THE WILLIAM HUMPHREY AND ABRAM MYERS YEARS: THE FTC FROM 1925 TO 1929

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The Federal Trade Commission is one of the oldest U.S. experiments with a multi-member federal regulatory body. To formulate coherent programs and establish a respectable institutional brand, such bodies benefit from a basic level of consensus and internal harmony. Though uniformity of perspective within the board is neither attainable nor healthy, a core commonality of purpose and fidelity to collegiality are highly desirable. Attaining such common cause depends heavily on the backgrounds, philosophies, and personal sensibilities of the board's members.

During President Calvin Coolidge's second term (and first full term), the FTC Commissioners shared neither the requisite commonality nor collegiality, as William Humphrey served as a protagonist in two successive splits among the Commissioners. The first, triggered by his arrival, was a partisan confrontation. The Republicans had controlled the White House and Congress since 1921, but first controlled a majority of Commission seats in June 1924 and first began to change the agency's direction aggressively when Humphrey arrived in February 1925. Though Humphrey was not a Presidentially designated Chairman (he arrived a quarter century before the President could designate the Chairman[1]), he was a boisterous man and a clamorous public official. He dominated the agency for a time by the force of his personality, and he continues to dominate discussions about FTC history between his arrival in

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[1] Reorganization Plan No. 8 of 1950, 15 Fed. Reg. 3175 (May 25, 1950).

1925 and his dismissal in 1933.[2] With his arrival, three Republicans appointed by Republican Presidents confronted two Democrats appointed by a Democratic president, while the intensely partisan Humphrey confronted a similarly partisan Democrat, Huston Thompson. The result, a deep and public divide, figures prominently in commentary about the FTC's formative era.

Contrary to most interpretations, though, we find that neither the partisan divide nor Humphrey's initial dominance lasted for long. As we explore through narrative and case studies, the partisan rift dampened by 1927, as the sitting Democrats' terms expired. Although they were replaced by other Democrats, Garland Ferguson and Edgar McCulloch, and although a Senate Democrat essentially chose one and several Senate Democrats backed the other, the new Democrats were far less confrontational than their predecessors. But partisan conflict did not give way to harmony. Rather, an *intra-party* rift emerged by 1927. That rift reflected some of the numerous approaches (or alternatives) to antitrust that ran through the progressive years and into the early New Deal, often transcending party lines. Humphrey was again a key player, but his principal foe this time was another Coolidge-appointed Republican, Abram Myers.

Humphrey and Myers aligned against each other, usually in the lead roles, on wide-ranging disputes. Substantively, Humphrey generally sought a relatively limited government role, preferably as a facilitator for business, unless conduct involved deception or fraud; Myers had a more activist agenda with some roots in the New Nationalism of Theodore Roosevelt (TR) and in his understanding of Herbert Hoover's associationalism. Additionally, Humphrey was a former Congressman focused on patronage and perks; Myers, a career antitrust lawyer from the Justice Department, focused more on agency performance. With one significant exception, a Humphrey-inspired antifraud initiative, Myers generally prevailed in his confrontations with Humphrey. Indeed, he often isolated his foe, although Humphrey struck back in public denunciations. However, Myers stayed less than three years; his hopes of reappointment were most likely compromised by a confrontation with a powerful senator and a federal judge. Humphrey's influence would revive somewhat after Myers left, but he would subsequently be on the defensive far more often than he was on first arriving.[3]

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[2] Franklin Roosevelt fired Humphrey without citing cause, and Humphrey sued, successfully, for lost pay. The case established the independent commission as a foundation of the federal regulatory state. Humphrey's Executor v. United States, 295 U.S. 602 (1935). *See also* William E. Leuchtenburg, *The Case of the Contentious Commissioner, Humphrey's Executor v. U.S.*, *in* FREEDOM AND REFORM 276 (Harold M. Hyman & Leonard W. Levy eds., 1967) [hereinafter *Contentious Commissioner*].

[3] *See* ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE (1966) [hereinafter NEW DEAL] (multiple approaches to antitrust). For significant works that virtually ignore Myers, see GERALD BERK, LOUIS D. BRANDEIS AND THE

More broadly, as we continue our analysis of the early FTC,[4] we examine its internal dynamics, highlighting issues that divided the Commission. We return to basic questions that bear upon the effectiveness of a young competition policy institution. How did its organization and management affect its performance? Was its ability to succeed helped or hindered by a multi-member structure, particularly a structure that, until 1950, included an inherently weak Chairmanship? These are the key issues highlighted by the successive splits discussed above. Also, was it able to develop constructive relations, or at least avoid destructive collisions, with other public bodies? Could it develop coherent policies from a mandate that amalgamated widely divergent views of the regulatory state? How did it handle political and economic change? Was it effective in implementing its program?

In this analysis, we challenge interpretations that dismiss the FTC of the 1920s, particularly after 1925, as too timid to mass its resources to confront issues of economic and legal import.[5] Commentators often suggest that its program of the 1920s reflected a broader, pervasive national languor in competition policy—what Richard Hofstadter termed "the era of neglect." The idea that the agency developed and nurtured an instinct for trivia, whether by choice or necessity, resonates powerfully over much of its existence.[6]

In its litigation program, the FTC did bring fewer new cases during Coolidge's second term than it had during the previous term. This was particularly so on the competition side. Nevertheless, we take issue with the view that the shift in litigation activity can correctly be equated with "neglect." As discussed below, numerous factors contributed to the decline in the number of

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MAKING OF REGULATED COMPETITION, 1900–1932 (2009); THOMAS BLAISDELL, THE FEDERAL TRADE COMMISSION: A STUDY IN THE CONTROL OF BUSINESS 82 (1932) (placing his departure in 1927); ROBERT F. HIMMELBERG, THE ORIGINS OF THE NATIONAL RECOVERY ADMINISTRATION 64, 97 (1976) (noting Myers's role in passing); George Cullom Davis, Jr., *The Transformation of the Federal Trade Commission, 1914–1929*, 49 MISS. VALLEY HIST. REV. 437 (1962).

[4] *See* Marc Winerman & William Kovacic, *Outpost Years for a Start-up Agency: The FTC from 1921–1925,* 77 ANTITRUST L.J. 145 (2010); Marc Winerman, *History Through Headlines*, 72 ANTITRUST L.J. 871, 874 (2005); Marc Winerman, *The Origins of the Federal Trade Commission: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 15–27 (2003) [hereinafter *Origins*]; William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 600–01 (1982); William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the FTC Act*, 76 ANTITRUST L.J. 929 (2010).

[5] A significant exception to this general trend is Gerald Berk's analysis. *See* BERK, *supra* note 3. Berk is highly approving of work that he attributes (at the Commissioner level) to Edward Hurley (1915–1918), Nelson Gaskill (1920–1925), and Humphrey (1925–1933).

[6] RICHARD HOFSTADTER, *What Happened to the Antitrust Movement?*, *in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 107 (1965) (adding that antitrust prosecutions throughout the decade "were almost minimal"); AMERICAN BAR ASS'N, COMMISSION TO STUDY THE FTC, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 4, 9 (Sept. 1969) (finding substantial trivia in the FTC's portfolio and attributing this view to past studies as well). *Cf.* Kovacic, *supra* note 4 (critiquing ABA's reliance on prior studies).

new cases, including earlier defeats in court; the use of "stipulations," settlements unaccompanied by agency orders, particularly on the consumer protection side; the substitution of self-regulatory trade practice conferences for some litigation; and efforts to reduce a backlog of cases, often years old. Further, the FTC after Humphrey arrived did issue new challenges to some major firms, and it did issue strong orders against some others. Its merger program slowed at first, but it issued some new merger orders (generally over Humphrey's dissent), resumed new merger challenges by 1927, and, at least by 1929, devoted substantial resources to merger reviews. It also began widely respected hearings, and wrestled with difficult questions arising from the growth of new industries and the spread of new technologies and modes of business organization.

In execution, though, the FTC's performance remained problematic. To a large extent, the most interesting aspect of its performance in this period is the gap between the commitments embodied in the Commission's programs and its ability to deliver. The agency did build on earlier cases that vindicated its authority to challenge certain conduct under the prohibition of unfair methods of competition (UMC) in Section 5 of the FTC Act—deception and, within the parameters that would support a Sherman Act case, resale price maintenance (RPM).[7] But its ability to prosecute more venturesome actions remained relatively weak. Some initiatives were compromised by its poor working relationship with the DOJ. Some, like its aluminum case, died at the agency level; others, like its motion picture case, died in court. Most devastatingly, in a 1927 decision rejecting an earlier challenge to Eastman Kodak, the Supreme Court held that the FTC could not order structural relief in a Section 5 case.[8] Had the Court found otherwise, the FTC might have become the country's preeminent merger enforcement authority.

Such rebukes underscored the agency's failure, when it stepped outside lines previously drawn by courts, to establish credibility as an expert competition policy tribunal. Courts often denied in practice the deference that the FTC Act provides in theory. In part, the agency's litigation defeats appear due to the hostility and, perhaps, institutional jealously of the appellate courts, which resisted the sharing of adjudication tasks over competition law to a new (and, to some degree, rival) administrative body. The agency could hardly draw deference on the basis of its members' expertise. Although some came to the agency with impressive resumes and some stayed long enough that they might develop antitrust expertise, only Myers was a career antitrust lawyer before he arrived. Further, the agency did not claim a mantle of expertise by incisive

[7] FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922) (deception); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922) (RPM).

[8] FTC v. Eastman Kodak Co., 274 U.S. 619 (1927).

opinions. Rather, despite improvements from the opinions issued earlier in the decade, it continued to explain its decisions feebly. The Commission's weak exposition of its reasoning gave little evidence of the expertise that was intended to be a strong advantage for the new agency, and reinforced whatever institutional bias or suspicions the courts brought to their review of FTC decisions.

The agency's inability to spell out convincing bases for its rulings in administrative adjudication arguably reflected a deeper problem: its failure to gain internal consensus on its overall mission and, perhaps, on its reasons for individual actions. Like many young competition agencies, the FTC's implementing legislation encompassed a range of expectations, some inconsistent.[9] The multi-member FTC embodied these disparate goals at the same time (while the more hierarchically structured Justice Department tended to reflect disparate goals *over* time).

These problems also arose with the agency's trade practice conferences. Encouraging industry self-regulation through conferences could leverage the agency's enforcement resources through "Group I rules," which proscribed conduct that also violated Section 5. Through "Group II rules" that the FTC approved for industry even though those rules went beyond Section 5, the Commission could sometimes accomplish beneficial results that it could not obtain through litigation. While often successful on the consumer protection side, though, the early conferences were far more problematic on the competition side. The agency approved many rules that, while consistent with some views of the regulatory state then extant, were highly anticompetitive. These problems were exacerbated by a brief experiment with a "clandestine violation" rule (backed by Myers but strongly opposed by Humphrey) intended to enable the Commission to enforce Group II rules under Section 5. But the most fundamental flaw in the trade practice conference procedure, as in litigation, was that the Commission rarely explained specific actions. Indeed, without the routine prospect of judicial review hanging over Group II rules, the agency may have had reduced incentives even to seek legal and economic coherence in its policy prescriptions. The process thus proved seriously flawed. By 1929, the program began to fracture; soon after, it would break down.

Thus, the trade practice conference program of the late 1920s shows the same themes as its litigation program of those years. The agency was torn by serious divides, first inter-party then intra-party. Its experience highlights a

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[9] *See, e.g.*, A. Neil Campbell & J. William Rowley, *The Internationalization of Unilateral Conduct Laws—Conflict, Comity, Cooperation, and/or Convergence,* 75 ANTITRUST L.J. 267, 277–81 (2008) (discussing historical context of the competition laws of the United States, the European Union, Canada, Australia, and South Africa).

vulnerability of multi-member bodies. Without an essential core of shared purpose, a commitment to collegial decisionmaking, and a basic level of personal compatibility among board members, the multi-member forum serves as a boxing ring rather than a means for constructive deliberation. Additionally, the agency's work during these years continues to highlight themes from earlier years, as it combined an often-ambitious agenda with seriously flawed execution.

I. THE FTC BEFORE 1925

A. Roots of the FTC Act

Upon Humphrey's arrival, the FTC was nearly a decade old. It was rooted in the Progressive Era, when antitrust was a deeply contested issue—most visibly between 1911, when the Supreme Court announced the rule of reason in *Standard Oil*,[10] through the 1912 election, and into the 1914 legislative debates that produced the FTC and Clayton Acts.[11] Critically, there was no single "progressive" philosophy on antitrust, and varying views articulated during the debates about creating an FTC would later be internalized within it.

Competing views about the FTC's formation in 1914 cast a long shadow in later decades. During the early New Deal, three visions about the appropriate role for antitrust policy continued to compete in the battles over the National Recovery Administration.[12] The first was an activist approach associated with TR's New Nationalism. In TR's vision, large businesses would be left intact in exchange for tight government control, including a process by which a government agency could pre-clear mergers and agreements.[13] The second anticipated less direct supervision of companies and more reliance on antitrust enforcement, as advocated in 1912 campaign (in increasing order of aggressiveness) by Woodrow Wilson in his New Freedom program; by Wilson spokesman Louis Brandeis, and by agrarians like William Jennings Bryan.[14] A

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[10] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[11] Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 717; Act of Oct. 15, 1914, ch. 323, 38 Stat. 730.

[12] *See* HAWLEY, NEW DEAL, *supra* note 3.

[13] Despite his reputation as trustbuster, TR had long doubted antitrust. By 1912, he criticized dissolution suits, praised a German law that legalized and regulated cartel activity, and embraced broad government oversight of business. *See* Winerman, *Origins*, *supra* note 4; Marc Winerman, *Antitrust and the Crisis of '07*, ANTITRUST SOURCE, Dec. 2008, at 1, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec08_FullSource12_22f.authcheckdam.pdf.

[14] Wilson advocated precise legislative standards and severe sanctions directed at offending corporate officials. At least in 1912, he viewed the economy as dynamic and anticipated that antitrust could restrain "giants," so that smaller and more innovative competitors could thrive. Until the spring of 1914, Wilson resisted giving prosecutorial powers to a trade commission. Winerman, *Origins*, *supra* note 4, at 38–48, 52–58, 62–68; JOHN MILTON COOPER, WOODROW WILSON: A BIOGRAPHY 176–77, 226–34 (2009). Brandeis's more aggressive approach called for stronger antitrust laws, but he also included an associationalist concern with trade association

third approach, "associationalism," broadly advocated collective action, including information-sharing programs among business. Associationalism was less prominent in the early debates than the other strands, but Brandeis incorporated it into his program and it gained increasing traction—sometimes but not always through advocates who sought to reconcile it with antitrust—by the 1920s.[15] Still other visions contesting for supremacy from 1912 to 1914 (and surviving into the 1920s) resisted any new legislation. Most of those who resisted new legislation wanted business left alone, but William Howard Taft, the sitting Republican President in 1912, offered a variant that included strong enforcement under the Sherman Act.[16]

B. THE FTC'S FIRST DECADE

The FTC opened its doors in March 1915. As we have discussed previously, with particular focus on 1921 through 1925, it pursued an ambitious agenda during its first decade. Although the World War I mobilization (which relied on extensive business-government collaboration through the War Industries Board) diminished antitrust enforcement for a time, the FTC moved forward to apply the range of policymaking tools that Congress provided. It relied heavily on litigation under the FTC and Clayton Acts, but also used, together with or in lieu of litigation, public hearings, investigations, and reports. It developed the non-statutory trade practice conference procedure. Unfortunately for the Commission, though, even when its litigation initiatives led to administrative orders, many of those failed in court. Further, while some defeats were likely inevitable in the face of a hostile judiciary, the agency compounded judicial hostility with decisions lacking convincing (or any) rationales.[17]

As we have also discussed before, the impact at the FTC of the Republicans' electoral victories in 1920 was slow in coming. Though the Republicans controlled the White House and Congress, the Commission was somewhat shielded by surviving pockets of progressivism, particularly in the Senate, and the vagaries of Commissioner turnover. Wilson's later appointees (the last of

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activity and sought to reverse the per se prohibition on resale price maintenance of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). *See* Winerman, *Origins*, *supra* note 4, at 32–38; *see also* MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 300–26 (2009) (ch. 13: *The Curse of Bigness*). For the still more aggressive (and less nuanced) views of Bryan and the agrarians, see Winerman, *Origins*, *supra* note 4, at 13, 43, 69–73.

[15] Winerman, *Origins*, *supra* note 4, at 36–37 (Brandeis); Winerman & Kovacic, *supra* note 4, at 153. *See generally* HIMMELBERG, *supra* note 3; HAWLEY, NEW DEAL, *supra* note 3.

