

THE QUIET VICTORY OF THE CIGARETTE LOBBY

How it found the best filter yet—Congress

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A Cincinnati-born, Wellesley-educated magazine writer and author of children's plays, Mrs. Drew lives in Washington with her lawyer husband and writes as a free-lancer. A former staff member of the CONGRESSIONAL QUARTERLY, she has had ample opportunity to study that Americanized Byzantine process by which the United States Congress deals with issues before it.

AT THE Public Health Service's annual Christmas party last year, some of the agency's employees entertained their colleagues by singing their own version of "On Top of Old Smoky":

On top of Old Smoking
A year has gone by
But the smoke we're deploring
Still gets in our eye.

They were lamenting the fact that a full year had passed since the Report of the Surgeon General on Smoking and Health warned that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action," and that still no such action had been taken. This summer Congress passed a bill requiring that cigarette packages carry the warning "Caution: Cigarette Smoking May Be Hazardous to Your Health," but the same song can be sung at the next Christmas party, and the next one, and the next one.

To hear its sponsors tell it, the new legislation "is a forthright, historic step towards the responsible protection of the health of this nation's citizens" (Senator Warren G. Magnuson, Democrat, of Washington), one that "constitutes a legislative

approach in which we can take some degree of pride" (Representative Oren Harris, Democrat, of Arkansas). In fact, however, the bill is not, as its sponsors suggested, an example of congressional initiative to protect public health; it is an unabashed act to protect private industry from government regulation. Behind the facade of a requirement for printing a warning on cigarette packages (which is not expected to deter smoking much), Congress tied the hands of the Federal Trade Commission by forbidding it to proceed with its own plans to apply much more stringent regulations. Had it not been for Congress, the FTC, which is charged with preventing unfair and deceptive trade practices, would have required a warning both on cigarette packages and in cigarette advertising. The effect of the advertising regulation is what the cigarette industry most feared; Congress obliged by forbidding it for at least four years.

In another remarkable provision, the law prohibits state and local governments from taking any action on cigarette labeling or advertising. It is one thing for Congress to prohibit the states from enacting legislation which overlaps and is inconsistent with its own requirements, as in the case of the labeling, but it is a far different thing for Congress to refuse to act, and to prohibit the states from acting, as in the case of cigarette advertising.

The tobacco industry's success at winning from Congress what it wanted while still providing the lawmakers with an opportunity to appear to be all in favor of health was a brilliant stroke. The industry brought it off because the tobacco lobby employed unusually skilled and well-organized strategy; because it hired some of the best legal brains and best-connected people in Washington to help with the fight; because it successfully grafted onto its built-in congressional strength from tobacco-producing states a sufficient number of congressmen to whom the issue was not one of health, or even of the tobacco industry, but one of

curbing the powers of regulatory agencies, such as the FTC; and because it succeeded in throwing a heavy smoke screen around the health issue. And finally, it was the industry's good fortune that President Johnson remained aloof from the battle.

The report of the Surgeon General's special advisory committee on smoking and health was instigated at the behest of private health organizations, such as the American Cancer Society, which sought a definitive government position on the accumulating studies pointing to a connection between smoking and disease. The panel of ten scientists established in 1962 to make the study had the approval of the health groups and the tobacco industry, for all parties had been allowed to veto any proposed member. The cigarette industry, it was widely assumed, had been boxed in.

After fourteen months, the panel's report was printed under the security regulations usually reserved for top-secret reports to the National Security Council, and on a Saturday (the stock market was closed) early in January, 1964, it was handed out to reporters locked in the State Department auditorium until the stipulated hour for the report's release. The Surgeon General's panel unanimously found that smoking was related to lung cancer, chronic bronchitis, emphysema, cardiovascular diseases, and cancer of the larynx.

Among those who were ready and waiting for the report was the Federal Trade Commission, which had rejected past requests for action, pending a definitive answer to the health question. Within days after the report was released, the commission announced hearings on proposed new trade regulations for the cigarette industry.

