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1974

CIGARETTE ADVERTISING AND THE "FAIRNESS" DOCTRINE:
THE IMPACT OF THE FCC'S BANZHAF DECISION

by

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Abstract

CIGARETTE ADVERTISING AND THE "FAIRNESS" DOCTRINE:
THE IMPACT OF THE FCC'S BANZHAF DECISION

by

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In June 1967 the Federal Communications Commission applied its "fairness" doctrine for the first time to commercial advertising. This case (known as the Banzhaf decision) and its consequences are analyzed to fulfill two goals: first, to test some of the basic propositions generated by scholars on the fundamental character of the regulatory process, and second, to do an impact study of a regulatory agency decision.

Very briefly, the plan of this study is as follows: the first chapter lays out the reasons for the study, the background to the case study, the major hypotheses, general approach and research strategies. Chapter Two includes a critique and methodological review of previous impact studies and a discussion of the problems of measuring impact. Chapter Three is a detailed narrative of the case study, beginning with the FCC's initial ruling applying the "fairness" doctrine to cigarette advertisements and ending with the consequences of Congress's ban of broadcast cigarette commercials. Chapter Four deals with the consequences of the Banzhaf decision for subsequent attempts to apply "fairness" to

the content of product commercials. Chapter Five is an impact study. It traces the impact of the Banzhaf decision with a special emphasis on its effects on the FCC's major clientele group - radio and television broadcasters. It does this by comparing operational measures of four concepts - compliance, enforcement, nondecision-making and circumvention - with data made available through the case study. The final chapter deals with the implications of these findings for measuring regulatory impact and shows how this study and other administrative impact studies shed light on various hypotheses posed by students of the regulatory process.

Since the majority of cases before the Federal Communications Commission involving "fairness" are disposed of informally through mail contacts, telephone conversations and personal discussions rather than in formal hearings a case study of the impact of a major "fairness" decision is also an ideal setting for providing some insights into the informal regulatory process, an area which has been virtually unexplored by political scientists.

Research techniques included in - depth interviews of key participants in the Banzhaf case, a survey questionnaire directed at the general managers of New York City's commercial radio and television stations and a content analysis of Broadcast Advertising Reports, which contain all advertisements shown on the three networks. Other research sources included internal corporate studies detailing compliance with the Banzhaf decision, FCC Annual Reports, Hearing Reports, and Public Documents, the Federal Register, The New York Times, Broadcasting magazine, and the Congressional Record.

Drawing from the evidence, several conclusions were reached:

1. Banzhaf was not a symbolic decision for it had a measureable effect on the distribution of commercial air resources. Radio stations complied immediately and fully with the decision. Television stations, on the other hand, dragged their feet on compliance. If Banzhaf and his small public interest group had not prodded the FCC into enforcing the decision, it would have been largely symbolic in its effect.

2. The broadcast cigarette commercial ban, enacted by Congress in 1969, thwarted the positive impact that Banzhaf had on cigarette consumption and on the dissemination of anti-smoking information. Although touted as a public health measure, the ban favored the tobacco industry by reducing the industry's advertising costs, by eliminating most broadcast anti-smoking messages, and by deflecting further regulation of cigarette advertising.

3. A case analysis of FCC decisions involving "fairness" and advertising demonstrates that the Commission's procedural rules heavily weight its resolution of "fairness" doctrine complaints in the broadcasting industry's favor. These rules put a substantial monitoring burden on the individual complainant, who is forced to give prima facie evidence that his complaint is justified before the FCC will take action on it.

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This study originated out of an interest in broadcasting and politics, stimulated by a year long public policy seminar conducted at the City University's Graduate Center by Professor Robert Engler. Tracy Westen, assistant to former Commissioner Nicholas Johnson, spoke at that seminar, outlining many of the problem areas involved in broadcasting regulation. The "fairness" doctrine was discussed and my interest in federal regulation became more specialized as a result of that evening. In addition, my overall interest in regulation was stimulated by many other provoking class discussions led by Professor Engler at the Graduate Center.

Major credits for the merits of this work belong to my advisor and reader - Professors Kenneth Sherrill and Judson James. Professor Sherrill has served me (since my undergraduate days at Hunter) as a model of teaching and scholarly excellence. His creative approach to political science and his comprehensive knowledge of both literature and methodology have been invaluable to me. In addition to being a total professional, he has been a good and true friend. I would also like to thank Professor James for hours of patient and constructive criticism. Both have made writing this dissertation a profound learning experience. I would also like to thank Dean Blanche Blank for taking the time out of a heavy schedule to be my third reader.

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CHAPTER I: INTRODUCTION

In June 1967 the Federal Communications Commission applied its "fairness" doctrine for the first time to commercial advertising. The aim in this dissertation is to analyze this case and its consequences in order to fulfill two goals: first, to test some of the various insights advanced by students of the regulatory process, and second, to do an impact study of a regulatory agency decision. Studying impact means examining and evaluating the effectiveness and application of a (judicial, executive or administrative) decision, especially its effect on the group to which it is directed.¹ Policy formulation is only one part of the decision-making process and thus is a necessary but not a sufficient condition for a broad understanding of regulatory politics. A complete study of public policy-making must not only focus on the factors leading up to and shaping a policy decision, but it must also focus on what happens after a decision is made. How and whether a policy is enforced, and whether it is complied with or circumvented by the group being regulated are crucial questions of impact left out of most analyses of the policy-making process. These are the major questions which my dissertation will address.

Approaches to the Regulatory Process

In an era of "big government" much governmental output originates in the bureaucracy. Independent regulatory commissions regulate the nation's transportation system, its television and radio broadcasting, its financial institutions, public utilities and commerce. The regulatory agencies collectively issue more than 100,000 rulings a year.² Political scientists have virtually ignored these policy-making institutions while

directing the bulk of their attention to the more traditional branches of government. However, in the limited literature available, some political scientists and public administration specialists have advanced several approaches to the regulatory process and various insights explaining aspects of it. An early approach to the regulatory process is the legal-institutional approach (Cushman).³ This approach evaluates congressional legislation governing the various commissions and analyzes their individual rules of procedure. The clash of group interest theory is another approach to the regulatory process (Leiserson, Truman, Herring).⁴ This approach emphasizes the role of private interest group conflicts in the policy-making process. Another theory advanced by political scientists explains the regulatory process through the existence of "life cycles" (Huntington, Redford, Bernstein).⁵ Proponents of the "life cycles" approach stress that regulatory commissions begin with a strong sense of mission and a willingness to pursue the public interest in their youth, but with maturity and an increasingly hostile political environment find dependence on, cooperation with, and servitude to the politically powerful groups the agency is supposed to regulate a more comfortable position. The "symbols and quiescence" approach represents another approach to the regulatory process (Edelman).⁶ This approach considers the impact of most major administrative decisions and regulations to be symbolic and designed to pacify the general public, while the real rewards of politics are divided between politicians and organized interest groups. Another group of authors, (Kolhmeier, Kariel, McConnell)⁷ believe that the regulatory process can best be described as one in which the agency's dominant, "regulated," groups frame the questions which are posed before

the agencies and determine the answers by influencing the regulators' values. In other words, they say that the independent regulatory commissions become lobbyists for the groups they are supposed to regulate in the public interest. A final approach is offered by Jaffee and Kolko.⁸ They say that regulation itself means the organization and rationalization of a formerly chaotic and uncontrolled industry. Governmental regulation also often spells the end of private competition. The central argument of this approach is that the enabling legislation setting up many regulatory agencies often promoted the interests of the regulated industry.

The Plan of This Study

While some general explanations and approaches have been advanced, case studies and systematic or analytic research testing specific propositions about the regulatory process are almost nonexistent.⁹ This dissertation is a case study¹⁰ of a landmark decision made by the Federal Communications Commission in which it applied its "fairness" doctrine to a product commercial (the Banzhaf decision). The Federal Communications Commission is a seven man regulatory body set up by the 1934 Communications Act to regulate the nation's radio and television broadcasting industries, interstate telephone and telegraph facilities and non-commercial radio transmissions (maritime, aircraft, mobile, police, amateur short-wave, etc.) in the "public interest, convenience and necessity."¹¹ The "fairness" doctrine is an FCC policy covering all commercial broadcast licensees. Under the "fairness" doctrine, stations which treat controversial public issues must provide time to all legitimate opposing views on that issue in order to fulfill the Communications Act's public interest mandate.¹²

Under the FCC's Banzhaf decision broadcasting stations were ordered to devote a significant amount of time each week to the dangers of cigarette smoking because cigarette commercials addressed only one side of the smoking and health controversy.¹³

Very briefly, the plan of this study is as follows: the remainder of this chapter will lay the reasons for the study, background to the case study, the major hypotheses, general approach and operational procedures. Chapter 2 is a critical review of previous judicial and administrative impact studies, including a discussion of the problems involved in measuring impact. Chapter 3 will be a detailed narrative of the case study, beginning with the FCC's initial ruling applying the "fairness" doctrine to cigarette commercials and ending with the consequences of Congress's legislative ban of broadcasting cigarette commercials. Chapter 4 will deal with the consequences of the Banzhaf decision for subsequent attempts to apply the "fairness" doctrine to product commercials in the period 1967-1973. This will be accomplished by a detailed narrative and analysis of the FCC's decisions in relevant cases for that period. Chapter 5 is an impact study, tracing the impact of the Banzhaf decision with a special emphasis on its effects on the FCC's major clientele group - radio and television broadcasters. This will be done by comparing operational measures of compliance, enforcement, nondecision-making and circumvention with data made available through the case study. Chapter Six first will attempt to recapitulate the major findings of this dissertation within the framework established in this chapter. Second, it will address the question of how the Banzhaf case and other impact studies shed light on hypotheses and theories advanced by students of the political process.

And finally, Chapter Six will deal with the implications of the Banzhaf study for the measurement of impact.

Reasons for the Case Study

Robert Dahl explains the usefulness of the case study approach in the following quotation:

If the disadvantages and limitations of studying one city are self-evident, the overwhelming and, I hope, compensating advantage is that the enterprise is reduced to manageable proportions. Many problems that are almost unyielding over a large area can be relatively easily disposed of on this smaller canvas.¹⁴

While general postulates about the regulatory policy-making process have been stated few detailed case studies of crucial elements of that process -- enforcement of and compliance with specific regulatory decisions -- have been done.¹⁵ Modern organizational theory and studies of executive and judicial decision-making prove that few decisions are self-executing.¹⁶ Whether the Federal Communications Commission's organized clientele groups circumvented the ruling or complied with it and whether the Commission enforced its decision are critical questions whose answers will give us a more complete picture of the policy-making process. Lasswell and Kaplan give the intellectual catalyst for impact research when they conclude that:

A decision is an effective determination of policy... involving the total process of bringing about a specified course of action....The decision-making process includes application as well as formulation and promulgation of policy, (consequently) those whose acts are affected also participate in decision-making; by conformity to or disregard of the policy they help determine whether it is or is not in fact a decision. Laws are not made by the legislature alone, but by the law-abiding as well; a statute ceases to embody a law in the degree that it is widely disregarded.¹⁷

Political scientists have long advocated applying the tools of social research to the making of public policy. Charles Merriam, in

The New Aspects of Politics,¹⁸ calls for the development of "political prudence." "Political prudence" involves both the organization of factual data about political problems and the scientific analysis of the costs and benefits of alternative public policies. Merriam says that although political science can never claim to be entirely scientific, it can contribute an impartial evaluation of public policy problems to the community at large:

Short of the attainment of what may technically be called political science, there is a wide field within which the practical intelligence of a community may be organized and applied to the consideration of special problems of general interest. The possibilities in this direction have never been exhausted or even approximated....The problem is the discovery, organization, and application of this quality [political prudence or rationality] to the problems of government.¹⁹

In other words, Merriam is calling for the rationalization of public policy-making — a process which is all too often based on incrementalism, emotional appeals, or short term pressures and goals. Merriam also urges intellectuals to get together with the men of action for the benefit of the public good. It was Merriam's hope that social scientists and political savants would use empirical research techniques to rationally evaluate policy alternatives. Government officials would then take these recommendations into consideration when making actual policy decisions. Thus Merriam's concept of "political prudence" urges the advancement of the "welfare of the state and...of political science" by applying the scientific method to governmental problems.²⁰

Harold Lasswell, writing in The Policy Sciences,²¹ agrees with Merriam's recommendations. Lasswell wants sociology, political science, and economics to develop into the "policy sciences." He believes that the "policy"

sciences can rationalize governmental decision-making by evaluating alternative courses of action, and by determining the optimum means of bringing them about. However, according to Lasswell, the policy formulation and enforcement process must first be empirically measured before the "policy" sciences can collect and interpret data on the most pressing political problems of our time.

The development of impact analysis represents a step in the directions advocated by Lasswell and Merriam. Arthur S. Miller, in writing about the need for impact analysis, says that the real task facing social scientists is that of:

...creating social progress, definable only as a direction of changethrough alleviating some of the grosser injustices that a society can agree upon and find remediable....The accomplishment of that task can be helped through impact analysis, for it is only when given decisions are criticized and evaluated in term of postulated goals that it can be determined whether social progress is being attained....Impact analysis cannot set the goals of decision-making -- that has to come from elsewhere -- but can assist in two ways: a) in providing a basis for decision and b) in evaluating the decisions themselves.²²

Studying the impact of a decision allows us to compare the stated goals of a policy with the actual consequences of its implementation. It tells whether the political demands which led to the decision have been realized or suppressed. And finally, it provides empirical data about political institutions, relationships and processes.

Background to the Case Study

We have reviewed thus far approaches to the regulatory process, the plan of this study, and the need for empirical studies of impact. The following sections provide a general background to the Banzhaf

decision by discussing the substance of the "fairness" doctrine, the informal administrative process, the facts of the Banzhaf case, and the controversy over counter-advertising. These background sections will be followed by sections outlining our major hypotheses, general approach, and operational procedures.

The "Fairness" Doctrine

The "fairness" doctrine is an FCC policy which requires radio and television broadcasters to give access on a balanced footing to opposing viewpoints or opinions concerning controversial issues of public importance. The FCC established the doctrine in 1949 in its Report on Editorializing.²³ The impetus for the "fairness" doctrine is the fact that the broadcast airwaves are a publicly owned resource making individual broadcasters not the private owners of the nation's television and radio stations but their public trustees. Thus the FCC believed private broadcasters should not be allowed the use of the public's airwaves to propagate their own political opinions to the exclusion of other viewpoints.

In setting up the guidelines of the "fairness" doctrine in the 1949 Report the Commission said:

The Communications Act of 1934...makes clear that licenses are to be issued only where the public interest convenience or necessity could be served thereby. And we think it is equally clear that one of the basic elements of any such operation is the maintenance of radio and television as a medium of speech and freedom of expression for the people of the nation as a whole...It is axiomatic that one of the most vital questions of mass communications in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day... Unquestionably, then, the standard of public interest, con-

venience and necessity as applied to radio broadcasters must be interpreted in the light of this basic purpose....It is the right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.²⁴

The "fairness" doctrine became the Commission's primary instrument to implement these basic goals. The Report on Editorializing goes on to state:

The Commission has made clear that in such presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise. Only where the licensee's discretion in the choice of the particular programs to be broadcast over his facilities is exercised so as to afford a reasonable opportunity for the presentation of all responsible positions on matters of sufficient importance to be afforded radio time can radio be maintained as a medium of freedom of speech for the people as a whole. These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public.²⁵

As we can see in these statements the FCC created the "fairness" doctrine with the most lofty goals of freedom of expression and democracy in mind. However, at the same time the FCC generated a long trail of controversy by refusing to define a "controversial issue of public importance" and by leaving the decisions involving practical implementation of the "fairness" doctrine up to the good faith and best judgment of each individual licensee.

It should be noted that the "fairness doctrine" is a Commission policy, not a formal codified rule. "Fairness" doctrine policy is developed through ad hoc decisions shaped by the particular facts

surrounding each individual case. Bradley C. Canon suggests that:

... this gives the doctrine the potential and flexibility needed for expansion, but it also renders its development relatively uncontrolled, with inconsistencies and serpentine twists of emphasis reflecting prevailing attitudes within the Commission.²⁶

And finally, the "fairness" doctrine should be distinguished from the concept of "equal time". Section 315 of the Communications Act states that broadcasting stations that give or sell time to one candidate for public office must make equal time on their station available to all candidates for that office. The "fairness" doctrine, on the other hand, requires the broadcaster to devote a reasonable amount of time to controversial issues of public importance. And if these issues are addressed on his station, the broadcaster cannot only present the viewpoint with which he agrees.

The "Fairness" Doctrine and the Informal Administrative Process

The "fairness" doctrine is an FCC policy, not a formal rule, and the majority of cases before the Commission involving "fairness" are disposed of informally through mail contacts, telephone conversations and personal discussions rather than in formal hearings. A case study of the impact of a major "fairness" decision is an ideal setting for providing some insights into the informal regulatory process, an area which has been virtually unexplored by political scientists. The narrative of the Banzhaf decision and of the cases which followed it dealing with the principle of counter-commercials, and this study of the Banzhaf decision's impact will all generate data pertinent to the informal administrative process, offering some evidence on the following group of questions: How effective are the communications links between

the agency, complainant, and client? What are the clientele's perceptions of and attitudes toward the agency? To what extent are procedural safeguards followed in informal processes? What effect does the informal handling of a case have on the Commission's enforcement zeal? What effect does the informal handling of a case have on a complainant's willingness and ability to pursue his complaint? And what effect does the informal process have on the clientele's ability to avoid agency or citizen demands?

The use of informal administrative techniques leads to regulation by "lifted eyebrow". This technique was first discussed by former FCC Commissioner John Doerfer in his dissent to Miami Broadcasting²⁷ in 1956. Doerfer noted that:

This Commission, as well as all broadcasters, spends a good deal of time and money in compiling percentages of various program categories.... All this is nonsense if the Commission has no actual sanctioning power. At best, it amounts to regulation by the lifted eyebrow ²⁸ a wholly inappropriate basis for administrative action.

The FCC chooses to secure compliance with its "fairness" decisions indirectly. The Commission rarely resorts to formal hearings or formal sanctions (fines, short term licenses, cease and desist orders) when a question of "fairness" is involved. Informal enforcement techniques used by the FCC can take any one of the following forms: the letter of reprimand (sent to the licensee following a successful "fairness" complaint); the letter of inquiry (requesting an explanation from the individual broadcaster for his station's policies); the advisory opinion (a letter advising a station on the Commission's feelings on a subject, although no complaint has been filed); delaying action on a station's

license renewal until it conforms to FCC policies; and speechmaking by Commissioners and other high level personnel.

Broadcasters, whose very licenses to function are dependent on the FCC, are very sensitive to these informal tactics. Kenneth Culp Davis says that the:

Crucial business fact which accounts for the effectiveness of the FCC's supervisory power is that hardly any question of program content can be important enough to cause a station to endanger renewal of its license.²⁹

Therefore an independent regulatory Commission regulates with the "lifted eyebrow" when it:

(1) establishes and enforces policies above and beyond [and occasionally contrary to] those formally enacted in its statutory mandate or subsequent regulations, and (2) controls clientele behavior by means other than formal adjudication or sanctions and, sometimes, in the absence of sufficient evidence to warrant such proceedings.³⁰

This definition provides the basis for our assessment of FCC reliance on this technique in the case study, the chapter on cases dealing with counter-commercials and the chapter dealing with Banzhaf's impact on the broadcasting industry.

Cigarette Commercials and the "Fairness" Doctrine --
The 'Banzhaf' Decision

In September of 1966 a young New York lawyer named John Banzhaf III wrote a letter to television station WCBS requesting free time, under the Federal Communications Commission's "fairness" doctrine, to address the controversial public issue of the desirability of smoking, which he claimed that the cigarette commercials shown on WCBS raised. WCBS denied his request for time, stating that news shows, panel shows and public service

announcements already presented an opposing view on their station. Furthermore, in its view the "fairness" doctrine was only applicable to the appearances of political candidates, public affairs programs, personal attacks and editorials, not product commercials. Banzhaf's subsequent complaint to the FCC resulted in a letter ruling by the FCC staff to WCBS in June, 1967 upholding Banzhaf's position. The staff ruled that a "significant amount" of time must be allocated each week to anti-smoking messages because of the frequency with which cigarette commercials were shown on television. Reconsideration of the ruling was denied unanimously by the full Commission and the FCC was upheld on appeal by a federal district court. Television and radio stations in the United States were being ordered to distribute approximately \$75 million worth of free air time annually to anti-smoking forces.

The decision was, in effect, rescinded when Congress banned cigarette commercials from radio and television. If cigarette commercials were no longer being used, anti-smoking messages could not be triggered by the "fairness" doctrine. (The ban took effect on January 2, 1971 in order that cigarette commercials could be shown during the football games seen on New Year's Day.) Although the FCC specifically limited its ruling to cigarettes the Banzhaf decision provided the opening wedge for what is called the counter-commercial movement. This is the term coined to describe the attempts of public interest groups to gain access to free television time through the FCC and the courts on the basis of "fairness" doctrine complaints against the one-sided presentation of controversial issues within product commercials.

"Fairness" and Advertising

The Banzhaf case involves a basic question of public policy and power: Who has the right to determine which groups in society shall have access to the mass communications media and thus influence and control over the information and opinion available to the public? Jerome Barron, a noted student of the constitution and the mass media says that a right of access to the electronic media and the press may be part of an emerging First Amendment right, that "... there is inequality in the power to communicate ideas just as there is inequality in economic bargaining power...."³¹ This imbalance makes the "marketplace of ideas" a romantic notion, for a more realistic view of the First Amendment right of expression is that "... it is somewhat thin if it can be exercised only at the sufferance of the managers of mass communications."³²

Nicholas Johnson, former FCC commissioner, believes that commercials that would rebut the claims of regularly scheduled commercials or that would address other sides of the controversial issues which they raise are essential if a true "marketplace of ideas" is to exist.³³ He says that there is no reason to exempt commercial messages from the "fairness" doctrine. The incessant flow of professionally planned, repetitious advertising messages seen by the American public do address a multitude of controversial public issues, not the least of which is the desirability of a galloping Gross National Product which is fed by commercial broadcast advertising itself. According to Johnson commercials which address public controversial issues either explicitly or implicitly do fall under the "fairness" doctrine's bailiwick of political communications. Therefore the FCC should sustain "fairness" complaints against such commercials and give opposing views rebuttal time.

Critics of the idea of counter-commercials say that the problems involved are ones of appropriateness and the economic viability of the broadcasting industry. They claim that ordinary product commercials (to be distinguished from editorial commercials)³⁴ do not address controversial issues and should be exempt from the "fairness" doctrine. Julian Goodman, President of the National Broadcasting Company, argues that "all advertising is advocacy."³⁵ A successful movement towards counter-commercials would, according to Goodman, destroy the margin of network profits and the financial base of commercial broadcasting. He concludes that counter-commercials are an inappropriate way of addressing controversial issues because the counter advertiser would be promoting his own special cause (my emphasis) only in response to something said in a commercial rather than a total analysis of the various aspects of the issue.³⁶ John Schneider (President, CBS Broadcast Group) considers the implications of Banzhaf and counter commercials for the broadcasting industry in even more emphatic terms:

Violence, the Surgeon General, the FCC, the FTC, children's programming, commercials, access, renewal, First Amendment. Each one is a problem. And alone or in the aggregate, they, in my judgment, pose as great a threat as does the ultimate extension of the "fairness" doctrine....If we're forced to try to live within the restrictions of these decisions broadcasting will be reduced to a welter of claims, counter claims and contradictions.... I can think of no argument, no sales presentation, no discount, no cost per thousand that could possibly convince an advertiser that he should use broadcasting to sell his product or service. The bottom, bottom line on this is that we're talking about survival, pure and simple. Without advertiser support, free broadcasting will cease to exist in this country. We're kidding ourselves if we don't face up to the real dimensions of this threat.³⁷

Mary Gardiner Jones (Commissioner on the Federal Trade Commission) points up the importance of the question of access to the media through

the vehicle of commercial spot announcements in an essay on the cultural and social impact of advertising on American society. She writes that advertising :

... is a catalytic force in our whole economic system and a major influence on the content of the mass media which shape our national culture and our political values.³⁸

Its influence in our economy is even more clear cut:

Advertising is of central importance in launching new products on the market, enabling companies to enter new markets, and in developing mass markets for products. The fact that American advertising expenditures exceed \$15 billion a year is convincing evidence of the businessman's conviction that advertising is an effective communications tool to reach individuals and persuade them to action.³⁹

Noting that television reaches about 80% of our population and the average viewer is exposed to some 40,000 commercials a year Commissioner Gardiner considers the impact on the American public of messages which are "essentially materialistic" and which contain the "the inescapable premise ... that we are all externally motivated."⁴⁰ She believes that since the commercial is such an important part of the "marketplace of ideas" that advertisements should communicate the full range of human options, life styles, and value systems, not just those of the advertiser and of the product consuming middle class. By analogizing the problems posed by the economic, social and cultural impact of advertising on society to those of free speech she concludes that the solutions do not lie in censorship but

... by promoting and encouraging as wide a diversity of viewpoints as possible. The need is for diversity, for balance and for fairness.⁴¹

Commissioner Jone's essay describes the power of advertising and the homogeneous viewpoints expressed by commercial messages which are

available only to the wealthiest groups in society. These facts taken together comprise the social, economic and political environment which the countercommercial movement threatens with change. Therefore, the Banzhaf decision is not significant only because of the particular facts of the case but because of the implicit and explicit issues and questions it raised for those at the FCC, for broadcasters, consumer and public interest groups, the courts and for the public at large.

Harold Lasswell asserts in his classic work on political power, Politics Who Gets What, When, How? that social, economic, and political elites maintain their positions by manipulating goods, practices, violence and symbols.⁴² In a television age, control over the media of mass communications is essential if control over the symbolic life of the nation is to be maintained by these elites. By institutionalizing a right of consumer access to radio and television time, Banzhaf threatened the corporate power structure's monopoly of control over access to the mass media. Even worse, in the eyes of the broadcasting industry, is the spectre of consumer messages attacking commercial products, using the professionally planned, "spot" format. The broadcasting industry believed that counter-ads would undermine their competitive edge over the print media and would ultimately lead to the death of the commercial broadcasting system. Thus Banzhaf had radical implications for the American communications and corporate establishment. First, Banzhaf threatened to deny corporate advertisers exclusive access to the communications media. And second, the Banzhaf decision threatened to take the profit motive out of broadcasting, and thus implicitly raised the alternative of a government-financed broadcasting system.

Major Questions to be Raised in the Conduct
of the Case Study

A study of the Banzhaf decision will shed light on a number of theoretical questions of more general relevance to students of American politics. These questions include:

A. Were the limits of the FCC's policy on the "fairness" doctrine and cigarette advertising set by their acceptability to the interests of its major organized clientele--radio and television broadcasters?⁴³

B. Was the FCC's Banzhaf decision merely a symbolic ruling designed for public consumption while substantive political resources (in this case television and radio air time) were left undisturbed in the hands of the group which it regulates?⁴⁴

C. Did the FCC enforce the Banzhaf decision?⁴⁵

D. Did broadcasters try to circumvent the Banzhaf decision?⁴⁶

E. What was the nature and degree of clientele compliance with the Banzhaf decision?⁴⁷

F. Did the FCC ignore its own Banzhaf decision in subsequent cases involving the "fairness" doctrine and commercial advertising in order to thwart public interest group demands for television and radio time and to prevent Banzhaf from becoming a precedent?⁴⁸

The Four Faces of Power

The section below discusses the four aspects of impact which are the basis for our research design. Following this, our concluding section outlines our research techniques and strategies.

V.O. Key defines politics as the study of power relationships:

Politics as power consists fundamentally of relationships of superordination and subordination, of dominance and submission, of the governors and the governed. The study of politics is the study of these relationships.⁴⁹

Key also warns that power should not be confused with commands from above:

The power relationship is reciprocal, and the subject may affect the ruler more profoundly than the ruler affects the subject. As Lasswell puts it, 'Power is an interpersonal situation; those who hold power are empowered. They depend upon and continue only so long as there is a continuing stream of empowering responses.'⁵⁰

In order to successfully study a decision's impact, one must empirically quantify and operationalize power relationships. A lot of the debate on the study of power focuses on whether these relationships can be operationalized and measured.⁵¹ This study focuses on four faces of power — compliance, enforcement, nondecision-making, and circumvention — that while analytically distinct are somewhat overlapping and/or complementary. These four concepts enable us to measure various aspects of power relationships and to incorporate Lasswell's and Key's basic premise (that power is a two-way process affecting both the decision-maker and the person or group the decision is directed toward) in our research strategy and design.

a) Although compliance has been virtually ignored by scholars in the fields in favor of studying the history and policies of regulatory commissions, their legal procedures, and the commissioners who have influenced regulation, it is a key element in the determination of the impact of a regulatory decision.⁵² Compliance is "to what extent a specific decision

is obeyed."⁵³ A decision may have an impact on people who are basically unaware of it, but when speaking about compliance knowledge, attitude, and intent must be involved. Thus the concept of compliance has three recognizable parts: "(a) norm-awareness, (b) intention to conform, and (c) conforming behavior"⁵⁴

Policy decisions without clientele compliance are a mere nullity and have no substantive meaning. Samuel Krislov says that the "emphasis upon compliance is basically a ... reversal of the elitist, leader-centered power approach"⁵⁵ and that "compliance is ... the correlative of power",⁵⁶ representing a conceptual clarification in political science analysis. He sees a trend in political science analysis, shifting from the notion of sovereignty, to power, to decision-making, and now to compliance, that is similar to trends in the physical sciences. Max Jammer's Concepts of Force⁵⁷ indicates that the notion of force in the physical sciences followed a similar trend. Jammer writes that in medieval times force was equated with power and virtue. Gradually more direct meanings for the term were developed until force was mathematically quantified.

According to Krislov, evaluating compliance stands the problem of power on its feet for it "restores the mutuality of social interaction".⁵⁸ By studying compliance one is rejecting the notion that social relationships are unidirectional and that the people and organizations who give orders are omnipotent. Instead, if you choose to study compliance with a decision, you are implicitly accepting Lasswell's and Key's idea of a "continuum of power relationships"⁵⁹ existing in the real world.

b) Enforcement is the complement of compliance. While compliance focuses on a clientele group's reaction to a decision, enforcement involves the actions of the decision-making body to increase compliance with its policies. Complying behavior on the part of the clientele may result from agency enforcement efforts while the nature of enforcement may be influenced by high or low compliance rates. Marver Bernstein states that:

Perhaps the least explored area in governmental regulation of business is the enforcement of regulations ... only passing reference has been made to the tasks of winning support for regulations, securing compliance of regulated groups, and applying sanctions against those who continue to violate the regulations....One of the crucial tests of the effectiveness of a regulatory commission is its capacity to obtain the compliance of persons subject to regulation and to enforce its regulations against violators. This capacity becomes, in the long run, a primary measuring rod of the ability of the agency to operate in the public interest.⁶⁰

The limited budget and investigative staff of the Complaints and Compliance Division (five lawyers and five field investigators) have to insure that 8,000 licensees comply with FCC regulations.⁶¹ The Bureau is overwhelmed by 40,000 complaints a year and thus does not regularly monitor radio and television stations to see whether they are complying with the FCC's "fairness" decisions. Instead, enforcement at the FCC is done passively, incrementally, and on a case by case basis. The Commission enforces its "fairness" rulings on the basis of individual complaints filed by average citizens, politicians, broadcasting stations, and organized groups.

Formal enforcement sanctions like fines, license revocations or suspensions, or short-term renewals are available to the FCC in addition to the more informal sanctions that have been previously discussed.

c) Nondecision-making is another concept essential for a complete understanding of the impact of the FCC's Banzhaf decision. Nondecision-making provides an analytic framework that examines the real consequences of decisions made by authorities in the political system. It does not imply that a decision has deliberately been avoided. Instead it addresses the crucial question of the roles which governmental bodies and the politically powerful and powerless play in the development and retardation of controversial political demands and issues. In addition, nondecision-making by a federal regulatory agency can make its enforcement efforts merely symbolic, having important consequences for clientele compliance and circumvention rates. Thus while the following discussion demonstrates that nondecision-making is conceptually distinct from compliance, enforcement, and circumvention, it can contribute substantially to an understanding of regulatory agency - clientele power relationships.

The nondecision-making approach is derived, in part, from E.E. Schattschneider's concept of the "mobilization of bias". Schattschneider says that:

All forms of political organization have a bias in favor of the exploitation of some kinds of conflict and the suppression of others because organization is the mobilization of bias. Some issues are organized into politics while others are organized out.⁶²

Peter Bachrach and Morton Baratz, incorporate the mobilization of bias into the nondecision-making approach:

The primary method for sustaining a given mobilization of bias is nondecision-making. A nondecision... is a decision that results in suppression or thwarting of a latent or manifest challenge to the values or interests of the decisionmaker... nondecision-making is a means by which demands for change in the existing allocation of benefits and privileges in the community can be suffocated before they are even voiced; or kept covert; or killed before they gain access to the relevant decision-making arena; or, failing all these things, maimed or destroyed in the decision-implementing stage of the policy process.⁶³

Therefore, the basic focus of the nondecision-making approach is to analyze power relationships:

To the extent that a person or group -- consciously or unconsciously -- creates or reinforces barriers to the public airing of policy conflicts, that person or group has power.⁶⁴

Nondecision-making may take any one of the following forms:

- 1) Nondecision-making can take the most direct, extreme form of force. Terrorization can prevent demands for change from entering the political process.⁶⁵
- 2) Sanctions can be invoked against the initiator of a potentially threatening demand.⁶⁶
- 3) A nondecision may privatize a conflict and thus prevent the development of a threatening demand. (E.E.Schattschneider defines the "privatization of conflict" as a political strategy designed to keep issues out of the public domain. Ideas like individualism, free private enterprise, and economy in government are used to restrict the scope of conflicts and to limit the use of public authority.⁶⁷ He says that much of the political conflict in our country is controlled by keeping it so private that it is almost invisible.) The mobilization of bias may be strengthened and the scope of a conflict simultaneously reduced by nondecision-making. Establishing additional rules and procedures to block demands for change is one way in which nondecision-making can be used to privatize political controversies.⁶⁸
- 4) An existing bias of the system -- a norm, precedent, rule, or procedure -- can be invoked to squelch an incipient issue.⁶⁹ Referring demands or issues to committees or commissions for prolonged study is one way in which a nondecision uses time-consuming and ritualistic routines

built into the system to deflect demands for change.⁷⁰ In addition, the use of symbolic appeals may transform threatening demands into innocuous ones.⁷¹

Bachrach asserts that nondecisions can be identified empirically:

A nondecision can be identified only within the context of a power struggle that the investigator knows to exist. If, within this context, the thrust of a decision is to thwart a demand or issue that is potentially threatening to the decision-maker or to prevent it from seriously being considered, then it may be said to be a nondecision.⁷²

Thus a nondecision is, "... an observable event within the context of an observable power struggle."⁷³ Certainly the case study, which involves the FCC's Banzhaf decision, subsequent contests between public interest groups and broadcasters, and its proposed ban on cigarette commercials, meets these testable requirements. The potentially threatening demand raised by the Banzhaf case in the section on access and counter commercials has already been discussed in this chapter. The fact that this case involved an observable power struggle and overt conflict can be verified in the following ways: the decision was appealed by both broadcasters and the tobacco industry; conflicts over the decision's implementation were brought before the FCC by public interest groups; and the decision was denounced by broadcasters in the trade press, before Congress, and in legal briefs filed at the Circuit Court of Appeals.

d) The final concept used in this study is circumvention. Circumventing a decision can be defined as "attempting to limit its scope, to avoid its full force, to make sure it doesn't apply to them."⁷⁴ Illegal circumvention of a decision is evasion and includes a passive failure to act in accordance with a decision's requirements.

Circumvention itself lies "somewhere in between outright acceptance and outright refusal to comply".⁷⁵ People may try to circumvent a decision by avoiding situations where compliance will become an issue, or by altering procedures slightly while avoiding more substantive changes. In the case of public regulation of business, the degree of clientele circumvention can be influenced substantially by agency enforcement efforts. Symbolic enforcement efforts also have important consequences for circumvention rates.

E.E. Schattschneider points up the relationship between circumvention attempts and the ultimate distribution of political power in the following paragraph:

Private conflicts are taken into the public arena precisely because someone wants to make certain that the power ratio among the private interests most immediately involved shall not prevail. To treat a conflict as a mere test of the strength of the private interests is to leave out the most significant factors. This is so true that it might indeed be said that the only way to preserve private power ratios is to keep conflicts out of the political arena.⁷⁶

If radio and television licensees successfully circumvented the Banzhaf decision, private power ratios would be preserved. The power to decide the basic question of access to commercial broadcasting would remain largely in the hands of broadcasters and corporate advertisers, and the scope of the conflict over counter commercials would be privatized again.

Summary - Four Faces of Power

This study focuses on four concepts — compliance, enforcement, nondecision-making, and circumvention — in order to measure the impact of the FCC's Banzhaf decision. The section below outlines our research design and how these concepts were operationalized for the purposes of this study.

Research Strategies and Design

Data for the decision narrative were gathered by interviewing key participants in the case. These included key people at Action for Smoking and Health (ASH), FCC Commissioners involved in the case, lobbyists for the tobacco manufacturers, members of the National Association of Broadcasters, and personnel at all three major networks. Also used were Pike and Fischer Radio Regulations, FCC Annual Reports, Hearing Reports, and Public Documents, the Congressional Record, the Federal Register, unpublished dockets at the FCC and briefs filed at the Washington, D.C. Circuit Court and at the Supreme Court. Other sources included The New York Times and Broadcasting magazine.

Compliance

In order to study compliance the general managers of all New York City radio and television broadcasting stations were interviewed in depth. The aim was determine the depth of awareness and understanding of the "fairness" doctrine, of the Banzhaf ruling (which applied the doctrine to cigarette commercials), and the rate of voluntary compliance with Banzhaf by station managers. (This rate was subjective and involved a ratio comparing the numbers of cigarette commercials and anti-cigarette announcements shown on each station when the ruling was in effect.) Whether the ruling was ever applied to other product commercials by the stations was also determined.

Rates of voluntary compliance were correlated with variables such as the number of personnel at the station, the percentage of advertising received from cigarette advertising at the station, and the station's

average cumulative weekly audience (relevant only for radio stations). These rates were also correlated with perceptions of the "fairness" doctrine and attitudes toward it by the people who have to apply it in real situations. Finally, an attempt was made to find out where the station manager learned about the "fairness" doctrine and the 1967 ruling applying it to cigarette commercials. (Possible sources include Broadcasting magazine, television or radio news, newspapers, the FCC, the National Association of Broadcasters or his attorney.)

Another general measure of industry compliance with Banzhaf was anti-cigarette announcement/cigarette commercial ratios for the three networks in one quarter of 1969. This was calculated by comparing data on anti-cigarette commercials to a content analysis of all cigarette commercials shown in that quarter on the three networks in Broadcast Advertiser's Reports.⁷⁷ More specific compliance data were culled from internal corporate studies (where available), from briefs filed at the FCC by Banzhaf's small public interest group Action on Smoking and Health (ASH) which monitored several major New York stations for two and three weeks periods, and from briefs filed by these stations in their defense. By counting numbers of cigarette advertisements and anti-cigarette spots, and then by constructing accurate ratios from this raw data the true limits of industry compliance with the FCC's Banzhaf decision were determined.⁷⁸

Enforcement

Enforcement was measured by doing an analysis of the FCC's decisions involving thirteen stations whose licenses had been challenged by ASH due to alleged non-compliance with the Banzhaf decision. This

tested whether the FCC investigated cases of alleged violation and whether it imposed fines, short-term licenses or other sanctions on stations which failed to live up to the guidelines imposed by the Commission in the Banzhaf decision. Interviewing members of the FCC's Broadcast Bureau determined whether any educational or publicity campaigns were used to promote compliance with the ruling. The scope of the FCC's enforcement of the Banzhaf decision was measured by determining whether the FCC applied the ruling as a precedent in future cases involving product commercials and the "fairness" doctrine. This was accomplished by a case analysis of counter advertising decisions made by the FCC in the period 1967-1973.

Nondecision-Making

This section of the study looked at three separate areas of the case study. First, the 1967 Banzhaf ruling itself and the study of patterns of compliance and enforcement told whether the ruling was largely symbolic or not, and thus whether or not a form of co-optation. Second, the FCC's proposal to ban cigarette commercials from broadcasting was a concern. Was this proposal in effect a form of nondecision-making designed to remove anti-cigarette spots from the air because they were threatening the economic interests of tobacco manufactures and broadcasters?⁷⁹ (If cigarette commercials were banned television and radio stations would no longer be under a "fairness" doctrine requirement to air anti-smoking commercials regularly each week. They could return to their former policy of airing them sporadically along with other public service announcements. The basis of this argument is the contention that tobacco manufactures felt that anti-cigarette advertisements were hurting sales more than cigarette advertisements

were helping them. After the ban they could switch the bulk of their advertising to the print media, which are not regulated by "fairness" requirements. Thus a ban on cigarette commercials would hopefully remove the threat raised by anti-cigarette commercials. This step could also favor broadcasters who would no longer be required to give substantial amounts of free time to anti-smoking commercials.) Interviews were conducted with tobacco industry lobbyists, network and local station personnel to find out whether the proposed ban was finally accommodated because it was in their interests, not against them, as they first believed. Interviews were also conducted at ASH and at the FCC's Broadcast Bureau to see whether they agreed with this hypothesis. Third, FCC actions in the period 1967-1973 regarding counter commercials were compared to Bachrach and Baratz's model to see whether any of them were instances of nondecision-making. This included both the analysis of FCC case decisions in that period and any other more formal FCC proceedings involving rulemaking.

Finally, the data generated by interviews of station managers were scrutinized to find out whether they applied the principles of Banzhaf to other controversial product commercials or whether the precedent of Banzhaf made them ban or delete controversial product commercials.

Circumvention

Jack W. Peltason's model of circumvention, which he applies to judicial decisions, can be easily used to analyze the administrative process with only slight modifications. Following Peltason, a regulated group may circumvent a regulatory agency decision by attacking the rule symbolically as "administrative legislation"; they could ignore the ruling or resist it with force; they could petition the agency to amend the ruling;

they could transfer their appeal to Congress or the courts.⁸⁰

Comparing the data of this study to Peltason's model determined whether broadcasters tried to circumvent the FCC's Banzhaf ruling. Data on symbolic attacks was found in Broadcasting magazine, in legal briefs before the FCC and the courts, and in The New York Times (see page 27, supra.) Rates of compliance were relevant in answering the question of whether broadcasters ignored the ruling. Whether broadcasters petitioned the FCC to amend the ruling or whether they tried to transfer their appeal to Congress or the courts can be found in the factual data of the case study. The results of this research, combined with the conclusions of the sections dealing with compliance, enforcement, and nondecision-making should tell whether any attempts at circumvention were successful.

