

Can't Anyone Here Play This Game? Judging the FTC's Critics

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ABSTRACT

The conventional wisdom is that the FTC was the governmental equivalent of a leper colony prior to 1969, and its credibility and reputation were restored only by the adoption of the wise recommendations in the 1969 ABA Report. There is no question that the FTC deserves plenty of criticism for its pre-1969 performance. It is also beyond doubt that there has been a dramatic turn-around in the intervening forty-five years, as the FTC adopted the recommendations in the 1969 Report. But, before we simply genuflect at the wisdom of those responsible for the ABA Report and the inherent virtue of their recommendations, it is worth noting that those recommendations also placed the FTC's continued existence at risk as well—and did so for an entirely new set of reasons than had been the case pre-1969. Indeed, the last forty-five years of the FTC's history (which are assuredly an improvement on the first fifty-five) are still a testament to the unintended consequences that can accompany even the best of reform proposals.

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INTRODUCTION

When it is time to celebrate someone's birthday, the customs are well-established. Parties are held. Gifts are given. Lit candles are put on top of a frosted cake. After *Happy Birthday to You* is sung, the candles are blown out. Finally, the cake is cut into large pieces, and cake and ice cream are consumed by everyone present.

Law professors have developed a dramatically different set of customs for celebrating the birthdays of constitutional amendments, treaties, laws, and regulatory agencies.¹ There are no gifts, and no lit candles. No one sings *Happy Birthday to You*. There is never any cake—let alone ice cream. Instead, law professors hold symposia and publish law review articles, scrutinizing the merits and performance of the constitutional amendments, treaties, laws, and regulatory agencies. The law reviews are filled (or littered, depending on your point of view) with the fruits of such labors.

We plead guilty to adding to the pile of fruit. Worse still, we are jointly responsible (along with Professor Danny Sokol) for organizing the Symposium held at The George Washington University Law School on the occasion of the 100th birthday of the Federal Trade Commission (“FTC”). It was that symposium that brought together the distinguished scholars whose work is published in this issue of *The George Washington Law Review*.²

¹ For nonobvious reasons, most scholars prefer to use “anniversary” to describe their periodic celebrations of the birth of constitutional amendments, treaties, laws, and regulatory agencies. See, e.g., Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 *ANTI-TRUST L.J.* 761, 761 (2005) (“The first question that occurred to me when I received the invitation to speak, was, why are we celebrating the 90th anniversary of the FTC?”). Despite the name of the symposium at which we presented this paper (“100th Anniversary of the FTC”), we believe “birthday” is a more accurate description, and so we use it herein.

² See generally J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers*, 83 *GEO. WASH. L. REV.* 2157 (2015); Daniel A. Crane, *Debunking Humphrey's Executor*, 83 *GEO. WASH. L. REV.* 1835 (2015); Jeffrey A. Eisenach & Ilene Knable Gotts, *Looking Ahead: The FTC's Role in Information Technology Markets*, 83 *GEO. WASH. L. REV.* 1876 (2015); Andrew I. Gavil, *The FTC's Study and Advocacy Authority in Its Second Century: A Look Ahead*, 83 *GEO. WASH. L. REV.* 1902 (2015); Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 *GEO. WASH. L. REV.* 1919 (2015); Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 *GEO. WASH. L. REV.* 2230 (2015); Jeffrey S. Lubbers, *It's Time to Remove the “Mossified” Procedures for FTC Rulemaking*, 83 *GEO. WASH. L. REV.* 1979 (2015); Maureen K. Ohlhausen, *Weigh the Label, Not the Tractor: What Goes on the Scale in an FTC Unfairness Cost-Benefit Analysis?*, 83 *GEO. WASH. L. REV.*

What possible justification can there be for holding a symposium on the FTC, let alone adding our own work to the pile of articles on the subject? Does the FTC's century-long "tradition of existence" alone justify a symposium?³ Or does some other reason explain our decision to commit time and resources to the study of a tiny independent agency within the sprawling behemoth that is the United States government?

A skeptical reader will quickly conclude that self-interest is the most obvious explanation of our enthusiasm. We are FTC alumni. As such, one might suspect that we have every interest in inflating the visibility of the FTC and in promoting high public regard for the FTC's good works.⁴ To paraphrase the old Vidal Sassoon ad, the better it looks, the better we look.⁵ A 100th birthday celebration provides an obvious focal point for making a metaphorical mountain out of a real-world agency molehill.

We can think of at least two other (and thankfully better) reasons—one of which justifies the symposium as a whole, and the other of which justifies our essay. First, over the past century, the FTC has inspired a massive scholarly literature. Indeed, from its earliest days the FTC has commanded close attention from scholars in economics, law, political science, and public administration.⁶ Previous major FTC

1999 (2015); Richard J. Pierce, Jr., *The Rocky Relationship Between the Federal Trade Commission and Administrative Law*, 83 GEO. WASH. L. REV. 2026 (2015); Edith Ramirez, *A Framework for Promoting Competition and Protecting Consumers*, 83 GEO. WASH. L. REV. 2049 (2015); D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064 (2015); David C. Vladeck, *Charting the Course: The Federal Trade Commission's Second Hundred Years*, 83 GEO. WASH. L. REV. 2101 (2015); Joshua D. Wright & John Yun, *Stop Chug-a-lug-a-lugin 5 Miles an Hour on Your International Harvester: How Modern Economics Brings the FTC's Unfairness Analysis Up to Speed with Digital Platforms*, 83 GEO. WASH. L. REV. 2130 (2015).

³ Cf. ANIMAL HOUSE (Universal Studios 1978) ("The Delta house has a long tradition of existence to its members and to the community at large.").

⁴ Our admiration for the FTC, its people, and its accomplishments has not blinded us to its imperfections. Our view of the institution is sympathetic, though not uncritical. Some of our doubts about the agency's structure and performance are recounted in William E. Kovacic & David A. Hyman, *Competition Agencies with Complex Policy Portfolios: Divide or Conquer?* 1-2013 Concurrences Art. No. 50168, <http://www.concurrences.com/Journal/Issues/No-1-2013/Articles/Competition-agencies-with-complex-50968?lang=fr>.

⁵ See D Heine, *1981 Vidal Sassoon Hair Care TV Commercial*, YOUTUBE (Feb.9, 2013), ("If you don't look good, we don't look good.").

⁶ Much of this literature is surveyed in Thomas K. McCraw, *Regulation in America: A Review Article*, 49 BUS. HIST. REV. 159 (1975). See also DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* 28–29 (2011) (discussing literature devoted to study of FTC and discussing why the Commission has received relatively more attention from commentators than the Antitrust Division of the Department of Justice).

milestones have inspired symposia,⁷ including an important collection of proceedings published by this Law Review when the agency reached its twenty-fifth birthday.⁸ To the best of our knowledge, no other regulatory body *in the history of mankind* has elicited such extensive analysis over such a sustained period from so many scholars. Surely, any agency that receives this level of sustained attention deserves a symposium (or two) when it reaches the century mark—if only to see what all the bother was about.⁹

Those facts might explain why we bothered organizing a symposium—but why should anyone bother reading our essay? The answer is simple. Rather than focus on the FTC, we focus on its critics. More specifically, we evaluate the advice those critics offered to the FTC, and we offer some preliminary assessments on whether that advice was sound. Our primary focus is a uniquely influential study of the agency: the American Bar Association's ("ABA") *Report of the ABA Commission to Study the Federal Trade Commission* ("ABA Report").¹⁰ Published in 1969, the ABA Report marked an inflection point in the history of the agency, and it laid the foundation for much of what the FTC has accomplished in the intervening forty-five years.¹¹ Indeed, as we detail below, if the FTC had not changed

7 Noteworthy symposia with published papers include the *Federal Trade Commission 90th Anniversary Symposium*, 72 ANTITRUST L.J. 745 (2005); Symposium, *The Fiftieth Anniversary of the Federal Trade Commission*, 64 COLUM. L. REV. 385 (1964); Symposium, *The Fiftieth Anniversary of the Federal Trade Commission 1914–1964*, 24 FED. B.J. 373 (1964). To mark its ninetieth birthday, the agency held a two-day symposium, and many papers were published in the Antitrust Law Journal volume cited here. Additional papers and a transcript of the FTC symposium are available at the FTC website. *FTC 90th Anniversary Symposium*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/events-calendar/2004/09/ftc-90th-anniversary-symposium> (last visited Oct. 31, 2015).

8 See Symposium, *Federal Trade Commission Silver Anniversary Issue*, 8 GEO. WASH. L. REV. 249 (1940).

9 As it happens, both The George Washington University Law School and George Mason University School of Law held symposia to mark the 100th birthday of the FTC. The George Washington University Law School Symposium was held on November 7–8, 2014. The George Mason University School of Law Symposium was held on February 13, 2014. See *17th Annual George Mason Law Review Antitrust Symposium February 13*, GEO. MASON U. SCH. LAW, http://www.law.gmu.edu/news/2014/17th_antitrust_symposium (last visited Oct. 31, 2015). The FTC held its own symposium and related celebratory events. See *Centennial Dinner & Symposium*, FED. TRADE COMM'N, <http://www.ftc.gov/about-ftc/our-history/centennial-dinner-symposium> (last visited Oct. 31, 2015). Since the FTC is in the business of promoting competition and competitive markets, it is singularly appropriate that there were dueling symposia to mark the FTC's 100th birthday.

