of regulatory statutes, but in the absence of any express statutory language creating the exemption, raises all of the issues relating to public choice and lack of legislative due process that are addressed in Part I of these comments. Indeed, these problems may be more acute because, in the absence of express language, members of Congress may be unaware that they have created an antitrust exemption. The House and Senate Judiciary Committees, which have jurisdiction over the antitrust laws and expertise among both members and staff, may have had no opportunity to consider the consequences of the exemption.

The Canon for Narrow Construction of an antitrust exemption should apply with special force when there is no express statutory language adopting the exemption. Given the fundamental importance of competition as a regulator of private conduct, any decision to deny application of antitrust law should be the result of clear statutory language or, in its absence, a strong showing that such an exemption was either intended by the Congress or is clearly necessary to carry out the purposes of the statutory regulatory scheme. This canon would also justify shifting evidentiary burdens to those who claim the benefit of an implied antitrust exemption. These and related issues are addressed more fully in the AAI Working Group's comments on regulated industries.

[4]Keogh v. Chicago & Northwestern Rwy, 260 U.S. 156 (1922).

2. The Commission intends to conduct a general evaluation of antitrust immunities and exemptions, and currently contemplates focusing, for illustrative purposes, on the first eight immunities and exemptions listed below (a.-h.). Please provide any relevant information about any of the immunities and exemptions below, including their costs, benefits, and impact upon commerce. [list of exemptions omitted].

Each of the antitrust exemptions could easily generate a major book-length academic study. It seems unlikely that the Commission can expect authoritative comments or evidence on each of the topics listed. The Commission could provide a valuable service by publicizing a comprehensive bibliography of these materials that are identified and by encouraging further research in appropriate areas.

Because of the political circumstances that pave the way for enactment of statutory exemptions, a pragmatic and politically savvy approach for reexamining these exemptions seems appropriate. The insurance industry is currently very much in the public eye because of abuses that have come to light through state law enforcement actions. This seems an opportune time to reexamine the McCarran-Ferguson Act, perhaps as a part of a larger inquiry of federal versus state regulation.

B. State Action Doctrine

1. Should courts change or clarify the application of the state action doctrine?

The State Action Doctrine is in need of clarification and revision. The "test" for state action exemption appears deceptively straightforward: (1) "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'" and (2) "the policy must be 'actively supervised' by the State itself."[5] With respect to the first prong, the question hinges upon whether "the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure."[6] However, issues have arisen with lower court implementation of the doctrine that have thwarted the main goal of the state action doctrine by expanding the application of the doctrine beyond its intended reach, and could potentially lead to more ambitious anticompetitive conduct that would be shielded from the antitrust laws by mere statutory acknowledgement, rather than genuine legislative desire to provide such a shield.

First, as described in the Federal Trade Commission Staff, Report of the State Action Task Force (Sept. 2003) ("FTC Report"), courts, using language from the Supreme Court's decision in Town of Hallie v. City of Eau Claire, have held that some statutes have clearly articulated a state policy to displace competition with regulation

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[5] 445 U.S. 97, 105 (1980) (quoting *City of Lafayette*, La. v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978)).

[6] Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 64 (1985).

when the anticompetitive conduct at issue is a "foreseeable result" of empowering the municipality to act under the statute.[7] Using the language of Hallie in this fashion, however, leads to perverse results. For example, some courts have held that a broad, statutorily conferred authority to act is sufficient to exempt antitcompetitive conduct from the Sherman Act under the state action doctrine.[8] Using such an analysis, however, could lead to the conclusion that any market foreclosure by a city is a foreseeable result of a city's broadly delegated authority. This sort of misuse of Hallie creates an overbroad application of the state action doctrine.

Second, some courts have not undertaken critical analysis of whether the state statute in question clearly intended to displace competition. As the Supreme Court has noted, "Acceptance of [the proposition] . . .that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances--would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require."[9] Nonetheless, as the FTC Report demonstrates, courts habitually ignore the purpose of the statute, focusing instead on whether the statute confers a general authority to act.[10]

A disconnect between the statute's authority and its purpose could lead to perverse results, particularly in industries that are on the cusp of "deregulation." These "deregulated" industries, such as the electric power industry, may still operate under heavy statutory regulation. Courts could wrongly hold that such legislation exempts from Sherman Act liability anticompetitive conduct taken within these fragile markets. For example, some courts have used the filed rate doctrine even when the very purpose of the statute is to promote competition.[11]

2. Should courts change or clarify application of the active supervision prong?

The FTC Report states valid concerns, not repeated here, for requiring strict application of the "active supervision" test.

3. Should courts require different degrees of "clear articulation" by legislators and different levels of "active supervision" by executive or regulatory entities depending upon the circumstances (a "tiered approach")?