Summary

An impact study of the application of the "fairness" doctrine by the FCC cigarette commercials can be useful in illuminating lacunae in the literature of political science by generating new data on the informal administrative process and by operationalizing and testing four concepts — compliance, enforcement, nondecision-making, and circumvention.

The Limitations of Impact Analysis

The next chapter examines the literature of impact analysis in light of measurement problems. Previous impact studies often concern themselves with a single decision or with a series of decisions in a single policy area. On the whole, impact studies tend to be ahistorical, beginning in a fixed point in time (usually whenever the particular decision involved was made). Many equate compliance with impact, ignoring important

aspects of impact like enforcement and circumvention. (Works which examine only one aspect of impact are referred to as "uni-dimensional" in subsequent chapters.) Some studies fail to take either psychological or socio-economic factors into account and restrict their analysis to a single community or state. Other measurement problems include a failure to define basic terms, the setting of arbitrary compliance standards, and an emphasis on immediate impact, instead of on long range consequences. Another fundamental weakness of impact analysis is a failure to relate individual case studies to each other or to more general theories of the political process.

Like other impact studies this work shares certain limitations which will be discussed below. However, it hopes to overcome some of the more common measurement problems which have plagued previous studies. This work's basic approach is multidimensional, for the research design incorporates four related aspects of impact (compliance, enforcement, nondecision-making and circumvention). Although its primary focus is the Banzhaf decision the narrative in Chapter Three examines an entire series of administrative and legislative decisions related to the case study. The narrative also provides a chronological and historical background to the Banzhaf decision. Also included is an examination of the role played by clientele attitudes (in Chapter Five). This study includes data collected from the the three major networks, and thus is equivalent to a study national in scope. Basic terms are defined in this chapter and the problem of arriving at a reasonable compliance standard is addressed in Chapter Five. Banzhaf's immediate and long range impact is examined by including a case analysis of the FCC's decisions enforcing Banzhaf and

of subsequent decisions involving counter-advertising. (Chapters Four and Five). And finally, this study relates its findings to other impact studies and to more general theories of the political process in Chapter Six.

While this work hopes to overcome basic measurement problems it does share certain limitations with other impact studies. Impact studies examine power relationships and the decision-making process but their focuses are necessarily limited in scope. This study's only claim is to be an impact analysis of a significant decision in the area of broadcasting regulation. While it may raise important questions about the regulatory process, about the public interest, about access to the communications media, and about monopoly control over the media, it does not pretend to resolve them. Its more limited objective, along with a number of other works in this genre, is to provide a foundation for more intelligent and thorough discussions of these larger problems.

Footnotes

1. Stephen Wasby, The Impact of the United States Supreme Court (Homewood: Dorsey Press, 1970), pp. 22-23.
2. Louis Kohlmeier, The Regulators (New York: Harper and Row, 1969), p. 30.
3. Robert E. Cushman, The Independent Regulatory Commission (New York: Oxford, 1941).
4. E. Pendleton Herring, Public Administration and the Public Interest (New York: McGraw-Hill, 1936); Avery Leiserson, Administrative Regulation (Chicago: University of Chicago, 1942); and David B. Truman, The Governmental Process (New York: Knopf, 1951).
5. Marver Bernstein, Regulating Business by Independent Commission (Princeton: Princeton University, 1955); Emmette Redford Administration of National Economic Control (New York, 1952); and Samuel Huntington, "The Marasmus of the ICC: the Commission, the Railroads and the Public Interest" in Peter Woll (ed.), Public Administration and Policy (New York: Harper and Row, 1966).
6. Murray Edelman, The Symbolic Uses of Politics (Urbana: University of Illinois, 1964).
7. Kohlmeier, op. cit.; Henry S. Kariel, The Decline of American Pluralism (Stanford: Stanford University, 1961); and Grant McConnell, Private Power and American Democracy (New York: Knopf, 1966).
8. Louis Jaffee, "The Effective Limits of the Administrative Process: A Re-Evaluation" in Samuel Krislov and Lloyd Musolf, The Politics of Regulation (Boston: Houghton-Mifflin, 1964), p. 73. and Gabriel Kolko, Railroads and Regulation: 1877-1916 (Princeton: Princeton University, 1965).
9. Four notable exceptions are: Bradley Canon, "The FCC's 'Fairness' Doctrine: Its Substance, Enforcement and Impact", unpublished Ph.D. dissertation, Department of Political Science, University of Wisconsin, 1967; A. Lee Fritschler, Smoking and Politics (New York: Appleton-Century-Crofts, 1969); Gabriel Kolko, ibid; and Samuel Huntington, op. cit.
10. The case study has proved to be valuable in analyzing the legislative and policy-making process. See Stephen K. Bailey, Congress Makes a Law (New York: Columbia University, 1950); Robert Peabody, et al., To Enact a Law (New York: Praeger, 1971); E.E. Schattschneider, Politics, Pressure and the Tariff (New York: Prentice-Hall, 1935); and Raymond Bauer, et al., American Business and Public Policy (Chicago: Atherton, 1963). The basic assumption is that in-depth, detailed studies are essential both to verify or disprove general hypotheses and to provide the data that are necessary to generate new ones.

11. 47 USC 1934 sections 307 a & d and 309 a.
12. FCC Report on Editorializing, 13 FCC 1246 (1949).
13. FCC 67-641 (June 2, 1967) pp. 2-3.
14. Robert Dahl, Who Governs? (New Haven: Yale University Press, 1960), p.v.
15. See Canon, op. cit., chapter IX; Theodore Caldwell and Leslie L. Roos, "Voluntary Compliance and Pollution Abatement" in Leslie L. Roos (ed.), The Politics of Ecosuicide (New York: Holt, Rinehart and Winston, 1971); and Jack H. Friedenthal and Richard Medalie, "The Impact of Federal Regulation of Broadcasting: Section 315 of the Communications Act", 72 Harvard Law Review 445-93 (January, 1959) for three impact studies in the field of administrative regulation. Several "Nader Reports" include general studies of administrative enforcement and compliance. See Edward F. Cox, et al., The Nader Report on the Federal Trade Commission (New York: Grove Press, 1969); Robert Fellmeth, The Interstate Commerce Commission (New York: Grossman, 1970); and James Turner, The Chemical Feast (New York: Grossman, 1970).
16. See Herbert Simon, Administrative Behavior (New York: MacMillan, 1947) and Public Administration (New York: Knopf, 1950). Richard Neustadt's study of executive decision-making also supports this hypothesis. He analyzes the five factors which are prerequisites for the self-executing presidential order in Presidential Power (New York: John Wiley and Sons, 1961), p. 19. For studies in the arena of judicial decision-making see Theodore Becker, The Impact of Supreme Court Decisions (New York: Oxford, 1969); Jack W. Peltason, Federal Courts in the Political Process (New York: Random House, 1955); Francis J. Sorauf, "Zorach vs. Clauson: The Impact of a Supreme Court Decision", 53 American Political Science Review 777-91 (September, 1959); and Patric Gordon, "The Impact of a Court Decision: The Aftermath of the McCullom Case", 6 Journal of Public Law 455-64 (Fall, 1957).
17. Harold Lasswell and Morton Kaplan, Power and Society: A Framework for Political Inquiry (New Haven: Yale University, 1950), pp. 74-75.
18. Charles Merriam, The New Aspects of Politics (Chicago, University of Chicago Press, 1931).
19. Ibid., p. 261.
20. Ibid., p. 259.

21. Harold Lasswell and Daniel Lerner (Eds.) The Policy Sciences, (Stanford University Press, 1965), Chapter One.
22. Arthur Miller, "On the Need for Impact Analysis of Supreme Court Decisions", Becker, op cit., p. 8.
23. Report on Editorializing, op.cit.
24. Ibid., p. 1249.
25. Ibid., p. 1251.
26. Canon, op. cit., p. 3.
27. 14 Pike and Fisher, Radio Regulations. 125 (1956).
28. Ibid., p. 128.
29. Kenneth Culp Davis, Treatise on Administrative Law volume 7, Section 4.03 (St. Paul: West Publishing Company, 1958). Canon, op.cit., agrees when he writes: "In short, fear of the agency's power and discretion secure undue clientele compliance to the 'lifted eyebrow of reproach'..." p. 17.
30. Canon, ibid, p., 17.
31. Jerome Barron, "Access to the Press - A New First Amendment Right", 80 Harvard Law Review (1967), p. 1647. See also Jerome Barron, "Is there an Emerging First Amendment Right of Access to the Media?", 37 George Washington Law Review 487 March, 1969).
32. Ibid., p. 1647.
33. Nicholas Johnson, "Commercials Against Commercials, Why Not?" The New York Times January 5, 1973, Arts and Leisure section, p. 17.
34. Ordinary Product Commercial - an advertisement promoting a particular brand of a product or service.
Editorial Commercial - an advertisement that explicitly addresses a public controversial issue, An example would be an anti-war commercial like the one the Business Executives Against the War wanted to air.
35. Julian Goodman, "Commercials Against Commercials, Help!", The New York Times December 24, 1972, Arts and Leisure section, p. 21.
36. The Circuit Court decision in the famous BEM (Business Executives' Movement Against the War) case stated:

"The one-sidedness and private editing of particular 'spot' editorial advertisements may in the end steer viewers and listeners away from the 'truth' by distorting complex issues....But that does not mean that they are unprotected by the First Amendment. Our Constitution protects many forms of misleading and overly simplified political expression in order to ensure robust, wide-open debate....We conclude, therefore, that the 'fairness' doctrine's goal of full and fair coverage of issues on normal programming time does not eliminate the public's interest in a further, complementary airing of controversial views during advertising time." Quoted in John Moore, "Advertising and Recent Developments in the 'Fairness' Doctrine," 29 Washington and Lee Law Review (Spring, 1972), p. 97.

37. John Schnieder, "Broadcasters, Advertisers, Citizens", remarks to Broadcasters Advertiser Club of Chicago (Oct. 19, 1971) p. 7.
38. Mary Gardiner Jones, "Cultural and Social Impact of Advertising on American Society", Law and the Social Order (1970), p. 379.
39. Ibid., p. 380.
40. Ibid., p. 384.
41. Ibid., p. 392.
42. Harold Lasswell, Politics, Who Gets What, When, How (New York: Peter Smith, 1950).
43. Marver Bernstein says that, in general, the limits of major regulatory policies are set by the regulated group, op. cit., p. 156. Kariel, op. cit., and Edelman, op. cit., agree.
44. Edelman, ibid., takes this stand with regard to major administrative decisions.
45. Bernstein, op. cit., says that a tradition of weak enforcement prevails in most regulatory agencies and that the degree of enforcement is the key to a determination of whether a regulatory agency is effective or not.
46. For a model of circumvention of judicial decisions see Peltason, op. cit., pp. 58-59.
47. See footnotes 15 and 16 for some studies of compliance with judicial, executive and administrative policies. See also James Anderson, "Public Economic Policy and the Problem of Compliance: Notes for Research", 4 Houston Law Review 62-72.
48. See Nicholas Johnson and John Jay Dystel, "A Day in the Life: the FCC", 82 Yale Law Journal #8 (July, 1973). On page 1633 they conclude that:

"If the FCC no longer approves of its own rules and precedents it simply ignores them -- either by waiving them to death or otherwise evading them. In short, the concept of principled decision-making does not exist at the FCC."

See also Peter Bachrach and Morton Baratz, "Two Faces of Power", 56 American Political Science Review 947-952 (December, 1962) and Peter Bachrach and Morton Baratz, "Decisions and Non-decisions: An Analytic Framework", 57 American Political Science Review 641 (September, 1963) for two discussions of the concept of nondecision-making. For an article operationalizing the concept see Peter Bachrach, "A Power Analysis: The Shaping of Anti-Poverty Policy in Baltimore", Public Policy 155 (Winter, 1970). For an analysis of nondecision-making by governmental agencies in the face of protest activity see Michael Lipsky, "Protest as a Political Resource", 62 American Political Science Review 1155 (December, 1968).

49. V.O. Key Politics, Parties and Pressure Groups (New York: Crowell, 1958), p. 5.
50. Ibid., p. 6.
51. See Robert Dahl, "The Concept of Power," in Behavioral Science volume 21, (July, 1957) p. 201; Herbert Simon, "Note on the Observation and Measurement of Political Power," in Introductory Readings in Political Behavior (Chicago: Rand McNally, 1961), p. 363; and James March, "The Power of Power", in David Easton (ed.) Varieties of Political Theory (Englewood Cliffs: Prentice-Hall, 1966) p. 39., for a sampling of this debate.
52. See Bernstein, op. cit., p. 217.
53. Wasby, op. cit., p. 30.
54. Johannes Feest, "Compliance with Legal Regulations: Observations of Stop Sign Behavior", 2 Law and Society Review (May 1968).
55. Samuel Krislov, "The Perimeters of Power: Patterns of Compliance and opposition to Supreme Court Decisions", delivered at the annual meeting of the American Political Science Association, September 4-7, 1963, in New York City, p.1.
56. Ibid., p. 2.
57. Max Jammer, Concepts of Force (Harper Torchbooks, 1963). p.3.
58. Krislov, op. cit., p. 2.
59. Ibid., p. 2.

60. Bernstein, op. cit., p. 217.
61. Johnson and Dystel, op. cit., p. 1623.
62. E.E. Schattschneider, The Semi-Sovereign People (New York: Holt, Rinehart and Winston, 1960), p. 71.
63. Peter Bachrach and Morton Baratz, Power and Poverty (New York: Oxford University Press, 1970), p. 44.
64. Ibid., p. 8.
65. Ibid., p. 44.
66. Ibid., p. 44.
67. Schattschneider, Semi-Sovereign People, op. cit., pp. 7 and 38.
68. Bachrach and Baratz, Power and Poverty, op. cit., p. 46.
69. Ibid., p. 45.
70. Ibid., p. 45.
71. Ibid., p. 45.
72. Bachrach, A Power Analysis, op. cit. p. 161.
73. Ibid., p. 162.
74. Wasby, op. cit. p. 30.
75. Ibid., p. 30.
76. Schattschneider, Semi - Sovereign People, op. cit., p. 38.
77. Network Broadcast Advertiser's Reports contain independently monitored data on all commercials that are shown on the three major networks for the year. They give a breakdown for product class for each parent company, number and time allotted each commercial, estimated advertising expenditures by network, and the time of day the commercial was shown on. A product class such as cigarettes is totaled by network for number of commercials shown and expenditures spent, but to calculate hours and minutes of cigarette commercials one must do a content analysis of the entire quarter.
78. Sorauf, op. cit., does the same type of analysis to determine the impact of a Supreme Court decision by counting overall national attendance in time-release programs after the Zorach decision.
79. Thomas Whiteside suggests this in "Annals of Advertising- Cutting Down", The New Yorker 42-95 (December 19, 1970).
80. Peltason, op. cit., pp. 58-59.

38.

CHAPTER II: MEASURING IMPACT

Chapter One responds to the question: 'Why do political scientists conduct impact analyses?' by reviewing the theoretical foundations in political science which gave rise to the field (Merriam, Lasswell, Key). This chapter focuses on the question: 'How do political scientists conduct impact analyses?' It answers this question by examining previous impact studies in light of fundamental measurement problems. This chapter critically analyzes these studies by indicating how some illustrate the basic problems encountered in measuring impact, while others overcome them.

In addition, Chapter Two distinguishes between impact studies that look at only one aspect of impact (usually compliance) and those that take a multidimensional approach. A critical comparison of the successes and failures of one-dimensional and multidimensional impact studies provides the bulk of this chapter.

The Dimensions of Impact

A major criticism made of many impact studies is that they confuse compliance with impact, resulting in a one-dimensional approach.¹ Studies which focus on one aspect of impact are summarized in Table 2-1. (See pages 42 -44.) Other authors believe that compliance is only one part of impact. They determine impact by examining circumvention and enforcement, in addition to compliance. Table 2-2 summarizes the impact studies which are based on this multidimensional approach and their research strategies and techniques. (See pages 45-47 .) These categories do not claim to be "scientifically" based but are used instead as an analytic device, in order to organize the limited literature available in a more fruitful way.

TABLE 2 - 1

LITERATURE SURVEY:
One - Dimensional Impact Studies

1. Author: Patric Gordon
Title: "The Impact of a Court Decision: The Aftermath of the McCullum Case."

6 Journal of Public Law
455 (Fall, 1957).

Focus of the Study: Gordon focuses on compliance with the Supreme Court's McCullum decision.

Research Techniques: Gordon evaluates the number of religious time release programs dropped or modified after the McCullum decision. He includes data from several states. This study does not generate any original empirical data.

2. Author: Jack Friedenthal and Richard Medalie
Title: "The Impact of the Federal Regulation of Broadcasting: Section 315 of the Communications Act"

72 Harvard Law Review
445 (January, 1959).

Focus of the Study: Friedenthal and Medalie focus on enforcement of the FCC's "fairness" doctrine.

Research Techniques: The bulk of this article is devoted to a general discussion and analysis of formal and informal enforcement sanctions available to the FCC. No empirical data is generated in this study.

3. Author: Francis Sorauf
Title: "Zorach versus Clauson: The Impact of a Supreme Court Decision"

53 American Political Science Review
777 (September, 1959)

Focus of the Study: Sorauf's focus is on compliance with the Supreme Court's Zorach decision.

Research Techniques: Sorauf analyzes national attendance figures (in released time religious programs) over a five year period. He also uses a survey questionnaire to determine the impact of Zorach on school superintendents in Pennsylvania.

4. Author: William Muir
Title: Prayer in the Public Schools
 Chicago: University of Chicago, 1967.

Focus of the Study: Muir focuses on the impact of Schempp on the attitudes of educators.

Research Techniques: Muir study's is based on two waves of key participant interviews, conducted personally.

5. Author: Norman Lefstein et al.
Title: "In Search of Juvenile Justice: Gault and its Implementation"
 3 Law and Society Review
 491 (1969).

Focus of the Study: Lefstein et al. focus on compliance with the Supreme Court's Gault decision.

Research Techniques: Lefstein et al. examine three juvenile courts in one city, using the research technique of participant-observation. This study also uses the Court's own decision for its evaluation of satisfactory compliance with Gault.

6. Author: Michael Wald
Title: "Interrogation in New Haven and the Impact of Miranda"
 in Theodore Becker (ed.)
The Impact of Supreme Court Decisions (New York: Oxford, 1969) 149.

Focus of the Study: Wald uses the personal, nonstructured interview and participant-observation to evaluate the impact of Miranda in New Haven, Connecticut.

7. Author: Neal Milner.

Title: "Comparative Analysis of Patterns of Compliance with Supreme Court Decisions: Miranda and the Police in Four Wisconsin Communities"

5 Law and Society Review 119
(1970).

Focus of the Study: Milner focuses on compliance with the Miranda decision. He also focuses on the role played by psychological attitudes. Milner uses the provisions of the decision as his compliance standard.

Research Techniques: Milner's study includes the following research techniques: an analysis of annual reports, the nonstructured personal interview, the survey questionnaire, and participant-observation. Milner's study covers four towns in Wisconsin.

8. Author: Theodore Caldwell and Leslie Roos

Title: "Voluntary Compliance and Pollution Abatement" in Leslie Roos (ed.) The Politics of Ecosuicide (New York: Holt; Rinehart and Winston, 1971) 236.

Focus of the Study: Compliance with a federal pollution abatement program is the focus of this study.

Research Techniques: Caldwell and Roos gathered data from four pollution monitoring points on Lake Michigan. They also analyzed aggregate data over time using an interrupted time series model. In this way they were able to compare pollution levels in the lake before and after the voluntary abatement agreement. They include in their research design a discussion of the problems involved in defining compliance and also relate their individual case study to Murray Edelman's "symbols and quiescence" theory.

TABLE 2 - 2

LITERATURE SURVEY:
Multidimensional Impact Studies

1. Author: Robert Lane

Title: The Regulation of Businessmen
Hamden: Archon Books, 1966.

Focus of the Study: Lane focuses on compliance and noncompliance with federal economic regulations. His study includes the regulations of the Federal Trade Commission, the National Labor Relations Board, the Federal Drug Administration and of the Wages and Hours Division of the Department of Labor. His emphasis is on the cultural and psychological dimensions of regulatory impact.

Research Techniques: Lane's research techniques include indepth personal interviews; a content analysis of trade magazines; an analysis of congressional hearing reports; and of agency annual reports. He includes several New England states in his study and also covers time periods of up to a decade in his analysis.

2. Author: Bradley Canon

Title: "The FCC's 'Fairness' Doctrine: its Substance, Enforcement and Impact"

Unpublished Ph.D. dissertation, Department of Political Science, University of Wisconsin, 1967.

Focus of the Study: Canon focuses on compliance and noncompliance with the FCC's "fairness" doctrine. He has a special emphasis on the role played by clientele attitudes.

Research Techniques: Canon's research technique is the semi-structured telephone interview. He includes in his survey all of Wisconsin's commercial television and radio station managers. Canon relates his findings to Murray Edelman's "symbols and quiescence" theory.

3. Author: Richard Johnson

Title: The Dynamics of Compliance
Evanston: Northwestern, 1967

Focus of the Study: Johnson focuses on compliance and noncompliance with Supreme Court decisions affecting religion in the public schools. He has a special emphasis on the role played by personal attitudes.

Research Techniques: Johnson generates the data for his study with a survey questionnaire and nonstructured personal interviews in a Midwestern town.

4. Author: Edward Cox, et al.

Title: The Nader Report on the Federal Trade Commission

New York: Grove Press, 1969.

Focus of the Study: Cox et al. focus on enforcement of, and compliance with, FTC decisions in several policy areas.

Research Techniques: This study analyzed FTC annual Reports and relied on extensive personal interviews to generate new empirical data. Their analysis covers a five year period and is national in scope.

5. Author: Albert Blaustein and Clarence Ferguson

Title: "Avoidance, Evasion and Delay" in Theodore Becker, (ed.) The Impact of Supreme Court Decisions (New York: Oxford, 1969) p. 96.

Focus of the Study: Blaustein and Ferguson focus on compliance and circumvention of the Supreme Court's Brown decision.

Research Techniques: This study relies on a general discussion of delaying tactics used by Southern communities fifteen years after Brown was promulgated. It includes an analysis and definition of basic terms. Blaustein and Ferguson do not generate any new empirical data in this study.

6. Author: Robert Birkby

Title: "The Supreme Court and the Bible Belt: Tennessee Reaction to the Schempp Decision"

in Theodore Becker (ed.) op. cit., p. 106.

Focus of the Study: Birkby studies compliance and noncompliance with Schempp, with a special emphasis on socio-economic factors.

Research Techniques: Birkby uses the research technique of the survey questionnaire. His study is limited to the state of Tennessee.

7. Author: James Levine
Title: "Constitutional Law and Obscene Literature: An Investigation of Bookseller Censorship Practices" in Theodore Becker (ed.) ibid., p. 129.

Focus of the Study: Levine studies compliance and noncompliance with the Supreme Court's Roth and Ginzburg decisions. He especially emphasizes the role played by personal attitudes.

Research Techniques: Levine generates his empirical data by sending a survey questionnaire to a random selection of 250 booksellers in 12 states.

8. Author: Kenneth Dolbeare and Phillip Hammond
Title: The School Prayer Decisions Chicago: University of Chicago, 1971.

Focus of the Study: Dolbeare and Hammond focus on compliance and noncompliance with the Supreme Court's Schempp decision. They emphasize the role played by both personal attitudes and the role of public opinion in determining Schempp's impact.

Research Techniques: Their research techniques include: a survey questionnaire; personal interviews; a content analysis of local newspapers; and a comparison of the results of public opinion polls taken before and after Schempp. Dolbeare and Hammond conduct two interview waves and include a discussion of definitional problems in their research design. This study is conducted in four midwestern communities.

Problems of Measurement

Impact studies are important not only for the specific contributions they have made individually to scholarly research but also for the fact that, taken as a whole, they have originated a new way of looking at decision-making and its ramifications. Impact analyses substantiated the views that decisions, although made by authoritative political bodies, were not instantly obeyed and that the actions of those affected by a decision were as critical to the decision-making process as those of the so-called "decision-makers" themselves. Early studies also pioneered the empirical evaluation of public policies by using the quantitative techniques of social science research. They compared the prescriptions of a decision to actual behavior on the local level, rather than by comparing it to precedent, by analyzing its substantive content, or by investigating the life histories of the men who promulgated it. They concluded that the promulgation of a decision represented the beginning, not the resolution of the political struggle over the issue, that the aftermath of decision-making was a crucial part of the policy-making process.

Since impact studies were breaking new ground by using social science research techniques to evaluate complex decisions, some of their best efforts were plagued by problems of measurement. Some of these major problems include: a failure to take social, economic, and political factors into account; a failure to define basic terms; the use of arbitrary compliance standards; focusing on only a single decision; restricting the scope of analysis to a single community or state; a division between theoretical and empirical work; concentrating on a

decision's immediate impact while ignoring its long range consequences; and other practical problems of data collection and research.² This chapter's major hypothesis is that focusing on one aspect of impact is a basic weakness of previous impact studies, and that it will tend to overlap with or create other fundamental measurement problems, such as those discussed above. The following analysis of measurement problems tests this hypothesis by comparing the research strategies and designs used by one - dimensional and multidimensional studies.

a) Many variables can affect a decision's impact, posing a fundamental problem for the individual attempting impact research. Some variables, such as the geographic location of complying and noncomplying districts;³ the source of the policy in question;⁴ the clarity of the message being sent;⁵ and the nature and degree of sanctions used to enforce a decision,⁶ are relatively easily pinpointed. The case by case approach,⁷ used by regulatory agencies and the courts, and the relative unanimity of the vote dictating a decision are also easily identified.⁸ Other variables are less concrete. The existing political, economic and social situation may also have a bearing on impact.⁹ The socio-economic characteristics of the responding group, and its size and structure may be important.¹⁰ Psychological factors such as belief systems and the perceptions and attitudes of those responding to a decision may have substantial effects.¹¹ Expectations about a decision (and whether or not they develop) and role conceptions may all play an important part in affecting the impact of political decisions.¹²

As Table 2-1 indicates only two out of eight studies which focused on one aspect of impact took these factors into account (Milner, Muir).

Six out of eight multidimensional studies emphasized the role played by psychological and/or socio-economic factors (Johnson, Birkby, Levine, Dolbeare and Hammond, Canon and Lane). (See Table 2-2, pp. 45-47.) Psychological and sociological factors were usually determined by the use of the survey questionnaire and personal interviews. The importance of examining attitudes and belief systems is pointed up by the fact that five of these studies found clientele attitudes and belief systems to be the most significant determinants of complying behavior (Johnson, Birkby, Levine, Dolbeare and Hammond, and Lane).

b) Another problem involved in the measurement of impact is the problem caused by vague or nonexistent definitions of basic terms. Confusion arises in the literature over terms like impact, aftermath, compliance, circumvention, and evasion. Impact is often mistaken for aftermath or compliance, while evasion, circumvention, and noncompliance are considered interchangeable. Only three out of a total of 16 studies directly resolved this common problem by clearly analyzing and defining the terms on which their research was based. Two multidimensional studies discussed what they meant by basic terms, before they went on to determine the behavior which these terms described (Blaustein and Ferguson, Hammond and Dolbeare). One study which examined only compliance, also directly addressed this problem (Caldwell and Roos). 13 studies failed to define basic terms (Sorauf, Gordon, Milner, Lefstein, Wald, Friedenthal and Medalie, Muir, Johnson, Birkby, Levine, Cox, Canon and Lane).

c) Another fundamental problem is conducting impact research is that of setting a satisfactory standard of compliance in any specific case. Samuel Krislov notes in a discussion of this problem:

What is or is not compliance belongs in the realm not of 'objective reality' but rather is defined by what is acceptable. This is a two-fold problem. The tone of compliance will vary based upon social perception. And the degree of compliance will be difficult to ascertain with surety.¹³

Krislov states that figures on prosecution and conviction cannot be used as the sole basis for computing compliance rates because high rates of conviction may be associated with high rates of compliance, while a low rate may be associated with low rates of enforcement and have nothing to do with the compliance rate at all.¹⁴ He also goes on to note a related problem - in excess of some rates compliance becomes largely self-generating while below certain rates enforcement becomes impossible:

Different social measures ... have differing crucialities in political systems, and consequently compliance requisites might very well be different ...¹⁵

Two out of sixteen impact studies resolved the critical problem of arriving at a satisfactory standard of compliance by using the standard set down by the decision-making body (either a court or a regulatory agency) (Milner, Lefstein). For example, Milner specifically states in his research design that he uses the provisions set down by the Supreme Court for carrying out Miranda, in his empirical evaluation of Miranda's implementation by four Wisconsin police departments. Both Milner and Lefstein studied compliance alone. 11 impact studies failed to discuss how they arrived at a satisfactory compliance standard. (Johnson, Blaustein and Ferguson, Birkby, Levine, Dolbeare and Hammond, Cox, Canon, Lane, Sorauf, Gordon, Wald). Caldwell and Roos, another compliance study,

considered any measurable decrease of pollution particles to indicate satisfactory compliance with a voluntary pollution abatement program.

d) Many impact studies restrict their scope of analysis by limiting their attention to a single (judicial, executive, or administrative) decision. Not one single aspect study examined more than a single decision. (See Table 2-1, pages 42-44.) Four out of eight multidimensional studies included more than one decision in their research design (Johnson, Levine, Cox and Lane). For example, Lane analyzed a series of decisions made by the Federal Trade Commission, the National Labor Relations Board, the Federal Drug Administration and the Wages and Hours Division of the Department of Labor in order to determine the effects of federal regulatory legislation. The scope of Lane's study can be contrasted with the majority of single aspect impact studies, which focus on the impact of a single Supreme Court case.

e) Many impact studies are likewise limited in geographic scope, exploring impact in a single community or state. Since the impact of most national political decisions can be expected to be national in scope, this is an important measurement problem. Two studies concentrating on a single aspect of impact included more than one state in their research design (Sorauf, Gordon). They did this by analyzing statistics giving national attendance figures in religious time-release programs. Four multidimensional studies included more than one state (Levine, Dolbeare and Hammond, Cox and Lane). As an illustration, Levine sampled 250 booksellers in twelve states to determine the impact of Roth and Ginzburg. He constructed his sample from the American Book Trade Directory.

In this way Levine was able to evaluate the national impact of the Supreme Court's obscenity decisions.

f) Another fundamental problem apparent in the majority of impact studies is the division between theory and empirical work.¹⁶ The field developed as a series of disconnected case studies which failed to relate their findings to each other or to more general theories of the political process. Only two of the 16 impact studies discussed here relate their findings to a more general theoretical framework. (Caldwell and Roos, and Canon). Both relate their individual case studies to Murray Edelman's "symbols and quiescence" theory of administrative politics. Caldwell and Roos focus only on compliance, while Canon uses the multidimensional impact approach.

g) Another problem of impact research is that many studies concentrate on immediate impact while ignoring a decision's long range consequences and effects. Seven out of 16 studies determined long range impact by gathering data which covered a substantial time period or by conducting more than one interview wave. Three single aspect studies took into account the possibility of long range impact (Sorauf, Muir, and Caldwell and Roos) while four multidimensional studies did so. (Blaustein and Ferguson, Dolbeare and Hammond, Lane, and Cox).

h) And finally, there are the stubborn practical research problems which are endemic to social science research. Data is hard to obtain, may be controlled by private individuals or institutions, or may be destroyed. Since impact research may often involve widespread areas of public policy, data collection is expensive. Only sheer unflagging

effort can pry data loose from the grasp of private corporations and individuals. Data collection covering long periods of time and wide-spread policy areas, while expensive, has to be conducted in the time-honored ways — through personal interviewing, the use of the structured survey questionnaire, and the technique of participant-observation. A careful comparison between data gleaned from personal interviews and that derived from more objective sources must be made in order to evaluate recollections and attitudes that have the benefit of hindsight.

Six out of eight single aspect impact studies used the personal interview, the structured survey questionnaire, or participant-observation, or other research techniques to generate new empirical data (Sorauf, Milner, Muir, Lefstein, Wald, and Caldwell and Roos). All but one multidimensional study also used empirical research techniques (Johnson, Birkby, Levine, Dolbeare and Hammond, Cox, Canon and Lane). Three studies evaluated impact without the use of empirical research techniques. Two single aspect impact studies (Friedenthal and Medalie, and Gordon) and one multidimensional study (Blaustein and Ferguson) did not generate new empirical data.

Results of the Comparison

The results of the preceding comparison can be summarized as follows:

- 1) The most significant difference between one - dimensional and multidimensional impact studies is that the latter are more likely to consider the influence of psychological, cultural and socio-economic factors. And when these factors are included in a study's research

design and are tested, they often emerge as the primary variables affecting a decision's impact. It is fair to conclude that the failure of a majority of single aspect impact studies to take psychological, cultural and socio-economic factors into account, significantly limited the scope and findings of their research strategies and designs.

2) Multidimensional studies also demonstrate a more complex research design by focusing on an entire series of decisions in a policy area, rather than on a single judicial or administrative case decision. The boundaries of a decision's impact are artificially contained by a research design which focuses on the decision in question alone, while ignoring subsequent decisions which may implement it. Whether or not a policy is followed up is often a crucial factor on the kind of impact it has on the group it is directed toward.

3) In addition, while the differences between both groups are not as significant, fewer multidimensional studies restrict the scope of their research to the determination of a decision's short range impact. Multidimensional impact studies were also less likely to restrict their evaluation of impact to limited geographic area. The majority of single aspect studies can be criticized for conducting a low level of analysis by exploring impact in an area that is severely delimited by factors of time and space.

4) All but one multidimensional impact study generated data with the empirical research techniques of participant-observation, the survey questionnaire, or the personal interview. Two single aspect impact studies failed to use empirical research techniques. Once again, while the difference between both groups is not large, fewer multidimensional studies exhibited

this particular weakness of research strategy and design.

5) As would be expected, studies that focused exclusively on compliance were the only impact studies to directly address the problems involved in arriving at a satisfactory compliance standard. Not one multidimensional impact study addressed this problem. Fourteen studies ignored this problem entirely and it remains a significant stumbling block to the conducting of impact research.

6) Impact studies in both groups also exhibited a shocking indifference to definitional problems. Out of eight studies only two multidimensional works analyzed and defined terms before using them to evaluate a particular decision's impact. Out of a total of eight single aspect studies, one explicitly defined terms like compliance and circumvention. Vague or nonexistent definitions thus remains an important problem in the measuring of a decision's impact.

7) Another fundamental problem of impact studies is their failure to relate case study findings to each other or to more general theories of the political process. Only two out of a total of 16 impact studies related their individual findings to a more general framework. One was a single aspect impact study, the other was based on the multidimensional approach. This comparison confirms Theodore Lowi's observation that the "continuing fission of theory and research..." is a basic problem exhibited by American political science.¹⁷

Summary Conclusions

While caution must be exhibited in analyzing such a limited universe, our comparison of single aspect and multidimensional impact

studies tends to support our initial hypothesis, that the latter will suffer from fewer measurement problems. Multidimensional impact studies are also more methodologically complex, and tend to include a wider scope in their research designs. However, while some problems of measurement have been overcome, other important problems remain. Previous impact studies, on the whole, have failed to define basic terms. They have ignored the fundamental problems involved in arriving at satisfactory compliance standards. And most importantly, they have failed to relate individual case study findings to each other or to more general approaches to the political process. This study contributes to the resolution of these problems by clearly analyzing terms before they are operationalized. (See Chapter One, supra.) It addresses squarely the problem of arriving at a satisfactory compliance standard in the Banzhaf case in Chapter Five. And in Chapter Six it relates the conclusions of the Banzhaf case study to other impact studies and to more general theories of the political process.

We turn in the next chapter to our main task, determining the impact of the FCC's Banzhaf decision. Chapter 3 is a narrative of the events which culminated in the FCC's decision to apply "fairness" to cigarette commercials. It also details the aftermath of the Banzhaf decision and its impact on congressional legislation.

FOOTNOTES

1. According to Stephen Wasby. On page 28 Wasby explains how compliance differs from impact:

"Compliance brings a narrower focus than does impact but is not separate from it; compliance is a subset of impact."

The Impact of the United States Supreme Court (Homewood: The Dorsey Press, 1970).
2. For a more detailed discussion of measurement problems and impact analysis see Wasby, ibid., Chapter Two.
3. This variable is discussed by Samuel Krislov in "The Perimeters of Power: Patterns of Compliance and Opposition to Supreme Court Decisions", a paper delivered to the American Political Science Association in New York, on September 4, 1963, pp. 13-16. Two other works which take the factor of geography into consideration when determining impact are Kenneth Dolbeare and Philip Hammond, The School Prayer Decisions (Chicago: University of Chicago, 1971) and Robert H. Birkby, "The Supreme Court and the Bible Belt: Tennessee Reaction to the Schempp Decision", in Theodore Becker, (ed.) The Impact of Supreme Court Decisions (New York: Oxford University Press, 1969), p. 106.
4. Krislov, ibid., p. 16.
5. Robert E. Lane in The Regulation of Businessmen (Hamden: Archon Books, 1966) and Bradley Canon, in "The FCC's 'Fairness' Doctrine: its Substance, Enforcement and Impact", unpublished Ph.D. dissertation, Department of Political Science, University of Wisconsin, 1967 both include the ambiguity of a decision's language as a variable to be analyzed when determining compliance and noncompliance with federal economic regulations. See also Stephen L. Wasby, op. cit., pp. 250-251 for a discussion of ambiguity and its effect on compliance with Supreme Court decisions.
6. Several impact studies take into account the type and degree of sanctions used in enforcing a decision. Among them are: Jack Friedenthal and Richard Medalie, "The Impact of the Federal Regulation of Broadcasting: Section 315 of the Communications Act", 72 Harvard Law Review 445 (January, 1959); Lane, ibid.; and Edward F. Cox et al., The Nader Report on the Federal Trade Commission (New York: Grove Press, 1969).
7. Marver Bernstein, in Regulating Business by Independent Commission (Princeton: Princeton University, 1955) cites the effect of the case by case approach on the impact of regulatory policies on page 225. Edward Cox et al. ibid., also note that the case by case approach is an important factor in determining impact.

8. Suggested by Wasby, op. cit., p. 251. See also Canon: op. cit., pp. 268-276 for a discussion of unanimous FCC decisions.
9. This is suggested by Wasby, ibid., p. 47.
10. Birkby, op. cit., emphasizes these factors in his impact analysis.
11. Lane, op. cit., Birkby, ibid., Richard M. Johnson: The Dynamics of Compliance (Evanston: Northwestern University Press, 1967), and Neal Milner, "Comparative Analysis of Patterns of Compliance with Supreme Court Decisions - 'Miranda' and the Police in Four Communities", 5 Law and Society Review 119-134 (1970) are among the studies which explore the importance of psychological factors on impact.
12. Wasby, op. cit., pp. 249-250; Johnson ibid.; and Lane ibid.; emphasize the effects of variables such as role conceptions and expectations about a decision.
13. Krislov, op. cit., p. 11.
14. Ibid., p. 12.
15. Ibid., p. 13.
16. Wasby and Krislov treat some of the theoretical problems and implications in the field of impact analysis but fail to combine their work with original empirical research.
17. See Theodore Lowi, "American Business Public Policy, Case Studies and Political Theory", 16 World Politics #4 (July, 1964), p. 688. See also pp. 677, 681, 687-688 for a more detailed discussion of this problem.

CHAPTER THREE: THE FCC'S BANZHAF DECISION:
PRECURSORS AND AFTERMATH

Introduction

The following is a narrative of the FCC's Banzhaf decision,¹ including both a description of the events in which Banzhaf was rooted and of those that took place in its aftermath. The Banzhaf decision can be fully understood only if the public controversy over smoking and health generated by the Surgeon General's 1964 Report² and the subsequent struggle in Congress over a cigarette advertising and labeling law³ are taken into account. After a brief review of the background of the Banzhaf decision I will go on to narrate the events of the decision itself, to attempts by broadcasters and the tobacco interests to make the FCC reconsider Banzhaf, and failing this, their appeals to the courts for relief. Although the Banzhaf decision was upheld by the Court of Appeals⁴ the case study does not end here. By 1969 both the FTC⁵ and the FCC⁶ had proposed to ban cigarette advertising from the airwaves when the pre-emption clause of the 1965 Cigarette Labelling and Advertising Act expired. The intentions of federal and state agencies to regulate cigarette advertising and sales more strictly led to the enactment of the 1969 Public Health Cigarette Smoking Act⁷ which outlawed all broadcast cigarette commercials. This law, in effect, represents the end of our case study, for it made the Banzhaf decision moot. Broadcasting stations would no longer be under the requirements of the "fairness" doctrine to present significant numbers of anti-smoking messages if they were prohibited from carrying cigarette commercials.⁸

The details of this case study will illustrate how a decision made as an essentially stop-gap measure became a landmark decision in

the history of broadcast regulation. It will show the roles played by both the staff and the Commissioners in the decision-making process and how they each effect policy outcomes.⁹ The case study will demonstrate the impact of personal values and political considerations on the administrative process.¹⁰ It will also demonstrate the existence of an informal administrative process that deviates substantially from that described by formal organizational charts, rules and procedures.¹¹ And above all it will illustrate the labyrinthian nature of the policy-making process -- a process dominated by a constant evolution of shifting public agency/private interest coalitions. And finally this study will show how important federal regulatory policies emerge out of a combination of luck, timing and circumstance, not as a result of planning or organized foresight on the part of the policy-makers themselves.

The 1965 Cigarette Labelling and Advertising Act

On January 11, 1964 the Advisory Committee to the Surgeon General made public its now famous report on the relationship of cigarette smoking to health. Their report's major conclusion was that the normal consumption of cigarettes was an extreme health hazard and warranted remedial governmental action.¹² The FTC, which had jurisdiction over unfair and deceptive advertising practices, immediately proposed a trade regulation rule requiring a strong health warning in all cigarette advertising and packages. The warning, which was to be included in both print and broadcast advertisements, read as follows: "Cigarette smoking is dangerous to health and may cause death from cancer and other diseases."¹³ The FTC's trade regulation rule was to become effective on January 1, 1965.

