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THE FEDERAL TRADE COMMISSION AND CONGRESSIONAL OVERSIGHT OF ANTITRUST ENFORCEMENT*

William E. Kovacic**

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The FTC is a “passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy.”

—David Stockman, Director, Office of Management and Budget

I. INTRODUCTION

For the second time in three years, Congress is contemplating serious changes in the law enforcement role of the Federal Trade Commission (FTC). Following months of intense, widely-publicized debate, Congress in 1980 curtailed the agency’s statutory authority, restricted several ongoing programs, and authorized the agency’s operations through September 30, 1982, with promises of unrelenting scrutiny. Within the past year, several members of Congress have introduced bills to limit further the Commission’s powers. As the agency’s appropriations and authorization measures come before the Congress, these proposals are likely to receive serious attention.

An important articulated basis for the 1980 legislation and current limiting measures is the congressional perception that the Commission has contradicted the legislature’s policy preferences in selecting its law enforcement programs. Congressman William Frenzel pungently cap-


3. See, e.g., S. 1984, 97th Cong., 1st Sess., 127 CONG. REC. S15,685 (daily ed. Dec. 16, 1981). Senators McClure and Melcher introduced S. 1984 which would (1) bar the FTC from intervening in the affairs of any state-regulated profession; (2) require the FTC to bring all of its cases in federal district court; (3) direct the Commission to reimburse private parties for the cost of responding to its subpoenas and other information requests; and (4) limit substantially the scope of the agency’s mandate to address "unfair methods of competition" and "unfair or deceptive acts or practices" under § 5 of the Federal Trade Commission Act. Id.; see also H.R. 3722, 97th Cong., 1st Sess., 127 CONG. REC. H2489 (daily ed. May 28, 1981) (bill with over 130 co-sponsors placing moratorium on FTC actions affecting the professions).

tured this view in 1979 as Congress debated bills to restrict the agency’s activities:

[T]he FTC is . . . a king-sized cancer on our economy. It has undoubtedly added more unnecessary costs on American consumers who it is charged with protecting, than any other half dozen agencies combined.

It is bad enough to be counterproductive and therefore highly inflationary, but the FTC compounds its sins by generally ignoring the intent of the laws, and writing its own laws whenever the whimsey strikes it.

Ignoring Congress can be a virtue, but the FTC’s excessive nose-thumbing at the legislative branch has become legend. In short, the FTC has made itself into virulent political and economic pestilence, insulated from the people and their representatives, and accountable to no influence except its own caprice.

On my most charitable days, I think repealing the FTC would be a good idea. Whenever I pick up the paper and read of another atrocity wrought by it, I think more hideous thoughts about making the punishment fit the crime. For instance, every staff member and every Commission member should spend 20 years at hard labor filling in their own asinine forms. And then they should spend the rest of their lives resubmitting the same material upside down and backward. The Commission, Representative Frenzel concluded, was “a rogue agency gone insane.”

Congress’ acute interest in the FTC’s policies comes roughly a decade after the last comparable congressional assessment of the FTC’s performance. In the late 1960’s and early 1970’s several committees with appropriations or oversight responsibilities extensively analyzed the Commission’s work and recommended a fundamental reorientation


6. Id. at H10,758. See also, e.g., 121 Cong. Rec. S15,687 (daily ed. Dec. 16, 1981) (Sen. McClure: “In recent years, we have seen unprecedented efforts by the Commission to expand its activities into areas well beyond those charted by Congress. It is time for Congress to curb these actions.”); House 1981 Government Operations Hearings, supra note 1, at 168 (OMB Director Stockman: “[I]n recent years the FTC has served the public interest very poorly, in major part because it has sought to expand its power and influence beyond that envisioned by Congress.”)
of its efforts. The committees concluded that the FTC, in its first half-century, had spent its resources on largely insignificant matters and had fallen unacceptably short of the goals set for it by Congress in 1914. They generally prescribed a shift toward more innovative, aggressive enforcement strategies and singled out a number of problems to which the agency should give careful attention. On some occasions, the committees cautioned that failure to carry out these reforms would warrant the Commission’s abolition.

This Article discusses the FTC’s response to congressional oversight of its antitrust activities since 1969. It begins by reviewing the 1969 Report of the American Bar Association Commission to Study the Federal Trade Commission. This document focused congressional attention upon the FTC’s antitrust role and deeply influenced the legislature’s thinking in the early 1970’s about the appropriate course of the agency’s competition work. The ABA Report proposed that the Commission devote its antitrust resources to economically significant problems in complex, unsettled areas of law and economics, stressing that the agency’s ability to perform this role depended heavily on the actions of institutions outside the agency—principally the Congress and the President. This Article analyzes the ABA’s findings and, from a historical perspective, examines the significance of external forces on the Commission’s ability to pursue the bar committee’s competition proposals. The historical review helps to explain the course of the

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7. See infra text accompanying notes 216-25.
8. Id.
FTC's antitrust work in the 1970's and, most important, its dependency on congressional support.

The second half of the Article describes how Congress endorsed the ABA's recommendations, directing the FTC toward more ambitious antitrust initiatives. It will be shown, however, that the initially strong congressional support for expansive, innovative enforcement endeavors peaked in 1976, after which congressional enthusiasm for some programs declined. To illustrate this decline, this Article discusses some of the measures by which the 96th Congress proposed to limit the FTC's antitrust authority.11 Through its analysis of the ABA Report, the historical influence of external institutions upon FTC competition activities, and the substance of legislative oversight since 1969, the Article demonstrates that the Commission's antitrust programs of the 1970's were consistent with, and responsive to, congressional policy preferences.

II. THE 1969 REPORT OF THE AMERICAN BAR ASSOCIATION COMMITTEE TO STUDY THE FEDERAL TRADE COMMISSION

On September 26, 1914, Woodrow Wilson concluded the chief antitrust legislative initiative of his presidency by signing into law the Federal Trade Commission Act.12 With its elastic substantive mandate and broad grant of investigatory powers, the statute embodied the high expectations of Congress that the new commission would be a singularly effective tool for maintaining competition. Three weeks before the bill's enactment, Senator Albert Cummins addressed the Senate in words that expressed the hopes of many of the legislation's supporters:

I predict that in the days to come the Federal [T]rade [C]ommission and its enforcement of the section with regard to unfair competition . . . will be found to be the most efficient protection to the people of the United States that Congress has ever given the people by way of a regulation of commerce . . . I look forward to its enforcement with a high degree of confidence.13

11. See supra note 2 and accompanying text.
13. 51 CONG. REC. 14,770 (1914). On Cummins' central role in the passage of the FTC Act,
In the Commission's first half-century, a host of commentators and special committees appraised the agency's effectiveness as an antitrust enforcement body. Their collective view was that the FTC had accomplished little of what the 63d Congress envisioned. Virtually every study stimulated attempts at reform. Few, however, were so influential—and none as significant in its effects upon modern Commission activities—as the ABA Report.

The American Bar Association (ABA) began its study in 1969, at President Richard Nixon's request, several months after a Ralph Nader-sponsored critique of the Commission drew widespread attention to the agency. To conduct the inquiry, ABA President William Gossett selected a committee of sixteen individuals with differing viewpoints and broad familiarity with the FTC. Although severely critical of the agency's antitrust achievements, the Committee still perceived a uniquely useful antitrust role for the FTC. Anchoring this view was the belief that the Commission possessed a special capacity for resolving economically complex and unsettled competition policy issues.

A. Findings and Recommendations

The ABA Report analyzed the agency as a whole and examined each operating bureau. This section reviews criticism relevant to antitrust enforcement, beginning with agency-wide functions that significantly affected the FTC's competition work.


15. ABA REPORT, supra note 10, at 86.


17. ABA REPORT, supra note 10, at 88 (press release of William Gossett). The committee consisted of five law professors, two economists, seven attorneys in private practice, a counsel to a major labor union, and a counsel to a major civil rights organization. The Committee's Chairman, Miles Kirkpatrick, later chaired the FTC from 1970-1973. Robert Pitofsky, the Committee's counsel and principal author of the Committee's Report, headed the agency's Bureau of Consumer Protection in the early 1970's and served as a commissioner from 1978-1981.

18. Of all the committee members, only Richard Posner opposed the Report's recommendations. ABA REPORT, supra note 10, at 92-119. Posner believed the underlying premises upon which Congress founded the agency—the ability to address anticompetitive practices beyond the reach of prevailing interpretations of the Sherman Act; and the desirability of developing antitrust policy through a specialized body with flexible substantive authority and political independence—were no longer valid. Id. at 115. For an elaboration of these views, see Posner, The Federal Trade Commission, 37 U. Chi. L. Rev. 47 (1969).
1. General Criticism

The Committee's overall evaluation of the agency was unfavorable. By any of several tests, the Report found the FTC wanting: "[The Commission's] performance when measured against a reasonable standard of acceptable government operation has been disappointing. When actual performance is measured against the potential which the FTC continues to possess, the agency's performance must be regarded as a failure on many counts." 19

The agency's poor performance, the Committee concluded, was due mainly to its failure to establish goals and priorities. 20 The FTC's review of its goals and priorities took place on an ad hoc basis only, 21 and reliance upon passive case selection tools such as the "mailbag" channel led FTC resources toward economically insignificant pursuits. 22 Even where the FTC had systematically established priorities, it rarely translated these objectives into guidelines for its staff. 23

To cure these flaws, the ABA Report recommended that the FTC promptly "embark on a program to establish goals, priorities, and effective planning controls." 24 An attractive approach, the Report concluded, would be an "immediate expansion and reinvigoration of the Office of Program Review," the FTC's existing planning apparatus. 25

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19. ABA REPORT, supra note 10, at 35.
20. The Committee observed:

Many of the present problems of the FTC—including allocation of resources, commitment of time and effort to relatively trivial matters, and extensive delay in the investigational stage of agency action—are traceable to a considerable extent to the fundamental failure to establish goals and priorities and to implement effective planning controls consistent with those goals and priorities.

_id_ at 77.

21. _Id._ at 12. This criticism did not apply to the FTC's merger program, whose management and operation the ABA praised. _Id._ at 13 n.33.

22. Faulty planning, the Committee stressed, "has caused a misallocation of funds and personnel to trivial matters rather than to matters of pressing public concern." _Id._ at 1. To the Committee, the preoccupation with trivia manifested itself in excessive fur and textile statute enforcement and inadequate spending on the merger program. _Id._ at 45, 69.

23. In the Committee's view, the typical FTC staff member had "no institutional devices or agency-wide standards . . . for comparing the relative merits of allocating FTC resources to proceedings against possible violations of law . . . ." _Id._ at 13. This weakness frustrated the implementation of coherent policies for opening and closing investigations, selecting remedies, and filing complaints.

24. _Id._ at 3. The ABA Report considered this to be the agency's top reform priority: "The first and most pressing order of business in revitalizing the FTC must be to replace present case-by-case techniques for opening and closing investigations, filing complaints, and settling cases with comprehensive planning controls." _Id._ at 77.

25. _Id._ at 78. Established in the early 1960's, the Program Review Office had consisted of one attorney, one economist, and a secretary. The position of Program Review Officer had been vacant for over a year when the ABA did its study. _Id._ at 12-13.
This office would review long-range goals, measure anticipated returns from enforcement initiatives against their cost, and prepare "an agenda of projects that ought to be undertaken by each bureau and division . . . and indicate priorities with respect to each." By curtailing the use of "passive" case selection devices, the project agenda would help correct the agency's "unfortunate tendency to involve itself in investigations and projects of marginal importance." To give practical effect to this process, the planning office would devise enforcement guidelines for the FTC's staff.

A second basic cause of the Commission's poor performance was its inability "to manage the flow of its work in an efficient and expeditious manner." The FTC's worse management shortcoming was its haphazard system for monitoring the progress of cases and investigations. This weakness severely hampered attempts to bring enforcement efforts to a timely conclusion. Moreover, the agency's procedures were afflicted by a "crippling delay" which the ABA Committee found to be "about as serious . . . as at any time in the agency's history."

The ABA Report proposed several management reforms to reduce delay. A vital first step was to establish a system for supervising the progress of cases and investigations, a second was to review the Commission's Rules of Practice and Procedure "to modernize and maximize the efficiency of the Commission's operations," and a third was to

26. Id. at 78.
27. Id.
28. Id. at 80.
29. Id.
30. Id. The Committee said the "failure of the FTC to initiate projects relevant to pressing contemporary needs" had resulted "[i]n important part . . . from the agency's traditional reliance on the mailbag to generate most investigations and projects in the absence of comprehensive planning and priorities." Id.
31. The guidelines would explain the Commission's priorities, delineate its powers to address them, and supply criteria for opening and closing investigations and cases. Id. at 79.
32. Id. at 1.
33. The ABA Report observed: "It . . . appears that there is no effective procedure within the FTC to keep track of progress on matters formally initiated, to establish realistic deadlines, or to terminate investigations once it becomes apparent that anticipated returns do not justify continued investment of time and effort." Id. at 15.
34. Because the FTC lacked an effective tracking system, the ABA Report stated, "projects of various kinds often disappear into the lower reaches of the agency and then resurface after many years." Id. at 81.
35. Id. at 34.
36. Id. at 81.
37. Id. at 84.
delegate more authority to the agency's staff.\textsuperscript{38} Beyond reducing delay, delegation would diminish the potential conflict that the ABA perceived to exist when commissioners sat as judges in matters that required their approval for commencement.\textsuperscript{39}

A third important source of the Commission's ineffectiveness lay in its choice of enforcement tactics. From recent enforcement statistics, the ABA Committee discerned that "the FTC has resorted less frequently to formal proceedings, and has increased its reliance upon an 'informal' or 'voluntary compliance' approach to bring about industry-wide compliance."\textsuperscript{40} The Committee said the de-emphasis of formal enforcement had "gone too far," damaging the agency's enforcement credibility.\textsuperscript{41} The Committee added that "[v]oluntary compliance" was especially suspect without an effective program to ensure compliance.\textsuperscript{42} Accordingly, the Committee recommended that the FTC resort more to compulsory enforcement proceedings and expand its efforts to check compliance with its outstanding orders.\textsuperscript{43}

2. Antitrust

In general, the ABA Committee considered the FTC's antitrust performance "less than satisfactory."\textsuperscript{44} The agency's disappointing record resulted largely from its failure "to take advantage of the unique strengths conferred upon it by Congress . . . in 1914."\textsuperscript{45} With its inves-

\textsuperscript{38} Id. at 3, 81-83. The ABA recommended that bureau directors be authorized, among other things, to issue complaints and close investigations.

\textsuperscript{39} Id. at 82-83. The ABA Committee predicated its delegation recommendations on the completion of its suggested planning reforms.

\textsuperscript{40} Id. at 8. The informal devices included industry guides, advisory opinions, trade regulation rules, and assurances of voluntary compliance and informal corrective actions. Id. at 8-9.

\textsuperscript{41} Id. at 25. The panel observed: "With such an obvious disinclination by the FTC to proceed formally, we fear that the business community may cease to take seriously the guides, rules, and other administrative pronouncements by the FTC, and also may cease to take seriously the statutes the FTC is empowered to enforce." Id. at 26.

\textsuperscript{42} The ABA stated:

[We] question the operation of a voluntary compliance program for which no effective compliance checks have been devised. Many companies that voluntarily agree to change their business practices undoubtedly will do so, but others will not. Absent a program of careful compliance surveillance, coupled with strong sanctions when necessary, the voluntary compliance program cannot be regarded as effective law enforcement.

\textsuperscript{43} Id. at 26.

\textsuperscript{44} Id. at 79.

\textsuperscript{45} Id. at 64.

\textsuperscript{45} Id. The Report identified the "unique strengths" as (1) broad investigatory powers; (2) the centralization in one agency of Commissioners, administrative law judges, attorneys, and economists who could develop special competence in the antitrust field; (3) the ability to decide questions without necessarily relying on case-by-case precedent; and (4) the power to issue studies to the President, Congress, and the public on antitrust issues. Id. at 64-65.
tigatory powers, institutional expertise, jurisdictional flexibility, and equitable remedies, the FTC appeared ideally suited to address the mixed economic and legal issues that dominate antitrust.46

Since 1914, however, this potential seldom had transcended the level of mere possibility. Merger enforcement aside, the Committee could find few FTC accomplishments on the frontiers of antitrust law:

If the measure of the quality of FTC performance in the antitrust area is whether the agency has broken new ground and made new law by resort to its unique administrative resources, it seems clear that the record is largely one of missed opportunity. However, the FTC did lead the way in implementation and interpretation of Section 7 of the Clayton Act. Moreover, that program has been carried out not simply by the institution of formal proceedings, but by the publication of economic reports and the promulgation of guides, i.e., by use of the full panoply of administrative resources available to the FTC.47

Although seemingly speaking hypothetically, the Committee's next remark revealed that it believed "ground breaking" to be an appropriate performance standard: "In the expectation that these kinds of successes can be repeated and extended by the revitalized FTC we envisage, we decline to propose the elimination of antitrust enforcement authority in the FTC."48 Thus, in weighing the desirability of antitrust enforcement by administrative means, the Committee recommended that the FTC retain its antitrust authority: "However well the federal judiciary may now be thought to be functioning in this area, there is an important role for the administrative process in solving difficult and complex antitrust questions."49

Because it expected the FTC to apply the "full panoply" of its resources to break new ground and make new law in the many "difficult and complex" areas of antitrust policy, the Committee endorsed continued antitrust responsibility for the agency.50 The significance of this view is evident in the ABA's recommendations about the future divi-

46. Id.
47. Id. at 65. Shortly before discussing the Commission's limited accomplishments as an antitrust pathfinder, the Committee noted, without comment, that "[u]nder the Lanham Trademark Act, 15 U.S.C. § 1064 (1964), the FTC has power (never used) to cancel trademarks where used for anticompetitive purposes." Id. at 64 n.98.
48. ABA REPORT, supra note 10, at 65.
49. Id. at 64. Earlier, the Report had concluded that the FTC could "perform valuable service in bringing the administrative process to bear on difficult and complex problems." Id. at 2.
50. Id. at 2, 65. If well-established, per se violations were antitrust policy's exclusive concern, one presumes the ABA might have suggested a different course.
sion of labor between the Antitrust Division of the Department of Justice (DOJ) and the FTC:

We recommend that the FTC concentrate on antitrust enforcement that would make best use of the unique advantages of its administrative process. This would mean, for example, that the FTC should take no action in situations in which the conduct at issue, if challenged by the Department of Justice, would be likely to be challenged in a criminal proceeding. Cases of per se illegality, such as price-fixing, market allocation, and boycotts designed to enforce price-fixing cartels should thus be left to the Department of Justice. For the trial of these cases which usually involve nothing more than controversies over whether alleged conduct in fact occurred, the criminal sanctions, where appropriate, and litigation procedures of the district courts are better suited than the FTC's administrative approach.

On the other hand, where issues of anticompetitive effects turn essentially on complicated economic analysis, and where decided cases have not yet succeeded in fashioning a clear line marking the boundary between legal and illegal conduct, such matters should generally be assigned to the FTC.\footnote{51} The ABA proceeded to suggest three specific changes in the FTC's antitrust programs. First, it singled out vertical restraints as one "complicated and economically significant" area in which the FTC had "foregone opportunities to participate in the constructive development of law that might contribute to the attainment of antitrust objectives."\footnote{52} Second, the Committee proposed that the FTC expand its merger enforcement efforts.\footnote{53} Finally, the ABA recommended that the agency "initiate a study and appraisal of the compatibility of the Robinson-Patman Act and its current interpretations to the attainment of antitrust objectives,"\footnote{54} and during this appraisal, limit its enforcement of the Act to "instances in which injury to competition is clear."\footnote{55}

\footnote{51. \textit{Id.} at 66.}
\footnote{52. \textit{Id.} at 68. In another passage, the ABA stated that the FTC had "virtually abandoned" efforts to address vertical distribution problems. \textit{Id.} The Committee identified several problems—dual distribution, territorial confinement and other limitations on franchises, and price squeezes—for which "the expertise of the FTC could be employed to enlighten the business community and the courts." \textit{Id.}}
\footnote{53. The ABA generally praised the FTC's merger work. \textit{Id.} at 69. "In this area . . . the FTC has contributed to the adoption of original and important theories of antitrust enforcement." \textit{Id.} (footnote omitted). The Committee added that the agency had not "committed enough of its resources to the divisions charged with responsibilities in the merger area." \textit{Id.}}
\footnote{54. \textit{Id.} at 67; 15 U.S.C. §§ 13-13b, 21a (1976).}
\footnote{55. \textit{Id.} at 68.}
3. Conclusion

The success of the ABA's recommended program depended upon the quality of the FTC's leadership and staff, both of which the ABA found deficient. The Committee acknowledged, however, that whether and how far the FTC would press its renewal were questions that only Congress and the President could answer. The Report stated:

If the proposals in this report are ever to be implemented, and if the FTC is to fulfill the role we believe it can play, it must have the continuous vigorous support of the President and Congress. The first important manifestation of that support should be the appointment of a Commission Chairman with executive ability, knowledge of the tasks Congress has entrusted to the agency, and sufficient strength and independence to resist pressures from Congress, the Executive Branch, or the business community that tend to cripple effective performance by the FTC.

If Congress, the President, and the agency's own leaders did not pursue a comprehensive reform program, the Committee flatly favored the FTC's abolition:

In conclusion, this Commission believes it should be the last of the long series of committees and groups which have earnestly insisted that drastic changes were essential to recreate the FTC in its intended image. The case for change is plain. What is required is that the changes now be made, and in depth. Further temporizing is indefensible. Notwithstanding the great potential of the FTC in the field of antitrust and consumer protection, if change does not occur, there will be no substantial purpose to be served by its continued existence; the essential work to be done must then be carried on by other governmental institutions.

As its dramatic insistence upon immediate reform shows, the ABA was impressed by how similar its findings were to earlier evaluations of

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56. The Committee concluded that there were "too many instances of incompetence in the agency, particularly in senior staff positions." Id. at 34. The panel believed that the uneven quality of staff, like other FTC shortcomings, reflected badly on the Commission's leadership. See Id. "The primary responsibility for these failures must rest with the leadership of the Commission. In recent years, bitter public displays of dissension among Commissioners have confused and demoralized the FTC staff, and the failure to provide leadership has left enforcement activity largely aimless." Id. at 1.

57. Id. at 35.

58. Id. at 3. The Report did not specify which "other governmental institutions" would carry on the agency's work, though presumably the Justice Department would assume the FTC's antitrust duties.
the FTC's antitrust performance.⁵⁹ The Committee's review of previous critiques suggested steadfast resistance by the FTC to needed changes:

Since its establishment in 1914, a succession of independent scholars and groups have sounded much the same themes in their criticisms of the FTC, including the absence of effective planning and failure to establish workable priorities, the consequent tendency to become involved in too many trivial cases, the delay and unnecessary secrecy in FTC operations, and the uneven quality of staff. It is worthy of note that each successive study made it clear that the older criticism was still applicable and that previously proposed solutions generally had been ignored.⁶⁰

At first glance, experience with the critical historical commentary suggested the futility of still another report that recited the same basic flaws and, yet, like most of its predecessors, said the FTC should retain its antitrust authority. The crucial question was why the FTC had not heeded previous reform proposals. To be convincing, the ABA had to show why its recommendations might take hold where other critiques apparently had failed.⁶¹


⁶⁰. ABA Report, supra note 10, at 9. One should be wary of the notion advanced in this passage that the earlier commentary was so completely homogenous as the ABA suggests. These critiques make many of the same points but they contain important differences as well. Significant points of disagreement or variations in emphasis emerge in discussions of the nature and causes of the agency's weaknesses, the appropriate standards for measuring performance, and the correct path for reform. To say that earlier critics shared common assumptions and spoke with one voice in evaluating the FTC's performance imparts a misleading simplicity to the problems and policy choices facing the Commission throughout its history. For an insightful review of the literature assessing the work of the FTC and other regulatory agencies, see McCraw, Regulation in America: A Review Article, 49 Bus. Hist. Rev. 159 (1975).

