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 the7the

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 *Sta da d O* ,[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]

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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, *a* 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, *O* , *a* note 4; Marc Winerman, *A t t a d t e C f '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, *O* , *a* 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*

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 res1trris/ in mConressi

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 h3sS 634o sub O1dno0.T wasdente
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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 (in-

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, *a* 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 *f a* at notes 121–125. In a few cases where Van Fleet and Hunt both aligned with the Democrats, Humphrey stood alone. *E.*, Holeproof Hosiery, 9 F.T.C. 210 (1925) (RPM); Cutler-Hammer Mfg. Co., 9 F.T.C. 546 (1925) (Humphrey alone dissented to 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, *a* note 4, at 170–71, 173–74; *T , Headed FTC U de T P e de* , 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*, *f a* 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]

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.

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 (

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, *a* note 4, at 189–90. *AM C . f A ., Hea Bef e e C . e J d c a* 402, 69th Cong., 1st Sess. (1926) [hereinafter *AM . . 6, 9.8039 e*

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

Reflecting TR's New Nationalism, that agenda contemplated close oversight of business. Myers defended the growth of government commissions

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 Robin-

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 Commis-

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

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

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 co-counsel (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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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

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 Contributions to Industrial and Economic Analysis: The Work of the Economic Division*, 8 GEO. WASH. L. REV

reduction in competition *de* 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] in most 48.Ts,

tential reach is illustrated by hundreds of challenges to "lotteries," most of which challenged non-deceptive elements of chance in sales.[103] But *G atz* seemed to leave little room for an independent antitrust jurisprudence that reached beyond the Sherman Act. Thus, in *FTC . Beec -N Pac- C .*, 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]

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The FTC's monopolization program was an ambitious failure. We have already discussed two cases that failed in court: *E a K da*, in which the Supreme Court in 1927 denied the FTC authority to order structural relief under Section 5, and *Pa M e -La* .[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 *E a K da* 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, *a* note 4, at 188–89. For the motion picture case, see Winerman & Kovacic, *a* note 4, at 188; *a* notes 81–83 and accompanying text.

[110] *A M Hea* , *a* 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; *ade C e H W e M T* , 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"); *a* 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, *a* note 38, at 234 (summarizing complaint); Winerman &

4. *Me e*

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 *Ea a K da* 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 *We e Mea C* . 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 *A -Ha a d He e a E c c C* . 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 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, *M M a d O M M b Me e* , 40 AM. ECON. REV. 432 (1950).

113 Winerman & Kovacic, *a* 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).

tially lessen competition" prong), and In *V a d* (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 *Te A ac te* 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 *V a d* 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 *te at aMS e* 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 *Te A ac te*).

[128] In *A -Ha a d He e a , I c. . FTC*, decided after it lost *Te A ac te* and *V a d* , 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), *e '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 a M* 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), *d.*, 4 F.2d 223 (1925), *d. a d 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), *d ed*, 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 Reports, and Contacts with the 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 ap-

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, *e* - *a Act*, *a* note 26, at 1086–89; Joseph, *a* 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).[169]

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 standardi-
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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] *Pet M I d t e State f V a* (1928), TPC, *a* 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: O M t te P ed C de f E c*, 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.