10 AM. BAR ASS'N, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969) [hereinafter ABA REPORT].

11 On the report's impact on the FTC, see William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective*, in PUBLIC

course in response to the 1969 ABA Report, it is doubtful that we would be celebrating the agency's centennial.

The conventional wisdom—which is not entirely mistaken—is that the FTC was the governmental equivalent of a leper colony prior to 1969.¹² For the agency's many critics, no aspect of the institution—including the architecture of the Commission's headquarters building on Pennsylvania Avenue—had redeeming qualities.¹³ By this view, the FTC's credibility and reputation were rescued only by the adoption of the wise recommendations in the 1969 ABA Report.

There is no question that the FTC deserves plenty of criticism for its pre-1969 performance. It is also beyond doubt that there has been a dramatic turn-around in the intervening forty-five years, as the FTC adopted the recommendations in the 1969 ABA Report. But, before we simply genuflect at the wisdom of those responsible for the ABA Report and the inherent virtue of their recommendations, it is worth noting that those recommendations also placed the FTC's continued existence at risk as well—and did so for an entirely new set of reasons than had been the case pre-1969. Indeed, the last forty-five years of the FTC's history (which are assuredly an improvement on the first fifty-five) are still a testament to the unintended consequences that can accompany even the best of reform proposals.

Part I of this Essay reviews the reports written by a series of blue ribbon commissions about the FTC, culminating in the 1969 ABA Re-

CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 63, 81–96 (Robert J. MacKay et al. eds., 1987).

¹² Our characterization of contemporary views of the FTC does not exaggerate the vituperation cast at the Commission. One influential assessment in this period, a Ralph Nader-sponsored study of the FTC, abounds with images of physical decay. See EDWARD F. COX ET AL., "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969) [hereinafter NADER REPORT]. In a chapter titled "The Cancer," the Nader Report said "[m]isguided leadership is the malignant cancer that has already assumed control of the Commission, that has been silently destroying it, and that has spread its contagion on the growing crisis of the American consumer." *Id.* at 130. In slightly less flamboyant terms, Ralph Nader himself said the FTC was "a self-parody of bureaucracy, fat with cronyism, torpid through an inbreeding unusual even for Washington, manipulated by the agents of commercial predators, impervious to governmental and citizen monitoring." Ralph Nader, *Preface to NADER REPORT*, *supra*, at vii.

¹³ NADER REPORT, *supra* note 12, at 4 ("If there is anything in the theory that the external esthetics of a building reflects its internal essence, then the architect of the Federal Trade Commission building had a genius for sensing the mediocre."). The Nader Report's architectural criticism was provided by Edward F. Cox, who studied architecture as an undergraduate at Princeton University and who was a special student in architecture at Yale University when the report appeared. *Id.* at 2; see also Edward F. Cox, Panel Remarks at the FTC 90th Anniversary Symposium: The First 90 Years: Promise and Performance 72 (Sept. 22, 2004), http://www.ftc.gov/sites/default/files/documents/public_events/ftc-90th-anniversary-symposium/040922transcript001.pdf.

port. Part II explores post-1969 developments and highlights various ways in which the ABA's recommendations either missed the mark or ignored important dynamics that either complicated the FTC's agenda or placed its very existence at risk. Part III identifies four lessons to be drawn.

I. BLUE RIBBON COMMISSIONS AND THE FTC

One of the FTC's most noteworthy features is how often blue ribbon commissions¹⁴ have put it under the microscope.¹⁵ Some commissions have examined the FTC as part of a broader review of government institutions.¹⁶ In other instances, the FTC has been the sole target.¹⁷ In each case, these blue ribbon panels have found the FTC wanting, concluding that it had failed to achieve the ambitious goals that Congress had set for it.¹⁸ Every blue ribbon commission issued sweeping recommendations about the necessity for course correction and demanded substantial reforms.¹⁹

The most important of these blue ribbon commissions was the American Bar Association's Commission to Study the Federal Trade Commission, which issued its report in 1969.²⁰ The ABA initiated the study in April of that year at the request of President Richard M. Nixon.²¹ The President's request followed by several months the pub-

14 "Blue ribbon" commissions are panels of outside experts who "evaluat[e] the performance of public institutions in the United States." See WILLIAM E. KOVACIC, *THE FEDERAL TRADE COMMISSION AT 100: INTO OUR SECOND CENTURY* 5 (2009), https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc_100rpt.pdf.

15 See McCraw, *supra* note 6, at 175–79 (canvassing these reports); see also STAFF OF SUBCOMM. ON ADMIN. PRACTICE & PROCEDURE, 86TH CONG., REP. ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Comm. Print 1960) (authored by James M. Landis); COMM. ON INDEP. REGULATORY COMM'NS, TASK FORCE REPORT ON REGULATORY COMMISSIONS (1949) (submitted as Appendix N to the Commission on Organization of the Executive Branch of the Government) [hereinafter HOOVER COMMISSION TASK FORCE REPORT].

At the time of the ABA Report, individual commentators also had studied the FTC's pre-1969 performance extensively. Their work included some notable negative assessments. See, e.g., GERARD C. HENDERSON, *THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* (1924); LOUIS M. KOHLMEIER, JR., *THE REGULATORS: WATCHDOG AGENCIES AND THE PUBLIC INTEREST* (1969); Carl A. Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383 (1964).

16 See ABA REPORT, *supra* note 10, at 9–11 & n.22.

17 *Id.*

18 See William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 593 (1982).

19 See *id.*

20 ABA REPORT, *supra* note 10.

21 President Nixon asked the ABA to "undertake a professional appraisal of the present

lication of a scathing critique of the FTC authored by a team of researchers working for one of Ralph Nader's organizations ("Nader Report").²² The Nader Report drew intense, unfavorable attention to the FTC and prompted the White House and Congress to scrutinize the agency's performance.²³ Normally, one would not have expected President Nixon to be responsive to criticism from a Nader-affiliated organization, but one of the co-authors of the Nader Report was Richard Nixon's soon-to-be son-in-law, Edward Cox.²⁴

To perform the study, ABA President William Gossett assembled a panel with exceptional professional accomplishments and deep expertise in the FTC.²⁵ The panel's chair, Miles Kirkpatrick, later chaired the FTC from 1970 to 1973.²⁶ The panel's counsel, Robert Pitofsky, subsequently headed the agency's Bureau of Consumer Protection from 1970 to 1973, served as a Commissioner from 1978 to 1981, and chaired the agency from 1995 to 2001.

efforts of the Federal Trade Commission in the field of consumer protection, in its enforcement of the anti-trust laws, and of the allocation of its resources between these two areas." *Id.* at 86. The President expressed his hope that "such a study would make recommendations for the future activities and organization of the Commission." *Id.*

²² NADER REPORT, *supra* note 12. The Nader study first appeared in January 1969 and was printed in the Congressional Record as "The Consumer and the Federal Trade Commission—A Critique of the Consumer Protection Record of the FTC," 115 CONG. REC. 1539 (1969) (statements by Sen. Gaylord Nelson). See also Ernest Gellhorn, *The Consumer and the Federal Trade Commission*, 68 MICH. L. REV. 151 (1969) (book review). The Nader study soon was expanded and published as EDWARD F. COX ET AL., "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969).

²³ On the Nader Report's impact, see RICHARD A. HARRIS & SIDNEY M. MILKIS, *THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES* 165–66 (1989). Professors Harris and Milkis observe that the Nader Report's "criticism of the FTC was not especially radical or novel," yet its effect was exceptional: "The direct impact the Nader report had on the FTC, however, was surprising. It sparked a series of political actions that eventually revitalized the agency." *Id.* at 165.

²⁴ Cox describes his role in the Nader Report and the way in which "[e]lements of the [Nader Report] were designed to attract the attention of the new Republican administration." Edward F. Cox, *Reinvigorating the FTC: The Nader Report and the Rise of Consumer Advocacy*, 72 ANTITRUST L.J. 899, 901 (2005).

²⁵ Five ABA Commission members were law professors who specialized in antitrust or consumer protection (Carl Auerbach, Harlan Blake, Carl Fulda, Ellen Ash Peters, and Richard Posner). ABA REPORT, *supra* note 10, at 88–89. Two were industrial organization economists (Betty Bock and Jesse Markham). *Id.* at 89. One was counsel to a civil rights organization that spearheaded formative challenges to racial segregation (Jack Greenberg). *Id.* at 88. One was counsel to a leading labor union (Thomas Harris). *Id.* Seven were attorneys in private practice (Paul Bower, John French, Allen Holmes, Miles Kirkpatrick, Ira Millstein, and Charles Stewart, Jr.). *Id.* at 88–89.

²⁶ David Stout, *Miles Kirkpatrick, 79; Lawyer Who Oversaw F.T.C. Reform*, N.Y. TIMES (May 17, 1998), <http://www.nytimes.com/1998/05/17/business/miles-kirkpatrick-79-lawyer-who-oversaw-ftc-reform.html>.