⁶¹. Most earlier evaluations of the FTC and antitrust enforcement had recommended that the agency continue to exercise antitrust authority. Some studies explicitly endorsed dual antitrust enforcement. G. Henderson, supra note 59, at 327; Hoover Comm'n Task Force Report, supra note 59, at 120, 125; Attorney General's Nat'l Comm. to Study the Antitrust Laws: Report of the National Committee to Study the Antitrust Laws 375-77 (1955). Several other major critiques did not address the issue directly but made proposals that assumed the retention of concurrent jurisdiction. See Budget 1960 Study, supra note 59; C. Auerbach, supra note 59; White House Task Force on Antitrust Policy (Neal Report) (presented to
The ABA Committee suggested two reasons for the minimal effect of earlier commentaries. The first was the tepid quality of previous FTC reform efforts. While noting exceptions, the Committee perceived a near contentment by the FTC with unobtrusive law enforcement, interrupted only by infrequent attempts to test the full potential inherent in its charter. The Committee recognized that some often-mentioned reform goals, such as effective planning, were intrinsically elusive, and in discussing the Commission's enforcement attitudes, the ABA did not claim to have exhausted all possible organizational or institutional explanations, short of outright neglect, for the agency's seeming disinclination to pursue significant antitrust matters. Nevertheless, the Committee concluded that the FTC, to an inexcusable degree, had merely shrugged off previous reform proposals. To prevent the agency from ignoring its recommendations, the ABA warned that the appropriate alternative to serious reform was the Commission's abolition.

Although it questioned the Commission's fortitude, the ABA was not satisfied that frail institutional will was the only, or even dispositive, reason for the scant discernable impact of earlier studies. In one salient passage, the Committee intimated that forces outside the agency had deadened the FTC's reform impulses. "If the proposals in this report are ever to be implemented, and if the FTC is to fulfill the role we believe it can play, it must have the continuous vigorous support of

President Johnson on July 5, 1968 and released on May 21, 1969), reprinted in Economic Concentration: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. Pt. 8, at 5054-82 (1970) [hereinafter cited as Economic Concentration Hearings: Pt. 8]. On the other hand, James Landis' 1960 commentary proposed that the FTC's antitrust authority be transferred to the Justice Department. Landis, supra note 59, at 29-30, 51-52; see also President's Task Force Report on Productivity and Competition (Stigler Report) (released June 16, 1969), reprinted in Economic Concentration Hearings: Pt. 8, at 5034-52. The Stigler Report stated that "substantial retrenchment by the Commission in the antitrust fields is highly desirable," but stopped short of recommending the total elimination of the agency's antitrust powers. Id. at 5039.

62. The ABA Report referred to the following passage from the Hoover Commission Task Force Report:

As the years have progressed, the Commission has become immersed in a multitude of petty problems; it has not probed into new areas of anticompetitive practices; it has become increasingly bogged down with cumbersome procedures and inordinate delays in disposition of cases. Its economic work—instead of being the backbone of its activities—has been allowed to dwindle almost to none. The Commission has largely become a passive judicial agency, waiting for cases to come up on the docket, under routinized procedures, without active responsibility for achieving the statutory objectives. ABA REPORT, supra note 10, at 10 (quoting Hoover Comm'n Task Force, supra note 59, at 125).

63. See ABA REPORT, supra note 10, at 15; see also R. KATZMANN, REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY 76-85, 180-89 (1980) (observing that the opening of some small, easily prosecuted cases may be important to recruiting and retaining a capable litigation staff).
the President and Congress." 64 The Report called for the appointment of a chairman with "sufficient strength and independence to resist pressures from Congress, the Executive Branch, or the business community that tend to cripple effective performance by the FTC." 65 Surprisingly, the ABA Report contained little mention of the environment surrounding the FTC in 1969, but the ABA Committee seems to have contemplated the willingness of actors outside the agency, particularly the President and the Congress, to support the agency's rejuvenation.

B. External Influences on FTC Antitrust Performance

The history of the FTC's competition programs suggests that the attitudes and behavior of institutions outside the agency were indeed important to the ABA's reform proposals. The agency's historical relationships with the President, the Congress, the judiciary, and the business community all had influenced the scope and quality of the FTC's antitrust endeavors. Drawing upon major events in the agency's history, the balance of this section addresses several important events and trends that help explain the ABA's implicit view in 1969 that external circumstances favored the agency's antitrust transformation. 66

1. Stature of Competition Policy

Since 1914, the scope and substance of FTC antitrust enforcement have depended fundamentally on how dearly the country has valued competition over rival systems for organizing the nation's economy. 67 The antitrust laws embody, among other things, a social preference for the primacy of market forces and limited government supervision of the economy. 68 These measures, however, are neither the sole nor final expressions of national policy toward economic organization. For

64. Id. at 35.
65. Id.
66. This review focuses mainly on the actions of governmental bodies toward the FTC. It therefore treats the influence of businessmen and the public on FTC activities indirectly as it emerges through the actions of the President, Congress, and the judiciary.
67. For an especially illuminating historical analysis of antitrust enforcement as a function of changing social attitudes toward competition and the market system, see R. Hofstadter, What Happened to the Antitrust Movement?, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188 (1965). For two important, recent contributions to the literature on the history of competition policy, regulation, and business-government cooperation, see REGULATION IN PERSPECTIVE (T. McCraw ed. 1981); OFFICE OF SPECIAL PROJECTS—BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION, NATIONAL COMPETITION POLICY: HISTORIANS' PERSPECTIVES ON ANTITRUST AND GOVERNMENT-BUSINESS RELATIONSHIPS IN THE UNITED STATES (1981).
68. On the public mood that precipitated congressional moves in the late 19th and early 20th centuries to redress monopoly, see generally R. Hofstadter, THE AGE OF REFORM 213-69 (1955); H. Thorelli, THE FEDERAL ANTITRUST POLICY 54-163, 235-368 (1955); S. Hays, The
much of this century, they have coexisted with many other statutes and policies that either stress a greater government role in guiding economic activity or exempt various industries from the competition rules applying to business generally. As political scientist Pendleton Herring observed in 1936, the country’s refusal to give competition policy a more certain endorsement hindered the FTC’s antitrust work: “An agreed-upon policy concerning government regulation of industry has not yet been developed with the clarity or objectivity essential in establishing a basis for the free exercise of discretion by an independent commission. Vacillations as to fundamental policy have disrupted the career of the Federal Trade Commission.”

The question of what role competition should play in governing economic activity dates back to the FTC’s very creation. The problem of monopoly occupied a prominent place in the presidential election campaign of 1912. All three candidates—Taft, Wilson, and Theodore Roosevelt—addressed the issue, but attention focused mainly on Wilson’s and Roosevelt’s antitrust enforcement views. Wilson proposed supplementing the Sherman Act with legislation banning the specific, illicit devices that enabled firms to achieve market power. “Our purpose is the restoration of freedom. We propose to prevent private monopoly by law, to see to it that the methods by which monopolies have been built up are legally made impossible.”

Roosevelt, the independent, Progressive Party candidate, took a

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Response to Industrialism 1885-1914, at 4-93 (1957); R. Weibe, The Search for Order 1877-1920, at 1-163 (1967).

69. P. Herring, Public Administration and the Public Interest 110 (1936). Twenty years later, Marver Bernstein, another scholar in the field of public administration, appraised the agency’s antitrust record in terms very similar to Herring’s:

The most critical problem of the FTC enforcement program stems from national inability to fix a course of antimonopoly action. The FTC has inherited the national ambivalence toward antimonopoly and competition. Moreover, it must operate in an environment marked by notable legislative deviations from antimonopoly objectives. . . . Its programs are complicated by the American habit of both respecting the accomplishments of bigness and fearing the political and economic consequences of increasing concentration of economic power. Its burden of enforcement is increased immeasurably by the lack of a clear commitment to antimonopoly throughout the government and the country generally.


72. W. Wilson, The New Freedom 222 (1913). “Everybody who has even read the newspapers knows the means by which these men built up their power and created these monopolies. Any decently equipped lawyer can suggest to you statutes by which the whole business can be stopped.” Id. at 172. The architect of Wilson’s position on antitrust during the campaign was Louis Brandeis. A. Link, 1910-1917, supra note 12, at 20-21.
different tack. Viewing substantial industrial concentration as inevitable, he recommended that the federal government guide the great accumulations of private economic power toward public ends. Roosevelt envisioned a federal commission with authority to regulate the issuance of securities; compel publication of company accounts; investigate any business activity; control hours, wages, and other conditions of labor; and set maximum prices for goods produced by monopolists who had attained their positions by honest means.

Wilson denounced Roosevelt's industrial commission as an "avowed partnership between the government and the trusts" in which business interests would dictate national policy, but his spirited objections placed him further away from Roosevelt than their views actually warranted. To most observers in 1912, however, their ideas mirrored a deep ideological division among progressives over the correct ap-

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73. Two major works of progressive thought helped move Roosevelt to this position: H. Croly, The Promise of American Life (1909); C. Van Hise, Concentration and Control: A Solution of the Trust Problem in the United States (1912). Croly attacked the historical perception that equated a Hamiltonian policy of government intervention with aristocracy and special privilege—an attitude that inhibited the creation of national policies to achieve Jeffersonian, or democratic ends. To Croly, the country needed a "new nationalism" in which the federal government would work actively to change economic and social conditions. Van Hise saw economic concentration as predetermined by the evolution of modern business, but believed administrative control of the products of this evolutionary trend was essential. On Croly's significance to Roosevelt's thought, see E. Goldman, Rendezvous With Destiny 146-65 (Vintage ed. 1955). On Van Hise's significance to Roosevelt's thoughts, see A. Schlesinger, The Crisis of the Old Order 1919-1933, at 22 (1957).

74. Roosevelt described the main elements of his program in Roosevelt, The Trusts, the People, and the Square Deal, 59 Outlook 649 (November 18, 1911); see also J. Blum, The Republican Roosevelt 116-123 (1977).

75. W. Wilson, supra, note 72, at 202. "If the government is to tell big business men how to run their business," Wilson asked, "then don't you see that big business men have to get closer to the government even than they are now? Don't you see that they must capture the government, in order not to be restrained too much by it?" Id. at 201-02.

76. See R. Hofstadter, supra, note 68, at 247-48. Wilson feared size wrought by consolidation or illicit practices; he disclaimed any desire to disturb firms that achieved dominance through "fair competition" alone. Wilson appeared to assume that those who pursued monopoly profit by exclusively benign means were doomed to Sisyphean frustration. Nonetheless, he seemed willing to let such ambition have its day. See generally, W. Wilson, supra note 72, at 163-91. Wilson's implicit faith that purely innocent behavior could virtually never yield a monopoly was probably the major respect in which his views differed from Roosevelt's.

It is wrong to attribute to Roosevelt in 1912 the total contempt for the Sherman Act that possessed some progressives who scorned the statute as a foolish bar to beneficial national planning. H. Croly, supra note 73, at 274; W. Lippmann, Drift and Mastery 124-46 (1914). Roosevelt in 1913 saw a continuing usefulness for the Sherman Act as a means for dissolving firms that had acquired monopoly power through sharp practices. See T. Roosevelt, Autobiography 423-50 (1913). Nonetheless, by the end of the decade, Roosevelt did turn against the measure whose application once stamped him as a "trustbuster." Approving the suspension of antitrust enforcement during World War I, Roosevelt wrote, "If the Sherman Law hurts our production and business efficiency in war time, it hurts it also in peace time, for the problems . . . are no different . . . ." T. Roosevelt, The Foes of Our Own Household 122 (1917).
proach to economic organization. Historian George Mowry defined the difference in these terms: "The one school cherished the competitive system with its individual values and feared the powerful state; the other welcomed concentrated power whether in industry or politics, looked to a paternalistic state staffed by an educated elite for leadership, and depreciated individualism." 77

After defeating Roosevelt and Taft to gain the Presidency, Wilson, in his original antitrust package, asked Congress to augment the Sherman Act with a roster of specific illegal practices; and to create a new trade commission with advisory and investigatory powers—a concept that, at least in organizational form, resembled the Rooseveltian agency he had earlier derided. 78 Upon the advice of Louis Brandeis and George Rublee, Wilson also gradually came to support a commission with adjudicatory authority to apply a broad standard proscribing unfair competitive practices. 79

At Wilson's urging, Congress put the expanded trade commission proposal atop its antitrust agenda. The legislators soon directly addressed the Commission's role: Should it promote competition policy or exercise public-utility regulation functions, including ratemaking? 80 Congress firmly endorsed the former in passing the FTC Act. 81 The


78. Wilson presented his original antitrust plan in a message to Congress in January 1914. See H.R. Doc. No. 625, 63rd Cong., 2d Sess. (1914), reprinted in 51 Cong. Rec. 1962-64 (1914). Henderson in 1924 observed that "the Rooseveltian conception of an administrative agency to license and supervise the 'trusts' had been the target of some of Mr. Wilson's most effective eloquence." G. Henderson, supra note 59, at 24.


80. The Senate Interstate Commerce Committee explicitly defined the policy choice as it reported the trade commission bill to the full Senate:

With the development of public sentiment on the subject of a trade commission, points of view have naturally changed with respect to particular provisions, and differences have also appeared with respect to the extent of the power to be lodged with such a commission. Some would found such a commission upon the theory that monopolistic industry is the ultimate result of economic evolution and that it should be so recognized and declared to be vested with a public interest and as such regulated by a commission. This contemplates even the regulation of prices. Others hold that private monopoly is intolerable, unscientific, and abnormal, but recognize that a commission is a necessary adjunct to the preservation of competition and to the practical enforcement of the law. The functions of such commissions would be as distinct and different as the ideas upon which they are founded.

S. Rep. No. 597, 63d Cong., 2d Sess. 10 (1914); see also H. Seager & C. Gulick, Trust and Corporation Problems 415 (1929).

new agency's founders believed it would remove impediments to competition, but would not plan or coordinate the affairs of business.

To its creators, the FTC Act reaffirmed the competition goals Congress had enshrined as national policy in 1890. Nonetheless, the Commission's establishment did not entirely dismay disciples of Roosevelt who preferred pervasive business-government cooperation and central planning. Congress mainly had intended to promote more effective antitrust enforcement, but the new agency conceivably had other uses as well. Since the statute did not expressly limit the agency to antitrust enforcement, the FTC, if properly directed, could supply a flexible instrument for joining government and business in a cooperative venture to direct the economy.

The struggle between the competition and cooperation models most strongly affected the FTC's role from World War I through the late 1930's. Central planning and cooperation made their first major inroads into American economic policy during the First World War. The war mobilization virtually suspended antitrust enforcement and reoriented the FTC mainly toward information-gathering. Through the War Industries Board (WIB), the federal government exercised sweeping power over the country's economic activities, controlling priorities, allocation, and pricing.

The mobilization provided the country's first major experiment in comprehensive economic planning, and created a new class of leaders in government, business, and academia who felt the WIB model of government-business cooperation should be pursued in peacetime.

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82. Herbert Croly raised this point several months after the FTC Act became law: "In this Trade Commission Act is contained the possibility of a radical reversal of many American notions about trusts, legislative power, and legal procedure. It may amount to historic political and constitutional reform. It seems to contradict every principle of the party which enacted it." The New Republic 8 (Jan. 9, 1915).


84. R. Hofstadter, supra note 67, at 193 (referred to this period as the "era of neglect" for antitrust enforcement).


86. See note 85 supra. During the war the Commission devoted most of its attention to investigating the cost and supply of essential raw materials. H. Miller, WORLD WAR ACTIVITIES OF THE FEDERAL TRADE COMMISSION 1917-1918, at 2-15 (1940); FTC, ANN. REP. 10-43 (1920).


88. Leuchtenberg, The Impact of the War on the American Political Economy, in The Impact
lowing several unsuccessful efforts at the war's end to obtain a continuing formal relaxation of antitrust enforcement, this group of individuals focused their energies upon the development of systems for industry self-regulation and business-government cooperation.98 The principal patron of this "associationalist" movement was Herbert Hoover, who, as Secretary of Commerce and President, encouraged the formation of trade associations and professional societies.99 Hoover urged these groups to prepare codes of ethical business behavior, collect and disseminate data on production and inventories, and promote "product simplification" by reducing the number of sizes and types of goods.100

The FTC's activities in the 1920's strongly reflected the influence of associationalism.101 The most important manifestation was the development of the trade practice conference.102 The Commission initiated the conferences by inviting all firms in an industry to meet with a

of World War I, 57, 58-63 (A. Link ed. 1969); E. Goldman, Rendezvous With Destiny 237-38 (1955); B. Baruch, supra note 87, at 104-07. Calling the antitrust laws "the simpler principles sufficient for the conditions of a bygone day," Baruch, who headed the War Industries Board, said the mobilization had enabled businessmen to enjoy "the tremendous advantages, both to themselves and to the general public, of combination, of cooperation and common action, with their natural competitors." Id. at 105.


100. A. Burns, supra note 90, at 68-69; A. Schlesinger, supra note 73, at 84-85; Hawley, supra note 90, at 117-18.

101. The Commission's Annual Report for 1928 commented:

Never in the history of American business has there been a time when self-regulation has received more intensive consideration. . . . If an industry is capable of self-regulation, the trade practice conference procedure of the Federal Trade Commission affords the most effective method yet devised to accomplish this end. . . . Trade associations, "institutes," the United States Chamber of Commerce, and business organizations in other forms have done, and are doing, excellent work in this respect.


commissioner and members of the agency's staff to discuss practices within the trade.\(^{94}\) When a consensus of the conference participants opposed some business tactic, the conferees drafted resolutions banning the suspect practice. If the FTC approved the conferees' views, it classified the proposals as either "Group I" or "Group II" rules. The Commission treated violations of Group I rules as prima facie violations of the FTC Act and sought cease and desist orders to halt them. For Group II rules, the FTC based its decision to prosecute on the circumstances of each claimed infraction.

From several meetings per year in the early 1920's, the trade conference became the agency's dominant enforcement approach by the end of the decade.\(^{95}\) Many commentators found the device a constructive means to understand business and promote commercial ethics without litigation.\(^{96}\) For some, the FTC's reliance on the conferences displayed a healthy inclination to replace competition-preserving enforcement with associationalist policies.\(^{97}\) For competition policy advocates, the conferences' effect hinged mainly on whether the FTC, in endorsing certain rules, was sanctioning collusion. Ultimately, the agency proved inadequately circumspect in this regard.\(^{98}\)

The war mobilization and the associationalism experiments of the 1920's gave the central planners important, limited tests of their theories. The economic collapse of 1929, however, provided a dramatic opportunity to sweep the competition model aside, perhaps permanently. This movement reached its peak in the first administration of Franklin Roosevelt, whose early New Deal drew mainly upon the country's war

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\(^{94}\) For a discussion of the FTC's trade practice conference procedure in the 1920's, see FTC, Trade Practice Submittals 1919 to 1923 (1923); McCarty, Trade Practice Conferences, 2 Corp. Prac. Rev. 19 (1930).

\(^{95}\) T. Blaisdell, supra note 59, at 93-98. Blaisdell calculated that between 1919 and 1929 there were 83 trade practice conferences, including 60 between July 1927 and November 1929.

\(^{96}\) See, e.g., G. Henderson, supra note 59, at 82, 244; National Industrial Conference Board, supra note 93, at 241.

\(^{97}\) In 1930, one former Commission official observed:
The trade practice conference marks the beginning of systematic cooperative effort between various progressive industries and the government to establish and enforce intelligent rules of business conduct. It permits industries to become self-governing through responsible trade organizations whose activities are supervised in the public interest by the Federal Trade Commission . . . . It creates among business men a more enlightened sense of their responsibility to the public, and it creates . . . . in the public a similar sense of its responsibility to permit business interests . . . . to conduct business on sound economic principles of cooperative effort as distinguished from destructive competition.

McCarty, supra note 94, at 29.

\(^{98}\) See infra text accompanying notes 169-75.
mobilization and associationalism experiences to stimulate recovery.99

The country embarked upon an unprecedented program of peace-
time economic planning in 1933 with the National Industrial Recovery
Act (NIRA),100 the cornerstone of recovery efforts until 1935. The stat-
ute created the National Recovery Administration (NRA) which ob-
tained codes of fair practice from each industry. Under the NRA's
often casual review, businessmen prepared and implemented codes
covering, among other things, pricing and output.101 By delegating
power over price and production to industry trade groups, "the NRA
created a series of private economic governments. . . . The large cor-
porations which dominated the code authorities used their powers to
stifle competition, cut back production, and reap profits from price-
raising rather than business expansion.102

Following a brief surge of enthusiasm accompanying its creation,
the NRA swiftly fell into disfavor. Internal conflict among the cooper-
ation advocates undercut NRA attempts to execute a coherent policy
and operate effectively.103 At the same time, supporters of antitrust en-
forcement relentlessly assailed the agency as a conduit for carteliza-
tion.104 By the time the Supreme Court struck down the NIRA in
1935,105 the NRA seemed to be collapsing under its own weight. Until
its official demise, however, the NIRA significantly affected the FTC's
competition work.106 Antitrust enforcement by the Commission and

99. See, e.g., E. Hawley, The New Deal and the Problem of Monopoly (1966); R.
Himmelberg, Origins, supra note 89; W. Leuchtenburg, supra note 87, at 41-42.
100. Act of June 16, 1933, ch. 90, 48 Stat. 195 (1933) (declared unconstitutional in Schechter
Poultry Corp. v. United States, 295 U.S. 495 (1935)).
101. C. Pearce, NRA Trade Practice Programs (1939); A. Schlesinger, The Coming
of the New Deal 119-35 (1958). Several industrialists, including Gerard Swope of General
Electric, Walter Teagle of Standard Oil of New Jersey, and Myron Taylor of United States Steel,
previously had urged the government to adjust production to demand. A. Schlesinger, supra
note 73, at 181-82. The National Recovery Administration appears to have modeled its industry
code program after the FTC's trade practice conference procedure. A. Burns, supra note 90, at
463.
102. W. Leuchtenburg, Franklin D. Roosevelt and The New Deal 1932-1940, at 69
(1963).
103. The NIRA's passage masked formidable tensions among cooperation-oriented business-
men and public administrators who differed over the exact form such cooperation should take. E.
Hawley, supra note 99, at 135-42.
104. W. Leuchtenburg, supra note 102, at 67-68; A. Schlesinger, supra note 101, at 100-
01, 130-35, 167-69.
106. One 1964 commentary called the NIRA "the greatest threat to the Federal Trade Com-
431, 432 (1964).
the Justice Department had virtually halted. By the mid-1930's, according to one observer, the FTC's chief function had become "preventing false and misleading advertising in reference to hair restorers, anti-fat remedies . . . a somewhat inglorious end to a noble experiment."108

The restoration of antitrust as an important national policy began in the late 1930's. In his second term, Roosevelt gave greater credence to the thinking of Felix Frankfurter, Benjamin Cohen, and Thomas Corcoran who embraced the Brandeisian preference for active antitrust enforcement.109 His appointment, in 1938, of Thurman Arnold as Assistant Attorney General triggered an unparalleled period of activity in the Antitrust Division. In five years, Arnold brought almost as many antitrust suits as the Division had in the previous fifty.110 The FTC shared in this rejuvenation as well and began the most serious litigation initiative up to that time—a comprehensive assault upon base-point pricing.111

The antitrust revival in 1938 was a turning point for American competition policy. Although the World War II mobilization blunted many antitrust cases launched before 1942, the competition model would not again face a challenger as formidable as the cooperation and planning theories of the early New Deal. Competition policy emerged from the Depression with a degree of social support that made possible the comparatively stable, substantial government antitrust work of the post-war era.112 While not all peacetime economic policy since 1938


108. P. Herring, supra note 69, at 115 (quoting Abram Myers, a commissioner from 1926 to 1929). Although an accurate appraisal of the agency's litigation efforts, Myers' remark understated the Commission's work in those years as a competition advocate. The FTC, for example, criticized the cartelizing proclivities of several NRA codes. E. Hawley, supra note 99, at 94-95, 108-09, 117; A. Schlesinger, supra note 101, at 171.

109. W. Leuchtenburg, supra note 102, at 148-49, 154-56, 163. Throughout the decade Roosevelt had exasperated his advisors by entertaining a variety of views on an issue without committing himself firmly to any one of them. Describing the President's ambivalence on economic policy, Leuchtenburg wrote "[h]e preferred to let the rival theorists war around him. It was almost as though he were watching himself, uncertain in his own mind and rather curious about which faction would win him over." Id. at 249. See B. Murphy, The Brandeis/Frankfurter Connection 152-85 (1982).