[16] HAWLEY, NEW DEAL, *supra* note 3, at 27–32. As federal judge, Taft had written a leading antitrust decision, in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). As President, his Justice Department pursued far more litigation than had TR's. Winerman, *Origins*, *supra* note 4, at 28–30.

[17] Winerman & Kovacic, *supra* note 4.

which, John Nugent, was appointed in 1921) were slow to leave. Three remained until Humphrey arrived, although one of these, Nelson Gaskill, was a Republican who sought a second term from Coolidge and became the swing vote in mid-1924. In any event, with or without a majority, the remaining Wilson-appointed Democrats, particularly Huston Thompson, could generate substantial controversy.[18]

II. THE POLITICAL BACKDROP TO COOLIDGE'S SECOND TERM: CONGRESS, COOLIDGE, AND HOOVER

The 1924 election, like that of 1912, was multi-sided. Coolidge ran against John W. Davis, a conservative Democrat nominated at a convention fractured over social issues, and Robert La Follette, a Republican Senator from Wisconsin and the standard bearer for a new and short-lived Progressive Party. (Huston Thompson was mentioned as a possible running mate for La Follette. Coolidge won handily.) The Republican also held the Senate; they advanced from 53 Senate seats (of 96) to 54 in 1925 (and would retreat to 48 in 1927). In the House, where they had won 225 of 435 seats in 1923 (75 fewer than in 1921), they advanced to 247 seats in 1925 (and would retreat to 238 in 1927). However, these numbers tell only part of the story. The Democratic ranks included many Southern conservatives, while the Republicans had such progressives as Senator George W. Norris of Nebraska—who backed La Follette and was, for a time, stripped of his seniority. Coolidge, like his predecessor Warren G. Harding, often encountered resistance in Congress.[19]

Coolidge, who had taken office when Harding died, shared his predecessor's commitment to cut taxes and shrink government. However, he was in many ways a different person. Unlike Harding, he ran his administration without the taint of scandal. On a personal level, he was at first a workaholic,

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[18] Winerman & Kovacic, *supra* note 4, at 164–65 (noting, for example, Thompson's testimony, in a proceeding to impeach the Attorney General, that the DOJ was insufficiently responsive to FTC referrals). Robert Himmelberg quotes a May 1925 letter (soon after Humphrey arrived) from a staffer to his patron, a progressive Senator. According to the staffer, it was formerly "as much as our jobs were worth to have the presumption and temerity to recommend against dismissals before taking testimony." Himmelberg finds the letter "very convincing," though open to self-serving imputations. HIMMELBERG, supra note 3, at 53 n.13.

[19] Party Division in the Senate, U.S. Senate, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm; House History, Office of the Clerk, U.S House of Representatives, http://artandhistory.house.gov/house_history/index.aspx; MICHAEL E. PARRISH, ANXIOUS DECADES: AMERICA IN PROSPERITY AND DEPRESSION, 1920–1941, at 66–70 (1992); ELLIS W. HAWLEY, THE GREAT WAR AND THE SEARCH FOR A MODERN ORDER 64–65 (2d ed. 1992); ROBERT SOBEL, COOLIDGE, AN AMERICAN ENIGMA 320–25, 330–34 (1998) (relations with Congress); *La Follette Group Favors Democrat for Vice-President*, CHRISTIAN SCI. MON., July 5, 1924, at 1; *Majority Senators Advance "Rebels*," N.Y. TIMES, Dec. 15, 1926, at 2; DAVID A. HOROWITZ: BEYOND LEFT AND RIGHT: INSURGENCY AND THE ESTABLISHMENT 60 (1996). *See generally* GARLAND S. TUCKER III, THE HIGH TIDE OF AMERICAN CONSERVATIVISM: DAVIS, COOLIDGE, AND THE 1924 ELECTION (2010).

although, according to a biographer, he was deeply changed by the death of his teenage son during the 1924 campaign and after that became listless and morose. On a political level, Coolidge was less open to Republican progressives than Harding had been. Most significantly for the FTC, Harding had brought into his cabinet Herbert Hoover, over substantial resistance from party leaders. Coolidge, in contrast, deeply disliked Hoover, though he did not force him to leave. Further, consistent with a general approach of delegating substantial discretion to subordinates, he allowed Hoover to pursue his interests.[20]

Before Hoover himself became President, he was, from 1921 to 1928, an extraordinarily influential Secretary of Commerce. He trespassed so frequently into the work of other agencies that he was sometimes called the Secretary of Commerce and "undersecretary of everything else." A self-made man, Hoover rose from poverty to become a leading international mining engineer and businessman, reported at age twenty-seven to be "the highest salaried man of his years in the world." In 1914, at age forty, he turned to public causes. He directed a non-governmental organization that fed Belgians when war broke out; served as Food Administrator in Woodrow Wilson's war cabinet; accompanied Wilson to the post-war peace negotiations at Versailles; and was the subject of a 1920 boomlet, backed by Brandeis and Franklin Roosevelt (FDR), for the Democratic Presidential nomination.[21]

Hoover's variant of progressivism saw the government as essentially a facilitator for voluntary private action (although his active approach, his government positions, and his use of government action or funding created paradoxes with which biographers have grappled[22]). His public/private approach was reflected in his efforts on disaster relief, extending from Belgium wartime food relief in 1914 to Mississippi Valley flood relief in 1927.[23] As to government's relations to business, his progressivism, which in some respects paralleled that of Brandeis, took the form of supporting associational activities, which sought to rationalize competition through such programs as information

[20] Winerman & Kovacic, *supra* note 4, at 159–65; SOBEL, *supra* note 19, at 308, 317.

[21] MARTIN L. FAUSOLD, THE PRESIDENCY OF HERBERT HOOVER 1–19 (1985) (noting "undersecretary." *Id.* at 15.); WILLIAM LEUCHTENBURG, HERBERT HOOVER 1–50 (2009) (quoting description of his wealth. *Id.* at 15.); Winerman & Kovacic, *supra* note 4, at 160.

[22] Leuchtenburg argues that Hoover's belief in voluntarism often ignored government backing or other support, and thus involved an element of self delusion. LEUCHTENBURG, *supra* note 21, at 31–32, 68–70. Another recent biographer finds that, "[p]hilosophically, he believed in limited government and voluntarism, but temperamentally, he inclined toward governmental activism and strong leadership." KENDRICK A. CLEMENTS, THE LIFE OF HERBERT HOOVER: IMPERFECT VISIONARY, 1918–1928, at xi (2010).

[23] LEUCHTENBURG, *supra* note 21, at 24–50, 68–70.

exchanges, uniform cost accounting, and the creation of industry standards.[24] To this end, he spearheaded efforts in the early 1920s to limit constraints on information exchanges that the Supreme Court announced in 1921 and relaxed in 1925.[25]

But Hoover did not oppose antitrust per se. During his Presidency, he would resist substantial efforts to change the antitrust laws, although he would support some limited, industry-specific modifications. Further, his Administration would even challenge specific associational agreements to which the DOJ under Coolidge had given qualified approval. His views, which may have evolved somewhat over time, were likely misunderstood by many (including, according to Hoover himself, by Commissioner Myers). However, there also appears a consistency in his view that information sharing and other associational activities could help smaller firms to compete, and thereby encourage what he called "American Individualism."[26]

III. HUMPHREY'S ARRIVAL AND EARLY DOMINANCE (1925–1926)

A. William Humphrey

Humphrey, whose arrival at the FTC unified and galvanized the Republican's recently attained majority, had been a Congressman from Washington State from 1903 through 1917. He returned to private practice after a failed Senate bid, but remained active in politics. In a 1924 letter to the White

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[24] Himmelberg, *supra* note 3, at 5–53; Dep't of Commerce, Trade Association Activities, Domestic Commerce Series—No. 20 (1927) (describing range of associational activities and including a chapter by former Commissioner Gaskill on information-sharing).

[25] Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921); Maple Flooring Mfrs. Ass'n v. United States 268 U.S. 563 (1925). Justice Brandeis, an advocate for trade association activities dissented in the former case and joined the six-Justice majority in the latter. *See* Winerman, *Origins*, *supra* note 4, at 36–37.

[26] Winerman & Kovacic, *supra* note 4, at 160; Herbert Hoover, American Individualism (1922); Herbert Hoover, The Memoirs of Herbert Hoover, The Cabinet and the Presidency, 1920–1933, 301–02 (1952); Himmelberg, *supra* note 3; Hawley, Great War, *supra* note 19, at 48, 53–57, 83–89; Ellis W. Hawley, *Herbert Hoover and the Sherman Act, 1921–1933: An Early Phase of A Continuing Issue*, 74 Iowa L. Rev. 1067 (1989) [hereinafter *Sherman Act*] (noting, at 1095, that Hoover, like Brandeis, sometimes depicted cooperation as a way to protect smaller business units, although another strain of his thought saw an alternative to preventing the evils of monopoly in "managerialization" of big business); Ellis W. Hawley, *Herbert Hoover, the Commerce Secretariat, and the Vision of an "Associative State," 1921–1928*, 61 J. Am. Hist. 116 (1974); Robert T. Joseph, *John Lord O'Brian, Hoover's Antitrust Chief, Gives the FTC an Antitrust Lesson*, Antitrust, Fall 2010, at 88; Letter from Herbert Hoover to Abram F. Myers (May 4, 1931) (writing that their earlier discussions had involved "developing the law of unfair practice," not "consolidations of price-fixing"), *in* Herbert Hoover Papers, Presidential Papers, Box 154, Herbert Hoover Library, West Branch, IA [hereinafter Hoover Papers]; *infra* note 135 and accompanying text.

House, he pled that he could soon be insolvent without the FTC appointment. Coolidge nominated him and the Senate confirmed him, 45–10.[27]

In dealings with other public officials, Humphrey often led with his fists. He reveled in personal and political attacks, which he directed at Democratic colleagues (at first), Republican colleagues (later), and others. Alluding to socialism, he denounced as "pink" politicians who used the FTC to "persecute honest business."[28] When Gifford Pinchot questioned if the FTC could be trusted to investigate utilities, Humphrey (in an FTC press release)[29] called the attack "regurgitated filth," and asked that Pinchot, "for the infinite relief of the country, have your keeper lead you to a thistle patch."[30] When Texas Congressman Tom Connally called him a friend of big business, Humphrey (on FTC Chairman letterhead) called him "tantalizingly pretty" and his preference for using his first name "redolent of hayseed and fertilizer"; and compared him to the heroes of the Alamo—with the caveat that Connolly preferred the weapon "made immortal by Samson."[31] Humphrey's indelicacy went beyond his foes; he described consumers who were the FTC's beneficiaries as an "endless procession of suckers" led by "[t]he fat woman and the bald headed man."[32] His partisanship, moreover, went beyond public pronouncements; Myers claimed that he was highly political in deciding specific matters.[33]

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[27] Leuchtenburg, *Contentious Commissioner*, *supra* note 2; Letter from C. Bascom Slemp to Senator W.L. Jones (Jan. 22, 1924), and Letter from William Humphrey to Bascom Slemp (July 18, 1924), *in* Calvin Coolidge Papers, File 100A, Reel 70, Manuscript Collection, Library of Congress, Washington, D.C. [hereinafter Coolidge Papers]; *Humphrey Is Confirmed*, N.Y. TIMES, Feb. 24, 1925, at 8. Humphrey claimed that, through circumstances that were not his fault, he was about to lose a building that represented his total worth. A bank would finance his litigation if he had a Commission seat with assured income.

[28] W.E. Humphrey, *Evidence, Not Suspicion, to Govern*, NATION'S BUS., June 5, 1925, at 17.

[29] Press Release, Fed. Trade Comm'n (Feb. 28, 1928) (Press releases are available at the National Archive, College Park, Maryland, RG-122, Division of Legal and Public Records, Press Clippings, Notices and Releases, 1918–1959. Box 150 contains press releases from 1925 and 1926; Box 151 contains press releases through January 1928; and Box 152 contains press releases through December 1929.) *See also* Letter from William Humphrey to Gifford Pinchot (Feb. 28, 1928), *in* William Humphrey Papers, Manuscript Collection, Library of Congress, Washington, D.C., Box 1 [hereinafter Humphrey Papers].

[30] Pinchot, who formerly served under TR, was then between terms as Governor of Pennsylvania. *See generally* CHAR MILLER, GIFFORD PINCHOT AND THE MAKING OF MODERN ENVIRONMENTALISM (2001).

[31] William Humphrey to Tom Connolly, undated, *in* Humphrey Papers, *supra* note 29; *see also Judges* 15:16 (King James) ("[w]ith the jawbone of an ass have I slain a thousand men.").

[32] William Humphrey, Fraudulent Advertising, Remarks to Nat'l Broad. Co. 1 (May 22, 1930), *in* WILLIAM E. HUMPHREY SPEECHES (unpublished collection) (on file in FTC Library, Washington, D.C.).

[33] Letter from Abram Myers to President Hoover, July 6, 1931, *in* Hoover Papers, *supra* note 26 ("He has never scrupled to come to the conference table stating that Senator so-and-so wanted such-and-such action taken in some case and invariably voted to give the senator what he wanted.").

Humphrey joined a Commission with two Wilson-appointed Democrats, Huston Thompson (1919–1927) and John Nugent (1921–1927); Republican Vernon Van Fleet (1922–1926), a Harding appointee and former state judge who served briefly in the Antitrust Division; and Republican Charles W. Hunt (1924–1932), a Coolidge appointee and former president of the Iowa Farm Bureau Association, who satisfied a demand for a "farmer's seat."[34] Initially, Humphrey dominated the Republicans and, through them, the Commission. On votes both public and nonpublic,[35] Van Fleet rarely broke with Humphrey, and Hunt, whose short term was set to expire in September 1925, did so less frequently and only when Van Fleet gave him cover.[36] The Democrats, though, were politically ambitious and did not fade silently. Nugent, fifty-seven years old when Humphrey arrived, ran for his old Senate seat in 1926 without leaving the Commission; Thompson, some seven years younger, had higher ambitions.[37]

B. THE FTC'S STRUCTURE

The Commission during these years was small; the Coolidge administration's instinct was to shrink government, and the FTC was hardly exempt from this impulse. Its staff grew slightly, but only from about 314 in 1925 to 344 in 1929. In this pre-computer era, most of these were support staff. Under ninety were lawyers. The agency was headquartered in Washington, D.C., with regional offices in New York, Chicago, San Francisco, and (sometimes) Seattle.[38]

In those days, Commissioners might review and annotate staff recommendations before meetings, but all collective business was conducted, and all votes taken, at meetings. The board often met three or more days each week. Commissioners rarely voted if absent, and might time votes to take advantage

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[34] Winerman & Kovacic, *supra* note 4, at 170–71, 173–76.

[35] Disclosures of dissenting votes were in the discretion of the dissenter(s). Today, some such disclosures are controlled by the Freedom of Information Act. 5 U.S.C. § 552(a)(5).

[36] Van Fleet's most significant break with Humphrey was in a case against International Shoe. *See* discussion *infra* at notes 121–125. In a few cases where Van Fleet and Hunt both aligned with the Democrats, Humphrey stood alone. *E.g.*, Holeproof Hosiery, 9 F.T.C. 210 (1925) (RPM); Cutler-Hammer Mfg. Co., 9 F.T.C. 546 (1925) (Humphrey alone dissented to *dismissing* a case challenging discounts, given by a seller with a 40 percent market share in exchange for exclusive dealing, where "respondent did not always enforce the contract.").

[37] Winerman & Kovacic, *supra* note 4, at 170–71, 173–74; *Huston Thompson, Headed FTC Under Two Presidents,* WASH. POST, Feb. 18, 1966, at B3 (giving Thompson' age); Nugent, John Frost, Biographical Directory of the United States Congress, http://bioguide.congress.gov/scripts/biodisplay.pl?index=N000169.

[38] FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1925, at 4 [hereinafter 1925 ANNUAL REPORT] (staff size); FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1929, at 138 [hereinafter 1929 ANNUAL REPORT]. *See infra* notes 72, 73 and accompanying text (discussion of the Seattle regional office).

of colleagues' absences. They chose their own Chairman and, after 1916, rotated the position annually. The Chairman presided at meetings, but, unlike today, did not oversee the entire agency. Each Commissioner oversaw one or more offices, although the Chairman generally claimed the Board of Review, which reviewed staff's complaint recommendations before they went to the Commission.[39]

C. Process, Process Changes, and Expansion of Trade Practice Conferences

The Commission had a backlog of over 260 cases when Humphrey arrived.[40] It soon took two steps that obviated the need for at least some new litigation: expanding the trade practice conference program and restoring a settlement process.

