Ernest Gellhorn

TWO'S

The FTC's Redundant

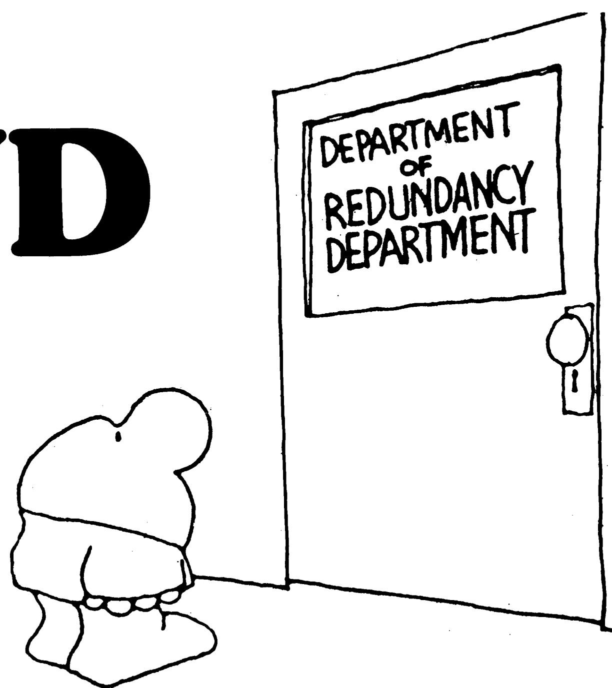
ANTITRUST, ONE OF THE federal government's oldest regulatory regimes, began with the Sherman Act of 1890. For almost a quarter century, its enforcement rested solely with the Justice Department. However, when court rulings narrowed the act's interpretation so that business practices were tested by a "rule of reason," Congress responded by passing the Clayton Act and the Federal Trade Commission Act, both in 1914. In addition to wanting to reach business practices leading to monopoly, Congress was concerned that the Justice Department's enforcement of these new laws in the federal courts—the Sherman Act's scheme—would be inadequate. The laws were imprecise, and business was entitled to further guidance. Also, the conservative federal judiciary might block their vigorous application. As a consequence, the Federal Trade Commission (FTC) was given concurrent authority with the Justice Department and private plaintiffs to enforce the Clayton Act and exclusive responsibility to enforce the FTC Act's prohibition of "unfair methods of competition." In practice, the overlap in the responsibilities of the two agencies in the antitrust arena is almost complete.

This is not to say that there are no important differences between the two agencies and their enforcement schemes, but only that most distinctions pertain to operational formats and sanctions. The FTC is limited to cease-and-desist orders, whereas the Justice Department can seek criminal and money penalties as well as injunctive relief. The FTC combines prosecutorial, rulemaking, and adjudicative functions, while the department's only express powers are prosecutorial. Also, the FTC's actions are heard first by administrative law judges and then by the commission acting in its adjudicatory capacity before being reviewed in the courts of appeal under a deferential administrative law standard; the Antitrust Division of the Justice Department, on the other hand, must present its cases to a judge or jury for *de novo* examination in a federal district court before they are reviewed in the courts of appeal on the somewhat more demanding "clear error" test. In addition, the FTC is an independent agency run by five commissioners (at most three from one political party) appointed for seven-year terms; by contrast, the Antitrust Division is a bureau in the Justice Department, headed by a single official appointed by the President and serving at his discretion. Finally, the FTC, which has a large staff of economists, is not confined to antitrust issues; indeed, over half of its time and resources are committed to consumer protection matters. The Antitrust Division does not have such dual responsibility.

The question arises, therefore, whether these and other differences between the two agencies are so distinctive that the sharing of antitrust responsibility adds substantially to the quality of enforcement. This essay concludes that despite innumerable efforts to reform and revitalize the FTC, its antitrust enforcement record is a dismal failure. Moreover, the problem is not inadequate personnel

Ernest Gellhorn is T. Munford Boyd professor of law at the University of Virginia.

A CROWD
Antitrust Powers



© 1981, Universal Press Syndicate. Reprinted with permission. All rights reserved.

or leadership, but is inherent in the FTC's redundant antitrust assignment, its inconsistent consumer protection responsibilities, and its particular vulnerability to special interests. Thus, unless radical surgery is undertaken, the commission seems certain to continue, even with new leaders and staff, its indefensible and often irrational antitrust program. The conclusion suggested is that the FTC's antitrust responsibilities should be eliminated.

