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Achieving Change at the Federal Trade Commission

Success and failure

By J. Howard Beales III and Timothy J. Muris

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Their over four decades of FTC experience includes not only working at the agency, but frequent Congressional testimony, writing numerous books, monographs, and articles about the agency, as well as advising numerous clients about FTC issues.

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Introduction

"Never mistake activity for achievement." – John Wooden[1]

[1] Craig Impelman, "Never Mistake Activity for Achievement," The Wooden Effect (blog), June 20, 2018, https://www.thewoodeneffect.com/activity-achievement/. Wooden was head basketball coach at UCLA, where his teams won the national championship in 10 of his last 12 years. He was also legendary for his longevity and the many life lessons he taught. When he died, 35 years after coaching his last game, *Washington Post* columnist John Feinstein wrote "As a coach, he had no peers. And he was a better man than he was a coach. That, more than anything, is his legacy." John Feinstein, "John Wooden: Untouchable Record, Incomparable Man," *Washington Post,* June 5, 2010, https://www.washingtonpost.com/wp-dyn/content/article/2010/06/04/AR2010060405169.html.

Although small in budget, the Federal Trade Commission (FTC) has sometimes had an outsized impact. Created to fulfill one of Woodrow Wilson's major promises in his 1912 presidential campaign,[2] the agency has commanded headlines, as when FTC investigations of meat marketing competition led to litigation and a new 1921 federal statute[3] and when the Securities and Exchange Commission sprang from the staff and Commissioners of the FTC.[4] The FTC's proposed 1964 Rule to warn of smoking's dangers on cigarette packs led to statutory labeling requirements.[5] And the 2003 National Do Not Call Registry,[6] when almost all homes had phone land lines, reclaimed America's dinner hour from the constant barrage of unwanted telemarketing calls, becoming one of the most popular governmental initiatives ever.

Despite this occasional prominence, the FTC has often been castigated for failing to fulfill its promise, or, worse, actually harming the very consumers it should protect. One scholar labeled it a "singularly unsuccessful agency" during most of its first 70 years.[7] In 1969, a prestigious American Bar Association committee noted the Commission's great potential, but stated that "if change does not occur, there will be no substantial purpose to be served by its continued existence."[8]

The Biden administration has demanded that the agency change course. Given the uneven history, 2021 is not the first time new FTC leadership called for an agency remake. Twice in a dozen years, following the elections of 1968 and 1980, FTC leaders demanded change. The Nixon administration initially appointed Caspar Weinberger as Chair, followed shortly by Miles Kirkpatrick. Aided by favorable press, the 1969 American Bar Association (ABA) report, a report earlier that year with similar conclusions from "Nader's Raiders,"[9] congressional encouragement, and an important Supreme Court decision appearing to bless an expansive interpretation of the Commission's basic statute, the new leadership pursued an aggressive agenda in both antitrust and consumer protection. In antitrust, the 1970s FTC sought deconcentration, highlighted by its massive case against the oil industry, a "shared monopoly" attack on the breakfast cereal industry, and a lengthy investigation of the auto industry that began with the conclusion that sufficient evidence already appeared to support dismantling General Motors. In consumer protection, the agency ultimately strove to become "the second most powerful agency in Washington," proposing rules to restructure numerous industries.[10]

The FTC's aggressiveness created a backlash that threatened its very existence. The backlash was led by some that had encouraged the agency's activism, including parts of the media, the Congress, and the practicing bar. Although surviving with its authority largely intact, it needed to regroup. Could it be more energetic than its pre-1970 lethargy, yet overreach less than in the later part of the 1970s when it sought to reshape the economy? Change was again in order. The Reagan administration named James Miller, a prominent advocate of deregulation, as Chairman. Under his leadership, the Commission laid the foundations for 40 years of acclaim, both in America and abroad, that it had finally developed a robust agenda to benefit consumers, and adequate tools to implement its agenda. That agenda saw the FTC, not as the economy's star player, but as a referee to enforce basic rules to protect consumers in the marketplace. Bipartisan and international support for the FTC (a key measure of success for any government agency) continued well into this century. Indeed, the FTC was the only one of about 40 ranked global competition agencies to receive five stars each year

[2] See Sidney M. Milkis, *Theodore Roosevelt, the Progressive Party, and the Transformation of American Democracy* (University Press of Kansas, 2009). The FTC has jurisdiction over most of the US economy, enforcing prohibitions on unfair or deceptive acts or practices (its consumer protection mission), unfair methods of competition (its competition or antitrust mission), and a variety of special statutes.

[3] See Marc Winerman, "The FTC at 90: History Through the Headlines," *Antitrust Law Journal*, Vol. 72, No. 3 (2005), p. 874, https://www.jstor.org/stable/40843648.

[4] Winerman, "The FTC at 90," pp. 880-881.

[5] See William MacLeod, Elizabeth Brunins, and Anna Kertesz, "Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy," *Antitrust Law Journal*, Vol. 72, No. 3 (2005), p. 947, https://www.jstor.org/stable/40843651.

[6] Federal Trade Commission, "Telemarketing Sales Rule," final amended rule, *Federal Register*, Vol. 68, No. 19 (January 29, 2003), pp. 4580-4679 (amending 16 C.F.R. Part 310), https://www.govinfo.gov/content/pkg/FR-2003-01-29/pdf/03-1811.pdf.

[7] Thomas McCraw, ed., *Regulation in Perspective: Historical Essays* (Cambridge, MA: Harvard University Press, 1981), p. 81.

[8] Commission to Study the Federal Trade Commission, American Bar Association, *Report of the ABA Commission to Study the Federal Trade Commission* (September 15, 1969), p. 3.

[9] "Nader's Raiders" were a group of volunteer law students who investigated various topics, starting with the FTC. See "Nader's Raiders," Enclclopedia.com, last updated May 29, 2018, https://www.encyclopedia.com/social-sciences-and-law/sociology-and-social-reform/social-reform/naders-raiders.

[10] See Timothy J. Muris and Kenneth W. Clarkson, "Introduction," in Kenneth W. Clarkson and Timothy J. Muris, eds., *The Federal Trade Commission since 1970: Economic Regulation and Bureaucratic Behavior* (Cambridge University Press, 1981).

since publication began in 2001—a streak that ended under this administration.[11]

The progressives who dominate the Biden economic policy rejected these decades of acclaim with an approach to change markedly different from prior reforms. In July 2021, while signing his competition executive order, the President called the previous 40 years an "experiment failed."[12] At his side stood his new FTC Chair, Lina Khan. In her first few weeks, Khan had already demonstrated that fundamental change was her top priority. These changes would affect not just policy, but also the agency's career staff. The previous President feared the "deep state;" surprisingly, many Biden progressives were also overtly suspicious of the careerists.

These periods of change at the FTC mirrored the economic policy of each administration. Although not widely recognized today, the Nixon administration aggressively expanded the federal government in its first term. New regulatory agencies began, including the EPA, OSHA, and the CPSC, and the federal government also expanded elsewhere. Liberal *New York Times* columnist Tom Wicker's 1991 biography praised Nixon's overall progressive domestic policies.[13] In contrast, the Reagan administration slowed significantly the overall growth of 1970s style regulation, although not always with as much success as in antitrust and consumer protection.[14] The Biden administration's aggressive intervention goes far beyond the FTC, as it pursues systematic overturning of trade and other economic and domestic policies inherited from governments of both parties in the late 20th and early 21st centuries.[15]

We evaluate the first 34 months of changes at the Biden FTC in comparison to the two earlier reform efforts.[16] We recognize that most new FTC Chairs emphasize at least some cases, initiatives, and programs that differ from their predecessors. Most new leaders may even disagree with their predecessors on some issues. But they do not reject wholesale significant parts of the agency's program that they inherit, nor do they criticize that program publicly while advocating a different set of principles and tasks. By change, we therefore mean more than marginal change: seeking fundamental shifts in the agency's direction. The three periods we discuss, following the elections of 1968, 1980, and 2020, produced new FTC leadership condemning what they found, and calling for such change.

Our focus here is not on the substantive merits of the policies adopted in any of the change eras; instead, we analyze in detail the process of developing and implementing change. We accept as given that elections have consequences, and the President of the United States is entitled to appoint new leadership to attempt to change the direction that the Administration will follow.[17] In commenting on the new efforts to change policies, we analyze whether, and if so to what extent, the Biden team has a strategy to overcome various obstacles to change, including the hostile judiciary. For example, the Biden antitrust enforcers have proposed significant changes in merger policy, based in part on rejection of the consumer welfare standard that has guided antitrust for decades. We will not discuss the substance of merger policy, but we will consider the new procedures implemented and whether the Biden proposals reflect a strategy to confront and change judicial reliance on the consumer welfare standard.