Like the earlier blue ribbon assessments of the FTC, the ABA Commission gave the FTC low grades: “[The FTC’s] performance when measured against a reasonable standard of acceptable government operation has been disappointing. When actual performance is measured against the potential which the FTC continues to possess, the agency’s performance must be regarded as a failure on many counts.”²⁷ The ABA Commission hammered the FTC’s operational methods and substantive programs.²⁸

Several specific operational lapses accounted for the FTC’s weak performance. Chief among these failings was the FTC’s feeble effort to set priorities and select programs to achieve them. Poor planning “caused a misallocation of funds and personnel to trivial matters rather than to matters of pressing public concern.”²⁹ With rare exceptions, the FTC set its priorities on an entirely ad hoc basis and relied on complaints (“the mailbag”) to govern its selection of programs.³⁰ This passive approach to generating projects contributed substantially to the “failure of the FTC to initiate projects relevant to pressing contemporary needs” and engendered the FTC’s “unfortunate tendency to involve itself in investigations and projects of marginal importance.”³¹ When the FTC did set priorities, it failed to give its staff “institutional devices or agency-wide standards . . . for comparing the relative merits of allocating FTC resources to proceedings against possible violations of law”³²

A second important weakness was poor case management. The FTC had no effective system “to manage the flow of its work in an efficient and expeditious manner.”³³ The agency lacked an “effective procedure . . . to keep track of progress on matters formally initiated, to establish realistic deadlines, or to terminate investigations once it becomes apparent that anticipated returns do not justify continued investment of time and effort.”³⁴ Because the agency lacked adequate means to monitor the progress of individual matters, “projects of various kinds often disappear into the lower reaches of the agency and

²⁷ ABA REPORT, *supra* note 10, at 35.

²⁸ *Id.* at 34.

²⁹ *Id.* at 1.

³⁰ *Id.* at 12, 77. The ABA panel exempted the FTC’s merger program from this criticism. *Id.* at 13 n.33.

³¹ *Id.* at 80.

³² *Id.* at 13.

³³ *Id.* at 1.

³⁴ *Id.* at 15.

then resurface after many years.”³⁵ Poor management mechanisms coincided with faulty procedures to yield “crippling delay” in the FTC’s operations.³⁶

A third serious flaw consisted of the frail means chosen to enforce the agency’s mandate. The ABA panel concluded that “the FTC has resorted less frequently to formal proceedings, and has increased its reliance upon an ‘informal’ or ‘voluntary compliance’ approach to bring about industry-wide compliance.”³⁷ An excessive use of advisory opinions, industry guides, trade regulation rules, and assurances of voluntary compliance as substitutes for litigation had eroded the agency’s credibility as a law enforcement body.³⁸ “With such an obvious disinclination by the FTC to proceed formally,” the ABA panel wrote, “we fear that the business community may cease to take seriously the guides, rules, and other administrative pronouncements by the FTC, and also may cease to take seriously the statutes that the FTC is empowered to enforce.”³⁹ Even when the FTC employed softer policymaking tools, it lacked the means (and the will) to ensure that businesses actually complied with their voluntary assurances.⁴⁰

The ABA Commission also found serious weaknesses in the FTC’s substantive programs, and described its work as an antitrust agency as “less than satisfactory.”⁴¹ Admittedly, the ABA Commission was grading on a high curve; because Congress had given the FTC such expansive authority, it was downgraded for failing “to take advantage of the unique strengths conferred upon it”⁴² In like fashion, the ABA Commission indicated that the “unique strengths” of the FTC were supposed to give it the ability to conduct cutting-edge antitrust analysis, and devise new norms of business behavior.⁴³

³⁵ *Id.* at 81.

³⁶ *Id.* at 34.

³⁷ *Id.* at 8.

³⁸ *Id.* at 8–9.

³⁹ *Id.* at 26.

⁴⁰ *Id.* (“Absent a program of careful compliance surveillance, coupled with strong sanctions when necessary, the voluntary compliance program cannot be regarded as effective law enforcement.”).

⁴¹ *Id.* at 64.

⁴² ABA REPORT, *supra* note 10, at 64. These special capabilities included: (1) expansive investigatory and information-gathering authority; (2) the assembly in one agency of administrative hearing officers, attorneys, and economists who, collectively, would build special expertise in competition law; (3) the application of a broad collection of policy tools to address new questions without being restricted by precedents developed in earlier cases; and (4) the power to issue studies to guide policymaking by the President and Congress and to inform the public. *See id.* at 64–65.

⁴³ *Id.*

The only area of antitrust enforcement where the ABA Commission gave the FTC passing marks was merger control, where the FTC “contributed to the adoption of original and important theories of antitrust enforcement.”⁴⁴ In fact, the FTC “[led] the way in implementation and interpretation of Section 7 of the Clayton Act”⁴⁵—and it did so “not simply by the institution of formal proceedings, but by the publication of economic reports and the promulgation of guides, *i.e.*, by use of the full panoply of administrative resources available to the FTC.”⁴⁶ However, even here, the ABA Commission noted that the agency’s performance would have been better still had the FTC “committed enough of its resources to the divisions charged with responsibilities in the merger area.”⁴⁷

Beyond these accomplishments, the FTC’s contributions to the development of competition policy norms were disappointing. As the ABA Commission observed, “[i]f the measure of the quality of FTC performance in the antitrust area is whether the agency has broken new ground and made new law by resort to its unique administrative resources, it seems clear that the record is largely one of missed opportunity.”⁴⁸ Despite these failings, the ABA Commission was unwilling to recommend the outright shuttering of the FTC—but it made clear that the only reason it was giving the agency one final chance was so that it could generalize the accomplishments it had secured in merger policy to the rest of its portfolio.⁴⁹ The FTC’s distinctive structure and capabilities clinched the case for giving it another chance: “[h]owever well the federal judiciary may now be thought to be functioning in this area, there is an important role for the administrative process in solving difficult and complex antitrust questions.”⁵⁰

Stated differently, the ABA panel was clear that the FTC’s comparative advantage was its ability to handle “difficult and complex antitrust questions”⁵¹—a position that had obvious implications for the appropriate allocation of labor between the Department of Justice (“DOJ”) and the FTC:

⁴⁴ *Id.* at 69.

⁴⁵ *Id.* at 65.

⁴⁶ *Id.*

⁴⁷ *Id.* at 69.

⁴⁸ *Id.* at 65.

⁴⁹ *Id.* (“In the expectation that these kinds of successes can be repeated and extended by the revitalized FTC we envisage, we decline to propose the elimination of antitrust enforcement authority in the FTC.”). The negative implication, of course, is that if the FTC failed to deliver, it would be terminated with extreme prejudice.

⁵⁰ *Id.* at 64.

⁵¹ *Id.*

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

On the other hand, where issues of anticompetitive effects turn essentially on complicated economic analysis, and where decided cases have not yet succeeded in fashioning a clear line marking the boundary between legal and illegal conduct, such matters should generally be assigned to the FTC.⁵²

The ABA Commission then proposed two major adjustments to the FTC's enforcement priorities. First, it identified vertical restraints as a "complicated and economically significant" field of antitrust scrutiny where the FTC had "foregone opportunities to participate in the constructive development of law that might contribute to the attainment of antitrust objectives."⁵³ The ABA Commission complained that the FTC had "virtually abandoned" the examination of vertical agreements, and it flagged several practices—dual distribution, exclusive territories and other limits on franchises, and price squeezes—on which "the expertise of the FTC could be employed to enlighten the business community and the courts."⁵⁴

Second, the ABA Commission recommended that the FTC expand its merger enforcement program.⁵⁵ Third, the ABA Commission proposed that the FTC reassess its Robinson-Patman Act⁵⁶ enforcement program.⁵⁷ In the preceding decade, the FTC had made enforcement of the Robinson-Patman Act the foundation of its nonmerger antitrust program, but the ABA Commission was skeptical about the

⁵² *Id.* at 66.

⁵³ *Id.* at 68.

⁵⁴ *Id.*

⁵⁵ *Id.* at 68–69.

⁵⁶ Robinson-Patman Act of 1936, Pub. L. No. 74-692, 49 Stat. 1526 (1936).

