Letters

We welcome letters from readers, particularly commentaries that reflect upon or take issue with material we have published. The writer's name, affiliation, address, and telephone number should be included. Because of space limitations, letters are subject to abridgment.

Antitrust and the FTC

TO THE EDITOR:

Ernest Gellhorn has written a thoughtful and provocative article ("Two's a Crowd: The FTC's Redundant Antitrust Powers," *Regulation,* November/December 1981) that will sharpen the ongoing debate on whether the public interest would be better served by a monopoly in antitrust enforcement. While I might be persuaded to agree with him that one agency could do the job, I'm afraid I would prescribe a different remedy from his.

Congress created the FTC for several reasons: to reach anticompetitive problems in their infancy, to provide specialized competitive expertise that the courts lacked, and to ensure vigorous antitrust enforcement. One of the commission's most important roles is to help shape the legal and economic analysis that is used to interpret our antitrust laws. Because many of today's competitive problems are so complex, the courts increasingly have applied rule-of-reason analyses instead of routine per se rules—a critical change, for it is precisely in this area that the commission, which can give concrete definition to the rule of reason, has a distinct institutional advantage over the Antitrust Division. Indeed, Gellhorn recognizes the commission's importance in this regard, citing the *DuPont* and *Heublein* decisions and the agency's recent emphasis on analyzing horizontal problems in the professions.

Gellhorn quarrels with the commission's case selection, even on horizontal matters, and states that the Antitrust Division could satisfactorily handle "complicated cases" adequately. The wisdom of the commission's selection in the past, like the Antitrust Division's, will no doubt consume pages of commentary in future law review articles. But the commission's long-term impact is more accurately measured, in my judgment, by the end product of those cases: the rationale and guidance expressed in the commission's final decisions and orders, where it has increasingly incorporated relevant economic and business justifications into its legal framework. Moreover, as antitrust analysis becomes more sophisticated, the commission's adjudicative process will be an even more relevant forum for exploring economic and legal issues fully and carefully. Our analytical work will help the courts as well, as they grapple with antitrust cases of increasing complexity and economic import. The commission's unique decision-making structure lets it shape the contours of antitrust policy in a way that the Antitrust Division, with its necessarily limited prosecutorial focus, cannot.

Much of Gellhorn's criticism focuses on the commission's challenges to vertical restraints. I share his view that these practices should generally be treated with less hostility than they have in the past. I would point out, however, that the commission's recent record shows a clear shift in that direction, particularly with respect to non-price restraints. As for resale price maintenance, which I believe deserves close scrutiny because of its greater potential for adverse horizontal effects, the commission's Bureau of Economics has recently begun a thorough review of empirical studies, past commission cases, and other evidence to see whether a per se standard of illegality is still warranted. This work, too, illustrates the commission's special ability to guide the future direction of antitrust enforcement with sound economic analysis.

Thus, while it is possible that the Antitrust Division could handle all antitrust matters (although around 75 to 80 percent of its work has traditionally been confined to criminal price-fixing cases), that approach would ignore the inherent value of having two agencies, with different areas of institutional expertise and power, responsible for preserving and enhancing competition throughout our economy. Rather than overcrowding the field, the combined resources of the FTC and Antitrust Division guarantee that we enjoy the benefits of healthy and vigorous marketplace competition.

David A. Clanton,
Commissioner,
Federal Trade Commission

TO THE EDITOR:

One can readily conclude from Ernest Gellhorn's excellent article that he is displeased with the cases the commission brought during the last six years. Whether he makes a convincing case for the drastic step of abolishing the FTC's antitrust jurisdiction is another matter. (Here and throughout, I speak only for myself, not for the commission or any of its members.)

Despite Professor Gellhorn's insightfulness, his litany of thumbnail case sketches is no substitute for a careful review of the merits of each individual case, which the limitations of space allow neither him nor me. However, one generic response to a generic criticism is illustrative. Gellhorn criticizes the commission for bringing price-fixing cases against small firms in small industries, such as pest controllers and roofing contractors. Yet if the commission did not bring such cases, small businesses—which add up to a large amount of commerce—would soon perceive that they were largely exempt from the law.