11 See William E. Kovacic, "Keeping Score: Improving the Positive Foundations for Antitrust Policy," *University of Pennsylvania Journal of Business Law,* Vol. 23, No. 1 (2020), p. 61, https://scholarship.law.upenn.edu/jbl/vol23/iss1/3/..

12 "We're now 40 years into the experiment . . . . I believe the experiment failed." "Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy," White House, July 9, 2021, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/.

13 Tom Wicker, *One of Us: Richard Nixon and the American Dream* (New York: Random House, 1991).

14 See William Niskanen, "Reaganomics", CEE Encyclopedia, Econlib, accessed February 19, 2024, https://www.econlib.org/library/Enc/Reaganomics.html.

15 See "Are Free Markets History?," *The Economist*, October 5, 2023, https://www.economist.com/leaders/2023/10/05/are-free-markets-history.

16 There is considerable scholarship, both on the events between 1969 and 1972, and on the beginning of the Reagan FTC, including a book analyzing why the original Reagan FTC team succeeded in implementing change, while their counterparts at the Reagan EPA failed. See Richard A. Harris and Sidney M. Milkis, *The Politics of Regulatory Change: A Tale of Two Agencies,* 2nd edition (Oxford University Press, 1996).

17 As two of the many architects of the policies the Biden team seeks to replace, and as commentators on the FTC since the 1970s, we have many views, expressed elsewhere, about the substantive policies now being implemented. See J. Howard Beales III and Timothy J. Muris, *Back to the Future: How Not to Write a Regulation* (American Enterprise Institute, June 2022), https://www.aei.org/research-products/report/back-to-the-future-how-not-to-write-a-regulation/; J. Howard Beales III and Timothy J. Muris, "FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?," *George Washington Law Review,* Vol. 83, No. 6 (November 2015), https://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-2157.pdf; Timothy J. Muris, *Neo-Brandeisian Antitrust: Repeating History's Mistakes* (American Enterprise Institute, June 2023), https://www.aei.org/research-products/report/neo-brandeisian-antitrust-repeating-historys-mistakes/; J. Howard Beales III, "The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection," *Journal of Public Policy & Marketing*, Vol. 22, No. 2 (2003), p. 193, https://journals.sagepub.com/doi/abs/10.1509/jppm.22.2.192.17644.

Obviously, the aftermath of the 2020 election remains a work in progress, while we know the full story of the events following 1968 and 1980. Still, we can evaluate the crucial beginning period for any attempt to implement change. That beginning is over for the Biden FTC team. No matter what they will do, that vital beginning can never be reclaimed. Our experience, as students of the administrative state, participants in the 1981 change, and as leaders of the FTC at the beginning of another administration in 2001, impressed on us the relative ease of acting at the beginning of a new president's administration compared to even a few years later.

To evaluate the Biden FTC's efforts to achieve change, Chapter 2 first considers one of its most dramatic characteristics, relentless norm busting. It began with designating a Chair named only as a non-Chair Commissioner. It continued with reducing information available to minority Commissioners, companies under investigations, and congressional oversight committees. Perhaps most surprisingly, because it produced enormous controversy without commensurate benefits, Chair Khan chose to be the first agency employee to ignore the advice of the Designated Agency Ethics Official (DAEO) to recuse herself, and participate as a judge in the Commission's administrative litigation challenging Meta's acquisition of Within. The Chair's decision appeared to violate her promise to Congress during her confirmation hearing to consult the DAEO and "proceed accordingly,"[18] and the Commission's unsuccessful attempt to keep the DAEO opinion nonpublic only amplified the controversy.

Chapter 3 analyzes a fundamental problem that any change agent confronts, how to manage the existing career staff. Unlike the Nixon and Reagan administrations, which moved quickly to address staffing issues through reorganization and other means, the Biden FTC arrived with open hostility, yet no systematic plan to deal with what it thought was a major hurdle to agency reform. The staff returned the hostility, with an exodus of experienced managers and an unprecedented decline in agency morale, as reflected in annual employee surveys. Regarding the staff's view of the honesty and integrity of senior FTC leaders, as well as the trust the staff placed in them, the FTC went from the *best* among surveyed small agencies in 2020 to the *worst* in 2021. Ironically, the leadership hostility derives from a mistaken belief that the "revolving door" made career FTC employees reflexively oppositional to the Biden change agenda, a belief that also led to the rejection of outside expertise that could have facilitated the new policies.

Chapter 4 considers the recipe for past success. For very different reasons, Nixon and Reagan each found a strong consensus that change at the FTC was necessary, with the FTC focused on trivia and anti-consumer enforcement before Nixon, and an agency that had seriously overreached by 1980. Moreover, both developed policies that commanded substantial outside support. That support was short lived in the early 1970s, while Reagan began the 40 year bipartisan record that the Biden administration seeks to overthrow. Both also had policy agendas consistent with the environment they inherited.

Chapter 5 turns to the different circumstances the Biden administration found. The FTC was widely respected as an elite international competition agency, with the views of the Biden administration well outside the mainstream until just a few years before the 2020 election when controversy over the FTC's performance began to surface. Moreover, Biden faces a hostile judiciary that supports policy determined by a standard the new leaders reject, the welfare of consumers. Initially, the Biden team appeared to rely on legislation to change fundamentally the laws the FTC would enforce; when that legislation faltered, there was no systematic plan to achieve legal reform. Instead, particularly regarding mergers, the new FTC adopted multiple policies to penalize any merger, regardless of its effects, rejecting the previous bipartisan view that focused on the merits of individual transactions to restrict only anticompetitive mergers. Many of these policies are ephemeral, subject to immediate reversal. Although the Biden FTC has been active, with a variety of cases, changed guidelines, and other new policy pronouncements, it appears to lack a coherent strategy to achieve change akin to that employed by their Nixon and Reagan predecessors. They have also begun an aggressive rulemaking campaign, some innocuous but others seeking fundamental

[18] Nomination Hearing, before the U.S. Senate Committee on Commerce, Science, and Transportation, April 21, 2021, video, 2:45:55, https://www.commerce.senate.gov/2021/4/nomination-hearing.

restructuring of the economy. Here, too, because the agency is trying to truncate and circumvent the special rulemaking procedures of the FTC Act, these initiatives face an uncertain future.

Finally, we conclude with lessons learned. In prior change eras, FTC leadership used reorganization as a key tool to address staff issues. The progressive view of the revolving door implied that major staff changes were essential, but the Khan FTC did not make them. Careful legal strategies to implement change characterized prior change eras. In contrast, the new Chair arrived "with a bunch of answers" and targets, "but no actual strategy for how to achieve her objectives within the agency's legal and resource constraints."[19] Faced with a judiciary that will likely enforce current law hostile to the Biden team's goals, a well-planned strategy for change is even more important than in prior eras. One "success" is the extensive norm-busting campaign; while it has certainly increased opposition, it appears to have no clear motivation except, perhaps, gratification from annoying those in disfavor.

[19] Ankush Khardori, "Lina Khan's Rough Year," *Intelligencer,* December 12, 2023, https://nymag.com/intelligencer/2023/12/lina-khans-rough-year-running-the-federal-trade-commission.html.

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The Biden administration in practice: breaking norms

From the very beginning, the Biden FTC has obliterated many long standing norms. Lina Khan was nominated as a non-Chair Commissioner, with her confirmation process based on that assumption. Once confirmed, however, she immediately was named Chair, violating the long established norm that the President would inform the Senate if he intended to designate a nominee as agency head.[20]

Norms are important lubricants of social and political interaction. They facilitate cooperative behavior,[21] and help participants with widely divergent viewpoints work together to reach mutually acceptable resolutions of problems. Norms thus help to ensure institutional survival, facilitate accomplishing its tasks, contribute to overall morale, and reflect central values of the institution.[22] As a recent paper noted:

> *Political norms are essential to ensure the functioning of democratic institutions. Their importance is especially salient in high polarization settings, where opposing parties need restraints on opportunistic behavior in order to realize mutually beneficial outcomes.*[23]

We discuss four of the numerous examples of breached norms that have attracted particular attention. First, in recent major matters, parties under investigation have charged that the agency has refused to follow the long established procedure of multiple meetings with the agency career staff, with senior managers, and then with the Commissioners themselves. Instead, they charge that the Commission brought legal proceedings with neither notification nor allowing the respondent to be heard. Failure to hold such meetings is frankly bizarre, because in our long experience agency lawyers desire such meetings to learn about potential weaknesses in their cases, enabling them to revise their complaints even if they still believe, as they usually do, that legal action is necessary. Second, internal Commission procedures in dealing with minority Commissioners have been violated, hindering their ability to perform their duties. Third, the Commission has been reluctant to provide information that Congress requests for oversight. Finally, Chair Khan failed to recuse herself as a judge from a case even when the agency ethics official advised her to do so, a step that appears both unprecedented and inconsistent with representations she made to Congress. Then, when Commissioner Christine Wilson dissented from the decision to allow the Chair's participation regardless of the ethics advice, the Commission prohibited Wilson from making these facts public.

