

## AN ABSTRACT OF THE THESIS OF

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The purpose of this study is to analyze the possibility of political influence upon the Department of Justice merger decisions within the brewing industry. Political preference was measured by the congressional ratings of a liberal political action committee, The Americans for Democratic Action (ADA), thus giving a liberalness score. Regressions including the merger guideline variables and the political preference measurement were estimated with a logit model. After running numerous regressions, the addition of the political preference variable resulted in insignificance for otherwise significant 1968 and 1982 guidelines variables. These results may indicate an inability of the model to differentiate between political pressure on antitrust enforcement during the establishment of the 1968 and 1982 guidelines, or beyond the establishment of the guidelines. However, the Chair of the Senate Antitrust Subcommittee, the oversight committee for the Department of Justice, is found to be the most significant with liberalness having a positive impact upon the probability of DOJ merger litigation.

Congressional Influence on Department of Justice Merger  
Decisions: A Case Study

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# CONGRESSIONAL INFLUENCE ON DEPARTMENT OF JUSTICE MERGER DECISIONS: A CASE STUDY

## I. INTRODUCTION

The purpose of this study is to determine the effect of political pressure on Department of Justice (DOJ) enforcement of the anti-merger laws. Rather than using agency information on the number of challenged cases as compared to the concurrent political climate, this study analyzes the political influence on antimerger enforcement in one industry, the brewing industry, from 1951-1989. This industry is ideal for such a study because it exhibits increasing concentration and it is a national industry. Additionally, the brewing industry has an adequate sample of horizontal mergers, rather than vertical or conglomerate mergers which may evoke a different enforcement of the laws.

The test of the relationship between the DOJ antitrust enforcement and political influence requires a measure of liberalness. The congressional ratings by a political action group, the Americans for Democratic Action (ADA), are used to quantify the degree of political liberalness on a scale from 0-100 with 100 being the most liberal. The chairs, ranking republicans, and ranking democrats of the Senate and House Judiciary Committees and the Subcommittees on Antitrust, were rated by the ADA, and their scores are used in the model. The other variables included in the empirical model are determined by the DOJ merger guidelines and their

changes in 1968 and 1982.<sup>1</sup> Variables included are: market share of the buyer, market share of the seller, probability that selling firm will fail, the industry's four firm concentration ratio, market share of imports, purchasing of only brands and not facilities, a market extension rather than a horizontal merger variable, and dummy variables to capture the effect of the change in the merger guidelines in 1968 and 1982.

A logit model is used to determine the probability that a particular merger is challenged. Most of the guideline variables were significant such as: the market share of the seller, the market share of the buyer, the four firm concentration ratio, and the 1968 and 1982 guideline variables. In terms of political pressure, the Chairman of the Senate Antitrust Subcommittee is found to have a positive and significant effect on antitrust enforcement. However, the individual effects of the chairman, ranking republican, and ranking democrat of the Senate Antitrust Subcommittee became increasingly significant with the removal of the 1968 and 1982 law variables. Further experiments with the model's specification suggest that there is difficulty in distinguishing the separate effects of the ADA political variable and the changes in the guideline variable. This is reasonable as congress influences merger decisions by first writing laws and later by possibly influencing regulators. Moreover, in this model political pressure is hard to determine, but the

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<sup>1</sup> U.S. Department of Justice merger guidelines, May 30, 1968. For text of the 1968, 1982, and 1984 guidelines, refer to; Section of Antitrust Law, American Bar Association, Horizontal Mergers: Law and Policy 264-336 (1986).

political rating of the Senate Antitrust Chair was significant in the DOJ antitrust enforcement within the brewing industry regardless of the presence of the 1968 and 1982 changes in the merger guidelines.

## II. THE ANTITRUST LAWS

The Sherman act of 1890 was partially enacted in response to the increase in the monopoly power of large nationally known firms; the crude beginnings of the modern American corporation. Section 1 of this first federal antitrust legislation forbids cartels; "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...". Courts have not interpreted Section 2 to mean that monopolies are illegal, but rather that it is forbidden to "behave as a monopoly".<sup>2</sup> The Sherman Act did not clarify to what extent a response to new competition would be considered illegal, thus the Clayton Act and Federal Trade Commission Act of 1914 were passed in order to clear the obscurity. The Clayton Act was aimed at prohibiting 4 particular types of behavior:

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<sup>2</sup> Section 2 states that, "every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...".



Section 2 - price discrimination that hinders competition (later amended in 1936 by the Robinson-Patman Act),

Section 3 - the use of tie-in and exclusive dealing contracts that lessen competition,

Section 7 - mergers that reduce competition, and

Section 8 - prohibits interrelated Boards of Directors from controlling competing firms.

Further, permission to recover treble damages by the injured parties is granted by the Clayton Act. The Federal Trade Commission Act created the Federal Trade Commission (FTC) to enforce the antitrust laws. Mainly, the FTC oversees section 5, which prohibits "unfair" methods of competition. The FTC also enforces consumer protection and the prevention of deceptive advertising.

The Celler-Kefauver Act of 1950 amended Section 7 of the Clayton Act to strengthen its legislation on merger activity. The elimination of horizontal conglomeration was argued by the courts to be the aim of the amended Section 7 and that enforcement should be for the "protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." Even though one view of antitrust goals may be to increase efficiency, efficiencies alone (before the 1982 guideline changes) generally did not provide justification for a merger resulting in increased concentration and expected increased in prices. After 1982, efficiencies may, however, provide a justification for a merger which may increase concentration if prices are expected

to decrease.

Frustrating ambiguities in the determinants of merger litigation led to the construction of merger guidelines in 1968. The goal of the DOJ was to reduce the uncertainty within the business community concerning merger enforcement. The 1968 guidelines rely primarily on a structural standard when evaluating horizontal mergers. For example, in markets with a 4 firm concentration ratio<sup>3</sup> (CR4) of 75% or greater, the firms will most likely face a merger challenge provided the market shares for the acquiring and acquired firms are: 4% and 4% or more, 10% and 2% or more, and 15% and 1% or more respectively. Where the Cr4 is less than 75, challenged mergers would generally have market shares for the acquiring and acquired firms as: 5% and 5% or more, 10% and 4% or more, 15% and 3% or more, 20% and 2% or more, and 25% and 1% or more, respectively. As the concentration ratio is central to merger decisions, defining the relevant market becomes contentious since there are no clear guidelines in this definition. The use of a broader<sup>4</sup> market definition, supported by merger proponents, "will [result in] fewer antitrust challenges" (Foer, p.27). (Tremblay 1993):

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<sup>3</sup> The four firm concentration ratio measures the total market share of the largest four firms' share of industry sales. If this share is large, the industry is said to be concentrated and less competitive than when the concentration ratio is low.