The FTC's Antitrust Record

The FTC has been sharply criticized for failing to set antitrust priorities since almost the day it was formed. Through the decades there have been persistent efforts to reform and revitalize nearly every aspect of its antitrust activity—only to be followed by more failures. Twelve years ago a study committee of the American Bar Association found the FTC's antitrust (and consumer) enforcement resources seriously misallocated and strongly rebuked the commission for focusing on counterproductive price discrimination and other trivial cases. One member of the group, Richard Posner of the University of Chicago Law School, presented his own review of the 260 restraint-of-trade cases brought by the FTC during fiscal 1963 (the last year for which an official volume of FTC decisions was available). He concluded that 99.5 percent of the cases were "misguided." Indeed, he went so far as to contend that none of the 260 seemed "justified on economic grounds" except for one merger case and perhaps four conspiracy cases (which in his opinion should have been brought, if at all, by the Department of Justice).

More recently the chief criticism of the FTC's antitrust performance has taken a different tack. Present-day critics claim that the FTC has been too activist, pursuing cases against structural monopolies and vertical restraints without defensible economic theories or persuasive evidence. These challenges have not been based, however, on a review of the commission's overall antitrust program. Most, in fact, seem focused on this or that particular action. In short, any decision about whether we need one government antitrust enforcer instead of two requires a systematic and thorough examination of the FTC's recent record.

To satisfy this need, I evaluated the agency's antitrust performance for two periods. First, I reviewed all forty-four of the final orders issued by the commission in antitrust cases in 1979 (the most recent calendar year for which an official volume is available). Then I took a longer look and sought to identify the major cases in the last six years—complaints, adjudications, orders, and decisions—on which the FTC might stake its claim for antitrust

jurisdiction. In both reviews, I have applied an efficiency-based consumer welfare standard to measure the commission's actions: were they designed (or likely) to increase efficiency and ensure a more competitive market? More specifically, were the practices challenged by the FTC likely to create a cartel or exclude competitors from the market, in which case the prohibition would increase competition, or were they likely to make the firm more efficient and enable it to offer its products and services at a lower price, in which case the prohibition would decrease competition?

The FTC's Antitrust Decisions in 1979. The primary reason for the harsh criticism of FTC antitrust actions during the 1960s was the commission's fixation on alleged price-and-service discrimination prohibited by the Robinson-Patman Act. Posner, for example, showed that in fiscal year 1963 nearly 96 percent of the FTC's orders involved assertions of such offenses. He argued that these challenged practices seemed to be no more than legitimate and desirable price or service competition, and the FTC appeared to be intervening at the behest of competitors seeking freedom from rivalry. Moreover, the fifteen horizontal-conspiracy, exclusive-dealing, and merger cases brought by the FTC seemed equally questionable. Close examination revealed that they in fact involved trivial market shares in situations where the challenged practices could not have adversely affected competition or, if the alleged conclusions were supported by the facts, deserved harsher treatment available only under Justice Department criminal prosecutions. The ABA committee report reached many of the same conclusions and likewise asserted that the FTC had "mismanaged its own resources."

Today this type of wholesale criticism cannot be directed so readily at the FTC's antitrust actions. Current cases, as the table shows, reflect a massive shift in the allocation of FTC prosecutorial resources away from Robinson-Patman violations and toward three areas: mergers, horizontal conspiracies, and vertical arrangements. It is generally agreed that horizontal mergers and horizontal conspiracies can produce serious anticompetitive effects. Also, many vertical arrangements (in particular, resale price maintenance schemes and tie-ins) are still condemned per se under Supreme

FTC ANTITRUST DECISIONS, 1979

Clayton Act	
Section 7, mergers	
horizontal	10
conglomerate	5
Section 8, interlocking directors	1
	16
FTC Act, Section 5	
Horizontal conspiracies	12
Vertical	
resale price maintenance	8
tie-ins	5
exclusive dealing, territorial	2
price discrimination	1
	28
Total	44

Source: *FTC Decisions*, volumes 93-94.

Court rulings. (Under a per se rule, proof that the defendant engaged in the offensive practice is enough to establish liability; evidence of purpose, effect, or justification is irrelevant.) Thus by 1979 the commission's actions appeared, at least superficially, to have responded to the ABA study group's recommendation to use its powers more effectively and creatively. Many of these orders involve areas where the FTC's special expertise in making economic evaluations of complex arrangements and business motives could be particularly important. Based on surface evidence, in other words, it could be the current criticisms of FTC antitrust prosecutions, rather than the prosecutions themselves, that are misdirected.

... closer examination reveals that all vertical cases, most merger challenges, and many of the horizontal conspiracy complaints concluded in 1979 were unnecessary or counterproductive.