Unlike the chapters that follow, here we do not have extensive discussions of the general norms under the Nixon and Reagan FTCs. The reason is simple: those Commissions, despite seeking fundamental change, respected these norms. The Biden FTC's actions are truly unprecedented. We do comment briefly, as appropriate, on the stark contrast.

Meetings with respondents

For decades, parties under investigation when threatened with possible law enforcement would meet first with the career staff, then with the relevant Bureau's senior management, and then with the Commissioners themselves. These meetings helped both sides: even when the Commission was highly likely to sue, it would often fine tune its allegations to address the defenses that it learned would be raised. Moreover, such meetings, as often as not, led to settlements that produced public benefits, stopping the problematic practices permanently and more quickly than litigation while informing the public and the rest of the business community about the Commission's approach to the issue. The practice of allowing meetings has also informed companies when the staff forwarded a recommendation to the Commission for its consideration.

In at least two recent and major cases, however, the Commission abandoned these practices, acting

[20] Alexei Alexis, "Khan Sworn in as Chairwoman of FTC in Surprise White House Move," *Roll Call*, June 16, 2021, https://rollcall.com/2021/06/16/khan-sworn-in-as-chairwoman-of-ftc-in-surprise-white-house-move/. The *Wall Street Journal* editorial page, a leading voice of market-oriented conservatism, criticized this norm breaking and was to become a leading critic of the new FTC. See Editorial Board, "An Antitrust Bait and Switch," *Wall Street Journal*, June 16, 2021, https://www.wsj.com/articles/an-antitrust-bait-and-switch-11623883196.

[21] Eric A. Posner, "Standards, Rules, and Social Norms," *Harvard Journal of Law & Public Policy*, Vol. 21, No. 1 (1997), https://chicagounbound.uchicago.edu/journal_articles/1734/.

[22] Daniel C. Feldman, "The Development and Enforcement of Group Norms," *Academy of Management Review*, Vol. 9, No. 1 (January 1984), pp 47-53, https://www.jstor.org/stable/258231. For an insightful overview from a principal-agent perspective of the issues the Biden FTC faces in seeking change, see D. Daniel Sokol and Abraham L. Wickelgren, "Agency Objectives, Organizational Change, and Optimizing Enforcement," *Journal of Antitrust Enforcement*, Vol. 11, No. 2 (July 2023), pp. 272-277, https://academic.oup.com/antitrust/article-abstract/11/2/272/7174315.

[23] Giovanna M. Invernizzi and Michael M. Ting, "Political Norms," July 21, 2021, http://dx.doi.org/10.2139/ssrn.3891131.

without informing the companies that the matter was before the Commission and without meeting with the respondents. When it issued an Order to Show Cause to modify the 2019 Facebook order, Meta was not given advance notice of the action.[24] A month later, it similarly did not follow normal notification procedures or allow Amazon to meet with Commissioners before filing a suit challenging enrollment and cancellation practices for Amazon Prime.[25] The agency did hold "last rites" meetings later in the year with Amazon before filing its antitrust complaint.[26]

There are other, more general, benefits of the traditional process of meetings with potential respondents. Facing potential litigation that may last for years, the short delay for meetings is insignificant, although it does give the affected parties better notice of the government's intentions, and therefore a better ability to respond during the first press cycle. Meetings are potentially checks on any overzealous career staff, who may become too committed to a theory to be entirely objective. Finally, both the perceived fairness of the process and the credibility of the agency are enhanced when the business community believes that regulators will take their concerns seriously even when they disagree. Refusing to give notice and to meet hardly serves this objective.

These traditional procedures are the hallmark of any enforcement agency focused on ensuring compliance. On the other hand, if leadership's goal is maximum publicity, lawsuits sometimes garner more attention than settlements. The agency and the public bear the costs, not the current agency leadership that likely will be gone before these lawsuits are decided and will thus largely avoid the hard work of litigation or the consequences of defeats.

Dealing with commissioners

We are not strangers to a deeply divided Commission; the divisions Chair Khan confronted also characterized the early years of the Reagan administration. Rather than resign, Carter administration Chairman Pertschuk decided to serve the remainder of his term. Pertschuk was an active opponent for the first three years of the Reagan FTC, and many important matters during that period were decided 3-2. The former Chairman worked closely with his many contacts on Capitol Hill and in the press to oppose the new administration's policy. He told the press that he stayed "to make life as miserable for them as [he] could." He reportedly said that he "enjoyed being a saboteur," which he likened to "being able to call in artillery on your own position."[27] Such an environment inevitably fuels disputes over process and procedures, as well as over policy.

Weinberger and Kirkpatrick did not face such divisions while they revitalized the Commission in the Nixon administration. The previous Chair, Paul Rand Dixon, remained on the Commission, where he had once been a long-time staff member before becoming Chairman. He viewed the Chairman as the leader of the agency, and was largely willing to follow. He was also interested in being reappointed as Commissioner, and eventually was. Consequently, there was much less controversy about the agency's change in direction.

Lina Khan, however, appears to have elevated tensions with minority Commissioners to a whole new level. Although the Commission acts rapidly on occasion, it had long taken the time necessary for deliberation and consideration of pending matters. It also has long valued open discussion between the career staff working on a matter and the Commissioners themselves at any meeting when a decision is made. Both traditions were abandoned for Khan's first public meeting on July 1, 2021. The format precluded career staff participation in the four major decisions

[24] Natasha Singer, "F.T.C. Seeks 'Blanket' Ban on Meta's Use of Young Users' Data," *New York Times*, May 3, 2023, https://www.nytimes.com/2023/05/03/technology/facebook-meta-ftc-data-ban-instagram.html. We advised Facebook on the underlying order.

[25] Jan Wolfe and Dave Michaels, "FTC Sues Amazon Over 'Manipulative' Tactics Used to Enroll Millions in Prime," *Wall Street Journal*, June 21, 2023, https://www.wsj.com/articles/ftc-sues-amazon-over-manipulative-tactics-to-enroll-users-in-premium-service-85400564. We have advised Amazon on various antitrust and consumer protection issues.

[26] Jan Wolfe, "Amazon to Meet with FTC Officials Ahead of Expected Antitrust Complaint," *Wall Street Journal*, August 7, 2023, https://www.wsj.com/articles/amazon-to-meet-with-ftc-officials-ahead-of-expected-antitrust-complaint-fbb0927f.

[27] Richard J. Leighton, "Miller, Pertschuk Battles Give FTC a Bad Name," *Legal Times*, August 20, 1984, p. 8, reprinted in Michael Pertschuk, *FTC Review (1977-84): A Report Prepared by a Member of the Federal Trade Commission Together with Comments from Other Members of the Commission for the Use of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, U.S. House of Representatives* (Washington, D.C.: U.S. Government Printing Office, September 1984), p. 264; Michael Decourcy Hinds, "Working Profile; 'Crotchety' Democrat Enlivens Trade Panel," *New York Times*, January 28, 1983, https://www.nytimes.com/1983/01/28/us/working-profile-crotchety-democrat-enlivens-trade-panel.html.

reached. One matter, a package of seven omnibus resolutions for competition investigations that reduced the involvement of the Commission as a whole in decisions about which investigations to pursue, was provided to the minority Commissioners less than a week in advance.[28]

Another procedural change involved the process of making and explaining Commission decisions. Historically, the document reflecting a Commission final decision includes the reasoning that led to the decision, as is the case in most judicial decisions. Drafts circulate, Commissioners comment, and revisions are made to arrive at the final document for approval. Chair Khan initially abandoned that practice, which strengthens Commission decisions by testing ideas from different perspectives. When the Commission rescinded the Vertical Merger Guidelines, for example, there was no written explanation until *after* the changes were made.[29] Perhaps because the majority's statement was not circulated to other Commissioners as a draft,[30] it contained claims that were "flatly incorrect as a matter of microeconomic theory" [31]

The Biden leadership also restricted the flow of information from the staff to minority Commissioners. Although minority Commissioners in the Reagan administration did not always receive information in the form they preferred, they regularly had access to the information they needed to do their job.[32] That is no longer the case. In at least two merger reviews, Commissioner Wilson was unable to obtain copies of the staff's second request for information from the staff itself. Instead, she had to take the step, unprecedented in our experience, of asking for the information from parties under investigation.[33] Thus, the Biden FTC prevented an official appointed by the President of the United States and confirmed by the Senate to vote on FTC actions from obtaining information necessary to discharge her duties. The Chair's office responded to public criticism of this obstruction with a literal roll of the eyes, in a tweet from the Chief of Staff that included an eye roll emoji.[34]

Another telling incident reveals the Biden team's attitude toward the norm of respect for minority Commissioners. When Commissioner Wilson testified about her process concerns before the House Judiciary Committee in September 2021,[35] a staffer at the American Economic Liberties Project tweeted that "The idea that anyone gives a shit about internal FTC process is laughable. Nobody cares, thanks."[36] Within six months, that staffer was an attorney advisor on Chair Khan's staff for competition matters.[37]

28 Dissenting Statement of Commissioner Christine S. Wilson, Open Commission Meeting of July 1, 2021, Federal Trade Commission, pp. 2, 9, https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf. Wilson and Commissioner Noah Phillips often complained about inadequate time to consider matters. See, e.g., Dissenting Statement of Commissioner Christine S. Wilson, Annual Regulatory Agenda, Federal Trade Commission, Matter No. P072104, January 4, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/p072104regagenda2022wilsondissent.pdf; Dissenting Statement of Commissioner Noah Joshua Phillips, Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases, Federal Trade Commission, July 21, 2021, https://www.ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995.pdf.