<sup>4</sup> "Concentration figures of any kind are derivative: if the market is broadly defined, concentration will virtually always be lower than if the market is narrowly defined" (Foer p.26).

In addition, the 1968 guidelines state<sup>5</sup> that the DOJ:

1. may ignore these structural standards for industries being significantly transformed (e.g. by technological changed), since market boundaries may be uncertain;
2. will apply a more strict standard in markets where there is a significant trend toward concentration;
3. will not allow the acquisition of an important (disturbing, disruptive, or unusually competitive) rival in the market;
4. will allow the acquisition of a failing firm if the failing firm does not have a reasonable prospect for survival and there are no other buyers that would better promote competition;

The 1982 guidelines add that the DOJ:

5. will accept an efficiency defense but only in exceptional circumstances; and
6. will apply a more lenient standard for market extension mergers (a merger between two firms selling a similar product in different geographic markets).

The 1982 merger guidelines were designed to be less strict than the 1968

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<sup>5</sup> Tremblay (1993).

guidelines and they "focus on preventing a price increase from enhanced market power due to a merger, especially when no countervailing efficiencies are present" (Coate 1992. p.278). These guideline examine factors such as: concentration (along with a definition of relevant markets), entry barriers, ease of collusion, efficiency and failing firm status. Along with the 1982 change in the merger guidelines, the measurement of market concentration was changed from the 4 firm concentration ratio to the Herfindahl-Hirschman index (HHI)<sup>6</sup>. The HHI equals the sum of the squared market shares of each firm in the market. If the HHI is greater than 1800 a market is considered highly concentrated, if the HHI greater than or equal to 1000 moderately concentrated, and if the HHI is less than 1000 a market is considered unconcentrated. These new guidelines also have a more precise definition of the relevant market; all products and firms that would be part of a successful cartel, i.e. rivals that customers would switch to if prices were raised 5% by the firm. Finally, the 1984 revision places a greater emphasis on the efficiency defense.

It would seem that the antitrust enforcement is duplicated by the existence

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<sup>6</sup> The HHI was considered as a more accurate measure of industry concentration and thus replaced the concentration ratio. Carlton and Perloff note that "The HHI can be theoretically derived as the right index of concentration to use to explain prices in a particular model of oligopoly behavior. Typically, empirical results do not depend on whether one uses the HHI or a four-firm concentration index to measure industry concentration. The HHI can be theoretically derived as the right index of concentration..." (1990 p 370).

of both the DOJ and the FTC. The agencies however share the enforcement of particular sections of the Sherman and Clayton Acts and enforce other sections alone.<sup>7</sup> However, "some antitrust experts maintain that the Federal Trade Commission should transfer its duties in Antitrust enforcement to the Antitrust Division of the DOJ" (Katzmann 1980, p 191).<sup>8</sup> Since the two agencies overlap in their areas of enforcement, it is conceivable that there would be some competition between the two departments.

Because of an interactive liaison system between the 2 agencies, however, confrontations are generally avoided. This liaison system established in 1948, creates a pool<sup>9</sup> of potential cases. The agencies consult each other in order to gain clearance to conduct investigations. "Usually, one agency will automatically grant

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<sup>7</sup> The Department of Justice has sole jurisdiction over criminal matters under the Sherman Act. The FTC has sole jurisdiction over section 2 of the Clayton Act and section 5 of the FTC act. Both agencies share enforcement on sections 2,3,7 and 8 of the Clayton Act.

<sup>8</sup> In the 1960 Senate Committee on the Judiciary Report on regulatory agencies to the President-elect, Dean James Landis suggested to President-elect Kennedy the transfer of FTC antitrust duties to the DOJ.

<sup>9</sup> Before the 1976 Hart-Scott-Rodino Act requiring firms to submit merger propositions to the DOJ," the DOJ personnel learned about mergers from complaints, the Wall Street Journal or trade press" (Johnson, p.969). Mergers may have occurred before 1976 without the DOJ's knowledge; however even after the H-S-R, merging firms may still go undetected if they are "structured to avoid H-S-R filing criteria" (Johnson).

clearance to the other to pursue an investigation, unless the contemplated action duplicates or interferes with a case that it is already conducting" (Katzmann, 1980 p 193).<sup>10</sup> Officials from the DOJ and FTC decide which will review a particular merger mainly on the basis of which department has the most experience with the firm or industry. For example, the FTC will pursue cases within the department store or supermarket industry, whereas the DOJ pursues cases in the Steel Industry.

There are arguments as to the necessity of both agencies which brings about comparison of staff and external pressures. The DOJ is noted for having a superior legal staff, even though both agencies have a high turnover rate as lawyers use their experience to gain positions in private practice. Both the FTC and DOJ are susceptible to external political pressure. As the DOJ is a part of the executive branch, pressure from the President as well as Congress may exist. Further, as the FTC is under the legislative branch, there is concern of Congressional influence within this agency. A reasonable amount of literature has accumulated with respect to the Congressional influence upon the FTC, including studies by R. Posner, B. Weingast, and M.Coate (see literature review). With the close relationship of these 2 agencies and their duties, an evaluation of the Congressional and even Presidential influence on the DOJ may substantiate any claims of political pursuits within the antitrust area.

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<sup>10</sup> "The clearance process has prevented a wasteful duplication of effort "(Katzmann, p194). The requests for clears are generally handled in 5 days.

Suzanne Weaver (1977) purposes that there is political influence on the DOJ through formal Congressional oversight from the Senate Antitrust Subcommittee, and through the case selection process. The relationship between the Antitrust Subcommittee and the DOJ consists of the subcommittee "suggesting areas where cases might lie" (Weaver, 1977 p.152). In addition, the Senate Subcommittee on Antitrust conducts hearings regularly on competition within various industries and the economy as a whole. At some point, attention is directed toward the DOJ's Antitrust division operations within the area under consideration.