The specter of a mandatory warning in all cigarette advertisements and packages caused substantial alarm in the tobacco industry. In addition, since advertising revenues were threatened by such a strong warning, the tobacco industry's fight against the FTC's trade regulation rule was joined by the American Newspaper Publishers Association, the Advertising Federation of America, the Association of National Advertising, the Radio Advertising Bureau, and the National Association of Broadcasters.¹⁴ Congress opened hearings on the subject and the subsequent controversy over a health warning in advertising pitted the tobacco-advertiser alliance against public health officials, private health agencies and the FTC. The conflict, a "piece of modern political Americana"¹⁵ according to one observer, ended with the pro-tobacco forces in firm control. Although the law which emerged from this controversy was touted as a public health measure, the Cigarette Labelling and Advertising Act proved to be little more than a boon for the tobacco industry. It mandated a weak warning label on cigarette packages alone. ("Caution: Cigarette Smoking May be Hazardous to Your Health.") Cigarette advertising did not have to include any health warnings. The act specifically prohibited the FTC or any other federal regulatory agencies from interfering with the contents of cigarette advertisements or labels, through July 1, 1969. And it also prohibited further state or local regulation of cigarette advertising or labelling until that time.¹⁶ Senator Frank Moss characterized the law as a:

tragic step backward... in exchange for eleven words on the side of the cigarette package, Congress exempted the cigarette industry from the normal regulatory process.¹⁷

The 1965 Cigarette Labelling and Advertising Act was considered by many concerned citizens and public officials to be an immoral setting of the tobacco interests above the public's interest. The FTC rescinded its proposed trade regulation rule¹⁸ after losing its turbulent struggle in Congress over the cigarette labelling law. But although the anti-tobacco forces had lost a battle they had not yet lost the war. Concerned public officials in a sister federal regulatory agency were painstakingly preparing their own initiatives to alert the public more forcefully about the hazards of smoking, without contradicting the pre-emptions set by the Cigarette Labelling and Advertising Act.

The 'Banzhaf' Decision

In the early 1960's a man named Katz, whose wife had died of lung cancer, had occasion to speak to Henry Geller, then General Counsel of the FCC.¹⁹ He asked Geller how a medium charged with operating in the public interest, convenience and necessity could continue to broadcast cigarette commercials. Geller held off initiating any FCC action on the question after the Surgeon General's report because of the FTC's decision to fight for a strong warning label in Congress. When the FTC emerged with only a weak warning on cigarette packages, Geller began to look for ways in which the FCC could act while staying within the guidelines set by congressional legislation. Since the provisions of the Cigarette Labelling and Advertising Act prohibited a cigarette advertising ban until July 1, 1969, Geller had to achieve a stop-gap measure to counteract the influence of broadcast cigarette commercials. He began to prepare a case for including cigarette commercials under the FCC's "fairness" doctrine, which governs the broadcasting of controversial

public issues. Although the "fairness" doctrine had never before been applied to the content of a product commercial, Geller felt that in this case it could be done in order to make broadcasters present the hazards of cigarette smoking more frequently and prominently to the public.²⁰ And although the Commission could have initiated a formal rule-making inquiry on this policy question (by putting out a formal notice in the Federal Register, gathering opinions from interested parties, and delivering a formal memorandum opinion and order) they chose instead to wait until a fairness complaint regarding cigarette commercials was made. Geller knew that without a complaint, his proposal to include cigarette commercials under the "fairness" doctrine would create a storm of disapproval in the broadcasting and tobacco industries, and in Congress, who controlled FCC appropriations.

On December 1, 1966 John F. Banzhaf III, a young New York lawyer, wrote to television station WCBS, asking them how they intended to fulfill their "fairness" obligations with respect to the cigarette advertisements being broadcast on their station. Although Banzhaf mentioned three specific commercials, he said that he referred in general to:

... all cigarette advertisements which by their portrayals of youthful or virile-looking or sophisticated persons enjoying cigarettes in interesting and exciting situations deliberately seek to create the impression and present the point of view that smoking is socially acceptable and desirable, manly, and a necessary part of a rich full life.²¹

In this way, Banzhaf wrote, cigarette advertisements addressed a controversial issue of public importance and WCBS, as a public licensee, had an obligation to devote a reasonable amount of time to the contrasting view "that smoking is a danger to health, not a sign of manliness,

and not a sophisticated and generally accepted social grace."²² Banzhaf referred to the Surgeon General's report, hearings and bills on the subject in Congress and the FTC's actions on cigarette labelling as attesting to the importance and controversial nature of the smoking issue. He concluded that the "fairness" doctrine did apply to product advertising and asked for free time for responsible groups, roughly in proportion to that now spent on your station promoting the virtues and values of smoking."²³ Banzhaf added that if his request were not met he would file a formal complaint at the FCC. In a second supplemental letter to WCBS Banzhaf specifically requested that free time be made available to himself as a responsible spokesman for the anti-smoking views.²⁴

Clark George, manager of WCBS - TV, rejected Banzhaf's request citing a number of news broadcasts and specials that his station had aired on the subject of smoking and health since 1962.²⁵ WCBS felt that in light of this record it was unnecessary to consider whether the "fairness" doctrine could be applied to product commercials, although they did believe that it was inapplicable to advertisements that aimed solely at selling a product or service.²⁶ They concluded that:

The value and quality of consumer products and services may often be a matter of dispute. One cannot listen to news broadcasts or read a newspaper today and not be exposed to controversy surrounding such consumer products and services as, for example, aspirin, soft drinks, beer, automobiles and medical insurance. We believe that it is clear that the 'fairness' doctrine was conceived by the Commission as an aid to the public's right to be informed about public issues...not as a vehicle for giving the Commission power to indirectly regulate product advertising when other government agencies are directly charged with the regulatory responsibility over such advertising.²⁷

Banzhaf filed a formal letter of complaint at the FCC on January 5, 1967. In it he disagreed with Mr. George's contention that deciding whether the "fairness" doctrine applied to product commercials was unnecessary, saying that: "this was exactly the point of my letter and it is now the subject of this complaint."²⁸ Banzhaf also pointed out that WCBS's record of news coverage of the smoking issue featured both sides of the issue and totaled no more than four broadcast hours. Even if the broadcasts cited by WCBS had only presented the anti-smoking view, they could have hardly offset the impact of:

...paid advertisements, prepared by highly skilled experts to maximize their persuasive power, and broadcast day after day after day for a total of five or ten or even more minutes per broadcast day.²⁹

Banzhaf also rejected George's parade of "horrors" (other products that could also trigger the "fairness" doctrine) stating that "their use or relative merits are not a 'controversial issue of public importance.'"³⁰ Banzhaf concluded his complaint by stating that applying the "fairness" doctrine to cigarette advertisements would be consistent with the public interest, the Surgeon General's report, congressional legislation, FTC action and FCC precedent.³¹

Henry Geller finally received the catalyst to stimulate the FCC to action. Geller's primary and key ally on the Commission was its chairman, Rosel Hyde, a crusty Mormon who personally opposed smoking on religious grounds. Geller and Hyde ignored FCC procedures in an effort to avoid leaks about the forthcoming Banzhaf decision, leaks which Geller says are "rampant" at the Commission and practically unavoidable.³² As part of this effort Geller failed to ask WCBS to respond

to Banzhaf's complaint, did not put the case on the regular agenda or send it to the minutes clerk to be printed and met with the full commission outside of the regular meeting room without any other staff members present, except for the Chief of the Broadcast Bureau.³³ The Banzhaf decision was unanimous, drafted by Geller and sent to WCBS as a staff ruling with the heading "by the direction of the Commission."³⁴ The decision's unanimity can be traced to two main sources: the overwhelming scientific evidence indicating that the normal consumption of cigarettes was extremely hazardous to the public's health and the strong respect that the personal views of Geller and Hyde commanded on the subject. Banzhaf represented the culmination of Hyde's and Geller's conviction that there was an inherent contradiction between a broadcaster's public interest mandate and the advertising of a product that caused cancer and death.

In a simple advisory letter to WCBS, in another unusual departure from regular procedures at the FCC, Geller made a sweeping policy decision affecting nearly all broadcasting stations in the country.³⁵ In it he held that the "fairness" doctrine was applicable to cigarette commercials but cautioned that the Banzhaf decision was limited only to cigarettes and was inspired by governmental and private reports that stated that the "normal use of this product can be a hazard to the health of millions of people."³⁶ Geller went on to say:

The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance — that however enjoyable, such smoking may be a hazard to the smoker's health.³⁷

The staff letter went on to reject Banzhaf's request for "roughly approximate" time saying that the probable consequence of a one-to-one anti-smoking/cigarette commercial ratio would be an elimination of broadcast cigarette advertising, which would be inconsistent with the guidelines provided by the 1965 Cigarette Labelling and Advertising Act. But the Commission felt that as part of the "extensive smoking education campaigns" favored by Congress in setting up the act³⁸ broadcast licensees should devote "a significant amount of time for the other viewpoint [on smoking]... each week."³⁹ A station might determine that showing a number of American Cancer Society or HEW public service announcements, in addition to news reports on the subject, would be a way to discharge its responsibility. But the FCC stressed that this was only a suggestion, left up to the "good faith, reasonable judgment of the licensee."⁴⁰ And finally the Commission noted that WCBS had a continuing program to present anti-smoking views and thus the Banzhaf decision was meant to provide guidelines for the station to decide whether that program was sufficient.⁴¹

The Banzhaf decision, while initiated as only a stop-gap measure in lieu of a cigarette advertising ban, became a landmark in communications regulation by increasing the scope of the FCC's involvement in broadcast programming content. In addition to being the first time that the "fairness" doctrine was applied to commercial advertising, the decision was also the first time that an implicit rather than an explicit discussion of an issue triggered the Commission's "fairness" doctrine. And the Banzhaf decision was also the first time that the FCC dictated the content of a station's programming in such a specific way, (in this case the content of the station's

public service announcements). Banzhaf also expanded and refined the concept of the public interest to include the public's health. Thus Banzhaf expanded both the scope of the Communications Act's public interest clause and the nature of the FCC's responsibility for implementing it.

Reconsideration of the 'Banzhaf' Decision

The FCC's Banzhaf decision did generate the expected flood of opposition in Congress and the broadcasting and tobacco industries. Petitions for reconsideration of the ruling began to inundate the FCC shortly after the ruling was made public.⁴² The Commission acknowledged the importance of Banzhaf as a precedent and agreed to reconsider its decision to determine whether it should be stayed or transferred to a full rule-making inquiry.⁴³

At the reconsideration hearing there were eight major arguments put forth against the merits of the Banzhaf decision: a) that the "fairness" doctrine itself violated the first and fifth amendments to the Constitution; b) the "fairness" doctrine, even if constitutional, applied only to news programs, public issue commentaries and editorials; c) Congress had pre-empted the field of the regulation of cigarette advertising; d) even if the "fairness" doctrine were to apply to commercials the FCC invalidly applied it to all cigarette commercials per se, even if they did not explicitly discuss a controversial issue; e) the suggestion that a significant amount of time be devoted to anti-smoking views each week and that anti-smoking announcements be used substituted Commission fiat for licensee judgment; f) the Commission

ruling cannot be logically limited to cigarettes alone; g) the ruling will have an adverse economic effect on the broadcasting and tobacco industries; and h) the ruling was procedurally invalid because the Commission failed to give interested parties a chance to be heard before issuing a novel and unprecedented policy.⁴⁴

In a lengthy memorandum opinion and order, the Commission (with Johnson and Loevinger concurring and Wadsworth absent) systematically rejected all eight arguments against its Banzhaf decision, letting it stand as written. Geller and Hyde were faced with a major problem in their effort to keep the decision unanimous. Commissioner Loevinger was getting nervous for he was afraid that Banzhaf might lead to a parade of requests for access to the broadcasting media, on the basis of many products other than cigarettes.⁴⁵

Loevinger's concurrence, in addition to being prophetic, also summed up some of the ambivalence and doubt that some on the Commission were feeling about Banzhaf, especially the doubts of those who were not as militantly anti-cigarette as Hyde and Geller. In his opinion Loevinger said that he agreed with the Commission:

...with doubt and reluctance...because the result is socially and morally right although it may not be procedurally and substantively consistent with controlling legal rules.⁴⁶

He also pointed out that although the Commission had re-emphasized the fact that the ruling was strictly limited to cigarette commercials⁴⁷ its Memorandum Opinion and Order in effect established the principle that the "fairness" doctrine does apply to commercial advertising. And there have been numerous government reports and congressional

actions on other advertised products whose normal use presented a health hazard. His problems with the majority's opinion led Loevinger to conclude that:

The Commission will be hard pressed to find a rational basis for holding that cigarettes differ from all other hazards to life and health.⁴⁸

Another important issue raised by the Commission in its Memorandum Opinion was the problem of defining compliance with the Banzhaf ruling. While the Commission rejected "guidelines, ratios or other rigid rules"⁴⁹ as a standard for compliance with Banzhaf it also added that for stations airing significant amounts of cigarette commercials an "occasional program a few times a year or ... appropriate announcements once or twice a week" would be insufficient.⁵⁰ The Commissioners concluded that considering the importance of the problem stations would not "seek to fulfill their obligation in a niggardly fashion, designed to raise problems or complaints."⁵¹

A jurisdictional struggle to appeal the reconsideration ruling followed. Banzhaf, in a shrewd tactical move, claimed that his original request for roughly approximate time had been rejected and appealed the ruling in the consumer-oriented Court of Appeals in the District of Columbia, four days before the FCC's decision was formally published. The National Association of Broadcasters, representing a television station in West Virginia, waited until after the decision was published to file its appeal in the heart of tobacco country -- the Circuit Court in Richmond, Virginia. The NAB petitioned the court to dismiss Banzhaf's appeal as premature, calling theirs the "first timely and legally sufficient petition" for appeal.⁵² Banzhaf's petition took precedent and

thus, ironically, the case appealing the FCC's order upholding its Banzhaf decision became Banzhaf versus the FCC.

Banzhaf vs. the FCC

Banzhaf versus the FCC was a combination of three separate suits: Banzhaf's suit against the Commission; the NAB's suit against the Commission; and a suit brought by the Tobacco Institute, also against the FCC.⁵³ Banzhaf, along with the tobacco interests and the broadcasters, "lost" the case on appeal, the court affirming the FCC's ruling in its entirety. The court stated that it had upheld the FCC because it found negative answers to the following questions, presenting the heart of the argument against the ruling: Did the Cigarette Labelling Act of 1965 preclude any regulation of the smoking and health problem? Even if the ruling was not forbidden, was it unauthorized? And was the ruling unconstitutional because of First Amendment considerations? The court in rejecting these arguments upheld the FCC on the basis of the 1934 Communications Act's public interest clause, rather than on the specific requirements of the "fairness" doctrine.⁵⁴

Judge Bazelon stated for the court that although the FCC's Banzhaf ruling originated as a "fairness" complaint, its legitimacy was derived from the Communications Act's mandate that the broadcast licensee must operate in the "public interest, convenience and necessity." Bazelon went on to add that although the "public interest" may be a vague term subject to the Commissioners' value judgments, "whatever else it may mean... we think the 'public interest' indisputably includes the public health."⁵⁶ In ordinary circumstances

the FCC would probably have considered banning cigarette commercials, but was precluded from doing so in this case by congressional legislation. Thus the next best thing they could do in light of their public interest mandate, was to make the Banzhaf ruling using the "fairness" doctrine. But the "fairness" doctrine only put the flesh on the policy, "by providing a familiar mold to define the general contours of the obligation imposed"⁵⁷ by statute.

The court's opinion also addressed several other important issues raised by the petitioners. The majority found that the Banzhaf ruling was not pre-empted by the Cigarette Labelling and Advertising Act because it did not require the inclusion of warning statements within cigarette advertisements themselves.⁵⁸ The court also agreed with the FCC's contention that anti-smoking information broadcast in panel shows and news programs was insufficient to combat the daily repetitive nature of cigarette commercials:

A man who hears a hundred 'yeses' for each 'no', when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed.⁵⁹

And the court concluded its decision by rejecting petitioners' First Amendment argument:

The cigarette ruling does not ban any speech Even if some valued speech is inhibited by the ruling, the First Amendment gain is greater than the loss.⁶⁰

The tobacco and broadcasting industries appealed the Circuit Court's decision to the Supreme Court. On October 14, 1969 the Supreme Court denied their petition, letting Banzhaf versus the FCC stand as written.

Background of the 1969 Public Health Cigarette Smoking Act

Both the FTC and the FCC were well aware of the fact that the pre-emption clause against further regulation of cigarette advertising was due to expire on July 1, 1969. In 1968 the FTC had already recommended to Congress 1) the banning of all cigarette commercials from radio and television, 2) a stronger warning label on cigarette packages and 3) the continued allocation of air time to antismoking messages.⁶¹ In February, 1969 the FCC put out to Notice a proposed Rule to ban cigarette advertisements from broadcasting if the 1965 Cigarette Act were allowed to expire.⁶²

The FCC based its rule-making proposal on HEW's 1967 Report to Congress citing statistical evidence linking cigarettes to cancer and to the Circuit Court's contention, in Banzhaf vs. the FCC, that "the public interest means indisputably the public health." Their recommendation of a broadcasting ban of cigarette commercials was made in an effort to nudge Congress into legislating an across-the-board ban of all cigarette advertisements. But the Commission conceded that it would be inconsistent with the public interest mandate to present advertising of a product that led to disease and death even if an across-the-board ban were not enacted.⁶³ The Tobacco Institute and the NAB promptly denounced the FCC's proposed rule-making as an attempt at "administrative fiat" which would replace legitimate congressional law-making processes.⁶⁴

Other public and private health groups emerged with the FTC and the FCC as part of what one observer called a "revived coalition" against the tobacco and broadcasting lobbies.⁶⁵ This coalition included

the AMA, Banzhaf's small public interest group Action on Smoking and Health (ASH), the American Cancer Society, the American Dental Association and the Public Health Service. At the urging of these groups state legislatures began to take steps to regulate both cigarette sales and advertising.⁶⁶ State regulatory proposals would also go into effect if the federal Cigarette Act expired. The continuing pressures for state and federal regulation of cigarette sales and advertisements set the stage for the opening of House and Senate hearings on a new law to replace the Cigarette Labelling and Advertising Act.

The 1969 Public Health Cigarette Smoking Act

Representatives of the tobacco interests in the House began to take action against the combined threat posed by state and federal regulatory proposals. Thirty legislators introduced bills on behalf of the tobacco industry during the ninety-first Congress.⁶⁷ The House Interstate and Foreign Commerce Committee held extensive hearings on cigarette advertising and labelling and the relationship between smoking and health.⁶⁸ On May, 1969 the House Commerce Committee reported to the floor H.R. 6543, which combined a stronger warning on the cigarette package with a six-year pre-emption of further state or federal regulation of cigarette advertising and labelling.⁶⁹ A motion to recommit the bill with stronger anti-smoking amendments failed by a vote of 252 to 137. Anti-smoking forces were beaten in every attempt to reshape the measure as tobacco interests remained in firm control of the House.⁷⁰ H.R. 6543 was in essence a replica of the 1965 Cigarette Labelling and Advertising law.

The Senate Commerce Committee's Consumer Subcommittee opened hearings on HR 6543 on July 21, 1969. The Senate Commerce Committee was less Southern in composition than its House counterpart and was chaired by Warren Magnuson, a strong proponent of cigarette advertising regulation. Senator Frank Moss from Utah chaired the Consumer's Subcommittee in charge of the bill. Moss is a devout Mormon and thus held strong personal views against cigarette smoking. He was unalterably opposed to the House-passed version of H.R. 6543. According to Senate Commerce Committee staffers⁷¹ Moss was given the go-ahead on a strong anti-tobacco bill by a majority of the Senate before the hearings even began. Thus Moss had three aces in the hole against the House version -- he had the votes to report an anti-tobacco bill out of committee, the votes to pass it on the floor and if all else failed Moss could filibuster H.R. 6543 to death, allowing the pre-emption clause of the 1965 Cigarette Act to expire.

Two weeks before the Senate hearings on the new cigarette bill began, the NAB drew up a compromise plan detailing a withdrawal of cigarette advertisements from the broadcasting media, to be spaced gradually over a period of four years.⁷² Broadcasters felt that with this plan they were complying with the FCC's request for voluntary action while minimizing their revenue losses. Another unacknowledged but obvious by-product of their plan was to cast the tobacco lobby's official stand against a broadcasting ban into the villain's role. Before the Moss hearings took place another crack appeared in the tobacco-broadcasting alliance when a secret NBC plan to ban high tar and nicotine cigarette

commercials became known to the tobacco industry. But the final split came on the second day of the Moss hearings.

July 22, 1969 was the turning point in the legislative struggle for a ban on broadcast cigarette commercials. On that date Joseph Cullman, chairman of the board of the Philip Morris Company, volunteered to the Moss committee that the tobacco manufacturers were willing to discontinue all cigarette advertising on television and radio by September, 1970 in exchange for an anti-trust exemption from Congress.⁷³ The tobacco companies also wanted the warning label on cigarette packages to stay the same and a continuance of the pre-emption clause against further regulation of cigarette advertising.⁷⁴ Vincent Wasilewski, President of the NAB, followed Cullman to the stand. He testified that if the health hazard posed by smoking were great enough to warrant a ban on broadcast advertising, the anti-trust exemption should be granted across-the-board, banning cigarette advertising in all mediums. He added that possibly cigarettes should be withdrawn from the market altogether.⁷⁵ Wasilewski pointed out that:

...this [proposal of Cullman's] is no great sacrifice on their [the tobacco industry's] part. Because they will save some two hundred million dollars in advertising expenditures on radio and tv, with the full knowledge, I think, that consumption of cigarettes will not really decrease.⁷⁶

The tobacco manufacturers, in a brilliant political and public relations coup, had abruptly turned the tables on the broadcasting lobby.

To make matters worse for the broadcasters, Dr. Daniel Horn of the National Clearing House for Smoking and Health testified before the Moss committee. Horn claimed that counter-cigarette spots were

ineffective and that by 1971 they could lose their impact due to repetition and poor quality. Horn's "expert" testimony led Moss staffers to believe that the anti-smoking cause would be better served by a broadcast cigarette commercial ban than by counter-cigarette messages (According to a source at the National Clearing House, Dr. Horn's testimony was based on his agency's jealousy of the counter-ads' success. Dr. Horn subsequently conducted an attitude survey that confirmed the important impact of counter commercials on the attitudes of both the smoking and non-smoking adult population.)⁷⁷

Moss immediately wrote letters to the three television networks, asking them to accept the tobacco industry proposal. CBS agreed, NBC gave Moss a qualified rejection, and ABC rejected the proposal out of hand. Moss then turned the two rejections over to the FCC, calling their responses "disappointing, unresponsive, shallow and insensitive."⁷⁸

The NAB, with the FCC's support, began to hit at an all or nothing theme, stating that to ban cigarette advertising from just one advertising medium was discriminatory, illogical and unjust. Cullman assured Moss that differences between his plan and the NAB plan were merely ones of "timing".⁷⁹ Wasilewski strongly disputed this noting that the NAB plan did not contain a pre-emption clause against further state or federal regulation of cigarette advertising.⁸⁰ Moss stated publicly that Wasilewski's letter was "astonishing" in its indifference to the public interest.⁸¹ By August the NAB had caved into public and political pressures, realizing that its position was untenable. It agreed to the tobacco industry's proposal, although it would appeal the forthcoming cigarette ban in court.⁸²

In October, 1969 the Senate Commerce Committee voted for a mandatory ban on broadcast cigarette advertising, to take effect on December 31, 1970 (allowing broadcasters to collect cigarette revenues from the fall football season). The tobacco industry won amendments prohibiting the FTC from acting on health warnings in print advertisements until 1973 and diluting the warning on cigarette packages. On the Senate floor Moss strengthened the warning and pushed up the date on pre-empting federal regulatory action to July, 1971. The bill passed the Senate on December 12 by a vote of 70 to 7. In Conference the effective date of the ban was changed to January 2, 1971, allowing broadcasters to collect revenues from cigarette commercials shown on the New Year's Day football games. Mandatory warnings in print advertisements were barred until January, 1972.

On April 1, 1970 HR 6543 -- the 1969 Public Health Cigarette Smoking Act -- was signed into law. The warning on cigarette packages read as follows: "The Surgeon General has determined that cigarette smoking is dangerous to your health". The television networks stood to lose eight per cent of their advertising revenues (approximately 244 million dollars a year). The tobacco companies got a two year pre-emption against warnings in print advertisements, saved over 200 million dollars in broadcast advertising costs, and reduced drastically the number of anti-cigarette announcements on television and radio. After the provisions of the cigarette advertising ban took effect both tobacco profits and cigarette consumption rose.⁸³ The tobacco industry also shifted 132 million advertising dollars into newspaper, magazine and billboard advertising.⁸⁴ In the Senate debate over the advertising

ban it was assumed that print advertising by the tobacco industry might double to 100 million dollars a year. The actual figure for print cigarette advertising in 1971 (158 million dollars) led Senator Moss to say:

Nowhere in the wildest reaches of my imagination did I think that the manifest intent of the Congress's action [on the cigarette ban] could be so brazenly mocked.⁸⁵

After the Broadcast Cigarette Commercial Ban:
conclusion of a case study of public policy-making

On December 15, 1970 the FCC adopted another report and order in regard to anti-smoking messages.⁸⁶ This new policy was to take effect when the ban on cigarette commercials became operative on the nation's airwaves.

In its Report the FCC addressed two issues: 1) whether a station would be under a "fairness" doctrine obligation to broadcast the pro-smoking side if it broadcast anti-cigarette announcements after the cigarette commercial ban; and 2) what were the public interest obligations of broadcasters in regard to the hazards of smoking after the ban went into effect?⁸⁷

In regard to issue number one the Commission rejected the Tobacco Institute's claim that if anti-cigarette 'spots' were aired stations would have to give time to the pro-smoking side. The FCC sided with the broadcasters, stating that the events culminating in the 1969 Public Health Cigarette Smoking Act ended the controversy over the relationship of smoking to health, and thus the use of the "fairness" doctrine would no longer be necessary. It was now up to the broadcast licensee's good

faith judgment to decide when to air anti-smoking announcements; to decide whether they addressed a controversial issue or not; and to decide whether or not to give time to the pro-smoking side.

The FCC also rejected Banzhaf's claim that significant amounts of air time should still be allocated to anti-smoking announcements.⁸⁸ The Commission found no reason to single out cigarette smoking from a host of other public issues which the broadcasters could address in their public service time.⁸⁹ However, the Commission did go on to note that while the issue of smoking and health may no longer be controversial, government reports and congressional legislation proved that it was still a matter of great public concern.⁹⁰ The Commission reminded broadcasters that:

... it is simply not correct that the broadcaster has unlimited discretion to use his facilities as he wishes... the licensee is given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern.⁹¹

And the Commission warned that the licensee's overall public service performance would be evaluated at license renewal time.⁹² In summary the FCC said that the amount of anti-cigarette announcements to be broadcast over television and radio would now be left up to the individual station's discretion; the broadcaster did not have to give free air time to the pro-smoking position; but warned indirectly that some anti-smoking announcements should be continued because cigarette smoking still presented a danger to the health of the American public.

A study done by the American Cancer Society six months after this decision found that ABC, CBS and NBC broadcast, respectively, 7,3.9 and 4.5 anti-cigarette commercials a week⁹³ compared to the following

figures for 1969: 3, 20 and 18.⁹⁴ The ACS also found that in 1971 twenty percent of the programs broadcast by the three networks still contained cigarette smoking by performers (the so-called "hidden" commercials), although the incidence of smoking on network television had dropped fifty percent since 1968.⁹⁵ (This study did not explore the possibility of other "hidden" commercials resulting from the tobacco industry's expanded promotion of televised sporting events.) These figures and the rising figures for cigarette consumption led the ACS to correlate a "dramatic and disastrous increase in cigarette smoking generally, and particularly among young people"⁹⁶ with the FCC's failure to require significant numbers of broadcast anti-smoking messages. The ACS continued to assert that a renewed full-fledged anti-cigarette broadcasting campaign would be "one of the most valuable contributions to public health in the history of this country."⁹⁷ Other similar calls for a renewed anti-smoking campaign have also fallen on deaf ears at the FCC.⁹⁸ Ironically one can say that the public pressures against cigarette smoking that culminated in the cigarette commercial ban may have contributed in no small way to increasing cigarette consumption in the 1970's.

Summary Conclusions

The following conclusions about the federal regulatory decision-making process can be drawn from the Banzhaf case study.

a) The Banzhaf decision was initiated by the FCC's General Counsel as a stop-gap measure in lieu of a cigarette advertising ban (which was prohibited by the 1965 Labelling and Advertising Act). Because Banzhaf raised fundamental questions about the FCC's role in determining broadcast

programming content, it generated a storm of controversy in the broadcasting industry. This controversy led to a formal reconsideration of the ruling and a subsequent Court of Appeals decision upholding the FCC. Thus an informal staff letter ruling became both a major policy pronouncement (affecting all of the nation's broadcasters) and a landmark in the history of communications regulation.

b) The facts of the Banzhaf case confirm former Commissioner Johnson's contention that broad delegations of authority by Commissioners enable the FCC's staff to decide questions of new policy as well as questions in settled policy areas. The full Commission, by delegating responsibility to its staff, allowed the staff to formulate policy in the new and unsettled area of "fairness" and cigarette advertising. Henry Geller, as FCC General Counsel, drafted and set the course of the Banzhaf decision. However, Geller did have an important ally in Rosel Hyde. The freedom of action granted to Geller in this particular case must be traced, in part, to the influence the Chairman's office exerts on the other Commissioners.

c) Hyde's, Geller's and Moss's personal views on cigarette smoking had important consequences for the shape of federal regulatory policies concerning tobacco and broadcasting. Hyde and Moss are both Mormons and thus their views against cigarette smoking were motivated by religious dogma, as well as by scientific evidence concerning health hazards. Personal interviews confirmed that those commissioners who were uneasy about Banzhaf or not as interested in the cigarette advertising controversy went along with Banzhaf because of Hyde's intense personal interest in the case and because of the brilliance and integrity of Geller's presentation. The

fact that the Public Health Cigarette Smoking Act was to be considered by a subcommittee chairman who was a Mormon also had considerable influence on the tactics and strategies adopted by the tobacco lobby.

d) Political considerations also had an important effect on the FCC's promulgation of the Banzhaf decision. Henry Geller had outlined a case for including cigarette commercials under "fairness" and had predicted the outcome of a full commission vote on it, six months before John Banzhaf filed his complaint. But Geller knew that if the FCC put out to Notice a proposed rule applying "fairness" to cigarette advertising, a storm of controversy would be generated in Congress. The decision's backlash could have an adverse effect on the FCC's appropriations requests. Thus political considerations forced Geller to wait for a citizen complaint to implement the FCC's new cigarette advertising policy.

e) When that citizen complaint arrived, Geller, with Hyde's backing, ignored established rules of administrative procedure to avoid premature leaks about the forthcoming Banzhaf ruling. Usually, a staff or commission ruling would be put off until negotiations stalemated between the complainant and the station involved. In this case, however, WCBS - TV was never asked to even respond to Banzhaf's complaint. In addition, Geller did not put the Banzhaf complaint on the regular agenda and failed to have it printed by the minutes clerk. And to maintain as much secrecy as possible, Geller and the Chief of the Broadcast Bureau discussed Banzhaf with the full Commission outside of their regular meeting room, without any other members present. Thus Geller and Hyde avoided formal, established channels at the FCC in order to apply Banzhaf to a major network station, before the tobacco and broadcasting industries could mobilize against it.

f) The Banzhaf case and aftermath illustrate the labyrinthian nature of the federal regulatory decision-making process. For example, the NAB's gradual withdrawal plan precipitated the break-up of the long standing broadcaster - tobacco alliance and Phillip Morris's offer to withdraw immediately all radio and television cigarette advertising. In making this offer the tobacco industry was able to ally itself with the anti-smoking forces and simultaneously thrust the NAB into the villain's role. This alliance of traditional enemies led to the enactment of the 1969 Public Health Cigarette Smoking Act.

g) The preceding sections illustrate how important regulatory policies emerge out of a combination of luck, timing, and circumstance, not as a result of planning or organized foresight on the part of the policy-makers. The ban on cigarette commercials on the electronic media alone was really originated by the tobacco lobby. Senator Moss had originally favored tougher regulation and affirmative disclosures within commercials, while the FCC's proposed ban was aimed at eliminating print advertising, as well as broadcast cigarette ads. The ban on broadcast cigarette commercials alone resulted from two unforeseen turning points in the Moss hearings. The tobacco industry's unexpected offer to withdraw all television and radio commercials immediately was one such turning point. The other was Dr. Horn's testimony that anti-smoking messages would lose their impact by 1971. Although Dr. Horn represented the agency mandated by Congress to inform the public about the health hazards of smoking, his testimony effectively downgraded the importance of the counter cigarette ads and paved the way for the passage of the 1969 ban on broadcast commercials.

This chapter has outlined the details of the FCC's Banzhaf decision and its impact on the federal regulation of cigarette advertising. The next chapter focuses on the impact of Banzhaf on internal decision-making at the FCC itself. It determines whether Banzhaf became a precedent for subsequent FCC decisions involving "fairness" and product advertising. And finally, it examines how the FCC dealt with consumer group demands for access to commercial broadcasting time.

Footnotes

1. FCC 67 - 641 (June 2, 1967).
2. "Smoking and Health: Report of the Advisory Committee to the Surgeon General of the U.S. Public Health Service," January 11, 1964. Known informally as the "Terry Report".
3. The law which resulted was the 1965 Cigarette Advertising and Labelling Act, Public Law 89-92 15 USC 1331.
4. Banzhaf versus the FCC 132 US Appeals DC F 2d 1082.
5. Federal Trade Commission, Report to Congress (June 30, 1968), p. 48.
6. Federal Communications Commission, Notice of Proposed Rule-Making 69-95 (February 6, 1969).
7. Public Law 87-90 15 USC 1331-1339.
8. The FCC confirmed this in "In re formulation of appropriate further regulatory policies concerning cigarette advertising and anti-smoking presentations", FCC 70-1305 (December 15, 1970). They concluded that since the passage of the 1969 Public Health Cigarette Smoking Act smoking was no longer a controversial issue and thus the "fairness" doctrine did not apply. It was left up to the individual licensee's judgment when to put on anti-smoking announcements.
9. Nicholas Johnson, former FCC Commissioner, condemns the dominant role played by the staff in decision-making at the Commission. Although decisions delegated to the staff are theoretically only those in areas of settled policy, frequently staff decisions, according to Johnson, are made in new policy areas. He adds that the staff is relied on too heavily by the Commissioners and that staff preferences determine the agenda and the facts that Commission decisions are based upon. See Nicholas Johnson and John Jay Dystel, "A Day in the Life: the FCC", 82 Yale Law Journal 1575 (July, 1973).
10. Informal organization theorists (in contrast to formal theories of organization) contend that facts can never be divorced from human values and that administrators, as human beings, cannot fail to make policy choices on the basis of personal, subjective judgments. See Herbert Simon, Administrative Behavior (New York: Mac Millan, 1947) and Public Administration (New York: Knopf, 1950). Nicholas Johnson states categorically that FCC decisions are the results primarily of "industry pressures, staff idiosyncracies and political judgments". See Johnson, ibid., p. 1576.

11. This is the contention of informal organization theorists who state that informal relationships and procedures, not formal rules, regulations and organizational charts, determine both the substance of policy and the process by which it is made. See Simon, ibid., and Peter Woll, Administrative Law: the Informal Process (Berkeley: University of California, 1963).
12. "Smoking and Health", op. cit., p. 38.
13. 29 FR 8325.
14. A. Lee Fritschler, Smoking and Politics - policy-making and the federal bureaucracy (New York: Appleton - Century - Crofts, 1969), p. 9.
15. Ibid., p. 2.
16. In addition to these provisions the act set up a federal program to inform the public of the possible health hazards of smoking -- the National Clearinghouse for Smoking and Health. It also required the FTC and HEW to make periodic reports to Congress on citizen education campaigns on smoking, cigarette advertising practices and the like.
17. The New York Times (February 1, 1969) p. 27.
18. "Vacation of Warning Requirements in Trade Regulation Rule Concerning the Advertising and Labelling of Cigarettes" 30 FR 9484 (1965).
19. The following narrative of events is based in part on personal interviews with Geller, former and present FCC Commissioners, ASH, broadcasters, the NAB, the Tobacco Institute and with Congressional staffers.
20. Since the Cigarette Labelling and Advertising Act declared that it was Congress's intent to inform the public of the possible health hazards of smoking (and later appropriated two million dollars to do so) Geller felt that the "fairness" doctrine could be used to further this objective without interfering with the content of cigarette commercials as such, which was prohibited by the act.
21. Letter to Television station WCBS from John Banzhaf III (December 1, 1966) p. 1.
22. Ibid., p. 1.
23. Ibid., p. 3.
24. Letter to Television Station WCBS from John Banzhaf III (December 20, 1966).

25. Letter to John Banzhaf (sic) from Clark George, vice-president and general manager, WCBS - TV (December 30, 1966), p. 1. The station cited eight broadcasts on smoking and health that they had aired in the past five years. They had also broadcast five one minute public service announcement submitted by the American Cancer Society.
26. Ibid., p. 2.
27. Ibid., p.2.
28. Letter to FCC's Broadcast Bureau from John Banzhaf III (January 5, 1967) p. 1.
29. Ibid., p. 2.
30. Ibid., p. 2.
31. Ibid., p. 2.
32. Interview with Henry Geller at the Rand Corporation, Washington, D.C. (January 18, 1974).
33. Regular procedure (when the Chief of the Broadcast Bureau and the General Counsel agree on the disposition of the case and it is in an area of settled policy) is to send a routine staff letter to the station giving it ten days to respond to the complaint. The complainant and station are asked to get together to iron out their differences. Sometimes a flow of three or four letters between the FCC, the station and the complainant ensues. In normal circumstances only if these informal negotiations fail does the staff initiate action by the full commission. If the Broadcast Chief and the General Counsel disagree as to the course of action (as in this case) or if the ruling would set a precedent, the case then goes on the Commissioners' agenda for a formal meeting and vote.
34. Usually the results of a full Commission vote are printed and published as a memorandum opinion and order. However, Canon notes that occasionally the commission, fearing to set a precedent, will direct that the ruling be incorporated in a staff letter anyway, rather than published as a full Commission decision. (This seems to be the case in this instance.) See Bradley Canon, "The FCC's 'Fairness' Doctrine: Its Substance, Enforcement and Impact", unpublished Ph.D. dissertation, Department of Political Science, University of Wisconsin, 1967, pp. 171-172. Incorporating the Banzhaf decision in a staff ruling was also unusual for it was not in an area of settled Commission policy.
35. Wide-ranging policy pronouncements would either be put out to notice as a rule-making inquiry or would be published as memorandum opinions and orders, giving the full views of all participating Commissioners. Usually the views of interested parties would be

evaluated before the policy was made. In this case, this procedure was revised because of the controversial nature and political implications of the decision. This failure of the FCC to solicit opinions on Banzhaf led the tobacco and broadcasting industries to petition the FCC for reconsideration of the ruling.

36. FCC 67 - 641, op. cit., p. 2.
37. Ibid., p. 2.
38. Senate Report #195, 89th Cong., 1st Sess., p. 5.
39. FCC 67-64 1, op. cit., p. 3.
40. Ibid., p. 3
41. Ibid., p. 3. A New York Times reporter asked Geller at a briefing whether a 3:1 ratio of cigarette commercials to anti-cigarette announcements would fulfill a station's obligations under the Banzhaf ruling. Geller replied that 3:1 was reasonable, but all he meant by his response was that 3:1 was reasonable, although 4 or 5 or 6 to one might be considered reasonable, too. However, Geller's reply was misinterpreted by much of the broadcasting industry to be a formal, required standard set by the FCC for compliance. This is a good illustration of how an informal speech, hint or suggestion by someone at the FCC becomes the standard of enforcement of its policy decisions. (The so-called "lifted eyebrow" technique discussed in chapter one.) Because of the dependency of broadcasters on the FCC for their operating licenses, hints like these are magnified into rigid standards for performance. This tendency is also exacerbated by the FCC's refusal to spell out clearly and directly what it expects from stations in the way of compliance with its "fairness" decisions. The NAB says that this leads to a kind of "Government-imposed self-censorship". See brief of the NAB appealing Banzhaf versus the FCC in the October, 1968 term of the U.S. Supreme Court, p. 14.
42. The FCC received petitions from the following groups: from a Washington law firm, filed on behalf of various broadcasting clients, June 20; from CBS on June 23rd; from the NAB on July 3rd; from the Association of National Advertisers on June 29th; from the Tobacco Institute on June 30th; from WGN Broadcasting Co. on July 3rd; from NBC, ABC, Storer Broadcasting, Griffin-Leake TV and 78 individual broadcasters on July 5th. On August 1st the Washington D.C./Maryland Broadcasters association filed a petition and on July 27th The Federal Communications Bar Association filed against Banzhaf. Numerous petitions for reconsideration were also received from state broadcasting associations and from Congress. Pleading in behalf of the Commission ruling was John Banzhaf III.
43. 32 FR #179 (September 15, 1967), p. 13162.

44. Ibid., pp. 13162-13163.
45. See the concurring opinion of Commissioner Lee Loevinger, "In the Matter of the Cigarette Advertising Ruling", 9FCC 2d 952. (Commissioner Loevinger's fears proved to be correct.)
46. Ibid., p. 952. Loevinger noted that the cigarette advertising order was really a rule-making opinion on the question of cigarette advertising and the "fairness" doctrine rather than a reconsideration of the specifics of the CBS case brought by Banzhaf. According to Loevinger, the initial Banzhaf decision exonerated WCBS from imputations of unfairness and essentially ended the complaint.
47. The memorandum opinion and order stated that cigarette advertising was distinct from other product advertising for two reasons: 1) government and private reports and congressional action in respect to cigarettes and 2) the normal use of cigarettes presented a health hazard to millions of people. 32 FR #179 op. cit., p. 13170.
48. Loevinger concurring opinion, op. cit. p. 954. In an attempt to alleviate Loevinger's fears and to avoid making Banzhaf a precedent for other claims to apply "fairness" to commercials, Geller included the following paragraph in the memorandum order: "There is ... some tendency to miss the main point at issue by concentration on labels such as the specifics of the 'fairness' doctrine or by conjuring up a parade of 'horrible' extensions of the ruling. The ruling is really a simple and practical one, required by the public interest. The licensee, who has a 'duty to operate in the public interest' (section 315 a of the Communications Act), is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health. Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in the public interest. In view of the legislative history of the Cigarette Labeling Act, that question is one reserved for judgment of the Congress.... But there is, we think, no question of the continuing obligation of a licensee who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter — that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility." ibid., p. 13173. Geller told me that he felt that he had "blown it" by basing the initial Banzhaf decision on the "fairness" doctrine. Much of the subsequent controversy over counter-advertising, Geller felt, could have been avoided if the decision had been strictly based on the public interest standard of the Communications Act. Interestingly, the Circuit Court, in upholding the memorandum opinion, did just that.