110. See supra note 107, at 3. Ironically, in 1937, Arnold had argued that antitrust was a charade that enabled the country to express harmlessly its indignation at the discomforting but ultimately necessary process of industrial concentration. T. Arnold, The Folklore of Capitalism 96, 207-29 (1937).

111. See infra text accompanying notes 198-208.

112. R. Hofstadter, supra note 67, at 233; Lamb, supra note 106. "[T]he passing of the N.I.R.A. and the failure of Congress to enact any similar measure began a new era for the Federal Trade Commission, and for antitrust enforcement in general." Id. at 433.
has conformed to the competition model, competition policy has enjoyed comparatively broader support since 1938 than it did in the century's first decades. Thus, a recommendation in 1969 that the FTC strengthen its antitrust programs arguably had greater practical significance than one made forty years earlier.

2. Federal Judiciary

A second important external factor shaping FTC antitrust enforcement has been judicial review.113 The judiciary's influence on the Commission's choice of competition programs emerged vividly in the courts' interpretation of the FTC's authority from 1914 to 1934. In creating an administrative agency to enforce the antitrust laws, Congress was seeking to ensure greater fidelity to its own competition policy goals.114 The main impetus for this choice came from the Supreme Court's Standard Oil Co. of New Jersey v. United States115 and United States v. American Tobacco Co.116 decisions in 1911. The Court's adoption of the "rule of reason" standard showed Congress that the Sherman Act's effectiveness depended greatly upon how judges interpreted its general provisions.117 Although some congressmen found the rule of reason standard to be substantively deficient, Congress' main concern in passing the FTC Act was with the process through which the antitrust laws would be interpreted.118

Under Congress' plan, the judiciary's role was essentially to determine whether the FTC's conclusions about the propriety of various


114. In this discussion of the institutional aims that moved Congress to create the FTC, the author has relied frequently upon Robert Lande's analysis of the goals of the FTC Act, R. Lande, The Goals of the Antitrust Laws (1981) (unpublished manuscript on file with the author); and Neil Averitt's study of section 5 in Averitt, supra note 13. For a brief recent summary, see ABA Antitrust Section, Monograph No. 5, The FTC as an Antitrust Enforcement Agency: The Role of Section 5 in the FTC Act in Antitrust Vol. I, at 20-25 (1981).

115. 221 U.S. 1 (1911).

116. 221 U.S. 106 (1911).

117. See G. Henderson, supra note 59, at 15; see also J. Landis, The Administrative Process (1938):

In the field of unfair competition and monopoly . . . there was widespread distrust of the courts' ability to evolve workable concepts to direct the economic forces which had posed these problems.

. . . Here distrust based itself upon the belief that the men who composed our judiciary too often held economic and social opinions opposed to the ideals of their time. The distrust was not without foundation.

Id. at 32-34.

118. See Averitt, supra note 13, at 233-34.
business practices had evidentiary support. Courts were not to probe the wisdom of the Commission's choice among policy alternatives where the agency's preference had sufficient evidentiary support. By this design, Congress intended the Commission to account primarily to it, not the courts, for its policy decisions. Senator Cummins described how the proposed FTC statute would distribute authority among the agency, the judiciary, and the legislature:

I realize that if these five men were either unfaithful to the trust reposed in them or if their economic thought or trend of thought was contrary to the best interests of the people, the commission might do great harm. I realize that just as I realize that the trend of economic thought upon the part of some judges has done and will continue to do great harm, or rather will continue to render ineffective to a degree a statute that it was believed by its authors would exterminate the monopolies then in existence and prevent the establishment of others.

I would rather take my chance with a commission at all times under the power of Congress, at all times under the eye of the people, for the attention of the people is concentrated to a far greater degree upon the commission which is organized to assist in the regulation of commerce or to administer the law regulating commerce than it has upon the abstract propositions, even though they be full of importance, argued in the comparative seclusion of our courts.

If we find that the people are betrayed either through dishonesty or through mistaken opinion, the commission is always subordinate to Congress. ... Congress can always destroy the commission; it can repeal the law which creates it ... 120

In adopting a relatively narrow standard of judicial review, Congress also sought to supply the institutional means with which to enhance the stature of the FTC's work. In section 5 of the FTC Act, Congress had given the Commission the interpretational and adjudicatory responsibilities that traditionally had been the province of the courts. 121 Congress theorized that the Commission's principal tool for

119. See supra note 113.
120. 51 Cong. Rec. 13,047-48 (1914). For a review of the legislative debates concerning the scope of judicial review, see R. Cushman, The Independent Regulatory Agencies 201-04 (1941).
121. The Senate Interstate Commerce Committee Report on the FTC Act explained the logic of this approach:

The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and
overcoming judicial opposition to this intrusion would be its competition policy expertise. This expertise would have essentially three sources: The Commission’s repeated exposure to antitrust problems; the Commission’s authority to employ specialists of various backgrounds; and the Commission’s extraordinary investigative and reporting powers.

Congressional expectations received a serious blow in 1920 in the first Commission case to come before the Supreme Court, FTC v. Gratz. Although the Court decided the case on a procedural issue, it proceeded to limit the Act’s ban on “unfair method[s] of competition”:

The words “unfair method of competition” are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.

As subsequently applied by the courts in the 1920’s, Gratz virtually barred the Commission’s development of antitrust principles not already established by judicial interpretation. Although the bare terms of Gratz were potentially generous in their implication that the Commission could forbid [them] . . . or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason, as stated by one of the representatives of the Illinois Manufacturers’ Association, that there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others.

S. REP. No. 597, 63d Cong., 2d Sess. 13 (1914). Experience with the Interstate Commerce Commission had shown that federal judges generally begrudged bestowing traditionally “judicial” functions upon an administrative body. C. McFarland, supra note 113, at 102-124.

122. G. Henderson, supra note 59, at 22. Senator Newlands expressed his expectation that: [A]s a result of investigation and as the result of long experience [the FTC] will build up a body of information and of administrative law that will be of service not only to it but to the country itself, and that gradually standards will be established that will be accepted and will constitute our code of business morals.

51 CONG. REC. 11,083 (1914).

123. Congress contemplated that the Commission and its staff would be made up of businessmen and economists, as well as lawyers. See 51 CONG. REC. 11083, 12216, 13005 (1914).

124. Both Blaisdell and Henderson described the powers conferred by §§ 6 and 9 of the FTC Act as “sweeping.” T. Blaisdell, supra note 59, at 112; G. Henderson, supra note 59, at 46.

125. 253 U.S. 421 (1920).

126. Id. at 427-28.
mission could cover areas "heretofore regarded as opposed to good morals . . . or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly,"127 its practical effect deflected the FTC away from the pathbreaking initiatives which were a major reason for the agency's creation.128

The Supreme Court imposed a second damaging limitation on the FTC's powers in 1927 in FTC v. Eastman Kodak Co.129 One year before Kodak, the Court had ruled section 7 of the Clayton Act inapplicable to asset acquisitions.130 The Commission sued Kodak under section 5 to require the film company to divest three recently acquired processing plants. The Court ruled that the FTC lacked divestiture power under section 5.131 By removing an essential remedy, the decision effectively prevented the Commission from plugging the Clayton Act's assets loophole132 and, more generally, from having an important role in the areas of monopolization and attempted monopolization.133

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128. During the legislative debates in 1914, Sen. Newlands had predicted that § 5 "will have such an elastic character that it will meet every new condition and every new practice that may be invented with a view to gradually bringing about monopoly through unfair competition." 51 CONG. REC. 12,024 (1914). Blaisdell summarized Gratz's impact as follows:

In establishing its policies the Commission included in its definition the older ideas of the common law. To these, as occasion demanded, it endeavored to add other criteria. In connection with both criteria, the limiting hand of the law has been felt. But particularly in applying the latter group, based on other social and economic criteria, have the courts been adamant. They have insisted on limiting the Commission to standards previously found in the law.

T. BLAISDELL, supra note 59, at 21. Blaisdell supported his view by reviewing the outcome of appeals of FTC cases through 1928. He divided the cases into two classes, one in which the Commission had applied existing legal standards ("old criteria") and a second in which it had attempted to develop new law beyond the boundaries of earlier doctrine ("new criteria"). Id. at 40. He found that "[a] much higher percentage of those grouped under 'New Criteria' [had] been reversed by the courts than of those grouped under 'Old Criteria.'" Id. at 41. He concluded that "[t]he Commission was apparently willing to broaden the scope of the law more rapidly than were the courts . . . Concerning cases arising under the older standards . . . [t]he courts and the Commission [had] not disagreed seriously in their interpretations." Id.

129. 274 U.S. 619 (1927).

130. FTC v. Western Meat Co., 272 U.S. 554 (1926). As drafted in the original Clayton Act, § 7 prohibited consolidations achieved by stock purchases. Businesses quickly realized that they could escape the statute's reach by simply buying the target firm's assets. See G. HENDERSON, supra note 59, at 40, 321. Experience with § 7 seemed to confirm congressional apprehension in 1914 about delineating every offensive practice in the statute for fear that businessmen would merely circumvent the limitation with other devices.

131. 274 U.S. at 623, 625.

132. Following Kodak and Western Meat, the Commission continued to actively monitor major acquisitions and to investigate transactions that might fall within § 7's stock purchase prohibition. J. LANDIS, supra note 117, at 40-41.

133. The Commission promptly acknowledged that Kodak had removed its power to order divestiture under § 5. See, e.g., FTC, ANN. REP. 67 (1927). Without this structural remedy, the Commission's ability to deal effectively with firms that had achieved near or actual monopoly
Early court decisions also narrowly interpreted the FTC's investigative and reporting powers. One set of cases barred investigations on the ground that the FTC had sought data on manufacturing production—two activities the courts of this era often treated as exclusively "intrastate" commerce, and thus beyond the FTC's jurisdiction. A second, more important line of rulings prohibited the FTC from gathering information unrelated to alleged antitrust violations.

There are two principal explanations for the generally unsympathetic treatment the Commission received from the courts during its first two decades. One is that the FTC failed to explain its decisions in full, narrative opinions and thus left the courts with little basis for upholding the agency's judgment. It is doubtful, however, that the agency's cryptic opinions and other infirmities in its operations were the dominant cause of its failures on appeal. The second and probably dispositive factor was the judiciary's distaste for economic regulation by legislative or administrative decree. Any attempt to classify judicial attitudes for a given era is prone to oversimplification, but it is not unreasonable to say that the Supreme Court viewed economic regulation more tolerantly after the 1930's and that this change led the courts

power was severely diminished. See A. Stone, Economic Regulation and the Public Interest 121-22 (1977).

134. T. Blaisdell, supra note 59, at 172, 258-62, 271-73; G. Henderson, supra note 59, at 67-70. In 1936, Arthur Burns observed that "judicial decision has whittled away [the Commission's] investigatory power, its right arm, until as Professor [Myron W.] Watkins has expressed it, 'There remains nothing but an impotent stump.'" A. Burns, supra note 90, at vi (footnote omitted).


137. The early commissioners refrained from writing complete narrative opinions, largely because they found the endeavor too time-consuming. Thompson, Highlights in the Evolution of the Federal Trade Commission, 8 Geo. Wash. L. Rev. 257, 267-68 (1940). Henderson was the main exponent for this viewpoint. G. Henderson, supra note 59, at 117, 165, 334. Henderson suggested that the FTC's poor opinions were the major reason for its failings on appeal. Id. at 334.

138. J. Landis, supra note 117, at 150. In Landis' words, the courts' willingness to defer to the FTC's administrative judgments in the 1920's was more "a matter of attitude in a particular case rather than of doctrine." Id. See T. Blaisdell, supra note 59, at 289-90; C. McFarland, supra note 113, at 92-99; Handler, Unfair Competition and the Federal Trade Commission, 8 Geo. Wash. L. Rev. 399, 401-02 (1940).
to allow administrative tribunals greater latitude. 139

Whatever their exact origin, the Supreme Court's interpretations of the Commission's substantive, remedial, and investigative authority seriously retarded the agency's development of a distinctive antitrust enforcement role. 140 The judicially imposed restrictions forced the Commission "to concentrate its energies within the narrow confines of the field of action set by the courts, and to refrain from a more experimental and venturesome exercise of its powers." 141 In the antitrust field, the FTC was left to work in terrain largely explored by the Justice Department. 142

Since the 1920's, the courts have either reversed or substantially modified the limitations imposed by Gratz, Kodak, and other early decisions interpreting the agency's investigation and reporting powers. 143 By 1969, the agency had obtained Supreme Court rulings construing its authority in a manner generally consistent with congressional expectations in 1914. The Court's affirmation in the mid-1960's of the FTC's power to order divestiture under section 5, and its endorsement of a flexible conception of "unfair methods of competition" were particularly significant developments. 144 This judicial trend provided the ABA with reason to expect that its recommendations would receive

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140. These early rulings severely diminished the FTC's standing as a law enforcement agency, and injured the agency's efforts to attract competent leadership and staff. Arthur Burns warned that "an administrative body hampered as the Federal Trade Commission has been by the judiciary cannot attract able men." A. Burns, supra note 90, at 574.


142. For example, the power to proscribe large asset acquisitions under § 5 of the FTC Act would have afforded the FTC at least the opportunity to develop a unique and influential antitrust enforcement role in the 1920's. See M. Handler, H. Blake, R. Pitofsky, & H. Goldschmid, CASES AND MATERIALS ON TRADE REGULATION 431 (1975). The Commission's efforts to curtail misleading advertising in the 1920's and early 1930's are partly attributable to its inability to gain judicial acceptance for a broader reading of its antitrust authority. See Handler, supra note 138, at 403-06.


consideration in an environment more favorable to ambitious FTC antitrust ventures than existed only a decade before.

3. President

A more sympathetic judiciary in the 1920's alone would not have guaranteed that the early FTC would have used its authority more effectively. Much depended on the agency's leadership. The President and Congress share responsibility for selecting commissioners, but the President historically has been the dominant force in choosing the FTC's leadership. White House attitudes toward antitrust have deeply affected the course of FTC competition programs. The Commission's first twenty years illustrate the importance of presidential antitrust preferences to FTC enforcement policy.

As a candidate and in the first two years of his presidency, Woodrow Wilson depicted himself as a foe of monopoly and special privilege. Soon after he signed the FTC Act, however, President Wilson's position toward business and antitrust turned to the right. As a consequence, Wilson's first appointments to the Commission "gave dominance to men who had an anxious regard for the traditional concerns of business and finance." To chair the new agency, he selected John Davies, a lawyer who had been Director of the Bureau of Corporations. Wilson also chose George Rublee, an attorney and Wilson advisor, and three men with business backgrounds, Edward Hurley, William Harris, and Will Parry.

The first Commission soon divided sharply over the direction it should take. Rublee and Harris favored antitrust litigation, while Hurley, Davies, and Parry preferred programs limited to advising business-

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146. See J. BLUM, supra note 12, at 79-80 (observing that the collapse of the Progressive Party in the 1914 elections and the coming of war in Europe inclined Wilson "to reveal his basic faith in the hearthfire of the conscience of men of wealth.").
147. Id. at 80.
148. Until 1950, the Commission chairmanship rotated annually among the commissioners. Since 1950, the President has designated the chairmen for all independent regulatory agencies. In 1950, James Mead became the first presidentially designated FTC Chairman. J. GRAHAM & V. KRAMER, supra note 145, at 10. For a discussion of the role of the chairman in directing the affairs of independent regulatory agencies in the modern era, see D. WELBORN, GOVERNANCE OF FEDERAL REGULATORY AGENCIES (1977).
149. The tendency for lawyers to occupy all of the commissioner posts is a relatively recent phenomenon. The FTC's current chairman, James C. Miller, III, is the first non-lawyer to serve as a commissioner since James Mead, whose tenure ended in 1955. Id.
men of the legality of various anticipated acts.\textsuperscript{150} The rift nearly paralyzed the agency. Seeking to establish a cordial relationship with the business community, the FTC did not issue its first complaint until February 1916, eleven months after it had officially opened its doors.\textsuperscript{151} Upon Rublee's departure and Hurley's elevation to chairman in 1916, the agency acquired an even more conservative bent.\textsuperscript{152} Hurley "devoted his talents to making the Commission useful to businessmen and to preaching the doctrine of cooperation between government and business...[U]nder his leadership, the Commission practically abandoned its role as watchdog of business practices."\textsuperscript{153} Although many of the FTC Act's original supporters had regarded the giving of guidance to business as worthwhile,\textsuperscript{154} the degree to which Hurley stressed the FTC's purely advisory functions chagrined many who believed the agency's effectiveness as a promoter of competition policy rested heavily on the prosecution of antitrust suits.\textsuperscript{155}

Wilson's appointments to the Commission in his second term

\textsuperscript{150} Herring, \textit{The Federal Trade Commissioners}, 8 \textsc{Geo. Wash. L. Rev.} 339, 344-45 (1940).
\textsuperscript{151} G. Henderson, \textit{supra} note 59, at 87; Rublee, \textit{supra} note 79, at 671.
\textsuperscript{152} Regarded as the most able of the early commissioners, Rublee served only an interim appointment after the Senate refused to confirm him for a regular term. Rublee had aroused the enmity of Senator Jacob Gallinger of New Hampshire by aiding Gallinger's opponent in the 1912 elections. Gallinger succeeded in blocking Rublee's confirmation for a full term. See Herring, \textit{supra} note 150, at 344.
\textsuperscript{153} A. Link, 1910-1917, \textit{supra} note 12, at 75. See also R. Weibe, \textit{supra} note 68, at 298. Hurley explained his enforcement approach in an address to the National Industrial Conference Board in July, 1916:

I am glad to meet with a body of business men like you gentlemen, and I will plead guilty on the start by saying that I do not know anything about the law, and that applies to the Clayton act and to the Federal Trade Commission act. In my position on the Federal Trade Commission I am there as a business man. I do not mind telling you that when I was offered the place I told the President that all I knew was business, that I knew nothing about the new laws nor the old ones, and that I would apply the force that I might have in the interest of business. I have been there since the sixteenth of March last year, and I think that the businessmen of the country will bear me out when I say that I try to work wholly in the interest of business.

\textsuperscript{154} Many businessmen had supported the creation of a commission with specific statutory authority to advise firms in advance of the legality of their actions. See R. Weibe, \textsc{Businessmen and Reform} 138-41 (1962).
\textsuperscript{155} Brandeis later referred to Wilson's early appointments to the Commission as "a stupid administration." A. Link, 1910-1917, \textit{supra} note 12, at 74. Understandably, Wilson did not share this view. In the fall of 1916, he told a grain dealer's trade association, "It is hard to describe the functions of that Commission; all I can say is that it has transformed the Government of the United States from being an antagonist of business into being a friend of business." P. Herring, \textit{supra} note 69, at 112. These words may have been designed to convince businessmen that Wilson's tariff and antitrust legislation had not, as the Republicans claimed, been the source of the economic depression of 1914. See A. Link, 1910-1917, \textit{supra} note 12, at 74-75. Link points out that Wilson relaxed government antitrust enforcement efforts after 1914, initially to gain business favor and later to spur war mobilization. \textit{Id.} at 74-76.
aligned the agency more closely with the preferences of congressmen who expected the FTC to be an effective antitrust enforcer.156 This shift, however, only partly compensated for the policies that guided the agency from 1915 to 1917. The first Commission's inability to pursue a substantial antitrust enforcement program made the FTC appear ill-suited to perform its assigned competition policy role.157

The 1920 election of Warren Harding as President augured the beginning of an unparalleled period of government solicitude for business interests.158 During the terms of Harding and his immediate successors, Calvin Coolidge and Herbert Hoover, two lines of thought molded presidential antitrust policies. The first was the associational view of business-government cooperation born in the War Industries Board experience of World War I.159 Most closely identified with Hoover, associationalism promoted greater industry "self-regulation" under the guidance of government which, with the advice of business, would coordinate economic activity. A second, distinct strand of thought saw government's proper role as serving the interests of business as businessmen defined them. Harding embraced this ideal, but it was Coolidge who became its foremost champion and "deliberately converted his administration into a 'businessman's government.'"160

Harding and Coolidge initially considered limiting the government's regulatory agencies, including the FTC, by modifying their stat-

156. See Herring, supra note 150, at 346-49.
157. A. LINK, 1910-1917, supra note 12, at 75. See also Herring, supra note 150, at 345.
158. Blaisdell described the transition in these terms:

Near the end of President Wilson's term of office the attitude of the public towards government regulation of business underwent a change. The trend of opinion as expressed by the shift in political control from Democratic to Republican forces was reflected in the changed policies of the Commission. This changed attitude may be roughly expressed as a change from less governmental control of business to more business control of government.

T. BLAISDELL, supra note 59, at 75; see also P. HERRING, supra note 69, at 125-38 (tracing the liaison of business and politics in American history); J. HICKS, REPUBLICAN ASCENDANCY, 1921-1933, at 64-66 (1960) (appointments to federal agencies expressing conservative trend). Arthur Link cautions that the Harding administration's regulatory policies constituted a change in degree from Wilson's views rather than an abrupt break. Link, Whatever Happened to the Progressive Movement in the 1920's?, 64 AM. HIST. REV. 833, 848-49 (1959). For a discussion of government antitrust policy in the 1920's, see R. HIMMELBERG, ORIGINS, note 89 supra.

159. See supra text accompanying notes 85-98.
160. W. LEUCHTENBURG, supra note 87, at 96. To Coolidge, business ideas formed a secular creed that inspired the nation's greatest achievements. "The man who builds a factory builds a temple," and "[t]he man who works there worships there." A. SCHLESINGER, supra note 73, at 57. William Leuchtenburg cautions that it would be incorrect to assume that the views of Coolidge and his advisors did not have the backing of a large segment of the American public. "The Coolidge era is usually viewed as a period of extreme conservatism, but it was thought of at the time as representing a great stride forward in social policy, a New Era in American life." W. LEUCHTENBURG, supra note 87, at 201. See also E. GOLDMAN, supra note 73, at 220-47.
utory charters. Though no longer in control of the Congress, progressives in both houses had sufficient strength to make this seem a Pyrrhic route.161 Consequently, Harding and Coolidge turned to devices more directly under presidential control, including their appointment power.162 Early in the 1920's, the FTC was led by the last Wilson appointees, who had begun several major initiatives, including the agency's controversial study of the meatpacking industry in 1919.163 With William Humphrey’s appointment to the FTC in 1925, however, Coolidge achieved a working majority of commissioners who shared his views on the correct relation of government to business.164

As commissioner, Humphrey publicly denigrated the policies the agency had followed from the end of World War I until his appointment and declared his intention to “help business help itself.”165 Under Humphrey’s influence, the Commission imbued its enforcement programs with the values of Coolidge and the associationists. One important step was the increased use of trade practice conferences.166 In theory, the trade practice device provided a useful tool for addressing industry-wide abuses and learning about business first-hand.167 Information from the conferences could also guide the FTC’s selection and prosecution of cases.168

From an antitrust perspective, however, the Commission’s actual use of the technique was less encouraging. Several observers, including advocates of the conferences, urged the FTC to balance conferences

161. W. LEUCHTENBURG, supra note 87, at 97.
163. See infra text accompanying notes 187-97.
165. P. HERRING, supra note 69, at 125. In a 1931 speech, Humphrey criticized the FTC’s prior litigation policy:

Under the old policy of litigation it became an instrument of oppression and disturbance and injury instead of a help to business. It harassed and annoyed business instead of assisting it. Business soon regarded the commission with distrust and fear and suspicion—as an enemy. There was no cooperation between the commission and business.

Id.

Analyzing Humphrey’s public comments, Herring wrote in 1936:

It is not that these declarations are particularly cogent or marked by profundity of thought; it is rather that they reflect in bald and obvious form the prevailing views of the conservative leaders in his party and in business at the time. The shifting of political fortunes had brought a combination of groups into control whose leaders expressed theories very different from the Wilsonian disciples of the New Freedom. Big business had become more than respectable.

Id. at 125-26.