Decisions to select a case are difficult to attribute to outside influences. It is alleged that some cases prone to political intervention were rejected because the DOJ presented an inferior case leading the Attorney General to believe the defense arguments to be superior. This tactic of deliberately presenting an inferior case would not be as evident among marginal cases as it would be with extreme cases, hence marginal cases may be more susceptible to seemingly superior defense arguments.

Moreover, outside detection of political influence, through formal oversight and case selection, can be difficult to detect as well as measure. However, various studies have analyzed the possibility of political influence on antitrust enforcement decisions using various measurements of political preferences.

### III. LITERATURE REVIEW

The belief in influence of politics in antitrust enforcement has a long history. Being only a theory, however, it has sparked a number of empirical constructs to validate the intuition of congressional dominance over regulatory agencies.

#### "A Statistical Study of Antitrust Enforcement"

Richard Posner (1970) analyzed various antitrust enforcement agencies including the DOJ and FTC. Within this study, Posner looked at various implications and possible causes of the number of antitrust cases filed. The data included cases from 1890-1969<sup>11</sup>.

Even though Posner studied a variety of implications from this data, this review will only focus on the ideas most pertinent to the topic at hand, political influence<sup>12</sup>.

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<sup>11</sup> Though the data only extend until 1969, the history of the antitrust enforcement will at the least give a setting for historical political involvement and provide a basis for current actions.

<sup>12</sup> Posner viewed various effects including the increase in the number of antitrust cases by both the DOJ and FTC over time. He also noted a correlation between antitrust cases and the level of overall economic activity until 1940. After



Posner considered that "one factor of potentially great explanatory power is politics, [in particular] the identity of the party in the White House" (p.411). The number of antitrust cases compared to the years of White House occupancy denoted that the Democrats had 979 cases with 58.2% of White House occupancy between 1905-1969. The Republicans brought 550 cases with only 41.8% occupancy. In proportion to occupancy, the democrats should have brought 890 cases, but were 89 cases in excess. It should be noted that a fair amount of the Republican administrations was during the first of the century when overall antitrust activity was low. To correct for this difference, Posner split the time periods from 1905-1937 and 1937-1969. In the first period, the Democrats brought only 110 cases, yet as a proportion of occupancy, they should have brought 144 cases. In the second period, the democrats brought 876 cases yet proportionally should have had 868 cases. Posner additionally tests whether the number of cases during an election year is above or below average and found that 26.7% were initiated in the election year, slightly above the 25% average.

Posner concluded that there is "no systematic tendency of one party to increase or decrease antitrust activity upon taking office", and more generally, that "it does not appear that the identity of the party in power has much influence on the quantity or quality of the Justice Department's antitrust activity"(Posner, 1970).

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1940 the number of DOJ cases did not increase significantly as the economy expanded. Posner concluded that antitrust activity is not determined by overall economic activity.

"Bureaucratic Discretion or Congressional Control?"

Weingast and Moran (1983) examine the correlation of the 1979-1981 public Congressional intervention into the FTC with the change in congressional committee preferences. In the 1979, Congress publicly charged the FTC with regulatory abuse on a series of cases, criticized policy initiatives, and stopped funds that caused the agency shut down. Although funds were reviewed, public Congressional intervention questioned the direction of FTC policy.

In Weingast's study, congressional preferences of the Committee on Commerce Subcommittee on Consumer Affairs were determined by the ratings of the political action committee Americans for Democratic Action (ADA). Weingast and Moran show that prior to the 1979-81 FTC reversals, there was a shift in committee preferences. For the period from 1977-1979, both the subcommittee's and the Senate's mean ratings fell from 57.7 to 26.4 and 45.5 to 37.5, respectively. Since these figures from 1977-1979 "represent a marked change in committee preferences from proactivist to anti-activist, it follows from our model that the committee would alter regulatory policy" (Weingast, 1983).

Weingast further extends his analysis to test whether Congress influenced the FTC before 1979. Since the choice of cases by the agency is used as a policy instrument, Weingast compares congressional committee preferences with agency choice of cases. This is done by viewing 3 different categories of cases (namely

credit cases, textile cases and Robinson-Patman cases<sup>13</sup>) and noting the distribution of these cases over the years, then correlating these with the change in congressional preferences.

The results of the political variables (ADA ratings which quantify the congressional preferences) were shown to be significant and of a positive sign, with the Senate being more important than the House in terms of significance and magnitude. Hence, as liberalness increases merger activity increases. From calculating the partial derivatives of the probability of opening a particular type of case, Weingast determines the change in the ADA score needed to change the probability of a particular case being opened by the agency. Subcommittee members were shown to have 2.5 times more influence over choice of cases by the agency than non-subcommittee members, and the subcommittee chair was shown to have 12 times more influence than non-subcommittee members. The inclusion of a budget variable in the regression sought to determine the influence of the Appropriations Committee, hence the effect of "rewards". This variable was significant in all three cases.

Weingast and Moran found that "the 1976-79 changes in the Senate subcommittee are large enough to result in dramatic shifts in agency decisions. The

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<sup>13</sup> Credit cases refer to cases falling under the Truth-in-Lending Act of Fair Credit Reporting Act.

Textile cases refer to cases falling under the fur, wool or textile statutes.

Robinson-Patman cases refer to cases falling under the Clayton Act section 2 as amended by the Robinson-Patman Act.

statistical evidence implies that the FTC is remarkably sensitive to changes in the composition of its oversight subcommittee and in its budget" (Weingast, 1983).

### "Bureaucracy and Politics in FTC Merger Challenges"

In a similar study, Malcom Coate (1990) models FTC antitrust enforcement as influenced by pressure from Congress and he evaluates the roles played by FTC lawyers and economists in influencing FTC action. The data used are from internal FTC records from 1982-1986.

In this model, one variable for political pressure is identified by "the number of times politically appointed FTC staff were called before congressional committees to testify on their antitrust enforcement records...[this is] a technique that politicians use frequently to increase amounts of antitrust enforcement." (Coate 1990, p.474). Another variable that may influence merger decisions is the amount of news coverage given to the merger. "The larger the merger, the more likely it is to result in job losses, plant closings or relocations, and revenue losses to local jurisdictions, thus more likely to encounter political resistance" (Coate 1990, p. 473). This news variable is measured by the number of articles in the Wall Street Journal mentioning the merger.