Also ready for the Surgeon General's report was the tobacco industry. Sometime in late 1963, the distinguished Washington law firm of Arnold, Fortas & Porter turned up as counsel to the Philip Morris Company. The Fortas in the firm's title is Abe Fortas, personal counsel and confidant to President Johnson — and later his first choice for the Supreme Court. Faced with the probability that the FTC would move against the companies, the industry formed a committee of lawyers from Arnold, Fortas & Porter and other top Washington firms, one representative of each of the "big six" tobacco companies — R. J. Reynolds, American Tobacco, Brown & Williamson, Liggett & Myers, P. Lorillard, and Philip Morris — and one of the industry's defense lawyers for personal injury suits alleging that smoking had induced cancer. This committee met almost daily, from the time of formation in early 1964 through completion of congressional action on the labeling bill this year. It covered every contingency for the companies: it planned the industry argument in the FTC hearings, it planned a court test of the FTC ruling if that became necessary,

and it deeply involved itself in the maneuvering in Congress. Once the issue came before Congress, the lawyers' committee wrote testimony, drafted bills and amendments, served as central casting for witnesses most likely to sell the industry's point of view, and fed to friendly congressmen statements and questions to be asked of witnesses. In gossip-prone Washington, there inevitably was speculation on whether Fortas' involvement had anything to do with the conspicuous absence of any mention of the smoking issue in President Johnson's message to Congress making various proposals in the field of public health. It is more likely, of course, that this omission was due to understandable reluctance on the part of the President to take on a bruising fight that would pit him against many members of his own party. Anyway, according to people in the Capitol, when the time came for key votes on the Hill, Fortas was busy on the telephone.

WHILE the lawyers' committee was providing the legal brainwork for the industry, the political expertise and the overt lobbying were supplied by Earle C. Clements, former Democratic representative and senator from Kentucky, former Senate Majority Whip and lieutenant to then-Majority Leader Lyndon B. Johnson, and former director of the Senate Democratic campaign committee, which dispenses vitally needed election funds. In 1964, Clements registered as a lobbyist for the big six. A more ideal man could hardly have been found, for not only did Clements have excellent political connections; he was well liked, he was a gentleman, and he was a shrewd master of legislative infighting. Clements is believed to be the one who sold the tobacco companies on the core of their strategy, a strategy which seems now the obvious one because it worked, but which was not so obvious at the time: go to Congress and accept the package label (the least alarming and most inconspicuous one possible) in exchange for protection against advertising requirements and state regulation. The industry would then give the impression of a sweet reasonableness, whereas a rigid position might bring more severe consequences. The label might even be a boon of sorts, providing a new defense in future personal injury cases brought by cigarette smokers.

Before the FTC ruling appeared, the industry had to decide whether to fight it in the courts or to seek relief from Congress. Guessing — correctly — that Congress was a surer thing (and a court test could always come later anyway), that is where the industry went. Clements is credited with persuading Oren Harris, chairman of the House Interstate and Foreign Commerce Committee, to hold hearings in mid-1964 on the question

of cigarette regulations, even before the FTC announced its decision later that June.

As the hearings ambled into the late summer and time for going home to get re-elected neared, the committee asked the FTC to delay the effect of the rulings, since Congress would not have time to act by the end of the session. The labeling ruling was to have gone into effect on January 1, 1965, and the advertising ruling six months later. The FTC complied with the committee's request, pushing the effective date for both regulations back to July 1. Thus the stage was set for this year's fight.