166. See supra text accompanying notes 93-98.
167. See supra note 96; G. HENDERSON, supra note 59, at 82, 244; A. STONE, supra note 133, at 58-59.
with formal, binding litigation.\textsuperscript{169} By the late 1920's, however, the trade practice conference had become the agency's dominant antitrust enforcement strategy, and the extreme retreat from formal litigation had diminished the Commission's enforcement credibility.\textsuperscript{170} A second, and more serious, problem was the content of the trade practice codes. From their inception in 1919, the codes' potential for fostering anticompetitive alliances was widely recognized.\textsuperscript{171} Toward the end of the 1920's, the Commission was routinely approving codes that effectively sanctioned price fixing and other horizontal trade restraints.\textsuperscript{172} Some codes so alarmed the Justice Department that in 1930 it called for the FTC to rescind provisions that seemed to violate section 1 of the Sherman Act.\textsuperscript{173} The Commission responded by reevaluating the codes\textsuperscript{174} and eventually deleting the suspect provisions.\textsuperscript{175}

Humphrey's influence also emerged in new FTC rules of procedure adopted soon after his appointment.\textsuperscript{176} Among the most important were (1) a declaration that the agency would settle all cases informally "except when the public interest demands otherwise;"\textsuperscript{177} and (2) a commitment that the FTC would neither announce the issuance of complaints "until after final determination of the case," nor make public matters settled informally before a complaint was filed.\textsuperscript{178} In Humphrey's tenure, the rules reduced the number of compulsory

\textsuperscript{169} G. Henderson, supra note 59, at 244. ("Experience has shown, however, that these informal proceedings cannot be relied upon exclusively.")

\textsuperscript{170} See T. Blaisdell, supra note 59, at 93-98; P. Herring, supra note 69, at 129-31. Use of the conferences reached its peak in the winter of 1929-30, when 57 were convened. Id. at 130.

\textsuperscript{171} G. Henderson, supra note 59, at 81 ("It is obvious that an embarrassing situation might arise if a meeting should get out of bounds and discuss some forbidden topic.").

\textsuperscript{172} Arthur Schlesinger gives the following description of the codes' operation: "Though dedicated to the elimination of "unfair" trade practices, the codes gradually began to spill over into such questions as price-cutting and, in some cases, provided fronts behind which businessmen fraternally conspired to evade the antitrust law." A. Schlesinger, supra note 73, at 65; see also J. Clark, The Federal Trust Policy 231-32 (1931) ("The industrialists persisted . . . in their effort to exploit the opportunity they found in the trade practice conference to temper the warfare of industrial competition and they were successful in devising euphemisms for trade-restricting agreements which escaped the attention of the commission . . ."); T. Blaisdell, supra note 59, at 95-96; T. Cochrane & W. Miller, supra note 92, at 346, 348; E. Goldman, supra note 73, at 237; P. Herring, supra note 69, at 131-32; W. Leuchtenburg, supra note 87, at 190 (1958); Kittelle & Mostow, supra note 93, at 456-38.

\textsuperscript{173} See P. Herring, supra note 69, at 132; see also J. Clark, supra note 172, at 240-42; R. Himmelberg, Origins, supra note 89, at 93-98.

\textsuperscript{174} T. Blaisdell, supra note 59, at 95-96; P. Herring, supra note 69, at 131; J. Clark, supra note 172, at 234; R. Himmelberg, Origins, supra note 89, at 96-98.

\textsuperscript{175} E. Hawley, supra note 99, at 39; P. Herring, supra note 69, at 131-32.

\textsuperscript{176} T. Blaisdell, supra note 59, at 82-86.


\textsuperscript{178} Id. This rule applied even to cases involving fraud and misrepresentation. P. Herring, supra note 69, at 129.
enforcement proceedings and kept many formal complaints and consent agreements out of the public eye.  

For members of Congress who supported active FTC antitrust enforcement in the 1920’s, the appointment and confirmation of commissioners with little sympathy for the statute’s original aims was a searing disappointment.  

Some found the Humphrey Commission so disturbing that they called for the agency’s abolition. Humphrey’s tenure, however, had graphically demonstrated how appointments could set the tone and content of Commission policies. To many commentators, the FTC’s ineffectiveness in its first two decades was caused by the successful efforts of the President and, on occasion, of the Congress to restrain the agency’s pursuit of the competition policy goals of the 1914 statute. The Commission’s experience in this era firmly supported the ABA’s conclusion in 1969 that the FTC’s antitrust revitalization would require the willingness of the White House to appoint, and of the Senate to confirm, commissioners who preferred a forceful antitrust role.

179. T. Blaisdell, supra note 59, at 85. “The coming of Humphrey to the commission meant that private negotiation with concerns accused of unfair methods was substituted for the former policy of prosecution.” P. Herron, supra note 69, at 129. Two commissioners, John Nugent and Huston Thompson, dissented vehemently to the publicity limitations on the ground that they deprived the agency of an important means of deterring anticompetitive behavior. Davis supra note 164, at 448-49.

180. Reflecting on Humphrey’s first year in office, Senator Norris lamented, “[i]t seems to me that if the commission is to function, if it is to continue to perform the work that the law designed it to perform, its personnel must be of men who believe in that kind of a law.” 67 Cong. Rec. 5962 (1926).

181. Senator King sponsored a bill to achieve this end, declaring that the FTC was “not only a useless appendage, but . . . a real menace.” Davis, supra note 164, at 453-54. Senator Connally said the agency had become “a city of refuge to which the guilty may flee, a sanctuary for those who violate and defy the laws of the United States.” Id. at 453.

Humphrey remained a commissioner until 1933 when President Roosevelt removed him from office. Humphrey’s estate eventually persuaded the Supreme Court that Humphrey’s dismissal had been improper. Humphrey’s Executor v. United States, 295 U.S. 602 (1935). Harold Ickes, Roosevelt’s Interior Secretary, later said that Roosevelt had claimed to have proof of actual misconduct by Humphrey, but had believed he could remove Humphrey without such disclosures. H. Ickes, The Secret Diary of Harold L. Ickes: The First Thousand Days 1933-36, at 374 (1953).

182. Blaisdell, for example, concluded:

[T]he most important reason for the Commission’s impotence lies in the drift of economic forces as they impinged on the political machinery. The struggle between “big business” and those economic groups which desired the control of “big business” by securing the control of the personnel and the policies of the Commission finally produced a governmental agency which would cooperate with business instead of regulate business. At best the remodelled Commission would regulate business in accordance with the ideals of business men.

T. Blaisdell, supra note 59, at 289-90. The other major obstacle, in Blaisdell’s view, was “the Commission’s challenge to governmental control as administered by the courts.” Id. at 290.
4. Congress

A fourth major external factor affecting the FTC's competition programs is Congress.\footnote{183} Through oversight, appropriations, and efforts to amend the agency's charter, Congress has significantly influenced the Commission's choice and execution of antitrust matters. As a general rule, the FTC has successfully pursued few economically significant initiatives that lacked legislative approval. Fulfilling the active antitrust role Congress envisioned in 1914 has always run the risk of provoking business to seek legislative relief from the agency's actions.\footnote{184} The FTC Act and its legislative history defined the nominal boundaries of the Commission's authority, but each new Congress determines how far the agency may go in exercising its powers.\footnote{185}

The political risk inherent in translating the broad mandate of 1914 into specific enforcement initiatives is evident in two past FTC competition projects, each the most ambitious and visible Commission initiative of its time: the meatpacking industry report of 1919, and the Cement Institute base-point pricing case of the 1940's. The meatpacking report controversy involved the use of the agency's investigation

\footnote{183. The preceding sections already have touched upon congressional influence upon FTC antitrust activities. Significant examples include passage of the NIRA in 1933 and Humphrey's confirmation in 1925. In their study of appointments to the FTC and Federal Communications Commission, Graham and Kramer found that Congress historically has deferred to Executive Branch judgment in reviewing appointments. See J. GRAHAM & V. KRAMER, supra note 145. There have been notable exceptions to this proposition, however, such as the Senate's refusal to confirm Rublee to a full term in 1915. See supra text accompanying note 152.}

\footnote{184. In 1936, Herring described this condition:

It seems apparent that from the beginning the commission was in a precarious position, for not only were its legal powers vague and its resources inadequate, but its relations with Congress were uncertain. The parties coming within its jurisdiction were often very powerful. The more important the business, the wider its ramifications, and the more numerous its allies and subsidiaries, the closer it came within the commission's responsibility. To review the firms with which this agency has had official contacts, especially in its early years, is to go down the roster of business in this country. Making political enemies was soon found to be an incident in the routine of administration. The discharging of official duties meant interfering with business and often "big business."

P. HERRING, supra note 69, at 115. See also R. CUSHMAN, supra note 120, at 219 ("The authority to investigate . . . mammoth business concerns . . . is a power loaded with political dynamite. It is bound to arouse the bitter antagonism of those being investigated and to set in motion powerful political pressures.")}
and reporting powers. In 1917, President Wilson requested the FTC to investigate the food industry as part of a wartime price study. Despite vigorous lobbying by meatpacking firms to avoid the food inquiry, the Commission comprehensively examined the packing business. The investigation yielded a six-volume report, which presented evidence of collusion among the nation’s five largest packers and numerous exclusionary tactics to thwart new competitors. 

The Commission’s recommendations included proposals for requiring the packers to relinquish control of stockyards and restricting their activities in unrelated product lines.

The study quickly stimulated impassioned debate in Congress. After months of hearings and discussion, Congress passed the Packers and Stockyards Act of 1921 which gave the Agriculture Department exclusive jurisdiction over the operation and practices of meatpackers, stockyards, and livestock commission houses. Congress’ vesting of authority over the packers in the Agriculture Department had an im-

186. 15 U.S.C. §§ 46, 49 (1976). Congress expected the Commission to use the information it secured through these powers in two ways. The first was to provide advice to Congress and the President on antitrust matters and to release data whose publication alone might correct market imperfections. The House Report on the FTC Act, for example, anticipated that publication of high business profits would attract entry into lucrative markets and depress prices. H.R. Rep. No. 553, 63d Cong., 2d Sess. 3-4 (1914). The second purpose was to improve the empirical basis upon which the Commission selected its antitrust enforcement priorities and developed cases. The mere fact that the agency exercised such powers might by itself deter violations. See T. BLAISDELL, supra note 59, at 113-14.

187. P. HERRING, supra note 69, at 118; see also T. BLAISDELL, supra note 59, at 188-91.

188. The report was submitted to President Wilson in summary form in 1918 and presented to Congress in its entirety in 1919. P. HERRING, supra note 69, at 118.


190. Reaction to the report provided “a concrete illustration of the political and administrative problems involved in attempting to regulate a powerful industry.” P. HERRING, supra note 69, at 118. Herring explained: “The sweeping character of this investigation and the bold changes suggested caused a political backfire almost fatal to the Commission. Five federal officials aroused the enmity of five great meat packers and the battle was on.” Id. at 119. Senator Watson, a leading advocate of the packers, called for an investigation of the Commission employees who conducted the study. Watson said that the FTC’s Chicago headquarters were “centers of sedition and anarchy . . . a nesting place for socialists, a spawning ground for sovietism.” 58 Cong. Rec. 7169 (1919). The Commission investigated and exonerated the employees in question, but dismissed them nonetheless, a move widely seen as an effort to placate Watson. See T. BLAISDELL, supra note 59, at 78-79; P. HERRING, supra note 69, at 119.

191. 7 U.S.C. §§ 181-229 (1976). “The packers were desirous of getting from under the jurisdiction of the Federal Trade Commission. They seemed to feel that they would receive more sympathetic treatment from the officials in the Department of Agriculture.” P. HERRING, supra note 69, at 120. See also T. BLAISDELL, supra note 59, at 194; Davis, supra note 164, at 441; J. LANDIS, supra note 117, at 112-13.
mediate, demoralizing effect on the FTC.\textsuperscript{192} For the longer term, however, the meatpacking incident prompted Congress to keep the agency's economic work on a shorter appropriations leash.\textsuperscript{193} This reduced the number of economic investigations ordered by Congress,\textsuperscript{194} and left the FTC to initiate an increasing proportion of its own economic studies.\textsuperscript{195}

Decreasing congressional involvement in the initiative of the FTC's economic work had important political implications. Historically, the least politically vulnerable FTC investigations and studies had been those begun at the request of Congress.\textsuperscript{196} On the other hand, studies begun at the President's request or by the Commission itself more often provoked congressional efforts to limit the agency's authority.\textsuperscript{197}

A second arena in which Congress has significantly affected the Commission's choice of competition programs is litigation. An outstanding example is Congress' effort in the early 1950's to overturn the

\textsuperscript{192} Davis, supra note 164, at 441.

\textsuperscript{193} Formal congressional efforts to retrench the Commission's economic work began in the middle and late 1920's with proposals to cease or sharply limit funding for the agency's economic division. R. Cushman, supra note 120, at 220. Spearheading this movement was Rep. Wood, Chairman of the House Appropriations Subcommittee for Independent Offices, who said that the Commission's chief economist, Francis Walker, did little but "promulgate a lot of wild-eyed theories and idealism." P. Herring, supra note 69, at 128. In 1933, Congress barred the FTC from beginning new investigations pursuant to legislative resolutions unless the requests were in the form of concurrent resolutions. See Stevens, The Federal Trade Commission's Contribution to Industrial and Economic Analysis: The Work of the Economic Division, 8 Geo. Wash. L. Rev. 545, 549-53 (1940). The restrictions did not stem entirely from the legislature's disapproval of the FTC's work. In the 1920's, the Senate had ordered most of the FTC investigations begun by congressional request. The Senate, however, had no authority to originate appropriations bills, and the House was left in the disagreeable position of supplying funds for projects it had no hand in devising. This situation irritated members of the House Appropriations Committee.


\textsuperscript{195} Stevens, supra note 193, at 553. In 1970, MacIntyre estimated that before 1933 some 43 investigations had been initiated by a resolution of the Senate and 5 by the House. Only 3 were requested between 1933 and 1938, and none were sought from 1938 to 1970. MacIntyre \& Volhard, supra note 194, at 755.

\textsuperscript{196} The FTC's study of electric and gas utility holding companies, which followed a Senate Resolution, is a noteworthy example. See FTC, Summary Report on Holding and Operating Companies of Electric and Gas Utilities, S. Doc. No. 92, Pt. 73-A, 74th Cong., 2d Sess. 59-76 (1935) (presenting a history of the FTC Study and its conclusions and recommendations).

\textsuperscript{197} The meatpacking study was performed at President Wilson's request. Two other examples also illustrate this trend. In 1952, President Truman asked the FTC for a comprehensive study of consumer expenditures. Congress promptly barred the Commission from spending any funds on such a study. See Boyle, Economic Reports and the Federal Trade Commission: 50 Years' Experience, 24 Fed. B. J. 489, 501 (1964). Similarly, in 1963 the Commission's Bureau of Economics proposed a study of the nation's 1000 largest firms. Congress banned any expenditure of the agency's funds on that venture as well. Id.; M. Green, The Closed Enterprise System 59, 369-70 (1972).
result in Federal Trade Commission v. Cement Institute. During the antitrust revival of the late 1930's, the Commission made base-point pricing its principal antitrust litigation priority. The main product of this program was In re Cement Institute, in which the agency ordered the members of the cement producers' national trade association to abandon a multiple base-point pricing system. The Seventh Circuit Court of Appeals reversed the Commission, but the Supreme Court reinstated the agency's order.

The Court's ruling triggered instant demands from cement industry officials that Congress declare base-point pricing legal. Congress considered several bills designed to overturn Cement Institute and closely questioned the Commission about its future enforcement plans. The climax came in June, 1950 when Congress passed the

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200. 37 F.T.C. 87 (1943) (the Commission had filed the complaint in 1937).

201. Aetna Portland Cement Co. v. FTC, 157 F.2d 533 (7th Cir. 1946).

202. FTC v. Cement Institute, 333 U.S. 683 (1948). Justice Black's majority opinion emphasized the Commission's extensive earlier work with the problem of base-point pricing. "We are persuaded that the Commission's long and close examination of the questions it here decided has provided it with precisely the experience that fits it for performance of its statutory duty." Id. at 720. More than a purely mechanical deference to an abstract concept of administrative expertise, this comment reflected an appreciation for the FTC's knowledge in this field. The remark underscored the "textbook quality" of the agency's base-point pricing program. As Congress, in 1914, had expected it would, the Commission built the Cement Institute lawsuit upon careful economic and legal analysis. Although the practice in question had many apologists, this seemed the type of complex issue and enforcement approach for which Congress created the agency.

203. Wallace & Douglas, supra note 198, at 694-95; Latham, supra note 198, at 273-77. Joining ranks with the cement industry were the country's steelmakers, which also were losing an FTC basing-point suit. See Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175 (7th Cir. 1948), aff'd by an equally divided Court sub nom. Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949).

204. The bills are discussed in chapters 2-5 of E. Latham, supra note 198, at 54-208. For a sympathetic treatment of these measures by the General Counsel of the Senate Special Subcommittee on Pricing, see Simon, The Case Against the Federal Trade Commission, 19 U. Ch. L. Rev. 297 (1952). For a rebuttal of Simon's views, see Wallace & Douglas, supra note 198.

205. S. 236: Hearings Before the Subcomm. on Pricing of the Senate Comm. on Interstate and Foreign Commerce, 81st Cong., 1st Sess. (1949); Interim Report on the Study of the Federal Trade Commission Pricing Policies, S. Doc. No. 27, 81st Cong., 1st Sess. (1949). In his 1964 article, Baum described the purpose of the hearings as follows:

Here was no deliberate, careful study of Commission and court interpretation. Rather, the hearings held were used to achieve two hurried ends: (1) the exertion of pressure to force the Commission to back down, and not enforce the rulings of the Court, and (2) the enactment of legislation which would soften existing antitrust laws.

Baum, supra note 185, at 597.
O'Mahoney Freight Absorption Act which effectively overturned Cement Institute. With the FTC's urging, President Truman vetoed the bill, and later efforts to revive the measure failed.

Although the O'Mahoney proposal failed, its narrow defeat exposed the precariousness of FTC lawsuits involving substantial economic stakes but lacking either the active support, or, at a minimum, the tolerant acquiescence of Congress. Clair Wilcox, the economist and business historian, summarized the lessons of the Cement Institute controversy for future economically significant FTC antitrust initiatives:

An administrative agency . . . is peculiarly vulnerable to political attack. If inert, lenient, and ineffective, its placid existence may be undisturbed. But if vigorous in the performance of its duties, it will be headed for trouble. Its powers may be curtailed, its appropriation slashed, its administrators refused confirmation, its personnel subjected to persecution, its very existence jeopardized.

. . . .

If the Federal Trade Commission comes to grief, it will not be because it has been too lax, but because it has been too tough. If it values survival, an agency thus attacked is likely to draw in its horns.

C. Implications for FTC Competition Programs

Lassitude, as Wilcox suggested, may be the most reliable path to long-run institutional survival for administrative agencies with politically sensitive law enforcement responsibilities. In 1969, however, the pervasive perception of FTC "inertia, leniency, and ineffectiveness" posed the greatest threat to its well-being. The ABA Report pro-

206. See supra note 185, at 606 (footnotes omitted).
207. See supra note 198, at 430-32; Simon, supra note 204, at 323; Wallace & Douglas, supra note 198, at 693.
208. See supra note 198, at 430-32; Simon, supra note 204, at 323; Wallace & Douglas, supra note 198, at 693.
209. See supra note 198, at 430-32; Simon, supra note 204, at 323; Wallace & Douglas, supra note 198, at 693.
posed that the FTC satisfy three broad criteria in choosing competition initiatives: First, limit its resources to projects with genuine economic significance; second, concentrate on matters involving unsettled legal doctrine and requiring complicated economic analysis; third, resort more to compulsory enforcement proceedings.

A central feature of the ABA criteria was their tendency, if closely followed, to have the Commission draw increasingly from the risk-laden end of the spectrum of all possible antitrust programs and enforcement methods. Each guideline advanced a change from “trivial” to economically important programs, from per se offenses to complex, unsettled areas of law and economics, from voluntary to compulsory enforcement—that would replace a safer approach with a riskier one. To succeed in a comparatively higher risk role, the Commission needed to pursue the ABA’s suggested internal reforms. The agency’s own substantive skills, and political acumen would be important in determining whether the agency developed meritorious programs and executed them without provoking serious collateral political attack. However, the success of the ABA’s proposals also depended as much on the attitudes of Congress, the President, the judiciary, and the nation at large as it did on the FTC’s skill in pursuing them.

ing “its dwindling energies to the prosecution of the most trivial cases,” the FTC was “engaged in active and continuing collusion with business interests—particularly big-business interests.” Id. at 45, 121. The Nader Report added that “[m]isguided leadership is the malignant cancer that has already assumed control of the Commission, that has been silently destroying it, and that has spread its contagion on the growing crisis of the American consumer.” Id. at 130. The agency’s work, it concluded, amounted to a “betrayal of the public interest.” Id. at 59. In 1972, the Nader organization published an equally unflattering analysis of federal antitrust enforcement and the FTC’s competition programs. See M. Green, supra note 197.

210. ABA REPORT, supra note 10, at 37, 68.

211. The risk comes in mainly two forms. The first is that the Commission will win fewer cases as it brings more lawsuits affecting high economic stakes and dealing with complex, unsettled areas of law and economics. Effective litigation strategy suggests that respondents will contest economically significant suits vigorously and encourage judicial officers to shun applications of “novel” economic theory and avoid apparent departures from existing legal doctrine. The second risk consists of the possibility that enforcement programs affecting substantial economic interests will spur affected firms to seek intervention by Congress or the President on their behalf, particularly where the Commission’s action rests upon unsettled legal or economic theories.

212. As the modern political science literature indicates, political adroitness is as important to the success of an administrative agency’s programs as technical proficiency. F. Rourke, Bureaucratic Power in National Politics 2 (1972). “[E]ach agency must constantly create a climate of acceptance for its activities and negotiate alliances with powerful legislative and community groups to sustain its position. It must, in short, master the art of politics as well as the science of administration.” Id.

213. Richard Posner’s dissent to the ABA REPORT argued that the career interests of FTC Commissioners alone made it extremely unlikely that the agency would begin or sustain politically risky programs. It has been proposed as a reasonable hypothesis that regulators motivated by self-interest act so as (a) to retain their jobs and (b) to obtain greater appropriations for their agency
In recommending that the FTC retain its antitrust powers, the ABA seems to have perceived that institutions outside the agency were amenable to the risk-taking its guidelines implicitly required. The ABA Committee appeared to believe that the President and Congress would play the most important role in determining the form and content of the FTC's antitrust work. The preferences of the Executive Branch would emerge through its selection of Commissioners, particularly the Agency's Chairman.\(^\text{214}\) Whether Congress wanted the FTC to assume the ABA's suggested antitrust role would become apparent in several ways: The demands Congress placed upon nominees to the Commission; the types of competition programs the oversight and appropriations committees urged the FTC to pursue; the breadth and durability of congressional backing for specific initiatives to implement Congress' broad preferences; and appropriations.\(^\text{215}\) The actual re-

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\(^\text{214}\) This Article does not analyze the appointment of commissioners by the Executive Branch in the decade following the ABA Report. As a group, these appointments placed the agency's leadership in the hands of individuals who shared many of the ABA's views and were committed to revitalizing the agency. See J. GRAHAM & V. KRAMER, supra note 145, at 333-56, 369-70. President Nixon's appointment of Miles Kirkpatrick, the head of the ABA Committee, to chair the FTC in 1970 is an outstanding example of this trend.

\(^\text{215}\) The FTC's success would require legislative support for both antitrust generally and for the agency's specific antitrust programs. As political scientist David Mayhew observes, the purposes which inspire congressmen to create regulatory bodies may differ from those which motivate legislators' reactions to specific enforcement programs.

Position-taking politics may produce statutes that are long on goals but short on means to achieve them. . . . Probably the best examples of congressional symbolism are those arising out of efforts to regulate business. Regulatory statutes are the by-products of congressional position taking at times of public dissatisfaction. . . . What happens in enforcement is largely a result of congressional credit-claiming activities on behalf of the regulated; there is every reason to believe that the regulatory agencies do what Congress
response of Congress and the Commission to the 1969 ABA Report is the subject of the next section.


From the date of its release, the ABA Report became a congressionally accepted standard for measuring the Commission's antitrust performance. Oversight and appropriations committees believed that the study had diagnosed the agency's ills correctly and had presented a sensible blueprint for reform. Congress endorsed the Report's conclusion that the FTC had used its antitrust powers timidly and unimaginatively, and insisted that future programs deal forth-

wants them to do. The ambitious "public interest" aims of the statutes are seldom accomplished.