⁵⁷ ABA REPORT, *supra* note 10, at 67–68.

merits of doing so.⁵⁸ Instead, the ABA Commission suggested that the FTC should assess “the compatibility of the Robinson-Patman Act and its current interpretations to the attainment of antitrust objectives”⁵⁹ and only enforce the statute in “instances in which injury to competition is clear”⁶⁰

As part of its evaluation, the ABA Commission examined previous efforts by blue ribbon study groups and by individual commentators to assess the FTC’s performance.⁶¹ To the ABA panel, the earlier studies depicted an agency stubbornly impervious to effective reform:

Since its establishment in 1914, a succession of independent scholars and groups have sounded much the same themes in their criticisms of the FTC, including the absence of effective planning and failure to establish workable priorities, the consequent tendency to become involved in too many trivial cases, the delay and unnecessary secrecy in FTC operations, and the uneven quality of staff. It is worthy of note that each successive study made it clear that the older criticism was still applicable and that previously proposed solutions generally had been ignored.⁶²

The ABA Commission highlighted the “dépà vu all over again” nature of its assessment by quoting an extended rebuke of the FTC by the Hoover Commission Task Force Report on Independent Regulatory Agencies, published in 1949:

As the years have progressed, the Commission has become immersed in a multitude of petty problems; it has not probed into new areas of anticompetitive practices; it has become increasingly bogged down with cumbersome procedures and inordinate delays in disposition of cases. Its economic work—instead of being the backbone of its activities—has been allowed to dwindle almost to none. The Commission has largely become a passive judicial agency, waiting for cases to come up on the docket, under routinized proce-

⁵⁸ *Id.* From 1960 through 1968, the FTC issued a total of 518 Robinson-Patman Act complaints, a total of over sixty matters per year. William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 410–11 (2003) (presenting data on FTC Robinson-Patman Act enforcement).

⁵⁹ ABA REPORT, *supra* note 10, at 67.

⁶⁰ *Id.* at 68.

⁶¹ *Id.* at 9.

⁶² *Id.* at 9.

dures, without active responsibility for achieving the statutory objectives.⁶³

The ABA Commission closed with a tough warning, making it clear that the FTC had one last chance to deliver the promised goods:

In conclusion, this Commission believes that it should be the last of the long series of committees and groups which have earnestly insisted that drastic changes were essential to recreate the FTC in its intended image. The case for change is plain. What is required is that the changes now be made, and in depth. Further temporizing is indefensible. Notwithstanding the great potential of the FTC in the field of anti-trust and consumer protection, if change does not occur, there will be no substantial purpose to be served by its continued existence; the essential work to be done must then be carried on by other governmental institutions.⁶⁴

Unsurprisingly, the ABA Commission devoted relatively little attention to “getting there from here,” opting instead for the “make it so” attitude that pervades the reports of most blue ribbon commissions.⁶⁵ Predictably enough, the ABA Commission also criticized agency leadership for allowing the situation to devolve into farce, with “too many instances of incompetence in the agency, particularly in senior staff positions,” a “confused and demoralized” staff, “aimless” enforcement activity, and “bitter public displays of dissension among Commissioners.”⁶⁶

Richard Posner—then a newly minted member of the faculty of the Stanford Law School—was the only person to dissent from the ABA Commission’s recommendation.⁶⁷ Posner was no stranger to the FTC. Earlier in the 1960s, he had served as an advisor to FTC Com-

⁶³ HOOVER COMMISSION TASK FORCE REPORT, *supra* note 15, at 125, *quoted in* ABA REPORT, *supra* note 10, at 10.

⁶⁴ ABA REPORT, *supra* note 10, at 3.

⁶⁵ And not just blue ribbon commissions. Congress is prone to similar attitudes in the setting of completely unrealistic statutory deadlines for action. See David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446, 1496 (2014) (“The stigma of failed execution attaches to the agency, not the legislators who think that effective implementation consists of simply telling a bureau to ‘make it so.’”).

⁶⁶ ABA REPORT, *supra* note 10, at 1, 34.

⁶⁷ Posner’s dissent appears in the ABA Report. *Id.* at 92–119. His dissent became the basis for a law review article. See Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969). In this Essay, we quote from both Posner’s dissent and his law review article. In some (but not all) instances, we draw from Posner’s law review article, which develops more fully the substantive criticisms he leveled in his original dissent.

missioner Philip Elman.⁶⁸ Among other duties, he had played a central role in drafting the FTC's proposed Cigarette Rule, which required tobacco companies to label cigarettes with the now-familiar warnings of the health hazards of smoking.⁶⁹

Posner's dissent bitterly scorned the majority's timid approach to its task. He asserted that the majority had skipped past "basic questions about the role of administrative agencies in economic life" and had failed to wrestle with "the fundamental premises of the FTC"⁷⁰ Posner perceived that "thoughtful observers are increasingly coming to believe that, far from eliminating poverty, inequality, monopoly, and other social evils, the most celebrated reforms of the Progressive and New Deal Administrations . . . may actually have aggravated them."⁷¹ The new intellectual ferment provided an occasion for a basic rethink about the FTC and similar federal bodies: "The deficiencies of government as a regulator of economic life, the gaps between pretensions and performance, the frequent perversion of governmental power to serve the ends of private economic blocs, are being perceived with a new freshness."⁷²

To Posner, this condition called for a no-holds-barred inquiry that directly questioned the agency's continued existence. "[A] serious analysis of the FTC must address fundamentals," he wrote.⁷³ Instead, the ABA Commission majority "largely ignores these questions and confines its attention to the surfaces of problems."⁷⁴ Consequently, the majority report was "a missed opportunity of major dimensions," especially because the FTC itself seemed to be "in a state of crisis, self-doubt, and self-criticism" from the shock of the Nader Report.⁷⁵ The ABA Commission could have exploited the agency's "anguish" to revisit first principles; instead, it served up "homilies on the importance of inspired leadership, good planning, and sensible priorities" with "proposals that amount to tinkering with the details of the Com-

⁶⁸ Posner, *supra* note 1, at 761.

⁶⁹ See *Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, 16 C.F.R. pt. 408 (2015); William MacLeod et al, *Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy*, 72 ANTITRUST L.J. 943, 947 (2005). Congress rendered the FTC rule moot by adopting legislation that required warning labels. See MacLeod et al., *supra*, at 946–48 (describing congressional response to FTC's proposed cigarette rule).

⁷⁰ See ABA REPORT, *supra* note 10, at 92–93.

⁷¹ *Id.* at 93.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 93–94.

mission's existing operations and organization.”⁷⁶ If the agency were not abolished, at least it should be denied any increase in budget and authority, for “[i]t is scandalous to allow so dubious an enterprise to continue to wax in size and power.”⁷⁷

On the merits, Posner dissented from the ABA Report for three reasons. First, Posner argued that Congress's assumptions when it created the FTC in 1914 had turned out to be either wrong, or were no longer applicable.⁷⁸ More specifically, Posner argued that Congress had assumed the FTC would use its expansive authority to target conduct that could not be reached under then-existing interpretations of the Sherman Act.⁷⁹ Similarly, Congress assumed that the FTC would use the full panoply of the tools it was given to study, investigate, and enforce the Federal Trade Commission Act,⁸⁰ rather than simply bring enforcement actions.⁸¹ Posner argued that the FTC had failed to do both of these things.⁸² Although Congress had assumed these tools would give the FTC a comparative advantage relative to the federal judiciary and the DOJ, in reality, the “administrative process appears to have no constructive contribution to make to combatting either fraud or monopoly.”⁸³

Second, completely independent of Congress's aspirations, Posner believed that the FTC had established a lengthy (and largely unbroken) record of failure.⁸⁴ Indeed, Posner concluded “the FTC's contribution to the formulation of sound antitrust policy has actually been negative”⁸⁵ The FTC had spent its time generating and pursuing antitrust and consumer protection cases that actually suppressed competition, despite its mandate to promote competition.⁸⁶

Third, Posner argued that the FTC's senior leadership would inevitably prefer unobtrusive substantive programs, lest aggressive enforcement damage their future career prospects.⁸⁷ Thus, few if any

⁷⁶ *Id.* at 94. These comments and many of the other harshest lines from Posner's dissent did not make the cut when he revised his comments for law review publication. *See generally* Posner, *supra* note 67.

⁷⁷ ABA REPORT, *supra* note 10, at 119.

⁷⁸ Posner, *supra* note 67, at 49.

⁷⁹ *Id.* at 49–50.

⁸⁰ Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41–58 (2012).

⁸¹ Posner, *supra* note 67, at 50–51.

⁸² *Id.* at 49–51.

⁸³ *Id.* at 52–54, 82.

⁸⁴ *Id.* at 61 (asserting that 99.5% of the FTC's antitrust activity “seems misguided”).

⁸⁵ *Id.* at 54.

⁸⁶ *See id.* at 70, 87.

⁸⁷ *Id.* at 82–87.

FTC leaders would see professional gain from carrying out the type of tough, far-reaching enforcement role that Congress (and the ABA Commission) envisioned for the agency.⁸⁸ The self-interest of FTC Commissioners who aspired to reappointment “would appear to dictate the avoidance of controversy and the conciliation of well organized economic interests and influential Congressmen.”⁸⁹

Nor was the prospect better for Commissioners who desired a future career in the private sector. Posner concluded that “[a] commissioner concerned with his future success at the bar will have no greater incentive to promote the consumer interest fearlessly and impartially than one whose guiding principles are job retention and agency aggrandizement.”⁹⁰ Posner explained:

The gratitude of consumers—indulging the improbable assumption that such a thing exists—cannot be translated into a larger practice. On the other hand, the enmity of the organized economic interests, the trade associations and trade unions, that a zealous pursuit of consumer interests would engender may do him some later harm, while making his tenure with the Commission more tense and demanding than would otherwise be the case. Exceptional people may rise to the challenge but they are unlikely ever to constitute a sizeable fraction of commissioners.⁹¹

To sum up, Congress had created a tiger with real teeth—but the FTC Commissioners and staff had voluntarily pulled out the tiger’s teeth and then let the tiger go to sleep in the sun.⁹² A “genuine dedication to consumer interests” would have caused “friction and work”—but why make waves?⁹³

The FTC was also resistant to change. Previous blue ribbon commissions had offered recommendations similar to those of the ABA Commission, but there had been no material improvement or response.⁹⁴ Rather than continue the cycle of failure, Posner called for

⁸⁸ *Id.* at 85–86.