In conjunction with determining the effects of political pressure, Coate accesses FTC inside information to contrast the influence of FTC staff economists

and staff lawyers in the evaluation of potential mergers.<sup>14</sup> Coate suggests that lawyers prefer more litigation in order to gain higher salaries, advance in position, and "build capital" for private employment. Economists, however, do not have these requirements in order to move into higher positions. In this model, disagreement among lawyers and economists is captured by how each defines the relevant market with respect to given guideline variables. Variables such as the HHI, barriers to entry and ease of collusion are evaluated by economists and lawyers and used to determine the probability of litigation. The question is if one group's evaluations weigh more heavily in the commission's final decision.

Coate found that when economists and lawyers disagree that the lawyers interpretation weighs more heavily in commission decisions. Moreover, "lawyers' evaluation of the variables identified in the merger guidelines has a greater effect than does the evaluation by economists" (Coate 1990, p.481).

Coate found that the commission does respond to political influences. "The Wall Street Journal story raises the probability of a challenge 4.7 percentage points, and one additional congressional hearing raises the probability of a merger challenge by 4.2 percentage points" (Coate 1990, p.476). Coate infers that in the interest of retaining constituents such as laborers and management, those in Congress have an incentive to block mergers.

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<sup>14</sup> The staff economists and lawyers provide information about a particular merger to the 5 FTC commissioners who, in turn, vote for or against a merger challenge.

#### IV. THEORY

The existence of political pressure on regulatory agencies is determined by the interpretation of the observed relationship between Congress and the antitrust enforcement agencies. To determine Congressional influence, Congress' observed actions are open to interpretation either as limited intervention into FTC affairs, or as hidden political pressure. Weingast proposes the following list of observed Congressional actions toward the FTC:

1. The lack of oversight hearings.
2. The infrequency of congressional investigations and policy resolutions.
3. The perfunctory nature of confirmation hearings of agency heads.
4. The lack of apparent congressional attention to or knowledge about the ongoing operation and policy consequences of agency choice.
5. The superficiality of annual appropriations hearings.

Two different approaches seek to explain the existence of these 5 observations. The first approach proposes the independence of regulatory agencies from Congressional influence. This traditional approach views these observations as evidence of a failure of Congress to oversee and control regulatory agencies. Control by Congress is inhibited by several factors: regulatory agencies' independent control over information leading to regulation, the access to agency-

clientele possibly encouraging alliances, and high cost of passing new legislation to steer agency policy. Moreover, the traditional view takes the 5 observations at face value suggesting that "by and large, regulatory commissions are not under close scrutiny by the White House or Congress." (Wilson 1980, p.388)

The second approach explains the 5 observations depiction of a seemingly distant relationship through informal incentives, thus establishing Congressional dominance. These informal and mutually "understood" incentives are established through budgetary favors or through threatening sanctions such as new legislation, specific prohibitions in order to hurt "pet projects" or embarrass chairmen, as well as appointments and reappointments (Weingast 1983, p. 769). Hence, this approach suggests that harsh punishments and generous rewards may provide adequate incentives to serve congressional pressure. This sort of system creates a "congressional conscience" within regulatory agencies that may sway decisions according to current congressional preferences. Ideally, Congress should "publically debate policy alternatives then issue directives to agencies (Weingast 1983, p.769). Rather, Congressional domination of regulatory agencies occurs through concealed incentives to establish a congressional conscience. These incentives are the real cause of the observed relationship between Congress and regulatory agencies, hence exposing the 5 observations as being surface only. Moreover, direct actions are scarce when indirect, but compelling, incentives are effective.

It can be seen that the 5 observations of the apparent Congressional distance from regulatory agencies could be explained through traditional means of

Congressional noninterference, or through underlying rewards or punishments seeking to act as a congressional conscience for the regulatory agency.

Another motivation for a politician to influence a particular merger decision depends upon the potential gains or losses in constituent support. "That is, well-organized private groups purchase regulatory favors in the political marketplace, benefiting both themselves and politician-sellers at the expense of less well-organized groups" (Coate, 1990). Thus, in any merger there are "winners" and "losers". Shareholders of a particular firm being threatened by a take over will ordinarily expect a gain in the value of their holdings. The potential gain in shareholders returns will be a result of managers running the firm more efficiently in order to avoid a takeover. Shareholders then may have an incentive to be politically active in a particular merger decision except for their geographic dispersal and their large numbers. Organizing such a group would be difficult as the gains for each individual shareholder would not be enough to motivate individual political action. Further, the political influence would be minor due to their dispersion throughout various congressional districts. Moreover, the group with individually meager, potential gains from a merger is too large and dispersed to have any great impact on a particular member of Congress.

The group facing potential losses, however, may be smaller but is more concentrated within one congressional district. Managers and laborers of the threatened company may be subject to layoffs or relocation as a result of the merger or of restructuring for efficiency. These high costs to constituents may



pressure the respective politician to attempt to defeat the merger or at the least, slow it down and increase the possibility that the merger will be abandoned. Wilson noted, "Exceptional majorities propelled by the public mood and led by a skillful policy entrepreneur take action that might not be possible under ordinary circumstances" (p.97). Therefore, this high cost of a merger to a concentrated block of voters may propel antimerger action by their congressman.

The high costs and concentration of employees may outweigh the individual gains by geographically dispersed shareholders, and thus, may instigate congressional action against a merger. However, Coate comments that "Political considerations alone will not determine agency decisions. Although, at the margin, political demands for enforcement will increase the bureaucratic supply of mergers challenged" (1990, p.470).

Weingast's analysis, which is a practical application of work by Fiorina (1974) and Fenno(1978), concludes that congressmen "vote their district". To understand committee benefits, we must assume the Fiorina et.al conclusion - that each politician votes so as to maximize support within his district.