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[7] Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42 (1985).

[8] *See, e.g.,* Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co., 760 F.2d 607 (5th Cir. 1985).

[9] Community Communications Co., Inc. v. City of Boulder, Colo., 455 U.S. 40, 56 (1982).

[10] Federal Trade Commission Staff, Report of the State Action Task Force 25 (Sept. 2003).

[11] See, e.g., California ex rel. Lockyer v. Dynegy, Inc., 375 F.3d 831, 852-53 (9th Cir. 2004).

The use of a "tiered" approach advocated in the FTC Report has much to recommend it. This tiered analysis, however, should not be a substitute for careful analysis of the facts of each case.

The tiered approach apparently would focus on the "the nature of the anticompetitive practice and the nature of the party engaged in that practice."[12] Assuming this approach alleviates issues associated with the Hallie foreseeability standard, there is reason to proceed with caution. First, each statute will have different effects depending upon the industry in question. Thus, courts should not think that examining the "nature of the restraint" is shorthand for categorizing the offense under the Sherman Act (e.g., horizontal group boycott, leveraging, or predatory pricing). Rather, examining the nature of the restraint requires an examination of the industry in which the restraint is embedded, the effects of the restraint within that industry, and the express or implied goals underlying the state regulation. The concern is that one court's holding with respect to one restraint under a particular statute within a particular industry does not become the standard for all such restraints, regardless of the legislative and industry context of the restraint.

4. Do courts in applying the state action doctrine currently account for spillover effects (anticompetitive conduct immunized by one state that has a deleterious effect on consumers in other states)? If not, should courts address spillover effects under the state action doctrine? What standards should govern that analysis?

No, courts do not consider spillover effects in their state action analyses, although they should. The proposals and analysis in the FTC Report soundly address these questions.

5. How should courts apply the state action doctrine to various governmental entities?

Two issues warrant comment: whether Congress should repeal the Local Government Antitrust Act and whether quasi-governmental authorities should be subject to the active supervision prong. On all other subquestions, the FTC Report soundly addresses the issues.

With respect to the issue of quasi-governmental actors, the Areeda & Hovenkamp approach appears sound. Namely, quasi-governmental actors should presumptively be considered as private for purposes of antitrust scrutiny when the organization is one "in which a decisive coalition (usually a majority) is made up of participants in the regulated market."[13] The FTC Report is correct that such an agency should be actively supervised

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[12] FTC Report, *supra* note 10, at 12.

[13] *See* 1 PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 501 (2nd Ed. 2000).

by a government official outside the organization to prevent entity capture.[14] The FTC Report notes that this is one of two possible approaches the FTC "could take" to address the problem of whether "hybrid, quasi-governmental" entities should be subject to the active supervision requirement.[15] The FTC Report's second proposed approach is more questionable. A "more rigorous, case-by-case analysis of whether there is an appreciable risk that the challenged conduct is the result of private actors pursuing their private interests rather than state policy"[16] will be difficult to carry out. Given the history of the state action doctrine's application in the lower courts, this seems a strategy doomed to failure. Moreover, it verges on saying there is something wrong with private actors pursuing their private interests within a democratic polity.

The Local Government Antitrust Act has operated to prevent plaintiffs from obtaining injunctive relief, even though the statute clearly was not intended to, and does not, bar injunctive relief. This immunity by proximity neuters the deterrence effect of the antitrust law with respect to actions brought by private plaintiffs.[17] The result is also odd given that Congress expressly rejected giving local governments complete antitrust immunity.[18]

A second related effect has been the evisceration of the clause "acting in an official capacity." Courts instead have found that the LGAA applies even where normal government functions are not at issue,[19]despite plain Congressional intent.[20]

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[14] FTC Report, *supra* note 10, at 55.

[15] Id.

[16] Id.

[17] A 2000 study of 116 cases reported in Westlaw found that in only two did courts grant injunctions where the court considered application of the LGAA. E. Thomas Sullivan, *Antitrust Regulation of Land Use: Federalism's Triumph Over Competition, The Last Fifty Years*, 3 WASH. U. J.L. & POL'Y, 473, 511 n. 196 (2000).

[18] See Report of the Senate Committee on the Judiciary, S. Rep. 98-593, 98th Cong. 2d Sess at 5 (1984)("'S. 1578 as reported does not address the basic application of the antitrust laws to local governments; Lafayette and Boulder remain unchanged. Rather, S. 1578 as reported alters the antitrust remedies available against local governments . . . found to have committed an antitrust violation.")