THE normally fiercely competitive tobacco companies had long since learned to practice brotherhood when their economic interests were at stake. In 1954 in the face of major studies suggesting a link between smoking and disease, tobacco manufacturers, growers, and warehousemen, under the guidance of Hill & Knowlton, a major public relations house, established the Tobacco Industry Research Council (since renamed the Council for Tobacco Research — U.S.A.). This group has handed out over \$7 million in research funds, a good bit of which has produced studies showing other causes of cancer and heart disease besides smoking. In 1958 the tobacco manufacturers established another organization, the Tobacco Institute. The institute ordinarily speaks for the industry and regularly issues a bulletin called "Reports on Tobacco and Health Research," which shows a remarkable facility for ferreting out research indicating causes of lung and heart disease other than smoking. Some examples from one issue: "Miners' Lung Cancers Triple Average"; "Rare Fungus Infection Mimics Lung Cancer" ("well nigh impossible to differentiate clinically"), and so on. Another issue duly reported evidence that charcoaled beef was conducive to cancer. Just after the Surgeon General's report came out, it was announced that the six major companies were giving \$10 million to the American Medical Association for research into smoking and health.

The industry's togetherness, as well as its careful preparation for the battle against regulation, was also apparent when it was announced with much ado in the spring of 1964 that the industry would embark on "self-regulation" in cigarette advertising, to cut the appeal of the ads to children and to stop saying or implying that smoking is good for the health. No longer would cigarette ads be placed in college newspapers or comic books; no longer would there be testimonials by noted athletes (but athletic programs were still sponsored); the virile young men and sweet young things who light up on television ads would have to be twenty-

five; and there would be no advertising on programs "primarily" aimed at children. The regulations were drawn up by the same lawyers' committee that was preparing for the fight in Congress.

The exact strength of the tobacco industry itself in Congress — that is, the number of members in each chamber from areas heavily dependent on tobacco growing, distributing, and processing — is difficult to gauge and largely irrelevant. The tobacco people claim that some twenty-one states and 700,000 farm families are involved in the industry, undoubtedly counting states and farms where tobacco growing is of minimal importance. Whatever the claims of the companies, the figures on the place of the tobacco industry in the American economy are impressive: In 1963, Americans spent over \$7 billion on cigarettes, buying 510 billion of them, or 4350 for each person over eighteen (as compared with 3500 in 1950). Each year the federal, state, and local governments take in at least \$3 billion in taxes on the sales of cigarettes alone. And tobacco companies currently spend over \$250 million on advertising.

On an issue of such importance to some of its members, the entire Southern congressional bloc will tend to stay together. In addition, because federal regulatory power over a large industry was at stake, a healthy percentage of the Republican members were natural allies for the Southerners on this issue. The fact that a requirement of a warning in cigarette ads might curtail cigarette advertising and therefore cause a considerable loss of revenue for the broadcasting industry influenced still more members. The National Association of Broadcasters submitted statements firmly opposing any advertising regulation ("a substantial expansion of the role now played by government could seriously impair the effectiveness of industry self-regulation by undermining incentive"), and the broadcasters are understood to have been doing their own contacting while the bill to overturn the FTC was moving through Congress. Congressmen are particularly sensitive to the viewpoint of local station owners, and they were aware of where the broadcasters stood.

Whatever there was of the other side was simply no match for this array of forces. Within the executive branch, the Public Health Service had to go it alone. The PHS did its best, however, to rally around itself what friends it had. Shortly after the Surgeon General's report came out, the PHS, the Cancer Society, the American Heart Association, the National Tuberculosis Association, the American Public Health Association (comprising public health workers across the country), and a number of other private health groups formed an unusual federal-private body called the National Interagency Council on Smoking and Health. The

AMA was not among the health-oriented groups which joined up. What testimony there was on the side of putting the FTC regulations into effect was better presented because of the council, and, more important, the council informed state health societies and doctors about what Congress was actually doing and stirred up a number of letters and telegrams to congressmen, urging them to hold fast for the advertising rule.

These efforts had some effect on the waverers. But the PHS was hurting from lack of true friends in Congress, an institution that has developed over the years a curious bifocal view of health issues. The lawmakers enthusiastically vote hundreds of millions of dollars — more, usually, than is requested — for health research, for when it is simply a matter of research, what congressman is against health? However, when the health officials go to Capitol Hill with proposals to put research findings into effect — to curb air pollution or discourage smoking — they are the skunks at the lawn party. For on these issues there are large economic interests at stake.