But closer examination reveals that all vertical cases, most merger challenges, and many of the horizontal conspiracy complaints concluded in 1979 were unnecessary or counterproductive.* In general, the matter at issue

*This discussion summarizes a documented analysis of the forty-four antitrust decisions issued by the FTC in 1979. It was first given as the Alumni Distinguished Lecture in Jurisprudence at the University of Tennessee on October 21, 1981, and will be published in the *Tennessee Law Review*.

in these actions was either a trivial event that could not have injured competition or an arrangement that would have made the firms more efficient. It seems clear that the FTC pursued a highly interventionist antitrust policy, often grounded in a misunderstanding of how markets work and how individual firms operate in competitive markets.

For example, ten of the mergers questioned were horizontal mergers between firms competing in the same product or geographic market. Horizontal mergers are worrisome if they involve such large market shares that they might either lead to monopoly or allow a cartel or oligopoly to operate more easily. However, some mergers can be justified even when a market is highly concentrated, depending on entry conditions, the merger's effect on efficiency and competition, technological changes, and so forth. Applying this standard, at least half of the horizontal merger cases were misguided. The mergers in question did not involve large market shares, concentrated industries, or industries with high entry barriers. Indeed, several of them seem wholly inconsequential, such as the doomed attack on Pillsbury's acquisition of a small pizza producer with 2 percent of the market, or vindictive, such as the celebrated *Lancaster Colony* complaint that was dismissed only after the glassmaking firm had closed its plant and was forced out of business because of the FTC challenge. A similar review of the five conglomerate merger attacks shows that all but one were equally quixotic. Thus nine of fifteen of the merger actions concluded in 1979—or three-fifths—appear counterproductive.

The FTC's pursuit of horizontal conspiracies under section 5 of the FTC Act has considerably more justification. In the past such prosecutions have been criticized as inadequate because the FTC's cease-and-desist powers are too mild for moving against cartel or exclusionary conduct; the criminal or severe monetary penalties available to the Justice Department in Sherman Act prosecutions have seemed more appropriate. That criticism, however, could be directed at only two of the twelve horizontal conspiracy cases completed in 1979. One involved an exchange of bid information by distributors controlling 70 percent of the public safety and communications equipment market, and the other a supply agreement among bearing manufacturers dividing up the automotive "after-market." That is, both allegedly involved arrangements (price fixing or market division) that have long been per se antitrust violations and therefore deserve the severe punishment that only the Department of Justice can invoke. Even with respect to these two cases, however, it could be argued that the economic, legal, and factual issues were so complex that expert review before the FTC, rather than *de novo* consideration by the courts, was appropriate.

Of the twelve horizontal conspiracy cases decided by the FTC in 1979, six involved professional trade association activities. These activities, pursued under the guise of enforcing professional ethics, sought to inhibit price-and-service competition through overly restrictive rules on advertising, bidding, and similar practices. This seems a situation where FTC prosecution, rather than the more stringent Justice Department sanctions, is appropriate, since the law has only recently been clarified to establish that professional standards are not exempt from antitrust scrutiny.

The remaining four orders in horizontal cases likewise seem inappropriate for Justice Department prosecution—but probably inappropriate for FTC action as well. These were consent orders between the FTC, on the one hand, and local trade associations (of pest controllers and of roofing contractors) and a joint buying group of appliance dealers, on the other. All the cases involved narrow, localized arrangements among seemingly uninformed and very small businessmen who clearly did not have the ability to exclude others or otherwise control the market. Indeed one wonders why the FTC thought it worthwhile to chase down a couple of dozen roofing contractors having no apparent market power, or allowed itself to act in effect as the agent of competitors who objected to the greater efficiencies created by the buying group of appliance dealers. In all, then, one-third of the FTC horizontal conspiracy cases were ill-conceived, although only one of them (that involving the appliance dealers) seems positively harmful.

On the other hand, all sixteen of the vertical restriction cases completed by the FTC in 1979 seem unjustified under a market-oriented standard—particularly because the courts by that time had already begun moving toward

a more rational position. Prior to 1977, the Supreme Court held a manufacturer's restrictions on the location of its dealers' stores and the territories they served to be per se illegal. However in 1977 (*Continental T.V., Inc.* v. *GTE Sylvania, Inc.*), the Court recognized that vertical restrictions "are widely used in our free market economy" because they "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." It ruled that vertical restrictions were to be "policed under the rule of reason" and were to be condemned only if their adverse competitive effects substantially outweighed their likely benefits.

Instead of being receptive to this change, the FTC has continued to fight it at every opportunity. For example, twelve of the vertical cases involved resale price agreements and tie-ins policed or imposed by manufacturers. While both kinds of arrangements are still prohibited per se and the agency thus cannot be criticized for ignoring precedent, it is difficult to imagine how it could have selected a more meaningless set of cases or found ones where vertical restraints were less likely to have anything but positive market effects. The resale price maintenance cases primarily involved the apparel industry, which is noted for intense rivalry, ease of entry, and rapid shifts in customer loyalty. Similarly, the commission applied the per se prohibition of tie-ins (a rule long chastised by virtually every observer) to tiny manufacturers of mobile homes that conditioned the lease of a trailer park site on the requirement that one of their homes be placed thereon. In sum, the FTC committed substantial resources to a campaign against vertical restrictions that ignored the size or position of the firms involved, the reasons for the restrictions, or their likely impact—thus inhibiting competitive pressures.