29 Christine S. Wilson, Testimony Before the House Judiciary Committee, Subcommittee on Antitrust, Commercial and Administrative Law, Hearing on Reviving Competition Part 4: 21st Century Antitrust Reforms and the American Worker, September 28, 2021, p. 15, https://www.ftc.gov/system/files/documents/public_statements/1596880/commissioner_wilson_hearing_on_reviving_competition_part_4_-_21st_century_antitrust_reforms_and_the.pdf.

30 Christine S. Wilson, "Marxism and Critical Legal Studies Walk into the FTC: Deconstructing the Worldview of the Neo-Brandeisians," remarks for the Joint Conference on Precautionary Antitrust: The Rule of Law and Innovation Under Assault, April 8, 2022, p. 17, https://www.ftc.gov/news-events/news/speeches/marxism-critical-legal-studies-walk-ftc-deconstructing-worldview-neo-brandeisians.

31 Carl Shapiro and Herbert Hovenkamp, "How Will the FTC Evaluate Vertical Mergers," ProMarket, September 23, 2021, https://www.promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/.

32 See James C. Miller III, "Review of Commissioner Michael Pertschuk's Report: 'The Performance of the Federal Trade Commission, 1977-1984,'" in Pertschuk, *FTC Review (1977-84)*, p. 368. One of us, as Director of the Bureau of Consumer Protection, met routinely with each Commissioner, occasionally discussing requested information. Our position was that we worked for the Commissioner, and they could of course receive desired information. Effective management required an orderly process, so we could understand the interest of each Commissioner, could work with them to minimize disagreement on the issues when possible, and on occasion, even seek the support of the full Commission.

33 Letter from Commissioner Christine S. Wilson to Clarivate Plc, September 3, 2021, https://www.ftc.gov/news-events/news/speeches/letter-commissioner-christine-s-wilson-clarivate-plc; Letter from Commissioner Christine S. Wilson to Thermo Fisher Scientific Inc, September 3, 2021, https://www.ftc.gov/news-events/news/speeches/letter-commissioner-christine-s-wilson-thermo-fisher-scientific-inc.

34 Leah Nylen, Alex Thompson, and Max Tani, "Trouble in Khan's Corner," *Politico*, April 5, 2022, https://www.politico.com/newsletters/west-wing-playbook/2022/04/05/trouble-inside-the-kingdom-of-khan-00023056.

35 Wilson, Testimony Before the House Judiciary Committee, Hearing on Reviving Competition Part 4.

36 Big Pharma Cheats (@PharmaCheats), Twitter, September 3, 2021, 2:24 p.m., https://web.archive.org/web/20210903230847/https://twitter.com/PharmaCheats/status/1433903810926235648.

37 Josh Sisco, "FTC's Khan Gets Several New Advisors," The Information, February 18, 2022, https://www.theinformation.com/briefings/ftcs-khan-gets-several-new-advisors.

Dealing with Congress

Congress routinely asks agencies for information as it performs oversight. Pre-Biden, the FTC routinely provided Congress with requested documents, albeit often more slowly than Congress would like, and sometimes grudgingly. During the Reagan administration, we were involved in extensive production of staff memoranda and investigative materials to various Congressional committees, with one instance involving a former FTC employee who had left to work for the Committee.

Although we sometimes negotiated, it never occurred to us to refuse Congressional requests. Indeed, we never wrote memoranda without recognizing they would be read by critical eyes in Congress. That experience was historically typical: Congressional subpoenas to obtain information were quite rare.[38] That may no longer be the case, as the House Judiciary Committee subpoenaed documents related to the FTC's Twitter investigation due to what the Committee saw as lack of cooperation with previous requests.[39] After 10 months and repeated threats to hold Chair Khan in contempt, the Committee still regards the FTC's response as inadequate.[40]

Even beyond the Twitter investigation, there is far more tension about Congressional access than even in past change eras. Unsatisfied with the Commission's document production, the House Judiciary Committee scheduled formal, transcribed interviews with career staffers, a highly unusual move. The controversy led to an exchange of heated letters between Chair Khan and Chairman Jim Jordan, with Khan objecting to the Committee's assignment of a former FTC employee as the lead contact point in the inquiry.[41] The documents and interviews provided the evidentiary base for an interim staff report detailing numerous problems in Khan's management of the Commission.[42]

The Commission has also claimed various privileges to withhold documents that Congress requested. Asked about the opinions of the Designated Agency Ethics Officer (DAEO) on whether she should recuse herself from the adjudication of the Meta/Within merger discussed below, Khan asserted the communications were "protected by the deliberative process privilege,"[43] a highly unusual, if not unprecedented, step for the FTC under the circumstances. Asked for copies of communications to her office from the unpaid consultants who were the subject of the Inspector General's report, Khan claimed that "specific communications from the unpaid experts and consultants to me and my office are protected under various privileges, including the deliberative process privilege" as well as exempt under FOIA,[44] a statute not previously thought to prevent disclosure to Congress. In some cases, the Commission has even apparently deleted responsive documents.[45]

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38 In one such instance, three Commissioners withheld responsive documents reflecting communications with their personal staffs. Two eventually allowed inspection of the documents, but the third, Commissioner Calvani, resisted, leading to a subpoena for his documents. He complied under protest. See Peter M. Shane, "Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information," *Administrative Law Review*, Vol. 44, No. 2 (Spring 1992), p. 213, https://www.jstor.org/stable/40709703.

39 Ryan Tracy, "House GOP Subpoenas FTC for Twitter Investigation Documents," *Wall Street Journal*, April 12, 2023, https://www.wsj.com/articles/house-gop-subpoenas-ftc-for-twitter-investigation-documents-47e597f7.

40 Letter from Rep. Jim Jordan to Chair Lina M. Khan, February 23, 2024, https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-02-23%20JDJ%20to%20FTC%20re%20contempt.pdf.

41 See Letter from Chair Lina M. Khan to Rep. Jim Jordan, August 11, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/2023.08.11letterkhantojordan.pdf; Letter from Rep. Jim Jordan to Chair Lina M. Khan, September 5, 2023, https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2023-09-05-jdj-to-ftc-khan-re-obstruction.pdf.

42 Committee on the Judiciary, U.S. House of Representatives, *Abuse of Power, Waste of Resources, and Fear: What Internal Documents and Testimony from Career Employees Show about the FTC Under Chair Lina Khan*, interim staff report, February 22, 2024, https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-02-22%20Abuse%20of%20Power%20Waste%20of%20Resources%20and%20Fear_0.pdf. The report was based on "documents from some managers and Front Office employees" obtained under threat of subpoena, and interviews with five managers. Committee on the Judiciary, *Abuse of Power, Waste of Resources, and Fear*, p. 2. In its own words, "this report chronicles Chair Lina Khan's neglect and mismanagement of the agency in furtherance of her personal pursuit of political and ideological aims." Committee on the Judiciary, *Abuse of Power, Waste of Resources, and Fear*, p. 1.