49. 32 FR #179 ibid., p. 13170. The Commission added that in this, as in other "fairness" doctrine rulings, "equal time" or other rigid rules are inappropriate. "Fairness" only requires a fair or balanced presentation of all sides of a controversial issue of public importance in contrast to the specific equal time rules governing the appearance of candidates for public office (rules emanating from section 315 of the Communications Act). Thus the problem of defining what a "significant amount of time" was was left up to the individual licensee, for the FCC felt that a formal rule-making inquiry on the question would be inappropriate. See footnote 31, ibid., p. 13172.
50. Ibid., p. 13170.
51. Ibid., p. 13170. This sentence can be viewed as another example of the FCC's penchant for regulation by the "lifted eyebrow". Rather than set a standard of compliance with its decision, the FCC instead hints that a station complying in a "niggardly fashion" will incur the Commission's displeasure.
52. 73 Broadcasting magazine (September 25, 1967), p. 9.
53. The following appeared as intervenors against the FCC: the American Tobacco Co.; Brown and Williamson Tobacco Co.; Larus & Brothers, Inc.; Liggett and Meyers Tobacco Co; Philip Morris, Inc; R.J. Reynolds Tobacco Co.; United States Tobacco Co.; P. Lorillard Co.; Spartan Radiocasting; Palmetto Radio; WAVE, Inc.; WFIE, Inc; WFRV, Inc.; Indianapolis Broadcasting; Gulf TV Corp.; Corinthian TV Corp; Great Western Broadcasting Corp; WLLE, Inc. The Heart Disease Research Foundation intervened on the FCC's behalf and the National Tuberculosis Association filed an amicus curiae brief for the FCC.
54. Although much is made by some communications lawyers of this distinction the FCC's development of "fairness" doctrine regulations is based on the public interest clause of the Communications Act. The court felt that the Communications Act, which set up the FCC to regulate broadcasters in the public interest, was stronger legal ground on which to base the cigarette decision, rather than on internal regulations developed by the FCC itself. (Henry Geller agrees with this reasoning, See footnote 48, supra.) Banzhaf versus the FCC, op. cit., p. 1088.
55. Ibid., p. 1092. The court adds: "None of the novel aspects of the ruling ... precludes an extension of the 'fairness' doctrine at this time. But the extension must, like the doctrine itself, find its authority in the public interest standard." See 47 USC sections 307 (a) and (d) and 309 (a) of the 1934 Communications Act.

56. Ibid., p. 1096.
57. Ibid., p. 1093
58. On a wry note the court goes on to say: "Accordingly, if we are to adopt petitioner's analysis, (that the package warning was sufficient for informing the public about the health hazard of cigarettes), we must conclude that Congress legislated to curtail the potential flow of information lest the public learn too much about the hazards of smoking for the good of the tobacco industry, and the economy. We are loathe to impute such a purpose to Congress absent a clear expression." Ibid., p. 1089
59. Ibid., p. 1099.
60. Ibid., pp. 1101-1102.
61. FTC Report op. cit.
62. FCC 69-95 op. cit.
63. Ibid., pp. 287, 289. Geller and Hyde both told me that their overriding goal was to ban cigarette advertising entirely, but that they were limited to acting against the broadcasting medium. However, both fully expected Congress to enact an across-the-board ban as a result of the FTC and FCC recommendations. Geller interview, op. cit. and interview with Rosel Hyde in Washington, D.C. (January 15, 1974). Four other points made in the Notice are also interesting. The FCC acknowledged the economic impact of the ban for the broadcasting industry (a loss of about \$244 million in revenues a year) but felt that the industry was profitable enough to absorb the loss, ibid., pp. 288-289. The Commission said that voluntary action by the broadcasting industry would be more desirable than a formal rule-making procedure -- another hint or suggestion illustrating the FCC's attraction to regulation by the "lifted eyebrow" and the informal administrative process rather than by formal rules and procedures, ibid., p. 290. The FCC stressed again that the ban was limited to cigarettes because this situation was unique, ibid., p. 292. And the Commission concluded the Notice by stating in the event of a ban, anti-smoking announcements would stay on the air, while the pro-smoking position could be provided by news shows and the like, ibid., p. 291.
64. Comments of the NAB in the Matter of Amendment of Part 73 of the FCC Rules with Regard to the Advertising of Cigarettes and the Comments of American Brands, Inc, etal. in the same matter, Docket #18434, (July 17, 1969).
65. Edward Schneier, "The Politics of Tobacco" in The Nation (September 22, 1969) p. 276.

66. The California Assembly passed a law banning all cigarette advertising if the federal law on cigarette advertising expired. New York and Utah also took steps to reduce cigarette sales. See Schneier, ibid., p. 276.
67. Ibid., p. 275.
68. The Tobacco Institute paid the travel expenses of over 20 doctors to the hearings. These experts testified that no relationship between smoking and ill health could be proved. Chairman Hyde underwent extensive and critical questioning at these hearings by members hostile to the FCC's Banzhaf decision and proposed ban. See Cigarette Labelling and Advertising - 1969, Hearings Before the House Interstate and Foreign Commerce Committee, 91st Cong., 1st Sess., (1969).
69. HR 6543, 91st Cong., 1st Sess., (1969). The House warning label read as follows: "The Surgeon General has determined that cigarette smoking is dangerous to your health and may cause lung cancer and other diseases." This is almost identical to the warning proposed by the FTC in 1964 which touched off such a virulent struggle by the tobacco interests.
70. The New York Times, (June 18, 1969) p. 31.
71. Interview with Edward Merlis, Senate Commerce Committee staff, January 25, 1974, Washington, D.C.
72. Comments of NAB. op. cit., p. 11. Their plan was a reaction to the FCC's informal suggestion for voluntary action in its proposed rule-making Notice. (See footnote 63, supra.) The NAB proposed to reduce cigarette advertising by 10% the first year, 15% the second, and 25% the third, fourth and fifth years of operation.
73. Hearings before the Consumer Subcommittee of the Committee On Commerce - United States Senate, 91st Cong., 1st Sess. - on HR 6543 - (July 22, 1969), p. 78.
74. Ibid., p. 79.
75. Ibid., p. 129.
76. Ibid., p. 128.
77. According to an off-the record interview at the National Clearinghouse for Smoking and Health, Washington, D.C., January 18, 1974. See "Adult Use of Tobacco" Washington, D.C.: U.S. Department of Health, Education, and Welfare, (June, 1973) pp. 11-14.

78. Hearings before the Consumer Subcommittee, op. cit., p. 134.
79. Letter to Senator Moss from Joseph Cullman, ibid., p. 144, (September 2, 1969).
80. Letter to Senator Moss from Vincent Wasilewski, ibid., p. 145.
81. Hearings, ibid., p. 146.
82. The NAB lost its case, Capitol Broadcasting versus Kleindiest (333 F. Supp. 580) 1971, in United States District Court. The NAB claimed in its brief that the ban of cigarette advertising from broadcasting alone violated the equal protection of the laws and the rights of free speech. The Court rejected the broadcasters' argument, stating that: "product advertising is less vigorously protected than other forms of speech" (p. 6A) and thus petitioners did not lose a right to speak but a right to collect revenues from others for broadcasting their cigarette commercials. Judge Wright, in his dissent, stated that Banzhaf vs. the FCC found cigarette commercials to address one side of a controversial public issue, and therefore he believed that they came within the core protection of the First Amendment (p. 12A). He also noted that the flood of anti-smoking messages on radio and television correlated with a drop in the rate of consumption of cigarettes, a drop that was the first in many years (p. 13A). Characterizing the cigarette ban as a "legislative coup" for the tobacco interests (p. 15A) Wright favored a continuing free competition of ideas on the smoking and health controversy, rather than a suppression of opinions on the broadcasting media. In his dissent, Judge Wright concluded that the effects of the Banzhaf decision and the cigarette advertising ban were contradictory. On the one hand, Banzhaf favored public access to the media, supported the concepts of free speech and vigorous debate, and served the public interest. The cigarette advertising ban, on the other hand, served the tobacco interests rather than the public interest. It saved the tobacco companies millions in advertising costs, staved off further regulatory action and got most of the anti-smoking counter - ads off the air. (pp. 14A, 18A). However, in spite of Wright's eloquent and rational dissent, the U.S. Supreme Court rejected the NAB's petition for a writ of certiorari on January 14, 1972.
83. The following figures on cigarette consumption are obtained from the Tobacco Institute in Washington, D.C:

<u>Year</u>	<u>Total Consumption (billions of cigarettes)</u>	<u>Percent Change from Previous year</u>
1963	507.00	2.69 +
1964	497.46	1.88 -
1965	514.01	3.33 +
1966	521.61	1.48 +
1967	523.05	0.28 +
1968	528.70	1.08 +
1969	516.62	2.28 -
1970	524.09	1.45 +
1971	537.64	2.59 +
1972	554.16	3.07 +

84. The New York Times. (January 19, 1972), p. 45.

85. Ibid., p. 45. The following table breaks down cigarette advertising figures for the years 1963-1972. (Table obtained from the Tobacco Institute).

<u>Year</u>	<u>TV</u>	<u>Newspaper Magazines</u>	<u>Radio</u>	<u>Direct</u>	<u>Other</u>	<u>Total</u>
1963	151.7	45.6	31.6	13.2	7.4	249.5
1964	170.2	45.2	25.5	14.6	5.8	261.3
1965	175.6	41.9	24.8	14.7	6.0	263.0
1966	198.0	43.4	31.3	17.9	6.9	297.5
1967	226.9	41.2	17.5	20.3	6.0	311.9
1968	217.2	44.6	21.3	21.6	6.0	310.7
1969	221.3	48.7	13.6	13.4	8.9	305.9
1970	205.0	64.2	12.4	16.9	16.2	314.7
1971	2.2	157.6	-0-	27.0	64.8	251.6
1972	-0-	159.2	-0-	22.9	75.5	257.6

86. FCC 70-1305, op. cit.

87. Ibid., p. 1.

88. ASH made this claim for the following reasons: 1) the public interest clause of the Communications Act; 2) the public had been bombarded by cigarette commercials on radio and television for decades; and 3) "hidden" commercials would take the place of the prohibited cigarette advertisements. (When the hero smokes on an adventure show or a guest smokes on a panel show it is a so-called "hidden" commercial for the tobacco industry). ASH petition on Docket 70-1305, pp. 7-10.

89. FCC 70-1305, op. cit., p. 8.

90. Ibid., p. 9.
91. Ibid., p. 8.
92. Ibid., p. 10. This warning is another example of the FCC's use of the "lifted eyebrow" technique. The FCC refuses to lay down a formula for continuing anti-smoking messages after the ban but then warns that the licensee will be evaluated at renewal time to see if he is doing his job on the smoking and health issue.
93. "The Incidence of Anti-Cigarette Spots Six Months After the Cigarette Commercial Ban", study prepared for the American Cancer Society by Lieberman Research, Inc., (July, 1971), p. 5.
94. Internal corporate study prepared by the legal department of the National Broadcasting Company.
95. Cigarette smoking occurred in 41% of the programs broadcast in 1968 and in 20% of the network programs aired the year after the FCC's decision. Figures found in "A Three-Year Follow-Up Study of the Incidence of Cigarette Smoking by Performers on Television Programs", prepared for the American Cancer Society, by Lieberman Research, Inc., (May, 1971), p. 3.
96. Broadcasting magazine (January, 1973), p. 25.
97. Ibid., p. 25.
98. See editorial, "Let's Go Back to the Old Way", in the New Jersey Record (February 15, 1974) and Michael Gartner, "Bring Back Cigarette Commercials", The Wall Street Journal (February, 28, 1972) p. 12, as two examples.

CHAPTER FOUR: THE IMPACT OF BANZHAF ON
DECISION-MAKING AT THE FCC:
PRECEDENT OR ABERRATION?

Introduction

The primary concern of this chapter is the impact of Banzhaf as a precedent on administrative law. This chapter discusses three related groups of FCC case decisions dealing with access to the broadcast media, to determine the extent of that impact. The Banzhaf case represented the first major breakthrough in public interest group attempts to apply the "fairness" doctrine to commercial "spot" time to gain access to the electronic broadcast media. As such, it generated a sizeable number of similar complaints to the FCC.

The first group of cases reviewed here deals with the concept of paid access -- the right of responsible groups or individuals to buy commercial broadcasting "spot" time for the discussion of controversial issues. The main issue which these cases raise is whether the broadcast airwaves should be treated as common carriers similar to telephone and telegraph lines, which are open to the public on a first-come, first-served basis. The broadcasting establishment, on the other hand, claims a statutory and constitutional right to pick and choose the prospective buyers of commercial air time.

The second group of case decisions treated here involves the issue of free access to the broadcast media via the public service announcement. By invoking the "fairness" doctrine pacifist organizations attempted to get free "spot" announcement time to rebut military recruitment announcements appearing in public service time slots. The main argument raised here was that military recruitment announcements addressed one

side of a controversial issue of public importance and thus under a station's "fairness" obligations the other side of this issue, urging conscientious objector status and/or draft resistance, should be aired. Broadcasters strongly disputed this argument, saying that military public service announcements (PSA's) did not address a controversial issue of public importance.

The final group of FCC case decisions reviewed in this chapter deals directly with the question of counter - advertising. On the basis of Banzhaf consumer advocates pressed "fairness" claims to get free time to rebut controversial public issues raised by various product commercials. Proponents of counter - advertising claimed that consumers should be given information about the possible deleterious consequences or effects of products advertised on television in a professionally-planned, repetitive format similar to that used in the product commercial itself. Critics of counter-advertising feel that "counter - ads" will drive advertisers to use the print media exclusively, and thus will undermine the economic base of the commercial broadcasting system.

Following the case narrative review will be a discussion of the substantive conclusions that can be drawn from these cases and an analysis of some of the insights which they provide into the decision-making process at the FCC. The questions which follow provide the framework for that analysis: How did the FCC deal with the public access cases, which the Commission itself said threatened the entire system of commercial broadcasting?¹ In making these decisions did the FCC ignore both judicial decisions and rational principles of administrative decision-making to

evade the logical consequences of the Banzhaf decision?² Does former Commissioner Johnson paint an accurate picture of policy-making at the FCC when he says that the FCC relies too heavily on information provided by interested parties; considers broad questions piecemeal; defers to industry interests; postpones difficult decisions; hopes for private compromises to ratify; and fails to anticipate major problems before they arise?³

In summary, this chapter deals with the impact of Banzhaf on the substance and process of subsequent FCC decisions involving "fairness" and the question of public access. The major question which it tries to resolve is whether the principle established in Banzhaf (that the "fairness" doctrine does apply to "spot" advertising) set a precedent at the FCC or whether Banzhaf was a unique decision confined to a single set of circumstances?

Paid Access Cases

Business Executives' Movement for Vietnam Peace (1970) and Democratic National Committee (1970) are the controlling case decisions at the FCC on the question of paid access -- whether any responsible group has a right to buy television or radio "spot" time for the discussion of controversial public issues. The paid access case decisions made by the FCC are summarized in Table 4 - 1. (See p.103.) The Business Executive's Movement for Viet Nam Peace (BEM) was a national organization of businessmen who in 1969 sought to buy one minute "spots" on a local Washington station, urging the immediate withdrawal of U.S. soldiers from Viet Nam. The station turned BEM down on the basis of its overall policy of prohibiting the sale of "spot" time for the discussion of controversial issues. The

TABLE 4 - 1

PAID ACCESS CASES, 1967-73

Formal Citation of Case and Vote Breakdown

- a) Business Executives Movement for Viet Nam Peace.
25 FCC 2d 242 (1970). Bartley and Cox - concur, Johnson -
dissents, majority - Burch, Lee, Lee and Wells.
- b) Democratic National Committee.
25 FCC 2d 216 (1970) Cox - concurs, Johnson - dissents,
majority - Burch, Bartley, Lee, Lee and Wells.
- c) Alexandra Marks.
34 FCC 2d 434 (1972) Johnson and R.E. Lee - absent,
majority - Burch, Wiley, Bartley, H.R. Lee, and Reid.
- d) Citizens Councils.
37 FCC 2d 1014 (1972) - staff letter ruling.

Breakdown of Commission Votes by Partisan Identification

D = Democrat R = Republican

- a) BEM dissents: D.
 majority: D, D, R, D, R.
- b) DNC dissent: D.
 majority: D, D, R, R, D, R.
- c) Marks dissent: D.
 majority: R, R, D, D, R.

Cases Challenging or Presenting the Principle of Public Access

<u>Date of Ruling</u>	<u>Complainant Station or Network</u>	<u>Type of Commercial</u>
a) August 5, 1970	a) BEM WTOP	a) spots vs. Viet Nam war.
b) August 5, 1970	b) DNC all three networks	b) spots vs. Viet Nam war.
c) 1972	c) Alexandra Marks vs. NAB code	c) wants free time to publicize astrology.
d) 1972	d) Citizens Council local station	d) spots to air pro-segregation view.

TABLE 4-1 continued

- a) Alleged Violation: Failure to sell time for spots urging withdrawal of U.S. troops from Viet Nam.
Ruling: Denied. Station covered all sides of the war in its regular programming. Broadcasters are not common carriers. Phelps reiterated.
- b) Alleged Violation: Wants FCC to make a declaratory ruling stating that networks must sell time to responsible groups for the discussion of controversial public issue.
Ruling: Denied. FCC rules that stations are not common carriers
- c) Alleged Violation: Alleges that NAB code denies her right of access to airwaves under Circuit Court's BEM ruling.
Denied: Denied. Her request does not involve a controversial issue. She wants free publicity while BEM involves paid time.
- d) Alleged Violation: Citizens Council wants time via BEM to air pro-segregationist views.
Ruling: Denied. Stations are not common carriers. Broadcasters can pick and choose.

What Happened to the Cases in the Courts or on Reconsideration by FCC?

- a) BEM appealed. 450 F 2d 642 (1971) - Circuit Court reverses FCC. Anyone can buy commercial spots - upholds right of public access. 92 SC Reports 1174 (1972) - Supreme Court upholds FCC and denies absolute right of access. Stations while not common carriers have to be fair in their treatment of public issues.
- b) DNC upheld with BEM 450 F 2d 642 (1971). Overruled by Supreme Court, May 24, 1973.

FCC Commissioners, 1967-1973 and Partisan Identification

D = Democrat

R = Republican

Cox - (D), Hyde - (R), Wadsworth - (R), Bartley - (D), Johnson - (D), Loevinger - (D), Robert Lee - (R), Wells - (R), Houser - (R), Reid - (R), Hooks - (D), Wylie - (R), and Burch - (R).

station management's position was that subjects like the war required more "in-depth analysis"⁴ than can be provided in a sixty-second announcement. The Democratic National Committee (DNC) case followed much the same route. In early 1970 the DNC tried to buy "spots" and half hour blocks of network time to discuss controversial political issues and to solicit funds. When its requests were denied by the networks it asked the FCC to make a declaratory ruling in favor of paid access.

BEM's request for access to the station's commercial time on the basis of the "fairness" doctrine was denied, the FCC noting that the station had covered all sides of the war issue extensively in its regular programming:

No particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the 'fairness' doctrine is designed to assure, rather than the right of any individual or group to present personal views.⁵

The FCC likewise denied the DNC's request for a declaratory ruling, stating categorically that broadcasting stations were not common carriers.⁶ The Commission based its opinion on NBC versus the United States,⁷ the Supreme Court decision which gave birth to the Commission's "fairness" policy:

Unlike other modes of expression, radio inherently is not available to all. Because it cannot be used by all, some who wish to use it must be denied.⁸

In both BEM and DNC the FCC refused to substitute its judgment for the licensee's on programming matters. The Commission felt that its role was to determine only whether the licensee acted "reasonably and in good faith".⁹ And in BEM the Commission made a significant procedural

pronouncement when it reiterated its "Phelps" rule. "Phelps" required prima facie evidence of a "fairness" violation before the Commission would decide the case on its merits.¹⁰ The consequence of this ruling was that a complainant must engage in extensive monitoring to sustain a "fairness" complaint since stations are not required under FCC rules to provide information about past or current programming to private individuals.

BEM and DNC were both reversed on appeal in Circuit Court. The Court was of the opinion that any responsible group does have a right of access to commercial radio and television time.¹¹ However, the FCC's subsequent appeal to the Supreme Court settled for the time being the problem of paid access. The Supreme Court held that there is no absolute right of access to the mass media and that therefore stations do not have to accept "spot" announcements on controversial issues. Stations only have to make sure that under the "fairness" doctrine their treatment of issues is balanced and fair.¹²

While the Circuit Court decisions reversing BEM and DNC were pending before the Supreme Court, two additional complaints made on the basis of BEM were brought before the Commission. The FCC denied access to commercial time to an astrologer and a segregationist group, stating again that stations were not common carriers.¹³

Free Access Via Public Service Announcements

In February, 1970 the FCC received a complaint against several San Francisco stations, filed on behalf of the San Francisco Women for

Peace. Complainant Donald Jellinek alleged that these stations violated the "fairness" doctrine in that they broadcast military recruitment announcements in public service time while refusing similar time to "spots" opposing military recruitment, which SFWFP offered to supply. Jellinek also held that his case was analogous to Banzhaf, the only difference being the fact that the United States Government was the sponsor in the instant case. Jellinek and SFWFP also felt that carrying anti - selective service views on news shows and panel discussions was not equivalent to the

... 'spot' format where the uninterpreted, pre - packaged message... allows the sponsor to prepare the announcements in such a manner as to have a desired psychological affect...¹⁴

Table 4 - 2 (see p. 108.) summarizes the FCC's free access decisions dealing with military recruitment announcements.

The FCC rejected Jellinek's request, finding that military recruitment PSA's urging voluntary enlistment did not address a controversial issue. The Commission added that it would not upset the programming judgment of a licensee unless it was arbitrary, and that in this case the licensee's judgment was fair and reasonable.

Commissioner Johnson offered a lengthy and scathing dissent to the majority's opinion. Johnson agreed with Jellinek's position that slick military recruitment advertisements implicitly addressed a controversial issue by equating "being a Marine" with travel to glamorous places, higher education and attractive people.¹⁵ His dissent also emphasized the controversial historical background of military recruitment policies and the fact that military service, like the consumption of

TABLE 4 - 2

FREE ACCESS VIA PUBLIC SERVICE
ANNOUNCEMENTS - CASES, 1967-73

Formal Citation of Case and Vote Breakdown

- a) Donald Jellinek.
23 FCC 2d 156 (1970). Johnson-dissents, majority - Burch,
Bartley, Wells, Lee, Lee, and Cox.
- b) David Green.
24 FCC 2d 171 (1970) Johnson - dissents, majority - Cox,
Burch, Bartley, Lee, Lee and Wells.
- c) Alan Neckritz.
24 FCC 2d 175 (1970). Johnson - dissent, majority - Cox,
Burch, Bartley, Lee, Lee, and Wells.

Breakdown of Commission Votes by Partisan Identification

D = Democrat R = Republican

- a) Jellinek dissent: D.
majority: D, R, D, R, D, R.
- b) Green dissent: D.
majority: D, R, D, R, D, R.
- c) Neckritz dissent: D.
majority: D, R, D, R, D, R.

Cases Challenging or Presenting the Principle of Public Access

<u>Date of Ruling</u>	<u>Complainant Station or Network</u>	<u>Type of Commercial</u>
a) June 4, 1970	a) Donald Jellinek (SPWFP) Calif. radio and TV stations.	a) armed forces recruit- ment ads.
b) June 4, 1970	b) David Green WRC and WMAL	b) armed forces recruit- ment ads.
c) June 4, 1970	c) Alan Neckritz KFRC	c) recruitment ads.

TABLE 4 - 2 continued

- a) Alleged Violation: Alleged that radio and TV stations in Calif. give free public service time to military recruitment announcements. Wants free time to broadcast anti-draft ads.
Ruling: Denied. Military recruitment ads do not address a controversial issue - just voluntarily recruit for U.S. army.
- b) Alleged Violation: Wash., D.C. TV stations air military psa's and refuse to broadcast psa's opposing recruitment and military service. Brought by a Quaker organization.
Ruling: Denied. Not a controversial issue. Station offered time on a religious program for Quakers to discuss their views.
- c) Alleged Violation: San Francisco TV stations and military psa's.
Ruling: Denied. Not a controversial issue. Up to licensee to determine format for discussions.

What Happened to the Cases in the Courts or on Reconsideration by FCC?

- a) Appealed as G.I. Association vs FCC - D.C. Circuit upholds FCC stating that military recruitment ads do not address an issue of controversial and public importance.
- b) Green vs FCC 447 F 2d 323 (D.C. Circuit 1971) - Upholds FCC - not a controversial issue to recruit for the armed forces.
- c) Neckritz vs FCC 446 F2d 501 - (9th Circuit) 1971 - Upholds FCC. Not a controversial issue to recruit for the armed forces.

FCC Commissioners, 1967-1973 and Partisan Identification

D = Democrat

R = Republican

Cox - (D); Hyde - (R), Wadsworth - (R), Bartley - (D),
Johnson - (D), Loevinger - (D), Robert Lee - (R), Wells - (R),
Houser - (R), Reid - (R), Hooks - (D), Wylie - (R), and Burch - (R).

cigarettes, can lead to maiming and death, making the parallel to Banzhaf even more exact.

Further complaints from other pacifist organizations about military recruitment announcements received similarly negative responses from the FCC.¹⁶ The question of free access via public service announcements was finally decided when the United States District Court upheld the FCC's ruling that the PSA's in question did not address a controversial issue of public importance.¹⁷ The Court held that a controversial issue was not raised by urging voluntary enlistment in the United States armed services.

Free Access Via Product Commercials

The issue of free access via product commercials was raised initially by the Banzhaf case. Table 4 - 3 (see p. 111.) summarizes the FCC's free access case decisions involving product commercials. The most significant complaint before the Commission since Banzhaf on the issue of counter - advertising was brought by Friends of the Earth against WNBC - TV. Gary Soucie, representing Friends of the Earth, requested free "spot" time on the basis of Banzhaf to discuss the controversial issue of air pollution which he claimed large car "ads" and high lead gasoline commercials aired by WNBC - TV raised.¹⁸ WNBC rejected Friends of the Earth's request, stating that Banzhaf only applied to cigarette commercials and that it had treated the issue of air pollution in a fair manner in its overall programming.

In its Letter to Gary Soucie (1970) (known as Friends of the Earth) the FCC declined to extend Banzhaf to auto and gas commercials on

TABLE 4 - 3

FREE ACCESS VIA PRODUCT ADVERTISEMENTS -
CASES, 1967-73Formal Citation of Case and Vote Breakdown

- a) Gary Soucie.
24 FCC 2d 743 (1970). - Bartley concurs, Johnson - dissent, majority - Lee, Cox, Lee, Wells and Burch. (known informally as Friends of the Earth)
- FOE remand decision, 33 FCC 2d 648 (1972) Johnson and H. Rex Lee absent, Wiley - not participating, majority - Burch, Bartley, Lee and Reid.
- FOE termination, 39 FCC 2d 564 (1973) H. Rex Lee - absent, Johnson - concurs, majority - Burch, Lee, Reid, Wiley and Hooks.
- b) Retail Store Employees Union.
14 FCC 2d 423 (1966) Johnson - dissent, majority - Hyde, Bartley, Lee, Lee, Cox and Wadsworth.
- c) Alan Neckritz.
29 FCC 2d 807 (1971) Bartley, Lee and Lee absent, Johnson-dissents, majority - Burch, Wells and Houser. (known informally as Chevron)
- Chevron remand decision - 34 FCC 2d 579 - staff ruling.
- Chevron termination - FCC 2d 528 - Johnson - dissent.
- d) Wilderness Society
30 FCC 2d 643 (1971) - R.E. Lee - absent, majority - Burch Bartley, Johnson, Lee, Wells and Houser. (known informally as Esso)
- Esso reconsideration, 31 FCC 2d 729 - Burch - concurs and Johnson both concurs and dissents, majority - Lee, Lee, Wells, Houser and Bartley.
- e) Center on Auto Safety
32 FCC 2d 926 (1972) - staff letter ruling.
- f) Martin Trigora.
34 FCC 2d 118 (1975) - staff letter ruling.
- g) Utility Consumers.
39 FCC 2d 449 (1973) - staff letter ruling.
- h) Peter Herbst.
40 FCC 2d 115 (1973) - staff letter ruling.

TABLE 4 - 3 continued

- i) Hudson - Mohawk
40 FCC 2d 119 (1973) - staff letter ruling.
- j) Evelyn Sarson.
34 FCC 2d 130 (1973) - staff letter ruling.
- k) Wilderness Society
1973 - staff letter ruling.
- l) William Rodgers.
30 FCC 2d 640 (1972) - staff letter ruling.

Breakdown of Commission Votes by Partisan Identification

D = Democrat R = Republican

- a) FOE dissent: D majority: D, R, D, R, D, R.
reconsideration majority: R, D, R, R.
termination majority: D, R, R, R, R, D.
- b) Retail Stores dissent: D.
majority: R, D, D, R, D, R.
- c) Chevron dissent: D.
majority: R, R, R.
- d) Wilderness Society
(ESSO) majority: R, D, D, D, R, R.
reconsideration dissent: D, majority: R, R, D, R, R, D.

Cases Challenging or Presenting the Principle of Public Access

<u>Date of Ruling</u>	<u>Complainant Station or Network</u>	<u>Type of Commercial</u>
a) August 5, 1970	a) Gary Soucie (FOE) WNBC - TV	a) gasoline and auto ads.
b) April 29, 1966	b) Retail Store Employees Union, local 880	b) Hills Dept. Store.
c) May 12, 1971	c) Alan Neckritz (Chevron) KGO, KRON, KPIX, KNBC, KNXT (TV)	c) Chevron F - 310 gas ads
d) June 30, 1971	d) Wilderness Society NBC	d) ESSO ad

TABLE 4 - 3 continued

<u>Date of Ruling</u>	<u>Complainant Station or Network</u>	<u>Type of Commercial</u>
e) Jan. 7, 1972	e) Center for Auto Safety ABC, NBC, WMAL and WRC (TV)	e) FORD air bag auto ads
f) March 16, 1972	f) Martin - Trigora 4 Indiana Stations	f) Illinois Power Co. ads.
g) 1973	g) Utility Consumers Council of No. local station	g) Utility Co. ads
h) March 16, 1973	h) Peter Herbst WNIW - TV	h) snowmobile ads
i) 1973	i) Hudson - Mohawk local station	i) snowmobile ads.
j) January 31, 1973	j) Evelyn Sarson (ACT) TV networks	j) Television Information Office ads
k) January 12, 1973	k) Wilderness Society WABC - TV network WMAL - TV	k) forestry ads
l) 1972	l) William Rodgers three networks	l) phosphate detergent ads
a)	<u>Alleged Violation:</u> Failure to cover issue of air pollution caused by autos and gasoline. <u>Ruling:</u> Denied. Cigarettes were a unique product. No one is for banning cars. <u>Banzhaf</u> a stop-gap measure because of 1965 act. Consumer groups should focus on products, not peripheral issue of ads. Opinion based on <u>Red Lion</u> - licensee must treat important issues but the format is up to him to decide. A warning in large car and gas ads would lead to the end of the commercial broadcasting system. Even if cigarettes are not unique we still would not extend <u>Banzhaf</u> to other commercials. If the system is undermined it won't solve the air pollution problem for it is an important informational device.	

TABLE 4 - 3 continued

- b) Alleged Violation: Failure of station to sell time to union urging boycott of store during a strike, to counter store's regular advertising.
Ruling: Denied. FCC renews license.
- c) Alleged Violation: Wants to rebut controversial issues raised by Chevron ad or to ban ad as deceptive.
Ruling: Denied. FCC won't apply "fairness" doctrine to ordinary product advertising. But footnote says that if an ad directly addresses a controversial issue, "fairness" will apply.
- d) Alleged Violation: Commercial advocating Alaskan pipeline raised a "fairness" obligation to give time to counter-ads.
Ruling: Affirmed. Broadcast of Esso Alaskan pipeline ad did address a controversial public issues, citing footnote 6 of Chevron.
- e) Alleged Violation: Wants counter-ads to air pro-air bag side against FORD commercial opposing them.
Ruling: Denied. Air bag ads do address a controversy but licensee's overall programming has complied with "fairness" on the issue.
- f) Alleged Violation: Utility ads address a controversial issue by advocating increased electricity usage and a construction program used by the power company to justify a rate hike.
Ruling: Denied. No explicit controversial issues covered and, in any event, complaint deficient on Phelps.
- g) Alleged Violation: Wants to put on a counter-ad vs. utility company spot requesting a rate increase.
Ruling: Denied. "Fairness" doctrine is not equivalent to "equal time". Station offered news coverage of their views. No particular person has "right to reply". Its up to licensee.
- h) Alleged Violation: Wants to put on counter-ads vs. snowmobile commercials. Claims they raise controversial environmental issues.
Ruling: Denied, on the basis of Phelps and the fact that ads in question are ordinary product advertising and thus do not address one side of a public controversy.
- i) Alleged Violation: Same as above but adds the emphasis on power and strength of snowmobiles in ads (like the big

TABLE 4 - 3 continued

- cars and high performance gasolines cited in FOE complaint, upheld by the Courts of Appeals). Complaint also notes the National Environmental Policy Act of 1969 which defines governmental policy as preventing pollution. (In the wake of Retail Clerks decision by Circuit Court which cites the national policy on labor bargaining as one reason for remanding decision back to Commission. Also Banzhaf was based in part on Congressional policy advocating giving smokers information on health hazards involved in smoking.)
- i) Ruling: Denied. Phelps and ads in question are ordinary product commercials.
- j) Alleged Violation: Failure to present ACC spot countering a TIO spot praising television's contribution to children's learning.
Ruling: Denied. Phelps failure to show a controversial issue, or assuming it was, that the stations involved failed to afford time for contrasting views.
- k) Alleged Violation: Failure to afford contrasting views to TV commercials stating that forestry practice of "clear-cutting" is environmentally desirable.
Ruling: Denied on the basis of Phelps.
- l) Alleged Violation: Wants to rebut phosphate detergent ads on the basis of Banzhaf. Cites the existence of governmental reports which say these detergents are harmful to the environment.
Ruling: Denied on the basis of Phelps.

What Happened to the Cases in the Courts or on Reconsideration by FCC?

- a) 449 F 2 d 1164 (1972) - FOE remanded back to FCC by Court of Appeals, who says that it is identical to Banzhaf.
35 FCC 2 d 648 (1972) - FCC still refuses to apply Banzhaf because many products have adverse environmental effects. Now FOE says that the issue is no longer big cars vs. small cars but any auto or gas commercials. NBC ordered to show in 20 days how it will treat the other side of the issue (not necessarily in spot announcements.)

39 FCC 2d 564 - complaint terminated by FOE, who is satisfied with NBC's treatment of the pollution issue.

TABLE 4 - 3 continued

- b) Retail Store Employees Union vs FCC 436 F 2d 248 (D.C. Circuit 1970). Test case vs WREO's license. Court remands case back to the Commission, citing national policy to treat employers and employees equally. Criticizes FCC procedures harshly in its opinion.
- c) Circuit Court remands Chevron back to FCC citing its similarity to FOE, 34 FCC 2d 579 - FCC still refuses to allow counter-ads on the air - grants interim delay until it decides larger question of FOE.
- FCC 2d 528 - Chevron no longer the same as FOE, Banzhaf does not apply. Chevron commercial does not urge high performance cars or gasoline on the public like FOE. Involves product claims not an issue of public importance.
- d) 31 FCC 2d 729 - On reconsideration the FCC says that NBC put on enough programming dealing with the issue to fulfill its "fairness" requirements. No counter-ads necessary.
- f) Trigora appeal to full commission of staff ruling denied - 2/27/73.

FCC Commissioners, 1967-1973 and Partisan Identification

D = Democrat

R = Republican

Cox - (D), Hyde - (R), Wadsworth - (R), Bartley - (D), Johnson - (D), Loevinger - (D), Robert Lee - (R), Wells - (R) Houser - (R), Reid - (R), Hooks - (D), Wylie - (R), and Burch - (R).

a number of grounds. The Commission reiterated its position that Banzhaf was a unique decision limited to a single category of product commercial. Banzhaf was a stop - gap measure initiated only by the limitations imposed by congressional legislation on cigarette advertising. Thus the Commission's actual goal in making Banzhaf was to bring about a ban of broadcast cigarette advertising, not to extend the "fairness" doctrine to product commercials per se.

The heart of the Friends of the Earth decision was devoted to a denial of the principle of counter-advertising. The Commission stated that to track regular commercials with a significant ratio of counter-ads would undermine the economic base of commercial broadcasting.¹⁹ The FCC felt that controversial public problems would not be solved by crippling such an important informational device and thus would refuse to extend Banzhaf even if it could not be logically limited to cigarettes alone.²⁰ The Commission concluded that while a licensee must broadcast all sides of controversial public issues, it was up to the broadcaster to determine what format to use.²¹ And the Commission added that consumer groups should focus their efforts on the products themselves not the "peripheral" issue of counter - advertising.²²

In a landmark decision the Court of Appeals reversed the FCC ruling. The Court said that when an advertisement insinuates that larger cars lead to greater personal fulfillment and when the air pollution which they produce is a health hazard, then the parallel with the Banzhaf case is "exact ... and inescapable."²³ The majority held that the FCC erred in saying that the advertisements in question did not raise one side of a controversial public issue and thus remanded the case to the FCC for further consideration.

The FCC refused to extend Barizhaf to large car and gasoline commercials in spite of the federal court decision. Instead, the Commission ordered WNBC - TV to demonstrate within twenty days how the station would present the other side of the air pollution issue, although this did not necessarily involve the use of "spot" announcements or counter - ads.²⁴

The case was finally settled in informal negotiations between Friends of the Earth and WNBC - TV. NBC secretly agreed to present a significant number of programs and PSA's dealing with air pollution, hoping to avoid further public pressures for counter - ads.²⁵ The FCC publicly terminated the case saying that Friends of the Earth had withdrawn its complaint, having been satisfied by NBC's cooperation in focusing attention on air pollution in New York.²⁶ In its termination of the Friends of the Earth case the FCC evaded the substantive issues posed by the Circuit Court in Friends of the Earth vs. the FCC. The Commission proposed instead a comprehensive inquiry on the "fairness" doctrine and its relationship to product commercials, which would supersede any ruling it would make now on the Friends of the Earth complaint.

Another significant counter - advertising case is the Chevron case, which was brought to the FCC by Alan Neckritz and decided by the Commission in May, 1971. Neckritz's complaint involved Chevron gasoline commercials which claimed that the additive F -310 led to cleaner air because it reduced auto exhaust emissions. The FCC rejected conservation group attempts to either rebut the ads or to ban them as deceptive, and based its rejection on the Friends of the Earth precedent. The Commission

felt that the ads only presented claims of product efficacy, not one side of a controversial public issue, and thus could be best handled by the FTC. The Commission reiterated in its Chevron opinion that a ruling in favor of the complainants would extend "fairness" to product commercials in general, driving advertisers off the air and resulting in the economic destruction of the public services provided by broadcast licensees.²⁷ However, in an important loophole in their argument, the FCC said if a product commercial addressed a controversial issue directly it would raise "fairness" responsibilities.²⁸

The FCC still refused to authorize the airing of any counter - commercials after the Circuit Court remanded its Chevron decision back to the Commission, citing its similarity to Friends of the Earth. The Circuit Court said that Chevron, like Friends of the Earth, addressed a controversial issue of public importance (in this case air pollution). Therefore the FCC should examine it for "fairness" doctrine implications, in light of its Banzhaf decision. But according to the FCC, the larger question of Friends of the Earth had to be decided before the Neckritz complaint could be resolved.²⁹

In its final consideration of the Chevron case the Commission cited again the "administrative nightmare" and "disastrous economic consequences" that the principle of counter - advertising posed for the commercial broadcasting system.³⁰ The FCC still left up to the broadcaster's reasonable and good faith judgment the treatment of controversial issues. It further concluded that the instant case was distinctly different from Friends of the Earth because Chevron F - 310 did not

aggravate the public health more or less than any other brand and did not urge high lead gasoline on the public. The decision ended with the Commission's hope that its comprehensive study of the "fairness" doctrine and product advertising, rather than a series of ad hoc decisions, would produce a more intelligent balancing of the "sensitive" issues raised by this problem area.³¹

In two cases (In Re Wilderness Society and Center for Auto Safety), under the loophole provided by Chevron, the FCC did hold that a product commercial raised a "fairness" obligation by directly addressing a controversial issue.³² In Re Wilderness Society involved an ESSO commercial which advocated building the Alaskan pipeline. Center for Auto Safety involved Ford Motor Company ads which opposed the installation of air bags as auto safety devices. However, on reconsideration of these two decisions, the Commission determined that the two stations involved had treated the issue in question sufficiently in their overall programming and thus counter - ads were not required.³³

In addition to these major cases in a series of staff letters the FCC rejected (on the basis of "Phelps") attempts to extend Banzhaf to children's ads, snowmobile commercials, phosphate detergent ads and public utility commercials.³⁴

One final case dealing with "fairness" and advertising remains on the FCC agenda. Retail Store Employees Union³⁵ was initially decided in 1966 and involved the unsuccessful attempt of a union to purchase broadcasting time to counteract a department store's ordinary advertising during

a union boycott. The union subsequently petitioned the FCC to delay renewal of the offending station's license. The FCC refused, renewing the license without a hearing or oral argument. In Retail Store Employees Union versus the FCC ³⁶ the Court of Appeals reprimanded the Commission for its summary treatment of the union. The court noted that a federal regulatory agency should adopt procedures that lead to a full inquiry on broad public interest questions, rather than procedures that tend to avoid them. The Retail Clerks remand decision is being reconsidered by the FCC as part of its overall "fairness" inquiry.

A recent speech by FCC Chairman Wylie indicates that the Commission has decided to reverse the Banzhaf decision. ³⁷ While the formal report containing the results of the overall "fairness" doctrine inquiry has not yet been made public (as of September, 1974) the direction that the report will take is quite clear. Wylie asserted that the Commission was in error when it applied "fairness" to cigarette commercials. The FCC has now determined that a product commercial must include a significant discussion of one side of a controversial issue to trigger the "fairness" doctrine.