⁸⁹ *Id.*

⁹⁰ *Id.* at 86.

⁹¹ *Id.*

⁹² See NORMAN I. SILBER, WITH ALL DELIBERATE SPEED: THE LIFE OF PHILIP ELMAN 357–58 (2004) (“In 1969 the [FTC] was heavily battered with adverse publicity for which I [Philip Elman, FTC Commissioner] was being blamed all over the place. The *Washington Post* had a feature article in the Sunday Outlook section written by Richard Harwood, who is now a managing editor of the paper. And, the headline was ‘Once in a While the FTC Snorts, Then Sleeps On.’ . . . *Fortune* magazine had a similar article.”).

⁹³ Posner, *supra* note 67, at 87.

⁹⁴ See generally Kovacic, *supra* note 18.

the freezing of the FTC's budget and the transfer of most of its responsibilities to other agencies, including the DOJ.⁹⁵

II. WHAT THE ABA COMMISSION MISSED

Like all blue ribbon enterprises, the ABA Commission offered its recommendations with the sure and certain knowledge that it knew best. Indeed, a high degree of confidence in the merits of one's opinions appears to be a job requirement for serving on blue ribbon commissions. But as with most blue ribbon commissions, a substantially higher degree of humility and modesty would have been more appropriate.

Even staunch critics of the FTC's performance circa 1969 (and we count ourselves among them) can easily find significant weaknesses in the ABA Commission's Report and in Posner's dissent. The ABA Report missed important issues, offered faulty diagnoses of the FTC's condition, and proposed glib cures that either ignored or failed to anticipate the predictable problems that would flow from the recommended reforms. Below we cover some of the low points.

A. *The Majority Report*

From the date of its release, the ABA Report gained broad approval from powerful legislators as the prescription for retooling the FTC and reorienting its programs.⁹⁶ On the day the ABA issued the study, the Senate Judiciary Subcommittee on Administrative Practice and Procedure held an oversight hearing on the FTC.⁹⁷ The Subcommittee's Chair, Senator Edward Kennedy, threw the gauntlet down before the agency:

This subcommittee hopes . . . to see to it that the proposals we have received do not merely become grist for the mill of future students of the FTC. . . . Surely, 45 years after Henderson's landmark work on the FTC, first exposing many of the same problems we see today, the time has come either to do something about them, or, with the dissenting member of the ABA group to consider abolishing the agency and starting it from the ground again.⁹⁸

⁹⁵ ABA REPORT, *supra* note 10, at 118–19.

⁹⁶ See Kovacic, *supra* note 18, at 630–31.

⁹⁷ *Federal Trade Commission Procedures: Hearings on Agency Responsiveness to Public Needs: The Federal Trade Commission Before the Subcomm. on Admin. Practice & Procedures of the S. Comm. on the Judiciary*, 91st Cong. (1969).

⁹⁸ *Id.* at 110 (statement of Sen. Edward Kennedy) (referring to HENDERSON, *supra* note

In a short time, Kennedy's warning echoed in confirmation hearings for FTC Commissioners, as well as in proceedings before the agency's authorization and appropriations committees.⁹⁹ It became apparent to FTC leadership that Congress had bought the ABA Report as a blueprint for reform. Was the diagnosis accurate, and was the cure sensible?

1. *Paint It Black*

The pre-1969 FTC richly deserved the thrashing administered by the ABA Report. Over an extended period of time, the FTC had prioritized counterproductive or meaningless endeavors. During the decade before the ABA Report, the aggressive application of the Robinson-Patman Act formed the disreputable core of the FTC's competition program,¹⁰⁰ and seemingly insignificant violations of apparel content-labeling laws anchored the agency's consumer protection program.¹⁰¹ Even the portions of the FTC's portfolio praised by the ABA Commission, such as the FTC's aggressive pursuit of conglomerate mergers, have not withstood the test of time.¹⁰²

But, in all fairness, the FTC was not simply a leper colony where talent and ambition went to die. Could an agency utterly devoid of redeeming virtues produce the international petroleum cartel report

15, a highly critical assessment of the FTC's first decade). See also *infra* note 118 and accompanying text (discussing Henderson's criticism of FTC case selection and resource allocation).

⁹⁹ See Kovacic, *supra* note 18, at 630–31 (collecting sources).

¹⁰⁰ ABA REPORT, *supra* note 10, at 67–68. The ABA panel said a “large and growing body of uniformly critical opinion” had questioned the FTC's Robinson-Patman Act enforcement program and the agency's tendency “to interpret the price discrimination provisions of the Act so as to equate injury to a particular competitor with injury to the competitive process.” *Id.* at 67. The critics had warned that the FTC's approach “has been detrimental to the consumer in its tendency to suppress price competition, deter experimentation with new and more efficient methods of distribution, and erect barriers to entry into new markets by highly competitive, geographically diversified firms.” *Id.*

¹⁰¹ *Id.* at 45 (“[E]nforcement operations of the Bureau of Textiles and Furs have been and continue to be among the most preferred in the FTC over the last 8 or 10 years.”). Among other criticisms, the ABA panel attacked “literal-minded enforcement” of the Fur Labeling Act and said “[m]any of the trivial violations found in the literal text of labels, invoices and advertising are hardly relevant to any serious consumer interest.” *Id.* at 47.

¹⁰² The ABA Commission praised the FTC's efforts to implement the Clayton Act's merger control provision, which was enhanced dramatically by the Celler-Kefauver Act in 1950. *Id.* at 68–69. The ABA panel said “the FTC has contributed to the adoption of original and important theories of antitrust enforcement.” *Id.* at 69 & n.104 (citing as an example *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967)). Today, antitrust commentators would agree that these landmarks of FTC merger enforcement were original and important, but also misguided. See ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 568–69 (2d ed. 2008) (describing retreat from disregard in *Procter & Gamble Co.* toward efficiency arguments in merger cases).

in the late 1940s,¹⁰³ successfully prosecute the leading producer of tetracycline for illegal monopolization in the 1960s,¹⁰⁴ and publish the Cigarette Rule in the early 1960s?¹⁰⁵ At crucial junctures, the FTC failed not because of a lack of ambition, but of its inability to execute exceedingly difficult projects successfully.¹⁰⁶ An agency that confronts hard problems but fails in execution is different from an agency that either does not even notice serious problems that are in front of its face, or sees them and flees the field. The failings in each of these three distinct scenarios differ, as do the solutions.

The ABA's misleading portrait of a relentlessly dull-witted and determinedly inept agency had major consequences. The demand for extraordinary improvements meant that even above-average performance was no longer acceptable. Only exceptional enhancements in performance—the public policy equivalent of hitting an 800-foot home run—would do. The singles, doubles, and triples that build rallies and score runs would count for little.

Admonished to attain stratospheric results, the FTC embarked on a program in the 1970s that sought to hit 800-foot home runs but resulted, predictably enough, in far too many outs.¹⁰⁷ Indeed, the FTC's commitments quickly outran its capability to deliver successful outcomes. Even as the FTC undertook a daunting array of complex, high-stakes competition matters, legislators—their views framed by the narrative of ineptitude and intransigence—still demanded more.¹⁰⁸

A telling illustration of the impossibly high expectations of the FTC's legislative overseers took place in a congressional hearing in 1974.¹⁰⁹ By then the FTC was running monopolization cases against the bread, breakfast cereal, photocopier, and petroleum refining sec-

103 STAFF OF FED. TRADE COMM'N, 82D CONG., REP. ON THE INTERNATIONAL PETROLEUM CARTEL (Comm. Print 1952). On the significance of the FTC's international petroleum cartel report, see William E. Kovacic, *Standard Oil Co v United States and Its Influence on the Conception of Competition Policy*, 11 COMPETITION L.J. 89, 95–96 (2012).

104 *Am. Cyanamid Co.*, 72 F.T.C. 623 (1967), *aff'd sub nom. Charles Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968). On the FTC's tetracycline litigation, see Joseph B. Kennedy, Jr., *Patent and Antitrust Policy: The Search for a Unitary Theory*, 35 GEO. WASH. L. REV. 512, 529–32 (1967).

105 See *supra* note 69 and accompanying text.

106 See generally Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921–1925*, 77 ANTITRUST L.J. 145 (2010).

107 See Kovacic, *supra* note 58, at 472–75 (recounting serious mismatch between FTC antitrust litigation programs in 1970s and agency's capacity to carry out ambitious cases skillfully).