43 FTC Chair Khan's Responses to Additional Questions for the Record, submitted to the Subcommittee on Innovation, Data, and Commerce, House Committee on Energy and Commerce, June 21, 2023, pp. 44, 45. Claims of privilege do have the "advantage" of hindering congressional investigations of claims of FTC mistreatment of those under investigation. Twitter, for example, has complained vociferously about the agency, and last summer asked a federal court to enter or modify an FTC order that governs its privacy practices because a current investigation "has spiraled out of control and become tainted by bias." X Corp.'s Motion for Protective Order & Relief from Consent Order, United States v. Twitter, Inc., No. 3:22-cv-03070 (N.D. Cal. July 13, 2023). The court ruled that because the obligations at issue were in an administrative order rather than the court order, the court lacked the power to do so. Order Re Motion for Protective Order and Relief from Consent Order, United States v. Twitter, Inc., No. 22-cv-03070-TSH (N.D. Cal. November 16, 2023). For a discussion of accusations of FTC interference with the operations of a free press in its Twitter investigation, see Editorial Board, "Josh Hawley, Meet Lina Khan's FTC," *Wall Street Journal*, March 8, 2023, https://www.wsj.com/articles/federal-trade-commission-lina-khan-twitter-files-elon-musk-josh-hawley-house-judiciary-committee-c489a3ca.

44 FTC Chair Khan's Responses to Additional Questions for the Record, Member Requests for the Record, Request 2 from Rep. Kat Cammack.

45 Khushita Vasant, "US FTC Likely Broke Law by Deleting Documents Responsive to Oversight on Noncompete Ban Rule, Khan Told," MLex Market Insight, June 2, 2023, https://mlexmarketinsight.com/news/insight/us-ftc-likely-broke-law-by-deleting-documents-responsive-to-oversight-on-noncompete-ban-rule-khan-told.

Khan's recusal promise

At her confirmation hearing, Sen. Mike Lee (R-UT) asked about possible appearances of impartiality in light of Khan's work on the Majority Staff Report. Khan responded that "If it were to arise, I would seek the guidance of the relevant ethics officials at the agency and proceed accordingly."[46] Predictably, the issue did arise, and Khan's response is illuminating.

To many modern progressives, conflicts of interest revolve primarily, if not solely, around financial interests. Receiving money from a corporation is disqualifying, even if the amount is relatively small or was years ago. In contrast to the simplistic progressive view, legal principles of conflict of interest include more than conflicts based on financial interests—they also include conflicts that undermine the appearance of "fairness." Such conflicts can even raise issues of due process under the United States Constitution. Circuit court cases involving the FTC Chairman in the 1960s articulate the basic requirements of fundamental fairness, which prevent Commissioners who appear to have prejudged cases from participating in adjudications.[47]

The progressive approach to conflicts was on full display in the Commission's decision to deny Meta's petition to recuse Chair Khan from participation in the adjudication of its proposed acquisition of Within, a maker of virtual reality games.[48] Following normal procedures, the Commission was seeking a preliminary injunction in federal court, and had also issued an administrative complaint, on which the Commission itself would serve as the judge.

Lina Khan's well known views on Facebook were the basis for Meta's petition for her recusal.[49] In her role as legal director of the Open Markets Institute, she signed a 2017 letter to the Acting FTC Chair contending that Facebook had become "too big and complex," and that "[t]he most obvious immediate step to address Facebook's current power is to prohibit mergers between Facebook and other potentially competitive social networks or other new and promising products and services. … Facebook should not be able to amass any greater power through acquisition."[50] In a 2018 interview, she said that "if Facebook tomorrow announces that it's acquiring another company, I would hope the FTC would look at that very closely and block it. . . [M]aking sure that it's not just out there expanding its power is really important."[51]

She also played a key role in the House Subcommittee on Antitrust' s investigation of major technology companies and their business practices, and was a coauthor of the eventual Majority Staff Report.[52] The report found that Meta had acquired several virtual reality companies, identified the Oculus virtual reality gaming system as one of its "five primary product offerings,"[53] and argued that because the company had "recently focused on acquiring startups in the artificial intelligence and virtual reality spaces" they "could position themselves to control the technology of tomorrow."[54] Her academic writings argue that Meta "established a systemic informational advantage (gleaned from competitors) that it can reap to thwart rivals and strengthen its own position, either through introducing replica products or buying out nascent competitors."[55]

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46 Nomination Hearing, before the U.S. Senate Committee on Commerce, Science, and Transportation, 2:45:55.

47 See the detailed discussion of Chair Khan's decision to participate in the Meta/Within case that follows.

48 The company initially sought recusal in the pending federal court case against Facebook, challenging past acquisitions among other conduct, but, given the nature of Khan's precise statements and the less rigorous fairness standards applicable to prosecutors, those efforts failed: moreover, the Commission's role in pursuing the case in federal court was, the judge held, essentially that of a prosecutor. *Federal Trade Commission v. Facebook, Inc.*, 581 F. Supp. 3d 34 (D.D.C. 2022).

49 Petition for Recusal of Chair Lina M. Khan from Involvement in the Proposed Merger between Meta Platforms, Inc. and Within Unlimited, Inc., FTC Matter No. 221-0040, August 24, 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/d09411_petition_for_recusal_combined.pdf.

50 Open Markets Institute, "Open Markets Institute Calls on the FTC to Block All Facebook Acquisitions," press release, November 1, 2017, https://www.openmarketsinstitute.org/publications/open-markets-institute-calls-on-the-ftc-to-block-all-facebook-acquisitions.

51 Lina Khan, "The Bernie Sanders Show: The Greatest Threat to Our Democracy?," Sen. Bernie Sanders, streamed live on May 15, 2018, YouTube video, 20:29, https://www.youtube.com/watch?v=wuCAy10hlHI.

52 The Majority Staff Report was issued in 2020. Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, U.S. House of Representatives, *Investigation of Competition in Digital Markets*, Majority Staff Report and Recommendation, 2020, https://democrats-judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf. The U.S. House Committee on The Judiciary adopted the report in 2022. U.S. House Committee on The Judiciary, "Judiciary Committee Publishes Final Report on Competition in the Digital Marketplace," press release, July 19, 2022, https://democrats-judiciary.house.gov/news/documentsingle.aspx?DocumentID=5025.

53 *Investigation of Competition in Digital Markets*, Majority Staff Report, p. 132.

54 *Investigation of Competition in Digital Markets*, Majority Staff Report, p. 327.

55 Lina M. Khan, "The Separation of Platforms and Commerce," *Columbia Law Review*, Vol. 119, No. 4 (2019), pp. 1002-1003, https://columbialawreview.org/wp-content/uploads/2019/05/Khan-THE_SEPARATION_OF_PLATFORMS_AND_COMMERCE-1.pdf.

Following the Commission's rules of practice, Chair Khan first considered the petition to recuse, and informed the other Commissioners that she declined to recuse herself. The other Commissioners then considered the petition, without the Chair's participation, and, by a 2-1 vote, determined that recusal was not warranted.[56]

Federal law *requires* that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned,"[57] and the Commission had previously said that this was the relevant standard to apply when evaluating due process issues in an adjudicatory proceeding.[58] The ethical standards for federal employees set a similar standard: "whether it is reasonable to conclude the employee appears biased."[59] Two circuit courts had required the recusal of a previous FTC Chair on due process grounds in very similar circumstances. The D.C. Circuit held that "[t]he test for disqualification has been succinctly stated as being whether 'a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'"[60] The Sixth Circuit stated that "[i]t is fundamental that both unfairness and the appearance of unfairness should be avoided. Wherever there may be reasonable suspicion of unfairness, it is best to disqualify."[61] In both cases, the comments that prompted recusal were arguably "far milder"[62] than Khan's statements.

The majority opinion is remarkable. Rather than considering whether a reasonable person with knowledge of the relevant facts might question Khan's impartiality, the majority considers her statements mere opinions on law or policy. That would surely be an appropriate analysis of, for example, her general views on the consumer welfare standard, but it is hard to avoid concluding from her statements about Facebook that she "has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[63]

Considering Khan's statements as opinions on law or policy, the majority asserts that "[a]dministrative adjudicators are presumed to be unbiased,"[64] and that a party seeking disqualification must overcome this presumption. Moreover, the majority held that "[t]he test may be stated in terms of whether the adjudicator's mind is "'irrevocably closed' on the issues as they arise in the context of the specific case.""[65] To say the least, this test is far removed from the statutory test of whether a Commissioner's impartiality "might reasonably be questioned."

The majority's other attempts to justify Khan's participation are equally unavailing. The opinion maintains that the "statements concern a different industry, a different realm of transactions than those presented here, and, effectively, a different acquiring company. ... In fact, they predated the rebranding of the company as "Meta," signaling its strategic shift into a focus on artificial and virtual reality."[66] But the 2017 letter to the FTC was quite explicit in its request

56 See Federal Trade Commission, Order Denying Petition for Recusal, In the Matter of Meta Platforms, Inc., Mark Zuckerberg, and Within Unlimited, Inc., Docket No. 9411, February 1, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/d09411commorderpetitionrecusal.pdf; see also Dissenting Statement of Commissioner Christine S. Wilson, Regarding the Petition for Recusal of Chair Lina M. Khan from Involvement in the Matter of Meta/Zuckerberg/Within before the Federal Trade Commission, Docket No. 9411, February 1, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/d09411orderpetrecusalwilsondissent.pdf.