Case Analysis

Observations and generalizations, with regard to the questions raised at the beginning of this chapter, can be drawn from these cases. In addition, the disposition of the FCC's cases on public access are not atypical; and thus the following analysis indicates the direction of Commission policies and practices in the general area of "fairness" as well. ³⁸

FCC Reaction to Demands for Access

How did the FCC react to demands by consumer groups for access to "spot" time on commercial television?

a) In essence the FCC turned down every request for public access based on the Banzhaf case. Not one broadcaster was ordered to sell time or to provide free "spots" to complainants in the 19 cases reviewed here. In the two cases found to be viable "fairness" complaints, on reconsideration the station's overall programming was found to make counter - advertising unnecessary.

b) Partisanship was not a factor in the FCC's public access decisions. The FCC Commissioners were united in their stand against counter - advertising and the principle of public access. Regardless of party affiliation or the party label of the President who appointed them a clear pattern of unanimity with a lone dissenter emerges in each access case. Nicholas Johnson was the only Commissioner to consistently favor public access for consumer groups. Johnson played the role of the "outsider" at the Commission on this issue.³⁹

c) There is no appreciable difference between full Commission and staff decisions in this area. Both rejected demands for counter-ads principally on procedural grounds.

d) The Commission's complaint procedure put the burden of proof on the complainant. In seven out of the nineteen cases the "Phelps" rule -- the need to demonstrate that a station had failed to give time for contrasting views in its overall programming -- presented a significant

obstacle for complainants.⁴⁰ In addition, the FCC has held that a station need not supply information with regard to "Phelps" (on the grounds that if a station had to do so for every complainant, there would be an undue burden that would deter robust debate.) Since the "fairness" doctrine is enforced solely by the complaint procedure the FCC has tilted the scales in the broadcaster's favor by burdening complainants with a substantial monitoring effort.

e) The cases demonstrate that the FCC has adhered to its standard of affording considerable licensee discretion in the area of "fairness". In six out of 19 cases the FCC held that a reasonable opportunity for contrasting views had been afforded.⁴¹ And in 9 cases the Commission held that the licensee had reached a reasonable judgment that no controversial issue of public importance was involved.⁴² The FCC also emphasized throughout that it was up to the licensee's good faith and reasonable judgment to determine the format in which controversial issues could be discussed.

f) If the FCC finds a "fairness" violation it may utilize any one of the following enforcement measures: levy a forfeiture of \$1,000 per violation (up to \$10,000 per broadcaster); send a letter of reprimand to the licensee or publish an advisory ruling. In extreme cases the Commission can revoke or suspend a station's license, delay its renewal, or refuse to renew. In the two cases reviewed here, found by the FCC to raise "fairness" obligations, the local stations were merely asked to demonstrate how they planned to deal in the future with the controversial issue in question. Subsequently, both station's overall programming

was found to satisfy "fairness" requirements and no further enforcement action was taken.

g) The counter - advertising cases raised complex procedural problems for both licensees and the FCC. The excessive time and money spent by NBC in its defense of the Friends of the Earth complaint was one reason given by the FCC for terminating the complaint. The main procedural problem raised by counter - advertising claims was how to determine whether a reasonable overall balance had been achieved by a station on a particular controversial issue. It led to comprehensive reviews by licensees of past programming, counting lines in scripts, evaluating them for their "pro" or "anti" bias, and a count of the minutes afforded to each side. This "stop - watch" approach⁴³ involved the FCC in the day - to - day programming judgments of broadcasters, in contravention of the First Amendment, which guarantees a press free from governmental interference. The danger of FCC interference (on a day-to-day basis) is that it inevitably raises the possibility of stifling unorthodox or anti-government views. Therefore, the "stop-watch" approach can endanger the First Amendment goal of robust, wide-open debate, which the "fairness" doctrine is designed to implement.

The Rationality of FCC Decision - Making

Is the FCC a rational decision - making body or does it ignore both its own case precedents and judicial orders when it no longer agrees with its past decisions?

a) Maintaining the commercial system of broadcasting as it now stands is a value having higher priority for the Commissioners than informing

the public of possible health hazards. Even subsequent to the Court of Appeals decision that Friends of the Earth was identical to Banzhaf, the FCC still refused to apply its own precedent to the case. The FCC based its Banzhaf decision on two facts: the normal consumption of cigarettes was harmful to the public's health and governmental reports and congressional action had acknowledged this to be true. When the Friends of the Earth made its claim against automobile advertising, the FCC changed its priorities and its argument. The Commission now stated that even if other products fulfilled the two prerequisites of the Banzhaf case it would not extend the "fairness" doctrine to advertising.

The Chevron case is even more illustrative of the logic governing FCC decision - making processes. The FCC sustained the broadcasting industry in the Chevron case on the basis of its original decision in Friends of the Earth. However, when the Circuit Court remanded Chevron to the Commission, citing its similarity to Friends, the FCC now held that the cases were different and Friends of the Earth was no longer controlling. The FCC had again ignored both a Circuit Court ruling, its own case opinion, and any principles of rational administrative decision-making.

b) A similar sequence of events occurred in the paid access cases. The Washington, D.C. Circuit Court upheld the public's right to buy television time, reversing the Commission's decision in BEM. However, the FCC refused to apply the court's decision in two subsequent cases on paid access, although it was the controlling law at the time.⁴⁴

c) In two cases the FCC held that product commercials addressed a controversial public issue directly and thus raised "fairness" obligations.⁴⁵

However, on rehearing the Commission found that the station's overall programming on the issue had been fair and thus counter - ads were unnecessary. The FCC made these rulings in spite of the Banzhaf decision (and the subsequent court decision affirming it) which emphasized that the impact of professionally - created, repetitive "spot" announcements could not be balanced by a few news programs and panel discussions addressing the issue. The FCC continued to refuse the use of the "spot" format to consumer groups, even if a product commercial triggered the "fairness" doctrine.

d) The Washington Court of Appeals stated that Chevron Retail Clerks and FOE posed circumstances identical to Banzhaf and that therefore "fairness" should be applied in those cases. The FCC realized that these decisions would generate a flood of new consumer access complaints. The Commission could not ignore the Court's order forever, and thus was forced by these remand decisions to overturn its original Banzhaf ruling. The only way the the FCC could rationalize its initial refusal to apply "fairness" to Chevron, FOE and Retail Clerks was to claim that the Banzhaf decision was in error.

Policy Formulation at the FCC

How is policy formulated at the FCC? Is former Commissioner Johnson correct when he says that the FCC defers to industry interests; fails to anticipate major problems; relies continually on information provided by interested parties; prefers to ratify private compromises; and considers broad questions in a piecemeal way? In response to these questions the public access case decisions provide the following outline and analysis of the Commission's policy - making process.

a) In each group of cases reviewed here the Commission's major decisions deferred to the interests of the broadcasting industry. The basic assumptions underlying these decisions allied the FCC with its clientele. These assumptions functioned as a barrier, denying access to the mass media to groups holding minority or extreme viewpoints in the social, economic and political spectrum. The FCC's belief that broadcasting stations were not common carriers effectively choked off attempts by organized political interests to gain access to paid "spot" television and radio. The FCC's claim that military recruitment messages did not address a controversial issue blocked pacifist organizations from gaining free access to television. And the FCC's basic contention that the "fairness" doctrine did not apply to commercials that dealt implicitly with controversial issues blocked consumer group attempts to extend Banzhaf to products other than cigarettes. And the FCC finally caved in to broadcasting industry pressures and reversed Banzhaf itself, thwarting any further public interest group attempts to put counter-ads on the air.

b) The Commissioners, with the exception of Commissioner Loevinger, failed to anticipate the problems that Banzhaf would raise for them. The FCC held to the view that cigarettes were a unique product demanding a unique solution, refusing to acknowledge the problems that would follow in the event that consumer groups and the courts disagreed with this position.

c) The FCC routinely relied on information provided by broadcasters in making its public access decisions. The FCC staff did not use monitoring or any other tool of independent investigation or analysis in any of the cases reviewed here.

d) The FCC demonstrated in Friends of the Earth that it prefers to ratify private compromises than to address controversial issues publicly and directly. Although the Commission had been explicitly ordered by the Court of Appeals to reconsider Friends in light of Banzhaf it still refused to act, favoring the informal and secret negotiations between Friends of the Earth and NBC over the public decision - making arena. The FCC elected to keep the conflict over counter- advertising private and out of the public domain. In this way threats raised by Banzhaf and Friends of the Earth (to commercial broadcaster control over access to radio and television time) could be contained. This is a good example of E.E.Schattschneider's "scope of conflict" theory at work. (See Chapters One and Six supra. for a more detailed discussion of Schattschneider's approach and its relevance to the Banzhaf case study.)

e) From 1967 - 1971 the FCC dealt with the question of public access to television in a piecemeal fashion. During that period the Commission postponed the difficult task of balancing public and private interests by refusing to make substantive decisions on the issues posed by public access attempts. Instead, the Commissioners relied heavily on procedural objections to block the majority of public access complaints. The Commission proposed to deal in a general fashion with the substantive issues posed by BEM, Banzhaf and Friends of the Earth (in its overall "fairness" inquiry) only after the federal district court reversed in succession three major FCC decisions in the area.⁴⁶

Summary and Conclusions

The FCC's decisions on public access, made subsequent to Banzhaf, demonstrate that Banzhaf was indeed an aberration in FCC decision-making. Banzhaf had a significant impact on the complaint stage of that process but was ignored by the Commissioners as a precedent when case decisions were made. The Commission's majority took a united stand against free or paid public access, which was effected through a fragmented case by case approach. Procedural requirements were relied on heavily to deny access complaints. Partisan identification or whether a decision was made by the full Commission or by the staff had little effect on the outcome of the decisions. The only significant voting pattern that emerges from these cases is Nicholas Johnson's taking on of the "lone wolf" role to publicize his pro-public access views.

The judgment of the broadcast licensee was upheld in the great majority of cases and a concern for broadcast industry interests was evident throughout. The FCC's complaint procedure put the burden of proof squarely on the shoulders of the complainant, who had to determine a prima facie "fairness" complaint before the Commission would decide the case on its merits. The only enforcement tools used by the Commission out of a total of 19 cases were two advisory letter rulings sent to offending stations.

The FCC ignored its own precedents and federal court decisions in an attempt to thwart an extension of Banzhaf. It routinely relied on information provided by broadcasters themselves, to form the factual basis of their decisions. The Commission failed to anticipate the problems

that Banzhaf would raise. When these problems were generated the FCC refused to address them directly and publicly, preferring instead to ratify secret private agreements negotiated between the principals. And finally, the FCC reversed Banzhaf itself when all preceding attempts to prevent it from becoming a precedent failed.

In short, both the procedures of the complaint process and the resolution of complaints in the public access area were weighted heavily in the broadcast industry's favor.

The preceding chapter dealt with the impact of Banzhaf on the federal legislative process. This chapter examined the impact of Banzhaf on decision - making at the FCC itself. Chapter five turns to an important question which is at the heart of this inquiry: what impact did Banzhaf have on the FCC's main organized clientele, the broadcasting industry?

Footnotes:

1. In its Letter to Gary Soucie 24 FCC 2d (1970) the Commission stated at 749:

"Were we to adopt a scheme of announcements tracking in a significant ratio the ordinary product commercials, the result would be the undermining of the present system, based as it is on such commercials. Such a result is not consistent with the public interest."

It reiterated this stand in its Chevron decision. See In Re Complaint of Alan Neckritz, 37 FCC 2d (1971) at 532.
2. Nicholas Johnson and John Jay Dystel say that the FCC frequently waives or evades administrative principles set down either by itself or by the courts when it no longer approves of its own decisions. See "A Day in the Life: the FCC", 82 Yale Law Journal (July, 1973) at 1633.
3. Ibid., p. 1589.
4. 25 FCC 2d 242 (1970). Known informally as BEM.
5. Ibid., p. 243.
6. 25 FCC 2d (1970) at 222. Known informally as INC.
7. 319 U.S. 190 (1943).
8. Ibid., p. 226.
9. BEM, op. cit., p. 245.
10. Letter to Allen Phelps 21 FCC 2d (1969) at 12. The Commission expects a complainant to submit specific information indicating: 1) the station involved; 2) the particular controversial issue which was discussed on the air; 3) the date and time the program was carried; 4) the basis for the claim that only one side of the question has been presented; and 5) whether the station has or plans to afford time to contrasting views. "Fairness" Doctrine Primer 29 FR 10415, 10416. Number five was largely unenforced until the "Phelps" ruling.
11. 450 F 2d 642 (1971).
12. 92 SC Reports 1174 (1972).
13. Letter to Alexandra Marks, 34 FCC 2d 434 (1972) and In Re Complaint by Citizens Councils, 37 FCC 2d 1014 (1972).

14. Letter to Donald Jellinek, 24 FCC 2d (1970) at 157.
15. Johnson dissent, ibid., p. 161.
16. In Re Complaint of David Green, 24 FCC 2d 171 (1970); In Re Complaint of Alan Neckritz, 24 FCC 2d 175 (1970); and Citizen's Communication Center, 21 P and P RR 2d 1222 (1971).
17. Green versus FCC 447 F 2d 323 (D.C. Circuit 1971) and Neckritz versus FCC 446 F 2d 501 (9th Circuit 1971).
18. Friends of the Earth cited many similarities between the issue of large cars and high octane gas and that of cigarettes: governmental reports and congressional action stating that air pollution posed a threat to the public's health; the fact that the advertisements in question emphasize the relationship of large car ownership to the "rich, full life"; and their claim that occasional news programs and panel discussions cannot rebut repetitious, professionally - planned auto and gas ads in a significant way. FOE also claimed that the public interest standard of the 1934 Communications Act mandated some counter-ads on the issue. See Letter to Gary Soucie, op. cit., p. 744.
19. Ibid., p. 749. See also footnote one, supra.
20. Ibid., p. 750.
21. Ibid., p. 746. The Commission made this finding according to Red Lion Broadcasting versus the FCC 395 US 367 (1969) and its own Report on Editorializing 13 FCC 1246 (1949).
22. Ibid., Letter to Gary Soucie, p. 746.
23. 449 F2d (1971) at 1169.
24. 33 FCC 2d 648 (1972).
25. According to an interview with an NBC lawyer. (July, 1973).
26. 39 FCC 2d 564.
27. 29 FCC 2d (1971) at 814.
28. Ibid., p. 812, footnote six.
29. 34 FCC 2d 579.
30. 37 FCC 2d 532 (1972).

31. Ibid., p. 532. The FCC put out a Notice of Inquiry, "In the Matter of the Handling of Public Issues Under the 'Fairness' Doctrine and the Public Interest Standards of the Communications Act", 30 FCC 2d 26 (June 11, 1971). This comprehensive inquiry on the "fairness" doctrine resulted directly from the FOE, Retail Clerk's and Chevron circuit court remand decisions. Only the report on political broadcasts has been issued to date (June 16, 1972). The report on "fairness" and product commercials is still pending as of September, 1974.
32. 30 FCC 2d 643 (1971) and 32 FCC 2d 926 (1972).
33. 31 FCC 2d 727 (1972).
34. Letter to Martin Trigora, 34 FCC 2d 118 (1973); In Re Complaint by Utility Consumers Council of Missouri, 39 FCC 2d 449 (1973); In Re Complaint by Peter Herbst, 40 FCC 2d 115 (1973); In Re Complaint by Hudson - Mohawk Group, 40 FCC 2d 119 (1973); In Re Complaint by Evelyn Sarson, 34 FCC 2d 130 (1973); and In Re Complaint of William Rodgers, 30 FCC 2d 640 (1972).
35. 14 FCC 2d 423 (1966).
36. 436 F 2d 248 (D.C. Circuit 1970).
37. Reported in The New York Times (July 3, 1974) p. 61. The staff report on "fairness" has been approved unanimously by the Commission, although Benjamin Hooks dissented on the decision to reverse Banzhaf.
38. See Henry Geller, The 'Fairness' Doctrine in Broadcasting: Problems and Suggested Courses of Action (Santa Monica: Rand, 1973). Mr. Geller's analysis of six months of general "fairness" complaints at the FCC reaches several similar conclusions. See pp. 36 - 38.
39. For a similar role - playing by Senator Proxmire see Ralph Huitt's article "The Outsider in the Senate: An Alternative Role", 55 American Political Science Review 566 - 75 (September, 1961). Lee Brown, in Television - the Business Behind the Box regards Johnson's use of the "outsider" role to be an effective one in his achieving of widespread influence on broadcasting policy. (New York: Harcourt - Brace, 1971). However, several Commissioners disagree strongly with this view, regarding Johnson as a maverick who was outside of the normal decision - making process at the FCC, with little or no effect on policy. Interviews with Commissioner R.E. Lee and former Commissioner Hyde (Washington, D.C. January, 1974).
40. BEM, Martin - Trigora, Herbst, Hudson - Mohawk, AGT, Wilderness Society, and William Rodgers.
41. Center for Auto Safety, Herbst, Green, Hudson - Mohawk, Utility Consumers and ESSG.

42. Jellinek, Green, Neckritz, Chevron, Herbst, Hudson - Mohawk, FOE, Retail Clerks, and Marks.
43. See former Chairman Burch's discussion of this problem in his concurring opinion in the Alaskan pipeline case, 31 FCC 2d (1971) at 735.
44. Alexandra Marks and In Re Complaint of Citizens Councils, op. cit.
45. Center for Auto Safety and In Re Wilderness Society, op. cit.
46. Retail Clerks, FOE and Chevron.

CHAPTER FIVE: THE IMPACT OF BANZHAF ON
THE BROADCASTING INDUSTRY

Introduction

This chapter focuses on the impact of the FCC's Banzhaf decision on the broadcasting industry. A complete understanding of the Banzhaf decision's impact as a public regulatory policy must be based on a determination of power relations between the FCC and its broadcasting constituency. Toward that end this chapter discusses the nature of clientele compliance with the Banzhaf decision; whether the FCC enforced Banzhaf; whether broadcasters tried to circumvent it; and whether the FCC or the broadcasting industry engaged in nondecision-making to muffle Banzhaf's effects.

The basic framework of this chapter is inspired by V.O. Key's and Harold Lasswell's belief that decision-making is a two-way process affected by the actions of the decision-maker and of those to whom the decision is directed.¹ (See Chapter One, supra.) This chapter examines both circumvention and compliance on the part of broadcasters, as well as enforcement and nondecision-making by the FCC in order to determine the Banzhaf decision's impact.

The bulk of this chapter is based on in-depth interviews with the person who handles "fairness" complaints at each commercial radio and television station in New York City² and compliance reports filed at the FCC in response to license challenges. A third data source was a study made by one of the major networks detailing compliance with Banzhaf at its owned and operated television and radio stations. In addition, personal interviews with former and present FCC Commissioners and staff, network officials, Senate staffers, and personnel at ASH and at the

Tobacco Institute are drawn upon in this chapter.

One point that should be kept in mind throughout this study is the heterogeneity of the broadcasting industry. The industry includes both television and radio companies, giant networks, owned and operated stations, affiliates and tiny independents.³ These distinctions are particularly important in this study for the bulk of cigarette advertising was carried by network television.⁴ Most radio stations and independent television stations carried negligible amounts of cigarette advertising and thus were unaffected by the Commission's Banzhaf policy. Thus the Banzhaf decision should be expected to have an uneven impact on broadcasters, with its greatest impact felt at the television networks.

The data analysis begins with a section on broadcaster attitudes toward the FCC and the Banzhaf decision. Sections dealing with compliance, enforcement, nondecision-making and circumvention will follow the section on attitudes. Our major concern throughout this chapter is to analyze and evaluate the impact and effectiveness of Banzhaf as a public regulatory policy. (The questionnaire used in the interview survey of New York City broadcasting stations is included in an appendix to this study. Items and marginal responses in the questionnaire are referred to throughout the text as "Question 1", "Question 2", etc.)

Broadcaster Attitudes, Understanding, and Awareness
of the 'Banzhaf' Decision

In our review of previous impact studies⁵ we have seen that the nature of clientele attitudes is often crucial in determining the impact of a public policy decision. Severe clientele disagreement with a policy or distrust of the governmental body making it can result in substantial

noncompliance and circumvention of the decision in question, minimizing its overall impact. This section deals with the parameters of broadcaster attitudes toward the FCC and its recent "fairness" policies. It includes a discussion of broadcast industry awareness and understanding of the Banzhaf decision and of subsequent counter-advertising cases; the general impact of Banzhaf on station operations; and the sources of industry information about the decision. It sets the stage for the next section which explores the possible effects of attitude and awareness on compliance with Banzhaf itself.

How Did Broadcasters First Become Aware of the 'Banzhaf' Decision?
What Was Their First Source of Information About the Ruling?

Our data show that 45% of key New York broadcasting personnel first heard about the Banzhaf decision from either the NAB or the FCC. A further third of those interviewed heard about Banzhaf through personal discussion or from their corporate attorney. Only 15% first heard about the decision from public information sources. (Question 11). These data reflect the informal communications channels link between broadcasting personnel in New York, the FCC, and the industry's Washington lobbyists. These informal communications channels enable broadcasters to get inside information at the Commission and gives them time to organize industry wide positions on potentially anti-industry decisions. In effect, an "early warning system" operates in the formulation of broadcasting policy. Details of potentially controversial decisions are filtered to the FCC's constituency and broadcast industry feedback is often the basis of policy modifications and compromises.⁶

What Was the General Impact of 'Banzhaf' on Metropolitan Broadcasters?
How Did 'Banzhaf' Affect Station Operations?

65% of respondents said that Banzhaf affected their station's operations. (Question 26.) 41% said that this effect was to increase the number of anti-smoking messages broadcast by the station. (Question 27) Two station managers said that Banzhaf created severe scheduling problems and five cited a loss of revenues due to the ruling. One - third of those interviewed reported that Banzhaf did not affect their station because they did not carry cigarette advertising.

The data suggests that the Banzhaf decision did have a significant effect on getting anti-smoking information to the public through the broadcasting media. While 90% of the commercial broadcasting stations in New York have at one time or another run anti-smoking messages (Question 28), one-third of respondents reported that they only began to broadcast those messages after the Banzhaf ruling was made. 50% of those interviewed claimed to have broadcast anti-smoking material before Banzhaf or whenever the American Cancer Society had sent it to the station. (Question 29) 43% of New York broadcast managers cited the Banzhaf decision as the sole cause for their airing of anti-smoking announcements. (Question 30).

62% of New York commercial stations are still broadcasting some anti-smoking "spots", in spite of the ban on broadcast cigarette advertising. (Question 33) Only four out of 32 stations reported to have dropped anti-cigarette messages right after the ban, choosing to ignore oblique FCC warnings to the contrary.⁷ (Question 35).

How Do Broadcasters View 'Banzhaf', Counter-Advertising and the
Cigarette Advertising Ban?

48% of key broadcasting personnel either agreed or agreed strongly with Banzhaf while 51% disagreed or disagreed strongly with it. (Question 22) The neat split in broadcaster views of the Banzhaf ruling is not surprising because of the heterogeneity of the group involved and the controversial nature of the decision itself. However, it should be noted that those disagreeing were 50% more likely to disagree strongly, while those agreeing were as likely to agree strongly as to agree. 1/3 of respondents said that their opinion of the Banzhaf decision was influenced by the dangers involved specifically in cigarette smoking, while only 18% cited the more abstract "fairness" doctrine issues which the Banzhaf decision raised. (Question 23). One third of respondents also believed Banzhaf to be discriminatory to the broadcasting media, cited cigarettes as a legal product or said that Banzhaf represented a dangerous precedent in governmental regulation of the broadcasting industry.

Industry attitudes toward the principle of counter-advertising in general differ substantially from their views of Banzhaf. 83% of respondents were united against a general principle of counter-advertising being applied to the broadcasting media. (Question 79) Thus while one-half of respondents supported applying "fairness" to cigarette commercials, 83% were against applying "fairness" to product advertising in general. Broadcasters as a group seem to support the FCC's claim that cigarettes were a unique product demanding a unique solution. 42% of respondents believe that "fairness" should apply only to news and public affairs programs, while a bare majority supported the application of the

"fairness" doctrine to any format in which a controversial public issue was raised. (Question 81) These data suggest substantial clientele disagreement with the FCC's ESSO policy, holding that "fairness" obligations were raised if a product commercial deals specifically with a controversial public issue. Nearly half of the broadcasters interviewed disagreed with even such a limited approval of counter-advertising.

72% of respondents disagreed with the ban on broadcast cigarette advertising, as opposed to counter-commercials. (Question 67) Broadcasters often expressed very emotional resentment at the ban during these interviews. They said that the ban discriminated against the broadcasting media in favor of print; that cigarettes were a legal product and that it should be legal to advertise them; and that the FCC had overstepped its jurisdiction by proposing the ban. (Question 69) 71% of broadcasters said that the ban had hurt the industry, resulting in a sizeable loss of advertising revenues. (Questions 71 and 72).

How Aware Were New York Broadcasters of the 'Banzhaf' decision?
What Was the Nature of Their Understanding of Subsequent FCC
Policies on "Fairness" and Advertising?

Key New York broadcasters were very aware of the specifics of the Banzhaf decision. Respondents were asked to determine whether five detailed summaries of the Banzhaf decisions provisions were true or false. These summaries and the percentage of correct responses follows:

- 1) The Federal Communications Commission has ruled that anti-cigarette spokesman should be given time approximately equivalent to the time spent on cigarette commercials each week. (79%).
- 2) The Federal Communications Commission has ruled that the time made available for anti-smoking "counter-ads" should be made available at no charge. (87%).

- 3) The Federal Communications Commission has ruled that if cigarette commercials are shown in prime time, anti-cigarette commercials have to be shown in prime time also. (88%).
- 4) The Federal Communications Commission stated in its opinion that although in this particular case (the Banzhaf case) it was applying the fairness doctrine to cigarette commercials, in the future the ruling may apply to other product commercials. (89%).
- 5) The 1967 Federal Communications Commission Banzhaf ruling applied to all cigarette commercials whether or not they directly addressed the issue of the effect of smoking on health. (100%).

A score of four to five correct answers was considered a high score. 69% of respondents achieved high awareness scores, even though they were interviewed six years after the Banzhaf decision was made. Managers of network owned and operated television stations scored highest in their awareness of Banzhaf, while independent radio station personnel scored lowest among respondents. (See Table 5 - 1, p.143 and Table 5 - 2, p.144). Respondents broke down in a similar fashion over general understanding of the "fairness" doctrine and of FCC policies applying it to advertising. The following questions were used to construct a general understanding index:

- 6) Have you heard whether the Federal Communications Commission has ever taken a position on the applicability of the fairness doctrine to advertising?
- 7) If Yes, when did you first hear about that position?
- 8) If Yes, how would you describe the position of the Federal Communications Commission?
- 9) Are you familiar with the Federal Communication Commission's 1967 rulings applying the fairness doctrine to cigarette commercials in the Banzhaf case?
- 10) If Yes, could you tell me about them?

TABLE 5-1
 BROADCASTER AWARENESS OF THE BANZHAF
 DECISION BY NETWORK RELATIONSHIP

<u>Levels of Awareness</u>	<u>Network - Owned Station</u>	<u>Network-Affiliate</u>	<u>Independent</u>	<u>Totals</u>
(low) 0	0	0	9%	6%
2	0	0	9%	6%
3	0	0	27%	19%
4	11%	100%	23%	22%
(high) 5	<u>89%</u> 100%	<u>0</u> 100%	<u>31%</u> 100%	<u>47%</u> 100%
N =	9 (28%)	1 (3%)	22 (69%)	32 (100%)

CHI SQUARE = 12.74151 WITH 8 DEGREES OF FREEDOM SIGNIFICANCE = 0.1211

Figures are rounded to the closest %.

TABLE 5-2

BROADCASTER AWARENESS OF THE BANZHAF
DECISION BY RADIO OR TELEVISION

<u>Levels of Awareness</u>		<u>Radio AM</u>	<u>Radio FM</u>	<u>Radio AM & FM</u>	<u>TV</u>	<u>Totals</u>
low	0	0	10%	0	10%	6%
	2	11%	0	33%	0	6%
	3	22%	20%	33%	10%	19%
	4	22%	40%	0	10%	22%
high	5	<u>44%</u>	<u>30%</u>	<u>33%</u>	<u>70%</u>	<u>47%</u>
		100%	100%	100%	100%	100%
N =		9 (28%)	10 (31%)	3 (9%)	10 (31%)	32 (100%)

CHI SQUARE = 11.50613 WITH 12 DEGREES OF FREEDOM SIGNIFICANCE = 0.4614

Figures are rounded to the closest %.

- 14) Are you familiar with any Federal Communications Commission fairness doctrine rulings, since the Banzhaf cigarette commercial rulings, involving other kinds of product commercials?
- 15) If Yes, could you tell me about them?
- 16) If you could summarize the general position of the Federal Communications Commission today on fairness and advertising, how would you do it?

A broadcaster was assigned a score of 1.0 for each accurate response. Zero represents a low score while 4-5 represents a good general understanding of the FCC's "fairness" and advertising policies. Network television management scored consistently higher than radio station management in general understanding of the FCC's "fairness" policies. (See Table 5-3, p. 146 and Table 5-4, p.147). This discrepancy can be explained by the fact that network television stations are large-scale, specialized operations with enough money to employ sophisticated and educated managers who are knowledgeable about the "fairness" doctrine and related FCC policies. Small, independent radio stations are frequently run on a tight budget and are staffed by "generalists" who often have to cover three or four different jobs at once. Radio station managers struggling to stay afloat in the competitive broadcasting business don't have as much time to spend on the provisions of the "fairness" doctrine.

How Do Broadcasters View the FCC?

New York broadcasters split three ways in response to the question "Has your opinion of the FCC gone up or down in the past five years?" (Question 84) But they were somewhat more likely to have a negative rather than a positive response. When asked to expound on their response, station management whose opinion of the FCC had gone up in recent years

TABLE 5-3

BROADCASTER UNDERSTANDING OF THE "FAIRNESS" DOCTRINE BY NETWORK RELATIONSHIP

<u>Levels of Understanding</u>		<u>Network - Owned Station</u>	<u>Network - Affiliate</u>	<u>Independent</u>	<u>Totals</u>
low	0	0	100%	41%	31%
	1	11%	0	27%	22%
	2	22%	0	23%	22%
	3	0	0	5%	3%
	4	56%	0	0	16%
high	5	<u>11%</u>	<u>0</u>	<u>5%</u>	<u>6%</u>
		100%	100%	100%	100%
N =		9 (28%)	1 (3%)	22 (69%)	32 (100%)

CHI SQUARE = 19.93417 WITH 10 DEGREES OF FREEDOM SIGNIFICANCE = 0.0299

Figures are rounded to closest per cent.

TABLE 5-4

BROADCASTER UNDERSTANDING OF THE "FAIRNESS" DOCTRINE BY RADIO OR TELEVISION

<u>Levels of Understanding</u>		<u>Radio AM</u>	<u>Radio FM</u>	<u>Radio AM & FM</u>	<u>TV</u>	<u>Totals</u>
low	0	33%	40%	67%	10%	31%
	1	33%	30%	33%	0	22%
	2	22%	20%	0	30%	22%
	3	0	0	0	10%	3%
	4	0	10%	0	40%	16%
high	5	<u>11%</u>	<u>0</u>	<u>0</u>	<u>10%</u>	<u>6%</u>
		100%	100%	100%	100%	100%
N =		9 (28%)	10 (31%)	3 (9%)	10 (31%)	32 (100%)

CHI SQUARE = 16.54855 WITH 15 DEGREES OF FREEDOM SIGNIFICANCE = 0.3466

Figures are rounded to closest per cent.

cited recent better appointments to the Commission and the general necessity for public regulation. Those who had more negative views charged the FCC with incompetence and ignorance of the public interest. (Question 85). A majority of broadcasters agreed, however, that the FCC was a fair regulatory agency that did not favor the networks over small, independent stations. (Questions 86, 87, and 88).

23% of respondents said that the Banzhaf decision had had a negative effect on their feelings toward the FCC. 6% cited a positive effect while 71% said that the decision did not affect their view of the Commission one way or another. (Question 83). Thus Banzhaf, on balance, had a slight negative effect on industry views of the FCC.

Broadcaster Attitudes - Summary

Broadcasters in New York sustained a high awareness and understanding of the Banzhaf decision. They received their first information about the decision through informal communications links with their Washington lobby and the FCC bureaucracy. Network, television station management -- carrying the bulk of cigarette advertising -- were the most aware of the details of Banzhaf and of subsequent FCC counter-advertising policies.

Broadcasters as a group were split in their attitudes toward the Banzhaf decision. Those who did agree with it did so because cigarettes were involved, not out of agreement with the principle of counter-advertising. They cited Banzhaf's main effect on station management and operations to be an increase in the number of anti-smoking public service announcements aired.

Broadcast station management, on the other hand, disagreed strongly with counter-advertising in general and the cigarette advertising ban. The FCC thus had substantial clientele support for its efforts to limit Banzhaf strictly to cigarette commercials, but lacked support for applying the "fairness" doctrine to product commercials other than cigarettes.

And finally, while broadcaster attitudes toward the FCC were mixed, Banzhaf on balance, had a negative effect on industry views of the Commission. However, respondents were in broad agreement that the FCC was basically even-handed in its discharging of its regulatory responsibilities. (Of course, "even-handed" has a subjective meaning here. A broadcaster may characterize FCC regulation as even-handed while a more objective observer would consider it biased in the broadcasting industry's favor.)

Compliance

Determining broadcast industry compliance with Banzhaf is essential for a complete understanding of the decision's impact. Compliance data for this section has been gathered from several sources: from interviews with station managers; from ASH's files; from station reports filed at the FCC; from Broadcast Advertiser's Reports; and from internal studies conducted by two of the major networks. This section examines the extent of broadcasting industry compliance with the Banzhaf decision and the factors which best explain differences in industry compliance patterns.

An agreed upon standard of compliance with the Banzhaf decision must be arrived at before actual patterns of compliance with the ruling can be assessed. This posed a problem for broadcasting stations because

the FCC's original ruling stated simply that any station broadcasting cigarette commercials should devote a "significant amount of time ... each week"⁸ to the anti-smoking side. Geller's offhand comment to newsmen that a 3:1 ratio between cigarette commercials and anti-smoking announcements was reasonable was misinterpreted by many in the industry as a formal compliance standard. The FCC itself did not get down to defining compliance with Banzhaf until ASH lodged a complaint against WNBC-TV in June, 1968. ASH monitored WNBC-TV for two weeks,⁹ gathering evidence of a substantial disparity between the number of cigarette commercials and anti-smoking messages broadcast in prime time. In addition, ASH charged that WNBC-TV failed to broadcast any anti-smoking announcements in prime time in nine of the fourteen days monitored. NBC rebutted ASH's charge of a 10:1 prime time ratio, claiming that anti-smoking spots in the early morning and afternoon hours were targeted toward young children and teenagers. NBC's lawyers added that the Banzhaf ruling said nothing about concentrating anti-smoking messages in prime time periods, and like any other "fairness" ruling its implementation was left up to the licensee's reasonable and good faith judgment.

The FCC denied ASH's petition for a license revocation hearing for WNBC-TV, but indirectly upheld ASH's side of the argument. Although the FCC agreed that NBC's total performance had not been deficient it ordered the station to produce a new policy on anti-smoking messages in periods of maximum viewing (7:30-11 p.m.). WNBC-TV was to produce this new policy in two months and report on its implementation to the Commission four months thereafter.¹⁰

In Re Chronicle Publishing Company (1969)¹¹ and Letter to Metromedia (1969)¹² reinforced the impact of WNBC-TV. As a result of these three cases a 5:1 prime time ratio was considered to be the implicit FCC standard for satisfactory compliance with the Banzhaf ruling. And finally, it is important to note that while Banzhaf was originally decided in June, 1967 the FCC did not specifically define compliance with the ruling until March, 1969.

Reported Compliance Ratios

This section on reported compliance ratios concentrates on the following questions: What ratios were reported by broadcasters during our interviews, as the compliance standard met by their station? How do these reported compliance standards correlate with levels of awareness and understanding of Banzhaf and "fairness" and with agreement or disagreement with the Banzhaf decision? What factors best explain differences in reported compliance rates? (Since these ratios were not objectively determined, a possible bias and error in reporting qualifies the following analysis).

All but one of the broadcasters who recalled the cigarette commercial/anti-cigarette message ratio at their station set it well within the FCC's informal guidelines (from 1 - 5:1). One manager reported defying Banzhaf by continuing to broadcast cigarette commercials without anti-smoking counter-ads. Four station managers reported a 1:1 ratio, signifying either their station's willingness to overcomply with the ruling or their confusion of a "fairness" ruling with the "equal time" requirements governing political candidates. (Question 32). Weight is given to the latter supposition when

reported ratio is correlated with awareness and understanding of the Banzhaf decision. A low awareness of the details of the Banzhaf ruling correlated with reporting a 1:1 ratio, while reporting a 5:1 ratio correlated with perfect awareness scores. (See Table 5-5, p.153). Station managers with the least understanding of FCC "fairness" policies reported 1:1 compliance ratios. Station executives with the highest understanding scores reported ratios closer to the actual FCC standard of 5:1. (See Table 5-6, p.154). Stations that did not carry cigarette advertising, as would be expected, had little perception of the Banzhaf decision and subsequent counter-advertising cases. And the single broadcaster who reported ignoring the Banzhaf decision scored low in his understanding of FCC "fairness" and commercial advertising policies. Although this individual was the general manager of a large New York radio station he thought that a FCC "fairness" ruling applied to his station only if a formal complaint involving his station had first been made.

Another possible explanation for reported 1:1 compliance ratios is the uneven impact that Banzhaf had on radio and on television stations. Television, and especially the networks, carried the bulk of cigarette advertising. Television executives thus had better perceptions of the ruling and of subsequent FCC efforts to enforce it. But compliance with Banzhaf would be much easier for radio stations. Their time is cheaper and more plentiful than television time and is not restricted by an expensive concept like prime time. (As a result radio stations would not be affected by the WNBC ruling. Their peak listening periods occur throughout the broadcast day and are not confined to a 7-11 p.m. time period.)

TABLE 5 - 5

RATIO OF ANTI-CIGARETTE TO CIGARETTE ADVERTISEMENTS AND
AWARENESS OF THE BANZHAF DECISION

		Levels of Awareness						
		low					high	
		0	1	2	3	4	5	Totals
Ratio of anti-	1:1	0	0	100%	50%	0	0	18%
cigarette	1:3	0	0	0	17%	25%	10%	14%
messages to	1:4	0	0	0	0	25%	30%	18%
cigarette	1:5	0	0	0	0	0	30%	14%
commercial								
No cigarettes		100%	0	0	33%	25%	30%	32%
advertisements								
Some cigarettes		0	0	0	0	25%	0	5%
advertisements,								
no anti-advertisements								
		100%	0	100%	100%	100%	100%	100%
N =		1	0	1	6	4	10	22
		(4.5%)	0	(4.5%)	(27%)	(18%)	(45.5%)	(100%)

CHI SQUARE = 22.81616 WITH DEGREES OF FREEDOM SIGNIFICANCE = 0.2979

Figures are rounded to nearest per cent.

(Number of missing Observation = 10)

TABLE 5-6

RATIO OF ANTI-CIGARETTE TO CIGARETTE ADVERTISEMENTS AND
UNDERSTANDING OF THE "FAIRNESS DOCTRINE"

		Levels of Understanding						
		low					high	
		0	1	2	3	4	5	Totals
Ratio of anti-	1:1	50%	0	0	0	0	0	18%
cigarette mes-	1:3	0	25%	25%	0	0	100%	14%
sages to ciga-	1:4	0	0	75%	0	20%	0	18%
tte commercials	1:5	0	0	0	0	60%	0	14%
No cigarettes		50%	50%	0	0	20%	0	32%
advertisements								
Some cigarettes		0	25%	0	0	0	0	5%
advertisements,								
no anti-advertisements								
		100%	100%	100%	0	100%	100%	100%
N =		8	4	4	0	5	1	22
		(36%)	(18%)	(18%)	(0)	(23%)	(4.5%)	(100%)

CHI SQUARE = 42.23193 WITH 20 DEGREES OF FREEDOM SIGNIFICANCE = 0.0026

Figures are rounded to nearest per cent.

(Number of missing observations = 10)

The data relating reported ratio to radio and television bears this argument out. Seven New York radio stations carried no cigarette advertising, while every television station carried some cigarette advertising. Every respondent reporting a 1:1 ratio was a radio station manager while television stations reported, in the main, compliance ratios of four and five to one. (See Table 5-7, p.156). The data separating network owned and operated stations from independent stations also confirm this explanation of varying compliance rates. Large, general audience, network owned and operated stations consistently reported four and five to one ratios while small, independents reported high, 1:1 compliance rates. (See Table 5-8, p.157; Table 5-9, p.158; and Table 5-10, p.159).

Other factors do not provide significant explanation for differing compliance rates. Degree of agreement with Banzhaf seems to have had little effect on reported compliance ratios. (See Table 5-11, p.160). Percent of advertising revenues received from cigarettes did not relate significantly to reported compliance rates. (See Table 5-12, p.161). Finally, the size of a radio station's average weekly audience did not seem to have any substantive effect on its compliance with the Banzhaf decision. (See Table 5-13, p.162).

Further Evidence of Patterns of Industry Compliance with 'Banzhaf'

One of the major networks (we shall call it network XYZ) conducted a national study of its owned and operated television and radio stations which confirms, to some extent, the voluntary compliance information reported in our interviews. Stations in New York, Los Angeles, Chicago, St. Louis and Philadelphia were included in the survey. Network radio station compliance ratios from January 1968 to June 1969 (for the total

TABLE 5-7

RATIO OF ANTI-CIGARETTE MESSAGES TO CIGARETTE ADVERTISEMENTS BY RADIO
AND TELEVISION STATION

		Radio AM	Radio FM	Radio AM and FM	TV	TOTALS
Ratio of anti-cigarette	1:1	33%	0	67%	0	18%
messages to cigarette	1:3	33%	0	0	14%	14%
commercials	1:4	17%	0	0	43%	18%
	1:5	0	0	0	43%	14%
No cigarette advertisements		17%	83%	33%	0	32%
Some cigarette advertisements, no anti-advertisements		0	17%	0	0	4.5%
		100%	100%	100%	100%	100%
N =		6 (27.3%)	6 (27.3%)	3 (13.6%)	7 (31.8%)	22 (100%)

CHI SQUARE = 30.68643 WITH 15 DEGREES OF FREEDOM SIGNIFICANCE = 0.0097

Figures are rounded to the nearest per cent.