217. The one major ABA proposal that Congress did not approve was the suggestion that the FTC limit its Robinson-Patman Act enforcement work. See infra text accompanying notes 235-37.
rightly with difficult, economically important antitrust problems. Congress also perceived a longstanding indifference by the FTC to the weaknesses emphasized in the ABA Report. Congressional leaders underscored their demands for improvement by reiterating the ABA’s view that reform should be a basic condition for the agency’s future existence. Though perhaps overstated, such admonitions left little doubt that Congress would no longer tolerate what it perceived to be plodding, insignificant antitrust enforcement.

This section analyzes in two parts the development of the FTC’s competition programs since the ABA Report. The first covers the period from 1969 through the second session of the 94th Congress in 1976. The second section covers the period from 1977 through 1980. Each section discusses the general antitrust role Congress wanted the agency to perform, as well as the specific ways in which it preferred the FTC to use its competition resources, and reviews the Commission’s response to this guidance.

A. 1969-1976

1. Congressional Guidance

The oversight and appropriations committees frequently articulated the general tone and character of antitrust enforcement they expected from the FTC’s leadership. They called for a fundamental

218. Senator Edward Kennedy, then Chairman of the Senate Judiciary Subcommittee on Administrative Practice and Procedures, made this clear during an FTC oversight hearing on the day the ABA Report appeared.

The subcommittee hopes . . . to see to it that the proposals we have received do not merely become grist for the mill of future students of the FTC. . . . Surely, 45 years after Henderson’s landmark work on the FTC, first exposing many of the same problems we see today, the time has come either to do something about them, or . . . to consider abolishing the agency and starting it from the ground again.

1969 Administrative Practice & Procedure Hearings, supra note 216, at 110.

Two major recent studies of the FTC’s relations with Congress in the 1960’s and 1970’s have demonstrated the existence of a strong congressional sentiment favoring vigorous government antitrust and consumer protection initiatives dating back at least to the mid-1960’s. See Pertschuk, supra note 9; Weingast & Moran, supra note 9. The chief functions of the ABA Report and 1969 Nader Report appear to have been those of (1) sharply increasing public and congressional attention to the agency and its performance, and (2) catalyzing powerful, pre-existing congressional reform impulses by supplying a concrete program for renewing the institution.

219. As mentioned above, several scholars have concluded that, since the founding of the FTC, the Senate has cursorily reviewed most appointments to the Commission. See J. GRAHAM & V. KRAME, supra note 145, at 400; R. KATZMANN, supra note 63, at 140-42; see also supra note 183. This view accurately describes the level of Senate participation in the appointments process for much of the FTC’s history, but not for the early and middle 1970’s. The Senate Commerce Committee and its staff actively screened potential commissioner nominees before their appointments and used confirmation hearings to elicit pledges that the nominees would aggressively execute the agency’s responsibilities. See J. GRAHAM & V. KRAME, supra note 145, at 333-51, 370-
redirection of the agency's competition programs. Indeed, the hearings of this period abound with instructions that the Commission's antitrust programs place a premium on boldness, experimentation, and a willingness to tackle major sources of consumer injury.

The process of redirection began in earnest in November 1969 during hearings to confirm Caspar Weinberger as the agency's new Chairman. Senator Warren Magnuson, Chairman of the Senate Commerce Committee, told the nominee to exert strong, independent leadership in renewing the agency:

This Commission is very important to this committee. I am sure that you realize the task that confronts the new Chairman in light of so many recent criticisms of the operation of the Federal Trade Commission . . . .

. . . I am hopeful that you will help maintain the right kind of morale by recruiting strongly and expanding the existing Trade Commission programs in order to perform the job well. . . .

The Trade Commission is an arm of Congress, and we have entrusted to that agency numerous tasks that require a great deal of attention and a great deal of fortitude not to respond to any pressures that come from any place.220

Miles Kirkpatrick, Weinberger's successor, received similar encouragement upon his first appearance before the Senate Appropriations Committee in 1971. Subcommittee Chairman Gale McGee told Kirkpatrick that his Committee wanted the Commission to act aggressively and take risks in applying its competition powers:

For a long time many of us have felt . . . that the FTC over a long period of time . . . seemed to be either sitting on its position rather than moving with the changing times or in many

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71; Weingast & Moran, supra note 9, at 6; see also infra text accompanying notes 220-25. The driving forces on the Commerce Committee were Senator Warren Magnuson, the Committee Chairman, and Senators Frank Moss and Philip Hart, who were Chairman and Vice-Chairman, respectively, of the Subcomm. for Consumers. All shared an abiding interest in the FTC's revitalization and used the Committee's power to promote that goal. See Perschuk, supra note 9; Weingast & Moran, supra note 9, at 18-19. The Commerce Committee Staff (whose chief counsel was Michael Perschuk) and other staffs at the disposal of these senators were instrumental in seeing that nominees were suitable to the Committee leadership. See J. GRAHAM & V. KRAMER, supra note 145, at 350-51. The joint efforts of the senators and their staffs ensured the selection of appointees—particularly nominees for the chairmanship—who shared the committee's enforcement goals and the abandonment of potential nominees who did not. See R. KATZMANN, supra note 63, at 143-45.

220. Weinberger Confirmation Hearings, supra note 216, at 5. The appropriations committees of the House and Senate conveyed the same message to Weinberger in his first appearances before them. See, e.g., House 1971 Appropriations Hearings, supra note 216, at 1289-90.
instances actually retreating from what its original intent had been. . . .

I think you would find a much friendlier Congress up here than some of your [budget] requests might suggest . . . that a great part of the Commission's duty is to strike blows in behalf of the consumer . . . .

I think this is one of the Federal commissions that has a much larger responsibility and capability than sometimes it has been willing to live up to for reasons of congressional sniping at it in some respects or pressures put on it through the industry and the like.

Too often it has been either shy or bashful . . . . That is why we were having a rather closer look at your requests just in the hopes of encouraging you, if anything, to make mistakes, but I think the mistakes you are to make ought to be mistakes in doing and trying rather than playing safe in not doing.

I believe that is the most serious mistake of all . . . you are not faulted for making mistakes. You may be for making it twice in a row, for not learning properly but, we would rather you make a mistake innovating, trying something new, rather than playing so cautiously that you never make a mistake . . . .

Similarly, when Lewis Engman appeared before the Senate Commerce Committee as Chairman-designate in 1973, the Committee's members exhorted him to follow the path traveled by Weinberger and Kirkpatrick during the preceding three years. 222 During the same hear-

221. Agriculture—Environmental and Consumer Protection Appropriations for Fiscal Year 1972: Hearings Before a Subcomm. of the Senate Comm. on Appropriations, 92d Cong., 1st Sess. 2673 (1971) [hereinafter cited as Senate 1972 Appropriations Hearings]. Senator McGee concluded the hearings by stating, "[w]e have considerable dependence on your initiative . . . to stay on top of the great bulk of these bothersome areas that are easily forfeited through neglect and we would like to encourage you to jump at rather than from." Id. at 2699. The following year, Senator McGee noted with approval that Chairman Kirkpatrick had "responded to the criticism . . . by both Mr. Nader and the American Bar Association by moving aggressively against some of the major industries in the United States." Senate 1973 Appropriations Hearings, supra note 216, at 1483. As he had the year before, the Subcommittee Chairman urged Kirkpatrick to apply the agency's antitrust powers vigorously. Id. at 1490, 1507.

ings, Senator Cotton complained that the FTC "has had a need for some kind of injection to pep it up so it would fulfill its mission." Senator Ted Stevens told Engman that he expected bold action from the new Chairman: "I am really hopeful . . . that you will become a real zealot in terms of consumer affairs and some of these big business people will complain to us that you are going too far. That would be the day, as far as I am concerned." On these and other occasions, the oversight committees left the Commission’s leaders with little doubt about the basic direction the Commission should pursue.

The confirmation and oversight process revealed the qualities Congress wanted to see in the Commission’s antitrust work. Beyond fixing the broad objectives and tone they wanted to achieve, the committees actively suggested specific uses for the Commission’s competition resources. As a first step, Congress urged the FTC to establish an effective system for planning its affairs and choosing priorities. Various committees emphasized the need for a planning mechanism that filtered out "trivial" matters and focused the FTC’s resources on major antitrust problems. In the committees’ view, the Commission also should translate the fruits of its improved planning efforts into guidelines by which staff attorneys and economists would organize their

223. Engman Confirmation Hearings, supra note 222, at 25.
224. Id. at 31.


The committees were disturbed by the ABA’s conclusion that the agency relied almost entirely on such passive devices as the “mailbag” to select enforcement targets. See, e.g., House 1972 Appropriations Hearings, supra note 216, at 94 (remarks of Rep. Whitten); Weinberger Confirmation Hearings, supra note 216, at 24 (remarks of Sen. Moss).

227. See, e.g., House 1970 Appropriations Hearings, supra note 216, at 390 (Rep. Evans expressed to Chairman Dixon his concern over the FTC’s exhausting resources on trivial matters).

work. 228

In addition to promoting the creation of a strong institutional planning base, Congress singled out many specific, generic competition problems and industry sectors for the FTC to scrutinize. They requested that the agency use a substantial portion of its antitrust resources to examine the consequences of industrial concentration and the influence of market structure upon economic performance—problems which Congress regarded as among the country’s most urgent competition priorities.229

Congress was especially concerned about business mergers, particularly conglomerate acquisitions contributing to industrial concentration.230 Congressional interest in this phenomenon took two forms. First, it encouraged the Commission to refine its techniques for measuring the performance of diversified firms and their constituent parts.231 For example, in 1973, Congress removed several obstacles to the implementation of a line-of-business reporting program through measures approved as part of the Trans-Alaska Pipeline Authorization Act.232 Second, Congress enacted new legislation to increase the FTC’s


229. See, e.g., S. 2387 and Related Bills: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Pt. 1, at 47-48 (1975) (Sen. Packwood stated: "When we in Congress see this inevitable result of the concentration of power, . . . the stifling of competition . . . , the answer is not to throw out the competitive system . . . [but] to restore the competitive system. The answer is to require the breaking up and divestiture of the giant business conglomerates into smaller parts so that the competitive system may flourish and grow again."); Senate 1972 Appropriations Hearings, supra note 221, at 2678-79 (Sen. McGee’s questions to Chairman Kirkpatrick); Letter from Sen. William Proxmire to Chairman Weinberger (June 1, 1970), reprinted in Kirkpatrick Confirmation Hearings, supra note 216, at 136-38; Role of Giant Corporations: Hearings on the Automobile Industry—1969 Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business, 91st Cong. 1st Sess., Pt. 1, 1-3 (1969) (remarks of Chairman Nelson) [hereinafter cited as Sen. 1969 Automobile Hearings].


The Executive Branch also expressed concern over existing merger trends. Address by Attorney General John Mitchell, Georgia Bar Association (June 6, 1969), reprinted in Economic Concentration Reports: Pt. 8, supra note 61, at 5122-23 ("I believe that the future vitality of our free economy may be in danger because of the increasing threat of economic concentration by corporate mergers. . . . The danger that . . . super-concentration poses to our economic, political and social structure cannot be overestimated.").

231. In November 1969, Sen. Moss asked Chairman-designate Weinberger whether Weinberger favored divisional or line-of-business reporting for the top 400 companies. In reply Weinberger stated, "I know the Federal Trade Commission has very broad reporting authority to require and discover the financial facts concerning corporations, and I think that this should be used in the pursuance of authorized studies with respect to determining conglomerate policy. . . ." Weinberger Confirmation Hearings, supra note 216, at 26; see also House 1973 Appropriations Hearings, supra note 216, at 522.

ability to identify and halt anticompetitive mergers. The 1973 Pipeline Authorization Act gave the FTC power in certain circumstances, to seek temporary restraining orders and preliminary injunctions in federal court to stop existing or impending antitrust violations, notably, illegal mergers. In 1976 Congress amended the Clayton Act to require firms to notify the FTC and the Justice Department before making certain acquisitions.

A second generic competition problem in which Congress took an active interest was Robinson-Patman Act enforcement. Several committees called on the Commission to explain a perceived agency neglect of the statute. The discussions of Robinson-Patman enforcement demonstrated that, while Congress agreed with the ABA’s proposal that the FTC expand its antitrust efforts in other areas, it wanted the agency to maintain other programs traditionally supported by Congress.

As it described the generic competition problems the Commission

amendments authorized the Commission to issue certain questionnaires without first obtaining clearance from the Office of Management and Budget (OMB), as previously required. Id. §§ 3501-3511 (1970). In 1972 and 1973 the Commission had sought OMB approval for its line-of-business questionnaires but was turned down each time. The 1973 legislation transferred this authority to the General Accounting Office, a body more favorably disposed to the FTC proposal. Id. § 3512; see Senate Commerce Committee 1974 Oversight Hearings, supra note 216, at 133; House 1973 Appropriations Hearings, supra note 216, at 522.


234. 15 U.S.C. § 18a(b) (1976). The statute also established a mandatory waiting period for firms attempting certain acquisitions and tender offers.

235. Robinson-Patman Price Discrimination Act §§ 2-4, 15 U.S.C. §§ 13-13b, 21a (1976). During Weinberger’s confirmation hearings in 1969, for example, the Senate Commerce Committee questioned the nominee about his enforcement plans. Weinberger Confirmation Hearings, supra note 216, at 28. Shortly before the hearings, Representative John Dingell, Chairman of the House Subcommittee on Small Business and the Robinson-Patman Act, had written to the Senate Commerce Committee asking that it discourage the Commission from following the ABA Report’s suggested reconsideration of the agency’s existing Robinson-Patman policies. Id. at 27.

236. House Special Investigations Subcomm. 1974 Hearings, supra note 225, at 208. In 1974, Representative Staggers, Chairman of the House Interstate and Foreign Commerce Committee, provided this assessment of the FTC’s Robinson-Patman enforcement trend:

In 1960, the Commission issued 130 Robinson-Patman complaints and 45 orders. In 1963, it issued 219 complaints and 250 orders. In 1965, it issued 13 complaints and 21 orders. In 1969, it issued 8 complaints and 9 orders. . . . In 1973, it issued 3 complaints and 4 orders. To me this dramatic decrease in the number of Robinson-Patman Act cases between 1960 and 1973 raises questions about whether the Commission is enforcing the law. The subcommittee must be concerned about whether the decrease in Robinson-Patman Act enforcement by the FTC constitutes an administratively abolition of the law. Id. at 68.

should address, Congress also earmarked specific industries and economic sectors it believed were fruitful subjects for antitrust inquiry. In the early 1970’s, Congress generally regarded the food industry as the top priority for FTC competition analysis. Several committees asked the agency to examine the effect of the food industry’s structure on prices, with special emphasis upon concentration in manufacturing and retailing.

With the sudden tightening of fuel supplies in the early 1970’s, however, energy soon displaced the food industry as Congress’ preferred FTC antitrust priority. By 1972, the Commission had received a growing number of congressional requests to begin or expand studies of various aspects of the energy industry, including gasoline marketing, natural gas supplies, the substitutability of oil, coal, natural gas, and uranium as electric utility fuels, mergers in the petroleum industry, and the effect of petroleum industry structure upon petroleum product prices. In 1973, gasoline and fuel oil shortages became especially acute, and virtually every major congressional committee with responsibility for competition or energy policy directed the Commission to make energy its chief antitrust priority.

238. See, e.g., Senate Commerce Committee 1974 Oversight Hearings, supra note 216, at 2, 109 (remarks of Sen. Moss); Food Price Investigation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 75-76 (1973). Committee Chairman Rodino stated:

I think the Federal Trade Commission has tremendous areas of responsibility at a time when prices are rising at such a rate, and the consumer is concerned whether or not the government is living up to its responsibility. . . . [A]ntitrust enforcement in the food industry has lacked vigilance . . . . Consumers are not being well served by the food industry.

Id.; see also id. at 1-2, 35-48 (remarks of Reps. Rodino and McClory). H.R. REP. No. 1175, 92d Cong., 2d Sess. 96 (1972) (suggesting that the FTC “give increased attention to the problem(s) of increased food costs”).


240. Senate Commerce Committee 1974 Oversight Hearings, supra note 216, at 111; Senate 1972 Appropriations Hearings, supra note 221, at 2685-86.

241. See, e.g., Senate 1972 Appropriations Hearings, supra note 221, at 2685-86; House 1975 Appropriations Hearings, supra note 227, at 745.


243. See, e.g., Competition in the Energy Industry: Gasoline and Fuel Oil: Hearings Before the
In their discussions about fuel shortages, several committees displayed an urgent interest in having the FTC move promptly to address perceived competitive dangers in the energy industry. During hearings on the FTC’s budget in April of 1973, Representative Mark Andrews conveyed this message to Chairman Engman in comments that reflected the tone and substance of congressional guidance to the agency in this period:

In the last 6 months in this country we have come smack up against an energy crisis. We have specific knowledge that small independent refineries in mid-America are unable to get crude oil because the majors are cutting them off . . . .

Here right under your nose is something where obviously you haven’t been doing your job or you would have it resolved . . . . I might ask the question where were you then and what are you doing now to force the majors, out of a sense of Christian justice if not economic survival for mid-America, to allow these small independent refineries to get a supply of crude so they can serve their customers . . . .

As far as I can see, the Federal Trade Commission has been sitting fat, dumb, and happy doing nothing about it.244 Within months, various other committees of Congress called for the Commission to investigate the shortages and move promptly to protect independent refiners and marketers from a loss of petroleum supplies.245 Committee members closely questioned Commission officials about features of major oil company structure and behavior that might warrant formal FTC intervention.246 Still other committees, without specifically requesting FTC action, expressed serious concern with the

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244. House 1974 Appropriations Hearings, supra note 222, at 101. See also id. at 103.


246. See, e.g., FTC PETROLEUM INDUSTRY INVESTIGATION, supra note 242, at v, vii (letter of May 31, 1973 from Sen. Jackson to Chairman Engman: “I am hereby requesting the Federal Trade Commission to prepare a report within thirty days regarding the relationship between the
viability of the petroleum industry's independent sector.247

In July 1973, the Commission issued a complaint charging the country's eight largest petroleum companies with maintaining a non-competitive market structure in the Atlantic and Gulf Coast states.248 The filing of this complaint, however, did not diminish congressional interest in having the Commission continue to monitor and address industry developments.249 Through legislation, Congress substantially expanded the Commission's competition advocacy responsibilities in the energy area. These included requirements that the FTC analyze the effects of the mandatory petroleum allocation program pursuant to the Emergency Petroleum Allocation Act of 1973;250 comment on the activities of American petroleum companies participating in programs under the aegis of the International Energy Agency;251 and review deepwater port applications filed with the Department of Transportation under the Deepwater Ports Act of 1974.252

Although food and energy were Congress' most important competition priorities in the early 1970's, they were not the only industries arousing antitrust interest. Various committees earmarked several

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248. In re Exxon Corp., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,388 at 20,269 (Dkt. No. 8934, July 17, 1973). One respondent to the Exxon suit later sought unsuccessfully to have the complaint dismissed on the ground that the Commission had no "reason to believe" that the FTC Act had been violated, and had issued the complaint mainly in response to congressional pressure. See FTC v. Standard Oil Co. of California, 449 U.S. 232 (1980).


250. § 7, 15 U.S.C. § 756 (1976); see House 1975 Appropriations Hearings, supra note 249, at 647, 697. A major congressional purpose in ordering the FTC study was to measure the allocation system's effects on independent refiners and marketers. Id. at 697 (remarks of Rep. Whitten).


other areas as particularly deserving of FTC competition analysis; most
frequently mentioned were steel, automobiles, and medical care.

As the materials above suggest, Congress in the early and mid-
1970's often indicated that, while reports and studies were a useful part
of the FTC's work, the Commission should rely more heavily on com-
pulsory enforcement procedures such as litigation. Congress was
also concerned that it had paid insufficient attention to ensuring com-
pliance with existing orders. Consequently, the committees en-
couraged the Commission to bolster its compliance efforts and in
1973, Congress doubled the maximum civil penalty for each violation
of a Commission order to $10,000. Moreover, to increase flexibility

Economic Comm. of Congress, 93d Cong., 2d Sess. 58 (1974) [hereinafter cited as Joint Economic
Comm. 1974 Hearings]; Senate 1972 Appropriations Hearings, supra note 221, at 2686.

254. See, e.g., Automotive Repair Industry: Hearings Before the Subcomm. on Antitrust and
Monopoly of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess., Pt. 4, at 1693-1722 (1970); Senate
1972 Appropriations Hearings, supra note 221, at 2688; House 1973 Appropriations Hear-
ings, supra note 216, at 499; Consumer Energy Act of 1974: Hearings Before the Senate Comm. on
Commerce, 93d Cong. 1st Sess., Pt. 1, at 108 (1973) (Sen. Long to J. Halverson, Director of the
FTC's Bureau of Competition: "I would think you would have done yourself a study on com-
petition for the FTC on the automobile industry because that is a good example of concentration. I
think I have an idea how they price those automobiles, do you?").

255. See, e.g., H.R. Rep. No. 1175, 92d Cong., 2d Sess. 96 (1972) (recommendation by House Appropriations Comm. that FTC give greater attention to the problem of "increased medical
Whitten).

256. This Congressional attitude was evident in the following dialogue between FTC Chair-
man Dixon and Rep. Evans, Chairman of the House Appropriations Subcommittee on Independent
Offices and Department of Housing and Urban Development:

Mr. Dixon. That is right.

Mr. Evans. I recognize you have to have a balance between the two. You cannot
prosecute every case that comes before the Commission. I think if you had a little more
emphasis on legal enforcement it would be better. You have been building up consent
agreements, stipulation letters, and settlements on a voluntary basis. This gets the job
done for the one industry but it does not set an example to others.

I think you should put more emphasis on your legal enforcement and crackdown in
some of your major cases.

House 1970 Appropriations Hearings, supra note 216, at 363-64; see also House 1971 Appropriations
Hearings, supra note 216, at 1381-82 (remarks of Rep. Evans); Senate 1972 Appropriations
Hearings, supra note 221, at 2684 (remarks of Sen. McGee).

257. See Weinberger Confirmation Hearings, supra note 216, at 16 (remarks of Sen. Moss).

258. See House 1974 Appropriations Hearings, supra note 222, at 171; House 1973 Appropriations
Hearings, supra note 216, at 425.

§ 45(m)(1)(A) (1976). The Magnuson-Moss bill also expanded the Commission's jurisdiction
under section 5 to matters "in or affecting commerce". Id. § 201, 15 U.S.C. §§ 45, 52(b) (1976);
include "persons and partnerships" as entities subject to the agency's investigation powers under
in prosecution, Congress gave the FTC power to bring civil penalty actions in federal court where the Justice Department declined to do so.\(^\text{260}\)

Congress' exhortations about the appropriate style and content of FTC antitrust programs had little chance alone of stimulating a major FTC revitalization. An especially telling test of congressional commitment was appropriations.\(^\text{261}\) When asked in 1969 by Senator Mathias what FTC renewal would require, Chairman Dixon responded, "[S]ee to it that the agency has the money and the manpower."\(^\text{262}\) In the 1970's, Congress took this advice; the agency's total budget rose from $20.9 million in fiscal year 1970 to over $70 million in fiscal year 1980.\(^\text{263}\)

The question then arose of how to measure the FTC's effectiveness in using the increased funds. Two different and, in some respects, conflicting, standards emerged from the oversight hearings. On one hand,
the committees largely agreed with the ABA view that the Commission should not inflate its enforcement statistics through trivial endeavors. One implication of this guidance was that the Commission should pay special attention to raising the overall significance and quality of its caseload, even though the absolute number of matters on its docket might fall below or not exceed pre-1970 levels.\textsuperscript{264} On the other hand, Congress sometimes attached great importance to FTC case and investigation statistics. Acknowledging that numbers alone were sometimes a suspect criterion,\textsuperscript{265} the committees intimated that greater appropriations ought to yield a higher number of cases and investigations.\textsuperscript{266}

Chairman Kirkpatrick and his successors sought, with some difficulty, to convince the committees that the statistics did not reflect reduced FTC antitrust enforcement, but stemmed instead from basic changes in the types of cases the FTC was pursuing.\textsuperscript{267} The Commission explained that its more stringent preliminary screening procedures also tended to reduce the number of matters certified as formal investigations.\textsuperscript{268} Nonetheless, FTC officials and Congress were unable to resolve what relative values qualitative and quantitative criteria should receive in evaluating the FTC's caseload. The uneasy consensus among the oversight bodies seemed to be that the numbers were neither controlling nor insignificant.