The conference process began (as "trade practice submittals") in 1919, but expanded when the Commission created a separate division to handle them in April 1925. As the process evolved, a single Commissioner would preside at a meeting where the industry adopted rules, and the full Commission later accepted or rejected them. By 1927, rules could be accepted as Group I rules, transgressions of which would violate Section 5, or Group II rules, which were accepted as "expressions of the trade." Violations of the latter did not necessarily violate Section 5, but the FTC's acceptance of such rules was, in practice, some shield against charges that *complying* with them would break the law.[41]

The agency also changed some processes in and surrounding litigation. Coolidge had sought such changes in his 1923 Annual Message to Congress, and praised the FTC in 1925 for adopting reforms.[42] On March 17, the Commission announced three changes. First, construing a "public interest" standard in Section 5, it would sue only to benefit the public, not where injury was only to a competitor and was "redressable in the court." Second, restoring a process that Gaskill had persuaded a majority to use for part of 1923 (and responding to a Gaskill memo of December 1924), the FTC offered settle-

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[39] Today, most Commission work is done by written circulation, without meetings. Commissioners can participate in meetings by telephone or video, and vote by proxy when all else fails. Further, the Chairman is the executive and administrative head of the agency. *See* Winerman & Kovacic, *supra* note 4, at 165–68.

[40] The backlog had grown from 133 in 1920 to 312 in 1922, dropping to 264 by 1925 and 135 in 1929 (though it rose the next year). *See* FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1930, at 118–19.

[41] *See* Winerman & Kovacic, *supra* note 4, at 200; FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1926, at 46–48 [hereinafter 1926 ANNUAL REPORT].

[42] State of the Union Addresses and Messages, The American Presidency Project, http://www.presidency.ucsb.edu/sou.php#axzz1L4vEePZv.

ments—without orders—to targets whose businesses were not inherently fraudulent and who stipulated that they would abandon challenged conduct. Finally, targets were given a chance to respond to proposed complaints before the Board of Review. On April 30, the Commission added that it would withhold the names of settling parties; it would neither make public case files nor acknowledge complaints until respondents had time to file an answer; and, until a final decision, it would make no public statement about a case. A less publicized change, on December 1, established a trial examiners' division. The Division facilitated stipulations and removed presiding officials at trials from the supervision of prosecutorial staff.[43]

Thompson and Nugent objected to many of these changes, and routinely opposed pre-complaint settlements. In violation of the new rules, they published dissents naming parties who settled pre-complaint—disclosures that, Nugent said, prompted talk of criminal prosecution.[44]

The Commission eventually retreated from some of these procedures. In 1926 it rescinded the rule delaying disclosure of complaints, and it began in 1934 to identify parties to precomplaint settlements. But it retained a precomplaint settlement process, and for many years settled cases without a formal complaint and order. Trade practice conferences would survive and provided the precursor in the 1960s for what became substantive rulemaking.[45] The new processes, moreover, likely contributed to a substantial drop in the agency's backlog, as measured both by total cases and longstanding cases.[46]

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[43] 1925 ANNUAL REPORT, *supra* note 38, at 11 (short versions of the press releases); Press Release, Fed. Trade Comm'n, *supra* note 29 (Mar. 17, 1925); *id.* (Apr. 30, 1925); 10 FTC Min. 39 (Mar. 11, 1925) (noting Gaskill's memo); Winerman & Kovacic, *supra* note 4, at 172 (1923 settlement procedure); 1926 ANNUAL REPORT, *supra* note 41, at 7–8 (trial examiners' division).

[44] Mack, Miller Candle Co., 8 F.T.C. 542 (1925) (dismissal, with dissent); *New Rules Split Trade Commission*, N.Y. TIMES, May 18, 1925, at 1; *Minority Attacks Trade Board Rule*, N.Y. TIMES, Mar. 19, 1925, at 2 (threats of criminal prosecution). One disclosure occurred in a particularly controversial merger of a series of mergers in the baking industry. *See Huge Bakery Merger Alleged to Be Trust*, WASH. POST, Oct. 6, 1925, at 1; 12 FTC Min. 676–77 (Oct. 13, 1926); *Combination in Restraint of Trade in Bread and Related Products: Hearing Pursuant to S. Res. 270 Before a Subcomm. of the S. Comm. on the Judiciary*, 69th Cong. 59–60 (2d Sess. 1926–1927) [hereinafter *1926 Bread Hearings*] (unauthorized disclosure of complaint). This merger is discussed further below. *See infra* notes 53–57 and accompanying text.

[45] FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1935, at 51 [hereinafter 1935 ANNUAL REPORT] (noting 1934 change and 391 settlements that year); FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1961, at 7 (noting continued use of settlements without orders). The concern about avoiding essentially private disputes was echoed by Justice Louis Brandeis, for a unanimous Court, in 1929. FTC v. Klesner, 280 U.S. 19 (1929).

[46] For figures on total cases, see *supra* note 40. As to longstanding cases, on July 1, 1925, eighteen cases were pending for more than four years, thirteen for more than five years, three for more than six, and two for more than seven. Four years later, excluding cases that had been ended and reopened, only six were pending for more than four years, and only one (a challenge to a consummated steel merger that had been "suspended" but was not formally dismissed until

D. Dismissals

Partisan tensions were also reflected in dismissals of cases pending when Humphrey arrived. During Humphrey's first eighteen months, one or both Democrats dissented from dismissals of twenty "consumer protection" cases and fifty-five "competition" cases (twenty-one of which involved price fixing conspiracies in tobacco marketing and six of which were RPM cases in which only Nugent dissented). These public dissents were often accompanied by statements with far more analysis than the Commission included in its formal decisions, and sometimes provoked similarly analytical responses by the majority.[47]

E. Authority to Undertake Certain Investigations Directed by the Senate

Another partisan split was a response to the Senate resolutions secured by progressive Senators that directed FTC investigations. Section 6(d) of the FTC Act[48] directs the Commission to conduct investigations at the direction of the President or either House of Congress, but only for law enforcement purposes. On May 4, 1925, a split Commission asked the DOJ whether the requisite purpose existed under four resolutions. The Attorney General's reply, authored by Abram Myers before he came to the FTC, found such purpose in full for three investigations and in part for one. Myers thus thwarted Humphrey even before he came to the Commission.[49]

F. The Aluminum Company of America Investigation (and Case)

Yet another partisan split preceded Humphrey's arrival. An FTC report, released in October 1924 with votes from Nugent, Thompson, Van Fleet, and Hunt, had recommended that the DOJ sue the Aluminum Company of America for contempt of a 1912 consent order, including its proscription on price squeezes by which the vertically integrated firm charged unduly high

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1939) for more than five years. (Based on lists in the 1925 and 1929 annual reports, with dates of complaints taken from the CCH Trade Regulation Reporter).

[47] *See* 1925 Annual Report, *supra* note 38, at 187–221; 1926 Annual Report, *supra* note 41, at 111–26. There were also eleven merger challenges with two related interlocking directorate cases. *See, e.g.*, Chicago Retail Lumber Dealers' Ass'n, 9 F.T.C. 517 (1925) (case with dueling statements by the dissenters and the majority). The FTC did not distinguish consumer protection from competition at the time, but we include in the former challenges to deception, lotteries, and commercial bribery; we include in the latter business torts cases.

[48] Act of Sept. 26, 1914, ch. 311, § 6(d), 38 Stat. 721. A later provision, now codified at 15 U.S.C. § 46a, requires Congressional directives to come from a concurrent resolution by both Houses. Act of June 16, 1933, ch. 101, § 1, 48 Stat. 291.

[49] *Attorney General's Opinion and the Powers and Duties of the Federal Trade Commission in the Conduct of Investigations Under Resolutions of the United States Senate* (Oct. 24, 1925), *reprinted in* 1925 Annual Report, *supra* note 38, at 118–24.

prices to prejudice downstream competitors. The issue was an administrative minefield. The FTC Act authorizes the agency to investigate compliance with the DOJ's antitrust decrees, but such investigations could obviously create inter-agency tension—particularly where, as here, the FTC prodded the Department publicly. It was also a political minefield. Treasury Secretary Andrew Mellon was a key financier for the target, and the FTC published its report soon before the 1924 election. Still, Attorney General Harlan Fiske Stone considered going forward; there was speculation that Coolidge moved Stone to the Supreme Court to forestall a case. Soon before Humphrey arrived, the agency advised the DOJ, on a party-line vote, that it would only share a target's own papers with the target's consent. When Humphrey replaced Gaskill on February 25, Thompson moved to allow the Department access to submissions that were not specifically promised confidentiality. That motion, too, failed 3–2.[50]

The submitter eventually consented to sharing, but the Senate held hearings to examine why the FTC had delayed sharing and the DOJ had not yet sued. The hearings were led by George Norris, Republican of Nebraska, and Thomas J. Walsh, Democrat of Montana. (Walsh, who had introduced the resolution under which the hearing was conducted and whose path repeatedly crossed the Commission's, had gained national prominence through other hearings, which began in 1923, that had uncovered the Teapot Dome scandal.) Witnesses included Stone's successor John Sargent, his antitrust chief William Donovan, and Commissioners Thompson, Nugent, and Van Fleet. The DOJ's witnesses downplayed the import of the FTC documents, in part because they involved no conduct after 1922. A single Justice Department staffer conducted his own investigation, found no evidence of misconduct in the past three years, and deemed some of the complaints made to the FTC to have been "inspired by hysteria, and a purpose to stimulate by any means, service on the part of the Aluminum Co. of America." The DOJ staffer found insufficient evidence to sue. Soon after, Sargent agreed.[51]

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[50] Winerman & Kovacic, *supra* note 4, at 189–90; *Aluminum Co. of Am.*, *Hearings Before the Comm. on the Judiciary* 402, 69th Cong., 1st Sess. (1926) [hereinafter *Aluminum Hearings*] (noting Commission vote on releasing the report); *Aluminum Company Accused by Stone*, N.Y. TIMES, Feb. 7, 1925, at 1; ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 182–85 (1968); 9 FTC Min. 635–36 (Feb. 11, 1925); *id.* 686–87 (Feb.25, 1925). *See also id.* at 546 (Jan. 16, 1925) (rejecting a similar access request in another case). Mellon remained a target during the New Deal, even before the famous antitrust prosecution. *See* NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIALS OF FDR'S GREAT SUPREME COURT JUSTICES 94–101 (2010) (discussing unsuccessful effort to indict Mellon for criminal tax fraud and subsequent civil prosecution, led by Robert Jackson, before the Board of Tax Appeals).

[51] *Aluminum Hearings*, *supra* note 50, at 128 ("inspired by hysteria"); *id.* at 164 (despite the controversy regarding the DOJ access to FTC documents, the DOJ ultimately examined original documents rather than the FTC's copies); *Senators Begin Aluminum Co. Inquiry Today*, BALT. SUN, Jan. 7, 1926, at 1; *Sargent, On Stand, Defends Conduct of Aluminum Case*, N.Y. TIMES, Jan. 9, 1926, at 1; *Sargent, His Aide, and Trade Board Targets at Inquiry*, N.Y. TIMES, Jan. 10,

The FTC already had decided to prosecute its own case. In May 1925, it unanimously charged the Aluminum Company with violating Section 2 of the Clayton Act and Section 5 of the FTC Act. Among other charges, the complaint alleged that the respondent had given unlawful discounts to buyers of virgin sheet aluminum who sold their scrap back to respondent. While the Commission would ultimately dismiss its complaint, the case meant that a unanimous Commission had brought a major (and politically volatile) monopolization challenge during Humphrey's first months.[52]

G. CONTINENTAL BAKING—ROUND ONE

Yet another partisan controversy that emerged after Humphrey arrived involved the dismissal of the FTC's suit against Continental Baking, although the controversy over dismissing the case tended to obscure the fact that the Commission had initially brought this major merger litigation after Humphrey arrived. The firm, along with two related firms controlled by the same family (the Wards), was buying bakeries across the country. The FTC issued a complaint under Section 7 of the Clayton Act[53] in April, but the adjudicative process was long delayed and the complaint was first disclosed publicly—in a statement by Thompson and Nugent that violated the non-disclosure rule—in October.[54]

The next February, with the FTC's case further delayed by the issuance of a new complaint and with apparently little consultation between the agencies, the DOJ brought its own case under the Sherman and Clayton Acts. The FTC had challenged the expansion of one of the family's firms by acquisitions; the DOJ focused on the possible combination of the three (and, according to Van Fleet, rendered the FTC case "comparatively trivial"). The DOJ's lead counsel was Abram Myers, who later described the FTC case as problematic on substantive and jurisdictional grounds. The DOJ obtained a settlement in its case,

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1926, at 1; *Sargent Throws out Aluminum Charges*, N.Y. TIMES, Feb 20, 1926, at 1; FRANCIS RUSSELL, THE SHADOW OF BLOOMING GROVE: WARREN G. HARDING IN HIS TIMES 608–18 (1968) (Walsh and Teapot Dome); J. LEONARD BATES, SENATOR THOMAS J. WALSH OF MONTANA: LAW AND PUBLIC AFFAIRS, FROM TR TO FDR 212–29 (1999).

[52] *Aluminum Hearings*, *supra* note 50, at 379 (FTC complaint); Memorandum to the Board of Review, Jan. 21, 1928, *in* Aluminum Co. of America, Confidential Memoranda and Itineraries, Docket Section, Aux. Case Files, 1915–1936, Box 691, RG-122, National Archives, College Park, Md.; *Trade Board Drops Aluminum Charges*, N.Y. TIMES, Apr. 5, 1930, at 29; *infra* note 110 and accompanying text (discussing litigation).

[53] Act of Oct. 15, 1914, ch. 323, § 7, 38 Stat. 731. For a discussion of the original text of that section, *see infra* notes 118–129 and accompanying text.

[54] 1926 ANNUAL REPORT, *supra* note 41, at 12–13; *1926 Bread Hearings*, *supra* note 44, at 59–60 (Thompson and Nugent disclosure); *Commissioners Defy Secrecy in Bread Case*, BALT. SUN, Oct. 6, 1925, at 1. Disclosure was delayed in part because respondent was granted multiple extensions to file an answer; further, though the complaint was issued before the Commission gave targets a pre-complaint hearing before the board of review, the Commission granted a hearing post-complaint. *1926 Bread Hearings*, *supra*, at 33–36.

though, that Myers called strong; he contended that defendants settled because adverse publicity was harming stock prices and creating financial hardship.[55]

The targets were apparently anxious that the FTC case be dismissed in conjunction with their settlement with the DOJ, although it is not clear that the FTC dismissal was critical. (Myers testified that the DOJ did not view it as such, and respondents signed the settlement papers in the DOJ proceeding before the FTC case was dismissed.) Humphrey called a Commission meeting on Friday, April 2, 1926, which was Good Friday. With Myers going into court for the DOJ on Saturday, Humphrey demanded an immediate vote to dismiss the FTC case. Thompson was away on business and Nugent wanted to review the papers through Monday. Van Fleet suggested a Saturday vote, but Humphrey held firm and got an immediate dismissal. Nugent and Thomas were eventually recorded as dissenting, and filed a lengthy statement arguing, among other things, that the DOJ settlement had substantial loopholes.[56]

This led to Congressional hearings in 1926 and 1927, with witnesses including Myers (addressing mainly his work for the DOJ) and Commissioners who had been sitting during the case. Walsh conducted these hearings largely by himself, and the Commissioners were allowed to question witnesses, including each other. Myers's testimony, moreover, proved to be a prelude. The proposed decree submitted to the court had mentioned the ongoing FTC case, and had not been modified to reflect its dismissal. Myers, who suggested that Judge Morris Soper was rushed, also testified that he told the judge that the FTC case had been dismissed, and produced a substantiating exchange of letters between himself and Soper. This would strongly influence a subcommittee report finding that Soper had "washed his hands" of the settlement—and that report would lead to further hearings, discussed below, in 1928.[57]

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[55] *1926 Bread Hearings*, *supra* note 44, at 62–81 (the DOJ complaint); *id*. at 83–87 (the DOJ settlement); *id*. at 97, 121 (failure to coordinate); *id*. at 101–02 (falling stock prices); *id*. at 215 (relation between the agencies' cases); *id*. at 269 (Van Fleet on the relation between the cases); *id*. at 270 (Van Fleet on weakness of the DOJ's case); *Combination in Restraint of Trade in Bread and Related Products: Hearing Pursuant to S. Res. 270 Before a Subcomm. of the S. Comm. on the Judiciary*, 70th Cong. 366–67 (1st Sess. 1928) [hereinafter *1928 Bread Hearings*] (Myers on weakness of the FTC case, noting that respondent's acquisitions were "selected with one eye on the Clayton Act," and most involved: (1) non-competing firms in different local markets, and (2) production and sales in a single state, which did not satisfy statutory or constitutional requirements, as then construed, for "interstate commerce"). DOJ also doubted the FTC's authority to order divestiture under Section 11 of the Clayton Act, *id.* at 97, and those doubts would soon be vindicated. FTC v. Western Meat Co., 272 U.S. 554 (1926); *see also infra* note 113 and accompanying text.