(Number of missing observations = 10)

TABLE 5-8

RATIO OF ANTI-CIGARETTE MESSAGES TO CIGARETTE ADVERTISEMENTS BY NETWORK RELATIONSHIP

		Network Owned and Operated Station	Network Affiliate	Independent	Totals
Ratio of anti-cigarette	1:1	0	0	29%	18%
messages to cigarette	1:3	0	0	21%	14%
commercials	1:4	43%	0	7%	18%
	1:5	43%	0	0	14%
No cigarette advertisements		14%	100%	36%	32%
Some cigarette advertisements no anti-advertisements		0	10%	7%	4.5%
		100%	100%	100%	100%
N =		7 (32%)	1 (4.5%)	14 (64%)	22 (100%)

CHI SQUARE - 16.66832 WITH 10 DEGREES OF FREEDOM SIGNIFICANCE = 0.0820

Figures are rounded to the nearest per cent.

(Number of missing observations = 10)

TABLE 5-9

RATIO OF ANTI-CIGARETTE MESSAGES TO CIGARETTE ADVERTISEMENTS BY STATION FORMAT

		General Audience	Mostly or All News	Classical	Rock	Young	Old	Black	Spanish	Foreign Language	Totals
Ratio of	1:1	0	0	0	0	0	100%	50%	50%	50%	18%
anti-cigarette	1:3	10%	0	0	0	0	0	50%	50%	0	14%
message to	1:4	30%	0	0	100%	0	0	0	0	0	18%
cigarette commercials	1:5	30%	0	0	0	0	0	0	0	0	14%
No cigarette advertisements	30%	100%	100%	0	0	0	0	0	0	50%	32%
Some cigarette advertisement, no anti-advertisements	0	0	0	0	100%	0	0	0	0	0	4.5%
		100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
N =	10 (46%)	1 (4.5%)	2 (9%)	1 (4.5%)	1 (4.5%)	1 (4.5%)	2 (9%)	2 (9%)	2 (9%)	2 (9%)	22 (100%)

158

CHI SQUARE = 52.69493 WITH 40 DEGREES OF FREEDOM SIGNIFICANCE = 0.0861

Figures are rounded to the nearest per cent.

(Number of missing observations = 10)

TABLE 5-10

RATIO OF ANTI-CIGARETTE MESSAGES TO CIGARETTE ADVERTISEMENTS BY NUMBER OF STATION EMPLOYEES

		Number of Employees			
		Small	Medium	Large	Totals
Ratio of anti-cigarette	1:1	33%	0	12.5%	19%
messages to cigarette	1:3	11%	25%	12.5%	14%
commercials	1:4	0	0	50 %	19%
	1:5	0	0	25 %	9.5%
No cigarette advertise- ments		44%	75%	0	33 %
Some cigarette advertisements, no anti-advertisements		11%	0	0	5 %
		100%	100%	100%	100%
N =		9 (43%)	4 (19%)	8 (38%)	21 (100%)

CHI SQUARE = 18.47568 WITH 10 DEGREES OF FREEDOM SIGNIFICANCE = 0.0475

Figures are rounded to the nearest per cent.

(Number of missing observations = 11)

TABLE 5-11

RATIO OF ANTI-CIGARETTE MESSAGES TO CIGARETTE ADVERTISEMENTS BY DEGREE OF AGREEMENT WITH THE BANZHAF DECISION

		<u>Degree of Agreement with Banzhaf</u>					<u>Totals</u>
		<u>Strongly Agree</u>	<u>Agree</u>	<u>No Opinion or don't know</u>	<u>Disagree</u>	<u>Strongly Disagree</u>	
Ratio of anti -	1:1	40%	0	0	20%	17%	18%
cigarette messages	1:3	20%	0	0	20%	17%	14%
to cigarette	1:4	20%	25%	0	0	33%	18%
advertisements	1:5	0	25%	0	0	33%	14%
No cigarette advertisements		20%	50%	100%	40%	0	32%
Some cigarette advertisements, no anti-advertisements		0	0	0	20%	0	4.5%
		100%	100%	100%	100%	100%	100%
N =		5 (28%)	4 (18%)	2 (9%)	5 (23%)	6 (27%)	22 (100%)

CHI SQUARE = 18.40750 WITH 20 DEGREES OF FREEDOM SIGNIFICANCE = 0.5606

Figures are rounded to the closest per cent.

(Number of missing observations = 10)

TABLE 5-12

RATIO OF ANTI-CIGARETTE MESSAGES TO CIGARETTE ADVERTISEMENTS BY PERCENTAGE OF CIGARETTE ADVERTISING REVENUES

		Per cent of Station Advertising Revenues from Cigarettes				
		<u>None</u>	<u>Little</u>	<u>Average</u>	<u>Lot</u>	<u>Totals</u>
Ratio of anti-	1:1	0	40%	11%	100%	18%
cigarette messages	1:3	0	20%	22%	0	14%
to cigarette advertise-	1:4	0	40%	22%	0	18%
ments	1:5	0	0	33%	0	0
No cigarette advertisements		100%	0	0	0	32%
Some cigarette advertisements, no anti-advertisements		0	0	11%	0	4.5%
		100%	100%	100%	100%	100%
N =		7 (32%)	5 (23%)	9 (41%)	1 (4.5%)	22 (100%)

CHI SQUARE = 31.85919 WITH 15 DEGREES OF FREEDOM SIGNIFICANCE = 0.0067

Figures are rounded to the nearest per cent.

(Number of missing observations = 10)

TABLE 5-13

RATIO OF ANTI CIGARETTE MESSAGES TO CIGARETTE
ADVERTISEMENTS BY SIZE OF CUMULATIVE
WEEKLY AUDIENCE
(APPLIES TO RADIO STATIONS ONLY)

	Size of Radio Station cumulative weekly audience			
	<u>Small</u>	<u>Medium</u>	<u>Large</u>	<u>Totals</u>
Ratio of anti cigarette 1:1	40%	25%	20%	29%
messages to cigarette 1:3	40%	0	0	14%
advertisements 1:4	0	0	20%	7%
No cigarette advertisements	20%	50%	60%	43%
Some cigarette advertisements, no anti advertisements	0	25%	0	7%
	100%	100%	100%	100%
N =	5 (36%)	4 (29%)	5 (36%)	14 (100%)

CHI SQUARE = 9.27499 WITH 8 DEGREES OF FREEDOM SIGNIFICANCE = 0.3196

Figures are rounded to the nearest per cent.

(Number of missing observations = 18)

broadcast day) were well within the informal guidelines set by the FCC. (See Table 5-14, p.164.) Radio station data for the eighteen month period studied also demonstrate that radio's compliance with Banzhaf was unaffected by the FCC's March, 1969 WNBC-TV ruling.

The data for XYZ's owned and operated television stations presents an entirely different picture. Through the first quarter of 1968 XYZ television stations were in substantial noncompliance with Banzhaf (figures gathered for prime time only) -- up to six months after the Banzhaf reconsideration ruling was made. Figures for the prime evening hours show ratios ranging from six to a high of 201 to one at the network's flagship station. From April, '68 through March, '69 station ratios fluctuate between five and ten to one. Television station compliance levels fall below five to one after the FCC's WNBC, Metromedia and Chronicle Publishing Company decisions of March, 1969. (See Table 5-15, p. 165).

Available figures indicate that even after the WNBC-TV ruling only two of the three major television networks were in full compliance with the Banzhaf decision during the total broadcast day. (See Table 5-16, p.166). These figures, along with those presented in Table 5-15 suggest substantial areas of television industry noncompliance with the Banzhaf ruling.

ASH collected strong evidence of television station noncompliance in its revocation petitions against the licenses of thirteen television stations. (See Table 5-17, p.167). Table 5-17 indicates that while stations disputed ASH's monitoring accuracy, the "representativeness" of the period selected, and the inclusion of billboard announcements as cigarette commercials,

TABLE 5-14

RATIO OF ANTI-CIGARETTE MESSAGES TO CIGARETTE COMMERCIALS ON XYZ OWNED AND OPERATED RADIO STATIONS,
FEBRUARY, 1968 - JUNE, 1969

	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June
	-----1968-----											-----1969-----					
Station A	1:1	2:1	3:1	4:1	5:1	2:1	5:1	2.5:1	1:1	1:1	1:1	1:1	1.5:1	2:1	1:1	5:1	2:1
Station B	2:1	4:1	3:1	6.5:1	4:1	5.5:1	7:1	4:1	2.5:1	3:1	2:1	2:1	3:1	2:1	2:1	3:1	2:1
Station C	1:1	4:1	4:1	5:1	5:1	3:1	4:1	3:1	1:1	1.5:1	1.5:1	3:1	5:1	2:1	3.5:1	5:1	2.5:1
Station D	2:1	3:1	4:1	5:1	4:1	5:1	5.5:1	2:1	2:1	1.5:1	1:1	2:1	4:1	3:1	2.5:1	3.5:1	2:1
Section E	2.5:1	2:1	3:1	2:1	1:1	2:1	2:1	1:1	2:1	2:1	1:2	2:1	3:1	2:1	1:1	3:1	2:1
Station F	2:1	3:1	6:1	5:1	4:1	4:1	8:1	6:1	3:1	2:1	1:1	1.5:1	3:1	3:1	4:1	3:1	2:1
Station G	4:1	4:1	4.5:1	4:1	2.5:1	2.5:1	5:1	2:1	2:1	1.5:1	1:1	2:1	3:1	3:1	2:1	2:1	3:1

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Ratio of cigarette commercials to anti-cigarette messages for the total broadcast day.

(Ratio is calculated by length of time only and figures are rounded).

Figures obtained from internal corporate network study.

TABLE 5-15

RATIO OF ANTI-CIGARETTE MESSAGES TO CIGARETTE COMMERCIALS ON XYZ OWNED AND OPERATED TELEVISION STATIONS,
 JANUARY, 1968 - MAY, 1969

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May
	1968												1969				
Station A	25:1	137:1	8:1	9:1	5:1	3.5:1	8:1	6:1	12:1	13:1	11:1	13:1	10:1	10.5:1	8:1	4:1	4:1
Station B	13:1	54:1	66:1	7:1	5:1	5:1	7:1	9:1	8:1	9:1	7:1	7:1	8:1	7:1	6.5:1	4.5:1	4:1
Station C	35:1	102:1	6:1	6:1	5:1	5:1	9.5:1	7:1	9:1	12:1	9:1	12:1	10:1	7:1	7:1	4.5:1	4:1
Station D	43:1	78:1	10:1	4:1	5:1	3.5:1	4:1	5:1	5.5:1	5.5:1	8:1	7:1	7:1	8:1	8.5:1	3:1	4:1
Station E	201:1	111:1	23:1	5.5:1	4:1	4:1	6:1	5:1	5:1	9:1	13:1	11:1	9:1	11:1	8:1	4.5:1	5.5:1

Ratio of cigarette commercials to anti-cigarette advertisements for prime time only (6 - 11 p.m.)

Ratio is calculated by length of time only and figures are rounded.

Figures obtained from internal corporate network study.

TABLE 5-16

RATIO OF CIGARETTE COMMERCIALS TO ANTI-SMOKING MESSAGES FOR THE TOTAL BROADCAST DAY ON THE THREE TELEVISION NETWORKS, OCTOBER-DECEMBER, 1969.

The following ratios were constructed from a comparison of the number and time of anti-smoking messages aired on the major networks during the final quarter of 1969 (figures obtained from an internal network memorandum) to the number and time of cigarette commercials broadcast in that period. A content analysis of Network Broadcast Advertiser's Reports (New York: BAR, Inc., 1970) for the fourth quarter of 1969 provided the data on the cigarette commercials.

	<u>CBS</u>	<u>NBC</u>	<u>ABC</u>
Time Ratio	2.7:1	2:1	13:4:1
Number Ratio	3.6:1	4:1	11.4:1

TABLE 5- 17

ASH LICENSE CHALLENGES, STATION REBUTTALS FOR THE PERIOD MONITORED, AND
FCC ACTION ON THE COMPLAINT, APRIL - DECEMBER, 1968.

All ratios for prime time only.

1. Station: KRON-TV (San Francisco, Calif.)
Monitored: 11/11/68 - 11/15/68
ASH Results: Time - 12:1 Number - 21.5:1
Station Rebuttal: * _____
FCC Action on Complaint: FCC rejects ASH complaint but delays license renewal on other grounds. Requests new anti-smoking policy in prime time in 60 days and a report on it in four months.

2. Station: KATU-TV (Portland, Oregon)
Monitored: 11/10/68 - 11/16/68
ASH Results: Time - 67.5:1 Number 34:1
Station Rebuttal: Station claimed that the week in question was unusual because it had to announce its pending license renewal in public service time spots. Station also claimed that ASH missed a 60 second anti-smoking ad and failed to count Nikkoban ads as anti-smoking material. They said accurate ratios were: Time - 18:1 Number - 17:1.
FCC Action on Complaint: FCC requests additional prime time compliance data from station. Station response indicates that it has complied with Banzhaf and WNBC-TV.

3. Station: KGW-TV (Portland, Oregon)
Monitored: 11/10/68 - 11/16 and 11/21/68
ASH Results: Time - 7:3:1 Number - 8.6:1
Station Rebuttal: In rebuttal station claims ASH monitoring is incorrect. It claims an accurate number ratio in prime time of 6.2:1 for that time period.
FCC Action on Complaint: FCC requests further compliance data from station. Station response indicates compliance with Banzhaf and WNBC-TV.

* _____ indicates that no station rebuttal figures were given for the ASH monitoring period.

TABLE 5-17 continued

4. Station: KSMP-TV (Wayzata, Minn.)
Monitored: 10/27/68 - 10/31/68 and 11/2/68
ASH Results: Time - 19:1 Number 14:1
Station Rebuttal: Station rebuttal includes a 64-second anti-smoking spot to arrive at the following figures: Time - 6.5:1 - Number - 7:1.
FCC Action on Complaint: FCC requests more prime time compliance data. Station response indicates compliance with Banzhaf and WNBC-TV.
5. Station: KNXT-TV (Los Angeles, Calif.)
Monitored: 8/19/68- 8/23/68
ASH Results: Time - 12.8:1 Number - 8.5:1
Station Rebuttal: * _____
FCC Action on Complaint: FCC requests more prime time compliance data and station is subsequently held to be adequate.
6. Station: KOIN-TV (Portland, Oregon)
Monitored: 11/10/68 - 11/16 and 11/21/68
ASH Results: Time - 15:1 Number - 10:1
Station Rebuttal: * _____
FCC Action on Complaint: FCC requests more prime time compliance data. Station held to be adequate.
7. Station: KPIX-TV (San Francisco, Calif.)
Monitored: 11/25/68 - 11/28/68 and 12/1/68
ASH Results: Time - 37:1 Number - 12:1
Station Rebuttal: Station rebuttal claims accurate ratios for that period are: Time - 23:1 Number - 10:1.
FCC Action on Complaint: FCC denies ASH request for a license renewal hearing but orders a new prime time anti-smoking plan for station in 60 days and a report on it in four months.

* _____ indicates that no station rebuttal figures were given for the ASH monitoring period.

TABLE 5-17 continued

8. Station: KPTU-TV (Portland, Oregon)
Monitored: 11/10/68 - 11/16/68
ASH Results: Time - 470:1 Number - 13:1
Station Rebuttal: * _____
FCC Action on Complaint: FCC requests more prime time compliance data. Station is held to be adequate.
9. Station: WNBC-TV (New York, New York)
Monitored: 4/17/68- 7/7/68
ASH Results: Time - 9:1 Number - 10:1
Station Rebuttal: Station claims ASH monitoring is defective. Billboards should not be counted as cigarette ads. NBC counts two cigarette ads from one parent corp. as one ad, giving a new number of 8.8:1.
FCC Action on Complaint: FCC does not hold license revocation hearing as requested by ASH. Instead Commission requests more compliance data from NBC and orders it to install a new prime time anti-smoking policy in 60 days and to report on it in four months. (WNBC-TV ruling.)
10. Station: WCCO-TV (Minneapolis, Minn.)
Monitored: 10/27/68 - 11/2/68
ASH Results: Time - 202:1 Number - 53:1
Station Rebuttal: * _____
FCC Action on Complaint: FCC requests more compliance data. Station held to be adequate.
11. Station: WLWI-TV
Monitored: 11/10/68 - 11/16/68
ASH Results: Time - 985:0 Number - 24:0
Station Rebuttal: * _____
FCC Action on Complaint: FCC requests more prime time information. Station held to be adequate.

* _____ indicates that no station rebuttal figures were given for the ASH monitoring period.

TABLE 5-17 continued

12. Station: WSBA-TV (York, Pa.)
- Monitored: 10/11/68 - 10/17/68
- ASH Results: Time - 44:1 Number - 12:1
- Station Rebuttal: Station alleges that ASH monitoring is inaccurate and includes a five minute interview against smoking in its ratio of anti-smoking spots. Time - 3.3:1 Number - 6:1
13. Station: WNEW-TV (New York, New York)
- Monitored: 9/68
- ASH Results: Time - 13:1 Number 16:1
- Station Rebuttal: Station counts prime time as 12 a.m. to 11 p.m. on Saturday and Sunday and thus alleges that true ratios for the month monitored are: Time 1:1 Number - 4:1
- FCC Action on Complaint: FCC requests more detailed prime time compliance figures for the evening hours only. Orders station to put more anti-smoking spots in evening prime time and to report on its new policy in four months.

("This program has been brought to you by Pall Mall..." is an example of a "billboard" announcement), only two station rebuttals claimed prime time compliance within the FCC guidelines.¹³

Industry Compliance With the 'Banzhaf' Decision - Summary

Patterns of broadcasting industry compliance with the Banzhaf decision seem to have been affected most significantly by economic considerations. Radio stations were able to comply easily with the ruling since they carried comparatively little cigarette advertising, had cheaper and more plentiful public service time, and were not restricted by prime time requirements. Network television stations, on the other hand, carried the bulk of cigarette advertising and avoided filling precious and expensive prime time minutes with anti-smoking spots. Ironically, these fundamental economic considerations led those with the most understanding and awareness of the Banzhaf ruling to avoid its intent, while those stations least aware of the decision overcomplied with it.

Decisions by television management to place anti-smoking public service announcements in the early morning and afternoon hours led, as we have seen, to charges of deliberate noncompliance with the Commission's cigarette advertising ruling. A detailed analysis of these charges, of the FCC's enforcement of Banzhaf, and of the impact of enforcement efforts on compliance, are the subject of the next section.

Enforcement

In Chapter One the enforcement tasks of a regulatory agency were defined as the winning of support for its regulations, securing compliance of regulated groups, and applying sanctions against those who

continue to violate the regulations. This section analyzes the extent and effectiveness of the FCC's enforcement of the Banzhaf decision and its relationship to industry compliance. It determines whether the Commission tried to win support for the Banzhaf decision; whether it increased compliance with Banzhaf by actively enforcing it; and whether it applied sanctions on Violators of the Banzhaf ruling. The conclusions of this section are based on an analysis of thirteen station license challenges brought by ASH, extensive personal interviews with station managers, FCC, and network officials, and the case analysis in Chapter Four.

The FCC's enforcement of the Banzhaf decision is a classic example of regulation by the "lifted eyebrow of reproach". The following narrative demonstrates that the Commission enforced Banzhaf on the basis of a mathematical ratio, which it formally disclaimed in its case opinions, and controlled its clientele's behavior by means other than formal sanctions and adjudicative hearings. The FCC relied on broadcaster fear of its licensing and other discretionary powers, rather than on formal enforcement proceedings, to secure compliance with the Banzhaf decision.

What Were the Results of the ASH License Petition Challenges?

Out of the thirteen licenses challenged by ASH, one station license renewal was delayed, but for reasons other than the cigarette commercial/anti-smoking message dispute, (KRON-TV, San Francisco) The twelve remaining petitions brought by ASH to revoke or suspend television station licenses were rejected by the Commission. No fines or other formal sanctions (like the cease and desist order) were levied on the stations, some of which were in substantial noncompliance with the Banzhaf ruling. (See Table 5-17, supra).

At first, the FCC handled the ASH petitions like any other "fairness" complaints. A copy of the complaint was sent to the station involved and the station was given ten days to respond to it. However, in an unusual procedural move, the FCC sent an additional letter of inquiry to each station requesting more detailed information on the number and length of anti-cigarette messages and cigarette commercials broadcast by the station in prime evening time. Although the FCC had had categorically rejected the use of "guidelines, ratios or other rigid rules"¹⁴ as standards for compliance in its reconsideration of the Banzhaf decision, it did apply a 5:1 ratio in these cases. If the FCC ascertained, through its letter of inquiry, that a station maintained an approximate 5:1 prime time ratio it rejected ASH's complaint petition without further action.¹⁵ When a station's compliance data indicated a significant deviation from a 5:1 prime time ratio the FCC held that the station's record during the total broadcast day was adequate but a "grater effort in maximum viewing time" was needed.¹⁶ The Commission ordered noncomplying stations to prepare new policies on prime time anti-smoking messages in 60 days and to report on their implementation to the Commission four months hence. The FCC succeeded in making known to the broadcasting industry — without hearings, oral arguments or formal adjudication of the ASH complaints — that a 5:1 ratio represented reasonable compliance with Banzhaf in prime evening time.¹⁷

Enforcement and Compliance

The effects of these mild letter rulings on compliance, in spite of the fact that no fines or other formal sanctions were applied to violators, can be seen in a comparison of individual station compliance data before and after the WNBC-TV ruling was made. The FCC ordered eight

television stations challenged by ASH to provide compliance data with its WNBC-TV ruling. These figures (for July 13 - 26, 1969) are compared with ASH compliance figures for the same stations in October and November, 1968. (See Table 5-18, p.175). These data demonstrate that only after the FCC seriously enforced Banzhaf did significant compliance with it begin. Compliance figures provided by XYZ's television network study also bear this conclusion out. Compliance at XYZ's owned and operated stations increased from an average of 8:1 before the WNBC-TV ruling to a 4.5:1 ratio following the decision.¹⁸ Further evidence of the relationship between enforcement and compliance is provided by the example of WNBC-TV itself. Prime time compliance at the station fell from 10:1 in April, 1968 to 4:1 in May, June, and July, 1969.¹⁹ While 86% of our respondents claimed that ASH license challenges had no effect on their compliance with Banzhaf, objective evidence of increased compliance after the challenges refutes these claims. (Question 64).

FCC commissioners acknowledge that Banzhaf was enforced by the "lifted eyebrow of reproach". Several disclosed in our interviews that they felt the informal letter of inquiry to be a more effective sanction than formal fines, cease and desist orders and license revocations.²⁰ Former Commissioner Cox summarized the FCC's enforcement of Banzhaf in the following way:

The FCC maintained a presence....We didn't forget Banzhaf. The industry knew what was going on. A careful broadcaster who valued his franchise kept it [his cigarette commercial/anti-cigarette ratio] at 1:7, at least, not 1:20.²¹

Educational and Publicity Campaigns and Other Enforcement Tools

This section focuses on the following question: Did the FCC use educational or publicity campaigns or enforcement techniques, other

TABLE 5-18

PRIME TIME COMPLIANCE ON EIGHT STATIONS CHALLENGED BY ASH
BEFORE AND AFTER THE WNBC-TV RULING

<u>Station</u>	<u>Pre-WNBC-TV</u> 1 <u>Compliance Figures</u>	<u>Compliance After</u> 2 <u>WNBC-TV Ruling</u>
KATU-TV	time - 67.5:1 number - 34:1	time - 1.3:1 number - 1.8:1
KGW-TV	time - 7.3:1 number - 8.6:1	time - 2.6:1 number - 2.6:1
KSMP-TV	time - 19:1 number - 14:1	time - 2.1:1 number - 1.6:1
KOIN-TV	time - 15:1 number - 10:1	time - 1.9:1 number - 2.6:1
KPTU-TV	time - 470:1 number - 13:1	time - 8:1 number - 9:1
WCCO-TV	time - 202:1 number - 53:1	time - 3.3:1 number - 7:1
WLWI-TV	time - 985:0 number - 24:0	time - 1.4:1 number - 2.4:1
WSBA-TV	time - 44:1 number - 12:1	time - 2:1 number - 1.7:1

1. All figures gathered from ASH files and are for prime time only. More details on these cases are found on Table 5-17, supra.
2. All figures are for the weeks July 13-26, 1969 and are from the Federal Communications Commission Files. All figures are for prime time only.

than the letter of inquiry, to enhance compliance with the Banzhaf ruling? The data collected by our station survey forms the basis of our conclusions in this area.

Did The FCC Use Publicity Or Other Indirect
Enforcement Techniques?

Twenty of the thirty-two station executives interviewed remembered receiving the regular public notice of the Banzhaf decision from the FCC. (Question 47). (In addition to being published in the Federal Register, important FCC rulings are sent directly to all broadcasting stations in the country.) Out of 32 commercial stations in New York only 5 stations had FCC contact about Banzhaf. Of these 5, two recalled a Commissioner's speech, 2 received a letter or call from the Commission about compliance, and one station recalled an FCC spot check of their daily logs. The remaining 27 stations recall no FCC action to enforce or publicize Banzhaf. (Questions 47 and 48). A reprint of the decision and a single Commissioner's speech represented the extent of the FCC's educational and publicity campaign on the Banzhaf decision.²² The two inquiries from the FCC were the only official enforcement tools that resulted in increased compliance with the Banzhaf decision. (Question 51.) In addition, out of 32 commercial broadcasting stations two stations reported private interest group enforcement efforts, with one complaint resulting in increased compliance with Banzhaf. (Questions 52, 53, and 56.)

These findings substantiate the view that the FCC enforced Banzhaf mainly through the informal pressures generated by their continued requests for station compliance data. The Commission undertook no independent monitoring or investigation to enforce Banzhaf. No publicity or educational

campaigns about the ruling were created, over and above sending a regular copy of the decision to the individual local stations. The FCC preferred that private citizens and public interest groups monitor and initiate complaints about Banzhaf, to complement the Commission's passive judicial-like approach to enforcement.²³

Scope of FCC Enforcement

Our analysis of counter-advertising cases subsequent to Banzhaf demonstrates that the FCC's application of Banzhaf was limited strictly to those complaints involving cigarette advertising. (See Chapter Four, supra.) The Commission refused to enforce Banzhaf as a precedent even when a product commercial addressed a controversial issue directly²⁴ or when the Circuit Court remanded cases back to the FCC, stating that they were identical to Banzhaf.²⁵ The FCC held fast to its opinion that cigarettes were a unique product demanding a unique solution. Its continued refusal to extend Banzhaf to other product advertising cases resulted in its overall review and inquiry into the "fairness" doctrine and product advertising. The results of that inquiry will be examined in detail in the section dealing with nondecision-making, below.

Enforcement - Summary

Several important generalizations about the nature of the FCC's enforcement of Banzhaf can be drawn from the preceding narrative.

a) The FCC relied exclusively on informal techniques to enforce the Banzhaf decision, assuming that enough broadcaster fear of the Commission existed to make these techniques successful. The FCC enforced Banzhaf by the "lifted eyebrow of reproach", using the informal letter of inquiry and

progress report as an alternative to setting a formal compliance standard, holding public hearings and levying formal sanctions (fines, short-term licenses, license suspensions and revocations and the like) on violators.²⁶

b) FCC enforcement of the Banzhaf decision increased broadcast industry compliance with it. However, real credit for enforcement of the Banzhaf decision must be given to ASH, which monitored violators and filed petitions against their licenses at the Commission. Without ASH's voluntary monitoring and license challenging efforts, the Banzhaf decision would have gone largely unenforced.

c) Evaluations of compliance and enforcement cannot be couched in black and white terms when a large and heterogeneous clientele and an understaffed government bureaucracy are involved. The FCC's overriding goal in the Banzhaf case was to make anti-smoking information available to the public on a more regular basis. If this is taken as the substantive goal of the Banzhaf decision, then one can say that broadcasters complied with it to some degree, but in the majority of cases involving television stations, not without substantial prodding from ASH and the FCC.

d) The Banzhaf case and its aftermath illustrate the crucial relationship between the economic considerations of the broadcasting industry and the scope of FCC decision-making and enforcement efforts. The FCC did enforce Banzhaf to a moderate degree. But Banzhaf was not really economically threatening to the broadcasting industry. Requiring one or two prime time public service announcements caused economic problems for only a few stations. Even the loss of advertising revenues sustained by the cigarette commercial ban, could be made up quickly by the networks.²⁷ But the FCC

drew the line when it was confronted with counter-advertising. The Commission refused to enforce Banzhaf as a precedent for it, along with the broadcasting industry, believed that the principle of counter-advertising threatened the commercial foundations of the American broadcasting system itself. And Banzhaf was reversed by the Commission to thwart the potential radical implications it posed as a precedent.

Nondecision-Making

This chapter thus far has determined the extent of broadcasting industry compliance with the FCC's Banzhaf decision. It has also examined the nature of FCC enforcement of that ruling. It turns now to another concept that helps simplify and shed light on the decision-making process. Nondecision-making helps explain a crucial aspect of impact by focusing on the actual consequences of decisions made by authorities in the political arena. In this way, it determines the roles that decision makers and constituent groups play in promoting and retarding the development of controversial political issues.

Chapter One defined nondecision-making as a technique used by those with social, economic, or political power to maintain the status quo. Nondecision-making can manifest itself in different ways: it may transform a substantive issue into a symbolic one; it may thwart demands for change by invoking rules or procedures; a nondecision may threaten sanctions against the individual or group demanding change; or it may co-opt the group in question. This section examines the case study for evidence of nondecision-making by focusing on the following series of questions: Was the original Banzhaf ruling a symbolic decision? Were the FCC's proposed cigarette advertising ban or the subsequent Public

Health Cigarette Smoking Act nondecisions? Is there evidence of non-decision-making in the FCC's overall "fairness" and advertising policies? And is there evidence in the Banzhaf case study and aftermath of non-decision-making by the broadcast industry? Our analysis and conclusions below dealing with nondecision-making are based on the preceding sections on compliance and enforcement; in-depth interviews with tobacco industry lobbyists, station and network personnel, staff at the Senate, the NAB, ASH, and FCC; Chapter Four's legal case analysis and the case study narrative contained in Chapter Three.

Was the 1967 'Banzhaf' Decision Largely Symbolic and
Thus a Co-optation of Banzhaf and ASH?

Preceding sections on compliance and enforcement suggest that Banzhaf was not a symbolic ruling and that the FCC was serious about expanding the amount and frequency of broadcast anti-smoking material. However, widespread compliance with Banzhaf did not exist on prime television time until the FCC signalled its serious commitment to the decision through its WNBC-TV ruling. The FCC was prodded into enforcement of the Banzhaf decision by Banzhaf's small public interest group ASH. Since the FCC does not monitor its clientele to check compliance with its decisions,²⁸ without ASH's voluntary monitoring efforts the Banzhaf decision would have gone unenforced. If ASH had not filled the gap in the Commission's regulatory enforcement process, the Banzhaf ruling would have remained largely symbolic. In other words, or more extreme terms, if a public - interest group had not taken law-enforcement into its own hands, the FCC would not have enforced its own rules. As it is, we see that the FCC has refused to allow Banzhaf to cover other cases.

Was the FCC's Proposal to Ban Cigarette Advertising
From Broadcasting a Nondecision?

There is no evidence substantiating the view that broadcasters supported the FCC's cigarette advertising ban proposal because it would get rid of most anti-smoking announcements and reduce demands for further counter-ads. Our previous section on industry attitudes indicated widespread disagreement with the ban because of the substantial loss of advertising revenues which it entailed. Broadcast industry opposition to the ban weakened only because they felt they were fighting a losing battle with the public and Congress. (Question 70.) The case study narrative in Chapter Three bears this interpretation out. The fact that only four New York stations dropped anti-smoking messages after the cigarette ban is further evidence that broadcasters and the FCC were not in collusion with tobacco interests to eliminate counter-cigarette ads. The cigarette commercial ban was appealed by the NAB and caused extensive public antagonism between the NAB and Tobacco Institute officials. This further disputes the hypothesis that the FCC was trying in its proposed ban to protect its clientele and the tobacco industry from the threats posed by anti-smoking messages. Broadcasters as a group would have been only too happy to suffer anti-smoking ads if they were allowed to keep lucrative cigarette commercials as well.

Shock and dismay were related to me by FCC officials over the shape that the cigarette advertising ban was to take. Several noted that the FCC's implicit goal in its ban proposal was to eliminate all cigarette advertising, that the 1969 law was discriminatory against broadcasters, and that it represented a caving in by Congress to the

tobacco interests.²⁹ The facts of the political struggle over the cigarette commercial ban fail to indicate any evidence of broadcaster or FCC collusion with the tobacco industry.

Was the Public Health Cigarette Smoking Act a Nondecision?

Although superficially the Public Health Cigarette Smoking Act of 1969 may appear to be a sweeping change in congressional regulation of the tobacco industry, in reality it continued the trend of congressional subsidization of tobacco set in previous years. The 1969 ban improved the tobacco industry's profit situation by saving it \$200 million a year in television advertising costs; by eliminating the bulk of counter-ads that were affecting consumption; by making it difficult to market new brands; and by protecting the industry from unrestricted state regulation of print advertising. Evidence of increasing cigarette consumption (especially among women and teenagers) demonstrates that the "setback" suffered by the tobacco forces through the cigarette advertising ban was merely symbolic. By switching their advertising dollars to print, billboards, and other promotional devices, and by simultaneously undermining Banzhaf the tobacco industry avoided any reduction in cigarette consumption rates. Senator Moss's goal in proposing a cigarette commercial ban on television and radio was to reduce consumption, not to regulate broadcasters. Moss sabotaged his own legislative and policy goal by accepting Philip Morris's offer to drop cigarette commercials from one advertising medium. Thus in the 1969 Public Health Cigarette Smoking Act the public ended up, once again, with a piece of symbolic regulatory legislation, which resulted in protecting and subsidizing the private interest that Senator Moss had intended to control.

FCC Policies on 'Fairness' and Advertising After 'Banzhaf'

Chapter Four's analysis of FCC case decisions suggests that the Commission did engage in nondecision-making to thwart the demands of consumer groups for access to commercial broadcasting time.

- a) The FCC relied on procedural requirements like the "Phelps" rule to block "fairness" complaints attempting to extend Banzhaf to other product commercials. The "Phelps" rule -- establishing a significant monitoring burden in "fairness" complaints -- was largely unenforced until 1969. In this same period the number of "fairness" complaints received by the FCC rose precipitously.³⁰ Geller notes in his study of the "fairness" doctrine that a substantial drop in FCC letters of inquiry correlates with this renewed application of "Phelps". (If a "fairness" complaint is rejected as incomplete by the FCC it would never even be referred to the station involved.)³¹ The FCC used procedural barriers in the complaint process to deflect increasing demands by consumer and other citizens' groups for fundamental change in the broadcasting system.
- b) The FCC perceived Friends of the Earth and the Chevron cases to be threats to the economic base of the commercial broadcasting system. When the Circuit Court remanded these cases back to the Commission the FCC turned to a classic nondecision-making device, creating a "study" which delays a decision indefinitely.³² The Commission's overall inquiry into the "fairness" doctrine was initiated in June, 1971. For three years this study has effectively thwarted any new consumer demands for access to television and radio time.

c) The FCC staff has recently drafted a report outlining the results of the Commission's "fairness" inquiry. In it, the full Commission (with Benjamin Hooks dissenting) repudiated the Banzhaf decision as a "mechanical approach to the 'fairness' doctrine which represented a serious departure from the doctrine's central purpose, that of facilitating the development of an informed public opinion."³³ Les Brown, The New York Times broadcasting critic, linked the reversal of Banzhaf to broadcasting industry fear of a broad application of the "fairness" doctrine to commercials, stating the industry believes counter-commercials would discourage all advertising on radio and television and severely damage its economic base.³⁴ The FCC's reversal of Banzhaf can be viewed as another classic nondecision, attempting to close off all possible avenues of change in control and access to the commercial broadcasting system.

Nondecision-Making by Broadcasters

How do individual stations handle product commercials that raise controversial issues? Did New York broadcasters voluntarily extend Banzhaf and give free time to counter-ads or did they refuse to accept any controversial product ads? Categorically rejecting all controversial commercials is a nondecision made expressly to frustrate potential consumer group access to commercial broadcasting time.

Only six out of 32 stations voluntarily extended time under the "fairness" doctrine because of a controversial commercial which they aired. (Question 75). The commercials which triggered "fairness" included railroad ads, energy ads, gas and auto ads and advertisements for no-fault insurance. (Question 76.) Three station managers offered time because

of interest group pressure and another admitted to doing so for fear of creating another Commission precedent on counter-ads. (Question 77.) A full third of respondents categorically refuse commercials which may raise "fairness" obligations. (Question 78.) In addition, the three major networks do not accept controversial product ads because of their opposition to counter-advertising.³⁵ The networks feel that a loss of some advertising revenues sustained to preclude future Banzhaf rulings is a bargain made in their favor.

Nondecision-Making - Summary

Efforts to retard both the purposeful regulation of the tobacco industry and consumer group access to broadcasting time permeate this case study. The tobacco industry succeeded in making the cigarette commercial ban a hollow victory for the anti-smoking forces. The broadcasting industry, with the aid of the FCC, has successfully prevented citizen access to the public airwaves. In short, this section demonstrates that the impact of short-range victories for the public's interest in the regulatory process are often overcome, in the long run, by the overwhelming inertia of the economic and political powers that be.

Circumvention

Circumvention is the final aspect of impact to be examined in this chapter. Active evasion or circumvention of a regulatory policy by the regulated group may take any one of the following forms: symbolic attacks on the ruling as "administrative legislation"; ignoring the decision or resisting it with force; petitioning the agency to amend its decision; or transferring appeals for relief to Congress or the courts. In this section

the data generated by the case study and the interview survey are compared to this circumvention model, determining whether broadcasters tried to evade the Banzhaf ruling. The results of this research, along with the conclusions of the preceding sections, should tell whether any attempts at circumvention were successful.

Did Broadcasters Try to Circumvent the 'Banzhaf' ruling?

Two-thirds of the broadcasters questioned said that their station's only response to the Banzhaf decision was to comply immediately, although we have seen that it took the WNBC-TV case to get something approximating real compliance. (Question 37.) One-third of respondents said that their station did try to circumvent Banzhaf. These stations either denounced the ruling, ignored it, petitioned the FCC to reconsider it, appealed it in the courts or went to Congress to have it reversed. Those station managers who attempted circumvention of the Banzhaf ruling did so out of disagreement with it, fear of the decision as a precedent, or out of a general misunderstanding of the ruling's provisions. (Question 38). Out of 32 stations, ten stations recalled that their general manager, parent corporation, or the NAB had contacted a government official personally to persuade them to oppose Banzhaf. (Question 40). The results of these conversations and whether or not they led to any active lobbying for the broadcasters could not be ascertained. (Question 44).

The facts of the case study narrative indicate that broadcasters as a group did petition the FCC to reconsider the Banzhaf ruling and then appealed the FCC's adverse reconsideration decision in federal court. The NAB, the three networks and over 80 individual broadcasters filed petitions

at the FCC for reconsideration.³⁶ These reconsideration petitions and legal briefs filed on appeal were filled with symbolic attacks on the Banzhaf decision. Broadcasters called it arbitrary, capricious, an abuse of discretion, and an attempt at administrative legislation in a field already pre-empted by Congress.³⁷

Preceding sections on compliance and enforcement suggest that radio broadcasters complied voluntarily with Banzhaf, as it was not an economic hardship for them to do so. Television broadcasters, on the other hand, evaded the ruling until ASH challenged key station licenses over the cigarette advertising issue. When the FCC signalled its serious concern with prime time compliance to the industry, television stations began to fall into line.

Circumvention - Summary

The results of this section, along with the sections on compliance, enforcement, and nondecision-making suggest that broadcasters did actively attempt to circumvent the Banzhaf ruling. These attempts were ultimately unsuccessful because of an adverse federal court decision (Banzhaf vs. the FCC) and the enforcement initiatives taken by ASH.

The Impact of 'Banzhaf' on the Broadcasting Industry

Several major conclusions about the impact of Banzhaf on the broadcasting industry can be drawn from this chapter.

- a) The Banzhaf decision was not merely a symbolic ruling. The FCC's aim in making the decision was to increase significantly the amount of anti-smoking information broadcast to the public. This goal was met by a

moderate degree of compliance with Banzhaf on the broadcasting industry's part. However, television stations did not comply with Banzhaf in prime evening time until ASH and the FCC pressured them into doing so. Active circumvention attempts by broadcasters were equally unsuccessful due to a Circuit Court ruling in the FCC's favor.

b) There is a close correlation between awareness and understanding of the Banzhaf decision and the potential impact it had for the broadcaster in question. However, there was an inverse relationship between awareness and understanding of the ruling and compliance with it. Radio station management, while less aware of Banzhaf, complied more immediately and substantially with it because it was economically feasible. Network television management, having a greater understanding of the decision, dragged their feet on prime time compliance because of the economic costs involved.

The broadcasting industry was split in its attitudes toward Banzhaf and personal agreement or disagreement with the decision seemed to have little effect on compliance with it. Industry attitudes toward the FCC in general also tended to be mixed, with significant agreement that the FCC is basically a fair regulatory agency. Banzhaf had little effect on general attitude toward the FCC.

c) While broadcaster attitudes toward Banzhaf were mixed, they were united in their opposition to the FCC's proposed cigarette commercial ban and the subsequent Public Health Cigarette Smoking Act. Opposition was based primarily on the fact that the PHCSA caused the broadcasting industry to lose more than \$200 million a year in advertising revenues.

The industry's belief that the cigarette advertising ban was a symbolic defeat for the tobacco lobby has been sustained by rising cigarette consumption rates.

d) The broadcasting industry is even more united in its opposition to the principle of counter-advertising, which it believes poses a fundamental threat to the system of commercial broadcasting itself. The effect of broadcast industry views and values on the FCC, is illustrated clearly in the counter-advertising cases and in the FCC's recent decision to reverse Banzhaf. While the FCC would go so far as to advocate a cigarette advertising ban (which cost broadcasters over \$200 million a year) it drew the line at sustaining a regulatory policy that threatened to undermine the economic base of the system itself. The FCC engaged in extensive nondecision-making to deflect the potential growth of the counter-advertising movement. The FCC and the broadcasting industry united in their determination to prevent Banzhaf from becoming a true precedent, frustrated consumer group attempts to gain access to radio and television time on the basis of "fairness" and product commercials.

e) Banzhaf's greatest impact on the broadcasting industry is the precedent which it set for Commission intervention in programming content and for public access to a heretofore nearly closed communications medium. However, the FCC has succeeded in reducing the potential implications of the Banzhaf decision through its "fairness" doctrine inquiry.

We turn now to the final chapter of this study. Chapter Six will recapitulate the major findings of this study, with special reference to the hypotheses stated in Chapter One. It will relate the conclusions

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of the Banzhaf case study and other administrative impact works to various insights posed by students of the regulatory process in particular, and the political process in general. Chapter Six will deal with the implications of the Banzhaf study for measuring the impact of regulatory policy. And finally, it will discuss some recommendations for reforming the federal regulation of broadcasting.