Gellhorn contends that the commission's consumer protection duties inevitably taint the free-market principles that should govern its antitrust duties. I disagree. Competition and consumer protection share a common, market-oriented approach. The competition side of the FTC Act ensures that the free market produces a wide range of goods at the lowest price, without any manufacturer misconduct such as price-fixing. The consumer protection side of the act then ensures that consumers can freely choose from among these various goods, without any seller misconduct such as coercion or deception. Properly administered, both sides protect the free market. The Miller administration at the FTC has already begun

to demonstrate this, though Gellhorn's article was written before the new management took over.

The next supposed structural failing of the FTC is susceptibility to special interest and congressional pressure. The Department of Justice is also familiar with political and private pressure, as Gellhorn admits, so there is no comparative advantage there. To abolish the FTC's antitrust authority, however, would be the ultimate caving-in to private interest pressure; indeed, that is just the prescription now sought by certain groups whose anticompetitive conduct the FTC has vigorously attacked. The FTC must be vigilant lest Congress or private interest groups sway its prosecutorial judgment, but so must every other government agency.

Finally, Gellhorn argues that all worthwhile FTC cases could have been handled equally well by the Justice Department. While most FTC actions proceed on antitrust theories which Justice is capable of pursuing, many cases benefit from the special procedural and substantive terms of the FTC Act. For example, the commission has been able to extend antitrust principles to professional associations, thus settling an uncertain legal issue, without subjecting the members of those groups to the possible unfairness of private treble damage actions as a Justice Department case would have done. And, contrary to what Gellhorn implies, the statutes administered by the Department of Justice do not exhaust all possible anticompetitive behavior. For example, pricing above the competitive level in an industry where there are few firms may be made much easier by certain practices short of an agreement between those firms, but the Sherman Act condemns only an agreement. The economic result, however, is the same: higher prices and less output; and only the FTC can prevent this result.

Moreover, Gellhorn entirely overlooks the tremendous congestion in federal district courts, where Justice must try its cases, and the greater sophistication of the FTC's judges and commissioners in antitrust matters compared with federal judges. Gellhorn's recitation of dubious decisions did not extend beyond FTC opinions. It is accepted teaching among economic analysts, however, that some of the greatest potential for misuse of antitrust law stems from misguided federal court decisions. Resale price maintenance, for example, which Gellhorn believes has been wrongly condemned, remains illegal per se by the Supreme Court's judgment, not the FTC's.

Gellhorn's basic concerns stem from his view that the commission has brought economically unsound cases in the past. As he himself acknowledges, however, the commission has done much better in recent years. I and other members of the present management are committed to completing that transformation.

Thomas J. Campbell, Director,
Bureau of Competition, FTC

TO THE EDITOR:

Ernest Gellhorn argues that the FTC's enforcement of the antitrust laws has not been limited to cases that enhance economic efficiency, not because of the agency's leadership, but because of two flaws in the agency's institutional structure.

First, he argues that the commission's consumer protection mission is not directed at economic efficiency, and that this affects the conception of its antitrust mission. This is a "structural" argument only if the substance of the consumer protection program results from something other than the views of the agency's leadership. If Gellhorn were chairman of the FTC, would he be unable to limit consumer protection cases to those that enhance economic efficiency? If some inexorable institutional forces would bind his hands, he would have the beginning of a structural argument. But he identifies no such forces.

The other reason Gellhorn cites is the FTC's vulnerability to "interest group pressure," exerted either indirectly through Congress or directly on the agency. Regarding the former, Gellhorn does not seem to say that the problem is Congress's "pressuring" the FTC to enforce specific antitrust laws (including those, like the Robinson-Patman Act, that are not directed at economic efficiency). Rather he suggests that Congress uses the FTC to obtain special favors for constituents. Gellhorn cites only one instance where he believes the commission "caved in" to congressional pressure—the 1973 complaint against the oil companies. This is a very curious example of special favors for constituents. And, in any event, one instance hardly makes a very convincing case, especially since the FTC might well have issued the complaint even without congressional pressure.