[19] *See, e.g.,* Martin v. Stites, 31 F. Supp. 2d. 926, 930 (D. Kan. 1998)(argument "that defendants were participants in a conspiracy to benefit defendant Schoenhals in exchange for his political support of the sheriff and for "various gratuities and free services" he provided to the county" insufficient to overcome local government immunity); Lamminen v. City of Cloquet, 987 F. Supp. 723, 733-34 (D. Minn. 1997)(allegations of violations of state law insufficient to overcome local government immunity).

[20] The legislative history of the Act makes clear that the Act's limitation of the immunity for officials acting in their "official capacity" "is to insure that local government officials performing

Because of these issues, the LGAA should be amended (a) to define more clearly what "acting in an official capacity" means and (b) to make more explicit that injunctive relief is available in private suits.

Additional submission: Statement of Professor Warren Grimes, A Congressional Insider's Recollections: Adoption of the Softdrink Interbrand Competition Act in 1980

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their normal, lawful functions will not be personally responsible for damages when the local government itself is not." Senate Report No. 98-593, *supra* note 18 at 8.

Additional Submission

Statement of Professor Warren Grimes[1]
A Congressional Insider's Recollections:
Adoption of the Softdrink Interbrand Competition Act in 1980

I assumed the lead counsel position at the House Judiciary Committee's Subcommittee on Monopolies in March of 1980. Almost immediately, I was awash in the Subcommittee's consideration of a proposed bill that would create an antitrust exemption for exclusive territories for bottlers of nationally licensed soft drinks. Representative Peter Rodino, the Chairman of both the Subcommittee and the Full Committee, and a majority of the Committee's members, were opposed to this legislation. Yet, before the end of June of that year, the Congress adopted this antitrust exemption. The story of how this happened is relevant to the Antitrust Modernization Commission's consideration of statutory antitrust exemptions.

The impetus for this legislation was the FTC's decision in 1978 declaring that exclusive territories for soft drink bottlers violated Section 5 of the FTC Act. Coca Cola et al., 91 F.T.C. 517 (1978). The FTC concluded that these territories squelched intrabrand competition between the various bottlers of branded soft drinks and forced consumers to pay higher prices for their favorite brands. I have no reason to doubt the validity of the Commission's conclusions. Indeed, the Subcommittee's own inquiry produced evidence that transshipments of brands by "vendors" who purchased from one bottler and resold in the territory of another bottler were a disciplining force in higher-priced territories. These arbitrage shipments were occurring notwithstanding the exclusive territorial licenses granted to bottlers by the large soft drink firms. The vested interests of soft drink bottlers and their employees, however, were substantial. Virtually every Congressman and Senator had one or more bottlers who were constituents. Employees of these bottlers also actively joined in the legislative campaign for an exemption. The result, it turned out, was a powerful legislative campaign that gradually gathered momentum to the point that it could not be stopped.

A committee chairman had in1980, and still has today, substantial power over any pending legislation assigned to the committee. The power of scheduling hearings and, more importantly, the power to schedule or refuse to schedule a mark up that leads to reporting the bill to the full House, determines the fate of most legislation. If the chairman did not want a bill to be enacted, he simply "sat on it," refusing to schedule any hearings or mark up. The Chairman's power was limited by the need to maintain a sense of fairness and respect among the Committee's members, but in the case of the proposed soft drink legislation, Chairman Rodino was willing to take the heat. One way of dissipating the political heat was to schedule perfunctory hearings. The Chairman held two hearings in the Fall of 1979, hoping this would placate supporters. By March of 1980 when I assumed my duties, the pressure of supporters was unrelenting, and the

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chairman scheduled three more days of hearings in March and April of 1980. The subcommittee staff had no difficulty finding witnesses to testify in support of the proposed bill. The bottlers trade association, individual bottlers, and union officials and employees of the bottlers were all more than willing to come to testify. They offered the testimony of an antitrust professor, apparently well compensated by the proponents, who testified that the bill would have no harmful effects on competition. Finding witnesses to oppose the bill was more difficult. Most antitrust academics were opposed to the bill. Most of the Committee's members were either opposed to the legislation or disinclined to push it. But there was simply no well organized financial interest to fund the opposition. There were, to be sure, various vendors who would buy at a low price from one bottler and transship to another bottler's territory. But these vendors were mostly small firms that were fearful of taking a public posture lest they lose their source of supply.

Ultimately, the subcommittee staff produced a line up of opposing witnesses that included Presidential Inflation Adviser Alfred Kahn, representatives of the FTC, Antitrust Division, Consumers Union, the Consumer Federation of America, independent marketing specialists, customers of soft drink bottlers, several antitrust professors, and even a small bottler of soft drinks. None of these witnesses or the organizations they represented were paid for their testimony (in a few cases the Subcommittee may have reimbursed an individual's transportation expenses to attend the hearing). Nor were these opposing witnesses in a position to attend congressional fund raisers or offer substantial contributions toward the reelection of members of Congress. However persuasive the testimony of these witnesses, there was never any doubt where the political power lay.