Footnotes

1. V.O. Key, Politics, Parties and Pressure Groups. (New York: Cromwell, 1942) p. 6 and Harold Lasswell, Power and Personality (New York: Norton, 1948) p. 10.
2. The following stations are included in my study: WPIX-TV, WNEW-FM, WIFM-FM, WBLS-FM, WNBC-TV, WCBS-FM, WOR-TV, WXLO-FM, WCBS, WNEW, WRVR-FM, WHN, WPIX-FM, WHOM, WPOW, WNBC, WNCN-FM, WEVD, WMCA, WOR, WINS, WABC, WWRL, WPLJ-FM, WNEW-TV, WADO, WRFM-FM, WXTV, WHBI-FM, WQXR, WCBS-TV, WABC-TV.
Letters were sent to each station requesting access to the person most knowledgeable about the "fairness" doctrine at that station. Usually this was the general manager. Occasionally the general manager was on vacation or indisposed for a long period and another station official (assistant manager, general counsel or president) had to suffice. This occurred in 11 cases. The station, not the interviewee, was the basic unit of response. All interviews were confidential. All interviews were conducted in New York City in the summer of 1973. The typical interview lasted 1 - 1 1/2 hours.
3. CBS, NBC, and ABC are the three major networks. PBS is a public network. WCBS-TV, WCBS-AM and FM are stations owned and operated by a network. Each network is allowed five owned and operated stations, located in the five largest markets in the country. Since advertising rates are based on the size of audience reached, these stations form a solid base for network profits. Affiliates are local stations around the country which broadcast network programs for a fee and the right to sell local advertising spots. Independents are not affiliated with any of the major networks and are frequently part of a broadcasting chain like the Westinghouse Broadcasting Group. WNEW- Channel Five (Metromedia) is an example of an independent station.
4. In 1969 \$150 million in network television revenues came from cigarette advertising. \$50 million in cigarette advertising was placed on local television stations and \$20 million was placed in radio. The New York Times August 21, 1969, page 83. This fact probably prompted John Banzhaf to file his original complaint against a network television owned and operated station (WCBS-TV in New York).
5. See Chapter Two. footnote 11, supra.
6. A good example of how this system operates arose in an off-the-record interview with a network vice-president, held in New York in May, 1974. He has been embroiled in the current controversy over advertising in children's programming and is a member of the NAB Code Executive Committee. At the time of our interview he was involved in behind-the-scenes negotiations with other NAB Code

members to create a unified industry stand against both a public interest group proposal for reducing advertising minutes and the FTC's and FCC's compromise offer. This network official was aware of the public interest group's proposal, the industry's counter-proposal and the compromise which the regulatory agencies would propose before public negotiations even began. In effect, he was organizing the broadcasting industry to reject the compromise proposal before the initial offer by ACT (Action on Children's Television) was made. (As it happened, The New York Times later reported that the broadcasting industry had accepted the FCC's and FTC's compromise offer).

7. See "In re formulation of appropriate further regulatory policies concerning cigarette advertising and anti-smoking presentations" FCC 70-1305 (December 15, 1970) and Chapter three supra.
8. 8 FCC 2d 382 (June 2, 1967).
9. April 1-7 and 15-21, 1968.
10. 16 FCC 2d (1969) 956,957.
11. 16 FCC 2d 884.
12. 16 FCC 2d 941.
13. WNEW-TV in New York claimed a large disparity between its own and ASH's figures. This was due to the fact that WNEW included twelve noon to eleven p.m. on Saturday and Sunday in its prime time period. WSBA's figures deviated substantially from ASH's because the station included a five minute interview broadcast at six o'clock to the time presenting the anti-smoking side at their station.
14. 32 FR #179 (September 15, 1967), p. 13170.
15. The FCC's letter to John Banzhaf rejecting his petition to revoke KNXT-TV's license is a good illustration of how the Commission clung to the illusion that it was not using a "rigid ratio" while it applied a 5:1 compliance standard. In its letter to Banzhaf the FCC first restates its original position, that only a significant amount of time must be devoted to anti-smoking material. It then goes on to review the facts surrounding KNXT-TV (Los Angeles) and concludes:
 "...the average ratio of commercials to anti-smoking announcements during hours of maximum viewing (6-11 p.m.) at KNXT-TV was about 5:1....We believe that this record does reflect reasonable compliance...in this vital area. But ... as we have previously stated, parity between cigarette commercials and anti-smoking messages cannot be required, and precise mathematical formulae for achieving this sensitive balancing are inappropriate."
Letter to John Banzhaf (June 25, 1969), pp. 1-2.

16. In Re Application of Westinghouse Broadcasting Co. 16 FCC 2d (1969) 1034; In Re Complaint Versus Metromedia, op. cit.; In Re Complaint Versus Chronicle Publishing Co., op. cit.; and In Re Complaint Versus WNBC-TV, op. cit.
17. Geller told me that "in effect, after NBC, KRON, and WNEW, we ended up with a 5:1 prime time ratio". Interview, Washington, D.C. January 18, 1974. Former Chairman Hyde called the 5:1 ratio "a ratio for administrative convenience only", Interview, Washington, January 18, 1974. The NAB's general counsel also agreed that a 5:1 ratio was "generally understood through the industry to be the acceptable prime time ratio after the WNBC and WNEW rulings." Interview January 10, 1974, Washington, D.C.
18. Average compliance ratios for XYZ's owned and operated television stations for January, 1968 to May, 1969 were the following:
 Jan - 63:1 Feb - 96:1 Mar - 23:1 Apr - 6:1 May - 5:1 Jun - 4:1 Jul - 7:1 Aug - 6:1 Sept - 8:1 Oct - 10:1 Nov - 9.5:1 Dec - 10:1 Jan - 9:1 Feb - 8.5:1 Mar - 7.5:1 Apr - 4:1 May 4.5:1
 All figures from XYZ network study of its owned and operated stations, supra. Figures are rounded.
19. Figures obtained from FCC files in Washington.
20. Hyde interview, op. cit. Interview with Former Commissioner Kenneth Cox, January 14, 1974, Washington, D.C. Henry Geller also agreed with this, Geller interview, op. cit.
21. Cox interview, ibid.
22. This was confirmed by my interviews with FCC staff in Washington. No further efforts were made by the Commission to publicize or explain the intricacies of Banzhaf to broadcasters.
23. Geller stated unequivocally that without the ASH challenges the cigarette ruling would never have been enforced. Interview, op. cit. Cox agrees that ASH carried the brunt of the monitoring and enforcement function. Interview, op. cit.
24. In the ESSO case and in Center for Auto Safety.
25. Friends of the Earth and the Chevron case.
26. Jack Friedenthal and Richard Medalie suggest that the FCC is forced into relying on informal sanctions because its formal sanctions are too severe. See "The Impact of Federal Regulation of Broadcasting: Section 315 of the Communications Act", Harvard Law Review 445 (January, 1959). In 1970 Congress amended the Communications Act to give the FCC the power to levy fines of \$1000 per violation up to \$10,000 per broadcaster.

27. In its proposal of a cigarette ban the FCC stated directly that it believed that the networks would be able to get other advertising to recoup the loss of cigarette commercials. See Notice of Proposed Rule-Making FCC 69-95 (February 6, 1969). p. 289.
28. The FCC does have 14 monitoring stations around the country, but they are used mostly for technical purposes -- to check on interference, the use of spectrums and violators of power rules and the like. The agency has no program monitoring on a regular basis. The FCC usually does not monitor to check out the veracity of substantive citizen complaints. An exception is made for complaints that allege the use of obscene language on the air.
29. This view was agreed on by Geller, Hyde, Cox, Public Service Health officials, the NAB's general counsel and by network management. Disagreement was voiced by members of Senator Moss's staff and by the Tobacco Institute. Geller interview op. cit.; Hyde interview, op. cit.; Cox interview, op. cit.; Summers interview, op. cit. Interview with Edward Merlis of the Senate Commerce Committee held in Washington, D.C. on January 15, 1974. Interview with William Kloepfer, vice president of the Tobacco Institute, held in Washington on January 15, 1974. Off-the-record interview with an official of the National Clearinghouse for Smoking and Health conducted in Washington on January 18, 1974. Off-the-record interviews with network officials conducted in the summer of 1973.
30. Data on the number of "fairness" complaints received by the Commission are as follows: 1965 - 359 1966 - 409 1969 - 1, 689 1970 - 1,491 1971 - 1,683 1972 - 2,800 Statistics from the FCC's Complaints and Compliance Division, Broadcast Bureau and are found in Henry Geller, The 'Fairness' Doctrine in Broadcasting (Santa Monica: Rand, 1973), p. 22.
31. Letters of inquiry dropped from 169 in 1965 to 31 in the first six months of 1973. See Geller, ibid., p. 22.
32. Peter Bachrach and Morton Baratz, Power and Poverty (New York: Oxford, 1970.) On page 45 Bachrach and Baratz say "Challenges [to the system] can also be deflected by referring the demands or issues to committees or commissions for detailed and prolonged study ..."
33. Les Brown, "F.C.C. would limit reply ruling on ads", The New York Times (July 3, 1974) p. 61.
34. Ibid., p. 61.
35. A recent development illustrates the intensity of network opposition to counter-ads. Mobil Oil wanted to address the energy crisis within its commercials and offered to pay for time for consumer groups to reply. All three networks refused Mobil's offer. See The New York Times, March 16, 1974, p. 1.

36. See Chapter Three, supra, for a detailed listing of these petitioners.
37. See the brief filed by NBC, ABC and WJLB against Banzhaf in the Court of Appeals, February 28, 1968, p. 25. See also the NAB's brief appealing Banzhaf vs. the FCC in the Supreme Court, October, 1968 term. For a summary of the arguments presented by broadcasters against Banzhaf see Chapter Three, supra.

CHAPTER SIX: CONCLUSIONS ON THE MEASUREMENT OF
IMPACT, THE TESTING OF HYPOTHESES,
AND ON THE THEORETICAL IMPLICATIONS
OF THE BANZHAF CASE.

Introduction

The goal of this chapter is to provide a broader focus for the conclusions summarized at the end of the preceding chapters. It integrates these individual findings into fuller conclusions and relates them to the main problems set forth in Chapters One and Two. The chapter outline is as follows: The first section recapitulates our major findings in terms of the hypotheses posed in Chapter One, relates them to previous impact studies and to more general works on the political process. Section two integrates the results of these hypotheses and empirical findings and places them in a broader theoretical context. The next section explores how this study dealt with some of the fundamental problems involved in measuring impact, discussed at length in Chapter Two. And finally, this chapter recommends some changes to reform the federal regulation of broadcasting, placing this study within the framework set forth by Lasswell and Merriam in Chapter One.

Review of Major Hypotheses

The following section reviews the implications of the empirical findings for the major hypotheses posed in Chapter One. It also relates these findings to the substantive conclusions of other impact studies and to more general works on the political process.

Question One: Were the limits of the FCC's 'fairness' doctrine and cigarette advertising policies set by their acceptability to the broadcasting industry?

One of the major assumptions of writers on the public regulation of business is that powerful regulated groups set the limits of federal regulatory policy affecting their industry.¹

Students of the regulatory process indicate that wealthy clientele groups accomplish this by framing the questions brought before the regulatory agencies and by influencing the regulators' most basic values. The FCC's policies on cigarette advertising prove to be exceptions to this rule. The results of our interviews demonstrate that the FCC's initial Banzhaf decision was unacceptable to fifty per cent of New York broadcasting station executives. The commercial cigarette advertising ban was even more unacceptable to the FCC's clientele. Seventy-one percent of New York broadcasters disagreed with the ban on cigarette commercials, noting that it entailed a severe loss of advertising revenues for the industry. John Banzhaf, an outsider with no ties to the commercial broadcasting industry, set the framework for the Commission's cigarette advertising policy with his original complaint against WCBS-TV, alleging that "fairness" applied to product commercials. Banzhaf's and ASH's decision to follow up his complaint with voluntary monitoring also set the stage for the Commission's enforcement of its original "fairness" and cigarette advertising ruling. The facts of this case study indicate that the broadcasting industry did not initiate the Commission's cigarette advertising policies, and once they were in effect, they were pursued beyond the limits of their acceptability to the broadcasting constituency.

In the subsequent controversy over the principle of counter-advertising, the FCC did equate broadcast industry interests with the public interest in its case decisions. The case study narrative demonstrates that the FCC limited itself to decisions which had only short

term economic consequences for its clientele. The FCC refused to extend Banzhaf to products other than cigarettes, accepting the broadcasting industry's argument that counter-ads threatened the commercial foundations of the system itself. The Commission allowed its clientele to set the limits of its advertising and "fairness" policies subsequent to Banzhaf, backing down from the independent stand it had taken on cigarette advertising. In July, 1974 the FCC caved in to industry pressures and reversed Banzhaf stating that the "fairness" doctrine should not be applied to any category of product commercial, cigarette commercials included.²

The original Banzhaf decision was made unanimously by the FCC when the Democrats outnumbered the Republicans on the Board 5 - 2. The decision to reverse Banzhaf was made by 5 Republicans joined by one Democrat. One Democrat, Commissioner Benjamin Hooks, dissented. The Republican - dominated Commission reflects the pro-industry and anti-consumer views of the Nixon administration. (This pro-industry bias is likely to affect the direction of FCC policies for some time to come, for 6 out of the 7 current commissioners are Nixon appointees.)

Question Two: What was the nature and degree of clientele compliance with 'Banzhaf'?

The FCC's decision to apply the "fairness" doctrine to cigarette commercials had a measurable effect on the allocation of commercial air time. Substantial increases in the number of anti-smoking messages broadcast were registered after Banzhaf. Many broadcasters aired these messages for the first time only after Banzhaf was

made public. Although Banzhaf did have a material effect on the allocation of broadcasting resources, compliance with the decision was not automatic. Radio stations complied more fully and more immediately with the FCC's ruling. Television stations dragged their feet on compliance by clustering lucrative cigarette commercials in prime evening time and free anti-smoking in inexpensive early morning and late night hours. ASH license challenge complaints prodded the FCC into enforcing Banzhaf, resulting in improved compliance with the decision on the part of the television industry. Thus in this case the "fairness" ruling in question was complied with only because a public interest group took enforcement of the FCC's decision into its own hands.

Question Three: Was the FCC's 'Banzhaf' decision symbolic?

Murray Edelman says that an administrative ruling is symbolic if it is made for publicity purposes only and does not materially effect the distribution of political resources and values.³ Edelman also specifically includes the FCC's "fairness" doctrine in his theory:

A notable example of symbolic action is the approach of the Federal Communications Commission to surveillance of program content in general and to discussions of public issues on the air in particular. In the postwar period we have had the Blue Book, the Mayflower Policy, the abolition of the Mayflower Policy, and the announcement of a substitute policy; but the radio or television license is in practice perfectly free, as he has been all along, to editorialize, with or without opportunity for opposing views to be heard, or to avoid serious discussion of public affairs entirely.⁴

The discussion above, dealing with clientele compliance, indicates that the Banzhaf decision was not merely symbolic. The FCC's decision to apply "fairness" to cigarette commercials had a material effect on the

distribution of broadcasting air time. In addition to increasing the number of anti-smoking messages, Banzhaf also gave access to groups like the American Cancer Society to prime time audiences. Bradley Canon, in his study of the "fairness" doctrine,⁵ also disputes Edelman's approach. Canon concludes that the "fairness" doctrine is not an administrative symbol, and that it impresses the regulated as much as the general public.⁶

Question Four: Did the FCC enforce the 'Banzhaf' decision?

The data generated by the impact analysis in Chapter Five indicate that the FCC's use of informal techniques like the letter of inquiry and the progress report increased clientele compliance with the Banzhaf decision. Canon also notes that the "fairness" doctrine's impact is not due to the FCC's use of formal enforcement sanctions. He concludes that broadcaster fear of the FCC's licensing and other discretionary powers, and the FCC's willingness to make use of that fear through the "lifted eyebrow of reproach" are the real reasons for the doctrine's impact.⁷ Friendenthal and Medalie, in an earlier study of the impact of "fairness,"⁸ arrive at somewhat different conclusions. Their research suggests that the informal enforcement of the "fairness" doctrine has been ineffective and that more middle range sanctions must be made available to the FCC to increase its impact on broadcasters.⁹ (Since then Congress has given the Commission the power to levy short term licenses and fines of \$1,000 per violation up to \$10,000 per broadcaster.)

Marver Bernstein sees the capacity of a regulatory agency to enforce and secure compliance with its policies to be the "primary

measuring rod of the ability of the agency to operate in the public interest."¹⁰ The conclusions of this case study and of other studies of administrative regulation¹¹ substantiate the ineffectualness of relying on voluntary compliance by clientele groups to implement regulatory policies. The results of these studies confirm Edelman's hypothesis that without concrete enforcement efforts, the public regulation of business will be largely symbolic in its effect.

Question Five: Did broadcasters try to circumvent the 'Banzhaf' decision?

The case study narrative and our impact analysis in Chapter Five suggest that broadcasters did actively evade the Banzhaf decision. Television stations circumvented the decision by concentrating anti-smoking messages in early morning and late evening hours. Broadcasters as a group petitioned the FCC to amend the ruling, and turned to Congress and the courts for relief. The NAB and the major networks attacked Banzhaf as an example of "administrative fiat". These circumvention attempts were ultimately unsuccessful because of a Court of Appeals ruling adverse to broadcasters (Banzhaf versus the FCC) and because the FCC indirectly upheld ASH complaints about prime time compliance in WNBC-TV. Broadcasters tried to cut their losses by limiting Banzhaf to cigarette commercials, after their attempts to circumvent the decision failed. The industry (with the FCC's tacit approval) then tried to privatize the conflict over counter-commercials by conducting secret negotiations with Friends of the Earth. However, due to successive circuit court rulings (remanding decisions back to the FCC) industry attempts to limit Banzhaf to cigarettes alone and to inhibit public interest

in the issue, were also unsuccessful. Broadcasters and the FCC were thus forced to reverse Banzhaf in order to contain the counter-advertising controversy.

The desire of the broadcasting industry to remain in full control of access to commercial air resources lay behind their efforts to circumvent Banzhaf. E.E. Schattschneider states that:

...the basic pattern of all politics is conflict... the outcome of every conflict is determined by the extent to which the audience becomes involved ... that is, the outcome of all conflict is determined by the scope of its contagion...¹²

According to Schattschneider the great strategy of politics is simply that private power elites (who want to maintain private power ratios) will try to keep a conflict contained and out of the public domain, while those who are powerless will try to widen its scope.

The facts of the Banzhaf case support E.E. Schattschneider's approach. The broadcasting industry tried to maintain its control over broadcasting resources by restricting Banzhaf's scope. Public interest groups increased the scope of conflict over Banzhaf by turning to the courts. Their interests lay in expanding Banzhaf to include product commercials other than cigarettes. But the FCC, in its recent reversal of Banzhaf, has succeeded in privatizing the conflict over counter-advertising. Broadcasters are again the final judge of who should have access to the commercial air waves.

Question Six: Did the FCC ignore 'Banzhaf' in subsequent 'fairness' cases, thwarting further public interest group demands for television and radio time?

Former Commissioner Nicholas Johnson and John Jay

Dystel write that:

... If the FCC no longer approves of its own rules and precedents it simply ignores them -- either by waiving them to death or otherwise evading them. In short, the concept of principled decision-making does not exist at the FCC.¹³

Chapters Four and Five demonstrate that the FCC engaged in extensive nondecision-making to prevent Banzhaf from becoming a true precedent. The Commission has succeeded in its goal of preventing public interest access to commercial broadcasting time. The Commission has refused to extend Banzhaf to identical cases remanded to it by the Court of Appeals; it removed the question of counter-advertising from the public decision-making arena through its device of an overall "fairness" inquiry; and it has recently approved a staff report reversing the Banzhaf decision itself. The three year delay in making this report public had already blunted further consumer demands for access to television and radio time. Peter Bachrach and Morton Baratz accurately sum up the effects of the FCC's "fairness" doctrine inquiry when they write:

Challenges [to the system] can ... be deflected by referring the demands or issues to committees or commissions for detailed and prolonged study or by steering them through time-consuming and ritualistic routines that are built into the political system. Tactics such as these ... are highly effective means to 'screen out any energetic search for innovation', and are particularly effective when employed against impermanent or weakly organized groups (e.g. students, the poor), which have difficulty withstanding delay.¹⁴

A Republican, conservative-dominated Commission has now found the time to be ripe for the "fairness" inquiry's results to be made public. The FCC has determined, in retrospect, that the Banzhaf decision was:

... a mechanical approach to the 'fairness' doctrine which represented a serious departure from the doctrine's central purpose, that of facilitating the development of an informed public opinion.¹⁵

The only rational explanation for the FCC's decision to overturn Banzhaf at this time (when cigarette commercials are no longer on the air) seems to be the dangerous precedent which it sets for consumer access to broadcasting air time.

Hypotheses - Summary

The Banzhaf case study and other studies of administrative impact point out the strengths and weaknesses of various insights into the regulatory process offered by Schattschneider, Edelman, Bernstein, Johnson, and Bachrach and Baratz, among others. A broader focus, integrating the results of our hypotheses and empirical findings, is provided in the following section.

Approaches to the Political Process and the Substantive Conclusions of the 'Banzhaf' Case

This section integrates the results of our hypotheses and empirical findings with broader approaches to the political process. The aim throughout this analysis is to deepen our understanding of both the Banzhaf decision in particular and the regulatory process in general.

'Key Issues', 'Nondecisions', the 'Funnel of Causality' and Symbolic Politics

W. Phillips Shively notes the essential relationship between theory and empirical work and its implications for social science research in the following quotation:

Social research is an attempt by social scientists to develop and sharpen theories which give us a handle on the universe. Reality, unrefined by theory, is too chaotic for us to absorb.... In order to have any hope of understanding why such things happen, in order to have any hope of controlling what happens, we must simplify our perceptions of reality. Social scientists carry out this simplification by developing theories.¹⁶

The theories that have best enabled me to make some order out of this chaos are Gordon Allport's "funnel of causality", Peter Bachrach and Morton Baratz's "nondecision-making," and Murray Edelman's "symbolic politics."¹⁷

Gordon Allport's "funnel of causality" helps to simplify multiple causality in social phenomena by creating a continuum of variables, according to their distance in time and specificity from the object effected. Allport applies his model to explain the factors which create individual personality differences. Close influences on personality development are variables such as family background, neighborhood, education and vocational training. The existing social situation is a factor slightly further out on the continuum. Factors which have a remote influence on the development of personality are the structure of society itself, economic and cultural traditions, and national and historical influences.¹⁸ In this way Allport's model of causality distinguishes between short and long range effects and between immediate and remote impact.

Bachrach and Baratz's nondecision-making and "key" issues approach also help provide the reference points for a systemic evaluation of the Banzhaf case. The nondecision-making approach focuses on the actual consequences of political decisions and on the roles which private and public organizations play in the development and retardation of controversial demands and issues. Nondecisions may transform substantive issues into symbolic ones; may thwart demands for change in the political system by invoking rules or procedures; or may threaten sanctions against or co-opt

the group or individual in question. Those who hold power resort to nondecision-making when "key" issues¹⁹ threaten to become a part of the public decision-making agenda.

a) Two "key" political issues were raised in the Banzhaf case study. Counter-advertising, a broad right of consumers to reply to controversial product commercials, threatened the dominant position enjoyed by broadcasters in determining broadcast access policies. The FCC's Banzhaf decision, the FTC's proposal for strong warnings in print advertisements, and increasing state regulatory efforts all posed fundamental threats to the control of the tobacco lobby and of congressmen from tobacco-producing states over federal tobacco policies. In the long run broadcast anti-smoking messages threatened to reduce tobacco industry profits (by discouraging new smokers and cigarette sales). Banzhaf also set a potential precedent for FCC interference in the content of programming and for the proliferation of consumer-oriented counter-ads, which might reduce broadcaster advertising revenues. Although Banzhaf's short range effect was only to increase the amount of broadcast anti-smoking material it did threaten both the tobacco and broadcasting establishments in the long run in fundamental ways.

b) The FCC and broadcasters carefully limited the impact of Banzhaf to cigarette commercials. Consumer group attempts to make Banzhaf into a general precedent for counter-advertising were thwarted. At first, the FCC tried to convert the substantive controversy over counter-ads into a procedural one with its use of the "Phelps" rule. That device failed when consumers used the criteria set down by "Phelps" in their complaints.

The Commission then proposed a short range substantive concession to the anti-smoking forces. When the cigarette commercial ban went into effect, the FCC could plead that Barizhaf was a special case. In this way the ban successfully diverted the public from the key issue of counter-ads, protecting the broadcasting establishment from the long range economic threats which it posed.

c) Another long range, systemic consequence of the broadcast cigarette advertising ban was to divert public attention away from the effective regulation of the cigarette manufacturing industry. Although the Public Health Cigarette Smoking Act was trumpeted as a major breakthrough for the federal regulation of tobacco, the tobacco lobby lost the battle but really won the war. Murray Edelman says that:

The most intensive dissemination of symbols commonly attends the enactment of legislation which is most meaningless in its effects upon resource allocation. In the legislative history of particular regulatory statutes the provisions least significant for resource allocation are most widely publicized and the most significant provisions are least widely publicized.²⁰

The Public Health Cigarette Smoking Act's most publicized provision -- banning cigarette advertisements from television and radio -- seems on the surface to reallocate resources in the public interest. However, the ban's long range effects reduced the number of broadcast anti-smoking messages, drastically increased print cigarette advertising, and delayed further state or federal regulation of cigarette advertising. Cigarette consumption rates and tobacco company profits rose after the ban went into effect. The cigarette commercial ban was thus a perfect example of symbolic action. Its long term consequences were to subsidize

the tobacco industry and to put the tobacco lobby and tobacco state congressmen back in firm control of cigarette "regulatory" policy.

d) Further attempts by consumer groups to expand Banzhaf into a precedent after the cigarette advertising ban failed. The FCC's refusal to apply Banzhaf to similar complaints and its overall "fairness" inquiry contained the counter-advertising controversy and returned broadcasting to the comfortable status quo of pre-Banzhaf times. Broadcasters once again have the final word on who can gain access to the communications media and the professional Madison Avenue "spot" format remains the private property of the corporate commercial advertiser.

While the short range impact of Banzhaf was limited to cigarette commercials, its long range impact was to raise two key questions of public policy. According to E.E. Schattschneider:

All forms of political organization have a bias in favor of the exploitation of some kinds of conflict and the suppression of others because organization is the mobilization of bias. Some issues are organized into politics while others are organized out.²¹

The FCC's Banzhaf decision functioned to organize the questions of public access to the communications media and of effective tobacco regulation into the political system. The cigarette advertising ban suppressed these key issues and functioned to organize them out of the political decision-making arena.

Measuring Impact

In Chapter Two we concluded that the development of impact analysis was characterized by a string of individual case studies, with

few works relating their findings to other studies or to more general theories of the political process. Sections one and two have recapitulated our major hypotheses, related them to the conclusions of previous impact studies, and to more general theories of the political process, in hopes of overcoming this fundamental deficiency in the field. A second major measurement problem set forth in Chapter Two was that the typical impact study was plagued by a low level of analysis. Many impact studies defined impact as compliance, resulting in a one-dimensional approach with predictably limited results. The majority of studies focused on a single case decision and restricted the scope of their analyses to a limited geographic area and a brief period of time. Other practical research problems (including vague definitions and the problem of inaccessible and expensive data) were also widespread. The efforts of this study to overcome these important measurement problems are summarized in the following section.

How Does This Study Overcome the One-Dimensional,
Single Case Approach to Impact Analysis?

a) The Banzhaf study's basic thrust is multidimensional. The operational procedures used assumed that impact has several dimensions (compliance, enforcement, nondecision-making and circumvention) and that these aspects of impact are related both analytically and empirically. Analytic relationships are explored in the discussion of the four faces of power (Chapter One, supra.) Empirical evidence confirming these analytic interrelationships is found in Chapter Five. Data analysis demonstrates that clientele compliance is substantially influenced by agency enforcement

efforts; that these enforcement efforts, in turn, are influenced by high or low compliance rates and the nature of clientele circumvention attempts; and that nondecision-making can make enforcement symbolic and thus has important consequences for clientele compliance and circumvention rates. In addition, Chapter Five explored the effect of clientele attitudes, beliefs, awareness and understanding on the impact of the Banzhaf decision. This study's basic premise has been that a decision's impact is not limited to compliance and that it is determined by a two-way process²² involving both the actions of the decision-makers (enforcement and nondecision-making) and the actions of the group the decision is directed toward (compliance and circumvention).

b) Along with being multi-dimensional, the Banzhaf study's focus is not restricted to a single decision. The case study relates the original Banzhaf decision, the FCC's reconsideration ruling, and its proposed cigarette commercial ban to Congress's enactment of the Public Health Cigarette Smoking Act, and thus explores the impact of Banzhaf on the federal legislative process (Chapter Three). Chapter Four is based on a case decision analysis of "fairness" complaints, focusing on the impact of Banzhaf on internal decision-making at the FCC. Chapter Five examines the impact of Banzhaf on the broadcasting industry and includes an analysis of the FCC's case decisions enforcing the Banzhaf ruling. In these ways, the Banzhaf study explores an entire series of related administrative and legislative decisions.

How Does the 'Banzhaf' study Deal With Limitations
of Time and Place?

c) The public record of FCC case decisions enforcing Banzhaf and on

counter-advertising enabled one to measure the impact of Banzhaf over a seven year period (1967-1974). Banzhaf's immediate and long range impact was analyzed with fewer resources than would ordinarily support research covering a substantial time period.

d) An impact study of the Banzhaf decision confined to the New York City area is really one national in scope. The television networks (whose headquarters are in New York) carried the bulk of cigarette advertising and were thus were most affected by the Banzhaf decision. The response of the network's New York City Stations can be taken to indicate the network's national response. And the fact that New York is the communications capital of the country also made data relatively inexpensive and accessible for a researcher based in the metropolitan area.

How Did This Study Deal With Definitional Problems?

e) The problems created by vague definitions in previous impact studies were reduced by explicitly defining and analyzing compliance, enforcement, nondecision-making, and circumvention before these terms were operationalized (in Chapter One). These definitions were summarized before each section of the data analysis and provided the reference point for our assessment of Banzhaf's impact. The critical problem of arriving at a satisfactory definition of compliance was resolved through an examination of FCC documents and case decisions and through extensive personal interviews with key participants in the case study. (See Chapter Five, supra.)

How Did the 'Banzhaf' Study Overcome
Practical Research Problems?

f) Practical problems of research and data collection are widespread when social science research is conducted with the resources of one individual. The advantages of a New York metropolitan base for studying the impact of federal broadcasting policy were noted previously. Data was collected in both Washington and New York and came from a wide variety of sources: from internal studies conducted by two major networks; from FCC documents; from ASH's files; from Broadcast Advertiser's Reports; and from personal interviews with key participants in the case study and with management personnel at each of New York City's commercial broadcasting stations.

The preceding discussion demonstrates that a creative use of the research techniques of the personal interview, content analysis, and of case analysis can help the researcher overcome many of the problems involved in measuring impact. A careful attention to fundamental definitions and their relation to operational procedures is also helpful in avoiding many measurement pitfalls. A close relationship between resources and the scope and limits of time and geography of the project undertaken is also a basic research requirement.

In the following section, this study makes some recommendations for basic changes affecting the FCC's policy-making process. The aim of these recommendations is to reform the FCC's present ad-hoc, incremental approach to regulation.

Lasswell, Merriam and the Rationalization of the
Policy Process

In this chapter the implications of the Banzhaf case for general approaches to the political process and for measurement problems encountered in conducting impact analysis have been reviewed. The final task (outlined in Chapter One) is to relate this case study to the challenges set forth by Charles Merriam and Harold Lasswell for the development of a science of policy analysis. This section recommends changes that would reform the FCC's policy-making process, placing this study squarely within the framework set forth by Lasswell and Merriam below.

Harold Lasswell and Charles Merriam have challenged political scientists to develop a science of policy analysis, for the good of the discipline and the community as a whole. Lasswell says that the policy formulation and enforcement process must first be empirically analyzed before the policy sciences can collect and interpret data on the most important political problems of our time.²³ Lasswell also believes that the social sciences can help decision-makers make more rational decisions by evaluating alternative courses of action in terms of their postulated goals, and by determining the optimum means of bringing these goals about.²⁴ According to his explanation of the "policy orientation," the policy process itself is a suitable object of study in its own right, "primarily in the hope of improving the rationality of the flow of decision."²⁵

Charles Merriam also urges social scientists to rationalize the policy-making process by analyzing political alternatives scientifically in light of their costs and benefits.²⁶ Merriam calls for "political prudence," the organization and application of factual information to

political problems.²⁷ For Merriam and Lasswell, political science should aim to be a:

... discipline concerned with explaining the policy-making and policy-executing process, and with locating data and providing interpretations which are relevant to the policy problems of a given period.²⁸

Both believe that social scientists will be able to pinpoint barriers to rational and systematic public policies by studying empirically the policy-making and executing process.

Following Lasswell, this study quantified the policy formulation and enforcement process before it analyzed Banzhaf's impact. This quantitative analysis was achieved by exploring the nature of compliance, enforcement, circumvention, and nondecision-making in the Banzhaf case using the social science research techniques of personal interviewing, content analysis and case decision analysis. (See Chapter Five, supra.) The Banzhaf study took the postulated goals of the Banzhaf ruling and the cigarette advertising ban into account in its evaluation of their systemic consequences. (See Chapter Six, supra.) This study's most fundamental goal has been to illuminate the policy-making process, and especially the implementation stage of that process, which has been ignored for far too long. (See Chapter One, supra.) And this chapter evaluates the short and long range benefits of the Banzhaf decision and the cigarette advertising ban. These evaluations were based on the factual data generated by studying Banzhaf's impact on congressional legislation, internal decision-making at the FCC, and on the broadcasting industry. (See Chapters Three, Four and Five, supra.)

Systemic barriers to effective regulation of the broadcasting industry are also suggested by an empirical analysis of the Banzhaf case. The present system of regulation functions in an ad-hoc, incremental manner

with little or no FCC supervision or control over clientele compliance with its decisions. Some suggestions to reform the present system are made and discussed below.

- 1) Congress should increase the staff and budget of the FCC's Complaints and Compliance Division. This Division currently has a staff of five lawyers and five field investigators who have to insure that 8,000 licensees comply with FCC regulations. This staff handles 40,000 complaints a year.²⁹ The ratio of complaints to staff insures that all but a tiny fraction of complaints will be handled in a routine and meaningless manner. Congress bears the responsibility for this situation. On one hand, it has charged the FCC to regulate the nation's commercial broadcasting system in the public interest, convenience, and necessity. But on the other hand, Congress allocates a tiny budget and staff to the Commission. The gap between the scope of the FCC's responsibilities and the size of its budget and staff has long inhibited effective regulation in the public's interest.
- 2) The FCC should conduct spot check monitoring of local broadcast stations for compliance with its "fairness" doctrine rulings. Fourteen local FCC monitoring stations are already in existence, but they monitor stations mainly for technical and frequency violations. (They do monitor a station if a substantive obscenity complaint is received by the Commission but do not monitor for complaints about lack of "fairness.") FCC inspectors already visit individual stations to check their logs for compliance with technical regulations. Their responsibilities could be expanded to include monitoring television and radio stations for violations of regulations affecting program content, as well.

Commissioner Robert E. Lee has told me that if the FCC were forced to monitor every licensee for "fairness" doctrine violations, it would need a bureaucracy the size of the Pentagon. This argument misses the point. This study and others have demonstrated that the individual broadcaster is reluctant to cross the FCC, for fear of jeopardizing or delaying his license. Thus the FCC can rely on tepid letter warnings and the like to gain compliance with its policies. However, these warnings, due to the FCC's limited budget and staff, are applied haphazardly and affect only a small proportion of the total broadcaster universe. If every broadcaster became a potential target for random, spot-check monitoring by the FCC, "fairness" doctrine regulations would become as uniformly adhered to as technical regulations are today.

3) The FCC's public relations staff should conduct extensive publicity and educational campaigns explaining its policies to both broadcasters and the general public. The substance of the "fairness" doctrine would have greater impact if the FCC would publicize it and make it more explicit.

Bradley Canon notes that since the FCC does not act as its own publicity agent and establishes the details of the "fairness" doctrine in a judicial and sometimes inconsistent manner, broadcasters receive most of their "fairness" information from central sources within the industry (the networks or the NAB).³⁰ These sources are often hostile or indifferent to the doctrine. As a consequence, when they transmit information to local broadcasters they exaggerate the difficulties and inconveniences which compliance with the "fairness" doctrine may raise.

By publicizing its "fairness" rulings, by making them more explicit, and by establishing formal liason offices with its clientele, the FCC could overcome the disadvantages of relying on informal and haphazard communications links with the networks and the NAB. Direct communications between the FCC and small, individual broadcasting stations would help to rationalize the implementation of "fairness" policies.

4) The FCC should reexamine its procedural and red tape requirements (especially the Phelps rule) to determine whether they are blocking the ordinary citizen's access to the Commission's complaint process. The Phelps rule puts the initial burden of the "fairness" process on the complainant by requiring him to present a prima facie case that the station failed in its overall programming to present a reasonable opportunity for contrasting views. Because the FCC has held that stations are not required to supply complainants with information, complainants have only one option -- monitoring the station for a substantial period of time. Monitoring is a time-consuming matter and few complainants are dedicated enough to the "fairness" doctrine to undertake it. Thus while the FCC enforces the "fairness" doctrine solely through a complaint procedure, it handicaps the average complainant with a really impossible monitoring responsibility at the outset.

Henry Geller, former FCC General Counsel, makes two suggestions which would alter this bias in favor of the broadcasting industry. The FCC could lighten the burden on the complainant by making it clear that only public affairs programming need be monitored, and it could set some minimum standard for the time period to be monitored.³¹ In other words Geller is saying that the FCC's procedures have to be publicized and made more specific if the average citizen is to be given a fair shake in the complaint process.

5) The FCC should use middle level sanctions like the letter warning, the short term license renewal, and fines more frequently to secure more effective compliance with its policies. The FCC's enforcement of the "fairness" doctrine has been strait jacketed by sanctions that were excessive compared to the violations involved. These sanctions (license revocation, denial or suspension) also would involve the FCC in time-consuming and burdensome litigation and were infrequently applied. In 1960 Congress helped to rectify this situation by giving the FCC the power to levy \$1,000 fines (up to \$10,000 per broadcaster) and the power to give stations short term licenses. However, since the "fairness" doctrine is a policy (not a rule) and is defined by the Commission in vague and uncertain terms, fines are rarely applied. And a short term renewal is really only a warning for it allows the broadcaster to stay on the air. Until the FCC either codifies the "fairness" doctrine or makes it more explicit, it will be forced to rely on indirect, haphazard techniques to enforce it.

A relatively small reallocation of priorities and resources could result in more effective public regulation. However, radical change in the system is not likely to come about even if these reforms were implemented. As long as the values and attitudes of those appointed to the regulatory commissions remains the same, structural changes are not likely to have profound effects.

The Regulatory Process

This concluding section of the study discusses some aspects of the regulatory process pointed up by the Banzhaf case. It examines

the case study to determine which political forces gained as a result of the decisions studied here, and whether these gains were made at the expense of others. And finally this section discusses the implications of the Banzhaf case for the future effectiveness of consumers in the regulatory process.

The critical factor in evaluating this case study is the nature of the policy decisions involved. Banzhaf and the cigarette ban did not have only economic effects. These decisions had life and death consequences. Overwhelming scientific evidence indicated that cigarette smoking resulted in premature death from cancer, emphysema and heart disease. This evidence, documented in government reports, resulted in the Banzhaf decision. The FCC's decision to apply "fairness" to cigarette commercials was a surprisingly innovative and courageous policy, from a usually timid and industry-oriented agency. Banzhaf was a decision made in the public's interest and it had substantial effects on disseminating information about the health hazards of smoking, on reducing cigarette consumption, and on attitudes toward smoking and health. However, before the FCC is patted on the back for Banzhaf it should be remembered that near - vigilantism on the part of Banzhaf and ASH was necessary before it was enforced. Without ASH's extensive monitoring Banzhaf would have been largely symbolic in its effects. The broadcasting establishment was successfully evading Banzhaf before ASH embarrassed the FCC into enforcing its own policy decision.

The Public Health Cigarette Smoking Act was touted as a consumer victory against the wealthy, powerful, and well-organized broadcasting and tobacco

lobbies. This superficial view of the act ignores its real consequences. Although broadcasters suffered a short term economic loss due to the ban, this loss was quickly made up by other local and nationally advertised products. They made public relations gains and points with the FCC by dropping cigarette ads, and were also able to eliminate most anti-smoking messages as well. The cigarette ban also seemed to mute the potential problems that Banzhaf was posing as a precedent. Most importantly, the cigarette commercial ban did not hurt the tobacco industry. Due to the ban the tobacco industry increased its profits and sales. Banzhaf's positive effects -- changing Americans' attitudes toward smoking and reducing cigarette consumption -- went down the drain. In the Public Health and Cigarette Smoking Act the tobacco lobby had pulled the same kind of strategic coup that had worked in 1965. They staged a symbolic legislative "loss" in order to protect themselves from effective regulatory legislation.

Harold Lasswell defines politics as "Who Gets What, When, How?" The Banzhaf case and its aftermath demonstrate that in regulatory politics those who have get more, and those who don't get a little, and then lose it quickly. Another conclusion generated by the Banzhaf case is that consumer involvement in the decision-making stage of the regulatory process is not sufficient for a continuing impact on policy. Consumer groups have to organize permanent offices to sustain legislative and administrative victories. And finally, this case study serves as a warning for future well-intentioned groups who are interested in seeing public policies that

are really in the public's interest. These groups should evaluate the possible consequences of suspiciously easy "victories" over entrenched political interests. Often these "victories" are brazenly undermined by the "vanquished" before the ink dries on the legislation in question.

Summary Conclusions

The Banzhaf study has addressed some of the major problems suffered by previous impact studies. It has generated new empirical data about the informal administrative process. In addition, it has shed light on the policy making process at the FCC, and on the role that clientele attitudes play in determining the impact of FCC regulations. It is very tempting to make generalizations on the basis of this case about broader subjects like the interrelationship between Congress and the regulatory agencies; between the corporate structure and the government; between socio-economic power and political power. These problems deserve the attention and concern of all thinking Americans. However, any one of these is the subject of a longer and more comprehensive work than the current one. This study's focus on a regulatory decision points up the critical importance of the regulatory policy-making process. It is the author's hope that any interest stimulated by this work will be followed up by further studies in this field.