Gellhorn also asserts that certain matters—a consent order prohibiting a tying arrangement for mobile home sites, for example—can be explained only by interest group pressure applied directly on the agency. I happen to agree that such a consent order is misguided, but it is a matter on which reasonable minds can and do differ. Those who disagree with me on principle are quite capable of acting on those principles without any "interest group pressure."

I am not saying that reducing the amount of "improper influence" is not a worthwhile objective—though, since "interest group pressure" is the very heart of a democratic system of government, one must carefully define "improper." (Surely Gellhorn doesn't think that all efforts to persuade agency officials to undertake cases not enhancing economic efficiency are improper by definition.) Nor am I saying that various institutional structures may not differ in their susceptibility to improper influence. But Gellhorn does not identify or discuss these differences. He merely concludes that the FTC has been improperly influenced because it does things he thinks it shouldn't.

Political leadership has a dramatic effect on what government agencies do. Since Paul Rand Dixon was a great champion of the Robinson-Patman Act, it is not surprising that the FTC spent a lot of resources enforcing that act under his chairmanship. And since subsequent chairmen have not thought that the antitrust laws should be limited to achieving greater economic efficiency, it is not surprising that the FTC's antitrust record under these chairmen is found wanting when measured solely against the criterion of economic efficiency. Will the cases produced by Jim Miller and Tom Campbell be just like those produced by Mike Pertschuk and Al Dougherty? As Gellhorn concedes, the FTC did radically change the direction of its antitrust program in the 1970s, demonstrating that changes in substantive direction are not beyond the institutional capacity of the agency.

Gellhorn might respond that the commission's collegial structure and the fixed terms of its five commissioners will keep the commission's politically appointed management from shaping enforcement policies. If the management wants to do something that requires the approval of the full commission, such as issue a complaint, its power is indeed limited by the need to convince a majority of commissioners. But that does not explain why the

commission would undertake projects opposed by management. The FTC operates on a "bottom-up" rather than a "top-down" basis. New law enforcement initiatives originate with the staff and filter upwards through the hierarchy to the commission. If the management does not want to forward a proposed case to the commission, it can simply close the matter on its own accord. This means, as a practical matter, that the management has tremendous, virtually unreviewable power to eliminate "bad" cases.

As one who has observed and participated in numerous FTC management evaluations of proposed antitrust investigations, I am keenly aware of differing management views regarding the appropriate objectives of antitrust enforcement, and also of the frequent reasonable disagreements about whether a case will enhance economic efficiency. I am not aware of any unique "structural" factors that force the agency's managers to adopt positions they disagree with on principle. One can only wonder why Gellhorn so assiduously avoids the fact that the commission's previous leadership simply had a different vision than his. Gellhorn's "structural" argument looks suspiciously like a "substantive" argument in disguise.

Despite my difficulties with Gellhorn's analysis, I think that a structural approach has promise for analyzing government enforcement of the antitrust laws. Such an approach should focus on the structural features of the "ideal" antitrust enforcement agency, and on whether they are more easily realized in an executive branch or an independent agency, and in one agency or two. Attacking the FTC's substantive record does not advance understanding of these structural considerations.

Thomas C. Armitage,
University of Washington

TO THE EDITOR:

Gellhorn's argument is so overdrawn as to be a little misleading. He bases his case on two lines of evidence: first, he does a biopsy of forty-four final orders issued by the commission in 1979 and finds about two-thirds "unjustified"; second, he reviews major commission cases and programs since 1975 and finds almost all of them similarly unproductive and wrong-headed.

On the first point, it should be understood that Gellhorn is applying a very special set of standards. He regards cases as justified only if the practices challenged are likely to create a cartel or exclude competitors, and he would usually leave even practices of that sort unchallenged if there were a significant efficiency defense.

That is an exceedingly narrow view of antitrust, one that has not been adopted by Congress and the courts. It's a little like defining "crime" to include only homicide and then complaining that the FBI is wasting 95 percent of its resources.

To take one glaring example, Gellhorn tags twelve vertical price-fixing cases as "unjustified"—even though the Supreme Court could not have been clearer in ruling that those arrangements are illegal regardless of any claimed efficiencies. While conservative antitrusters may find that rule cannot be supported, it's hardly fair to blame the FTC for enforcing the law in line with Congress's intent as interpreted consistently by the courts.