[56] Cont'l Baking Co., 10 F.T.C. 436 (1926); *1926 Bread Hearings*, *supra* note 44, at 103, 211 (the DOJ did not negotiate to have the FTC case dropped); *id.* at 165–76 (Thompson and Nugent dissent); *1928 Bread Hearings*, *supra* note 55, at 332 (Good Friday).

[57] *1926 Bread Hearings*, *supra* note 44, at 108 (testimony that Soper was "taking something in the nature of an Easter holiday"); *id.* at 123–26 (exchange of letters, which Myers had secured in preparation for his confirmation hearings); *id.* at 126–27 (testimony that Soper was available

IV. THE DYNAMICS CHANGE: THREE NEW COMMISSIONERS

After nominating Hunt to a short term in mid-1924 and Humphrey to a nearly seven-year term in early 1925, Coolidge re-nominated Hunt in September 1925. With Senate foes of the agency's new direction venting their frustration, the vote confirming Hunt was only 48–20.[58]

Coolidge's next three nominees were new Commissioners, and their appointments changed the agency's dynamics. In 1926, Abram Myers replaced Van Fleet, who resigned in mid-term (denying that his resignation was hastened by tensions at the agency), and Edgar McCulloch replaced Thompson, whose term was expiring. In 1927, Garland Ferguson replaced Nugent, who stayed until (and beyond) the end of his term; Nugent had run for his old Senate seat in 1926 without leaving and, in 1927, acknowledged that his term was over only when the Comptroller General so ruled.[59]

A. THE NEW REPUBLICAN: ABRAM F. MYERS (1926–1929)

Abram Myers, who had already figured prominently in post-Humphrey events from his perch at the DOJ, became a Commissioner in August 1926. Attorney General Sargent had recommended him less than a week before, writing that Myers had started at the Department as an office boy and now knew more about antitrust than anyone else that Sargent knew.[60] Like Gaskill, Myers cultivated ties with Hoover. Like Gaskill, Humphrey, and Thompson, he articulated an agenda and used speeches to advance it.

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only to sit for a short while); S. SUBCOMM. ON THE JUDICIARY, 70TH CONG. (1ST SESS.), COMBINATIONS IN BREAD AND RELATED PRODUCTS 8 (Comm. Print 1928) [hereinafter 1928 SUBCOMMITTEE REPORT]. For a discussion of the 1928 hearings, see *infra* notes 84–85 and accompanying text.

[58] Commissioners and Chairmen of the Federal Trade Commission, Oct. 2010, http://www.ftc.gov/ftc/history/commisionerchartlegal2010.pdf; Winerman & Kovacic, *supra* note 4, at 170–71, 173–76; *Trade Board's Policy Attacked in Senate*, N.Y. TIMES, Mar. 6, 1926, at 26 (asserting that Hunt "was supposed to be 'progressive' in tendency when appointed, [but] exhibited reaction in his votes and activities after assuming office").

[59] *Senate Approves Hunt on Federal Trade Board*, CHI. DAILY TRIB. Mar. 11, 1926, at 8; *Leaves Trade Commission*, N.Y. TIMES, July 18, 1926, at E8 (Van Fleet); *Nugent Out, McCarl Rules*, N.Y. TIMES, NOV. 6, 1927, at N16. Nugent argued that he was entitled to serve seven years from the day he took office. The Comptroller General ruled that Nugent's seat traced back to a Commissioner whose initial term could have run through September 26, 1920, so his term ended seven years later. (A later amendment allows Commissioners to stay until a successor is prepared to take office. Act of Mar. 21, 1938, ch. 49, § 1, 52 Stat. 111.)

[60] Memorandum from Edward T. Clark, Secretary, to Coolidge (July 28, 1926), *in* Coolidge Papers, *supra* note 27, File 100CI, Reel 68 (transmitting Sargent's recommendation). Myers became secretary to the assistant to the Attorney General in 1910, and, except for a two-year stint in the Solicitor General's office, was in the Antitrust Division from 1912 to 1926, eventually as the senior career staffer. Memo/Bio of Abram F. Myers, July 1926, *in* Coolidge Papers, *supra* note 27, File 100CI, Reel 71.

Reflecting TR's New Nationalism, that agenda contemplated close oversight of business. Myers defended the growth of government commissions and bureaus, and advocated tighter corporate control through federal licensing or incorporation. If the federal government could "dismember" a corporation in a Sherman Act case, he asked, why "withhold its hand until a combination has been formed under State law?" Why not "say in the beginning what shall be the nature of the organization that may engage in interstate commerce?"[61]

However, Myers was more skeptical about large firms than TR had been. Indeed, he echoed Brandeis (and ignored incentives that even monopolists have to increase profits) in denouncing those who would consolidate "laterally and perpendicularly across every industry, until all producers and traders are transformed into hirelings and every incentive for increase in efficiency and improvement in products disappears." Further, while he was criticized for the *Continental Baking* settlement, he showed a concern for corporate reach by pressing an investigation, discussed below, of ties between General Motors, Dupont, and U.S. Steel.[62]

Myers was also an ardent associationalist, a perspective advanced by Hoover but (with sufficient government oversight) also consistent with the New Nationalism. Trade association activities could help maintain prices, and Myers denounced below-cost sales, in particular, as "business suicide" and "industrial murder."[63] More broadly, collective behavior through trade associations could "mark the gradual passing of the business cycle, with its alternating extremes of overproduction and underproduction, employment and unemployment, high prices and low prices."[64] While acknowledging limits on information sharing under the case law,[65] Myers generally defended far-reaching trade association activities.

He did so in particularly broad terms in late 1928, soon before he left the agency. By then, the agency had adopted a "clandestine violation" rule, dis-

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[61] Abram F. Myers, *Federal Regulation of Corporations Under the Commerce Clause*, ANNALS AM. ACAD. POL. SOC. SCI. 143, 146–47 (1927).

[62] Abram F. Myers, *Anti-Trust Laws or Socialism,* ASS'N MGMT., May 1927, at 8–9 [hereinafter *Anti-Trust Laws*] (describing effects of mergers); *infra* notes 76–77 and accompanying text (Du Pont).

[63] Abram F. Myers, The Federal Trade Commission: A Constructive Force in American Business 1 (Nov. 9, 1927) [hereinafter Constructive Force], *in* ABRAM F. MYERS SPEECHES (unpublished collection) (on file in FTC Library, Washington, D.C.) [hereinafter MYERS SPEECHES]. Those who priced below cost, he declared, had "the soul of a monopolist." *Id.* at 3.

[64] Abram F. Myers, Legitimate Trade Association Activities 4 (May 17, 1928), *in* MYERS SPEECHES, *supra* note 63.

[65] Myers, Constructive Force, *supra* note 62, at 4 (discussing Maple Flooring Manufacturers Ass'n v. United States, 268 U.S. 563 (1925)).

cussed below, which sought to make Group II rules, in certain circumstances, enforceable under Section 5.[66]

It had also approved some extraordinary substantive provisions, also discussed below, including provisions that required posting of petroleum prices by wholesalers and retailers, and forbade deviations from these prices.[67] Myers, a strong proponent of these actions, was quoted in the *National Petroleum News* as saying that they would "encourag[e] and approv[e]" cooperation to enable independent businesses "to survive the competitive struggle and remain independent." Such provisions promoted "[c]are in the pricing of products and the avoidance of secret departures from prices openly established," and were "in keeping with Section 2 of the Clayton Act . . . ." They were also justified by downstream concerns. "The products of one industry are the raw materials of another, and discrimination between competing concerns in the matter of prices on necessary materials, not based on differences in quality or quantity, will in the end give rise to the very evils which it is the purpose of the antitrust laws to prevent." The FTC-approved provisions, he argued, would leave competition as "the great regulator of our domestic economy," because "[t]he struggle for greater efficiency, for the elimination of waste, and for fixing standards of quality would continue with renewed vigor." Prices would be set "by each industrial unit acting singly, and . . . would reflect the relative efficiency and individual policy of each concern. The striving for improvement in the quality of output would be unhampered by the temptation or need to lower standards in order to realize a profit in a chaotic market." While the "peculiar needs" of some industries might justify some industry-specific relaxation of the antitrust laws, moreover, Myers generally thought that needed actions could be taken consistently with existing laws.[68]

B. THE NEW DEMOCRATS: EDGAR MCCULLOCH (1927–1933) AND GARLAND FERGUSON (1927–1949)

When Thompson left, there were already three Republican Commissioners. Unable to name another, Coolidge invited Senate Minority Leader Joe Robinson to choose a Democratic nominee from his home state of Arkansas. There was speculation that Coolidge had used the "lure of patronage" as leverage to secure Myers's confirmation.[69]

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[66] *See infra* note 79 and accompanying text.

[67] *See infra* text accompanying note 144.

[68] Warren C. Platt, *How Federal Trade Commission Would "Make Law": The American Petroleum Institute Code of Ethics*, NAT'L PETROLEUM NEWS, Jan. 16, 1929, at 28, 30 (all quotes in paragraph excerpted from a November 1929 Myers Speech reprinted in *National Petroleum News*).

[69] Telegram from E.T. Clark to Hon. Joseph Robinson (Sept. 24, 1926), *in* Coolidge Papers, *supra* note 27, File 100A Misc., Reel 71; Letter from Joseph Robinson to President (Oct. 11,

Robinson chose McCulloch, who was born in 1861, joined the Arkansas Supreme Court in 1904, became Chief Justice in 1909, and served there until he joined the FTC. His major contribution at the agency, discussed below, was conducting the public utility hearings (which elicited respect from skeptical progressives and often limited his attendance at Commission meetings). McCulloch would die in office in 1933.[70]

Coolidge next chose Ferguson, a lawyer reportedly suggested by his former Secretary, C. Bascom Slemp, and whose campaign for the seat included letters from numerous Democratic Senators. Ferguson had attended the Naval Academy and graduated from the University of North Carolina. He had worked for Southern Railway, Newport News Shipping Corporation, and, since 1921, had been in private practice. He reportedly satisfied a demand for a Southern nominee, and Humphrey backed him as well. Unlike Thompson, Humphrey or Myers, Ferguson had little public persona. However, FDR would twice reappoint him and he served longer than any other FTC Commissioner.[71]

V. THE MYERS YEARS (1926–1929)

Soon after Myers arrived, he targeted Humphrey's priorities and often isolated Humphrey. The Commission's minutes, often dry summaries of agency actions, bristle during these years with the contempt between Humphrey and Myers.

A. The Battle of Seattle and Personal Attacks

Some of their confrontations involved administrative matters dear to Humphrey. In October 1925, at Humphrey's urging, the agency created a Seattle office headed by Humphrey's former partner, Ellis DeBruler. On May 18, 1927, citing the need to save money, remove unqualified staff, and create spots for "more talented men and women," Myers argued that the office

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1926), *in* Coolidge Papers, *supra*; *Senate to Accept Coolidge Nominees*, N.Y. TIMES, Jan. 3, 1927, at 2. Robinson's name would later attach to the Robinson-Patman Act.

[70] 1 HENRY MILLER, STATUTES AND DECISIONS PERTAINING TO THE FEDERAL TRADE COMMISSION, iv (1930) [hereinafter STAT. AND DEC.] (biography); RICHARD LOWITT, GEORGE W. NORRIS, THE PERSISTENCE OF A PROGRESSIVE, 1913–1933, at 361–62 (1971); BATES, *supra* note 51, at 259 (Norris's and Walsh's approval for the utility hearings); *M'Culloch, Federal Commissioner, Dies*, WASH. POST, Jan. 24, 1933, at 3. One admirer claimed that Robinson chose him to create a vacancy on the Arkansas court for a less judicious appointment. Letter from Oscar Winn to Everett Sanders (Feb. 5, 1927), *in* Coolidge Papers, *supra* note 27, File 100A, Reel 71.

[71] STAT. AND DEC., *supra* note 70; Letter from William Humphrey to Edward T. Clark (Aug. 17, 1926), *in* Coolidge Papers, *supra* note 27, File 100, Reel 69 ("he is a good lawyer and a fine man" and "not primarily socialistic in his political views."); *North Carolinian Named to Trade Commission,* WASH. POST, Nov. 13, 1927, at 15. Ferguson was endorsed by four Senators (all Southern Democrats and two from his home state of North Carolina) and numerous other officials, again, with particular focus on North Carolina. *See* Coolidge Papers, *supra*, File 100, Reel 69.

should be closed. With Humphrey dissenting, the other Commissioners voted to close the office and fire much of its staff. Before the actual closure, Humphrey wrote to the White House, portraying the matter as a Nugent initiative to challenge Coolidge and the 1925 FTC's rule changes. From Washington Senator W.L. Jones, who sat on the Appropriations Committee, he secured a threat to cut the FTC's budget. Still, the office was closed, although Humphrey managed to protect DeBruler in the short term and restore the office after Myers left.[72]

Soon after, Humphrey headed to Washington for the summer. After leaving, he wrote to then-Chairman Hunt, in a letter marked "personal," that he might take depositions on the West Coast, and claimed his trip as government travel. Hunt, who was starting to align consistently with Myers, brought the matter before Myers and Nugent, who were still in D.C. They told Humphrey that they would inform him if he were needed for official business, and directed the Secretary not to pay Commissioner travel expenses without specific Commission authorization.[73]

B. Du Pont and Other "Myers Investigations"

During Humphrey's vacation, Myers successfully introduced resolutions to investigate resale price maintenance (RPM), basing point pricing (at Nugent's suggestion), deceptive "blue sky" securities, and corporate ties between Dupont on the one side and General Motors and U.S. Steel on the other. Humphrey had earlier tried to stop investigations that lacked a clear law enforcement purpose. Myers instigated them.[74]

After new Senate-directed investigations intervened, these investigations were shortened or delayed. The Blue Sky investigation appears to have led to an internal report only. The RPM investigation would lead to a two-volume report, the second of which, in 1931, would recommend against legalizing RPM. The basing point pricing investigation would lead to a 1932 report that

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[72] 11 FTC Min. 117–19 (Oct. 19, 1925) (creating Seattle office, Nugent and Thompson dissenting); 12 FTC Min. 650–52, 654–55 (May 18, 1926); Letter from William Humphrey to Everett Sanders (May 27, 1927), *in* Coolidge Papers, *supra* note 27, File 100, Reel 68, *attaching* W.L Jones to Hunt (May 21, 1927) (closing the office would show that the FTC was indifferent to "economy and efficiency"); 15 FTC Min. 360 (Mar. 28, 1928) (recording Debruler's gratitude for a pay raise and transfer); 1929 ANNUAL REPORT, *supra* note 38, at 58 (noting regional office in Seattle). Letter from Abram Myers to President Hoover (July 6, 1931), *in* Hoover Papers, *supra* note 26 (identifying Debruler as Humphrey's former partner).

[73] 14 FTC Min. 138–39 (July 1, 1927). Soon after, Hunt, with Myers's approval, rejected another request, asking Hunt to arrange a hearing, with DeBruler appearing for the FTC, where the requesting attorney was "Harry Jones son of Senator . . . ." *Id.* at 287 (Aug. 8, 1927).

[74] FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1928, at 199–202 [hereinafter 1928 ANNUAL REPORT]; *see, e.g.*, 14 FTC Min. 256–67 (July 27, 1927) (showing Myers making motion).

found substantial use of the practice in the cement industry and identified competitive problems associated with it—part of a decades-long struggle by the FTC against the practice.[75]

The Du Pont investigation was the most significant. Du Pont sold its limited holdings in U.S. Steel by 1928, but it kept a controlling interest in GM until, decades later, that control was successfully challenged in court. A final, typewritten, report was voted out on Myers's last day and dated some two weeks later. On Ferguson's motion, the Commission had made substantial deletions, to which Myers, presumably with reluctance, has assented. The total published report was only nine pages plus exhibits. The omitted materials (including most of the report's body) included substantial discussions about the firms' relations with railroads, and a brief discussion that raised broad questions about inter-corporate stockholding. How might it impact firms that competed with each other, that bought or sold from each other, or that had business dealings, as buyers or sellers, with the same third parties? How might such relations impact minority shareholders? How might sufficiently extensive relations among major firms broadly impact the economic and even political sphere?[76]

Then Humphrey got the last word. The exercise showed "bureaucracy gone insane." The investigation was ordered, "not by accident," with two Commissioners away. Although the published segments of the report focused on the investments as a basis for corporate influence or control, Humphrey ignored its competitive aspects and said that Myers hoped only to vindicate his broad views of federal oversight. Having outlasted Myers, and referring to Myers, Nugent and Hunt, Humphrey crowed, "[i]t is beyond all reasonable probability that the President will ever appoint, and the Senate confirm, a majority of the Commission who hold such irrational opinions . . . ." The

[75] FED. TRADE COMM'N, REPORT ON RESALE PRICE MAINTENANCE (PART 2), at 1–6 (1931) (rejecting as unworkable proposals to allow RPM subject to government oversight of prices; Humphrey distancing himself from the report); FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON PRICES BASIS INQUIRY, THE BASING-POINT FORMULA AND CEMENT PRICES (1932); FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON BLUE-SKY SECURITIES (1929) (typewritten manuscript, designated "Confidential. For office use only."). (The last report was not mentioned in subsequent listings of investigations in FTC annual reports. *E.g.*, FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1935, at 147 [hereinafter 1935 ANNUAL REPORT]).