\textsuperscript{264} The Commission's actual experience from 1965 to 1979 shows that the total number of antitrust complaints ranged from 25 in 1965 to 37 in 1976 and again in 1979. The chief departures from this pattern occurred in 1966 when the agency issued 95 complaints (including 73 Robinson-Patman cases), and in 1978 when it filed a low of 12.

\textsuperscript{265} See R. Katzmann, supra note 215, at 146; see, e.g., House 1973 Appropriations Hearings, supra note 216, at 407 (Rep. Whitten to Chairman Kirkpatrick: "I know that the number of cases is not always a true test.")

\textsuperscript{266} See House 1973 Appropriations Hearings, supra note 216 at 407, 427-28; House 1974 Appropriations Hearings, supra note 222, at 120.

\textsuperscript{267} Chairman Kirkpatrick explained the reduction in these terms:

FTC activities in the past 2 years have put greater emphasis on industry structure, and on seriously anticompetitive behavior. Merger investigations and cases have required increasing staff commitments. Some other examples of relatively more complex antitrust work now in progress: (1) territorial restrictions in distribution of various products; (2) leverage exerted by "power buyers" on the conduct of dominant marketers; and (3) an important monopoly case in the cereal industry.

FTC expects that its efforts to get effective relief in these more complicated antitrust areas will mean that fewer cases will be settled. For this reason, and also because of an increase in complaint recommendations, FTC's litigation burden is on the increase. It is expected to expand significantly in fiscal 1973.

House 1973 Appropriations Hearings, supra note 216, at 429.

\textsuperscript{268} House 1974 Appropriations Hearings, supra note 222, at 124-25 (remarks of Rep. Whitten and FTC Executive Director Mezines).
2. Commission Response

During the late 1960's and early 1970's, the ferment within Congress and among commentators about the FTC's antitrust role triggered an extensive process of reform within the FTC.269 Agency officials took seriously the congressional committees' view that the agency should upgrade its antitrust programs substantially.270 The Commission understood that the expected product of this overhaul would be innovative, vigorous antitrust enforcement that came to grips with vital competition issues.

FTC efforts to reorient competition programs had several dimensions. In line with congressional preferences, the first priority was to build an effective system for choosing enforcement targets and communicating the agency's objectives to staff.271 The foundation for this effort was the creation of planning and evaluation offices.272 The Commission also attempted to integrate its Bureau of Economics more

269. In September, 1969 Commissioner Philip Elman told the Senate Judiciary Subcommittee on Administrative Practice and Procedures that the Nader report and the mere pendency of the ABA investigation had stimulated a wide-ranging reexamination of the commission's work by its staff:

I might also say that a great many of the changes that have taken place at the Commission have taken place in the last 2 or 3 months. And I think they have come under the spur of this new awareness of how much the Commission could be doing and how it has failed to fulfill its full potential. I think the healthiest thing that ever happened to the Federal Trade Commission has been the avalanche of adverse criticism of the past year. And it has been reflected internally. See 1969 Admin. Practice & Procedure Hearings, supra note 216, at 47; Senate Commerce Committee 1974 Oversight Hearings, supra note 216, at 134-37 (remarks of former Commissioner James Nicholson).

270. Alan Ward, who directed the Commission's Bureau of Competition in the early 1970's, made this point to the House Special Investigations Subcommittee in 1974:

Federal Trade Commission law enforcement policies did change in the late sixties. . . . The agency's former enforcement policies, after all, had been severely criticized by almost everyone who knew anything about them—by the bar, respected academicians, congressional committees and consumer groups, and this criticism lead to formation of a Presidential Commission to study whether or not the agency should be abolished. . . .

Before I came to the Commission, the enforcement stance of the Commission was beginning to change. It had already begun to respond to the report of the ABA Commission which urged a concentration "on difficult and complex problems," with which the F.T.C. was uniquely equipped to deal. House Special Investigation Subcomm. 1974 Hearings, supra note 225, at 219-20.


272. In 1970, the Commission created an Office of Policy Planning and Evaluation which, through the mid-1970's, assumed increasing responsibility for reviewing competition programs and coordinating FTC planning initiatives. See, e.g., Senate 1972 Appropriations Hearings, supra note 221, at 2602; House 1972 Appropriations Hearings, supra note 216, at 94; House 1973 Appropriations Hearings, supra note 216, at 611, 1062-66. In 1972 the Bureau of Competition created an Evaluation Office to screen proposals for new investigations and to monitor the progress of ongoing projects. Id. at 1070. See also ABA ANTITRUST SECTION, MONOGRAPH 5, THE FTC AS AN ANTITRUST ENFORCEMENT AGENCY: ITS STRUCTURE, POWERS AND PROCEDURES, VOL. II, at 5-8 (1981).
closely into the antitrust program selection process.\footnote{273} As a further aid to choosing future enforcement ventures, the Bureau of Economics and the new planning and evaluation offices began devoting more resources to assess the effects of proposed and completed Commission cases.\footnote{274}

An important manifestation of the agency's new emphasis on central planning was greater use of the budget process to set priorities. In 1975, the FTC adopted its first program-based budget, which allocated resources according to the types of violations or industry sectors to be examined.\footnote{275} At the same time, Commissioners began formally reviewing resource commitments and expenditures twice annually in meetings with bureau directors and staff.\footnote{276} The budget review sessions were part of a broader agency effort to translate the product of its planning systems into guidelines for agency staff.\footnote{277}

As it developed new planning tools, the Commission sought to improve the information sources it needed to decide which economic sectors and types of industry behavior most deserved antitrust analysis. During his chairmanship, Caspar Weinberger said the Commission wanted to enhance its "ability to monitor more precisely price and profit trends within the array of industries in which it has regulatory responsibility and to collect more detailed data on corporations."\footnote{278} In

\footnote{273} The economists' principal planning role was to identify economic sectors worthy of careful antitrust scrutiny. \textit{See}, e.g., \textit{Senate 1973 Appropriations Hearings}, supra note 216, at 1433; \textit{House 1974 Appropriations Hearing}, supra note 222, at 989.
\footnote{275} \textit{See}, e.g., \textit{House 1976 FTC Oversight Hearings}, supra note 216, at 5, 7; \textit{see also R. KATZMANN, supra note 63, at 122-25.}
\footnote{276} The Office of Policy Planning and Evaluation was instrumental in developing the program budget and the periodic review procedure. \textit{See}, e.g., \textit{Senate Commerce Comm. 1974 Oversight Hearings}, supra note 216, at 297; \textit{House 1974 Appropriations Hearings}, supra note 222, at 115.
\footnote{277} An early step in the direction stemmed from Caspar Weinberger's desire to "probe the frontiers" of the agency's statutes to devise new strategies for addressing competition and consumer protection problems. He notified the agency's staff that "[t]he Commission is receptive to novel and imaginative provisions in orders seeking to remedy alleged unlawful practices." Letter from Caspar Weinberger to Senator Edward Kennedy, (July 22, 1970) reprinted in \textit{Kirkpatrick Confirmation Hearings}, supra note 216, at 133-36.

Chairman Kirkpatrick and Engman built upon this technique by developing guidelines and using policy protocols to signal changes in priorities or suggest new enforcement strategies. \textit{See}, e.g., \textit{Senate 1972 Appropriations Hearings}, supra note 221, at 7.
\footnote{278} Letter from Caspar Weinberger to Sen. William Proxmire (July 9, 1970), reprinted in \textit{Kirkpatrick Confirmation Hearings}, supra note 216, at 138. In the letter, Weinberger specified the FTC's needs for the Joint Economic Committee of Congress:

Access to adequate industry data has become increasingly difficult in recent years as conglomerate firms have moved into a large number of industries. I have previously recommended to Congressional committees that high priority should be given to modification of corporation reporting practices to provide better ability to assess current competitive trends on an industry by industry basis. This will enable the Commission to
1971, FTC Chairman Miles Kirkpatrick reported to the Senate Appropriations Committee that the Commission had transformed Weinberger's suggestions into a concrete project to collect line-of-business data. Majorities in both chambers supported the line-of-business initiative and approved the appropriations needed to carry out the project.

Applying its new planning and priority-setting methods, the Commission earmarked several economic sectors and industries for careful antitrust inquiry. A major criterion for selecting industries for study was the importance of their goods and services to day to day consumer purchases. The FTC established the food, energy, and health care industries as its highest competition priorities. The decision to build comprehensive programs for these industries also reflected the Commission's view that industry-wide analysis afforded the best means for dealing with the underlying causes of poor industry performance.

evaluate the industry effects of past enforcement activities more effectively and to plan its future programs more specifically.

Id.; see also House 1975 Appropriations Hearings, supra note 249, at 670 (remarks of Chairman Engman).

279. Senate 1972 Appropriations Hearings, supra note 221, at 2643.


Not until 1978, however, after prolonged litigation with firms subject to the program's reporting requirements, did the FTC begin to collect the bulk of data it had sought to obtain. See In re F.T.C. Line-of-Business Report Litigation, 1978-2 Trade Cas. ¶ 62,152 (D.C. Cir.), cert. denied sub. nom., American Air Filter Co. v. FTC, 439 U.S. 958 (1978).

281. See, e.g., House 1972 Appropriations Hearings, supra note 216, at 14 (remarks of Chairman Kirkpatrick).


283. See, e.g., Senate Commerce Committee 1974 Oversight Hearings, supra note 216, at 293; House 1972 Appropriations Hearings, supra note 216, at 194-95.


285. Although it received somewhat less emphasis, the transportation industry constituted a fourth prominent area of concern. See, e.g., House 1973 Appropriations Hearings, supra note 216, at 499; House 1972 Appropriations Hearings, supra note 216, at 193.

286. In 1974, James Nicholson, who served as an FTC Commissioner from 1968 to 1969, evaluated the FTC's industry-wide approach as follows:

Through in-depth investigations of certain industries by its staff and its issuance of complaints against prominent firms in the office copier, soft drink and lumber industries, the Commission has announced its willingness to conduct its statutory responsibilities on an aggressive and often industry-wide approach. Thus, the Bureau of Competition appears to have broadened its enforcement perspective to get at the underlying causes of restraints upon competition in industry-wide situations . . . . Such an approach is a more meaningful and efficient way to attempt to remedy the competitive problems in our society.

Senate Commerce Committee 1974 Oversight Hearings, supra note 216, at 137 (footnotes omitted).
To address competition problems in these and other economic sectors, the Commission used several enforcement strategies. The most visible approach was litigation. In the first half of the 1970’s, the agency initiated a number of significant suits, some of which involved new applications of section 5. The most prominent were the FTC’s monopolization and attempted monopolization suits, including suits dealing with ready-to-eat breakfast cereals, petroleum, office copiers, bread, coffee, car rentals, processed lemon juice, and airline schedule guides. These monopolization suits presented special opportunities and difficulties to the FTC in the 1970’s. Even as congressional sentiment supported Commission efforts to deal with market structure and firm behavior in several concentrated industries, the agency feared proceeding at a pace that outstripped its resources and its progress in instituting planning, personnel, and

287. The Commission’s litigation efforts corresponded with a de-emphasis of voluntary, non-binding proceedings which had been criticized by the ABA and Congress. The FTC began limiting the use of assurances of voluntary compliance to minor, inadvertent violations. See Senate 1972 Appropriations Hearings, supra note 221, at 2684.  

288. One significant criterion for measuring the importance of the FTC’s work is the size of respondent firms mentioned in its suits. A recent, preliminary compilation of data suggests that the absolute size of firms sued by the Commission from 1970 to 1979 substantially exceeded the size of those prosecuted in the 1960’s. See FTC Data Indicates Bureau of Competition, Not Antitrust Division, Sights Bigger Targets, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 971, at A-7 (July 3, 1980).  


297. See supra text accompanying notes 229-47. As late as the fall of 1974, with the Kellogg, Xerox, Exxon, and Borden cases underway, some committees were criticizing the Commission on the ground that it had not been sufficiently vigorous in attacking monopoly. The following exchange between Senator Proxmire and Chairman Engman in November, 1974 is illustrative: SENATOR PROXMIRE. . . . the FTC, like a number of other regulatory agencies seems to concern itself with minor infractions of the law, and to spend much of its time on cases of small consequences. For example, have you used your powers to investigate the steel industry . . .?  

MR. ENGMAN. We have a study of the steel industry now underway, Mr. Chairman.
management reforms.\textsuperscript{298}
A second, major litigation priority was the Commission's merger work.\textsuperscript{299} The agency assigned substantial resources to conglomerate mergers with possible horizontal consequences,\textsuperscript{300} and continued its scrutiny of more traditional horizontal and vertical acquisitions.\textsuperscript{301} A third important category of cases dealt with vertical and horizontal restraints.\textsuperscript{302} The Commission challenged vertical territorial restrictions in the soft-drink bottling industry\textsuperscript{303} and opposed resale price maintenance and distribution restraints in several consumer goods industries.\textsuperscript{304}

The Commission's major initiatives in the horizontal restraints area included cases dealing with delivered pricing in the plywood in-
industry,\textsuperscript{305} shopping center leases limiting the entry of discounters,\textsuperscript{306} interlocking directorates,\textsuperscript{307} and limitations on advertising, pricing of services, and entry in the health care industry.\textsuperscript{308} The FTC brought substantially fewer Robinson-Patman cases than it had in the 1960's,\textsuperscript{309} and focused more attention on industry-wide investigations, including substantial inquiries in the transportation\textsuperscript{310} and health care fields.\textsuperscript{311}

Coupled with these new litigation programs was an increased emphasis on monitoring compliance with orders obtained from previous lawsuits.\textsuperscript{312} The FTC increased the size of its compliance program,\textsuperscript{313} and initiated several important civil penalty actions,\textsuperscript{314} many of which applied the new powers Congress had given the agency in 1973.\textsuperscript{315}

The second principal element of the Commission's competition policy work was the preparation of reports. The main subjects of its published studies were mergers and acquisitions,\textsuperscript{316} energy,\textsuperscript{317} and food.\textsuperscript{318} An increasing number of these reports responded to legislation

\textsuperscript{305} In re Boise Cascade, 91 F.T.C. 1 (1978) (complaint issued Apr. 18, 1974), enforcement denied, 637 F.2d 573 (9th Cir. 1980).

\textsuperscript{306} In re Tyson's Corner Regional Shopping Center, 85 F.T.C. 970 (1975).


\textsuperscript{308} See, e.g., In re American Medical Association, 94 F.T.C. 701 (1979) (complaint issued Dec. 19, 1975), aff'd in part, modified in part, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided court, 1982-1 Trade Cas. (CCH) ¶ 64,616 (1982); In re American College of Obstetricians and Gynecologists, 88 F.T.C. 955 (1976) (consent decree).

\textsuperscript{309} Except in 1966, the Commission brought about ten Robinson-Patman cases per year from 1965 to 1969. In 1966 the agency issued 73 Robinson-Patman complaints, most being consent cases involving small clothing manufacturers. In the early 1970's the average number of Robinson-Patman suits fell to four per year, and dropped to two per year in the late 1970's.

\textsuperscript{310} On February 2, 1976, the Commission authorized an investigation to study the concentration, structure, and performance of the United States automobile industry.

\textsuperscript{311} On February 26, 1976, the Commission authorized the Bureau of Competition to investigate physician control of Blue Shield plans.

\textsuperscript{312} Senate 1973 Appropriation Hearings, supra note 216, at 1433, 1448 (1974); House 1973 Appropriations Hearings, supra note 216, at 426.

\textsuperscript{313} Id.; see also House 1974 Appropriations Hearings, supra note 222, at 171.


\textsuperscript{316} See, e.g., FTC, CONGLOMERATE MERGER PERFORMANCE: AN EMPIRICAL ANALYSIS OF NINE CORPORATIONS (1972); FTC, ECONOMIC REPORT ON CORPORATE MERGERS (1969).

\textsuperscript{317} See e.g., FTC, EFFECTS OF FEDERAL PRICE AND ALLOCATION REGULATIONS ON THE PETROLEUM INDUSTRY (1976); FTC, REPORT TO THE FEDERAL TRADE COMMISSION ON THE STRUCTURE, CONDUCT AND PERFORMANCE OF THE WESTERN STATES PETROLEUM INDUSTRY (1975) (joint report by the Bureaus of Competition and Economics); FTC, CONCENTRATION LEVELS AND TRENDS IN THE ENERGY SECTOR OF THE U.S. ECONOMY (1974).

\textsuperscript{318} See e.g., FTC, PRICE AND PROFIT TRENDS IN FOUR FOOD MANUFACTURING INDUS-
directing the FTC to analyze the competitive consequences of newly established regulatory programs,\textsuperscript{319} or to examine certain important economic sectors.\textsuperscript{320}

The Commission also expanded its competition advocacy efforts before other agencies and branches of the government. The FTC appeared before other federal agencies to comment on the competitive effects of several regulatory programs,\textsuperscript{321} often as part of new statutory responsibilities Congress had conferred upon it.\textsuperscript{322} The FTC also testified before congressional committees to propose new antitrust legislation or to offer its views on a variety of competition policy matters.\textsuperscript{323}

As it upgraded the quality of its case and investigation workload, the FTC also attempted to increase its institutional ability to execute the new competition initiatives successfully. This process of reform had several elements. Among the most fundamental was improving the quality of the agency’s staff. Congress generally gave Chairman Weinberger broad latitude to make personnel changes\textsuperscript{324} and actively followed his progress in doing so.\textsuperscript{325} The recruitment and retention of capable attorneys and economists remained a high priority of Weinberger’s successors.\textsuperscript{326}

\begin{footnotesize}{\begin{itemize}
\item\textsuperscript{319} Most of these statutes dealt with energy. For example, under the Emergency Petroleum Allocation Act of 1973, Congress required the Commission to prepare a comprehensive evaluation of the petroleum allocation program administered by the Federal Energy Office. 15 U.S.C. §§ 751-756 (1976). \textit{See House 1975 Appropriations Hearings, supra note 227, at 647, 688-89, 758-59.}
\item\textsuperscript{321} These agencies included the Interstate Commerce Commission, the Civil Aeronautics Board, the Department of Transportation, the Federal Energy Administration, the Department of the Treasury, the Department of Energy, the Department of Health, Education, and Welfare, and the International Trade Commission.
\item\textsuperscript{322} These statutes explicitly exhibited the congressional desire that the FTC encourage federal bodies to consider the competitive consequences of their regulations. \textit{See Regulatory Reform Hearings, supra note 274, at 133, 148-49.} Statutes requiring a greater FTC intervention role before government agencies included the following: Deepwater Port Act of 1974, 33 U.S.C. § 1506 (1976); Energy Policy and Conservation Act of 1975, 42 U.S.C. § 6201 (1976); Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 1 (1976).
\item\textsuperscript{323} Between 1970 and 1980, representatives of the Commission made over thirty appearances annually before Congress to discuss competition matters. In most of those appearances, the Commission discussed proposed changes in the antitrust laws, amendments to regulatory statutes, or competition policy generally.
\item\textsuperscript{324} \textit{Weinberger Confirmation Hearings, supra note 216, at 19 (remarks of Sen. Moss).}
\item\textsuperscript{325} \textit{Kirkpatrick Confirmation Hearings, supra note 216, at 1 (remarks of Sen. Magnuson).}
\item\textsuperscript{326} \textit{See, e.g., House 1973 Appropriations Hearings, supra note 216, at 1103; see also S. Breyer, REGULATION AND ITS REFORM 343 (1981); R. Katzmann, supra note 63, at 117-18, 127-29.}
\end{itemize}}
The second major reform was a reorganization in 1970 that gave the Commission the basic form it retains today. The move consolidated the existing bureaus of Textiles and Furs, Industry Guidance, Deceptive Practices, and Restraint of Trade into two principal operating bureaus—Competition and Consumer Protection. The new bureaus, along with the Bureau of Economics, constituted the agency's major divisions. This consolidation substantially reduced the number of levels of review through which staff work had to pass before reaching the Commissioners.

The third approach was to improve the Commission's system for monitoring the status of competition programs and managing information. In 1973 the Commission began developing a comprehensive, computer-based information management system.

A fourth line of endeavor was the establishment of new internal procedures for screening cases, setting deadlines, reviewing the progress of competition matters, and requiring staff members to account for delays. As the cornerstone of these procedures, the Commission expanded its existing ground-level evaluation tools and created new devices (such as the preliminary investigation) to establish, at an early stage, a sufficient basis for deciding whether a matter warranted further expenditure of FTC funds. The improved operating procedures and information management system were designed to reduce delay and to support planning activities.

327. Kirkpatrick Confirmation Hearings, supra note 216, at 133-34; House 1972 Appropriations Hearings, supra note 216, at 67-73. For a description of these changes, see R. KATZMANN, supra note 63, at 113-15, 118-25, 127-29. Of the reorganization and personnel changes Katzmann observes:

The political climate was conducive to the making of sweeping changes. There existed a consensus across the political spectrum (ranging from President Nixon to Ralph Nader) that held that the commission was performing poorly and should be revitalized. The new leadership was given a clear mandate to alter existing arrangements. It is unlikely that the commission leadership would have been able to move so swiftly in reorganizing and purging the agency of personnel without such widespread support.

Id. at 128. The reorganization plan also created the Office of Policy Planning and Evaluation, discussed above.


The Commission also considered revising its administrative procedures to expedite its cases. FTC officials informed the oversight committees that the size, scope, and complexity of the agency's antitrust cases made it difficult, within the bounds of due process, to save time by altering the agency's litigation rules. The Commission changed some rules, but generally maintained that pre-trial preparation, cooperation between the parties, and judicial control of pre-trial proceedings largely determined a case's duration.

Despite the FTC's organizational, management, and procedural reforms, Congress, in late 1975 and early 1976, began questioning the Commission's ability to bring its largest litigation efforts to a timely conclusion. Attention focused on the cereal and petroleum monopolization suits, filed in April 1972 and July 1973. Early in these proceedings Commission officials had informed Congress that cases such as In re Exxon Corp. would necessarily be time-consuming and expensive. Some congressmen, who had supported the Commission's actions, regarded the prospect of protracted litigation as unacceptable. Their concern was not that the cases lacked genuine substantive merit but that the aims of these suits were sufficiently urgent to warrant direct legislative action. It was in this spirit, for example, that Congress in 1975 and 1976 seriously considered several proposals to vertically restructure the petroleum industry. However, congressional proponents of legislative action suggested that the FTC discontinue the Exxon case only if Congress promptly accomplished by statute what the FTC suit conceivably might attain at a later date.

334. See id. at 512 (remarks of Rep. Evans and Chairman Kirkpatrick).
335. See id. at 512-13 (remarks of Chairman Kirkpatrick).
336. The Xerox suit ended in a consent decree in 1975. See supra note 291.
338. On October 8, 1975, the Senate defeated by a vote of 45 to 54 a vertical divestiture measure offered as an amendment to a pending piece of energy legislation. See 121 CONG. REC. 32,289-96 (1975). Two weeks later, on October 22, a modified version of the vertical divestiture proposal was reintroduced as amendment to the same energy bill and was defeated by a vote of 40 to 49. See 121 CONG. REC. 33,593-616 (1975). On June 15, 1976, the Senate Committee on the Judiciary approved and reported to the full Senate a bill (S. 2387) requiring the vertical divestiture of the nation's eighteen largest oil companies. See S. Rep. No. 1065, 94th Cong., 2d Sess., Pt. 1 (1976). The Judiciary Committee bill did not reach the Senate floor.
339. For example, Senator Packwood, who co-sponsored a vertical divestiture bill in the 94th Congress, argued that new legislation afforded a speedier, less costly alternative to litigation:
B. 1977-1980

By the fall of 1976, the FTC had attained perhaps its greatest level of congressional respect. Congress seemed generally pleased with the Commission's renewed antitrust enforcement approach. Certainly, the objective measures of legislative feeling supported such a conclusion. Since 1969, both the agency's total budget and competition expenditures had more than doubled, and Congress had significantly expanded its statutory authority. Less tangible, but nonetheless important, indications of congressional opinion pointed in the same direction. In a report on federal regulatory bodies issued in October of 1976, the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce largely praised the FTC's competition work, stating that the FTC had become "one of the more effective regulatory agencies."[340] There was little question that Congress endorsed the course which the FTC's competition programs had taken.[341]

Over 2 years ago... the FTC charged eight majors with violating the Federal Trade Commission Act...[340] This case has not even reached the hearing stage, and is likely to drag on into the 1980's. The time and expense to the Nation can be avoided by congressional action which will insure that competition is restored now.