His argument that the FTC should be abolished because its *major* cases and programs since 1975 haven't measured up to his standards is similarly flawed. This approach must be handled with care because, by definition, it ignores the unglamorous, day-to-day enforcement on price-fixing, mergers, and other competitive problems that are the bulk of the FTC's work.

Gellhorn does spotlight some clear commission errors. The complaint against DuPont for taking advantage of its superior efficiency by expanding capacity rather than raising prices, a complaint that was eventually dropped by the full commission, may have been the "wrongest" case in ninety years of antitrust enforcement. But Gellhorn goes wrong when he tries to show that all the commission's other initiatives were comparably misguided.

He says the commission sued Borden when it was guilty of nothing more than selling ReaLemon at low prices. In fact, the central theory of the case was that Borden, with 90 percent or so of the market, was guilty of predation against small new entrants by selling close to or below out-of-pocket cost—a conventional theory even by conservative standards. Incidentally, a court of appeals affirmed the commission decision last week in a two-to-one vote. Maybe the court ought to be abolished too.

Gellhorn also cites some criticism of the FTC's "costly line-of-business program," repeating the charge that it is ineffective and "probably misleading." But the courts have consistently rejected those charges. In fact, the line-of-business data have been the basis of some remarkable new scholarship at the commission challenging conventional *liberal* views on merger policy. So much for the charge (not made by Gellhorn, but made by others) that the commission is a kangaroo court.

The commission accounted for more than its share of mistakes in the 1970s, and Gellhorn, as one of its ablest but severest critics, is adept at pointing them out. His case for merging antitrust enforcement in the Department of Justice is a formidable one, although I don't agree with it.

What I find objectionable in Gellhorn's assault is the tendency to simplify the issue by painting the commission's initiatives as virtually always misguided and inept. Life is rarely that simple. A more impressive case against the FTC would acknowledge its achievements, expose its mistakes, and trust AEI's readers to make their own informed judgments.

Robert Pitofsky,
Georgetown University Law Center,
Former Commissioner, FTC

ERNEST GELLHORN responds:

It may be true, as this quartet of FTC defenders would have it, that a more sympathetic reviewer could construct a case for the continuation of the FTC's antitrust authority from the very same events which, in my view, justify its demise. But I sought to develop a larger picture, going beyond individual prosecutions and other major actions, and focusing on what it is that continually makes the FTC misuse its resources and prosecute trivial or even beneficial business practices. It is therefore disappointing, and I think ultimately damaging to the defenders' case, that they merely pick away at bits and pieces of my analysis and ignore my larger challenge—namely, why has the FTC fared so badly compared with the Antitrust Division in antitrust enforcement?

Even accepting, for the sake of argument, that antitrust enforcement ought to be based on more than efficiency considerations, the efforts of these past and present FTC commissioners and staffers to defend their actions are so insubstantial that they provide further evidence for my case. David Clanton defends the FTC's existence on the grounds that, in exceptional cases, the commission's opinions have cor-

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rected egregious errors by the staff and the commission itself in filing misguided complaints. Thomas Campbell would have us believe that prosecutions of trivial price-fixing cases are necessary to convince all businesses that the law will be enforced no matter how silly the violation or how great the resource commitment. He also ignores the FTC's constant use of its prosecutorial authority to "fix" the competitive contest in favor of those with greater political skill. And he rewrites the record on antitrust prosecution of professional groups, which in fact was initiated by the Justice Department several years ago, before the FTC belatedly jumped on the bandwagon.

Robert Pitofsky, on the other hand, blames the FTC's price-fixing prosecutions on the Supreme Court, rather than the commission itself. But the Court's comments on the subject during the past dozen years consist only of dicta—and cannot be held responsible for the FTC's persistent commitment of resources to trivial cases in this area. Of course, he (and Campbell) are right that a summary review like mine must simplify matters and that a longer essay could provide fuller details on my criticism of particular cases. What he fails to address is the overriding question of why, as he concedes, so many FTC complaints are persistently wrong-headed.