57 28 U.S.C. § 455.

58 See Federal Trade Commission, Opinion and Order of the Commission Denying Motion for Disqualification, In the Matter of Intel Corporation, Docket No. 9341, December 18, 2009, p. 5, n. 10, https://www.ftc.gov/sites/default/files/documents/cases/100119intelstatement.pdf.

59 Memorandum from Lorielle L. Pankey, Designated Agency Ethics Official, to Commissioner Christine S. Wilson regarding Federal Ethics Response to Meta Petition for Chair Khan's Recusal, August 31, 2022, p. 7, https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rfE9nltMFEH8/v0.

60 *Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co. v. Security and Exchange Commission*, 267 F.2d 461, 469 (2d Cir. 1959), cert. denied, 361 U.S. 896 (1959)). The Commission's complaint alleged that the company had misrepresented that its training would qualify students to be airline stewardesses. In a speech addressing newspaper standards for accepting advertisements, Dixon asked as one of several hypothetical questions what would be the attitude about an ad that offers "becoming an airline's hostess by attending a charm school." He did not name the company.

61 *American Cyanamid Co. v. Federal Trade Commission*, 363 F.2d 757, 767 (6th Cir. 1966). The case challenged alleged violations in the production and sale of tetracycline. As Chief Counsel and staff director of a Senate subcommittee investigating drug prices, Dixon played an active role in questioning witnesses about tetracycline, and the report discussed the product and the company's conduct.

62 Christine Wilson, "Why I'm Resigning as an FTC Commissioner," *Wall Street Journal*, February 14, 2023, https://www.wsj.com/articles/why-im-resigning-from-the-ftc-commissioner-ftc-lina-khan-regulation-rule-violation-antitrust-339f115d.

63 *Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission*, 425 F.2d 583, 591 (D.C. Cir. 1970).

64 Federal Trade Commission, Order Denying Petition for Recusal, p. 4.

65 Federal Trade Commission, Order Denying Petition for Recusal, p. 4, quoting *Southern Pacific Communications Co. v. American Telephone & Telegraph Co.*, 740 F.2d 980, 991 (D.C. Cir. 1984), quoting *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 701 (1948).

66 Federal Trade Commission, Order Denying Petition for Recusal, p. 1.

to "prohibit mergers between Facebook and other potentially competitive social networks *or other new and promising products and services*." [67] Moreover, the statements in the Majority Staff Report she coauthored recognized virtual reality as a core Meta product and was concerned that through acquisitions Meta "could position themselves to control the technology of tomorrow."[68] Surely the statements give rise to a "reasonable suspicion of unfairness," that is prejudgment, making "it … best to disqualify."[69]

In terms of modern tribal politics, the majority opinion is more understandable. By refusing to recuse herself from a matter that was highly unlikely to be adjudicated,[70] Chair Khan put considerable pressure on her fellow Democrats to defend her and, in effect, the modern progressive view of conflicts. The adverse consequences of even partial disagreement with the Chair were revealed later in a series of messages to Commissioner Bedoya following a footnote raising questions in his concurring statement to the Chair's desire for an extraordinary, legally unprecedented, challenge to Meta.[71] Commissioner Bedoya and his staff received multiple threatening communications from a former chief of staff to Sen. Elizabeth Warren (D-MA) complaining about his lack of fidelity.[72]

The Commission's decision to allow Khan's participation prompted a lengthy dissent from Commissioner Christine Wilson. She concluded:

> *Three factually analogous cases (one with facts nearly identical to those in the current situation) represent the most relevant precedent for considering recusal of an FTC Commissioner. Those cases make the conclusion here inevitable. As explained below, Chair Khan's participation as an adjudicator in the Meta/Within Transaction would violate both due process principles and federal ethics standards.*[73]

Wilson's dissent cited, and apparently quoted extensively, the opinions of the Designated Agency Ethics Official (DAEO), who is responsible for "taking appropriate action to resolve conflicts of interest and the appearance of conflicts,"[74]and "may independently determine whether an employee must recuse due to certain appearance of partiality concerns."[75] Although the DAEO concluded that Khan's participation would not be a per se violation of federal ethics requirements, she expressed "strong reservations with Chair Khan participating as an adjudicator in this proceeding where – fairly recently, before joining the Commission – she repeatedly called for the FTC to block any future acquisition by Facebook. In my view such statements would raise a question in the mind of a reasonable person about Chair Khan's impartiality …"[76] She recommended recusal, but left the decision to Khan, who chose to participate.

The Commission majority, however, redacted Wilson's dissent, blacking out any reference to the DAEO. It cited a policy adopted in 1984 that individual Commissioners could not quote from or reveal staff recommendations without the consent of the majority of the Commission,[77] as well as the Commission's

67 Open Markets Institute, "Open Markets Institute Calls on the FTC to Block All Facebook Acquisitions" https://www.openmarketsinstitute.org/publications/open-markets-institute-calls-on-the-ftc-to-blockall-facebook-acquisitions (emphasis added).

68 *Investigation of Competition in Digital Markets*, Majority Staff Report, p. 327.

69 *American Cyanamid Co. v. Federal Trade Commission*, 363 F.2d 757, 767 (6th Cir. 1966).

70 As with most mergers, the outcome would likely be resolved at the preliminary injunction stage. Had the FTC won, the deal would most likely have been abandoned; if the FTC lost; it would most likely dismiss the administrative complaint. In the event, the adjudication was dismissed. Federal Trade Commission, Commission Order Returning Matter of Adjudication and Dismissing the Complaint, In the Matter of Meta Platforms, Inc., Mark Zuckerberg, and Within Unlimited, Inc., Docket No. 9411, February 24, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/d09411commorderdismisscomplaint.pdf.

71 Statement of Commissioner Alvaro M. Bedoya, In the Matter of Facebook, Inc., Commission Docket No. C-4365, May 3, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/2023-05-02-Bedoya-Facebook-Order-Statement-FINAL.pdf.

72 Editorial Board, "Progressives Attack Their Own at the FTC," *Wall Street Journal*, June 27, 2023, https://www.wsj.com/articles/ftc-lina-khan-meta-commissioner-alvaro-bedoya-dan-geldon-f6f4b7b9. Because the Meta matter was technically in adjudication, FTC rules required the Commissioner to treat the messages as ex parte communications and place them on the public record.

73 Dissenting Statement of Commissioner Christine S. Wilson Regarding the Petition for Recusal of Chair Lina M. Khan from Involvement in the Matter of Meta/Zuckerberg/Within, p. 2.

74 5 C.F.R. § 2638.104(c)(6).

75 Memorandum of Lorielle L. Pankey, Designated Agency Ethics Official, to Commissioner Christine S. Wilson, p. 6.

76 Memorandum of Lorielle L. Pankey, Designated Agency Ethics Official, to Commissioner Christine S. Wilson, p. 1.

77 Federal Trade Commission, Order Denying Petition for Recusal, p. 16.

deliberative process privilege.[78] As Wilson noted, the Commission had waived this privilege in at least five prior cases, and had released or quoted DAEO opinions, as had other agencies.[79] The majority, however, declined to release the memorandum, although it later became public.[80]

The 1984 policy, adopted over the dissent of former Chairman, then Commissioner Michael Pertschuk,[81] essentially "restated principles that have been recognized within the Commission since its beginnings."[82] Section 10 of the original FTC Act makes it a misdemeanor for "any officer or employee of the Commission ... to make public any information obtained by the Commission without its authority."[83] The Commission dismissed three of the five cases Wilson cited as predating the adoption of the policy, but because the policy codified a long standing practice, its precise date is irrelevant.

More important, the practice, and the policy, is aimed at staff recommendations in the context of decisions about nonpublic investigations. There, disclosing staff recommendations also risks disclosing confidential information protected by statute and obtained in the course of the investigation. Although there may be legitimate concerns about employee privacy, the concern about revealing confidential information does not arise in the case of DAEO opinions. Moreover, because the DAEO position exists in significant part to reassure the public that civil servants pursue the public interest without conflicts, releasing such opinions is advisable, particularly in controversial cases. That was the course Chair Majoras took when a petition sought her recusal in the FTC's review of the Google-DoubleClick transaction, releasing a statement with numerous references to the DAEO's opinions and determinations.[84] One might reasonably expect a Chair whose opening statement at the first public Commission meeting in her tenure stressed the importance of transparency to do the same.[85]

Disclosure of the DAEO's views is especially important in light of Khan's promise in her confirmation hearing. Although she promised to consult the DAEO, we were apparently expected to simply take Khan's word for it. Her own consultation with the DAEO was oral, and the opinion was only memorialized in writing at Commissioner Wilson's request. Keeping that opinion secret would leave no other source of information about the advice she received. Indeed, when asked about when she first consulted with the DAEO, Khan claimed "the consultations I had with the DAEO are protected by deliberative process privilege,"[86] and declined to answer.