1975 Petroleum Vertical Integration Hearings, supra note 229, at 49. He went on to suggest that the existing antitrust laws might be inadequate to deal with certain competition problems:

The present antitrust laws... even if rigidly enforced, will not achieve what is necessary in this country: A breakup of the concentrations of power in the major industries in this country, oil and otherwise, so that we might return to the numerous, small- and medium-size competitive industries that made this country grow, and continue to be needed to keep this country great.


340. Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., Report on Federal Regulation and Regulatory Reform 57 (Subcomm. Print 1976) [hereinafter cited as 1976 House Report]. Noting that the FTC had been criticized previously for "excessive concentration upon matters of small consequence," the House report applauded the Commission's efforts "to consider some major antitrust and consumer protection problems." Id. The report singled out the FTC's cereal and petroleum monopolization suits, its challenge to advertising restrictions by the American Medical Association, and its investigation of the automobile industry as examples of a desirable trend in this direction.

The following year the Senate Governmental Affairs Committee (successor to the Committee on Government Operations) also praised the FTC's antitrust revitalization and used the agency's competition performance since 1969 as one basis for recommending the maintenance of the dual antitrust enforcement system. See Study on Federal Regulation: Regulatory Organization: Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess., Vol. v., at 246-54 (1977) [hereinafter cited as Senate Governmental Affairs 1977 Report]. Compared to other committee studies of the FTC's work written earlier in the decade, these reports suggested a progressively greater level of congressional satisfaction with the Commission's performance from 1969 up to 1977. For one of the earlier, less flattering assessments, see Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1976: Hearings Before a Subcomm. of the House Comm. on Appropriations, 94th Cong., 1st Sess. Pt. 7, at 187-278 (1975).

341. For example, a business periodical article on the FTC noted "[W]ith its turnover to
Although the Commission's antitrust work had enjoyed solid congressional backing through 1976, the durability of this support was much less certain. Major segments of the business community viewed the content and tone of the agency's new antitrust and consumer protection programs with alarm, and spoke increasingly of seeking substantial, legislatively-mandated retrenchment of the agency's litigation, rulemaking, and information-gathering efforts. When the first session of the 95th Congress convened in January 1977, the legislature's membership had changed significantly. The roster no longer included the names of Philip Hart, Vance Hartke, Mike Mansfield, Gale McGee, Frank Moss, John Pastore, and John Tunney, senators who had been strong advocates of the Commission's antitrust revitalization and influential in mustering congressional support for the agency's ambitious programs and the enlargement of its budget and statutory powers.

As programs begun in the early and mid-1970's came to fruition in the late 1970's, the Commission would be unable to rely on the support of many key individuals who had championed its initiatives. Instead, it would have to justify its competition projects before a Congress that had significantly less stake in defending or maintaining FTC work begun through 1976 and possessed a stronger inclination to review new proposals more critically. Moreover, it was a Congress more likely to listen sympathetically to claims that the agency had erred in its choice and execution of competition programs.

activism, the agency has clearly won the approval of Congress." The Escalating Struggle Between the FTC and Business—Executives Openly Challenge the Actions and Policies of the Newly Activist Agency, Bus. Wk. 53 (Dec. 13, 1976) [hereinafter cited as Business Week 1976]. Some observers at this time also believed the agency's status in Congress would likely improve in the future with the appointment of Michael Pertschuk, an influential Senate staff member, to chair the FTC. See Caught in a Cross Fire of Praise at the FTC, N.Y. TIMES, Mar. 20, 1977, § 3, at 3, col. 1.

342. For a perceptive discussion of the business mood at the time, see Bus. Wk. 1976, supra note 341, at 52.

343. Senators Hart, Mansfield, and Pastore retired and did not seek re-election in 1976, and Senators Hartke, McGee, Moss, and Tunney were defeated in the general election. The departure of these Senators marked the beginning of a process of erosion in the ranks of congressmen who had urged the commission to occupy ever larger territory in the antitrust and consumer protection field. This process continued in 1978 with the deaths of Lee Metcalf and Hubert Humphrey; the retirement of James Abourezk; and the election defeat of Dick Clark, Floyd Haskell, and Thomas McIntyre.

344. As a group, these senators had held a disproportionate number of important positions in the Senate hierarchy generally and occupied pivotal seats on committees with appropriations and oversight responsibility for the FTC's work.

345. Through a review of voting records, Weingast and Moran document a major shift in Congressional preferences for FTC policy. "The oversight committee," they write, "experienced a nearly complete turnover in 1977 that brought to power members opposing the policies of their predecessors." Weingast & Moran, supra note 9, at 46.
1. Congressional Guidance

From 1977 through 1980, the oversight and appropriations process did not constitute a complete departure from earlier legislative scrutiny of the agency's competition programs. The Congress continued to develop many themes that had emerged at the decade's beginning.

Like their predecessors in the early 1970's, the committees encouraged the Commission to refine its system for selecting priorities and choosing enforcement programs. Both chambers placed greater emphasis on the use of cost-benefit studies by the agency in choosing future cases and investigations. In another area, closely related to planning and case selection, Congress sustained its support for the agency's line-of-business program. The oversight committees expressed concern about the delays occasioned by lawsuits challenging the program and considered (but did not enact) legislation to expedite the data collection. The appropriations committees continued to fund the program, but also urged the Commission to reduce as much as


348. For example, in 1977, Representative Moss told the House Subcommittee on Consumer Protection and Finance that the successful completion of the line-of-business program was essential to the continuing revitalization of the FTC's competition programs. Federal Trade Commission Amendments of 1977 and Oversight: Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 101-02 (1977) [hereinafter cited as House 1977 FTC Oversight Hearings].

349. In 1977, Representative Eckhardt, Chairman of the Subcommittee on Consumer Protection and Finance, proposed giving the FTC increased statutory power to overcome procedural obstacles to collecting the line-of-business data. Id. at 1-2.
possible its reporting requirements.\textsuperscript{350}

Congressional interest in planning and priorities was part of a broader concern with the FTC's ability to manage its programs capably. As they had done earlier in the decade, the committees pressed the Commission to closely monitor its use of resources and to expedite ongoing cases and investigations.\textsuperscript{351} The committees also questioned the FTC's care in using compulsory process in its investigations.\textsuperscript{352}

Beyond analyzing the Commission's planning and management systems, Congress specified several types of competition problems and particular industries the FTC should scrutinize. Though less forcefully than it once had, Congress continued to regard economic concentration as meriting serious antitrust attention. During antitrust enforcement oversight hearings in 1977, Senator Paul Laxalt commented: "To me, the undue concentration of economic power in this country is troublesome. I think that undue concentration constitutes as big a threat to the individual liberties of Americans as anything that I can perceive."\textsuperscript{353} Similarly, in March 1980, Representative Neal Smith of the House Appropriations Committee advocated a continuing concern with certain oligopoly industries during hearings on the FTC's 1980 budget request:

I happen to be one who thinks that you ought to be spending a lot of time on some major problems, such as oligopolies which have a direct impact and effect upon inflation in this country. This is especially true in food processing and some

\textsuperscript{350} See Senate 1978 Appropriations Hearings, supra note 347, at 548-55.
\textsuperscript{351} See Senate 1979 Appropriations Hearings, supra note 346, at 1708; House 1981 Appropriations Hearings, supra note 347, at 207-09. The FTC's Exxon and Kellogg monopolization suits most often provided the point of departure for discussing the agency's management skills. See, e.g., House 1979 Appropriations Hearings, supra note 347, at 1077; Senate 1978 Appropriations Hearings, supra note 347, at 505-06. For example, committee members questioned the turnover rate for attorneys assigned to these cases. See Senate 1980 Appropriations Hearings, supra note 346, at 2086. The FTC's ability to retain new attorneys beyond a period of several years had concerned Congress earlier in the decade as well. See Senate 1975 Appropriations Hearings, supra note 330, at 1204-05; Interfuel Competition: Hearings on S. 469 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 313-15, 522-23 (1975) [hereinafter cited as Interfuel Competition Hearings]. Some members suggested that the agency consider contracting for the services of outside, experienced lawyers. House 1974 Appropriations Hearings, supra note 222, at 144-45. The Committees also raised the possibility of narrowing the issues in the Exxon case. See House 1980 Appropriations Hearings, supra note 347, at 823.
\textsuperscript{352} See House 1980 Appropriations Hearings, supra note 347, at 875. On occasion, the committees seemed surprised at the suggestion that the FTC had the power or the inclination to conduct an investigation solely for the purpose of gathering information about an industry. See Senate 1981 Appropriations Hearings, supra note 347, at 380.
\textsuperscript{353} Oversight of Antitrust Enforcement: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 5 (1977) [hereinafter cited as Senate Judiciary 1977 Oversight Hearings]; see also id. at 2-3 (remarks of Sen. Kennedy, Subcomm. Chairman).
areas where imports do not keep a cap on domestic prices or have an impact as they do in some areas of manufacturing.\(^3\)

Merger enforcement also remained an area of antitrust concern that Congress believed the FTC should assign a high priority. In 1979, the Senate Appropriations Committee asked the Commission what action it had taken “in response to the current conglomerate merger wave?”\(^4\) Later that year, Senator Kennedy introduced two merger bills, one limiting large conglomerate acquisitions\(^5\) and the other prohibiting the nation’s sixteen largest oil companies from purchasing any firm with $100 million or more in assets.\(^6\) As it considered these proposals, the Senate Judiciary Committee also encouraged the FTC to use its statutory power to block anticompetitive acquisitions.\(^7\)

In enumerating specific economic sectors for scrutiny, Congress reaffirmed its interest in energy, food, medical care, and transportation. Congress occasionally singled out other areas of economic activity for FTC attention, including concentration in the ownership of the news media.\(^8\) Of the industries already receiving FTC attention, Congress stressed energy. The appropriations committees directed the FTC to expedite the energy industry studies which had been funded by a special congressional appropriation in the early 1970’s.\(^9\) Congress also substantially expanded the Commission’s competition advocacy re-

\(^3\) House 1981 Appropriations Hearings, supra note 263, at 143. See also Senate Government Affairs 1977 Report, supra note 340, at 246.

\(^4\) Senate 1980 Appropriations Hearings, supra note 346, at 2145. One year earlier Senators Kennedy and Metzenbaum had urged the antitrust enforcement agencies to devise new strategies for dealing with large conglomerate acquisitions. See Mergers and Industrial Concentration: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 1-3, 143-44, 185-86 (1978) [hereinafter cited as Senate 1978 Merger Hearings].

\(^5\) See Mergers and Economic Concentration: Hearings on S. 600 Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) [hereinafter cited as S. 600 Hearings].


\(^7\) See Senate Judiciary 1977 Oversight Hearings, supra note 353, at 6-8 (remarks of Sen. Metzenbaum).

\(^8\) In 1978, the Senate Appropriations Committee submitted the following written question concerning media ownership to the Commission:

Last year Arthur Sulzberger, publisher of the New York Times, noted that the American newspaper industry is probably the one unregulated business left in the world. In terms of employment the newspaper industry is the third largest in America, and only behind automobiles and steel. What interest does the FTC have in this area? ... Can you bust the media trusts with current statutes? ... What causes your inability to challenge media acquisitions and the concentration of press power in the hands of a few giant companies?

Senate 1979 Appropriations Hearings, supra note 347, at 1729.

\(^9\) House 1979 Appropriations Hearings, supra note 347, at 1076-77.
sponsibilities under several new energy statute, including the Petroleum Marketing Practices Act of 1978,\textsuperscript{361} the Outer Continental Shelf Lands Act Amendments of 1978,\textsuperscript{362} the National Energy Conservation Policy Act of 1978,\textsuperscript{363} and the Powerplant and Industrial Fuel Use Act of 1978.\textsuperscript{364} Each of these measures required the agency to assess the competitive consequences of various government regulatory programs.

The food industry also remained a high antitrust priority for Congress, but different areas of interest were suggested.\textsuperscript{365} The House Appropriations Committee suggested that the Commission pay more attention to food retailing\textsuperscript{366} and the beef processing industry.\textsuperscript{367}

Congress gave close, and often critical, scrutiny to three other major FTC competition initiatives during this period: The automobile investigation, the Formica trademark cancellation suit, and cases affecting the professions. The House and Senate Appropriations Committees were especially apprehensive about the automobile inquiry's purpose and scope.\textsuperscript{368} They were concerned that the Commission had slighted the role of foreign automobile makers and had imposed excessive document demands upon American firms.\textsuperscript{369}

The committees also expressed reservations over the agency's effort to cancel the Formica trademark on the ground that the name had become generic.\textsuperscript{370} In 1979, the House Appropriations panel intensively questioned the Commission about its Formica investigation,\textsuperscript{371} and whether the case foreshadowed far-reaching efforts to cancel other well-known trademarks.\textsuperscript{372} Early in the same year, several bills were introduced in the House to bar the FTC from exercising its powers to cancel a trademark on the ground that the mark has become a common

\begin{footnotes}
\item[367] Id. at 771-72 (remarks of Rep. Andrews).
\item[369] See, e.g., Senate 1980 Appropriations Hearings, supra note 346, at 2030-31, 2081; House 1979 Appropriations Hearings, supra note 347, at 1001, 1055-57. The Committees proposed that the FTC expand its analysis of foreign car manufacturers and curtail the breadth of its requests to domestic companies.
\item[370] FTC v. Formica Corp., 5 TRADE REG. REP. (CCH) ¶ 50,372 (1978).
\item[371] House 1980 Appropriations Hearings, supra note 347, at 817 (Rep. Early to Chairman Pertschuk: "On what grounds did the FTC bring this action, a fishing expedition?").
\item[372] Id. at 816, 817, 821.
\end{footnotes}
mon, descriptive name.373

The third troublesome FTC initiative was the agency’s competition work involving the professions, particularly its programs affecting lawyers and physicians.374 The Senate Antitrust Subcommittee in 1977, and the Senate Appropriations Committee in 1977 and 1979 questioned the Commission about its interest in professional associations.375 Although the appropriations and oversight panels did not explicitly oppose the program or suggest its modification, the tone of their inquiries conveyed a sense of discomfort with this initiative.

2. Commission Response

The oversight and appropriations hearings from 1977 to 1980 revealed a perceptible change in congressional attitudes toward the FTC’s competition programs. Until late 1979, this adjustment was a relatively quiet one. Congress continued to endorse many of the same initiatives it had promoted earlier in the decade, including the FTC’s line-of-business, energy, and food programs. Moreover, it had sustained the pattern of budget increases set in the early 1970’s, raising the Commission’s total appropriation from about $47 million in 1976 to nearly $70 million in 1980. Mixed with these threads of continuity,


374. In his economic message to Congress on October 8, 1974, President Ford had urged careful antitrust scrutiny of horizontal agreements concerning professional services. The President said:

I am determined to return to the vigorous enforcement of antitrust laws.

The Administration will zero in on more effective enforcement of laws against price-fixing and bid-rigging. For instance, noncompetitive professional fee schedules and real estate settlement fees must be eliminated. Such violations will be prosecuted by the Department of Justice to the full extent of the law.


375. Senator Laxalt and Chairman Pertschuk discussed the basis for the agency’s interest in this field:

SENIOR LAXALT. Explain to me the concern in connection with the various professional groups on this level as opposed to inquiring into the problem on a state level.

MR. PERTSCHUK. The Commission, beginning 2 to 3 years ago, as part of its policy planning process, had identified these areas as ones in which the competition was simply not working in which price fixing, barriers to entry, restrictions against advertising, or other restraints were causing excessively high prices to consumers, and excluding competitors. These were identified as areas in which a high potential payoff in terms of consumer benefit and restoring competition could lie. There are clearly very serious questions about Federal-State relations in the Commission’s entering this area. And there are questions about the extent of the Commission’s authority in this area.

The Commission is proceeding in a careful and gingerly way to identify those areas in which the restraints on competition are most egregious with justification least strong and least evident for state action.

however, were important differences in tone and emphasis. Before 1976, majorities in both chambers of Congress encouraged the FTC to test the boundaries of its authority. After 1976, Congress was less amenable to further expansion and considerably more disposed to scrutiny of ambitious FTC antitrust ventures already underway.

In fulfilling its antitrust role from 1977 to 1980, the Commission was responsive to these changes in congressional attitude. This was particularly evident in the agency's efforts to strengthen its processes for selecting priorities and managing its work. The enhancement of the FTC's priority and program selection techniques proceeded along four lines. The first was the establishment in 1977 of an Office of Special Projects and a Planning Office within the Bureau of Competition. The Office of Special Projects was given responsibility for identifying and examining long-range economic factors, such as technological change, which influence the competitive process. The Planning Office focused upon developing legal and economic analysis for use in selecting new cases and refining the theoretical underpinnings of ongoing suits and investigations. This office also directed most of the Commission's efforts to measure the effects of its completed antitrust cases.

The second major refinement of the agency's planning mechanism was the improvement of priority selection tools that enabled the Commission to periodically examine the FTC's workload and evaluate proposals for new projects. In 1977, the Commission commenced a series of monthly meetings to review the agency's activities in a given subject area and explore future strategies. From 1977 through 1980, the FTC conducted "policy review sessions" for the automobile industry,

376. See New Beginnings for Antitrust Enforcement at the Federal Trade Commission, Address by Alfred Dougherty, Jr., Ohio State Bar Ass'n Annual Antitrust Law Inst. (Oct. 28, 1977) [hereinafter cited as Dougherty 1977 Speech]; Senate 1980 Appropriations Hearings, supra note 412, at 2162-63. The two new offices were created as part of a reorganization that realigned the Bureau's litigation offices along programmatic lines. The move was designed to enable the agency's litigators to build expertise in certain industry sectors (e.g., food).

377. See, e.g., Antitrust, Competition Policy, and the Emerging Industry, Address by Albert Foor, Roundtable on Antitrust and Technology of the New York State Bar Ass'n (Jan. 23, 1980). The Special Projects staff also served as the FTC's liaison for a variety of interagency task forces and carried out competition advocacy duties under new statutes requiring the FTC to monitor the competitive consequences of new technologies.

378. One major area of Planning Office work has consisted of analysis of the agency's substantive and remedial authority. See, e.g., Averitt, supra note 13; Averitt, supra note 143.

379. For a discussion of these efforts, see Senate 1981 Appropriations Hearings, supra note 347, at 408; House 1981 Appropriations Hearings, supra note 263, at 202.

380. See New Directions for the FTC, address by Michael Pertschuk, New England Antitrust Conference (Nov. 18, 1977) [hereinafter cited as Pertschuk 1977 Speech].
compliance activities, mergers, health services, media ownership, and the Commission's industry-wide enforcement programs. The third major change in the agency's planning system was increased effort to more fully integrate its economists into both the selection of competition programs and the generation of cases and investigations. In an attempt to accomplish this, agency-wide task forces of lawyers and economists were created to examine existing areas of antitrust concern, and assess possible new areas of inquiry.

The fourth key area of planning and priority selection work was the enlargement and improved use of the agency's information sources. The Commission published its first analysis of data obtained through its line-of-business program, and extensively used information received through its pre-merger notification program under the Hart-Scott-Rodino Act of 1976. As it employed these new data sources in planning and evaluating enforcement programs, the agency made its internal data sources more accessible to staff.

Consistent with the interest of the oversight and appropriations committees, the Commission placed greater emphasis on managing its workload effectively. This manifested itself in several areas of the agency's competition work. First, the FTC finished installing the chief elements of the management information system begun in the early

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381. The Commission's Office of Policy Planning coordinated the policy review meetings and prepared briefing books for the sessions. The briefing books were subsequently edited and made public. See 3 TRADE REG. REP. (CCH) ¶ 11,000 (1980).
382. Chairman Collier and Ferschuk identified this as a major Commission objective in their appearances before the appropriations committees. See Departments of State, Justice, and Commerce, the Judiciary, and Regulatory Agencies Appropriations for Fiscal Year 1978: Hearings Before a Subcomm. of the House Comm. on Appropriations, 95th Cong., 1st Sess. 4 (1977) [hereinafter cited as House 1978 Appropriations Hearings]; House 1979 Appropriations Hearings, supra note 347, at 814.
384. Id. Subjects explored in this manner include energy, food, health care, transportation, mergers, joint ventures, and remedies. See Dougherty 1977 Speech, supra note 376.
387. See note 388 infra. In addition, the Bureau of Competition also began to catalogue the products of past and ongoing Commission research and to see that staff benefited from the fruits of this body of work. Id.
1970's.\textsuperscript{388} Second, the agency exerted more stringent early review of case and investigation proposals. The planning and priority selection reforms outlined above were one step in this direction. Another ingredient was the expanded role of the Bureau of Competition's Evaluation Office and Evaluation Committee in examining recommendations for complaints and investigations.\textsuperscript{389}

The Commission and the Bureau of Competition applied a more rigorous analysis to the agency's existing information-gathering programs, investigations, and lawsuits. In 1979, the FTC substantially reduced the number of stock and asset acquisitions that must be reported under the agency's pre-merger notification provisions.\textsuperscript{390} The following year, the Commission narrowed the scope of both its automobile industry investigation\textsuperscript{391} and its \textit{Exxon} monopolization suit,\textsuperscript{392} measures which the Congress had urged the agency to consider.\textsuperscript{393}

In selecting industries for competition study, the Commission mainly examined industries providing consumer goods and services.\textsuperscript{394} The FTC devoted over half of its antitrust resources to the energy,\textsuperscript{395} food,\textsuperscript{396} health care,\textsuperscript{397} and transportation\textsuperscript{398} industries. The agency

\textsuperscript{388} The system afforded FTC commissioners and other supervisory officials the first truly effective means for obtaining reliable, timely information on the status of ongoing investigations and cases, as well as the disposition and content of closed matters. \textit{See} House 1981 Appropriations Hearings, \textit{supra} note 263, at 207-10; Senate 1979 Appropriations Hearings, \textit{supra} note 347, at 1708; House 1978 Appropriations Hearings, \textit{supra} note 382, at 97, 104. The Agency also strengthened its computer systems for collecting and organizing data used in major litigation projects. \textit{Id.} at 104.

\textsuperscript{389} \textit{House 1978 Appropriations Hearings, supra} note 382, at 4. This type of preliminary analysis, coupled with efforts to evaluate and learn from the agency's previous lawsuits, helped the Bureau of Competition to limit the scope of its investigations and narrow the issues raised in its complaints. For a discussion of the effects of these reforms on the litigation of one recent FTC suit, see Crock, \textit{Here's One Case The Truthbusters May Finish Soon}, Wall St. J., May 17, 1979 at 26, col. 3 (analyzing the progress of the Commission's DuPont monopolization suit).

\textsuperscript{390} \textit{See FTC, ANN. REP. 13 (1979); FTC Proposes Easing Merger Reporting Rules, Wall St. J. Aug. 22, 1979 at 2, col. 2.}

\textsuperscript{391} \textit{Senate 1981 Appropriations Hearings, supra} note 347, at 376, 383.

\textsuperscript{392} \textit{See In re Exxon: Complaint Counsel's First Statement of Issues, Factual Contentions and Proof} (Oct. 31, 1981) (on file with author). \textit{See also FTC Narrows Case Against 8 Oil Firms But Alleges Possible Price 'Conspiracy', Wall St. J. Nov. 3, 1980, at 19, col. 2.} Two months later the FTC's staff also filed a statement in the \textit{Exxon} proceeding outlining its views on relief. \textit{See F.T.C. Staff Eases View In Oil Case, N.Y. Times Feb. 3, 1981, at D-1, col. 6.}

\textsuperscript{393} On the auto investigation, \textit{see supra} notes 335-36. On the \textit{Exxon} case, \textit{see supra} note 351.