By a consumer welfare standard, then, the commission of 1979 appears not much better than the agency criticized so harshly a decade ago. At best fourteen of forty-four actions, only about one-third, seem justified—and the FTC gets credit in this accounting for dismissing some highly questionable complaints that probably should never have been filed. In none does it appear that the FTC offered anything distinctive in terms of economic insight, possible remedy, or procedural advantage. All could have been brought with at least equal effectiveness by the Department of Justice—and casual observation suggests that the department (then or now) would not have pursued most of the cases condemned here.

By a consumer welfare standard . . . the commission of 1979 appears not much better than the agency criticized so harshly a decade ago.

Major Cases since 1975. When I looked at a larger slice of FTC activity—the major cases active since 1975—the result was not much better. Few of these actions can be said to have promoted the consumer's welfare.

The two most important antitrust cases in progress in 1979 were those against the petroleum industry (begun in 1973) and the ready-to-eat cereals industry (begun in 1972). The former consumed almost a third of the FTC's antitrust budget in that year and the latter nearly as much. Both cases involved major industries and were viewed as significant tests of antitrust theory or the commission's authority. And both were rife with problems. The oil company case, which had already dragged on for several years without approaching trial, was devoid of any supporting theory or facts (other than the notion that bigness equals badness). This conclusion was ultimately acknowledged by the FTC trial staff when it moved in July 1981 to have the case dismissed—which the commission grudgingly did two months later. The cereals case, on the other hand, was based on a definite theory ("shared monopoly"), but it was a theory that relied on novel and highly questionable assumptions—for example, that large advertising expenditures reflected the existence of supracompetitive profits and that product differentiation was used to secure monopoly advantage. That case was dismissed in September 1981 by the administrative law judge for failure of proof, and the commission has not yet acted.

With the benefit of hindsight it now seems clear that neither action should have been brought. The petroleum litigation was a patently political response to overt congressional

pressure and to public frustration over rising gas prices. The cereals case reflected primitive FTC antagonism to brand advertising and was marred by embarrassing procedural irregularities. While both cases required expert evaluation and thus were suitable for initial consideration by sophisticated administrative law judges, they also revealed serious limitations in the FTC's processes, including the vulnerability of its prosecutions to congressional pressure, an unsophisticated understanding of market operations, and the confusion sometimes created by the joining of adjudicative and administrative roles within one agency. It seems unlikely that the Department of Justice would have engaged in such misadventures (it specifically declined to act in the cereals case).

Nor were the two cases just expensive aberrations. During the late 1970s there was also the *Borden* case, in which the commission held that Borden's ability to attract customers to its trademarked ReaLemon product gave it undue market power, that the company used this power improperly when it responded to competition by lowering its price, and that Borden's conduct was unfair because it forced competitors to operate at a loss (since they did not have a similar premium "cushion"). Instead of leaving Borden alone and encouraging competitors to develop an equally attractive product—as a consumer welfare standard would have required—the commission prohibited Borden from responding to individual price competition (all of Borden's price cuts had to be across the board) or from selling at "unreasonably low prices" (prices at which competitors lose business). The irony is that at the same time that the FTC was condemning Borden for using lower prices and a better product to attract consumers, it was attacking the cereal companies for allegedly not engaging in the very same practice.

The FTC similarly sought to shackle a successful firm in *DuPont* (the titanium dioxide case). This time, however, the commission understood the implications of the action and ultimately dismissed the complaint it had brought. DuPont had developed a process for making a paint pigment from low-grade ores, which gave it a competitive advantage in the early 1970s when the supply of high-grade ore dwindled and alternate processes required use of costly environmental devices. The staff argued, as in *Borden*, that DuPont had acted unlawfully: it should have either shared its technology with others or refrained from lowering its prices (which hurt its high-cost competitors). That is, DuPont should be condemned for pressing its competitive advantage by expanding its capacity and refusing to follow the price increases publicly announced by others—all for the purpose of increasing its market share. This argument went for naught, however, as a unanimous commission decided that DuPont could not be punished for using its more efficient process to achieve market success. The FTC recognized that "the essence of the competitive process is to induce firms to become more efficient and to pass benefits of the efficiency along to consumers."