[76] REPORT OF THE FEDERAL TRADE COMMISSION ON DU PONT INVESTMENTS UNDERTAKEN BY A RESOLUTION OF THE COMMISSION DATED JULY 29, 1927 (1929) (noting, at 5, "complete control") [hereinafter DU PONT REPORT]; 16 FTC Min. 530–31, 557–58, 575–76 (Jan. 4, 11, and 14, 1929) (showing Ferguson's initiative); *Du Pont Steel Sold at $2,600,000 Profit*, N.Y. TIMES, Mar. 20, 1928, at 1; *Materials Stricken From the Report on Du Pont Investments in General Motors and United States Steel*, *in* Franklin D. Roosevelt Papers, OF 100, Box 2, Franklin D. Roosevelt Presidential Library, Hyde Park, N.Y. [hereinafter FDR Papers] (Section 5 (railroads); Section 8 (conclusions)); United States v. E. I. du Pont Nemours and Co., 353 U.S. 586 (1957) (ordering sale of stock in General Motors).

matter showed "how men clothed with a little brief authority, become drunk with their own greatness and lose all sense of proportion."[77]

Humphrey had already taken one other step to prevent a recurrence of the Myers motions. In June 1928, by a 3–2 vote, he secured a formal summer recess.[78]

C. Humphrey's Consumer Protection Initiatives: Publisher Cooperation and Liability in Fraud Cases

Though Humphrey was skeptical about much enforcement activity, he strongly advocated stopping fraud and deception. He spoke on the subject and sought new ways to address it, including publisher's liability under Section 5 and a conference to focus publishers on screening ads. At Humphrey's initiative and under his direction, the publishers' conference anticipated partnerships that survive today. It called for publishers to work with the Better Business Bureau, which would tell them when it found ads "to be fraudulent upon reasonable investigation and notice to the persons complained of." In a reversal of their usual roles, Myers, joined only by Hunt, dissented from this conference, calling the screening unfair and legally dubious, and urging the agency to "guard against the charge that it was instrumental in establishing a blacklist."[79]

D. Clandestine Violation Rule

During Myers's tenure, he and Humphrey generally agreed on expanding the trade practice conference program, but they increasingly diverged on specifics. One fundamental disagreement involved the "clandestine violation rule." The rule was adopted at a conference for the cottonseed oil industry with McCulloch presiding, and it was later pressed by Myers as well. Its goal was to turn Group II rules into legal norms, using a deception theory as the pivot; businesses that agreed to follow the rules but failed to do so would be breaking their pledge. Humphrey and Ferguson dissented, with Ferguson

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[77] DU PONT REPORT, *supra* note 76.

[78] 16 FTC Min. 23–24 (June 22, 1928) (motion by Humphrey, supported by Ferguson and McCulloch, providing that the agency would act only on "emergent and routine" matters between July 15 and September 1).

[79] *Publishers of Periodicals* (Nov. 12, 1928), FED. TRADE COMM'N, TRADE PRACTICE CONFERENCES 169 (1929) [hereinafter TPC]; William Humphrey, Publishers and False Advertising (Sept. 17, 1927), *in* WILLIAM E. HUMPHREY SPEECHES, *supra* note 32; Humphrey, False Advertising, *supra* note 32; Press Release, Fed. Trade Comm'n, *supra* note 29 (June 14, 1928) (Myers's dissent); 15 FTC Min. 400 (Apr. 4, 1928) (Myers's and Hunt's disapproval of conference). *See also* 17 FTC Min. 99–101 (Mar. 1, 1929); *id.* at 273 (Apr. 12, 1929) (securing a stipulation from the International News Service). *See generally* Edward J. Balleisen, *Private Cops on the Fraud Beat: The Limits of American Business Self-Regulation, 1895–1932*, 83 BUS. HIST. REV. 113 (2009) (detailing both the extent of such self-regulation and its limits).

sometimes taking the lead. Humphrey objected that the rule delegated law-making authority to a private body, and highlighted other cottonseed oil rules that would become legal norms, including a maximum price on certain commissions; excessive pricing would thus violate Section 5. The "rule," moreover, was apparently intended to apply to signatories of other codes, even those with no such provision. However, it was announced just months before Myers left, and dropped, over McCulloch's dissent, four months after he left.[80]

E. The Motion Picture Industry: Litigation and a Myers-Led Conference

Not every major initiative during these years divided Humphrey and Myers. They united to support a 1927 order against the Famous Players-Lasky Corporation (FPL). That order is further evidence that the FTC's antitrust enforcement program in this period cannot be dismissed as trivial, and the follow-up shows the FTC integrating litigation with other tools, yet it also reveals the agency's limits in executing its plans effectively.

FPL was formed in 1919 by a consolidation of firms previously owned by Adolph Zukor and Jesse Lasky. It soon had strong positions in movie production, distribution, and exhibition. The Commission sued FPL and various affiliates and individuals, although its final order reached only FPL, Zukor, and Lasky. Drawing on a 32,000-page record, its sixteen pages of findings described transactions from which FPL had emerged; its expansion by acquisitions and intimidation of other distributors and exhibitors; and its use of block booking, by which it would not lease individual films in an area so long as one exhibitor bought a "block." The FTC also found that other producers "necessarily followed" FPL's practice of block booking. Finding that FPL's practices hindered competition and created a dangerous tendency toward monopoly, the Commission unanimously issued a far-reaching order, though Nugent dissented that it should have gone still further. It forbade block booking; buying or threatening to buy theaters with the intent of intimidating other theater owners; and enforcing a conspiracy for anticompetitive purposes. Consistent with the agency's unfortunate custom in its first decades, however, the decision cited no economic testimony or legal precedent. More importantly, while it detailed FPL's *size* in 1926, it ignored evidence, available for 1919 to 1924, that the respondent's market share had dropped. For example, FPL had

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[80] 16 FTC Min. 253 (Oct. 1, 1928); *id.* at 304–12 (Oct. 18, 1928); Press Release, Fed. Trade Comm'n, *supra* note 29 (Oct. 18, 1928) (Humphrey's dissent); TPC, *supra* note 79, at 83 (1929); Press Release, Fed. Trade Comm'n, *supra* note 29 (May 29, 1929) (McCulloch's dissent to repealing the rule, noting that it was intended as a policy that would apply to other codes). For further discussion of trade practice conferences, see *infra* notes 130–149 and accompanying text.

30.8 percent of total film rentals for the last half of 1921, but only 20.5 percent in 1924.[81]

Within a month, the agency announced a trade practice conference to extend its prohibition on block booking. Myers directed the conference, with participants from various components of the industry (including such figures as Metro-Goldwyn-Mayer's Louis Mayer). The conference endorsed such varied rules as a morals code and a ban on paid advertising in films, but, when it turned to block booking, Myers ruled that the FTC had already resolved that issue. As with Humphrey's conference with publishers, this movie industry conference reflected a pre-existing agency agenda. At least for Myers, the proceedings tried to secure industry acquiescence to a norm that the FTC had already embraced. In this it failed. Some representatives soon left, Myers said the session was "disintegrating," and, as to block booking, the conferees produced a statement that "it shall not be used for the accomplishment of any illegal purpose."[82]

The next year, the Commission asked a court to enforce the FPL order. Respondents had not sought judicial review, a condition that, under the 1914 FTC Act, put the onus on the agency to ask a court to "enforce" it. The agency sought enforcement only on block booking, and it lost. The agency had ignored evidence of FPL's falling market share. The court did not.[83]

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[81] Winerman & Kovacic, *supra* note 4, at 188 (early phases of the case); Press Release, Fed. Trade Comm'n, *supra* note 29 (Aug. 31, 1921) (original complaint); Famous Players-Lasky Corp., 11 F.T.C. 187, 196–200 (1927) (parties); *id*. at 200–06 (creation and growth of FPL); *id*. at 206–07 (block booking); *id*. at 207–10 (acquisitions and position by 1926); *id*. at 211–13 (order), *pet. for enforcement denied*, 57 F.2d 152 (2d Cir. 1932); Brief of Respondents, FTC Auxiliary Case Files, 1914–1936, Box 363, National Archives, College Park, MD; FTC v. Paramount Famous Players-Lasky Corp., 2 STAT. AND DEC., *supra* note 70, at 487 (2d Cir. Mar. 9, 1931) (interlocutory order; describing size of the record); 57 F.2d at 155 (detailing FPL's percentage of film rentals from 1919–1924).

[82] Abram R. Myers, Fair Methods of Competition in the Motion Picture Industry, Opening Address, *in* MYERS SPEECHES, *supra* note 63 (Oct. 10, 1927); *Film Men to Meet to Plan Ethics Code*, N.Y. TIMES, Oct. 9, 1927, at E1; *Warns Movie Men to Clean House; A.F. Myers Tells Conference of Industry Failure to Correct Evils May Mean "Regulation,"* N.Y. TIMES, Oct. 11, 1927, at 21; *Film Groups Clash over Trade Reform*, N.Y. TIMES, Oct. 13, 1927, at 22; *Film Men Silent on "Block Booking,"* N.Y. TIMES, Oct. 14, 1927, at 14; *Film Conference Still Widely Split*, N.Y. TIMES, Oct. 15, 1927, at 22; FED. TRADE COMM'N, TRADE PRACTICE CONFERENCE FOR THE MOTION PICTURE INDUSTRY 85 (1928) (advertising provision); *id*. at 90–91 (morals code); *id*. at 11 (block booking statement). The morals code, a Group II rule, included bans on "profane and vulgar" expressions, ridicule of the clergy, and miscegenation. *Id.* at 90. *See also Pure Films Advocated: [Louis] Mayer Urges Aid for Morons*, L.A. TIMES, Oct. 11, 1927, at 1.

[83] Press Release, Fed. Trade Comm'n, *supra* note 29 (Aug. 2, 1928) (announcing challenge); *FPL*, 57 F.2d 152.

F. CONTINENTAL BAKING—ROUND TWO

Finally, the last controversy we discuss in this section involved Myers alone. As discussed above, 1926 and 1927 Senate hearings had focused on the FTC's and the DOJ's Continental Baking cases. At those hearings, Myers had suggested that Judge Soper was hurried when he signed the order settling the case, and had suggested that the Judge was on vacation. Myers had also produced an exchange of correspondence between himself and Soper in which they seemed to agree that Myers had told Soper before Soper signed the decree that the FTC had dismissed its case (despite a suggestion in the decree to the contrary). Relying on Myers's assertions and submissions, a committee report found that Soper had "washed his hands" of the matter. Soper was deeply offended (he noted that the quoted reference alluded to Pontius Pilate), and asked to testify in response. Contrary to Myers's suggestion of vacation plans, he noted that he had a full schedule for two weeks before and two weeks after the hearing. As to the exchange of correspondence, the letter provided to the committee recited that Myers recalled telling Soper about the FTC settlement. Myers's actual letter, though, said that this was his own recollection, but that he was deferring to the contrary recollection of the U.S. Attorney for Baltimore.[84]

Senator William Borah, Republican of Idaho, declared Myers either a liar or a forgerer, while Walsh pressed him in a way that led to a harsh colloquy; shifting to a tangential discussion about the senator's role in aluminum hearings, Myers broadly denounced Walsh's style as "villainous." On the merits of the immediate dispute, Myers insisted that Soper had been aggressive and peremptory at the hearing. As to the correspondence, though, he acknowledged that he had given the committee an early draft of his letter to Soper, but insisted that he had done so inadvertently. "[W]ould anyone other than a hopeless lunatic alter a letter that is going to be included in a public document," knowing that the recipient might read it? In his account of the miscommunications in Continental Baking, Myers though, was backed only by his secretary, who took responsibility for sending the wrong letter, and his cocounsel (and future wife) Mary Connor. Soon after, the subcommittee apologized to Soper while reluctantly accepting Myers's explanation for producing the wrong document.[85]

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[84] 1928 SUBCOMMITTEE REPORT, *supra* note 57, at 8; *1928 Bread Hearings*, *supra* note 55, at 326 (Pontius Pilate reference); *id.* at 327–28 (Soper's calendar); *id.* at 332 (noting that hearing was the day after Good Friday, a holiday in Baltimore); *id.* at 337 (reference in Myers's letter to the hearing); *id.* at 348 (identifying "Colonel Woodcock," whose recollection diverged from Myers's, as U.S. Attorney for Baltimore); *id.* at 349 (describing inadvertence); *id.* at 352 (describing Soper as "aggressive and peremptory"); *Myers Letter Changed, Judge Soper Testifies*, WASH. POST, Feb. 18, 1928, at 1.

[85] *1928 Bread Hearings*, *supra* note 55, at 340 (lying or forgery); *id.* at 349 ("lunatic"); *id.* at 379–85 (testimony by secretary); *id.* at 364 ("villainous"); *id.* at 391 (Connor's background as

G. MYERS'S DEPARTURE AND ITS AFTERMATH

Myers stayed at the FTC beyond September 26, 1928 on a recess appointment, but his prospects for renomination and confirmation were small, and he left on January 15, 1929. He moved to private practice and also became general counsel, and later president and chairman of the board, of the Allied States Association of Motion Pictures Exhibitors. He also headed a "Congress of Industries" that resisted the Commission's retreat in the early 1930s from some controversial code provisions.[86] As Myers left, he claimed substantial success for his tenure. By 1931, though, after much of his work had been undone, Myers bitterly criticized the FTC as a "colossal failure" and called for a new agency to take its place.[87] Myers had become Chairman soon before he left, and McCulloch took the spot. In a quick sign that Humphrey's fortunes had changed, McCulloch took oversight of the Chief Counsel's and Chief Trial Examiners' Division, and Humphrey got the coveted Board of Review.[88]

VI. LATER DEVELOPMENTS

A. THE UTILITIES AND CHAIN STORE INVESTIGATIONS

The Senate in 1928 directed the FTC to undertake two massive investigations. The first directive, on February 28, was to investigate the business structure and use of publicity by the public utility corporations supplying electricity. In an unusual shift (progressives had often sought FTC investigations), Senator Walsh wanted the Senate to conduct its own investigation, but the Senate voted 46–31, after three days of heated debate and "with party lines

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Myers's secretary and a junior attorney working under his supervision); *Senate Subcommittee Apologizes to Soper*, N.Y. TIMES, Apr. 3, 1928, at 2; *Woman Lawyer Marries,* N.Y. TIMES, Nov. 14, 1929, at 30. To claim or imply that Judge Morris Soper had acted without adhering to the highest professional standards was no small matter. Judge Soper became a revered member of the Fourth Circuit and was a deeply respected figure in the Maryland bar. Myers described him as "one of our ablest and most efficient judges." *1926 Bread Hearings*, *supra* note 44, at 123.

86 1928 ANNUAL REPORT, *supra* note 74, at 109 (recess appointment); Letter from Abram Myers to Edward T. Clark (Dec. 17, 1928), *in* Coolidge Papers, *supra* note 27, File 100A, Reel 68 (intent to resign); *Ottinger Is Backed for Federal Trade Board; Republicans Here Ask Coolidge to Name Him*, N.Y. TIMES, Dec. 24 1928, at 1 (attributing Myers resignation to opposition by Walsh and Borah to his confirmation); HIMMELBERG, supra note 3, at 97; 51 AMERICAN BIOGRAPHY: A NEW CYCLOPEDIA 360 (William Richard Cutter ed., 1932). For the reason why a recess appointment was needed, see *supra* note 59.

87 Letter from Abram Myers to President Coolidge (Jan. 2, 1929), *in* Coolidge Papers, *supra* note 27, File 100CI, Reel 68 (noting reduced backlog; resolution of several major cases; recent successes in court; achievement of a "permanent machinery for cooperating" with the DOJ; changing the perception of FTC as primarily a prosecutorial agency; start of new investigations; and removing "unnecessary and well-nigh useless employees"); MILTON HANDLER, ED., THE FEDERAL ANTITRUST LAWS, A SYMPOSIUM 124–38 (1932) (remarks by Myers; symposium was held in 1931 at Columbia University); *New Trade Board Is Urged by Myers,* N.Y. TIMES, Dec. 11, 1931, at 27.