\textsuperscript{394} \textit{House 1981 Appropriations Hearings, supra note 263, at 12; House 1980 Appropriations Hearings, supra note 347, at 572, 583; House 1979 Appropriations Hearings, supra note 347, at 813, 972; House 1978 Appropriations Hearings, supra note 382, at 3, 11.}

\textsuperscript{395} \textit{See supra note 394; see also House 1979 Appropriations Hearings, supra note 347, at 818,936.}

\textsuperscript{396} \textit{Note 394 supra; see also House 1979 Appropriations Hearings, supra note 347, at 819,937.}

\textsuperscript{397} \textit{Note 394 supra; see also House 1979 Appropriations Hearings, supra note 347, at 820, 969 & 972.}

\textsuperscript{398} \textit{Note 394 supra; see also House 1979 Appropriations Hearings, supra note 347, at 819.}
used a variety of approaches to raise competition concerns about these and other industries.

Among the most salient initiatives begun from 1977 to 1980 were Commission lawsuits. The FTC brought significant antitrust cases dealing with monopolization and attempted monopolization,\(^{399}\) mergers,\(^{400}\) horizontal restraints,\(^{401}\) and vertical restraints.\(^{402}\) The Commission issued complaints or decisions in several important cases involving complex legal and economic issues such as strategic entry deterrence, predation, and the acceptable range of dominant firm behavior generally;\(^{403}\) market signalling among firms in concentrated markets;\(^{404}\) the Colgate doctrine;\(^{405}\) and the lawfulness of various vertical, horizontal, and conglomerate mergers.\(^{406}\) Other important facets of the Commission's litigation work included increased cooperation with state governments seeking to apply the results of FTC investigations in their own lawsuits;\(^{407}\) greater use of injunctions to halt potentially anticompetitive mergers;\(^{408}\) and the development of new remedial devices such as restitution.\(^{409}\)


\(^{400}\) See, e.g., In re Exxon Corp., 3 TRADE REG. REP. (CCH) ¶ 21,599 (No. 9130, Aug. 1, 1979); In re Beatrice Foods Corp., [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,437 (No. 9112, June 29, 1978), order to cease and desist issued, 3 TRADE REG. REP. (CCH) ¶ 21,775 (Nov. 21, 1980).

\(^{401}\) See, e.g., In re Ethyl Corp., [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,579 (No. 9128, May 30, 1979), order to cease and desist issued, 3 TRADE REG. REP. (CCH) ¶ 21,856 (Aug. 12, 1981); In re Indiana Dental Ass'n, 93 F.T.C. 392 (1979) (consent order).

\(^{402}\) See, e.g., In re Russell Stover Candies, Inc., 3 TRADE REG. REP. (CCH) ¶ 21,719 (No. 9140, July 1, 1980).


\(^{405}\) In re Russell Stover Candies, Inc., 3 TRADE REG. REP. (CCH) ¶ 21,719 (No. 9140, July 1, 1980), complaint dismissed, 3 TRADE REG. REP. (CCH) ¶ 21,801 (Mar. 16, 1981).

\(^{406}\) See, e.g., In re Exxon Corp., 3 TRADE REG. REP. (CCH) ¶ 21,599 (No. 9130, Aug. 1, 1979); In re Heublein, Inc., 96 F.T.C. 385 (1980).


These litigation projects, however, constituted only one of several Commission approaches for developing competition policy. Programs to stimulate research, analysis, and discussion of important antitrust issues were also an important strategy. From 1977 to 1980, for example, the Commission sponsored conferences on solar energy industry competition;\textsuperscript{410} health care competition;\textsuperscript{411} media concentration;\textsuperscript{412} social consequences of firm size and market structure;\textsuperscript{413} predation and modern antitrust analysis;\textsuperscript{414} and commercialization of new technologies.\textsuperscript{415}

The study of significant competition issues took other forms as well. In this period the FTC's attorneys and economists published working papers, protocols, and articles dealing with numerous matters including business strategy,\textsuperscript{416} predatory practices,\textsuperscript{417} trademarks,\textsuperscript{418} innovation,\textsuperscript{419} the limits and purposes of the FTC's enabling acts,\textsuperscript{420} and the measurement of market power.\textsuperscript{421} In addition the Commission funded outside research by distinguished academicians on mergers,\textsuperscript{422} dynamic economic analysis,\textsuperscript{423} and the competitive effect of govern-

413. See FTC, \textit{The Economics of Firm Size, Market Structure and Social Performance} (July 1980).
418. See, \textit{e.g.}, R. Craswell, \textit{Trademarks, Consumer Information and Barriers To Competition}, (Jan. 1979).
419. See, \textit{e.g.}, J. Hilke & C. Goldfarb, \textit{The Relationship Between FTC Activities and Private Sector Technological Growth} (Oct. 16, 1978).
420. See supra note 347.
422. See W. Boucher, \textit{The Process of Conglomerate Mergers} (1980); W. Carleton, R. Harris & J. Stewart, \textit{An Empirical Study of Merger Motives} (1980). These studies were funded jointly by the FTC and the Small Business Administration.
ment procurement practices. These research projects supplemented reports by the Bureaus of Competition and Economics.

Another important field was competition advocacy. The Commission expanded the intervention role it began earlier in the decade, and participated in many proceedings before other government agencies. In addition, the Commission considered the use of rulemaking as a competition enforcement approach. The FTC considered, but declined to issue rules governing certain conglomerate mergers; barring physician organizations from controlling Blue Shield; and other open-panel medical prepayment plans and prohibiting the ownership of crude oil and petroleum products pipelines by major integrated oil companies.

3. Proposed Limitations

In 1979 and 1980, congressional dissatisfaction with some elements of the FTC's competition and consumer protection work swelled into a forceful movement to curtail certain specific projects and to redefine


425. From 1977 to 1980 the Commission published many staff studies, including reports on selected concentrated industry sectors and issues earmarked by Congress for examination earlier in the decade. See, e.g., FTC, Market Shares, Concentration and Competition in Manufacturing Industries (1978); Bureau of Economics, FTC, Sales, Promotion, and Product Differentiation in Two Prescription Drug Markets (Feb. 1977); see also FTC Ann. Rep. 77-80 (1980).

426. See, e.g., House 1981 Appropriations Hearings, supra note 263, at 142; Senate 1981 Appropriations Hearings, supra note 247, at 389; House 1979 Appropriations Hearings, supra note 347, at 969; see also FTC, Ann. Rep. 81-85 (1980). A brief summary of the types of FTC intervention and commenting activities in the energy and transportation fields since 1976 indicates the program's scope and its importance to the agency's competition policy role. For the Department of Energy, the FTC prepared comments on a variety of regulations affecting petroleum prices and supplies. For the Interstate Commerce Commission, the Commission supplied comments in several proceedings dealing with pricing and entry for various categories of motor carriers. For the Civil Aeronautics Board, the Commission provided comments on several matters affecting fares charged by domestic air carriers. For the Department of Interior, the Commission supplied comments on policies governing bids for leases to develop offshore oil and gas properties. For the Department of Transportation, the Commission in 1979 assessed the competitive implications of the application of the Texas Deepwater Port Authority to build a deepwater terminal facility in the Gulf of Mexico.


428. FTC consideration of a possible pipeline rule began with the filing by Senator Kennedy of a petition calling upon the Commission to commence such a proceeding. See 44 Fed. Reg. 35,237 (1979).
the agency’s underlying authority. The intensity and breadth of this drive have been equalled only twice before in the agency’s history—in the meatpacking report and Cement Institute confrontations discussed earlier. Divisions within both chambers over the extent of restrictions to be imposed were so severe that the Commission’s funding lapsed on two occasions, forcing the agency to close its doors for the first time ever. The Commission had gone without an authorization bill for fiscal years 1978, 1979, and 1980—a portent of the discontent that surfaced graphically in congressional consideration of the Federal Trade Commission Improvements Act of 1980.

Most of its provisions dealt with the consumer protection programs, but the Act also affected several FTC competition matters. It prohibited the FTC from petitioning the Commissioner of Patents for cancellation of a registered trademark on the ground that the trademark had become the common, descriptive name for an article or substance. The Act barred the Commission from conducting any study or investigation of agricultural marketing orders or prosecuting agricultural cooperatives for conduct exempt from the antitrust laws by the

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429. For three contemporaneous assessments of the reasons behind congressional moves to limit the Commission’s authority in 1979 and 1980, see Debate: The Federal Trade Commission Under Attack: Should the Commission’s Role be Changed? 49 ANTITRUST L.J. 1481 (1982) (remarks by William Baxter, Philip Elman, Miles Kirkpatrick, and Robert Pitofsky); Gellhorn, The Wages of Zealotry: The FTC under Siege, Jan./Feb. 1980 AEI J. ON GOV’T AND SOC’Y 33; Katzmann, Capital Hill’s Current Attack Against the FTC, Wall St. J., May 7, 1980, at 26, col. 3; M. Pertschuk, supra note 9. Among the more perplexing tasks in attempting to explain this display of legislative feeling is to determine the extent to which congressional displeasure with the FTC’s competition and consumer protection work contributed to the final result, or, alternatively, whether the opposition aroused by either the FTC’s competition or consumer protection programs separately would have precipitated such a searching and, at times, impassioned review of the agency’s activities. Equally troublesome is to appraise the degree, if any, of additional scrutiny and rebuke the agency received by serving as an outlet for deep-seated, popular frustrations with government behavior that are only partly attributable to the FTC’s work. The answers to these and other questions are important to determining what lasting significance congressional actions will have for the Commission’s competition role.

430. See supra text accompanying notes 186-97.

431. See supra text accompanying notes 198-98.


434. This provision effectively terminated the Commission’s Lanham Act proceeding to cancel the Formica trademark, marking the first time in the agency’s history that Congress had intervened to eliminate an ongoing FTC adjudicatory proceeding. The Formica case was in discovery when the 1980 authorization Act was passed. The Trademark Trial and Appeal board dismissed the FTC’s cancellation petition on June 13, 1980, and the FTC staff then moved for the Commission to formally close the matter.
Capper-Volstead Act.\textsuperscript{435} The other limitation directly affecting the Commission's choice of possible competition initiatives was a ban on investigations relating to the business of insurance unless such studies were authorized by a vote of either the House or Senate Commerce Committee.\textsuperscript{436}

The only other specific antitrust restriction to gain Congress' approval in this period was the Softdrink Interbrand Competition Act of 1980,\textsuperscript{437} which exempts soft drink bottlers' exclusive territorial franchises from antitrust challenge so long as there is competition in the area from other soft-drink brands.\textsuperscript{438} The Act culminated long efforts by the bottlers to gain relief from the FTC's suit challenging the industry's exclusive geographic territories.\textsuperscript{439}

In addition to the restrictions it did enact, Congress considered other measures to limit the agency's competition work. The House Appropriations Subcommittee nearly banned further funding for the Commission's automobile industry investigation and \textit{Exxon} monopolization suit;\textsuperscript{440} Senator Hatch introduced a bill to require the FTC to bring all of its antitrust cases in the federal district courts, thus eliminating the agency's adjudicatory function in the competition field;\textsuperscript{441} and during consideration of the Senate version of the FTC's authorization bill, Senator McClure offered an amendment prohibiting FTC scrutiny of state-regulated professions.\textsuperscript{442} Finally, Senator Heflin proposed eliminating the Commission's power to order divestiture or other forms of structural relief in non-merger cases.\textsuperscript{443}

\textsuperscript{435} The statute allowed the agency to complete its ongoing monopolization suit against the Sunkist Growers. \textit{See supra} note 399.


\textsuperscript{438} \textit{See id.}

\textsuperscript{439} Since 1972, Congress had given extensive consideration to bills similar to the 1980 Act. \textit{See, e.g., House Committee Approves Bottlers Bill Allowing Territorial Restrictions,} [Jan.-June] \textit{Antitrust & Trade Reg. Rep.} (BNA) No. 973, at A-14 (June 1, 1976). The 1980 Act swept through Congress with overwhelming support, as 310 congressmen co-sponsored the House bill alone.


\textsuperscript{441} \textit{See} [July-Dec.] \textit{Antitrust & Trade Reg. Rep.} (BNA) No. 938, at G-1 (Nov. 8, 1979).

\textsuperscript{442} \textit{See Senator Proposes Limitations on FTC's Jurisdiction Over Professional Groups,} [July-Dec.] \textit{Antitrust & Trade Reg. Rep.} (BNA) No. 938, at A-22 (Nov. 8, 1979). If approved such a measure would have ended the agency's competition proceedings dealing with the legal, medical, and dental professions. \textit{Sims & Smith, FTC Assault: A Modern-day Roman Circus}, Legal Times of Wash., Dec. 10, 1979, at 18, col. 1. The McClure proposal failed by two votes to gain Senate approval. 126 Cong. Rec. S 1116 (daily ed. Feb. 6, 1980).

\textsuperscript{443} \textit{See Federal Trade Commission—Divestiture: Hearing Before the Subcomm. for Consumers
The policy views behind these measures were present in Congress in the early 1970's but were held by only a minority of the congressional membership. Thus, though not a complete break from the past, these actual and proposed restrictions signified a basic change in the attitudes and preferences regarding the role of the FTC that Congress had expressed for most of the decade. Significantly, recent experience indicates that this congressional sentiment to pursue reversal of earlier legislative policies has scarcely abated, even though FTC actions since 1980 have effectively mooted, in whole or in part, some of the antitrust restrictions that failed to win approval from the 96th Congress. Despite passage of the 1980 Improvements Act and the Commission's self-restraint, congressional advocates of further limits on the agency's competition authority are now poised to accomplish major, unfinished elements of the legislative agenda from 1980.

IV. CONCLUSION

Congress in 1914 gave the Federal Trade Commission expansive competition authority in large measure because the legislature expected to play an active role in ensuring that the agency faithfully pursued the enabling statute's goals. Rigorous congressional review of the FTC's competition programs fits squarely within the system of careful legislative oversight that Senator Cummins envisioned 68 years ago. Indeed, it should startle no one that the 97th Congress would closely appraise the Commission's antitrust initiatives or evaluate its competition policy role. From this Article's examination of the FTC's experience since 1969, and the forces that have shaped its evolution since 1914 emerge several considerations that are relevant to current congressional debate over the Commission's future.

The first consideration concerns the proper basis for altering the

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of the Senate Comm. on Commerce, Science, and Transportation, 96th Cong., 2d Sess. 1-5 (1979). If enacted the Heflin measure would have effectively barred the Commission from ordering divestiture in its ongoing monopolization suits, notably the Kellogg and Exxon cases. Id. at 9-16 (remarks of Commissioner Plofsky). Perhaps more than any other proposed antitrust limitation to receive attention in 1979 and 1980, the Heflin bill represented an abrupt departure from the tone and substance of congressional guidance in the 1970's concerning the Commission's powers. See id. at 97-110.

444. For example, since passage of the 1980 Act, the Commission has closed its investigation of the automobile industry and discontinued its cereal and petroleum monopolization suits. See supra notes 289-90; FTC Drops Cereals Case, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1048, at 154 (Jan. 21, 1982); FTC Drops Complaint in Exxon Proceeding, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1031, at A-28 (Sept. 17, 1981). These initiatives were subjects of one or more of the restrictions discussed above.

445. See text accompanying note 120 supra.
FTC's statutory charter. Although the desirability of scrupulous congressional oversight is beyond dispute, the grounds on which some members of Congress now propose to restrict the FTC's antitrust powers are questionable. Congress can legitimately probe many aspects of the agency's competition performance and ask searching questions about both the substantive merits of the Commission's antitrust programs and the skill with which the FTC has carried them out; but there is no principled basis for curtailing the agency's antitrust authority on the premise that the Commission has contradicted congressional guidance. The FTC's choice of competition programs and enforcement strategies during the 1970's was consistent with the legislature's articulated preferences. And new limiting legislation that grounds itself on the Commission's supposed past infidelity to Congress' will builds on an illusion.

An issue closely related to the consistency of FTC programs with congressional guidance is whether Congress in fact exerts meaningful influence over the Commission's choice of enforcement programs.

446. As Joseph Harris states the principle, "It is not enough for a legislature to enact policies . . . into law; it must check to see how those policies are being executed, whether they are accomplishing the desired results, and, if not, what corrective action the legislature may appropriately prescribe." J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION I (1964).

447. As Robert Katzmann commented in May of 1980, "it is clear that the [Commission's] activities in the last decade have not defied congressional policy expressions." Katzmann, Capitol Hill's Current Attack Against the FTC, Wall St. J., May 7, 1980, at 26, col. 3.

This Article has focused upon congressional guidance concerning the FTC's antitrust activities, but its conclusions are largely applicable to congressional oversight of Commission consumer protection programs, as well. Many such initiatives, which have been the subject of intense congressional criticism in recent years, received strong legislative support in the early and mid-1970's. The Commission's efforts to regulate television advertising directed toward children is an outstanding example. Several oversight and appropriations committees directed the Commission to give this program a high priority and to emphasize binding enforcement strategies, rather than voluntary, cooperative programs with industry. See, e.g., Senate Commerce Comm. 1974 Oversight Hearings, supra note 216, at 2, 309, 317, 344, 347 (remarks of Sens. Moss and Pastore); Senate 1975 Appropriations Hearings, supra note 330, at 1190-93 (remarks of Sen. McGee); see also S. REP. NO. 285, 95th Cong., 1st Sess. 53 (1977).

The [Senate Appropriations] Committee shares the Commission's growing concern about the effects of advertising on children. The Committee therefore encourages the Commission to review its current expenditures to determine if sufficient funds can be made available from fiscal year 1977 resources to implement a viable program in this critical area.

Id.

448. Weingast and Moran argue that congressional complaints that the FTC failed to abide by legislative guidance should instead be acknowledged as dissatisfaction with the prevailing policy views of Congress in the early to mid-1970's. They write: "Despite the political rhetoric about a runaway, uncontrollable bureaucracy being responsible for the 1979-81 sanctions, . . . these sanctions were instead tied to the committee changeover that brought to bear congressional control due to legislators with markedly different preferences." Weingast & Moran, supra note 9, at 46.

449. There is an active debate among commentators over the extent to which Congress controls the activities of the FTC and other regulatory agencies. One view contends that independent
Many of the proposed reforms now under congressional review stem from the assumption that Congress at present exercises only minimal control over the FTC's activities.\textsuperscript{450} A major implication of the analysis in this Article is that the substantial congruency of congressional antitrust preferences and FTC antitrust programs in the 1970's was not mere coincidence. Rather, the 1970's were a period of powerful legislative influence in the Commission's competition activities. From 1969 to 1976 in particular, Congress used virtually every tool at its disposal to move the FTC toward far-reaching applications of its antitrust powers. With great force and effect, Congress stressed that the Commission's well-being depended upon its development of ambitious, aggressive enforcement programs.\textsuperscript{451} Moreover, the history of congressional oversight since 1914 indicates that the FTC would not have pursued such a course had Congress not urged it to do so. To depict the 1970's as a time in which Congress functioned as an inattentive, ineffective overseer, leaving the FTC to account only to itself, stands the situation on its head.\textsuperscript{452}

Beyond questioning some proposed bases for limiting the Com-

\textsuperscript{450} See Weingast & Moran, supra note 9, at 46-47.

\textsuperscript{451} This was the message, for example, in Senator McGee's advice in 1971 to Miles Kirkpatrick that the Commission should err on the side of trying too much, rather than attempting too little. See supra text accompanying note 221. It was also the spirit in which Senator Stevens told Lewis Ensminger in 1973 to become a "real zealot" in executing his duties as FTC Chairman. See supra text accompanying note 224.

\textsuperscript{452} The argument that the Commission operated in the 1970's without effective external constraints assumes that institutions other than Congress which might have restrained the agency declined to do so. In assessing the role of the federal judiciary in this period, for example, some commentators have concluded that the federal courts gave uncritical review to FTC cases that rested upon disputed or expansive applications of the agency's authority. See, e.g., K. Clarkson & T. Muris, supra note 9, at 35-49. Some decisions of this period, such as the Supreme Court's opinion in FTC v. Sperry & Hutchinson Co., 405 U.S. 223 (1972), unquestionably gave a broad reading to the agency's substantive powers. But an arguably truer measure of the closeness of judicial scrutiny in the 1970's and its influence upon the Commission is the manner in which courts, in the latter part of the decade, reviewed the products of specific, concrete attempts by the FTC to apply what nominally was a generous definition of its authority. A review of decisions on the merits by the federal courts and the Commission itself in antitrust cases decided from 1977 to 1980, however, reveals no apparent inclination to give the FTC a free rein in its choice and prosecution of antitrust theories. See, e.g., Official Airlines Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980), cert. denied, 101 S. Ct. 1362 (1981); Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); In re E.I. du Pont de Nemours & Co., 96 F.T.C. 653 (1980).
mission’s authority, this Article also suggests several factors that deserve serious consideration during the current congressional debate. One important factor in weighing the merits of the agency’s antitrust performance would be to review what Congress expected of the agency throughout the 1970’s. From the FTC’s creation in 1914 to the present, Congress and the nation generally have expected things of the Commission at different times. Any contemporary evaluation of the FTC’s record that does not take into account the rules to which the Commission was expected to conform in the 1970’s cannot serve as a reliable guide for prescribing the agency’s future activities or rewriting its statute. A complete and accurate assessment must necessarily acknowledge changes in the views of congressmen and commentators about what constitutes good performance.\textsuperscript{453}

Historical retrospection would shed light upon the Commission’s record in at least one other important respect. By almost any yardstick, the past decade has differed markedly from any in the FTC’s past. The tremendous expansion (by way of judicial interpretation and statute) of the agency’s substantive, remedial, and investigatory powers; major, sustained budget increases; and the sudden, substantive reorientation of its competition and consumer protection agendas placed immense strains on the Commission. These developments required it to simultaneously develop new planning and management systems and to initiate programs that fulfilled the more ambitious role Congress expected it to perform. Recent years seem to have produced a gradual consolidation

\textsuperscript{453} The assumptions by which commentators have criticized regulatory agency performance have depended greatly on the age in which the criticism is delivered and the enforcement preferences of the commentators. For example, in his lectures on The Administrative Process in 1938, James Landis described the main failing of administrative agencies in these terms:

\begin{quote}
The pressing problem today... is to get the administrative to assume the responsibilities that it properly should assume. Political and official life to too great an extent tends to favor routinization. The assumption of responsibility by an agency is always a gamble that may well make more enemies than friends. The easiest course is frequently that of inaction. A legalistic approach that reads a governing statute with the hope of finding limitations upon authority rather than grants of power with which to act decisively is thus common.
\end{quote}

\textit{J. Landis, The Administrative Process} 75 (1938). His lectures were given at a time when, as he put it, “the drive against monopoly on the part of the Federal Trade Commission [had] dwindled into a mere campaign against false advertising...” Id. at 113.

As this Article has suggested, congressional expectations can vary considerably over time, as well. For example, one cannot fully understand the origins or approach of the recently concluded generation of government monopolization cases concerning the computer, telephone, breakfast cereal, and petroleum industries without reference to the congressional and academic ferment that supported such initiatives in the late 1960’s and early 1970’s. See supra note 444; \textit{Justice Settles AT&T Case,} [Jan.-June] \textit{Antitrust & Trade Reg. Rep.} (BNA) No. 1047, at 82 (Jan. 14, 1982); \textit{Antitrust Division Dismisses IBM Case,} [Jan.-June] \textit{Antitrust & Trade Reg. Rep.} (BNA) No. 1047, at 88 (Jan. 14, 1982).
of the agency's expanded resources, authority, and management and planning reforms. Outward signs of this trend include stronger emphasis on planning, research, and preliminary screening in choosing and shaping competition programs; closer attention to program management and the refinement of information systems on which such management greatly depends; and greater sensitivity to theoretical and practical concerns affecting the economically sensible application of competition policy. The legislative activity of the past few years often has tended to obscure these significant developments.

Finally, a broad historical review would offer a useful perspective on what substantive functions the FTC should serve in the antitrust field. Congress in 1914 perceived a serious need for an administrative body that could incrementally adjust the boundaries of antitrust law to conform with modern learning in law and economics. As it prescribes the FTC's antitrust role for the 1980's, Congress might profitably consider whether its predecessors' conception of the agency in 1914 suits its needs today. This issue, not an imagined refusal of the Commission to heed legislative guidance, arguably lies at the heart of the matter.