108 See, e.g., *infra* note 113 and accompanying text.

109 See *Market Power, the Federal Trade Commission, and Inflation: Hearing Before the J. Econ. Comm.*, 93d Cong. (1974) [hereinafter *Market Power Hearing*].

tors, a breathtaking swath of American commerce.¹¹⁰ With this bet-the-agency program underway, FTC Chairman Lewis Engman testified before the Joint Economic Committee of Congress.¹¹¹ Despite the agency's exceptionally ambitious agenda, Senator William Proxmire scolded Chairman Engman for timidity.¹¹² Proxmire said "the FTC, like a number of other regulatory agencies seems to concern itself with minor infractions of the law, and to spend much of its time on cases of small consequence."¹¹³ Thus, the expectations created by the ABA Report were self-reinforcing—the more the FTC did, the more Congress and commentators expected of it. The crash, when it finally came, was more severe precisely because the FTC had felt it necessary to overextend itself simply to stay in the game, rather than declare that it had already exceeded a sensible pitch count.

2. *Misinterpretation of Earlier Studies*

The ABA Report canvassed earlier studies of the FTC and noted that "each successive study made it clear that the older criticism was still applicable" and that the Commission had generally "ignored" previous reports.¹¹⁴ Unfortunately, the ABA Commission misinterpreted the findings of these earlier studies—perhaps a consequence of the tendency of blue ribbon commissions to read only the executive summaries of earlier works, rather than plough through the entire report.¹¹⁵ For example, the ABA Commission correctly noted that a recurring theme of earlier studies was that the FTC had focused too many resources on trivial matters.¹¹⁶ However, the ABA Report did not acknowledge substantial differences in how earlier studies had defined "trivial."

¹¹⁰ See Kovacic, *supra* note 58, at 473–74. These were only some of the agency's monopolization cases. The Commission also had undertaken other massive litigation projects, including a challenge to the distribution system used by the soft drink industry. *Coca-Cola Co.*, 91 F.T.C. 517 (1978) (complaint issued July 15, 1971), *remanded*, *Coca-Cola Co. v. FTC*, 642 F.2d 1387 (D.C. Cir. 1981).

¹¹¹ See *Market Power Hearing*, *supra* note 109, at 31–78 (statement of Lewis A. Engman, Chairman, Fed. Trade Comm'n).

¹¹² *Id.* at 58–89.

¹¹³ *Id.* at 59.

¹¹⁴ ABA REPORT, *supra* note 10, at 9.

¹¹⁵ The ABA Commission was formed in April 1969 and turned in its report barely six months later—hardly enough time to perform a detailed examination of the FTC's historical evolution or to grasp the forces that shaped the agency's choice and performance of programs. See *id.* at 4–5.

¹¹⁶ *Id.* at 1.

One example involves Gerard Henderson's oft-cited study in 1924 on the FTC's first decade.¹¹⁷ Henderson strongly suggested that all consumer protection cases were trivial, at least by comparison to the competition cases that Henderson believed to be the sole appropriate target of FTC enforcement.¹¹⁸ By contrast, the ABA Commission viewed consumer protection as a worthy focus of the FTC's activity, yet it mechanically cited Henderson's bare conclusions to support its own view that the FTC was preoccupied with trivia.¹¹⁹ More generally, the ABA Commission failed to notice that the pre-1969 literature on the FTC did not employ a common baseline for assessing performance. It then relied on these earlier reports to blithely make the case that the FTC had willfully refused to improve,¹²⁰ when the agency's actual track record was considerably more complex.

The insistence on foregoing "trivial matters" in favor of significant cases also had the unfortunate tendency to suggest that cases involving small economic stakes were unworthy of the agency's attention. There are at least three good reasons for an agency to have at least some smaller cases in its portfolio. First, small cases in anti-trust sometimes make big law, and an agency that brings no small cases may miss valuable opportunities to develop principles that are useful in "big" matters in the future.¹²¹ Second, the prosecution of at least some small cases provides an essential way for junior case handlers to develop proficiency in litigation.¹²² Third, by bringing smaller cases from time to time, an agency may be able to increase compliance

117 HENDERSON, *supra* note 15. From the pattern of citations in the ABA Report, it appears that this is one study that the panel's staff read cover to cover.

118 *Id.* at 166–67. Henderson was a protégé of George Rublee, an advisor to Woodrow Wilson on the creation of the FTC and one of the new agency's first Commissioners. Henderson, in this instance, was likely channeling Rublee's view that the FTC should adhere strictly to a competition-focused agenda and forego what we today would call consumer protection matters. See Kovacic, *supra* note 18, at 605.

119 See ABA REPORT, *supra* note 10, at 9–10, 37.

120 See *id.* at 1.

121 An agency that wrote off "small" cases as trivial would not have brought cases such as *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986), *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), or *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). All involved minor economic stakes, but generated doctrine that deeply influenced antitrust law and policy.

122 See ROBERT A. KATZMANN, *REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY* 84 (1980) ("It is interesting to note that the Federal Trade Commission has often been criticized for prosecuting worthless cases of little economic value and for not vigorously attacking structural imperfections in the economy. Critics of the commission overlook the fact that the allocation of resources to investigations with minimal potential value to the consumer may be an inevitable cost of maintaining the morale and developing the skill of the attorneys.").

by reminding firms of the vitality of principles established in earlier cases.

3. *Blindness to Program and Political Risk*

The ABA Commission set out three basic guidelines for the FTC's future antitrust work:

- (1) Forsake trivia in favor of economically significant matters;¹²³
- (2) Emphasize cases involving complex, unsettled questions of competition economics and law, and leave per se cases to the DOJ;¹²⁴ and
- (3) Replace voluntary commitments with binding, compulsory orders.¹²⁵

Each of these changes certainly sounds sensible, particularly when taken one at a time. After all, who could be against the forsaking of trivia? But, each change involved a shift from a safer law enforcement strategy to a riskier one. The pursuit of economically significant matters galvanizes tougher opposition in litigation and motivates firms to seek out legislative assistance in backing down the agency. Focusing on complex and unsettled areas of the law involves greater litigation risk (because the cases are on the edges of existing doctrine) and exposes the agency more broadly to claims that it is engaged in unprecedented enforcement or sheer adventurism. The pursuit of tougher remedies arouses a stronger defense by respondents and, again, increases efforts to enlist Congress to discipline the FTC.

Although the ABA Commission noted the importance of political support and a vigorous chairman who would "resist pressures from Congress, the Executive Branch, or the business community,"¹²⁶ it paid almost no attention to the predictable consequences of having the FTC occupy the risk-heavy end of the spectrum of all possible enforcement matters. The political science literature before 1969 had emphasized the political dangers inherent in the Commission's expansive norms-creation mandate and its broad information-gathering and reporting powers.¹²⁷ For example, Pendleton Herring's study in the mid-1930s about the political hazards facing economic regulatory bod-

¹²³ ABA REPORT, *supra* note 10, at 34, 68.

¹²⁴ *Id.* at 65–66.

¹²⁵ *Id.* at 34.

¹²⁶ *Id.* at 35.

¹²⁷ See, e.g., THOMAS C. BLAISDELL, JR., *THE FEDERAL TRADE COMMISSION: AN EXPERIMENT IN THE CONTROL OF BUSINESS* (1932); E. PENDLETON HERRING, *PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST* (1936).

ies said the agency's mandate placed it in "a precarious position" from the start:

The parties coming within [the FTC's] jurisdiction were often very powerful. The more important the business, the wider its ramifications, and the more numerous its allies and subsidiaries, the closer it came within the commission's responsibility. To review the firms with which this agency has had official contacts, especially in its early years, is to go down the roster of big business in this country. Making political enemies was soon found to be an incident in the routine of administration. The discharging of official duties meant interfering with business and often "big business."¹²⁸

Had it read and absorbed the teaching of the available political science literature, the ABA panel would have had to confront deeper, harder questions about the causes of the FTC's performance. The panel missed (or underestimated) the big issue of politics. Like many blue ribbon studies of government performance, the ABA Report was long on demands for bold action and short on practical suggestions about how to cope with the crushing political backlash that boldness can breed.¹²⁹

B. *The Posner Dissent*

Posner argued that the FTC would not be able to deliver on the ABA Commission's ambitious agenda because the FTC's leaders and staff lacked the necessary incentives to do so.¹³⁰ In his view, FTC Commissioners deliberately avoided confrontation with powerful economic interests that could frustrate reappointment or deny the board member a suitable landing place in the private sector upon leaving the agency.¹³¹ Similarly, FTC staff saw little upside (and considerable downside) to being overly aggressive in enforcing the law.¹³²

Posner's assessment was certainly plausible. Government service disproportionately attracts people who plan to stay, and keeping your head down is an excellent way of doing that. "Don't make waves" becomes the default strategy of the lifers, and those who are tempera-

¹²⁸ HERRING, *supra* note 127, at 115.

¹²⁹ See William E. Kovacic, *Blue Ribbon Defense Commissions: The Acquisition of Major Weapon Systems*, in *ARMS, POLITICS, AND THE ECONOMY* 61, 69-72 (Robert Higgs ed., 1990) (describing tendency of blue ribbon commissions to devote too little attention to reform implementation).

¹³⁰ ABA REPORT, *supra* note 10, at 114-19.