More interesting, in this respect, are Thomas Armitage's responses to my view that the FTC's miserable record is due in part to its inconsistent consumer protection responsibilities and special vulnerability to interest-group pressures. He misreads my argument on the first of these two, seeing it as a claim that the FTC never could develop a rational consumer protection program (an issue I did not address) and he never says whether the interventionist bias of the current program has in fact skewed the agency's antitrust performance. The interest-group pressure argument, moreover, focused more on the FTC's pursuit of a few appliance dealers and tiny apparel manufacturers than on the oil company case.

Armitage's analysis of some factors that affect the FTC's performance is useful, and I agree with his suggestion that what one person sees as improper pressure, another sees as principled analysis. Unfortunately, he leaves us with no explanation or further understanding of why the FTC's antitrust record is such a dismal one.

Government and Science

TO THE EDITOR:

William Havender's "Politicians Make Bad Scientists" (*Regulation*, November/December 1981), which reviews the massive work of Sir Richard Doll and Richard Peto, focuses on their criticism of two government papers on the causes of cancer. As Havender mentions, the Doll and Peto monograph (*Journal of the National Cancer Institute*, June 1981) is far more than an attack on those two papers: it is a thorough description of what is known about the causes of cancer in the United States today. In the course of that description, the authors refer often to articles published by government scientists in scientific journals, and some of their arguments depend on the data generated by and the conclusions reached by government scientists.

To characterize the two government reports as "science" may be, as Doll and Peto point out, inappropriate. If so, it would be preferable to regard the authors of those reports not as scientists but as government officials making policy statements. This creates some difficulty, since it may be less than obvious which role, scientist or policy maker, an individual is playing. But it would remove the temptation of asking, as Havender did, "How good a scientist is government?" In fact, as we all know, government employs many scientists. Like scientists anywhere, some are very good, some good, and some not so good. It is impossible to decide how good a scientist government is. Government is not a scientist.

Finally, Doll and Peto acknowledge in their opening paragraph that their study was commissioned by the Office of Technology Assessment. That is to say, they produced the paper in response to a request from government scientists. The Doll and Peto paper was the basis of part of OTA's 1981 Assessment of Technologies for Determining Cancer Risks from the Environment. Efforts by government employees that please individuals with certain convictions might be acknowledged as freely as the displeasing ones are criticized.

Michael Gough,
Office of Technology Assessment

WILLIAM HAVENDER responds:

Had I opened my piece with the question, "How good a scientist is industry?" I rather doubt that Gough would have replied in his somewhat huffy manner, "In fact, as we all know, industry employs many scientists. Like scientists anywhere some are very good, some good, and some not so good. It is impossible to decide how good a scientist industry is. Industry is not a scientist." Instead, I expect that he would have easily recognized my question as an allusion to and an abstraction of the reigning *Zeitgeist* —namely, the taken-for-granted presumption that researchers and scientific organizations receiving industry funds must automatically be tainted, and their statements should accordingly never be accepted on faith but instead subjected to searching examination when not rejected outright.

Analogously, the question that I did ask was directed—and I think this should have been obvious from the context in which I put the question—to the indulgent *Zeitgeist* presumption concerning statements coming from government officials in the name of science and bearing on upcoming regulatory decisions. Under this presumption, such statements may be taken in good faith as essentially valid or at least honest, since government, unlike profit-seeking industry, has no motives other than to search for truth. The instance I highlighted, which was solidly documented by Doll and Peto, shows that this presumption can be wrong on both counts: not only was the Califano report inept at a very elementary level, but the attempt that was made to funnel its novel conclusions directly into policy-making arenas while bypassing the normal scientific practices of identified authorship, peer review, and journal publication casts a grim light on its integrity as well. Given the wide ramifications that the Califano report might have had on regulation, industry, consumer and worker welfare, and the general economy, this is no minor matter. And because there are other instances where novel scientific findings, shown only much later to be in error, have been hastily used by government officials to influence pending regulatory decisions, this failure of the presumption is by no means unique. Since this presumption, concerning not basic science itself but the process by which government *uses* science to shade policy making, is what I wished briefly to point up and to question in my introductory sentence, I think the query "How good a scientist is government?" was, *pace* Gough, just the right one to ask. ■