Occasional other FTC actions also suggest increasing economic sophistication. For example, the *Heublein* decision late in 1980 reversed an administrative law judge decision that sought to bar a merger of two wine producers who did not compete directly and who had very low market shares. This ruling suggested that the commission would no longer attack insignificant mergers that do not threaten competition. The FTC's vigorous review of professional association ethical rules also shows how the commission's antitrust authority can be used for the consumer's benefit.

The problem with relying on these occasional beacons is that the evidence from other FTC decisions points in the opposite direction. Two examples are the commission's recent complaints, first, under the Robinson-Patman Act against Boise Cascade for accepting discounts from an office products supplier and, second, under section 5 of the FTC Act against a candy company (Russell Stover) for merely announcing and encouraging adherence to suggested retail prices. In neither instance could the firm's conduct possibly have injured consumers or competition and both complaints were inconsistent with the Supreme Court's reasoning in *Sylvania*. Another example is the commission's complaint under section 5 against manufacturers of gasoline additives (*Ethyl Corp.*) for uniform prices that concededly came about without agreement or conspiracy and were evidenced only by "lock-step" pricing over a four-year period—the opposite of what DuPont had been challenged for doing.

Possibly the most questionable, yet in its

way typical, instance of FTC overreaching in recent years is its unanimous decision in *Reuben Donnelley* (the *Official Airlines Guide* case). There the commission ruled that an airline guide publisher who did not give equal billing to commuter airlines had violated the FTC Act, even though it could not be shown that this action in any way benefited the firm or stemmed from a conspiracy with scheduled airlines. Although the FTC's theory of imposing a duty not to act arbitrarily on monopolists had an appealing sound, the theory contradicted established authority and had no principled basis on which to distinguish prohibited from permitted conduct. As the Second Circuit Court of Appeals noted, the FTC's rule would permit the sole supermarket in a town to be prosecuted for preferring Birdseye peas over Green Giant, if the commission could find that as a consequence the latter's market position had been impaired and competition threatened. There were, in addition, sound economic reasons for the publisher's practices that went unexamined by the FTC.

My gloomy evaluation of the FTC's major antitrust actions is shared by others. The most prominent critique is an independent study by thirteen lawyers and economists, *The FTC since 1970*, edited by Kenneth Clarkson and Timothy Muris (1981). There, after reviewing the FTC's antitrust record for 1970–77, UCLA Law Professor Wesley Liebeler concluded that the commission "can be understood only in political terms"—namely, as a place where congressmen can lay the blame for any and all ills of life arguably caused by the business community. Economists William Breit and Kenneth Elzinga similarly concluded that the FTC's costly line-of-business program, wherein extensive information is being collected from major businesses, is ineffective and probably misleading as well. Economist Charles Goetz and lawyer Warren Schwartz carefully demonstrated that the FTC's supposedly "pathbreaking" consent decree forcing Xerox to engage in cross-licensing could be "both anticompetitive and innovation-deterring," although it probably only "impeded technology exchange between Xerox and the other major competitors." And Professors Kenneth Clarkson, Timothy Muris, and Donald Martin found that the only effect of the FTC's attack on shopping center restrictive covenants was to "raise costs to consumers."

The Division of Antitrust Responsibility

Both common sense and organization theory support the idea that administrative responsibility for enforcement of the antitrust laws—or, for that matter, of any other set of rules addressing a single subject—should be entrusted to only one government bureau. Single agency responsibility is likely to expedite policy development and coordination, strengthen public accountability (thereby encouraging rational policies and responsible use of power), and economize scarce resources for policy development and evaluation. A related point is that, until management and production scale economies are reached, it is more costly to have two bureaus with two sets of policy makers, administrators, and workers performing similar tasks than to have one. These costs are particularly pronounced in labor-intensive bureaus where lawyers and economists are the principal resource.

In addition to these a priori arguments in favor of consolidation, several structural factors distinctive to the existing dual system of antitrust enforcement also argue in favor of its abandonment.

The FTC's Redundant Antitrust Assignment. A comparison of the statutory assignments of the two agencies is revealing. The Antitrust Division's principal responsibility is to enforce the Sherman and Clayton Acts. Under both statutes the division is given only law enforcement authority; its focus is simply to ensure that the avenues to competition are open and that rivalry is not impaired. Thus, except in the merger area, the division has generally conceived its primary purpose to be the prosecution of per se offenses such as price fixing, market divisions, boycotts, and other direct interferences with business rivalry. And in the merger area, its enforcement has increasingly been directed toward large-scale horizontal or conglomerate mergers involving concentrated industries.