After the hearings were completed in April, Chairman Rodino still hoped to avoid any mark up of this legislation. Privately, one prominent Republican member of the Subcommittee told me that he hoped the bill would never come to a vote. "I'll have to vote for it" he told me, but he hoped the Chairman never scheduled a mark up. The sentiment of this member was probably shared by other committee members — they would vote "yea" if the matter came to a vote, but privately hoped that they would never have to vote. The Senate, however, had already passed the bill, and pressure was mounting for action by the House.

Faced with the Chairman's refusal to schedule a mark up, proponents of the bill began gathering signatures on a petition to discharge the Judiciary Committee of its jurisdiction over the bill. Under House Rules, if a majority of the House (218 members) signed the petition, the bill would come before the full House for an up or down vote in exactly the form that it had been introduced, without any input or amendments from the Judiciary Committee. In early June, the Chairman learned that the threshold had been reached. The bill was scheduled to be brought to the floor in late June. Now, the only way that the Committee could shape the bill was to promptly mark it up and bring an amended version to the House floor before the original bill came to a vote under the discharge petition procedure. A mark up also allowed the Committee to issue a report that described the bill and its purpose. This was Chairman Rodino's choice and the bill was promptly marked up and reported to the House floor on June 20, 1980.

The result was a bill that was somewhat more measured than the original bill. The Committee added a proviso that applies the exemption only when there is "substantial and effective competition in the relevant market or markets." The battle to shape this legislation continued during the drafting of the Committee report. The report, drafted by Committee staff, cited cases that had defined relevant market narrowly, in one instance confining the market to a single soft drink brand. If widely followed, a single-brand market definition would have undercut the exemption. Committee proponents of the bill filed their own additional views, signed by 13 of the Committee's 35 members, in attempt to counter the committee report. Committee staff had no role in drafting these views, which were transparently the work of the law firm representing the soft drink bottlers. In hard hitting dissenting views, also drafted by Committee staff, three members of the Committee dubbed it "legislation of the industry, by the industry, and for the industry."[2]

The role of committee staff and outside counsel in drafting the report and various views filed by the members may be seen by some as grounds for ignoring all report language not formally adopted by the Committee. On the other hand, the views expressed in the Committee report (drafted under instructions from Chairman Rodino and approved by him) reflected an undercurrent of dissatisfaction with the bill among many of those members who voted in favor of the bill.

After enactment of the bill, the FTC's enforcement action was nullified. In the longer term, the impact of this legislation is unclear. Already by 1980, Coca Cola owned bottling companies that sold 15% of its licensed products; for Pepsi Cola, the figure was 20%.[3] The large soft drink brand holders continued to acquire large bottlers after 1980. The large independent soft drink bottlers that led the charge for the legislation in 1980 have largely disappeared from the marketplace. The antitrust exemption, however, remains the law of the land. It provides a rather striking example of the possible political backlash and consequences from an antitrust enforcement decision deemed threatening to a politically powerful industry.

The impact of enactment of this bill is also seen in the encouragement it provided to other groups that sought exemptions. Almost immediately after the soft drink legislation was enacted, the malt beverage (beer) industry began pressing for a similar antitrust exemption for local distributors. Although that push ultimately failed, a lot of resources were expended (by those who lobbied for the legislation, by the House and Senate Judiciary committees which held many days of hearings, and by the antitrust agencies and others who opposed the legislation) before the issue died. Within the next six years, the Congress did enact legislation providing for special antitrust treatment for joint exporting activity, for research and development joint ventures, and for municipalities.

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[2] The report of the committee with dissenting, additional, and supplemental views is H. Rep. No. 96-1118, 96th Cong., 2d Sess. (1980).

[3] These figures are reported in the dissenting views filed with the report. Id.

What could have been done differently? There are risks to politically overreaching law enforcement. A law enforcement action that is deemed threatening to an entire industry is fertile ground for a strong legislative campaign for an exemption. The FTC's decision striking down the exclusive territories for soft drink bottlers, viewed in doctrinal terms, was neither startling nor particularly novel. The case was easily distinguishable from the facts in the Supreme Court's landmark vertical restraints decision in Continental TV v. GTE Sylvania, 433 U.S. 36 (1977), where a single producer of a small market-share brand was employing a less draconian form of restraint (location clauses). Perhaps FTC Commissioners should have paid more attention to the potential political fallout from their decision outlawing exclusive territories. Even if these territories were found to violate Section 5 of the FTC Act, the political fallout might have been diffused, for example, by a phased-in remedial decree that did not immediately prohibit the use of exclusive territories that had been in place for generations.