The combination of the committee system for legislative action and the size of congressional districts provides a more stable line of legislative power for the interests of the constituents. Interests within this small district of voters tend to be uniform and thus intensely influential upon the district's representative seeking voter support. Mitchell in his analysis of public choice comments, "rational citizens, politician's and bureaucrats are pursuing the only intelligent course of action,

namely, rent-seeking and redistribution" (1984 p.168). Legislative power is enhanced by the structure within Congress which consists of committees and subcommittees that are divided and specialized into narrow areas of interest. The congressional committee system establishes a means for providing benefits to each group and reducing intergroup conflicts hence increasing the welfare of all legislators. This system allows practically monopoly control over specific areas and policies through the opportunity to make proposals as well as veto control over proposals made by others, "therefore partially insulating agency policy from outside influence" (Weingast 1983, p.775). In conjunction with this policy power, committees are formed by self selection. It is then to the congressman's advantage to select a committee and gain leverage within the areas of his constituents' interest. This explains why agricultural committees are dominated by legislators from farming districts and why the interior and public land committees are dominated by congressmen from the western states. Weingast proposes that "each legislator gives up some influence over many areas of policy in return for a much greater influence over the one that, for him, counts the most" (1983, p.771). Weingast further implies that a change in the composition of regulatory oversight committees leads to major shifts in agency policy.

## V. EMPIRICAL EVIDENCE

This study attempts to determine the true process which decides the fate of a proposed merger within the brewing industry. The merger decisions are to be based on the specific guidelines set by the Department of Justice, and are "supposed to structure merger regulation to make enforcement decisions consistent, increasing predictability and lowering private transaction costs" (Coate 1992, p. 279). The Tremblay (1993) analysis of the consistency between the law and its actual enforcement within the brewing industry used a logit model to determine the probability that the Justice Department will challenge a merger. Based on the merger guidelines it contained the following independent variables:

$MS_b$  = the premerger market share of the buying firm.

$MS_s$  = the market share of the selling firm.

$PROB_{sf}$  = the predicted probability that a selling firm will fail and exit the industry.

$CR_4$  = the industry's four firm concentration ratio.

$D_{brand}$  = a brand dummy variable, which equals 1 if the firm purchases only the brands (not facilities) of another firm (0 otherwise).

$MS_{im}$  = the market share of imports.

$D_{trend}$  = a concentration trend dummy variable, which equals 1 for the  $i$  ( $i=2,3,4,...8$ ) largest firms if the firms concentration ratio increases by seven percent or more over a 5- to 10- year period (0 otherwise).

$D_{mx}$  = a market expansion merger dummy variable, which equals 1 if a firm

makes a market extension (rather than a horizontal) merger (0 otherwise).

$D_{68}$  = a 1968 merger guideline dummy variable, which equals 1 from 1968 through 1981 (0 otherwise).

$D_{82}$  = a 1982 merger guideline dummy variable, which equals 1 from 1982 through 1989 (0 otherwise).

The model to determine possible political influence on DOJ merger decisions will also use a logit regression and the Tremblay variables with the addition of a political rating variable. The following is a description of the logit model:

$$\begin{aligned} \text{PROB}^{*lit} = & \beta_0 + \beta_1 MS_b + \beta_2 MS_s + \beta_3 \text{PROB}_{sf} + \beta_4 CR_4 + \beta_5 D_{brand} + \beta_6 MS_i \\ & + \beta_7 D_{trend} + \beta_8 D_{mx} + \beta_9 D_{68} + \beta_{10} D_{82} + \beta_{11} ADA_{score} \end{aligned}$$

where the latent variable  $\text{PROB}_{lit}$  equals the probability of a merger being challenged, and the observed  $\text{PROB}_{lit}$  is defined:

$\text{PROB}_{lit} = 1$  if the merger was challenged;

$\text{PROB}_{lit} = 0$  otherwise;

The data include 106 proposed or actual mergers within the brewing industry from 1950-1989 (see appendix B). The ADA<sub>score</sub> variable is used to rate the differing legislator offices of the House and Senate:

The Judiciary Committee :

Chair, Ranking Republican, Ranking Democrat

The Subcommittee on Antitrust:

Chair, Ranking Republican, Ranking Democrat

The measurement of liberalness among the House and Senate Chairs, Ranking Republicans and Ranking Democrats for the Judiciary Committee and Antitrust Subcommittee is a rating system of a liberal political action committee, Americans for Democratic Action (ADA).<sup>15</sup> The ADA catalogues the voting records of each Congressional member on approximately 12 major legislative issues. They then calculate the percentage of responses supporting the ADA position which is then the score. The scores of those in congress range between 0 and 100, with 100 being the most supportive of ADA legislative positions or most liberal. A numerical value for the political variable is chosen over a discrete variable (1=democrat and 0=republican) in order to provide more accuracy to actual liberalness. Democrats for example are all not necessarily more liberal than Republicans. In some cases the ADA score was higher, indicating more "liberalness", for certain Republicans than for certain Democrats. Further, even within the Democratic party there is a noted difference in political position of

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<sup>15</sup> The ADA voting Record has been published annually since 1947 and is a "standard measure of political ideology as well as legislative performance" (ADA informational circular). Their efforts are to "push progressive legislation and fight regressive Republicans and conservative Democratic obstruction" (ADA).

Southern and Northern Democrats. Thus, with yearly tabulations of voting records and their compliance with ADA positions<sup>16</sup>, an annual liberalness score can be obtained for every Congressional member. The ADA scores, "shown to be a good index of legislators' preferences" (Weingast 1983), should indicate the degree to which the preference of more liberal politicians leads to more merger challenges within the Department of Justice.

## VI. EMPIRICAL RESULTS

In Table A, results for the original guideline model without the political variable are presented along with 5 other pertinent logit regressions. The regression without the ADA political variable (Table A; run 1) results in insignificance for Dbrand, MSim, Dtrend and Dmx which may be expected as these variables are intended to capture decisions in special cases (Tremblay, 1993). In

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<sup>16</sup> In 1987 the ADA ranked Congress using 20 legislative issues. The votes cover the "full spectrum of domestic, foreign, economic, military and social issues" (ADA Today 1987). The ADA tries to select votes with sharp conservative/liberal deviations. For example, in 1987 one issue was:

1. Plastic Handguns-HR2616

Motion to table [kill] Metzenbaum (D-OH)-Thurmond (R-SC) amendment to prohibit hard-to-detect plastic fire-arms. PASSED 47-42 [No = +] (+ favors the ADA position).

Other issues were the Bork Nomination, Strategic Defense Initiative-S 1174, Nuclear Waste-HR2700, Contra Aid-HRRes 175, and Homeless-HR 558.