¹³¹ *Id.*

¹³² *Id.*

mentally unsuited to that approach either self-select out, or are actively encouraged to depart.¹³³

But matters are not so simple. Regulators that create or administer a program that threatens major commercial interests can leave government and monetize their expertise by guiding firms through the regulatory shoals.¹³⁴ The prosecution of big cases attracts media attention and raises the prominence of the officials who set them in motion. This publicity often translates into attractive offers for post-government employment. Posner also overlooked the emergence of attractive career paths for aggressive enforcement officials outside the private sector. A reputation for toughness would prove to be an asset, not a barrier, for those aspiring to join university faculties, think tanks, or advocacy groups that wanted to add high visibility officials to their ranks.

III. SOME LESSONS AND A FEW MODEST SUGGESTIONS

People like morality tales. The conventional morality tale inspired by the ABA Report goes like this: In 1969, the FTC had a long history of existence, but almost nothing else to recommend it.¹³⁵ The ABA Report accurately diagnosed the problems and laid out a clear agenda for the FTC to redeem itself.¹³⁶ The FTC followed the recommendations in the ABA Report, and the agency was saved. All hail the ABA Commission, and the wisdom of those who served on it.¹³⁷

Of course, life is more complicated. Unambiguous morality tales are more common in children's books than in real life.¹³⁸ A close reading of the record indicates that the pre-1969 FTC was not as aw-

¹³³ For a comic rendition of this issue, through the lens of the experiences of three young and enthusiastic employees at a single small (but fictional) federal agency, see JIM GERAGHTY, *THE WEED AGENCY: A COMIC TALE OF FEDERAL BUREAUCRACY WITHOUT LIMITS* (2014).

¹³⁴ And not just regulators. Even ancillary participants can sell their expertise as guides to the labyrinth they have helped create, sometimes for eye-popping sums. For example, Professor Jonathan Gruber, who was a top advisor during the crafting of the Patient Protection and Affordable Care Act, was paid approximately \$1.7 million for consulting work for four states (Michigan, Minnesota, Vermont, and Wisconsin) relating to the implementation of the statute he helped design. See Chris Conover, *Jonathan Gruber: The \$6 Million Stonewaller*, *FORBES* (Dec. 10, 2014, 8:51 AM), <http://www.forbes.com/sites/theapothecary/2014/12/10/jonathan-gruber-the-6-million-dollar-stonewaller/>.

¹³⁵ See *supra* note 3 and accompanying text.

¹³⁶ See generally ABA REPORT, *supra* note 10.

¹³⁷ Cf. *MEN IN BLACK II* (Columbia Pictures 2002) ("K is back! The light keeper! All hail K! All hail K! Oh, K, can you see by the dawn's early light . . .").

¹³⁸ Jonathan Rauch, *Robert Reich, Quote Doctor*, *SLATE* (May 30, 1997, 3:30 A.M.), http://www.slate.com/articles/briefing/articles/1997/05/robert_reich_quote_doctor.html ("Life, unlike Reich's book, is not a series of morality fables.").

ful, and the ABA Report was not as good, as the conventional wisdom would indicate.¹³⁹ We consider the lessons that should be drawn and offer four “modest suggestions that may make a small difference” the next time we encounter a similar situation.¹⁴⁰

A. *Be Careful What You Demand (Or Wish For)*

The ABA Commission wanted the FTC to be a fierce and aggressive enforcer/regulator, and it generated a detailed list of all the things the agency had to do to justify its continued existence.¹⁴¹ The FTC responded aggressively to the challenge—but in so doing, it became significantly overextended.

In other work, we consider a number of factors that appear to be associated with good agency performance.¹⁴² One of the most important factors is whether the agency has the capacity and capability to perform the tasks that it has been given (or for which it has assumed responsibility).¹⁴³ An agency that is overextended will find itself engaged in a constant process of regulatory triage—meaning it is unlikely to do a good job on any of the tasks within its portfolio of responsibilities. It is one thing to launch a single bet-the-agency case and entirely another to launch a half-dozen of those cases and an equal number of significant rulemaking projects simultaneously—let alone staff each case and rulemaking project so as to maximize the likelihood of good outcomes across the entire portfolio.¹⁴⁴

The ABA Commission set a high bar for the FTC to clear if it was to remain in business—and the FTC responded with the enforcement

¹³⁹ See *supra* Part II.

¹⁴⁰ JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 369 (1989).

¹⁴¹ See generally ABA REPORT, *supra* note 10.

¹⁴² See Hyman & Kovacic, *supra* note 65, at 1468–83; see also Hyman & Kovacic, *supra* note 4, at 33–35.

¹⁴³ See Hyman & Kovacic, *supra* note 4, at 34.

¹⁴⁴ See William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 923 (2009). The article notes that the failure to “match commitments to agency capabilities” was an avoidable error:

One could understand a decision to bring one innovating and potentially path-breaking shared monopolization case, but it was improvident to bring two. One could imagine a decision to bring one or two predatory pricing cases, but it overtaxed the agency’s capacity to do three at once. To do four significant dominance cases at one time might have been manageable. To do eight was unwise. Incumbent leadership began new matters without asking difficult questions about how the agency would bring them to a successful end. *Id.*

equivalent of building and launching an armada of 1,000 ships.¹⁴⁵ Little thought was given by the ABA Commission (or by top FTC management) as to whether the agency was up to the task of waging the functional equivalent of multiple land wars in Asia.¹⁴⁶ In particular, the ABA Commission gave no attention to the time it would take the agency to build the highly skilled teams of professionals it would need to perform the ambitious agenda it had recommended. There should have been an express caution that building this capability would take time. Instead, the ABA Report's "one last chance" admonition¹⁴⁷ led the FTC to take on a daunting agenda before it had the ability to deliver. This consequence arguably is one of the ABA Commission's most unfortunate legacies. The remarkable thing is that the FTC managed to do as well as it did—notwithstanding the Herculean list of labors handed to it by the ABA Commission.

B. *Leadership Incentives Matter*

Posner did not think the FTC leadership would ever be able to rouse itself from its stupor.¹⁴⁸ He also could not envision a set of incentives that would motivate the FTC to become an activist presence on the regulatory scene.¹⁴⁹ As detailed above, Posner's assessment on both of these issues was wrong.¹⁵⁰

But, it does not follow that the FTC's leadership (or the leadership of any other agency) is subject to an optimal set of incentives. Agency leadership always faces a choice between consumption and investment—and the stakes are systematically skewed toward consumption (in the form of launching new high-profile cases) by the short duration of any given leader's tenure.¹⁵¹ As one of us noted in

¹⁴⁵ Cf. CHRISTOPHER MARLOWE, *DOCTOR FAUSTUS* 92 (John D. Jump ed., 1962) (1604) ("Was this the face that launch'd a thousand ships And burnt the topless towers of Ilium?").

¹⁴⁶ Cf. *THE PRINCESS BRIDE* (Metro-Goldwyn-Mayer 1987) ("You fell victim to one of the classic blunders, the most famous is never get involved in a land war in Asia.").

¹⁴⁷ See *supra* note 64 and accompanying text.

¹⁴⁸ ABA REPORT, *supra* note 10, at 114–19.

¹⁴⁹ *Id.*

¹⁵⁰ See *supra* Part II.B. Posner admits as much in his piece on the occasion of the 90th birthday of the FTC. Posner, *supra* note 1, at 765 ("My separate statement had foreseen none of these developments. I am duly chastened, which is no doubt why I was invited to give this talk. But I am not yet ready to recant entirely.").

¹⁵¹ One can conceptualize this problem as a temporally-based externality. When agency leadership does not change, the leaders capture the benefits (and bears the costs) of the outcomes in the cases that they initiate. But, a timely, scheduled departure makes it possible for agency leadership to "outrun their mistakes," so that when blame-time arrives, the burden will fall on someone else." ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* 90 (1988). See also William E. Kovacic, *Federal Antitrust Enforcement in the Reagan*

another article, the case-centric approach to evaluating agency performance—which is what the ABA Commission effectively embraced and encouraged—has a critical vice:

It accords no credit to long-term capital investments. It gives decisive weight to the initiation of new cases. This incentive system can warp the judgment of incumbent political appointees who typically serve terms of only a few years. The perceived imperative to create new cases can create a serious mismatch between commitments and capabilities, as the sirens of credit-claiming beckon today's manager to overlook the costs that improvident case selection might impose on the agency in the future, well after the incumbent manager has departed. It is a common aphorism in Washington that agency leaders should begin by picking the low-hanging fruit. . . . What is missing in the lexicon of Washington policymaking is an exhortation to plant the trees that, in future years, yield the fruit.¹⁵²

Thus, if anything, the ABA Commission's "do something" recommendations encouraged (and hyper-charged) precisely the wrong incentives.

C. *Don't Forget About Politics*

Perhaps the largest failing of the ABA Commission was its failure to anticipate the political risks associated with its recommendations. Academics and do-gooders will enthusiastically lecture all and sundry about how the government exists to promote the general public inter-

Administration: Two Cheers for the Disappearance of the Large Firm Defendant in Nonmerger Cases, 12 RES. L. & ECON. 173, 188 (1989) ("[T]he institutions that attribute credit or blame to a manager for decisions whose effects become apparently chiefly after (often years after) the manager has left government service are relatively weak.").