Congresswoman Hageman called Khan's claims "unbelievable":

> *it is unbelievable to me that you would not ask for written ethics advice on this particular topic. You admit that you have . . . received written ethics advice on other topics but on this topic you claim you did not see the written memo. Instead, you want us to believe that you only received oral advice and not specific oral advice but "only general advice understanding the legal framework."*[87]

The fact that the DAEO found no per se violation left Khan wiggle room to claim, as she did, that read narrowly and literally, she had kept her promise. Surely, however, a significant minority of reasonable consumers, and likely far more than that, would understand her promise to "seek guidance ... and proceed accordingly" as a promise to follow the advice she received. Certainly, seeking "guidance" would

[78] Federal Trade Commission, Order Denying Petition for Recusal, p. 16.

[79] Dissenting Statement of Commissioner Christine S. Wilson, Regarding the Petition for Recusal of Chair Lina M. Khan from Involvement in the Matter of Meta/Zuckerberg/Within, p. 36.

[80] Leah Nylen, "FTC Rejected Ethics Advice for Khan Recusal on Meta Case," *Bloomberg Law,* June 16, 2023, https://news.bloomberglaw.com/antitrust/ftc-rejected-ethics-advice-for-khan-recusal-on-meta-case.

[81] Pertschuk, *FTC Review (1977-84),* p. 222.

[82] Miller, "Review of Commissioner Michael Pertschuk's Report," p. 392.

[83] 15 U.S.C. § 50.

[84] Federal Trade Commission, "FTC Issues Statements Regarding Recusal Petition for Review of Proposed Acquisition of Hellman & Friedman Capital Partners V, LP (DoubleClick, Inc.) by Google, Inc.," press release, December 14, 2007, https://www.ftc.gov/news-events/news/press-releases/2007/12/ftc-issues-statements-regarding-recusal-petition-review-proposed-acquisition-hellman-friedman#wek.

[85] Ephrat Livni, "The First Open Meeting of the F.T.C. under Lina Khan Starts with Political Sparks, *New York Times,* July 1, 2021, https://www.nytimes.com/2021/07/01/business/ftc-lina-khan.html.

[86] FTC Chair Khan's Responses to Additional Questions for the Record, p. 44.

[87] Congresswoman Harriet Hageman, "Oversight of the Federal Trade Commission," hearing, House Committee on the Judiciary, streamed live on July 12, 2023, YouTube video, 39:40, https://www.youtube.com/watch?v=Uy8afsR8my4.

seem to include seeking a recommendation from the official charged with precisely that mission, but Khan said she did not do so, discussing only general legal questions. A message understood by a "significant minority" is the test the FTC has used to determine whether a practice is deceptive.[88] Thus, applying the FTC's own standards of deception, Chair Khan's promise was not merely to "consider" the DAEO's advice, but at least to seek it, and in fact to follow it. Khan did not do so.

Other FTC employees have universally followed the DAEO's advice: "to the best of my knowledge, no FTC employee has participated in a specific party matter when the agency designee has recommended recusal on appearance or other federal ethics grounds."[89] Khan is the first. Despite the DAEO's statement, however, Khan surprisingly told Congressman Jeff Duncan that she "would have no way of knowing whether other FTC employees have followed or not followed DAEO recommendations."[90]

The entire episode helped prompt Wilson's "noisy exit" from the FTC, accusing Khan of "disregard for the rule of law and due process."[91] Khan's decision to participate in the Meta/Within merger adjudication figured prominently in Wilson's explanation, as did the treatment of career staff discussed below.

Fortunately for Khan, the question of her participation in the Meta/Within adjudication will not face further legal scrutiny. When the Commission lost its request for a preliminary injunction in federal court,[92] it also dismissed its administrative complaint.[93]

The flawed progressive defense of Khan

Progressive organizations leapt to defend Chair Khan's participation in the Meta matter, arguing that she has no financial conflict. One article claimed she had "perhaps the smallest number of work-related conflicts in recent FTC history," and concluded "we finally have an FTC head with no such conflicts, no history of working for anyone whom the commission might regulate, and thanks to her anti-corporate moves, no prospect of a cushy post-office career at the companies she used to regulate."[94] The fact that her impartiality might reasonably be questioned did not matter. Indeed, part of the defense of her participation was her consistency in attacking big tech, a position those progressives support.

Round two of the progressive defense of Khan followed the playbook for the earlier FTC settlement with Facebook: [95] attack the messenger. The FTC's DAEO owned some stock in Meta ($15,001 - $50,000) in a joint account (with a parent) that she did not control.[96] The director of the Revolving Door Project claimed that "Disqualifying Lina Khan from matters involving Meta would be enormously valuable to Meta," and that "tens of billions" were at stake.[97] The DAEO, however, had previously been advised by the Office of Government Ethics that offering ethics advice to employees on conflicts did not "amount to personal and substantial participation in an issue."[98] To its credit, the Commission defended the DAEO's participation.[99] Nevertheless, the Revolving Door Project asked the FTC Inspector General to investigate.[100]

88 *In re* POM Wonderful LLC, 155 F.T.C. 1, 7 (2013).

89 Memorandum of Lorielle L. Pankey, Designated Agency Ethics Official, to Commissioner Christine S. Wilson, p. 8.

90 FTC Chair Khan's Responses to Additional Questions for the Record, p. 44.

91 Wilson, "Why I'm Resigning as an FTC Commissioner."

92 Order Denying Plaintiff's Motion for Preliminary Injunction, Federal Trade Commission v. Meta Platforms, No. 5:22-cv-04325-EJD (N.D. Cal. January 31, 2023).

93 Federal Trade Commission, Commission Order Returning Matter of Adjudication and Dismissing the Complaint, In the Matter of Meta, Inc., February 24, 2023.

94 David Dayen, "Attacks on Lina Khan's Ethics Reveal Copious Amounts of Projection," *The American Prospect*, June 23, 2023 https://prospect.org/economy/2023-06-23-attacks-lina-khans-ethics-reveal-projection/.

95 See the discussion at note 187.

96 Brody Mullins and Rebecca Ballhaus, "Ethics Official Owned Meta Stock While Recommending FTC Chair Recuse Herself from Meta Case," *Wall Street Journal*, June 30, 2023, https://www.wsj.com/articles/ethics-official-owned-meta-stock-while-recommending-ftc-chair-recuse-herself-from-meta-case-8582a83b.

97 Mullins and Ballhaus, "Ethics Official Owned Meta Stock While Recommending FTC Chair Recuse Herself from Meta Case."

98 Mullins and Ballhaus, "Ethics Official Owned Meta Stock While Recommending FTC Chair Recuse Herself from Meta Case."

99 Federal Trade Commission, "FTC Chair and Commissioners Issue Joint Statement," press release, June 30, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-chair-commissioners-issue-joint-statement.

100 Andrea Beaty, "RDP Asks FTC IG to Investigate Ethics Officer Who Pushed Khan to Recuse While Owning Meta Stock," Revolving Door Project, June 30, 2023, https://www.therevolvingdoorproject.org/rdp-asks-ftc-ig-to-investigate-ethics-officer-who-owned-meta-stock/.

The irrelevance of this particular conflict to the DAEO's opinion seems clear. She had previously issued a specific authorization for Khan to participate as an investigator or prosecutor in matters involving Meta and Amazon.[101] Why would she do so if she were motivated by the alleged conflict of interest? Presumably excluding Khan entirely would have been even more valuable. To progressives, however, impartiality is unnecessary, at least as long as the decision advances progressive policies. Any potential financial interest, however, is too much, even if small (the DAEO) or speculative (the Facebook settlement).

[101] Memorandum of Lorielle L. Pankey, Designated Agency Ethics Official, to Commissioner Christine S. Wilson, p. 9.

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3

Managing the career staff to achieve change

Any new leader whose main objective is fundamental change will encounter resistance from some of the staff she inherits. Nevertheless, to achieve change, new leaders must rely on at least part of the existing staff, especially in the short run. The managerial challenge is how best to guide these essential individuals in a new direction. Even the most willing and professional staff cannot accomplish change unless they know with some specificity what they are supposed to change, and how to implement the changes. Thus, communicating the new goals of the organization is critical, but more is necessary. Academic writings may offer a clear picture of an overall philosophy, but even the most detailed law review article is unlikely to offer sufficient guidance how to identify specific targets or how to draft the pleadings. We begin with a review of how previous leadership redirected the career staff in the early 1970s and early 1980s, and then consider in detail the Biden administration's relationship with the career staff.