The tobacco strategists correctly deduced that the focal point for the fight to overturn the FTC would be the Senate Commerce Committee. The full Senate and the full House could be expected to follow the lead of the committee reporting out the bill, for both committees preside over legislation which affects a wide range of commercial interests and therefore have considerable leverage in their respective chambers. ("Everybody and his dog has business before those committees at some point," says one Hill aide.) The House Interstate and Foreign Commerce Committee, heavily laced with Southerners and conservatives, would be no problem; it could be expected to report out a bill requiring the label but forbidding, permanently, the FTC to require health warnings in cigarette ads. This would put the industry in the strongest possible position for bargaining with the Senate.

The Senate committee was not such a sure thing. The six Republicans were reliable enough, for this was clearly a crucial issue for Senator Thruston B. Morton of Kentucky, second-ranking GOP member of the committee, former chairman of the Republican National Committee, and current chairman of the fund-dispensing Senate Republican campaign committee. On the Democratic side, however, the only member whose political life required defense of the tobacco industry was Ross Bass of Tennessee, a freshman. Early in the hearings, Senator Vance Hartke of Indiana, another Democratic committee member, emerged as a tireless cross-examiner of those who opposed the industry's point of view. When questioned about Senator Hartke's seeming devotion to a cause of minimal importance to his own state, his aides took pains to explain that

his interest did not stem from his longtime friendship with Clements, as some believed, or from the fact that Clements' campaign committee had given Hartke vitally needed election funds. Hartke himself said that he had come to the hearings thinking that there "must be some connection" between smoking and health, but came away "completely astonished" to find that the connection had not been proved. This gave the industry eight sure votes, and there were others on tap. What it wanted, however, was for the bill that went to the floor to have the support of Chairman Magnuson and of as many committee members as possible.

The industry's task was more difficult than it might have been if Senator Maurine B. Neuberger, Democrat, of Oregon, had not won a seat on the Commerce Committee when Congress opened in 1965. Mrs. Neuberger had long called for closer federal regulation of cigarette merchandising. Now she had an opportunity to challenge the witnesses who appeared before the committee and to proselytize her colleagues. To offset the attempts to undercut the FTC rulings, Mrs. Neuberger introduced legislation giving congressional sanction to what the FTC was trying to do. But in this she stood virtually alone.

The industry's presentation at the Senate hearings was masterful. Bowman Gray, chairman of the board of R. J. Reynolds, appeared for the industry, which carefully did not bombard the committee with too many tiresome witnesses, and the tone of his testimony was more in sorrow than in anger. Mr. Gray pointed out that the tobacco companies were "profoundly conscious" of the health questions and were zealously researching the problem; that "many distinguished scientists . . . are of the opinion that it has not been established that smoking causes lung cancer or any other disease"; that "millions of persons throughout the world derive pleasure and enjoyment from smoking" (as if someone were proposing to abolish the right to smoke); and that the central purpose of advertising was to compete among products, not to induce people to smoke. Mr. Gray said that the industry was naturally opposed to warnings both on labels and in advertisements, but his testimony was interlarded with the "howevers" and "ifs" that signaled the industry position: If a label is required, have Congress require it, and spell out its terms, rather than leave this to the dangerous FTC or the health-conscious Health, Education, and Welfare Department, parent agency of the PHS. And if Congress requires the warning label, it should not interfere with "the right to advertise — an essential commercial right": "I am confident that the Congress will reject this extreme proposal."

Throughout the hearings, the industry, with the help of friendly senators, carefully built a record

designed to show that medical opinion was split over the Surgeon General's report — despite the fact that no medical group has ever denied its validity and only a small minority had dissented — that whatever Mrs. Neuberger or the FTC wanted to do was “extremist,” and would wreak havoc in a basic American industry as old as Jamestown; and it made very effective use of the “excess” argument. According to this argument, excessive smoking may be dangerous, but so is excessive drinking, or over-eating, or driving too fast. Would Congress want to put warnings of possible death on liquor, food, and automobiles? Where would it all end? This line of reasoning ignored the fact that the Surgeon General's report was not talking only about excessive smoking, and in fact stated that no safe level of smoking could be established. But the technique worked very well.