88 16 FTC Min. 628 (Jan. 28, 1929) (assignments).

obliterated," to divert the matter to the FTC. The Commission then surprised the skeptics. At the Senate's direction, the hearings were public and, at the Commission's initiative, McCulloch ran them until he died. The lead counsel was Francis Healy, later a Securities and Exchange Commissioner. The hearings would generate many headlines (including five front-page stories in *The New York Times* in May 1929), and be praised by the likes of Norris and Walsh. They would absorb substantial resources; yield seventy-three volumes of reports; and eventually lead to the Public Utilities Holding Company Act. The success of this investigation further highlights that the Commission during these years was hardly inactive.[89]

Soon after, the Senate on May 12 directed the Commission to investigate chain stores. That, too, would lead to a long investigation, with a final report recommending a Commission wish list of statutory changes in 1934. Those recommendations included amending Section 5 to prohibit unfair or deceptive acts or practices as well as unfair methods of competition and changing Sections 2 and 7 of the Clayton Act.[90]

B. The Charles March Appointment

Myers's departure in January created a vacancy and, since the Presidential transition did not occur until March 4, 1929, Coolidge named Charles H. March to fill it. March, a lawyer, had been mayor of Litchfield, Minnesota. He was active in Coolidge's 1924 campaign, and worked to block Hoover's 1928 nomination because Hoover had opposed bills to support agricultural prices; a press report suggested that March's appointment was a jab by Coolidge at Hoover.[91]

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[89] 1928 Annual Report, *supra* note 74, at 1–4; 1935 Annual Report, *supra* note 45, at 19–28; W.H.S. Stevens, *The Federal Trade Commission's Contribution to Industrial and Economic Analysis: The Work of the Economics Division*, 8 Geo. Wash. L. Rev. 545, 552 (1940) (utilities and chain store investigations absorbed most economic resources); Winerman, *Headlines*, *supra* note 4, at 879–80; *Senate Committee Approves Walsh Utilities Inquiry,* Wash. Post, Feb. 2, 1928, at 13; *Trade Commission Inquiry on Utilities Is Voted by Senate*, Wash. Post, Feb. 16, 1928, at 1; *supra* note 70 and accompanying text (praise by progressives for investigation).

[90] 1928 Annual Report, *supra* note 74, at 197–98 (resolution). The recommended change to Section 5 would be made by the Wheeler-Lea Act, Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111. The Clayton Act would be amended by the Robinson-Patman Act, Act of June 19, 1936, ch. 592, § 1, 49 Stat. 1526, and the Celler Kefauver Act, Act of Dec. 29, 1950, ch. 1184, 64 Stat. 1125.

[91] *Charles H. March of the FTC, Was 74*, N.Y. Times, Aug. 29, 1945, at 23; *Rebuff to Hoover Backers Charged*, Balt. Sun, Jan. 25, 1929, at 2 (discussing March and other nominees). March had also served on Minnesota's Commission of Public Safety during the war. *See* Carl H. Chrislock, Watchdog of Loyalty: The Minnesota Commission of Public Safety During World War I 68 (1991). The "McNary-Haugen" proposals to support domestic agricultural prices would have charged farmers a fee and dumped surplus produce overseas. The appointment was curious in this respect, though: Coolidge himself had twice vetoed McNary-Haugen legislation. *See* Parrish, Anxious Decades, *supra* note 19, at 87–88, 204.

March maintained a low profile at first, but later played a more prominent, and eventually a highly public, role. In 1932, he would induce the FTC's first Chairman, Joseph E. Davies, to intervene with president-elect Franklin Roosevelt to have FDR in turn intervene to protect the FTC's budget. In 1933, as FDR prepared to remove Humphrey (a move that March and Ferguson backed), he assured Roosevelt, in a letter addressed "Dear Boss," that "The *people* are positively with you one hundred per cent." He and FDR became friends, and FDR reappointed him twice. By the late 1930s, March gave speeches denouncing "Monopoly" as the prelude to Fascism, and even developed Presidential aspirations. He died in office in 1945.[92]

VII. CASE STUDIES: THE FTC'S LITIGATION AND "ASSOCIATIONAL" PROGRAM

A. LITIGATION

Between Harding's inauguration in 1921 and Coolidge's in 1925, the FTC issued 549 complaints, of which 367 involved "consumer protection" and 182 "competition." During the next term, those numbers dropped to 286 total complaints (a 48 percent fall), with 246 in consumer protection (a 33 percent drop) and 39 in competition (a 79 percent drop).[93] These declines reflected in part the use of stipulations (404 of them, mostly in consumer protection matters) and trade practice conferences, as well as the need to clear a pipeline clogged with old cases, many of them resource-intensive. They likely reflected, as well, prior FTC defeats in such areas as exclusive dealing, tying clauses, and discrimination based on trade status.[94] The substantial fall in competition complaints, moreover, resulted during these years in only a small

[92] Letter from Charles March to President Roosevelt (Sept. 18, 1933), *in* FDR Papers, *supra* note 76, OF 100, Box 2; Letter from Joseph E. Davies to President Roosevelt (June 7, 1935), *in* FDR Papers, *supra*, OF 100, Box 8 (letter from the first Chairman of the FTC describing March's role in 1932 budget crisis); *President and Advisers Off for Bay Island Outing Today*, WASH. POST, July 13, 1935, at 1; Letter from President Roosevelt to Charles March (July 13, 1942), *in* FDR Papers, *supra*, OF 100, Box 2 (addressed "Dear Charles" and advising March that he would be reappointed); Charles H. March, *Monopoly's Stranglehold*, 98 THE FORUM 322 (1937); *Monopoly Denounced by G.O.P. "White Hope*," S.F. CALL-BULL., July 20, 1939, *available in* Charles H. March Papers, West Central Minnesota Historical Center, Morris, Minn.; *Col. March Won't Talk Presidency*, S.F. EXAMINER, Jul. 29, 1939, *available in* Charles H. March Papers, *supra* ("dark horse" of progressive Republicans).

[93] The analysis of complaints is based on docket listings in the CCH Trade Regulation Reporter (one docket is not listed) and reports of decisions. For a discussion of "consumer protection" and "competition," see *supra* note 47.

[94] 1929 ANNUAL REPORT, *supra* note 38, at 217–21 (number of stipulations); *supra* note 46 (backlogs); Winerman and Kovacic, *supra* note 4, at 178–80, 182–83 (earlier defeats).

reduction in competition *order*s (although that number would fall further during the Hoover years).[95]

Turning to quality, the agency improved its processes by removing hearing examiners from the supervision of prosecutorial staff.[96] But the substantive quality of its decisionmaking remained inadequate. When the Commission issued cease and desist orders, its decisions set forth factual findings (often with more detail than in earlier years) and announced legal conclusions. But they still omitted legal discussions (although citations to case authorities sometimes appeared in dissents or replies to dissents)[97] and, in most cases, economic testimony and analysis.[98] Further, when the Commission dismissed cases, even major monopolization cases dismissed after years of trial, it rarely gave any explanation.[99]

1. *The Unfair Methods of Competition Standard*

The FTC during these years derived its litigation authority primarily from the broad prohibition of UMC in Section 5 of the FTC Act, and from the Clayton Act. The legal touchstone for defining UMC during these years was the opinion by Justice James MacReynolds in *FTC v. Gratz.*[100] UMC, whose meaning the Court said would ultimately be determined by "the courts, not the commission," was "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."[101] Though Section 5 would proscribe only UMC through 1938 (when Congress added a separate proscription on unfair or deceptive acts or practices[102]), *Gratz* essentially created a "consumer protection" prong under UMC. The FTC could challenge deception and other practices under the "morals" clause, whose po-

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[95] *See* NAT'L INDUS. CONFERENCE BD., PUBLIC REGULATION OF COMPETITIVE PRACTICES IN BUSINESS ENTERPRISE 287, 290–94 (Myron W. Watkins et al. eds., 3d ed. 1940) [hereinafter NICB]. Using the NICB's counts, which did not entirely correspond to the FTC's, the FTC issued fifty-three "competition" orders from 1921 to 1924, and forty-two from 1925 to 1928. *Id.* (The number would drop to nineteen from 1929 to 1932. *Id.* at 294–96.)

[96] *See supra* note 43.

[97] Thus, a search of the FTC decisions file in HeinOnline found no reference in an FTC decision before 1934 (or in a dissent before 1925) to Senators Cummins or Newlands, the chief proponents of the FTC Act, or variants of the term "incipient," which appeared repeatedly in the legislative debates and is germane to arguments about the reach of Section 5.

[98] *But cf.* Winerman and Kovacic, *supra* note 4, at 184 (noting rare use of economic testimony, paid for by interested states, in earlier challenge to basing point pricing by U.S. Steel).

[99] *E.g.*, Aluminum Co. of Am., 13 F.T.C. 333 (charges "not sustained by the testimony and evidence").

[100] 253 U.S. 421 (1920).

[101] *Id.* at 427.

[102] Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111.

tential reach is illustrated by hundreds of challenges to "lotteries," most of which challenged non-deceptive elements of chance in sales.[103] But *Gratz* seemed to leave little room for an independent antitrust jurisprudence that reached beyond the Sherman Act. Thus, in *FTC v. Beech-Nut Packing Co.,* the Court ruled 7–2 that the FTC Act reached RPM, but required the same sort of collective action that had to be shown under the Sherman Act.[104]

2. *Deception*

Most of the FTC's "consumer protection" complaints were decided without internal controversy, and the agency had impressive success when respondents sought judicial review or the agency sought enforcement in court.[105] There were, however, some controversies. As noted above, Thompson and Nugent dissented in 1925 and 1926 from many dismissals, particularly those attributed to respondent's purported abandonment of the challenged practices. Over the years, Commissioners periodically disagreed on some cases that raised such issues as "puffery" or (in modern terms) trade name excision.[106] One persistent split involved the use of "Philippine Mahogany" for Philippine wood that shared some characteristics of mahogany. When the Commission issued orders banning such use, Humphrey argued that such wood had attributes of mahogany "commercially" and the FTC was undermining the market for a cheaper substitute good.[107] An unusual development was that, after the majority was vindicated in court, the Commission in 1931 reversed itself and backed Humphrey.[108]

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[103] *See* NICB, *supra* note 95, at 287–99. Lotteries, which entailed any game of chance in connection with a sale, accounted for 9.6 percent of FTC orders from 1916 to 1938. *Id*. Some challenges to lotteries charged an element of deception, but most did not.

[104] 257 U.S. 441 (1922) (Justices Holmes and McReynolds, dissenting; Justices McKenna and Brandeis, concurring). Brandeis had long objected to the per se condemnation of RPM announced in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). *See* Winerman, *Origins*, *supra* note 4, at 36–37.

[105] Thus, of the six deception cases that courts decided on the merits during these years, the FTC won in *Moir v. FTC*, 12 F.2d 22 (1st Cir. 1926), *Leavitt v. FTC*, 16 F.2d 1019 (2d Cir. 1926), *Sea Island Thread Co. v. FTC*, 22 F.2d 1019 (2d Cir. 1927), and *Indiana Quartered Oak Co. v. FTC*, 26 F.2d 340, *cert. denied,* 278 U.S. 623 (1928); it prevailed in part in *Procter and Gamble Co v. FTC*, 11 F.2d 47 (6th Cir. 1926); and it lost in *Ostermoor & Co. v. FTC*, 16 F.2d 962 (2d Cir. 1927).

[106] *E.g.*, Ostermoor & Co., 10 F.T.C. 45 (1926), *annulled by* Ostermoor & Co., 16 F.2d 962 (2d Cir. 1927) (order based on illustration showing the inside of a mattress expanding dramatically when its cover was partially opened, with Humphrey dissenting that this was puffery); Good Grape Co., 10 F.T.C. 99 (1926) (allowing respondent to continue to use its trade name if it disclosed prominently that the drink actually contained artificial grape flavors, over Thompson's dissent).

[107] *E.g.*, Indiana Quartered Oak Co., 11 F.T.C. 271 (1927), *aff'd,* 26 F.2d 340 (2d Cir. 1928). The parties in parallel FTC cases agreed to abide by the court's decision in this test case. 1 STAT. AND DEC., *supra* note 70, at 682.

[108] Gillespie Furniture Co., 15 F.T.C. 439 (1931) (Hunt and McCulloch dissenting).

3. *Monopolization*

The FTC's monopolization program was an ambitious failure. We have already discussed two cases that failed in court: *Eastman Kodak*, in which the Supreme Court in 1927 denied the FTC authority to order structural relief under Section 5, and *Famous Players-Lasky*.[109]

Two other major cases failed at the administrative level. In the aluminum case, noted above, the Commission brought an ambitious challenge to the Mellon-dominated firm in 1925. Later, staff proposed to expand the complaint to include, among other things, allegations that the respondent participated in international price fixing. This was hardly fanciful; there had been international provisions in the 1912 consent decree, and international restraints later become part of the DOJ's famous challenge to Alcoa. Humphrey's response, though, was to mock in a press release staff's efforts to obtain information in Europe. Ultimately, although two staff members did seek evidence abroad, the Commission rejected the proposed amendments, and, in 1930, it dismissed the complaint without explanation.[110]

Another case challenged a patent pool for radio manufacturers, including GE, RCA, AT&T, Westinghouse, and Western Electric. It, too, was dismissed without public explanation, although the minutes show that Hunt, Myers, Ferguson and Humphrey supported dismissal. Only McCulloch would have found a violation, and Myers explained, but only internally, that *Eastman Kodak* blocked an effective FTC remedy and he wanted to clear the way for a suit by the DOJ. The FTC's dismissal was followed by precisely that litigation and, consistent with Myers's concerns, the DOJ's consent decree included provisions that the FTC could not have gotten, requiring, among other things, that GE and Westinghouse divest their shares in RCA.[111]

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[109] For Kodak, see FTC v. Eastman Kodak Co., 274 U.S. 619 (1927) (Justices Brandeis and Stone, dissenting); Winerman & Kovacic, *supra* note 4, at 188–89. For the motion picture case, see Winerman & Kovacic, *supra* note 4, at 188; *supra* notes 81–83 and accompanying text.

[110] *Aluminum Hearings, supra* note 50, at 2 (1912 decree); Dissent by Commissioner Humphrey to the Action of the Commission in Sending Attorney Whiteley to Europe, Aux. Case Files, Box 691, National Archives, College Park, MD; *Trade Commissioner Hits Whiteley Trip*, WASH. POST, May 18, 1927, at 3; Additional Memorandum from Richard P. Whiteley & E.J. Hornibrook to Board of Review (Oct. 11, 1928), at 20 (one of several memos proposing expanded complaint); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); 17 FTC Min. 49–51 (Feb. 15, 1929) (vote not to expand the case, Commissioner McCulloch dissenting); Aluminum Co. of Am., 13 F.T.C. 333 (1930) (dismissing case "for the reason that the charges of the complaint are not sustained by the testimony and the evidence"); *supra* notes 50–52 and accompanying text.

[111] Gen. Elec. Co., 12 F.T.C. 510 (1928) (dismissal order); 16 FTC Min. 511–12 (Dec. 19, 1928); 1925 ANNUAL REPORT, *supra* note 38, at 234 (summarizing complaint); Winerman & Kovacic, *supra* note 4, at 189; United States v. Radio Corp. of Am., Equity No. 793 (D. Del. 1932), *summarized in* TALBOT S. LINDSTROM & KEVIN B. TIGHE, ANTITRUST CONSENT DECREES 160 (1974); *Trade Board Drops Radio "Trust" Case*, N.Y. TIMES, Dec. 20, 1928, at 38.

4. *Mergers*

As we have described before, the FTC's merger program in the 1920s was yet another failure. There was substantial merger activity in the 1920s before the Depression struck. Indeed, there was a second merger wave, which George Stigler identified as a period of "merger to oligopoly" (as opposed to earlier mergers to monopoly.)[112] But, during these years, the Commission nearly always lost its cases and, while some losses were nearly inexplicable, others were well-deserved.

Losses that construed narrowly its remedial powers were particularly problematic. When *Eastman Kodak* held that the Commission could not order structural relief under Section 5, it took the FTC Act off the table as a basis for merger control. Further, while Section 11 of the Clayton Act did provide explicit authority for the FTC to order divestitures in cases under Section 7 of that Act, Section 7 applied, until 1950, only to stock acquisitions. That limit loomed larger after two 5–4 decisions by the Supreme Court. In 1926, the Court in *Western Meat Co.* undermined the FTC's Section 11 authority, holding that respondents could escape its divestiture authority by turning a stock acquisition into an asset acquisition pre-complaint. Then, in 1934, the Court in *Arrow-Hart and Hegeman Electric Co.* would eviscerate that authority; reviewing an order based on a 1928 complaint, it held that respondents could escape Section 11 by turning a stock acquisition into an asset acquisition *post*-complaint.[113]

Humphrey did not back these remedial limits, but, along the way, he generally opposed merger orders. During his eight years on the Commission, the FTC issued five such orders, and he dissented with published statements in four. His dissents all involved complaints issued before Coolidge left office, although three were decided later, and they showed that his influence over the agency's merger agenda was sometimes tenuous. In the first, Humphrey was in the minority (with Hunt) because Van Fleet aligned with Nugent and Thompson; in the others, Humphrey stood alone against McCulloch (who tended to advocate aggressive and sometimes mechanistic positions in merger cases), Hunt (who had broken with Humphrey when he aligned with Myers), Ferguson, and March. While Humphrey's influence at the agency level was thus relatively limited, he did have a bit of consolation for losing at that level.