The FTC, by contrast, does not have one central assignment. In addition to sharing Clayton Act enforcement with the Justice Department, the commission is the sole enforcer of section 5 of the FTC Act, which has been read as covering actions that violate either the letter or the spirit of the antitrust laws. Indeed, in *FTC* v. *Sperry & Hutchinson Co.* (1972), the

Supreme Court ruled that the FTC's powers were equivalent to those of a "court of equity," holding that mere injury to competitors or consumers can justify FTC prosecutions of trade restraints. But, while the FTC's substantive authority is broader than the Justice Department's, its remedial powers are often more limited. It cannot seek criminal or monetary penalties and is restricted to injunctive (cease-and-desist order) relief. Thus, both its substantive authority and remedial powers are frequently oriented toward actions at the fringe where other societal goals often conflict with antitrust principles. An antitrust policy not limited by any substantive constraint—such as the consumer welfare theory that undergirds the hardcore per se rules—can be formless. Left without a standard for measuring its actions, the FTC staff and commissioners have too often fallen back on unsupported ad hoc economic, social, and political analyses. In other words, the breadth and vagueness of the agency's authority, rather than being an advantage, appear to have contributed greatly to its problems.

The FTC's Inconsistent Consumer Protection Programs. At first blush the mingling of antitrust and consumer protection responsibilities within the FTC might seem a stroke of genius worth preserving. The latter responsibilities arise, after all, because the marketplace has not protected vulnerable consumers from deceptive, misleading, or unfair practices. Where that market "failure" is a product of imperfect competition and is also amenable to antitrust attack, a coordinated antitrust and consumer protection effort could promote consumer welfare.

. . . the FTC's consumer protection responsibilities not only do not complement but positively impede its antitrust efforts.

In a fundamental respect, however, the FTC's consumer protection responsibilities not only do not complement but positively impede its antitrust efforts. The whole theory of consumer protection is very different from that which should underlie antitrust enforcement. Properly defined, antitrust intervenes in the market only to correct market failures by barring conduct that distorts market forces or otherwise by restoring competitive opportunities. In contrast to the FTC's consumer protection orientation, sound antitrust principles assume that consumers will make decisions that maximize their welfare as long as suppliers are coerced by competition to compete for their attention and sales. The FTC has not, however, applied sound principles in drawing up its antitrust program. Instead, it has seemingly borrowed from its consumer protection activities the idea that its job is not to make the rules of the game as impartial as possible, but to get the best possible outcome for some of the players —which in antitrust can mean not consumers but small businesses. (As the earlier case review shows, the results differ from the intent: such intervention is contrary to the general interests of small businesses, and frequently favors one group of them against another.) In cases such as *Borden* (ReaLemon) and *DuPont* (titanium dioxide) the FTC actually opposed marketplace competition, reflecting a deep-seated hostility to intense rivalry that results in some firms losing out. Thus in exercising its antitrust authority, the FTC often acts as a market manager not unhappy with fostering cartels or limiting competition so long as it controls the rules by which the industry operates. This partly explains the FTC's 1971 decisions regarding appliance dealers and mobile home manufacturers.

The FTC's Vulnerability to Interest Group Pressure. Confusion of purpose does not fully explain the FTC's prosecutions, many of which involve trivial events unworthy of federal government intervention by any standard. Surely the FTC does not believe that its responsibility to protect consumers justifies its attack on a few appliance dealers in New Jersey seeking the advantages of group buying, its pursuit of mobile home manufacturers trying to entice buyers by also leasing trailer sites, or its condemnation of distribution methods used by such "giant" apparel manufacturers as Motherhood Maternity Shops and Huck A Poo Sportswear —all of which enterprises were slapped with cease-and-desist orders in 1979. These and numerous other FTC actions can only be explained by taking account of the commission's particular vulnerability to interest group pressures, usually from competing businesses facing un-

welcome competitive threats. Clearly none of the cases just mentioned was prompted by serious consumer complaints.

This vulnerability is yet another illustration of how the great experiment of a dual antitrust enforcement structure has failed. The FTC's creation as the second independent agency (following the Interstate Commerce Commission model), separate from the other three branches of government, was initially justified as an experiment in technocratic government. The FTC was to be an expert body that would not only guide business on antitrust compliance but also apply rigorous and nonpartisan standards on when to intervene in the marketplace. In the event, just the opposite occurred. The FTC has provided no distinctive guidance and has been viewed as an "arm of the Congress"—a point invariably stressed by senators during confirmation hearings on FTC commissioners. As a result, members of Congress have not been hesitant to pressure the commission into listening to and acting on constituent concerns. Separated from the executive branch and unprotected by the President's political powers, the commission has caved in to political pressure (see the petroleum case) or to cries for help from business and other groups. The Antitrust Division has stoutly resisted such pressures—as illustrated most recently when division chief John Shenefield not only refused to capitulate to Senator Howard Metzenbaum's demand that the division press felony charges against uranium producers, but even refused to permit the Senate committee to pore through sensitive litigation files on the subject. In contrast, the FTC has too often been almost helpless against similar pressure tactics. Confidential documents are not assured protection from legislative misuse, and some cases are obviously brought in order to placate interest groups. The genius of the Founding Fathers in establishing coordinate branches able to check one another was not improved upon by the establishment of a second antitrust agency.