TABLE A

Independent  
variables

Regression Equations

	reg. 1	reg. 2	reg. 3	reg. 4	reg. 5	reg. 6
Intercept	-12.718 <sup>a</sup> ( 6.35)	-13.198 <sup>b</sup> (4.95)	-7.318 (1.16)	-19.726 <sup>b</sup> (5.14)	-15.802 <sup>b</sup> (5.09)	-22.044 <sup>b</sup> (4.19)
MS <sub>B</sub>	57.829 <sup>a</sup> ( 5.98)	62.135 <sup>b</sup> (4.97)	63.276 <sup>a</sup> (6.21)	58.557 <sup>b</sup> (4.94)	53.868 <sup>b</sup> (4.25)	54.116 <sub>c</sub> (3.23)
MS <sub>S</sub>	291.3 <sup>a</sup> (10.84)	354.9 <sup>a</sup> (11.22)	336.2 <sup>a</sup> (10.84)	320.0 <sup>a</sup> (11.62)	338.8 <sup>a</sup> (11.89)	346.1 <sup>a</sup> (10.01)
PROB <sub>SP</sub>	-25.487 ( 2.49)	-52.811 (2.43)	-30.611 <sup>c</sup> (3.05)	-23.876 (1.37)	-42.649 (2.14)	-41.205 (1.62)
CR <sub>4</sub>	0.319 <sup>c</sup> ( 0.01)	0.083 (0.14)	0.128 (.27)	0.449 (3.35)	0.186 (0.17)	0.424 <sup>c</sup> (2.77)
D <sub>BRAND</sub>	- 2.438 ( 2.11)	-3.030 (2.05)	-2.758 (2.10)	-2.733 (1.87)	-2.990 (1.95)	-3.173 (2.24)
MS <sub>IM</sub>	-426.0 ( 1.47)	-181.1 (0.17)	-277.6 (0.55)	-805.5 (3.27)	-406.7 (1.16)	-621.6 (2.31)
D <sub>TREND</sub>	-0.879 ( 0.49)	-0.742 (0.23)	-1.656 (1.32)	-1.207 (0.82)	-0.715 (0.22)	-0.0148 (0.00)
D <sub>MX</sub>	-0.209 ( 0.03)	-0.914 (0.34)	-0.346 (0.06)	-0.474 (0.10)	-1.081 (0.47)	-1.305 (0.61)
D <sub>68</sub>	- 9.464 <sup>b</sup> ( 5.25)	-4.600 (0.91)	-6.925 (2.13)	-6.949 (2.25)	-3.132 (0.35)	-7.451 (2.56)
D <sub>12</sub>	-14.574 <sup>a</sup> ( 5.79)	- 3.832 ( 0.36)	-13.178 <sup>c</sup> (3.74)	-7.805 (1.65)	-2.332 (0.12)	-7.251 (1.58)
SACH		0.0743 <sup>c</sup> ( 2.67)				
SARR			-0.018 (0.43)			
SARD				0.059 (1.95)		
AVECHRD					0.087 <sup>c</sup> (3.06)	
AVE3						0.117 (2.09)
number in data set	106	84	94	94	84	84
Likelihood ratio	35.05	25.14	30.50	29.08	24.74	25.53

<sup>a</sup> significant at the 1% level<sup>b</sup> significant at the 5% level<sup>c</sup> significant at the 10% level

\* Chi-Square statistics are in parenthesis

addition, the deletion of one or all of these insignificant variables produces similar results, indicating a stable model. The positive sign and significance of MSB, MSS, and C4 can be expected as these are the most important structural variables in the merger guidelines. These results demonstrate that as the market share of the buyer or seller increases, the probability of litigation increases. Further, as the four firm concentration ratio increases, the probability of a merger challenge also increases. The results also indicate that the change in merger guidelines in 1968 and 1982 have a significant and negative impact on the probability of a merger challenge supporting the premise that antitrust standards have become more lenient over time. The greater absolute value of the estimate for the 1982 guidelines variable indicates that "the 1982 merger guidelines... were designed to be less strict than the original 1968 version" (Johnson, p 973).

Using ADA ratings for both the House and the Senate Chairs, Ranking Republican and Ranking Democrat of the Judiciary Committee and the Subcommittee on Antitrust for the ADAScore variable, the regressions reveal insignificance for all except the Senate Antitrust Subcommittee. As seen in regression 2, the Chair of the Senate Subcommittee on Antitrust variable (SACH) is significant at the 10% level and positive indicating that as liberalness increases the probability of litigation increases. Further, the addition of the chair variable results in the 1968 and 1982 mergers guidelines variable becoming insignificant. Alterations of the model (see Table B; regressions 8 and 9) by dropping one or more of the originally insignificant variables (dmx, dtrend, msim, dbrand) results in



TABLE B

Independent  
variables

Regression Equations

	reg. 7	reg. 8	reg. 9	reg. 10	reg. 11	reg. 12
Intercept	-15.764 <sup>b</sup> (3.87)	-10.092 <sup>c</sup> (3.61)	-6.058 <sup>b</sup> (3.81)	-14.242 <sup>a</sup> (7.27)	-8.564 <sup>c</sup> (3.02)	-8.978 <sup>c</sup> (3.28)
MS <sub>g</sub>	53.314 <sup>b</sup> (3.83)	54.002 <sup>a</sup> (7.44)	50.603 <sup>a</sup> (7.73)	56.155 <sup>b</sup> (3.97)	61.186 <sup>b</sup> (5.40)	39.740 <sup>b</sup> (5.70)
MS <sub>s</sub>	306.7 <sup>a</sup> (8.62)	325.1 <sup>a</sup> (10.83)	305.7 <sup>a</sup> (11.46)	347.0 <sup>a</sup> (11.45)	339.0 <sup>a</sup> (10.08)	272.5 <sup>a</sup> (10.66)
PROB <sub>if</sub>	-35.442 (1.44)	-43.755 <sup>c</sup> (3.29)	-34.062 <sup>b</sup> (3.81)	-48.695 (2.29)	-29.316 <sup>c</sup> (2.66)	-39.984 <sup>b</sup> (4.60)
CR <sub>u</sub>	-0.129 (1.08)	-0.074 (0.30)	-0.158 <sup>b</sup> (4.24)	0.1054 (0.0)	0.168 (0.80)	-0.045 (0.31)
D <sub>trend</sub>	-2.694 (1.81)			-3.032 (2.01)	-2.820 (2.22)	
MS <sub>im</sub>	-63.668 (0.04)			-263.4 (0.89)	-330.6 (0.82)	
D <sub>trend</sub>	-0.583 (0.14)			-0.743 (0.19)	-1.148 (0.62)	
D <sub>mx</sub>	-0.534 (0.14)			-1.044 (0.42)	-0.629 (0.20)	
D <sub>es</sub>		-2.600 (0.67)		-2.922 (0.54)	-7.545 <sup>c</sup> (3.17)	
D <sub>ez</sub>		-0.845 (0.03)		-1.938 (0.12)	-13.577 <sup>b</sup> (4.30)	
SACH	0.162 <sup>c</sup> (3.29)	0.073 <sup>c</sup> (3.19)	0.053 <sup>b</sup> (3.90)	0.061 (1.97)		
SARR				-0.002 (0.01)		
SARD				0.027 (0.45)		
AVE3						0.079 <sup>c</sup> (3.13)
number in data set	84	84	84	84	84	84
Likelihood ratio	23.12	28.64	30.16	24.61	28.54	31.55