¹⁵² Kovacic, *supra* note 144, at 922; *see also* Kovacic, *supra* note 151, at 189 ("[A] short-term perspective may incline the manager to launch headline-grabbing initiatives with inadequate regard for the matter's underlying merits or the ultimate cost to the agency, in resources and reputation, in litigating the case. If the case goes badly, the manager responsible for the take-off rarely is held to account for the crash landing. He can hope the passage of time will dim memories of his involvement, he can blame intervening agents for their poor execution of his good idea, or he can shrug his shoulders and say he was making the best of the fundamentally bad situation that policymakers encounter in the nation's capital."); Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 166 (2005) ("An agency head garners great attention by beginning 'bold' initiatives and suing big companies. When the bill comes due for the hard work of turning initiatives into successful regulation and proving big cases in court, these agency heads are often gone from the public stage. Their successors are left either to trim excessive proposals or even to default, with possible damage to agency reputation. The departed agency heads, if anyone in the Washington establishment now cares about their views, can always blame failure on faulty implementation by their successors.").

est—but decades of research on political economy make it clear that there is not much of a constituency for that mission.¹⁵³ Indeed, an agency that seeks to promote the general public interest is an agency without any constituency.¹⁵⁴

Thus, the ABA Commission wound up and sent into battle an agency without any real constituency or political backing, to wage war against a large and politically powerful collection of firms in every sector of the economy. There is no question that the FTC was unlucky, in that many of its most enthusiastic supporters were being voted out of office at the same time the FTC was picking fights with everyone and their brother.¹⁵⁵ But, luck aside, if you were trying to create a “coalition of the willing” determined to clip the wings of the FTC, you would be hard-pressed to pick a better strategy than the one selected by the ABA Commission.¹⁵⁶

Although the members of the ABA Commission were politically connected insiders, they completely failed to anticipate the firestorm that would engulf the FTC as a direct result of the agency’s adoption of the ABA Report’s recommendations.¹⁵⁷ Had they been more insightful about the predictable consequences, they might have been

¹⁵³ Cf. Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, REG., May/June 1983, at 12, 13 (“[T]he pages of history are full of episodes best explained by a theory of regulation I call ‘bootleggers and Baptists.’ Bootleggers, you will remember, support Sunday closing laws that shut down all the local bars and liquor stores. Baptists support the same laws and lobby vigorously for them. Both parties gain, while the regulators are content because the law is easy to administer.”).

¹⁵⁴ Susan E. Dudley, *Lessons Learned, Challenges Ahead*, REG., Summer 2009, at 6, 6 (“OIRA’s mandate is to advance the general public interest Hence there is no concentrated constituency for OIRA . . .”).

¹⁵⁵ On the sea change in the political environment faced by the FTC and on the FTC’s strategy of picking fights with everyone and their brother, see generally Kovacic, *supra* note 18. Also, consider this (perhaps apocryphal) story: a former FTC employee with first-hand knowledge recounted that former-FTC Chairman Michael Pertschuck used to come into work, and ask his attorney advisers, “What can we do today that will piss off the Chamber of Commerce?” That approach is unlikely to win friends and influence people.

¹⁵⁶ Robert Conquest’s third law of politics may have some explanatory power here. Conquest observed, “[t]he simplest way to explain the behavior of any bureaucratic organization is to assume that it is controlled by a cabal of its enemies.” ROGER SCRUTON, *THE USES OF PESSIMISM: AND THE DANGER OF FALSE HOPE* 20 n.5 (2010).

¹⁵⁷ Consider one indication of the degree to which those who served on the ABA Commission were politically connected insiders. The head of the ABA Commission subsequently became the Chairman of the FTC (Miles Kirkpatrick), as did the Executive Director/Commission Counsel (Robert Pitofsky). See FED. TRADE COMM’N, COMMISSIONERS AND CHAIRMEN OF THE FEDERAL TRADE COMMISSION (2014), <https://www.ftc.gov/system/files/attachments/commissioners/commissionerchartlegal.pdf>.

considerably more measured and circumspect in their marching orders.¹⁵⁸

D. The Perils of Blue Ribbon Commissions

Blue ribbon commissions are a time-honored tool for the investigation of politically sensitive matters (including man-made disasters, intelligence failures, vexing social problems, and the like).¹⁵⁹ Being asked to serve on a blue ribbon commission is a distinct honor. And, apart from the time required, what could possibly go wrong? The staff will do most of the work—and it is not like the Commissioners are going to be held personally responsible for their findings or recommendations. For most blue ribbon commissions, the most likely scenario is that the final report will be shelved and collect dust.

But not always. Sometimes the blue ribbon commission's recommendations are actually implemented. When that happens, things often do not work out as expected. Often, the recommendations are met with strong resistance from incumbent interests. Sometimes, the recommendations sound good in theory, but make no sense in practice. Sometimes, Commissioners simply lack the necessary expertise and incentives to arrive at sensible recommendations. Sometimes, as with the ABA Commission, the recommendations solve one problem but create another and more serious set of problems.

We do not labor under the misapprehension that our case study will cause blue ribbon commissions to fall out of favor. There are strong incentives for Presidents and Congress to turn to blue ribbon commissions in a wide variety of settings. But, our revisionist view of the merits of the ABA Commission's Report is a cautionary tale, for those who would put undue trust in such measures. As one of us noted several years ago, "clever institutional design can mitigate the effect of politics, but politics never goes away."¹⁶⁰ Perhaps we should develop better mechanisms to ensure that the recommendations of blue ribbon commissions do no harm, including contemporaneous peer review, the designation of a "red team" charged with finding weaknesses in the blue ribbon commission's work, and a mechanism

¹⁵⁸ In other work, we explain why political support is a critical factor in the success or failure of a governmental agency. See generally Hyman & Kovacic, *supra* note 4; Hyman & Kovacic, *supra* note 65.

¹⁵⁹ See Kovacic, *supra* note 129, at 62–63; see also Jordan Tama, *Crises, Commissions, and Reform: The Impact of Blue-Ribbon Panels*, 67 POL. RES. Q. 152, 152–53 (2014).

¹⁶⁰ David A. Hyman, *In Medicine, Money Matters*, REG., Winter 2010–2011, at 40, 45.

for forcing Commissioners to internalize some of the costs associated with flawed or naïve recommendations.

CONCLUSION

In 1962, the New York Mets lost 120 games in a single season—the worst record in the history of modern baseball.¹⁶¹ Casey Stengel, the long-suffering manager of the team, noted in a conversation that he had a “catcher (Chris Cannizzaro) who cannot catch the ball and let runners circle the bases.”¹⁶² “Makes you think, [Stengel said] . . . [y]ou look up and down the bench and you have to say to yourself, ‘Can’t anybody here play this game?’”¹⁶³ Jimmy Breslin subsequently immortalized Stengel’s observation by using it as the title of his best-selling book about the ‘62 Mets.¹⁶⁴ We have stolen Breslin’s title and use it to refer to both the pre-1969 FTC and also to the ABA Commission.

The problems with the pre-1969 FTC are well known. The problems with the ABA Commission’s Report, however, have been entirely overlooked—and those responsible have been lionized for their role in the transformation of the FTC. The ABA’s recommendations assuredly set the FTC on a new path—but that path led to a new set of perils. We do not know whether the ABA’s recommendations would have looked different had the ABA Commissioners appreciated the political risks associated with the sweeping changes they were demanding—but political risks there assuredly were. These risks were compounded by the “go big or go away” reward structure and threat implicit in the ABA Commission’s recommendations. Posner’s dissent made the opposite mistake—assuming that agency leaders would never swing for the fences—which, if anything, they did too often in the wake of the ABA Report.

That said, the results are clear. The FTC transformed itself in response to the ABA Report, which explains why we are celebrating the agency’s 100th birthday. Instead of a portfolio weighted toward Robinson-Patman Act and apparel labeling cases, the FTC is routinely operating at the cutting edge of the law. But, because the ABA Commissioners failed to understand the full implications of their rec-

¹⁶¹ Richard Sandomir, *Affectionate Scorn for ‘62 Mets: New Life for Breslin’s Book*, N.Y. TIMES (Apr. 7, 2012) http://www.nytimes.com/2012/04/08/sports/baseball/breslin-chronicler-of-62-mets-recalls-their-appeal.html?_r=0.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*; see also JIMMY BRESLIN, CAN’T ANYBODY HERE PLAY THIS GAME? THE IMPROBABLE SAGA OF THE NEW YORK METS’ FIRST YEAR (1963).

ommendations, when the FTC now finds itself at the cutting edge of the law, at least some of the time it is “in the role of the salami.”¹⁶⁵ All in all, we suspect those who work at the FTC would have preferred the cake and ice cream.

¹⁶⁵ Pierre N. Leval, *Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture*, 36 J. COPYRIGHT SOC'Y U.S.A 167, 168 (1989) (“It has been exhilarating to find myself present at the cutting edge of the law, even though in the role of the salami.”).