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[112] George Stigler, *Monopoly and Oligopoly by Merger*, 40 AM. ECON. REV. 432 (1950).

[113] Winerman & Kovacic, *supra* note 4, at 190–92 (also noting that only two Section 7 orders issued by the Commission survived judicial scrutiny and, in both cases, respondents effectively circumvented those orders by subsequent transactions that survived court challenges); Eastman Kodak, 274 U.S. 619 (1927) (Justices Brandeis and Stone, dissenting); FTC v. Western Meat Co., 272 U.S. 554 (1926) (Chief Justice Taft and Justices Brandeis, Holmes and Stone, dissenting in part); Arrow-Hart and Hegeman Elec., Co. v. FTC, 291 U.S. 587 (1934) (Chief Justice Hughes and Justices Brandeis, Cardozo, and Stone, dissenting).

His view was vindicated every time by the courts, albeit, in two instances, by a divided Supreme Court. His positions in some of these cases, moreover, seemed to have substantial merit.[114]

There were similar, if somewhat less stark, patterns in the Commission's treatment after Humphrey arrived of merger complaints pending from before he arrived. The Commission dismissed nineteen such cases (eleven of them in Humphrey's first year), with Humphrey backing every dismissal and Thompson, Nugent, or both dissenting from ten.[115] New merger complaints also slowed during Humphrey's first years, although they later revived.[116] Further, at least by 1929, the Commission was actively seeking new merger cases. For the fiscal year ending in mid-1929, it reported 271 merger investigations (some of them carried over from the past year).[117]

However, Section 7 was then problematic not only in its limits (reaching only stock acquisitions), but also in its potential breadth. It had three clauses, forbidding acquisitions whose effect "may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, *or* to restrain such commerce in any section or community, *or* tend to create a monopoly of any line of commerce."[118] The first clause could easily reach procompetitive mergers, and internal annotations early in the *Arrow-Hart* case made clear that, in 1928, Humphrey's colleagues thought it irrelevant if a merger was procompetitive. A majority of the Board

[114] Int'l Shoe Co., 9 F.T.C. 441 (1925), *aff'd*, 29 F.2d 518, 523 (1st Cir. 1928), *rev'd*, 280 U.S. 291 (1930) (Justices Stone, Brandeis and Holmes, dissenting); Temple Anthracite Coal Co., 13 F.T.C. 249 (1930), *annulled*, 51 F.2d 656 (3d Cir. 1931); V. Vivaudou, Inc., 13 F.T.C. 306 (1930), *rev'd,* 54 F.2d 273 (2d Cir. 1931); Arrow-Hart and Hegeman Elec. Co., 16 F.T.C. 393 (1932), *aff'd*, 65 F.2d 336 (2d Cir. 1933), *rev'd*, 291 U.S. 587 (1934) (Chief Justice Hughes and Justices Stone, Brandeis and Cardozo, dissenting). A fifth order, later vacated, was noted only in an annual report. FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1927, at 131 (Armour Co., Docket 455). One example of McCulloch's sometimes mechanistic approach was his dissent in *Temple Anthracite*. The respondent, a holding company, acquired two competitors on the same day. The agency ordered divestiture of one, but McCulloch would have ordered divestiture of both. 13 F.T.C. at 265.

[115] Complaints were dismissed without public dissent in dockets 449, 450, 452, 454, 775, 1215, 1219, 1248, and 1296. They were dismissed with Nugent and Thompson dissenting (except in one case where Thompson had already left the agency) in dockets 451, 531, 549, 573, 578, 964, 1009, 1181, 1247, and 1259. A summary chart of all Section 7 merger complaints brought by the FTC through 1931 is available in the Humphrey Papers, *supra* note 29, Box 2.

[116] There were four new complaints in 1925 (two issued before Humphrey arrived, two with his support), none in 1926, two in 1927, four in 1928, and eight in 1929. The 1929 figure exceeded the number of new complaints for any other year in the decade, although it missed the peak of eleven complaints issued in 1919. The dockets were 1259, 1291,1298, 1358 (1925); 1451, 1464 (1927); 1497, 1498, 1511, 1537 (1928); 1588, 1589, 1676, 1689, 1694, 1705, 1706, 1729 (1929). Humphrey voted for some of these complaints. *See, e.g.*, Wickwire Spencer Steel Corp., 10 FTC Min. 73 (Mar. 25, 1925).

[117] 1929 ANNUAL REPORT, *supra* note 39, at 6–7.

[118] Act of Oct. 15, 1914, ch. 323, § 7, 38 Stat. 731 (emphasis added).

of Review recommended that the case be tried even though the merged firm, the third-largest in the industry, could better compete with its larger competitors. Four Commissioners agreed. Ferguson and Hunt saw no discretion in the matter; Myers reasoned that "the surest way to get rid of unsound or oppressive legislation is to enforce it"; and McCulloch agreed with his colleagues.[119] In another case, Myers wrote that "it was never intended that the . . . Commission, confronted with a clear case of stock acquisition between two competitors, should speculate as to the effect of such transactions on the public," where, "[i]n the first place, the data would be extremely meagre [sic] and unreliable."[120]

This should have changed after the Supreme Court rejected in 1930 the agency's order against International Shoe, an order issued soon after Humphrey arrived. The acquirer was the largest domestic marketer of leather shoes; the acquired firm was one of the largest, and also the largest shoe manufacturer in New England and the largest in the world of "men's dress welt shoes." After rejecting, essentially, a failing-firm defense, the Commission reached very specific conclusions, based on findings of fact that were quite detailed (although not sufficiently detailed to support the specificity of the conclusions.) As to men's dress shoes, it found violations of the first and second clauses of Section 7; as to shoes generally, it found violations of the second clause for: (1) sections and communities in which the merged parties had been "engaged in commerce" and (2) three specific local communities.[121] Van Fleet joined Nugent and Thompson in the majority, which was both unusual and telling, in that Van Fleet was sensitive to the need to show competitive effects in a merger analysis.[122] Humphrey, in a dissent that relied on some questionable conclusions, argued that there was no injury to the public.[123]

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[119] *Application for issuance of a complaint against Arrow-Hart and Hegeman Electric Co., Report—Board of Review* (May 17, 1928) and *Commissioner's Notes,* in Confidential Memoranda File, Docket Section, Aux. Case Files, 1915–1936, Box 789, RG-122, National Archives, College Park, MD. (The respondent had a *post*-complaint hearing before the Board, since, after *Western Meat*, notice of a pre-complaint hearing would have allowed it to convert its stock acquisition to an asset acquisition and evade the FTC's Section 11 authority.)

[120] *In the Matter of Consolidated Cigar Corp, D-1451, Memoranda by Commissioner Myers on respondent's motion to dismiss at the completion of the Commission's evidence*, Jan. 16, 1928, in Confidential Memoranda File, Docket Section, Aux. Case Files, 1915–1936, Box 750, RG-122, National Archives, College Park, MD.

[121] Int'l Shoe Co., 9 F.T.C. 441 (1925), *aff'd*, 29 F.2d 518, 523 (1st Cir. 1928), *rev'd*, 280 U.S. 291 (1930); *id.* at 446–47 (acquirer's and acquired firm's size, product lines, and product distributions); *id.* 453–54 (specifying violations). The complaint also alleged violations of the third ("tend to create a monopoly") clause, and Nugent and Thompson would have found violations of that clause as well. *See* 9 F.T.C at 462 n.1.

[122] *See* Fisk Rubber Co., 10 F.T.C. 433 (1926) (dismissing complaint that relied exclusively on the first clause of Section 7, and printing Van Fleet's pre-complaint dissent, objecting, essentially, that there was no evidence of market power).

[123] *Int'l Shoe Co.*, 9 F.T.C. at 463. Humphrey accepted the failing-firm defense; found (in a matter that was not pressed before the Supreme Court) that post-acquisition prices did not in-

The court of appeals upheld the agency, but the Supreme Court reversed, 6–3. Justice Stone, writing for himself and Justices Holmes and Brandeis, found sufficient evidence for the Commission to conclude that competitive products of "two of the largest shoe manufacturers in the world . . . reached the same local communities through different agencies of distribution," and that the merging parties "made their appeal to the same buying public."[124] The majority, though, seems to have treated the existence of different distribution channels as decisive. Although some statements in the decision could be read more broadly, it seems to have treated the distribution channels as, in effect, separate relevant markets in which the firms rarely faced each other and, because the sales overlap in channels the firms both used were relatively small, the Court found the merger's effect on competition insignificant. Whatever the merits of its factual analysis, though, the Court asserted generally, and with reference to all three clauses, that Section 7 was violated only if an acquisition reduced competition "to such a degree as will injuriously affect the public."[125]

After *International Shoe*, it is hard to see how the FTC could avoid a public interest analysis. Yet, within three months, in two other Section 7 cases resulting from the flurry of activity in the late 1920s, the FTC issued orders without mentioning or reacting to the Court's public injury language—even as Humphrey highlighted that language in dissent. The Court appeared to have said that it would carefully examine evidence bearing upon the alleged reduction of competition in the relevant market. At least by implication, a public interest standard may have suggested that it would rely on market share data to draw inferences about likely competitive effects and would consider evidence bearing upon post-merger price movements. Yet internal memos show the agency expressly seeking to avoid an analysis of competitive effects.[126] Publicly, in *Temple Anthracite* (where the agency relied only on the "substan-

crease and in some cases fell; and questioned whether pre-merger competition between the firms was "material."

[124] Int'l Shoe Co. v. FTC, 280 U.S. 291, 304 (1930).

[125] *Id.* at 295–99, 304. The majority cited an estimate that about 95 per cent of the McElwain sales were in towns and cities with populations of 10,000 or over; while about 95 per cent of the sales of the International were in towns with populations of 6000 or less. *Id.* at 296. The dissenters did not address the specific finding, which arguably (though not necessarily) referred to sales to the ultimate consumer. The FTC's brief, though, had characterized the figures as estimates, made by the chairman of the board on cross examination, which did not purport to rely on an examination of sales records. Brief for the Commission 21, Int'l Shoe Co. v. FTC (Oct. Term 1919). The FTC's brief to the Court also made express reference to a potential competition theory, which the court seemed to ignore. *Id.* at 17; *see* 280 U.S. at 298.

[126] The agency did review pending merger cases after *International Shoe*. One view within the agency appeared to be that the Court wanted only evidence that the merging parties had been, pre-merger, substantial competitors in the same market. *See, e.g.*, *Supplemental Memorandum Report, Continental Steel Corp.*, May 19, 1931, Docket Section, Aux. Case Files, 1915–1936, Box 847, RG-122, National Archives, College Park, MD.

tially lessen competition" prong), and in *Vivaudou* (which relied on all three prongs), the agency detailed sales figures for the parties, but failed to place these in the context of total market size or otherwise explain why the case implicated the public interest. In both cases, appeals courts reversed the agency and noted the omission of market share data. Yet, perhaps because *Temple Anthracite* was decided by a 2–1 vote, the agency felt sufficiently confident that it voted to seek a writ of certiorari. The Solicitor General declined to do so.[127]

Why did the Commission take so long to get the message?[128] The dissenting vote on the appeals court in *Vivaudou* suggests that its position was not wholly frivolous. Further, Section 7 did reach acquisitions whose impact "may be" to have any of the proscribed effects; it did contain the "substantial lessening of competition between the parties" prong; and the Supreme Court had earlier upheld a Commission order that was not backed by market share data.[129] Still, the FTC's failure to confront *International Shoe* in these two later decisions, particularly given its past track record in its more aggressive cases, is baffling. Indeed, nowhere did the agency publicly articulate the relevant elements of proof under the various clauses of Section 7, although it clearly understood there to be differences among the clauses (since it sometimes but not always pled all three). These cases, then, highlight the fundamental weakness in the FTC's ability to follow cases through to successful resolutions, and, more specifically, its failure to take steps that would likely be needed successfully to resolve a controversial case.

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[127] V. Vivaudou, Inc. v. FTC, 54 F.2d 273, 275 (2d Cir. 1931); Temple Anthracite Coal Co. v. FTC, 51 F.2d 656, 660 (3d Cir. 1931); FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1932, at 114 (discussing Commission vote and Solicitor General response on certiorari in *Temple Anthracite*).

[128] In *Arrow-Hart and Hegeman, Inc. v. FTC*, decided after it lost *Temple Anthracite* and *Vivaudou*, the FTC finally did note market share data (albeit it only in passing). 16 F.T.C. 393, 419 (1932), *aff'd*, 65 F.2d 336 (2d Cir. 1933), *rev'd*, 291 U.S. 587 (1934). That was the case, though, where the Court held that the parties could evade FTC divestiture authority by turning a stock acquisition to an asset acquisition post-complaint. *See also* United States v. Republic Steel Corp., 11 F. Supp. 117 (N.D. Ohio 1935) (providing market share data—which the court found inadequate to sustain the prosecution—in a challenge by the DOJ based on first clause of Section 7).

[129] *See* FTC v. Western Meat Co., 5 F.T.C. 417 (1923), *aff'd*, 1 F.2d 95 (9th Cir. 1924), *mod.,* 4 F.2d 223 (1925), *mod. and aff'd,* 274 U.S. 554 (1926). (The effect of the Supreme Court's decision was to uphold the original Commission order.) However, the Court focused on the agency's authority to order divestiture under Section 11, and not the merits of its substantive findings—an issue that Western Meat had not pressed in its brief. Brief for the Respondent Western Meat, FTC v. Western Meat (Oct. Term 1926). (Further, despite the Commission's "win" at the Supreme Court, Western Meat later managed to consummate the transaction. *See* Western Meat Co. v. FTC, 33 F.2d 824 (9th Cir. 1929), *cert. dismissed*, 281 U.S. 771 (1930).)

B. Trade Associations: Information Exchanges and Trade Practice Conferences

The appropriate limits of trade association activities was a hotly contested issue in the 1920s. Associations expanded substantially during the decade, operating under agreements that typically defined unfair competitive practices and provided mechanisms, with complaints, investigations, and arbitration, to deal with alleged violations.[130] The Commission confronted or facilitated associational activities through litigation, reports, and trade practice conferences.

1. *Litigation, the Open Price Association Report, and Contacts with Justice Department*

Early in the decade, both the FTC and the DOJ challenged information exchanges.[131] However, through the Harding and Coolidge years, in part under pressure from Hoover, antitrust enforcers zigged and zagged in their approaches to such sharing.

At the DOJ, Attorney General Harry Daugherty (1921–1924), under pressures from Hoover on one side and advocates for more enforcement against trade associations on the other, sought strict limits on information sharing.[132] Under Harlan Fiske Stone (1924–1925), the Department moved (in a somewhat convoluted way) to expand the range of permissible sharing.[133] Under John Sargent and his antitrust chief William Donovan (both 1925–1929), the DOJ itself essentially approved by letters, albeit with qualifications, problematic price exchanges, including an arrangement for Sugar Institute members to share current, transaction-specific information through the Institute. However, the DOJ's leadership apparently had second thoughts even before Coolidge, Sargent, and Donovan left office; Donovan prodded the FTC in January 1929 about concerns that FTC-approved codes, despite similarities to codes that the Department had itself reviewed, could interfere with antitrust prosecutions.[134]

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[130] *See* MILTON HANDLER, CASES AND OTHER MATERIALS ON TRADE REGULATION 265, 271–73 (1937).

[131] For example, an FTC challenge, dismissed in 1924, involved dissemination of aggregate figures with a barometer that, Thompson wrote in dissent, reflected an arbitrary "normal production." Douglas Fir Exploitation and Export Co., 8 F.T.C. 526, 529 (1924).

[132] *See supra* note 26 and accompanying text (Hoover); HIMMELBERG, *supra* note 3, at 26–44.

[133] Stone's efforts, as portrayed by Himmelberg, are curious. As Attorney General, he reportedly sought a "friendly suit" to challenge a moderate information-sharing program; then, after arriving at the Supreme Court, he wrote the decision in *Maple Flooring Manufacturers Ass'n v. United States*, 268 U.S. 563 (1925). HIMMELBERG, *supra* note 3, at 45–47. *See also* Hawley, *Sherman Act*, *supra* note 26, at 1083 (noting correspondence between Hoover and Stone while Stone was working on the decision).