Objections to Unification

It is impossible to address here all the arguments made over the years against elimination of the FTC's antitrust enforcement authority. But the major ones are as follows:

(1) Political independence. Despite the FTC's recognized susceptibility to undue pressure, the first argument most often made in its defense is that having an independent antitrust agency helps ensure that critical economic decisions are untainted by corrupt or undesirable political influences. Supporters of this argument are fond of pointing to the FTC's separate review of the Warner Lambert–Parke Davis merger in 1970 when Acting Attorney General Richard Kleindienst overturned the Antitrust Division's recommendation to challenge the merger of a company managed by one of President Nixon's close friends. Although FTC independence from presidential control is occasionally useful, it seems a costly way to ensure the integrity of antitrust enforcement, because of the policy conflicts that it necessarily engenders. Moreover, independence from the President is not synonymous with independence from political control. As discussed above, the effect of separating the FTC from the protection of the President has been to deprive it of needed defense against the (at least as virulent) political proclivities of Congress. If it were true that separation from presidential supervision produced less "political" determinations, criminal prosecutions should be removed from the

In any case it is difficult to see why antitrust is so special—why it should have two enforcement agencies when even more sensitive areas such as tax collection get by with one.

Justice Department. In any case it is difficult to see why antitrust is so special—why it should have two enforcement agencies when even more sensitive areas such as tax collection get by with one.

(2) Flexible enforcement authority. If antitrust is not special, it is contended, at least the FTC's antitrust powers are. Section 5 of the FTC Act gives the commission a particular flexibility only occasionally given other expert, independent agencies. Thus, Congress deliberately declined to define "unfair methods of competition," recognizing that the commission was to have economic expertise and that the law needed to be flexible if it was to respond effectively

to sophisticated yet unknown future business practices. The commission's unconfined authority is admittedly an ongoing experiment and the courts have read the FTC powers broadly in order to protect competition and consumer welfare. Nor, it is argued, could the Sherman or Clayton Acts fill this need if the FTC's antitrust authority were abolished. It is for this reason, moreover, that section 5 grants the commission authority only to issue cease-and-desist orders. No private actions can be based on the FTC Act; no jury is involved in its cases; and no fines, damages, or criminal penalties can be imposed.

This argument is better in theory than in practice, however, and even the theory is breaking down. In point of fact, the commission has not filed a single case in the past decade that the Antitrust Division could not have brought under its current authority. Since the Clayton Act already covers incipient violations, giving the FTC the power to attack such violations (or what could be called "incipiency squared") seems only an exercise in redundancy. More important, there is no reason to authorize the government to intervene in the market in advance of a substantial likelihood that competition will be impaired—and traditional interpretations of the antitrust laws are, if anything, too permissive in upholding such actions. Nor can much be made of the fact that the juries used in Sherman and Clayton Act cases are not the equal of administrative law judges. Most jury cases result from private actions, which are not affected by the FTC's antitrust authority. Actions by the Justice Department (other than criminal prosecutions) are often heard by a district judge, either because the parties so agree or because the case involves only equitable relief. And no one has seriously argued that federal court trials are inferior to hearings before administrative law judges. But the most convincing response to the argument is the record. The FTC's "innovative" use of section 5 in the petroleum and ReaLemon cases, as well as its action in the cereals case, is persuasive evidence of how these special powers can be misused—and of why their termination is desirable.

(3) Rulemaking and adjudicative powers. The FTC, it is said, has an advantage over the Justice Department because it possesses rulemaking authority that enables it to lay down prospective general prohibitions and adjudicative authority that gives it greater control over the implementation of policy. Neither of these justifications is valid. Antitrust law is fact-specific, and does not lend itself to embodiment in general rules that are any more rigid or binding than "guidelines." The commission itself has issued one rule in the antitrust field—a narrow one at that.

As for the adjudicative powers of the commission: It is, to begin with, questionable whether these provide any advantage with regard to policy coordination, because of the Administrative Procedure Act's requirement of separation of functions. Once a complaint is filed, rules of adjudication apply and the FTC commissioners, in order to avoid any "taint" to the proceeding, are obliged to separate themselves from the staff prosecutors and bureau directors who supervise the cases. As a result, FTC prosecutions are effectively insulated from commission oversight and control until after the administrative law judge's decision. Mistakes tend to be perpetuated, with the commissioners too often ending up feeling obligated to continue a questionable action solely because of the efforts already made on its behalf.