Footnotes:

1. This argument is made by Marver Bernstein in Regulating Business by Independent Commission (Princeton: Princeton University Press, 1955) p. 156; by Murray Edelman in The Symbolic Uses of Politics (Urbana: University of Illinois Press, 1964) pp. 23-24; by Louis Kohlmeier in The Regulators (New York: Harper and Row; 1969) p. 30; by Henry Kariel in The Decline of American Pluralism (Stanford: Stanford University Press, 1961); and by Grant McConnell in Private Power and American Democracy (New York: Knopf, 1966). Classic works in the field of regulatory politics by E. Pendleton Herring, Public Administration and the Public Interest (New York: McGraw-Hill, 1936); by Avery Leiserson, Administrative Regulation (Chicago: University of Chicago Press, 1942); and by David Truman, The Governmental Process (New York: Knopf, 1951) also make this argument.
2. According to a draft of an FCC staff report, approved unanimously by the Commission, with Benjamin Hooks dissenting on this provision. Reported in The New York Times, July 3, 1974, p. 61.
3. See The Symbolic Uses of Politics *op. cit.* Chapter three contains a general discussion of the use of administrative rulings as symbols.
4. Ibid., p. 39.
5. The FCC's 'Fairness' Doctrine: Its Substance, Enforcement and Impact, Unpublished PH.D. dissertation, Department of Political Science, University of Wisconsin, 1967.
6. Ibid., pp. 325-326.
7. Ibid., p. 338.
8. "The Impact of the Federal Regulation of Broadcasting", 72 Harvard Law Review 445 (January, 1959).
9. Ibid., p. 491.
10. Bernstein, *op. cit.* p. 217.
11. Friedenthal and Medalie, *op. cit.*; Theodore Caldwell and Leslie Roos "Voluntary Compliance and Pollution Abatement" in Roos (ed) The Politics of Ecosuicide (New York: Holt, Rinehart and Winston, 1971); and Edward Cox *et. al.*, The Nader Report on the FTC (New York: Grove Press, 1969). Caldwell and Roos say on page 263 that the results of their research indicate that conservation policies without effective enforcement and monitoring by the Federal Government are largely symbolic in their effects. Cox *et. al.* associate the FTC's refusal to use its enforcement sanctions and

its reliance on voluntary compliance to be fundamental causes for its ineffectiveness as a regulatory agency. The authors also note that the FTC relies heavily on symbolic rhetoric to prove to the public that it is "regulating" business.

12. The Semi-Sovereign People (New York: Holt, Rinehart and Winston, 1960), p. 2.
13. "A Day in the Life: the FCC", 82 Yale Law Journal #8 (July, 1973) p. 1633.
14. Power and Poverty (New York: Oxford University Press, 1970) p. 45. Cox finds that the FTC uses the device of the prolonged study for identical reasons:
 "A study into a given area is announced with fanfare and expression of concern, and a target date is set. As time passes, the due date is quietly extended and extended again ... with delay serving to cloak an issue in secrecy and to avoid action on it." op. cit., p. 75.
15. The New York Times (July 3, 1974), p. 61.
16. The Craft of Political Research (Englewood Cliffs: Prentice Hall, 1974) p. 3.
17. See his work The Nature of Prejudice (Boston: Beacon Press, 1954), Chapter Thirteen for a detailed discussion of this model. This concept is also used in Angus Campbell, et al., The American Voter (New York: John Wiley and Sons, 1960), and in a modified form, in Donald Matthews and James Prothro, Negroes and the New Southern Politics (New York: Harcourt Brace, 1966).
18. Allport, ibid p. 208.
19. A "key" issue is a:
 "...challenge to the power or authority of those who regularly enjoy a dominant position in the determination of policy outputs ..."
 Bachrach and Baratz, op. cit., p. 94.
20. Edelman, op. cit., p. 26.
21. Schattschneider, op. cit., p. 71.
22. Herbert Simon confirms that decision-making is a two-way process:
 "Authority may be defined as the power to make decisions which guide the actions of another. It is a relationship between two individuals, one 'superior', the other 'subordinate'. The superior frames and transmits decisions with the expectations that they will be accepted by the subordinate. The subordinate expects such decisions

and his conduct is determined by them. The relationship of authority can be defined, therefore, in purely objective and behavioristic terms. It involves behaviors on the part of both superior and subordinate. When, and only when, these behaviors occur does a relation of authority exist between the two persons involved. When the behaviors do not occur there is no authority ..."

Administrative Behavior (New York: Free Press, 1957), p. 125.

23. Harold Lasswell and Daniel Lerner, (ed) The Policy Sciences (Stanford: Stanford University Press, 1965), Chapter One.
24. Lasswell, ibid.
25. Ibid., p. 3.
26. Charles Merriam, The New Aspects of Politics (Chicago: University of Chicago Press, 1931), p. 261.
27. Ibid., p. 261.
28. Lasswell, op. cit., p. 14.
29. Figures taken from Johnson and Dystel, op. cit., p. 1623.
30. Canon, op. cit., p. 326
31. Henry Geller, The 'Fairness' Doctrine in Broadcasting (Santa Monica: Rand, 1973), p. 22.

APPENDIX

APPENDIX

* Because of multiple responses numbers add up to more than 32.

1. How long have you been in the broadcasting industry?

- | | |
|---------------------|------|
| 1) less than 1 year | (1) |
| 2) 1-3 years | (0) |
| 3) 3-6 years | (4) |
| 4) 6-12 years | (7) |
| 5) 12-20 years | (14) |
| 6) over 20 years | (6) |

2. How long have you been at this station?

- | | |
|---------------------|-----|
| 1) less than 1 year | (5) |
| 2) 1-3 years | (7) |
| 3) 3-6 years | (8) |
| 4) 6-12 years | (9) |
| 5) 12-20 years | (3) |
| 6) over 20 years | (0) |

3. What is your position at the station?

- | | |
|-------------------------------|------|
| 1) general manager | (19) |
| 2) assistant manager | (2) |
| 3) counsel | (4) |
| 4) vice president | (2) |
| 5) owner | (1) |
| 6) director of public affairs | (1) |
| 7) president | (1) |
| 8) program manager | (1) |
| 9) sales manager | (1) |

4. How long have you been at this position?

- | | |
|---------------------|------|
| 1) less than 1 year | (11) |
| 2) 1-3 years | (7) |
| 3) 3-6 years | (9) |
| 4) 6-12 years | (4) |
| 5) 12-20 years | (1) |
| 6) over 20 years | (0) |

5. What position did you hold before your present job?

- 1) news director (2)
- 2) sales manager (7)
- 3) job outside of broadcasting
other than advertising (2)
- 4) advertising (2)
- 5) director of public affairs (2)
- 6) private legal practice (1)
- 7) vice-president (4)
- 8) president of a radio station (2)
- 9) legal department at another
station (3)
- 10) director of syndication (1)
- 11) director of programming (1)
- 12) general manager of another
station (2)
- 13) assistant to general manager (1)
- 14) executive producer (1)
- 15) music director (1)

6. Have you heard whether the Federal Communications Commission has ever taken a position on the applicability of the fairness doctrine to advertising?

- 1) yes (22)
- 2) no (10)
- 3) no answer or don't know (0)

7. IF YES, when did you first hear about that position?

- 1) accurate on both case and year (1)
- 2) accurate only on case (6)
- 3) accurate only on year (0)
- 4) vague (13)
- 5) inaccurate (1)
- 9) no answer or don't know (1)

8. IF YES, how would you describe the position of the Federal Communications Commission?

- 1) full and accurate (3)
- 2) accurate-not full (4)
- 3) accurate-very little
information (5)
- 4) vague (4)
- 5) inaccurate (3)
- 9) no answer or don't know (3)

9. Are you familiar with the Federal Communication Commission's 1967 rulings applying the fairness doctrine to cigarette commercials in the Banzhaf case?

- 1) yes (31)
- 2) no (1)
- 9) no answer or don't know (0)

10. IF YES, could you tell me about them?

- 1) full and accurate (8)
- 2) accurate - not full (7)
- 3) accurate - very little information (8)
- 4) vague (1)
- 5) inaccurate (3)
- 9) no answer or don't know (5)

*11. How did you first become aware of the Federal Communication Commission's 1967 cigarette commercial decision involving the fairness doctrine? (The Banzhaf ruling)

	<u>First Response</u>	<u>Second Response</u>	<u>Third Response</u>	<u>Total</u>
1) from Federal Communications Commission	5	1	-	6
2) from National Association of Broadcaster	9	4	1	14
3) from TV news	1	1	1	3
4) from radio news	1	-	-	1
5) newspapers	3	2	-	5
6) personal discussion	5	-	-	5
7) from Wash or Corporation attorney	6	5	1	12
9) no answer or don't know	1	-	-	1
0) no further answer	1	-	-	1

*12. Did you discuss the decision with any of the following people?

1) station's attorney	14	1	-	15
2) someone at National Association of Broadcaster	1	3	-	4
3) someone at Federal Communications Commission	1	2	-	3
4) a friend at an advertising agency	4	2	2	8
5) friends at other stations	4	5	4	13
6) a cigarette manufacturer	1	2	-	3
7) a cigarette manufacturer representative	1	-	-	1
8) someone at networks	2	2	-	4
9) station management	1	1	1	3
0) no answer or don't know	7	-	-	7

*13. What did you talk about?

	<u>First Response</u>	<u>Second Response</u>	<u>Third Response</u>	<u>Total</u>
1) what decision means to station, how it should be implemented, etc.?	10	3	2	15
2) how can we make up lost \$ (if cigarette advertisers leave or are banned)?	5	3	2	10
3) will this set a precedent for future?	3	5	1	9
4) generally pro-Banzhaf - good for industry	1	-	-	1
5) generally anti-Banzhaf - bad for industry	1	1	1	3
6) make sure we're complying	2	-	-	2
7) inconsistency of government policy to tobacco question	1	-	-	1
8) suspicion of a deal between Congress and broadcasters	1	-	-	1
9) the Federal Communications Commission knuckled under to Congressional pressure stimulated by Banzhaf	1	-	-	1
10) tobacco men wouldn't discuss decision - had "lid" put on them	1	-	-	1
11) anti-cigarette ban	1	1	-	2
12) will we appeal decision?	1	-	-	1
13) decision has little impact on our station (no cigarette advertisements)	1	1	2	4
14) wanted information about Banzhaf	1	1	-	2
15) it's television's problem not radids	1	-	-	1
16) vague	-	-	-	-
17) no answer or don't know	6	-	-	6

14. Are you familiar with any Federal Communications Commission fairness doctrine rulings, since the Banzhaf cigarette commercial rulings, involving other kinds of product commercials?

1) yes	(22)
2) no	(10)
9) no answer or don't know	(0)

15. IF YES, could you tell me about them?
- | | |
|---------------------------------------|-----|
| 1) full and accurate | (6) |
| 2) accurate - not full | (7) |
| 3) accurate - very little information | (5) |
| 4) vague | (1) |
| 5) inaccurate | (1) |
| 9) no answer or don't know | (2) |
16. If you could summarize the general position of the Federal Communications Commission today on the fairness doctrine and advertising, how would you do it?
- | | |
|---------------------------------------|------|
| 1) full and accurate | (9) |
| 2) accurate - not full | (3) |
| 3) accurate - very little information | (10) |
| 4) vague | (6) |
| 5) inaccurate | (2) |
| 9) no answer or don't know | (1) |
17. On the average, how much time do you spend following Federal Communications Commission rulings on the fairness doctrine?
- | | |
|-------------------------------------|------|
| 1) much time | (4) |
| 2) some time | (7) |
| 3) little time | (11) |
| 4) sees all rulings but can't judge | (6) |
| 5) someone else at station does it | (4) |
| 9) no answer or don't know | (0) |
18. Could you explain that in more detail (a few hours every week, every month) how do you follow them?
- | | |
|------------------------------|-----|
| 1) few hours a month | (4) |
| 2) 1-2 hours a week | (8) |
| 3) 3-5 hours a week | (3) |
| 4) 5-10 hours a week | (0) |
| 5) over 10 hours a week | (1) |
| 6) can't judge - time varies | (8) |
| 9) no answer or don't know | (8) |
19. How much time do you spend following Federal Communications Commission rulings on advertising?
- | | |
|-------------------------------------|------|
| 1) much time | (1) |
| 2) some time | (9) |
| 3) little time | (11) |
| 4) sees all rulings but can't judge | (6) |

- 5) someone else at station (3)
does it
- 9) no answer or don't know (2)
20. Could you explain that in more detail (a few hours every week, every month), how do you follow them?
- 1) few hours a month (3)
2) 1-2 hours a week (7)
3) 3-5 hours a week (3)
4) 5-10 hours a week (1)
5) over 10 hours a week (0)
6) can't judge - time varies (8)
9) no answer or don't know (10)
21. Here are some summaries of Federal Communications Commission rulings applying the fairness doctrine to cigarette advertising. Could you tell me whether or not these summaries are accurate?
- 1) The Federal Communications Commission has ruled that anti-cigarette spokesman should be given time approximately equivalent to the time spent on cigarette commercials each week.
1. right (23)
2. wrong (6)
9. no answer or don't know (3)
- 2) The Federal Communications Commission has ruled that the time made available for anti-smoking "counter-ads" should be made available at no charge.
1. right (26)
2. wrong (4)
9. no answer or don't know (2)
- 3) The Federal Communications Commission has ruled that if cigarette commercials are shown in prime time, anti-cigarette commercials have to be shown in prime time also.
1. right (23)
2. wrong (3)
9) no answer or don't know (6)
- 4) The Federal Communications Commission stated in its opinion that although in this particular case (the Banzhaf case) it was applying the fairness doctrine to cigarette commercials, in the future the ruling may apply to other product commercials.
1. right (24)
2. wrong (3)
9) no answer or don't know (5)

- 5) The 1967 Federal Communications Commission Banzhaf ruling applied to all cigarette commercials whether or not they directly addressed the issue of the effect of smoking on health.
- 1. right (29)
 - 2. wrong (3)
 - 9. no answer or don't know (0)
22. On the whole, do you agree with the Federal Communications Commission's ruling on the Banzhaf case dealing with cigarette advertising?
- 1) strongly agree (7)
 - 2) agree (7)
 - 3) no opinion or don't know (3)
 - 4) disagree (6)
 - 5) strongly disagree (9)
23. Why?
- 1) believes that both sides of the smoking issue should be aired because cigarettes are so harmful (11)
 - 2) believes fairness doctrine should be applied to controversial product advertising (0)
 - 3) because broadcasters need a strong regulatory body (1)
 - 4) because he's against the advertising of cigarettes (methods) (1)
 - 5) goes only by own corporate policy (1)
 - 6) for access rather than fairness (1)
 - 7) harms broadcasting industry economically (0)
 - 8) fairness doctrine shouldn't apply to advertising (1)
 - 9) Federal Communications Commission has no right to interfere with programming content (1)
 - 10) doesn't believe in fairness doctrine itself (1)
 - 11) case sets terrible precedent (2)
 - 12) discriminates vs. broadcasters (5)
 - 13) Banzhaf leads to ban which does more harm than good (1)
 - 14) its a legal product (3)
 - 15) ruling is ludicrous (1)
 - 16) ruling is a power play vs. industry by Federal Communications Commission (1)

- 17) vague (0)
- 18) no answer or don't know (1)

24. Do you agree with the subsequent rulings?

- 1) strongly agree (6)
- 2) agree (17)
- 3) no opinion or don't know (4)
- 4) disagree (4)
- 5) strongly disagree (1)

25. Why?

- 1) good to retreat from Banzhaf - bad precedent (8)
- 2) Federal Communications Commission shouldn't act until Congress or Federal Trade Commission declares a product unsafe (2)
- 3) drives away advertisers (1)
- 4) against counter advertisements can't treat an issue in 30 seconds (3)
- 5) legal products (1)
- 6) Federal Communications Commission appointment better under a Republican administration (1)
- 7) Federal Communications Commission had to soften its stand - came on very strong with Banzhaf decision (2)
- 8) depends on product (2)
- 9) goes only by own corporation policy (1)
- 10) fairness doctrine should be applied to advertising (1)
- 11) people should have access to counter commercials (2)
- 12) for self-regulation - Federal Communications Commission shouldn't be involved (7)
- 13) vague (0)
- 14) no answer or don't know (1)

26. Did the cigarette commercial ruling affect your station's operations at all?

- 1) yes (20)
- 2) no (11)
- 9) no answer or don't know (1)

27. IF YES, in what ways?

- 1) put on more anti-cigarette advertisements (13)
- 2) caused scheduling problems (2)
- 3) loss of revenues (5)
- 4) vague (0)
- 9) no answer or don't know (0)

28. Has your station aired any anti-cigarette commercials?

- 1) yes (28)
- 2) no (3)
- 9) no answer or don't know (1)

29. IF YES, when did your station start broadcasting them?

- 1) always had them (2)
- 2) whenever American Cancer Society started to make them (5)
- 3) before Banzhaf (5)
- 4) when Banzhaf decision was made public (8)
- 5) right before ban went into effect (1)
- 9) no answer or don't know (8)

30. What made you start airing them?

- 1) Banzhaf decision (12)
- 2) American Cancer Society sent them (3)
- 3) When we became aware of smoking as a controversial issue (4)
- 4) when tobacco companies made a last push for cigarette commercials right before the ban (1)
- 5) felt it was a sound subject for a public service announcement (5)
- 9) no answer or don't know (4)

31. How often did your station air anti-cigarette commercials?

Number per Week

Number of Stations

6	1
7	1
10	2
12	1

31. (cont'd)

<u>Number per Week</u>	<u>Number of Stations</u>
14	1
25	1
28	1
30	1
150	1
0	22

32. Compared to the number of cigarette commercials, what proportion of anti-cigarette commercials did you put on?

1) 1:1	(4)
2) 1:2	(0)
3) 1:3	(3)
4) 1:4	(4)
5) 1:5	(3)
6) 1:6 - 1:10	(0)
7) no cigarette commercials and some anti-cigarette spots	(7)
8) no anti-cigarette advertisement but some cigarette commercials	(1)
9) fluctuated wildly - no 1 ratio	(0)
10) no ratio at all	(0)
11) no answer or don't know	(8)

33. Is your station still broadcasting anti-cigarette commercials?

1) yes	(18)
2) no	(11)
9) no answer or don't know	(3)

34. IF YES, are these a part of your public service obligation, or are these above and beyond it?

1) part of public service obligation	(18)
2) beyond public service obligation	(0)
9) no answer or don't know	(1)

35. IF NO, when did you stop them?

1) when cigarette ban went into effect	(4)
2) cancer society stopped sending them	(1)
3) never had any anti-cigarette advertisements on air	(3)
9) no answer or don't know	(4)

36. Why?

- 1) cigarette ban went into effect (2)
- 2) other public service announcements are more important for our audience (2)
- 3) talent and personalities speak out vs. cigarettes - more effective (1)
- 4) with cigarette commercials banned anti-cigarette advertisements would lead to charges of unbalance under the fairness doctrine (2)
- 5) no public service announcement's - public service program instead (1)
- 9) no answer or don't know (2)

*37. Do any of the following describe your station's response to the Federal Communication Commission's application of the fairness doctrine to cigarette commercials?

	<u>First Response</u>	<u>Second Response</u>	<u>Third Response</u>	<u>Total</u>
1) publicly denounced ruling as "administrative legislation"	1	1	-	2
2) ignored ruling	1	-	-	1
3) petitioned Federal Communications Commission to amend ruling	3	2	-	5
4) appealed decision in the courts	1	2	-	3
5) tried to get Congress to pass a law prohibiting the Federal Communications Commission from such action	1	1	-	2
6) complied immediately	13	1	4	18
9) no answer or don't know	2	-	-	2
0) not applicable (no cigarette advertisements)	10	-	-	10

*38. Why did your station respond this way?

1) disagreed with ruling	4	3	1	8
2) wrong for Federal Communications Commission to get into this area	1	-	-	1
3) feared case as a precedent	2	2	-	4
4) Congress is the proper arena to decide the issue	-	-	-	-

*38. (cont'd)

	<u>First Response</u>	<u>Second Response</u>	<u>Third Response</u>	<u>Total</u>
5) didn't understand ruling	2	-	-	2
6) we always obey the law	2	1	2	5
7) we always obey the Federal Communications Commission	2	-	-	2
8) we agreed with the ruling	4	-	-	4
9) we don't want trouble with the Federal Communications Commission	2	-	-	2
10) Station had complied with content of decision before Banzhaf	1	-	-	1
11) parent corporation told us to comply	2	-	-	2
12) no answer or don't know	-	-	-	-

39. Did this action have any effect?

	<u>First Response</u>	<u>Second Response</u>	<u>Third Response</u>	<u>Total</u>
yes	0	0	0	0
no	6	5	1	12
no answer or don't know	0	0	0	0

40. After the Banzhaf decision was made public, did your station speak to anyone in government to try to persuade them to agree with the station's position on this issue?

1) yes	5
2) no	17
3) done by National Association of Broadcasters (doesn't know specifics)	1
4) done by corporation (doesn't know specifics)	4
9) no answer or don't know	4

41. IF YES, who was it?

1) congressman	2
2) senator	0
3) someone at Federal Communi- cations Commission	2
4) both congressman & senator	1
9) no answer or don't know	1

42. Who contacted them?

- 1) station manager (2)
- 2) counsel (2)
- 3) president of station (0)
- 4) vice-president (0)
- 5) corporation that owns station (0)
- 6) sales manager (1)
- 9) no answer or don't know (1)

43. What was discussed?

- 1) can you get ruling changed? (0)
- 2) will this lead to a ban on cigarette advertisements? (0)
- 3) will Banzhaf become a precedent (1)
- 4) the issue is going to Congress- what will the outcome be? (2)
- 5) don't vote for a ban on cigarette advertising (1)
- 6) ruling has no impact on us (no cigarettes advertisements) (1)
- 7) vague (0)
- 9) no answer or don't know (1)

44. What happened as a result of this conversation?

- 1) nothing (0)
- 9) no answer or don't know (2)

45. Are you aware of any attempts made by the Federal Communications Commission to enforce the Banzhaf ruling on cigarette commercials at your station?

- 1) yes (2)
- 2) no (25)
- 9) no answer or don't know (5)

46. IF YES, how did the Federal Communications Commission do this?

- 1) Federal Communications Commission sent us ruling (0)
- 2) Federal Communications Commission called or wrote us a letter (2)
- 3) monitored station (0)
- 9) no answer or don't know (0)

47. Here is a list of things the Federal Communications Commission has done with some stations I've spoken with. Have they done any of these things?

- 1) sent station an informational pamphlet on Banzhaf ruling (20)
- 2) Federal Communications Commission created an educational or publicity campaign about Banzhaf decision (2)

47. (cont'd)

- 3) Federal Communications Commission monitored station to verify compliance with its ruling (0)
- 4) Federal Communications Commission contacted station informally by telephone or letter (2)
- 5) Federal Communications Commission threatened to or actually imposed fines on station (0)
- 6) Federal Communications Commission threatened to or actually revoked or suspended station's license (0)
- 7) Federal Communications Commission threatened to or actually gave station a short term license because of non-compliance with the ruling. (0)
- 8) Federal Communications Commission either threatened or actually gave station unfavorable publicity to enforce ruling (0)
- 9) Federal Communications Commission inspectors checked station's logs (1)
- 10) Federal Communications Commission did none of the above (10)
- 11) no answer or don't know (0)

48. Could you describe this action (or threat) to me?

- 1) regular mailing of ruling from Federal Communications Commission (19)
- 2) Federal Communications Commission explained and publicized ruling at a National Association of Broadcasters meeting and through Broadcasting magazine (2)
- 3) a citizen complaint forwarded by Federal Communications Commission (1)
- 4) letter or call about station's compliance from Federal Communications Commission (1)
- 5) Federal Communications Commission inspectors come to do a spotcheck inspection of the station's logs (1)

48. (cont'd)

9) no answer or don't know (0)

49. Who spoke to whom in regard to it?

1) Federal Communications
Commission Commissioners
spoke to broadcasters (2)

2) Federal Communications
Commission sent letter to
Station's attorney (2)

3) Federal Communications
Commission sent inspectors to
Station itself (1)

9) no answer or don't know (0)

50. What was discussed?

1) discussed impact or implemen-
tation of the ruling -
compliance etc. (0)

2) explained ruling (2)

3) Federal Communications
Commission asked for compliance
data from station (2)

4) just did a technical spot-
check - if all letters were
right, etc. (1)

9) no answer or don't know (0)

51. What happened as a result of this action (or threat)?

1) nothing (1)

2) put on more anti-cigarette
advertisements (2)

9) no answer or don't know (2)

52. Did any public interest group try to enforce the Banzhaf ruling at your station?

1) yes (2)

2) no (23)

9) no answer or don't know (7)

53. IF YES, how did they try to do this?

1) monitored station (1)

2) complained to station (0)

3) complained to Federal Communi-
cations Commission (1)

9) no answer or don't know (0)

54. Who spoke to whom in regard to it?

- 1) Banzhaf (ASH) spoke to station manager (1)
- 2) other individual spoke to manager (1)
- 3) complainant dealt with station attorney (0)
- 9) no answer or don't know (0)

55. What was discussed?

- 1) too little compliance with ruling (0)
- 2) how station can comply better (1)
- 3) treated as a hassle not a serious issue (1)
- 9) no answer or don't know (0)

56. What happened as a result of this action (or threat)?

- 1) nothing (1)
- 2) put on more anti-cigarette advertisements (1)
- 9) no answer or don't know (0)

57. Did anyone in the broadcasting, advertising or tobacco manufacturing industry (or their representatives) contact your station about the Banzhaf ruling?

- 1) yes (10)
- 2) no (13)
- 9) no answer or don't know (9)

58. IF YES, who was it?

- 1) broadcaster (1)
- 2) advertising agency (1)
- 3) cigarette manufacturer (2)
- 4) cigarette manufacturer representative (3)
- 5) National Association of Broadcasters (1)
- 6) categories 1-4 (1)
- 7) categories 4 & 5 (1)

59. Why did they contact your station?

- 1) wanted or gave advice about effects of Banzhaf (3)
- 2) wanted information about what station was going to do in light of Banzhaf (2)

59. (cont'd)

- 3) asked about scheduling of
cigarette advertisements
and counter advertisements (1)
- 4) how were we going to fight
this legally? (1)
- 5) asked about cigarette ban (1)
- 6) wanted air time to rebut
anti-cigarette advertisements (2)
- 9) no answer or don't know (0)

60. What was discussed?

- 1) discussed \$ cost of Banzhaf -
how are we going to fill
empty slots if cigarette
companies leave? (0)
- 2) discussed Banzhaf as a
harmful precedent for industry (0)
- 3) discussed station's reaction
to Banzhaf (3)
- 4) just general information (3)
- 5) discussed giving air time to
tobacco company representative (2)
- 6) discussed scheduling of
cigarette advertisements
around counter advertisements (1)
- 7) discussed unfairness of ciga-
rette ban (1)
- 9) no answer or don't know (0)

61. Here is a list of people who could be affected by the Banzhaf decision.
Did you contact any of them about the cigarette commercial ruling?

- 1) someone in advertising industry (5)
- 2) someone in broadcasting
industry (1)
- 3) tobacco manufacturer or their
representative (2)
- 4) did not contact anyone (21)
- 5) categories - 1 - 3 (3)

62. IF 1, 2, or 3, if you did contact someone, why?

- 1) wanted to have a general
conversation on it (2)
- 2) called about putting a
spokesman on air (1)
- 3) wanted information or advice (2)
- 4) talked about \$ impact (2)

62. (cont'd)

- 5) talked about cigarette ban (2)
- 6) talked about future implications of Banzhaf (1)
- 7) talked about lack of impact of decision (1)
- 9) no answer or don't know (0)

63. What did you talk about?

- 1) general information about Banzhaf decision (3)
- 2) discussed compliance with ruling (1)
- 3) ruling as a precedent (1)
- 4) \$ cost of ruling (1)
- 5) how would we get other advertisers if Banzhaf led to a ban on cigarette commercials?(2)
- 6) putting spokesmen on air (1)
- 7) Banzhaf ruling is OK - ban is unfair and ridiculous (1)
- 8) lack of impact of Ban on us (no cigarette advertisements) (1)
- 9) no answer or don't know (0)

64. Was your station's response to the Banzhaf ruling affected by challenges to the licenses of other major stations owned and operated by the networks?

- 1) yes (4)
- 2) no (25)
- 9) no answer or don't know (3)

65. IF YES, in what ways?

- 1) helped publicize enforcement- so we complied to a greater degree (3)
- 2) legislation by "raised eyebrow" (1)
- 9) no answer or don't know (0)

66. IF NO, why not?

- 1) not relevant to us (12)
- 2) we comply anyway no matter what others are doing (8)
- 3) wasn't aware of challenges (2)
- 9) no answer or don't know (0)

67. Did your station agree with the Federal Communications Commission's 1969 proposal to ban cigarette commercials from the air?

- 1) yes (8)
- 2) no (21)
- 9) no answer or don't know (3)

68. IF YES, why?

- 1) cigarette smoking is bad for your health - shouldn't advertise them (5)
- 2) ethical or moral reasons - broadcasters shouldn't accept their advertisements (1)
- 3) we had already banned cigarette advertisements from our station (2)
- 9) no answer or don't know (0)

69. IF NO, why not?

- 1) not Federal Communications commission's business (4)
- 2) not government's business (1)
- 3) legal product - advertisements should be legal (5)
- 4) law is discriminatory vs. broadcasters (9)
- 5) no young people listen to this station (1)
- 6) loss of revenue (2)
- 9) no answer or don't know (0)

70. If you remember, at first broadcasters opposed the ban very strongly. Then their opposition became less intense. Could you explain why?

- 1) felt it was a losing battle (13)
- 2) cigarette advertisements so controversial - better to get revenues from other sources (1)
- 3) lousy product - all for the better (3)
- 4) anti-smoking lobby strong and National Association of Broadcasters is weak and chicken (3)
- 5) public was aroused (1)
- 6) didn't affect \$ as anticipated (2)
- 7) deal made between government and the networks (1)
- 8) many broadcasters own print media - a trade-off (1)

70. (cont'd)

- 9) lesser of two evils - stops counter commercial movement (1)
- 10) loss of business (0)
- 11) broadcasters have too much at risk to fight too hard (1)
- 12) broadcasting lobby not cohesive in long run - too entrepreneurial and competitive (2)
- 13) Congress felt strongly about ban and this influences Federal Communications Commission (1)
- 14) no answer or don't know (2)

71. Some people say that broadcasters benefitted from the 1969 Public Health and Cigarette Smoking Act which banned cigarette commercials from radio and television because they would no longer have to carry anti-cigarette commercials. Other people say that the act harmed broadcasters because of the lack of advertising revenues which it caused. Which do you think?

- 1) 1969 act helped broadcasters (5)
- 2) act hurt broadcasters (22)
- 3) neither (1)
- 4) both (3)
- 9) no answer or don't know (1)

72. Why do you say this?

- 1) broadcasters lost a lot of \$ from ban (21)
- 2) act harmed broadcasters and public - 1st amendment question of banning the advertisements of a legal product (2)
- 3) got Federal Communications Commission off their backs - afraid of stringent rules on advertising - killed issue of counter advertisements (2)
- 4) helped broadcasters to diversify and expand into areas not previously advertised on television (6)
- 9) no answer or don't know (1)

73. Do you have any other comments to make on the cigarette commercial ban?

- 1) no (13)

73. (cont'd)

- 2) ban very discriminatory for
print vs. broadcasters (0)
- 3) like to see a voluntary ban (2)
- 4) ban took off anti-spots and
smoking has increased (4)
- 5) unfair to single out cigarettes
they have some good effects too (1)
- 6) ban hurt networks more than
affiliates and independents (1)
- 7) ban delighted tobacco company
and hurt broadcasters (saved
tobacco cost \$, got rid of anti-
advertisements) (3)
- 8) afraid of both ban and Banzhaf -
scary precedent for broadcasters (3)
- 9) ban good because smoking is so
bad (1)
- 10) would like to see a ban in
all media (3)
- 11) our company put on many anti-
spots right before ban went
into effect to cull favor with
the public and Federal Commu-
nications Commission (1)
- 12) no answer or don't know (0)

74. Can you offer any explanation of why the Federal Communications Commission proposed a ban on cigarette commercials but not on commercials for other tobacco products?

- 1) Surgeon General report (14)
- 2) Banzhaf stressed cigarettes (0)
- 3) pipe and tobacco not as
harmful (11)
- 4) fallacious and illogical
reasoning (2)
- 5) deal made with tobacco lobby -
they get some and lose some (3)
- 9) no answer or don't know (2)

75. Has your station ever applied the Banzhaf ruling to any other product commercials?

- 1) yes (6)
- 2) no (25)
- 9) no answer or don't know (1)

76. IF YES, WHAT other product commercials?

- 1) railroad commercials (1)

76. (cont'd)

- 2) auto and gas commercials (2)
- 3) no fault insurance commercials (2)
- 4) any commercial involving energy and pollution (1)
- 5) any commercial on station (0)
- 6) vague (0)
- 9) no answer or don't know (0)

77. Why did your station apply the Banzhaf ruling to these (or this) particular commercials?

- 1) didn't want another Banzhaf precedent at the Federal Communications Commission (1)
- 2) pressure from a public interest group (1)
- 3) felt it was addressing a controversial issue - other side must be heard (3)
- 9) no answer or don't know (1)

78. IF NO, why not?

- 1) we won't accept controversial advertisements (3)
- 2) we ban commercials in poor taste or deceptive (4)
- 3) if advertising is challenged as controversial we either edit it or pull it off (3)
- 4) fairness doctrine shouldn't apply to advertisements (0)
- 5) never received any complaints (4)
- 6) no need (4)
- 7) not obliged to by law (3)
- 8) feels Federal Communications Commission not station manager should apply fairness doctrine (1)
- 9) not equipped to evaluate claims (1)
- 10) has a consumer access program for complaints against station's programs or advertisements (2)
- 11) no answer or don't know (0)

79. What are your feelings toward the idea of counter-advertisements?

- 1) general opposition to idea of counter-advertisements (24)
- 2) general approval to idea of counter-advertisements (5)
- 9) no answer or don't know (3)

80. One of the major grounds of the Banzhaf decision was that cigarettes are very dangerous to people's health. Do you think any of the following products are dangerous enough for their advertisements to warrant "counter-commercials"?

a) automobiles

- | | |
|----------------------------|------|
| 1. yes | (5) |
| 2. no | (24) |
| 9. no answer or don't know | (3) |

b) Why do you say this?

- | | |
|----------------------------|------|
| 1. particular opposition | (24) |
| 2. particular approval | (5) |
| 9. no answer or don't know | (3) |

c) non-prescription drugs

- | | |
|----------------------------|------|
| 1. yes | (4) |
| 2. no | (22) |
| 9. no answer or don't know | (6) |

d) Why do you say this?

- | | |
|----------------------------|------|
| 1. particular opposition | (21) |
| 2. particular approval | (4) |
| 9. no answer or don't know | (7) |

e) gasoline products

- | | |
|----------------------------|------|
| 1. | |
| 1. yes | (3) |
| 2. no | (23) |
| 9. no answer or don't know | (6) |

f) Why do you say this?

- | | |
|----------------------------|------|
| 1. particular opposition | (23) |
| 2. particular approval | (3) |
| 9. no answer or don't know | (6) |

g) Wine and beer

- | | |
|----------------------------|------|
| 1. yes | (2) |
| 2. no | (27) |
| 9. no answer or don't know | (3) |

h) Why do you say this?

- | | |
|----------------------------|------|
| 1. particular opposition | (26) |
| 2. particular approval | (2) |
| 9. no answer or don't know | (4) |

i) snowmobiles

- 1. yes (3)
- 2. no (26)
- 9. no answer or don't know (3)

j) Why do you say this?

- 1. particular opposition (26)
- 2. particular approval (3)
- 9. no answer or don't know (3)

81. Some people say that the fairness doctrine ought to apply only to news programs, editorials, personal attacks and public affairs programs. Other people say that the fairness doctrine ought to apply to all controversial issues of public importance, no matter what the format. Which do you think?

- 1) only public affairs-type programs or personal attacks (13)
- 2) any format (16)
- 3) neither (2)
- 9) no answer or don't know (1)

82. Why?

- 1) Federal Communications Commission has no right to interfere with programming (0)
- 2) government has no right to interfere with programming (2)
- 3) fairness doctrine does not apply to advertising (10)
- 4) counter advertisements are an inappropriate response (1)
- 5) fairness doctrine leads to blandness on television and radio (2)
- 6) depends on how you define a controversial issue (3)
- 7) Federal Communications Commission and Federal Trade Commission should make fairness doctrine evaluations not station managers (1)
- 8) fairness doctrine must apply to any controversial issue - its law (6)
- 9) public has right to hear - its our moral and legal obligation (5)
- 10) where social harm is involved counter advertisements are justified (1)
- 11) no answer or don't know (1)

83. In general, how did the Banzhaf ruling affect your feelings toward the Federal Communications Commission?

- 1) made feelings more positive (2)
- 2) made feelings more negative (7)
- 3) did not effect feelings very much (4)
- 4) no effect (18)
- 9) no answer or don't know (1)

84. Has your opinion of the Federal Communications Commission, in general, gone up or down in the last five or six years?

- 1) up (9)
- 2) neither (10)
- 3) down (12)
- 9) no answer or don't know (1)

85. Why?

- 1) Johnson's leaving (1)
- 2) they're doing a good job (2)
- 3) better appointments lately to Federal Communications Commission (2)
- 4) Federal Communications Commission necessary - broadcasters would take advantage without it (3)
- 5) Federal Communications Commission sensitive to broadcasters needs but doesn't ignore public interest either (2)
- 6) have a job to do and they do it (1)
- 7) never thought about it (1)
- 8) gets too involved with program content (3)
- 9) too bureaucratic (2)
- 10) they don't know what they are doing - incompetent and inconsistent (4)
- 11) too pro industry (2)
- 12) too many splinter and minority groups influence their decisions (0)
- 13) staff has too much influence (1)
- 14) Johnson is on Federal Communications Commission (1)
- 15) personal experience of persecution by a handful of Federal Communications Commission zealots (1)
- 16) de-regulation of radio - less work (1)
- 17) no answer or don't know (4)

86. Some people say that on the whole the Federal Communications Commission treats the local stations fairly, while others say that the Federal Communications Commission treats them unfairly. Which do you think?

- 1) Federal Communications Commission treats them fairly (21)
- 2) Federal Communications Commission treats them unfairly (4)
- 9) no answer or don't know (7)

87. What makes you think this?

- 1) Federal Communications Commission leans over backwards to help stations on complaint and licensing hassles - understand station's position (5)
- 2) reasonable controls are necessary (4)
- 3) sensitive to broadcasters sans ignoring general public (1)
- 4) slightly erratic but basically fair (11)
- 5) Federal Communications Commission is erratic and unpredictable (2)
- 6) Federal Communications Commission ignores the local station (1)
- 7) treats broadcasters like second class citizens (1)
- 8) blanket approach by Federal Communications Commission is unfair to smaller station (1)
- 9) licensing leads to encroachments and demands on station (1)
- 10) Federal Communications Commission conducted vendetta on respondent's station (1)
- 11) no answer or don't know (4)

88. In your opinion, does the Federal Communications Commission favor the networks over the local stations?

- 1) yes (4)
- 2) no (22)
- 9) no answer or don't know (6)

89. IF YES, how?

- 1) responds to economic and political clout of networks (1)
- 2) bigger stations have better lawyers and thus more influence at Federal Communications Commission (2)
- 3) prime time access rule (1)
- 4) Federal Communications Commission goes after bigger stations because they are big (1)
- 9) no answer or don't know (3)

90. In your opinion, do you think that public interest groups have too much of an effect on Federal Communications Commission decisions?

- 1) yes (8)
- 2) no (21)
- 9) no answer or don't know (3)

91. Why do you think this?

- 1) public interest groups don't have much clout at the Federal Communications Commission (8)
- 2) public interest groups only have power when Congress gets into the act (1)
- 3) they have a constitutional right to petition (3)
- 4) Federal Communications Commission is afraid of vocal splinter groups (2)
- 5) small groups have too much power over Federal Communications Commission procedures - one complaint can hold up your license (4)
- 6) they harass Federal Communications Commission (2)
- 7) Each Federal Communications Commission Commissioner has his own pet group (1)
- 8) vague (7)
- 9) no answer or don't know (2)

92. Is your station radio Fm, AM or a television station?

- 1) radio am (9)
- 2) radio fm (10)
- 3) television (10)
- 4) radio am and fm (3)
- 5) television and radio (0)

93. Is your station:

- | | |
|-------------------------------|------|
| 1) network owned and operated | (9) |
| 2) network affiliate | (1) |
| 3) independent | (22) |
| 9) no answer or don't know | (0) |

94. What is your station's market size?

<u>Average Cumulative Weekly Audience (Radio Only)</u>	<u>Number of Stations</u>
300,000	1
400,000	1
500,000	2
700,000	1
800,000	2
1,000,000	4
1,500,000	2
1,600,000	1
1,800,000	1
2,000,000	2
2,500,000	3
5,000,000	2

95. Could you briefly describe your market to me?

- | | |
|-----------------------------|------|
| 1) general audience | (13) |
| 2) mostly or all news | (3) |
| 3) classical | (2) |
| 4) rock | (1) |
| 5) jazz | (0) |
| 6) young | (3) |
| 7) old | (1) |
| 8) black | (2) |
| 9) spanish | (3) |
| 10) good music | (2) |
| 11) foreign language | (2) |
| 12) no answer or don't know | (0) |

96. How many people are employed at your station?

<u>Number of people employed by station</u>	<u>Number of stations</u>
1 - 20	3
21 - 30	6
31 - 40	4
41-50-	3
51 - 60	1
61 - 70	2
71 - 80	0
81 - 90	1
91 - 100	0
101 - 125	2

96. (cont'd)

<u>Number of people employed by station</u>	<u>Number of stations</u>
126 - 150	1
151 - 175	0
176 - 200	2
201 - 225	3
226 - 250	2
400	1
no answer or don't know	1

97. Approximately what percentage of your station's advertising revenue came from cigarette advertisements each year?

<u>Per cent Advertisements from Cigarettes</u>	<u>Number of stations</u>
0	10
1%	2
2%	3
3%	1
5%	4
6%	1
7%	3
8%	5
15%	2
18%	1

98. Interviewer evaluation of respondent's attitude.

1) very cooperative	(18)
2) cooperative	(10)
3) not too cooperative	(1)
4) downright evasive	(3)

99. Interviewer evaluation of general understanding of respondent,

1) some understanding	(5)
2) good general understanding	(22)
3) little or no understanding	(5)

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