[134] HIMMELBERG, *supra* note 3, 57–62. The Sugar Institute code, for example, included a pledge by participants to share current prices with competitors through the Institute, and not to deviate from those prices without prior notice of a change. Donovan approved it by a letter

Later, during Hoover's presidency and under Attorney General William Mitchell (1929–1933) and his antitrust chief John Lord O'Brian (1929–1932), the DOJ would retreat still further from Donovan's program. Thus, for example, it would push the FTC harder to retreat from earlier code approvals and would sue the Sugar Institute for the practices to which it had earlier given qualified approval.[135]

At the FTC, three days after the agency received Donovan's letter of January 1929 (and four days before Myers left), the agency voted to issue a report on "open price trade associations." In an unusual sequence of events, the Commissioners seemed to have tried to distance themselves from the report; they voted first to issue it as a report by the Chief Economist (to our knowledge, this would have been the first "staff report"), but two weeks later decided to issue it with the Commission's imprimatur.[136]

The report, which had been ordered by a 1925 Senate resolution, was generally sensitive to antitrust concerns. It advocated disclosures of statistical aggregates (and proposed increased powers for the Census Bureau to obtain the underlying data), but essentially recommended that sharing of individual transaction data be deemed illegal per se. It questioned "stabilization," an oft-noted purpose of associationalism, expressing concern that the goal of stabilization was often higher prices. It viewed critically many association activities. A chapter on "Questionable Activities," for example, focused primarily on possible evidence of illegal conspiracy.[137]

As it grappled with more specific issues, the report sometimes focused on market analysis. A discussion (in a section titled "moral gropings") deemed it "unfortunate that competition is so largely a matter of prices, rather than of quality and service." However, that discussion then analyzed the problem as one of market failure: buyers had insufficient means to recognize and confirm quality and performance, and that problem could be rectified by such practices as standardized grading.[138] Elsewhere, though, the report took a more moralistic approach to business conduct. It spoke approvingly of the "Kantian ethics" of using only sales techniques that could be divulged to competitors. Its discussion of secret discounts was an odd juxtaposition of economics and morals.

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advising (in standard language), that the DOJ saw no basis for a proceeding, but might reconsider "should subsequent developments indicate the necessity for action." *Id.* at 57–58.

[135] *Id.* at 89–99 (DOJ's objections to FTC codes); *id.* at 105 (Sugar Institute); Hawley, *Sherman Act*, *supra* note 26, at 1086–89; Joseph, *supra* note 26; Sugar Inst., Inc. v. United States, 297 U.S. 553 (1936).

[136] 16 FTC Min. 560 (Jan. 11, 1929); *id.* at 632 (Jan. 28, 1929).

[137] FED. TRADE COMM'N, REPORT ON OPEN-PRICE TRADE ASSOCIATIONS xxi (1929) [hereinafter OPEN-PRICE REPORT] (increased powers for Census Bureau); *id.* (per se illegality); *id.* at 78–79 ("stabilization"); *id.* at ch. 6 ("Questionable Activities").

[138] *Id.* at 295–96.

Though recognizing that such discounts were a substitute for price cutting and similarly motivated, the report distinguished "the element of secrecy and dishonesty" from the practice's "price-cutting effect," and "unqualifiedly condemned" the former. It added that such practices undermined price reporting (an argument whose force would be weakened if the data were disclosed only to a third party for use in developing aggregate statistics).[139]

The report also opened the door to agreements on specific components of total price. In discussing, for example, an agreement to charge a specified differential for boards thicker than a specified size, it said that such customs "are recognized as legal," although "too insistent an attempt of competitors to compel one of their number to stick to the letter of such a, perhaps, somewhat arbitrary practice might be questionable." Later, the report explained that attempts to stabilize prices by agreements that limited specific terms of sale (including standard credit terms) might have a desirable element of standardization—and that, while industry might not be trusted by itself to formulate such standards, FTC trade practice conferences provided a forum by which the industry could do so in a context where the public was also represented.[140]

2. *Trade Practice Conferences*

Turning now to the specifics of trade practice conferences, most of them produced, sometimes exclusively, "consumer protection" rules. These could lead to enforcement actions (although they had no probative value in the litigation), or they could forestall, substitute for, or provide a basis to dismiss such actions.[141] Typical rules condemned, for example, secret payments to endorsers and slack-filled packaging.[142]

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[139] *Id.* at 256–57. For a literature discussing how limits on secret agreements could support collusion, see David Genesove & Wallace P. Mullin, *Rules, Communication, and Collusion: Narrative Evidence from the Sugar Institute Case*, 91 AM. ECON. REV. 379 (2001); Margaret C. Levenstein & Valerie Suslow, *What Determines Cartel Success?*, 44 J. ECON. LIT. 43 (2006); George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

[140] OPEN-PRICE REPORT, *supra* note 137, at 258–59, 361 (adding, as to standardized terms, that "the simplification of bargaining helps the relatively inexpert more than it helps the expert party to a trade").

[141] *See* FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1927, at 12 (attributing certain cases to a conference rule); Worrell Mfg. Co., 11 F.T.C. 482 (1927) (dismissing a commercial bribery complaint because respondent had subscribed to a code) (Commissioner Myers dissenting). For a discussion of self-regulatory efforts to fight fraud, see Balleisen, *supra* note 79.

[142] *E.g.*, *Golf Ball Industry* (1928), *in* TPC, *supra* note 79, at 78; *Package Macaroni Industry, id.* at 11. Some codes also incorporated standards, a program very much favored by Hoover's Commerce Department, although the FTC was awkwardly poised to act in this area. Attempts to enforce a standard by the FTC present the question of whether that standard reflects consumer understanding sufficiently that non-compliant use of terms is deceptive. This proved a contentious issue in several cases in which the FTC incorporated into orders, with Thompson and Nugent dissenting, a standard for the term "shellac" that drew on a (non-FTC-approved) industry code. Don-O-Lac Co., 8 F.T.C. 235, 245 (1924).

On the competition side, Commission-approved conference rules addressed some concerns that the agency had then abandoned in litigation, among them "guarantees against price declines"[143] and below-cost pricing. Particularly problematic were anticompetitive provisions to limit pricing or other sales policies, sometimes in the form of an agreement to stabilize price elements; sometimes by provisions (included in two oil codes) calling for industry to post prices and stick to them; sometimes by insufficiently qualified bans on below-cost pricing and price discrimination; and, once, by a quickly rescinded provision requiring distribution of price lists for future sales.[144] Some of these provisions were novel in the late 1920s, while others dated back as early as 1919.[145] As they became more prominent, and as the use of the Group I and Group II schema by 1927 made clearer that the FTC was "approving" the code provisions, the Commissioners could hardly have been oblivious to their implications. For example, as early as 1926, prodded by the Nebraska Attorney General, the Commission rescinded a 1919 provision that proscribed prices below those "warranted by market or trade conditions."[146]

Controversies surrounding the FTC-approved codes of the 1920s would come to a head in the early 1930s, as the Commission would conduct a disorderly retreat from its earlier approvals, producing yet another period of turmoil and disarray at the agency. Those controversies are beyond the temporal scope of the current paper. However, several contentious issues were already emerging by late 1928. One, discussed above, turned on the clandestine violation rule. Others involved a proposed grocery code, where the Commissioners split, with Ferguson serving as the swing vote on differing provisions. On November 30, Humphrey unsuccessfully proposed to move from Group I to Group II provisions that would condemn secret rebates and "uneconomic or

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[143] *E.g.*, *Millwork Industry* (1928), TPC, *supra* note 79, at 140, 142 (Group II rule proscribing guarantee against price decline, by which seller takes the risk of a price decline before the buyer sells the product); Corn Prods. Ref. Co., 9 F.T.C. 483, 483, 488 (rejecting, with Nugent and Thompson dissenting, challenge to the practice by a firm with a 53 percent market share).

[144] *Cottonseed-Oil Mills Industry*, TPC, *supra* note 79, at 147, 153 (maximum price provisions); *Petroleum Industry in the State of Virginia* (1928), TPC, *supra* note 79, at 79, 80 (Group I rule); *Millwork Industry* (1928), TPC, *supra* note 79, at 140, 143 (circulation of price lists; rescission noted at 143 n.12); *Waxed-Paper Industry* (1928), TPC, *supra* note 79, at 144 n.13 (noting recision within six months of Group II provision "condemning without qualification the selling of goods below costs"); *id.* at 147 (replacement Group I provision condemning below-cost pricing with the purpose of injuring a competitor and the effect of lessening competition).

[145] *Creamery Industry* (1919), TPC, *supra* note 79, at 1, 3–4.

[146] *See* 12 FTC Min. 720 (Oct. 22, 1926); *Creamery Industry* (1919), TRADE PRACTICE SUBMITTALS 4 (1926) (the relevant text was deleted from the 1929 volume); *see also* 16 FTC Min. 253–54 (Oct. 1, 1928) (noting that Supreme Court of Alabama had temporarily enjoined some Group II rules out of concern that they facilitated price fixing); Press Release, Fed. Trade Comm'n, *supra* note 29 (Feb. 6, 1929) (retreating from a rule adopted the previous June that provided for the circulation to an entire industry of every manufacturer's and distributor's price list, along with changes to that list).

unjustly discriminatory" price differentials. In this relatively modest proposal—he did not propose to eliminate either provision completely—only McCulloch joined him, as Ferguson aligned with Hunt and Myers. McCulloch then moved to eliminate completely a Group II rule that condemned selling below cost, "except on special occasions for recognized economic reasons." This time, Ferguson joined Humphrey and McCulloch, while Myers objected that this action would signal that "an agreement to eliminate the jungle competition inherent in selling below cost" (i.e., the code provision) was an antitrust violation. On December 21, with Myers away, the head of the trade practices conference division asked the Commission to revisit the latter issue. Retreating to antitrust, the other Commissioners accepted a Ferguson proposal that condemned selling below cost "for the purpose of injuring a competitor and with the effect of lessening competition."[147]

This was also the period when the FTC broke with the DOJ (which was still under Donovan) on these issues. The proximate cause involved petroleum. In March, 1928, the Commission unanimously adopted a code governing the industry in Virginia. Among its provisions, two required prices to be posted and sellers to charge only those prices. Rule 2 applied to refiners, distributors, jobbers and wholesalers; Rule 6 applied to businesses selling to consumers; and, for unexplained reasons, the former was a Group I rule and the latter a Group II rule. Additionally, Rule 2 also proscribed rebates, concessions, or discounts, while Rule 4 forbade refiners, distributors, jobbers, and wholesalers from subleasing filling stations or their sites at a price less than that defined by a formula.

On January 8, 1929, the Commission announced plans to hold a national conference for the industry. Four days before, at a meeting with the DOJ, industry representatives explained that the Virginia code never went into effect because the Texas Company objected to Rule 4 and Standard Oil of New Jersey to Rule 2. However, industry representatives still cited the FTC's approval of the code as a shield from antitrust prosecution. Despite DOJ's remonstrances to the FTC, the agency held its conference in February and on June 22 approved a code, with Humphrey absent but no dissenting vote. That code contained, among other problematic provisions, the posting provisions from the Virginia code.[148]

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[147] *See* 16 FTC Min. 439–41 (Nov. 30, 1928); 519–20 (Dec. 21, 1928).

[148] *Petroleum Industry in the State of Virginia* (1928), TPC, *supra* note 79, at 79–81; 15 FTC Min. 268–72 (Mar. 5, 1928) (noting unanimous vote, with Humphrey observing that he had doubts on jurisdictional grounds); *Re: Oil Institute Proposed Code of Ethics,* Jan. 4, 1929, D.J. Central Files, Classified Subject Files, Correspondence, 60-57-32, Box 356, R.G. 60, National Archives, College Park, MD.

As noted above, the Commission provided some justification for its trade practice rules in its report on open price trade associations (although that justification was not entirely consistent with the agency's actions), and Myers in speeches gave his own defense of these provisions. Beyond these sources, the available record to explain specific agency actions is thin.[149] More broadly, it is often hard to discern a collective rationale, or individual Commissioners' rationales, for specific agency actions. Why did Ferguson, in 1929, align with differing sets of colleagues on differing provisions of the grocery code? Why was the price-posting provision in the 1928 petroleum code in Group 1 for refiners, distributors, jobbers, and wholesalers, but Group 2 for business selling directly to consumers? Did the views of the agency or of individual Commissioners evolve over time, perhaps in response to Donovan's concerns? Were certain rules acceptable only because of industry-specific conditions (e.g., the posting rules in the oil industry)? If so, why and how? Because the Commission did not articulate its rationales for specific actions, it is hard to know, and, at the least, there is a suspicion that the absence of an articulated rationale, much less a consistently articulated rationale, suggests that the agency had not formulated one.

VIII. CONCLUSION

The early FTC operated in an environment with numerous cross-currents, including "anti-trust," a New Nationalist approach, associationalism, and a "leave-business-alone" approach. All had multiple variations and they could be mixed and matched in various ways. During Coolidge's second term, all were present in the Commission.

With so many cross-currents, fluctuations in policy over time were likely inevitable. This is particularly evident in the struggle to define national competition policy regarding trade associations and the establishment of norms for "fair competition." In the 1920s, one sees the strong pull of associationalist values in the FTC's willingness to facilitate industry-wide information sharing and other forms of cooperation, especially in the context of trade practices proceedings. In many instances, the FTC drew the line in ways that contradict modern views about antitrust policy (for example, through prohibitions on price cutting and other "destructive" forms of rivalry). In doing so, the Commission did abide by widely held views about appropriate policymaking, but it gave little explanation as to why it shared those views or how they applied to specific agency actions.

To what extent did the FTC's organization, structure, and management affect its ability to navigate effectively amid powerful policy cross-currents?

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149 While limited records are available, some in DOJ files, the FTC files for trade practice conferences no longer exist.

The DOJ's hierarchical organization hardly made it a model of consistent policymaking in the 1920s, but at the FTC, with its five-member board and weak chairmanship, the problems were compounded by clashes of divergent approaches at the same time. The FTC also had the additional problems of a changing political environment, politicization, internal polarization, and personal incompatibility among the Commissioners. The changing environment was in part the much-delayed impact of the 1921 election, which struck the Commission in relatively mild form in 1924 and more dramatically in 1925. The politicization was in part intrinsic to the dynamic of an agency out of touch with the Administration, but was exacerbated by two factors: progressive Senators of both parties, who initially worked with and through the Commission but turned against it after 1925, and the clash between two intense partisans, Thompson and Humphrey. Finally, there was polarization, which initially followed party lines but later turned to intra-party strife. With substantive disputes further exacerbated by Humphrey's political bent, acerbic style, and sense of administrative prerogatives, the Commission split into hostile camps.

A multi-member structure can produce creative synthesis at best, but, at the Commission, it produced discord and flip-flopping policy changes—both on issues that were primarily in the FTC's bailiwick and on issues where it interacted with other agencies, such as the DOJ and Herbert Hoover's Commerce Department. The weak chairmanship framework exacerbated, and perhaps helped foster, these difficulties. This structure meant that key decisions about agency policy would be up for grabs each year, and the agency's ability to define longer-term aims and programs to achieve them would suffer. Not until 1950, with the Reorganization Act, would a serious effort be made to remedy this structural infirmity.

Turning to the FTC's substantive program, it is difficult to sustain the view of much commentary that its work in this period was unimaginative and commercially trivial. The creation of the settlement process and the use of trade practices conferences were creative responses to the tremendous administrative burdens the agency faced, while the conference procedure, in addition, built up relations with the business community. While the agency substituted settlements and trade practice conferences for some litigation, it also issued some significant complaints and orders. It improved in some respects its litigation processes, and it experienced frequent success in areas, like deception and RPM cases, where it trod on a reasonably well-worn path.

The agency in many instances had a good eye for important matters, but its inability to execute key initiatives effectively betrayed it time and again. Many matters featured an inexplicable inability to adopt measures that would improve the prospects for success in litigation and conform Commission practice to simple standards of good transparency. By 1925, it should have been apparent to the Commission that the failure to present fleshed-out legal (and economic) reasoning for decisions taken undermined its prospects for success in the courts and damaged perceptions of its capability within the bar and academia. Add to this some hostile courts and some 5–4 losses at the Supreme Court, and the agency's merger and monopolization programs produced, in the end, scant results at best. Its failure to explain its actions in trade practice conference matters similarly undermined its credibility. These lapses had long-lived consequences, as defeats in the agency's first decades—such as the *Eastman Kodak* ruling that it could not order structural relief in a Section 5 case and decisions that undermined its divestiture authority under the Clayton Act—severely hampered its future efforts to develop effective law enforcement programs.