What is clear, however, is that the combination of policy-making, prosecutorial, and adjudicatory powers can cause the FTC acute embarrassment. One recent example is the now infamous incident in the cereals case where the chairman initially approved an agreement with the administrative law judge to extend his contract for the case beyond his retirement. This action raised serious questions about the integrity of the FTC's procedures and caused the case to fall under a cloud from which it never emerged.

(4) Special expertise. Another defense of the present arrangement stresses that the two agencies have specialized in different fields—the Antitrust Division concentrating on manufacturing, heavy industry, and finance, the FTC on retailing and consumer goods. In addition, the FTC, having committed substantial resources to its Bureau of Economics in recent years, is now uniquely qualified to deal with the increasing complications of antitrust policy in markets that have became transnational in scope. Its economic sophistication is important, not only for guiding its own decisions in antitrust cases but also for ensuring that its advice to Congress is sound. Changing the assignment would risk

disturbing this expertise without eliminating any real duplication. A related point is that the Antitrust Division, which has grown by 50 percent in the past decade and is the largest litigating division in the Justice Department, may be pushing the limits of efficient organizational size.

My problems with these assertions is that they are little more than unprovable *ipse dixits*. Whether a merged Antitrust Division–FTC Bureau of Competition would be a "bureaucratic Penn Central" is unknowable in advance. There are other litigating units of the federal government with much larger caseloads. The argument also assumes, without basis, that consolidation would not achieve any economies. As for the FTC's sophisticated talent and agency experience, what good are these if they have no discernible effect on which cases are brought or how they are decided? Nor has the FTC played a special role in giving the Congress expert antitrust guidance—except in 1936 when it drafted the now-condemned price discrimination law and in 1948 when it misled Congress into believing that a rising tide of concentration required revision of the antimerger laws. Finally, the de facto division of industry oversight has often not been followed in recent years.

(5) Small business protection. When the Reagan administration initially proposed that the FTC's antitrust activities be eliminated by the simple expedient of stopping all funding, the President and Congress quickly learned that despite recent complaints the commission enjoys a vocal and powerful antitrust constituency. The primary supporters of the FTC appear to be small businesses and their trade associations, along with consumer groups and the organized antitrust bar. That small businesses or their trade associations do not have the clout of yesteryear—as shown by the virtual abandonment of Robinson-Patman prosecutions (price discrimination)—does not mean that they can, or should, be ignored. Nor, however, should they be "protected" at the cost of economic efficiency. And it is here that the FTC's actions have often seemed badly skewed. Far too many of its cases, rather than resting on neutral principles, can be justified as attacks on bigness and little else. And, ironically, the small-business bent of the FTC has often worked to the disadvantage of competing small businesses, as numerous cases have involved the FTC in pitting one set of small businesses against another—with the result that those who get to the FTC first or most effectively win the "competitive" contest.

(6) Competition in enforcement. One additional argument, given that optimal enforcement levels are difficult to set a priori, is that competition between the FTC and the Antitrust Division could lead to innovation, incentives to excel, and other benefits to antitrust enforcement. Neither the theory nor the facts fit the antitrust case, however. In theory rivalry works where several producers compete for the business of the same set of consumers. But the Antitrust Division and FTC have agreed for many years not to compete with each other, and when any investigation is initiated in either agency, the agencies follow specific clearance procedures designed to prevent open conflict. Thus, the more precise analogue is to market divisions that do not enhance efficiency and are otherwise per se illegal. This is not to say that the two agencies do not compete for cases, personnel, and budgets. The point is, rather, that bureaucratic rivalry is the antithesis of a race for efficient delivery of antitrust services.

RECENT EVIDENCE of new directions at the Antitrust Division, seemingly compatible with the consumer welfare standard applied here, argues by analogy that similar change could occur at the FTC. Why not, then, give the FTC yet another chance to prove itself? Certainly the record is not as dismal as it was in 1969. And back then the reformers' response was to give the commission even more power and money in order to make it an effective regulatory force.

The problem, of course, is that we have already traveled this route many times. Contrary to received wisdom, the FTC's basic deficiencies lie not in its people, the size of its budget, or its limited authority, but rather in the redundancy of its antitrust assignment, the mingling of its consumer protection and antitrust responsibilities, and the degree of its vulnerability to interest group pressures. Appointing new personnel, or requiring that the FTC prosecute its actions in federal district court or that appeals go to an administrative court (or whatever), is mere tinkering. There is no need to look any longer for an alternative. The Antitrust Division's presence and record make consolidation achievable without serious disruption. ■