<sup>a</sup> significant at the 1% level<sup>b</sup> significant at the 5% level<sup>c</sup> significant at the 10% level<sup>\*</sup> Chi-Square statistics are in parenthesis

a positive and increasingly significant Chair variable. Dropping both of the 1968 and 1982 guidelines variables will also result in a significant Chair variable as seen in Table B; regression 7. The Ranking Republican (SARR) as well as the Ranking Democrat (SARD) scores (Table A; run 2 and 3 respectively) result in insignificance and therefore little explanatory power within determining the probability of a merger being challenged. The negative sign on the estimate for the Ranking Republican suggests that as the Ranking Republican increases in liberalness, the probability of challenging a merger decreases. This counterintuitive result will be discussed later in the paper. Run 5 in Table A includes the average scores of the Chair and Ranking Democrat of the Senate Subcommittee on Antitrust (AVECHRD) that result in significance, and imply a positive relationship between liberalness and the probability of a merger challenge. Regression 6 in Table A includes an average of the Senate Chair, Ranking Democrat and Ranking Republican (AVE3) and shows insignificance with a positive relationship between liberalness and probability of a merger being challenged. A key point in analyzing the outcome of the Ranking Democrat and Chair average (AVECHRD) with the outcome of the average of all three (AVE3) may be the absence of the Ranking Republican variable. Again, the negative parameter estimate may have an adverse effect within an average of an otherwise significant variable (AVECHRD); however I will defer this to a later discussion within the paper. Finally, by concurrently including the separate ADA scores for the Chair, Ranking Republican, and Ranking Democrat, no joint significance is found (see Table B; run 10 and 11).

## Explanation of the Results

The sole significance of just the Senate Subcommittee on Antitrust parallels similar findings by Weingast (1983, p. 791),

The evidence provided by our estimations of the relationship of the Congressional ADA scores. . . and the FTC caseload reveals substantial Congressional influence. In the period studied (1965-1980), the Senate was more important than the House. . . and the Senate subcommittee and its chairman have a greater impact than the full Senate.

The positive sign on the Senate subcommittee chair also parallels the Weingast findings; however with the inclusion of all of the guideline variables in regression 2 (Table A), the Chair is almost significant at the 10% level (0.1021). In combination, however, with the significant results from dropping one or more insignificant variables, the influence of the subcommittee Chair is relevant (see Table B; runs 7, 8, and 9).

This study is attempting to identify indirect political influence outside of the influence on guidelines or on the laws. Separation of the outside influence, as measured by the ADA, and legal influence, represented by the 1968 and 1982 guideline variables, may be difficult, "if Congress influences the bureaucratic decision to challenge mergers after development of the merger guidelines, it would also influence the bureaucratic decisions reflected in the guidelines themselves" (Coate, 1990 p.478). This model shows that it is difficult to distinguish between direct political influence on an individual merger and the political influence on the

guidelines themselves. Though only the parameter of the Antitrust Subcommittee Chair is significant, the addition of any Congressional score to the regression results in insignificance for one or both of the 1968 and 1982 guideline variables. Further, the deletion of one or more of the 1968 or 1982 guideline variables results in the increasing significance of the ADA political variables. A correlation matrix for run 2 estimates the correlation between the 1982 guideline variable and Antitrust Chair to be 0.44 and between the 1968 guideline variable and the Antitrust Chair to be 0.33. The mid-range correlation with the Chair and the 1968 and 1982 guidelines at the least shows that the 2 measures of political influence move in the same direction together and are mildly correlated. It is not inconceivable then that pressure reflected within the guidelines and pressure in other forms are difficult for this model to distinguish. Further, the exclusion of the 1982 and 1968 variables results in a significant chair variable and an increase in the parameter estimate by almost 2 times, undoubtedly capturing the effect of the political influence within the guidelines.

Because the Antitrust Subcommittee generally consists of about 7 legislators, an average score of the 3, the Chair, Ranking Republican, and Ranking Democrat, should give a better indication of the prevailing preference of this DOJ oversight committee. As seen in regression 6 (Table A), the average scores (AVE3) are not significant in the model. This result may be explained by the counterintuitive results of the Ranking Republican scores.

In all regressions including a variable for the Ranking Republican of the

Congressional Judiciary Committees or Antitrust Subcommittees, the parameter estimate shows an increase in merger litigation as the Ada score for the Ranking Republican decreases. This suggests that as liberalness among the ranking republicans decreases the influence increases merger challenges - not at all consistent with the general political philosophy of the party. A possible explanation of this counterintuitive result may stem from the consistent difference in parties which hold the Chair position and the Ranking Republican position. The combination of the significant influence of the Chair over merger decisions with the regression results showing insignificant Ranking Republican influence may allow for a decision to challenge a merger regardless of the Ranking Republican preference (or ADA score). If the Chair had been consistently republican (lower ADA scores) and assuming significance of influence, then outcomes of potential mergers may have differed and correlated with the position of the ranking republican thereby resulting in a positive parameter estimate. In this case, one would then expect the Ranking Democrat variable to be insignificant and to have a negative parameter estimate. In support, a correlation matrix shows that the Ranking Republican and the Chair have a small but negative correlation (-0.1631). It follows that if the preferences of the Chair throughout the data align with the democratic party (higher Ada scores), then this negative relationship between the Ranking Republican and the number of merger challenges may be captured. In fact, examination of the data reveals that the Chair of the Senate Antitrust Subcommittee was a democrat