THE committee quickly disposed of Mrs. Neuberger's, and the FTC's, approach on a 12-2 vote and settled down to the real issue, which was how long to suspend the effect of the FTC's ruling on advertising. Chairman Magnuson and a number of the committee's members were opposed to suspending it permanently, as the House had done, for this, too, was “extremist,” and unseemly, for the rule-making authority of the regulatory agencies is supposedly independent of Congress. Where there is conflict, the issue is supposed to be decided in the courts. Moreover, although the permanent suspension may have been something devoutly to be wished by the cigarette industry, it was not something realistically to be expected. After some seesaw voting, Morton, Bass, and Hartke agreed with Magnuson to vote out a bill to require a label on packages by the following January and to suspend the advertising for three years after that. In the committee's report to the Senate, only Mrs. Neuberger objected to the suspension.

The united front of the committee and canny confusing of the issue undermined Mrs. Neuberger's attempt in the full Senate to reduce the time of suspension. As the time for the voting approached, a number of senators honestly believed that all they were about to do was to join the Commerce Committee in taking the heroic step of warning the public about the health dangers in smoking. Despite last-minute efforts by Mrs. Neuberger, Senator Robert F. Kennedy, their aides, and David Cohen, a lobbyist for the Americans for Democratic Action, to explain what else was involved, her amendment was defeated 29 to 49. The Senate then went on record to pass the bill by a vote of 72 to 5.

Meanwhile, the House committee had behaved predictably, voting out a bill to require a label on

the side of the package and to bar the FTC permanently from requiring a warning in ads. The only surprise was that Mr. Harris and his colleagues felt compelled to indulge in a blatant breach of congressional etiquette to get the bill passed. One quiet Tuesday afternoon, with no prior notice, with only a few members on the House floor, and with the bill's principal opponent, Representative John E. Moss of California, out of town (but with the tobacco strategists in the gallery), the bill was called up. Moss, the sole member of the Harris committee to dissent in the committee's report and one of the Democratic Party's House whips, had had an understanding with the House leadership, or so he thought, that the bill would not be brought up until Thursday, two days later. Moss was flying back from Europe while the bill was being debated and arrived at Dulles Airport a half hour after the House passed the bill by a voice (unrecorded) vote.

Though some were surprised at the speed with which the House conferees acquiesced in the Senate's shorter ban on the FTC requirement for the warning in cigarette advertising, it was the logical thing to do for a number of reasons, among them columnist Drew Pearson. Mr. Pearson had begun to sniff out what was going on in the cigarette fight, and on the day that the House-Senate conferees first sat down to work out their differences, his column in the morning *Washington Post* was headlined, “Steamroller Goes Through House.” This was not the sort of image that the tobacco companies were seeking. In addition, the companies knew that even a permanent ban would not be all-protective in the event more and more research showed direct links between smoking and disease, and if the public became sufficiently aroused. Also, Senator Magnuson was standing firm for the Senate's terms.

The best strategy at this point, then, was to accept the Senate bill — with two exceptions — and to go away quietly. The first exception was that the House conferees would not accept the Senate's provision that the label be on the front of the package (though there is reason to wonder how many know what is printed on the front *or* the side of cigarette packages other than the brand name). After some haggling, the Senate and House conferees decided to require that the warning “appear in conspicuous and legible type,” but not to require that it be placed anywhere in particular, just that the place be “conspicuous.” The second request — and this, too, was granted — was that the ban on the FTC action should expire on July 1, 1969, rather than on January 1. This way, there will once again be time for Congress, with another presidential election year just behind it, to go to bat for the cigarette industry and filter the “harmful elements” out of any new proposals.

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ROBERT HEILBRONER

*The Power
of Big Business*

SEAN O'CASEY

*The Bald
Primaqueera*

RICHARD HERRNSTEIN

*In Defense
of Bird Brains*

IRWIN ROSS

Trial by Newspaper

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CARLTON LAKE

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