and ranked between 80-100 for all of the years.<sup>17</sup>

Within the average of the Antitrust Subcommittee 3 ranking members, the negative parameter estimate may be the result of the negative Ranking Republican estimate. Insignificance of this average may also be a result of the high insignificance of the Ranking Republican. Because intuition would suggest that an average of the ranking legislators within a small committee should determine the outcome of a merger, the contrary results may depict a strong influence of the Ranking Republican variable upon the Chair and Ranking Democrat variables. In accord with intuition, the average of the Ranking Democrat and Chair (AVECHRD) shows significant results. Thus liberalness has a positive impact on merger challenge decisions as seen in Table A, run 5. Again, similar to the chair variable, as the 1968 and 1982 guidelines are removed the parameter estimate for AVECHRD triples from 0.0871 to 0.2474 and the significance doubles from 0.0802 to 0.0245. The combination of the guideline variables and the AVECHRD variable results in insignificant guideline variables again supporting the difficulty in distinguishing between political influence within the guidelines and political pressure beyond the guidelines.

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<sup>17</sup> It must be noted that not all Democrats rank higher than republicans in the Ada ratings. It is possible for republicans to have scores between 80-100, however this is not the case within the Senate Antitrust Subcommittee between 1951-1989. In only 4 of the years (1954-1959) the Ranking Republican had an average ranking just over 50, however the respective Ranking Democrats and Chairs consistently had scores above the Ranking Republican.

## VII. CONCLUSION

Coate notes that antitrust models have been constructed as an "interest-group process. . . whereby antitrust is used to benefit well-organized private interests" (Coate, 1990). The results of this study do not contradict the interest group theory and support that antitrust enforcement is influenced primarily by the Chair of the Senate Antitrust Subcommittee. This study reveals that as the Chair becomes more liberal the probability of the DOJ challenging an individual merger increases. This power of the Chair over the regulatory agency exemplifies the gains of forming smaller more specific committees. Results are supported by the studies of Weingast and Coate revealing Congressional influence on the FTC in challenging mergers. Thus, for the brewing industry, political positions play a part either through the setting of the guidelines, political pressure beyond the guidelines, or perhaps both. With the pool of studies of both the FTC and DOJ revealing supporting evidence of political influence, the lack of a visible relationship between Congress and these antitrust agencies suggests an existence of indirect but compelling systems of rewards and punishments that serve Congressional preferences.

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## APPENDICES

## Appendix A

Because the Department of Justice is under the Executive Branch in addition to the Congressional oversight committee, an additional model including a presidential variable was tested upon the brewing industry data.

A discrete presidential variable was set equal to 1 for a democratic president and 0 for a republican president. Posner comments that " the parties have, or at least avow, different economic philosophies and antitrust has always been - or seemed - politically controversial" (411). The results of the model are as follows:

Table C

INDEPENDENT VARIABLE	STANDARD ESTIMATE	CHI-SQUARE
Intercept	-13.77	5.61
MSb	59.65	5.78
MSs	295.60	10.32
PROBsf	-27.44	2.57
C4	0.37	2.67
Dbrand	- 2.57	2.22
MSim	-440.0	1.49
Dtrend	- 0.89	0.52
Dmx	- 0.17	0.02
D68	-10.92	3.86
D82	-16.79	4.10
Pres	- 0.63	0.17

LIKELIHOOD RATIO CHI-SQUARE = 34.87

The presidential variable has a low chi-square indicating low significance in the model. Further, the negative coefficient sign is counterintuitive meaning that if the President were a democrat, the probability of a merger challenge would decrease. This is not consistent with the democratic economic philosophy. The insignificance of this variable supports the Posner study, as well as the "Gains, Losses " Theory. Since the President has the whole nation as constituents, those that would lose from a merger are politically more "watered-down" than if they appealed to their own Congressman. The dispersal and little incentive for individual shareholders still stifles any incentive to encourage a merger. Therefore, for the brewing industry, presidential interest in mergers is not likely. Weaver notes that "it is fair to say that presidents in postwar America have not made antitrust enforcement an object of their sustained or systematic intervention" (1977).

## Appendix B

### Data Sources

The source for the member of Congress and the different committees and subcommittees was The Congressional Record published by the Congressional Quarterly in Washington D.C.. The contributor of the congressional scoring was the Americans for Democratic Action Political Action Committee (ADA), 1625 K Street, N.W. Suite 210, Washington, D.C. 20006, (202)-785-5980. The sources of the compiled data for the brewing industry are found in Tremblay (1993).

### Notes on Data

The data consist of 106 total brewing industry merger proposals from 1950-1989. The median year of the data set is 1964, indicating that half of the observations were before 1964.

The number of observations for each regression in Table A and Table B is different due to the differences in the number of observations for particular congressional positions. From 1950-1989, the ADA recorded scores for each member of Congress except in the case of death in office, holding office for fewer than 12 votes, or resignation. Two such cases occurred within the Chair of the Senate Antitrust Subcommittee (SACH), in 1956 and in 1963. 10 proposed merger observations were lost as a result of these missing ADA scores.

Further, The Congressional Record listed no Senate Antitrust Subcommittee

from 1950-1954 which deletes 12 more observations for a total of 22 deletions out of 106 or only 84 complete observations for the SACH.

ADA rankings for the Ranking Republican (SARR) and Ranking Democrat (SARD) are missing the 12 observations from 1950-1954 for the same reason as the Chair thus totaling only 98 complete observations. The Congression Record does not record a Senate Antitrust Subcommittee from 1981 - 1986. Considering the nature of antitrust enforcement of the Reagan Administration and the absence of the Senate Antitrust Subcommittee, a Congressional score of 0 is substituted for the Chair, Ranking Republican and Ranking Democrat of this committee to reflect the most conservative position<sup>18</sup> - having no Senate DOJ oversight subcommittee at all. However, this substitution does not affect the results much as there are only 6 brewing merger observations from 1981-1986.

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<sup>18</sup> This substitution is done by the author of this paper and does not correlate with the ADA score of any partiucular member of Congress as it is unknown who may have held these committee positions. That is, the ADA did not rank as 0 the Chair, Ranking Republican and Ranking Democrat of the Senate Antitrust Subcommittee, but rather did the author since there was no Committee to oversee the DOJ.