Staff management: Nixon and Reagan eras

When Caspar Weinberger arrived in January 1970, two scathing assessments of the FTC had just been published. To "Nader's Raiders," the problems at the FTC "could be summarized in one word: people."[102] Geographic locations determined hiring decisions, favoring the south in general and Tennessee in particular, along with partisan politics. Few from the nation's top law schools were hired, and the report concluded that "bright men need not apply."[103] (Few women were government attorneys in that long ago era.) A second report, more measured in tone, more academic in outlook, and more authoritative in its source, the American Bar Association, was every bit as critical. The report found that one bureau chief responsible for hiring preferred older applicants who "had come to appreciate that they were not going to make much of a mark" because they were less likely to leave.[104] The ABA concluded that "If there is a formula better designed to avoid hiring bright and energetic young men, we have not heard of it."[105]

Reorganization was crucial to Weinberger's strategy to address personnel. He created the modern Commission organization, with a Bureau of Competition for antitrust and a Bureau of Consumer Protection for unfair or deceptive practices. He abolished separate bureaus that had been much criticized for pursuing trivia, such as the Bureau of Textile and Furs. Unlike some past reorganizations, Weinberger's changes improved the morale of the staff that remained, because it indicated reduced emphasis on the cases that were castigated in the Nader and ABA reports, and because it was seen as the first step toward fulfilling the promise of implementing those reports. In all, 18 of 31 top managers were discharged.[106]

When Weinberger left after 7 months, his successor, Miles Kirkpatrick, continued the work of transforming the professional staff. Working through his executive director, he replaced nearly one third of the middle and lower level staff.[107] Weinberger and Kirkpatrick had systematically addressed the "people" issue.

Miller faced a radically different senior management and personnel challenge. The Weinberger and Kirkpatrick transformation of the staff, combined with the agency's rapid growth in the 1970s,[108] meant that there were relatively few managers with long tenures. Moreover, during the Carter administration, outsiders without agency experience, whatever they may have done previously, were hired to lead many of the most important projects.

There was a distinct dichotomy in the staff Miller inherited. Many, especially those recruited during Michael Pertschuk's Chairmanship from 1977-1981, were "devoted to a mission of aggressive consumer

[102] Muris and Clarkson, "Introduction," p. 2.

[103] Edward F. Cox, Robert C. Fellmeth, and John E. Schultz, *The Nader Report on the Federal Trade Commission* (New York: R.W. Barron, 1969), p. 150.

[104] American Bar Association, *Report of the ABA Commission to Study the Federal Trade Commission*, p. 33. Robert Pitofsky, later a Commissioner and the Chair, served as chief counsel for the committee.

[105] Arthur John Keefe, "Reactions to Current Legal Literature," *American Bar Association Journal*, Vol. 56, No. 2 (February 1970), p. 188, https://www.jstor.org/stable/25725059.

[106] See the discussion in Muris and Clarkson, "Introduction," p. 4, and the sources cited therein.

[107] Muris and Clarkson, "Introduction," p. 4.

[108] In 1968, the FTC had 1244 permanent positions and a total of 1249 workyears. *The Budget of the United States: Fiscal Year 1970*, Appendix (Washington, D.C.: U.S. Government Printing Office, 1969), p. 934, https://fraser.stlouisfed.org/title/budget-united-states-government-appendix-233/fiscal-year-1970-5724. In 1979, it had 1665 permanent positions, and 1746 compensable workyears. *The Budget of the United States Government: Fiscal Year 1981*, Appendix (Washington, D.C.: U.S. Government Printing Office, 1980), p. 875, https://fraser.stlouisfed.org/title/budget-united-states-government-appendix-233/fiscal-year-1981-5738.

protection."[109] They typically found Miller's economic approach to regulation anathema, and left the Commission before or shortly after his arrival in October 1981, eleven months after the 1980 election.[110] Other staff, however, recognized the political and policy demand for toning down federal government activism, and "granted that the agency went too far under his [Pertschuk's] leadership."[111] Miller noted that when he arrived, he "thought that 80 percent of the staff was sufficiently ideologically zealous that their professional performance would be impaired. I have found, however, that 80 percent of the staff is really very professional and responds well to the new leadership."[112]

The substantive portfolio Miller inherited differed significantly between the two main operating bureaus. In Competition, the major antitrust cases that consumed substantial resources in the 1970s were essentially over, having ended in failure or with an expected final decision rejecting a case pending at the Commission. The Commission dismissed its largest case, to dismember the oil industry,[113] before Miller arrived and the case alleging a "shared monopoly" in the cereals industry was pending at the Commission, with a widespread belief that the Commission would dismiss it (as it did).[114] As a result, staffers who joined the agency to pursue deconcentration already knew that effort was over.

In consumer protection, however, major resources continued to be devoted to rulemaking, with 11 rules awaiting final Commission action.[115] Attorneys working on these projects often wanted to continue the fight. As Commissioner Pitofsky noted in 1980, "staff devotion to a single project over a period of years and the adversary clashes that often develop during the proceeding can generate in some rulemaking projects a will-to-win in the staff which influences their view of the record and their recommendations."[116] The rule backlog would consume much energy throughout Miller's tenure.

Miller addressed the issues he inherited in the Bureau of Consumer Protection in part through reorganization, announced three months after his arrival. Three divisions pursuing closely related advertising issues were consolidated, reducing the number of senior management positions. Tightened evidentiary standards were adopted to assure that rulemaking proposals actually advanced consumer welfare.[117] Moreover, the agency's budget declined significantly.[118] Nevertheless, Harris and Milkis concluded, "there were no wholesale attempts to purge agency staff and generally there was an effort to retain, and in some cases even promote, capable personnel. In fact, compared to what happened with previous changes of administration at the FTC, only a small number of people were removed from their jobs."[119] Instead, staff reductions were accomplished through normal attrition, running at double digits annually when Miller arrived.[120]

Thus, in the Nixon and Reagan changes, there were significant departures from the agency through reorganization, attrition, and other measures. The new leadership was selective about who left, who stayed, and what positions were filled. Leadership found homes for career managers willing to join the new team and pursue a new direction, while those

[109] Harris and Milkis, *The Politics of Regulatory Change*, p. 199.

[110] Harris and Milkis, *The Politics of Regulatory Change*, p. 199.

[111] Harris and Milkis, *The Politics of Regulatory Change*, p. 199.

[112] As quoted in Harris and Milkis, *The Politics of Regulatory Change*, p. 201.

[113] In the Matter of Exxon Corp., et al., Docket No. 8934.

[114] In the Matter of Kellogg Co., et al., 99 F.T.C. 8 (1982). One significant case, against Xerox, resulted in a settlement. Decision & Order, Xerox Corp., Docket No. 8909, reprinted in Xerox Corp., 86 F.T.C. 364 (1975). The massive investigation in the auto industry, begun in 1976 on the premise that GM, and perhaps Ford, should be dismantled, had closed in May 1981 with one of the lead FTC attorneys quipping that "we have a hard time finding any monopoly profits being earned. Monopoly losses maybe, but not profits." See Timothy J. Muris, "Improving the Economic Foundations of Competition Policy," *George Mason Law Review*, Vol. 12, No. 1 (2003), p. 5, https://demotesturl.com/george-mason/wp-content/uploads/2014/03/12-1_Muris.pdf.

[115] Harris and Milkis, *The Politics of Regulatory Change*, p. 197.

[116] Federal Trade Commission, "Oral Presentation Before the Commission and Communications with Commissioners and Their Staffs in Trade Regulation Rulemaking Proceedings," *Federal Register*, Vol. 45, No. 230 (November 26, 1980), p. 78630, https://archives.federalregister.gov/issue_slice/1980/11/26/78624-78630.pdf.

[117] See Timothy J. Muris, "Rules Without Reason: The Case of the FTC," *Regulation*, Vol. 6 (September/October 1982).

[118] In 1983, the agency had 1310 workyears, only five percent larger than at the beginning of the Weinberger administration. *Budget of the United States Government: FY 1985*, Appendix (Washington, D.C.: U.S. Government Printing Office, 1984), p. I-Y40, https://fraser.stlouisfed.org/title/budget-united-states-government-appendix-233/fiscal-year-1985-5740.

[119] Harris and Milkis, *The Politics of Regulatory Change*, p. 202.

[120] Kenneth W. Clarkson and Timothy J. Muris "Commission Performance, Incentives, and Behavior," Clarkson and Muris, *The Federal Trade Commission since 1970*, p. 300.

who made clear they were wedded to the old agenda either left on their own or were pushed out.

The Biden FTC's inauspicious arrival

Lina Khan faced a scenario more like Weinberger than Miller, with many long tenured senior managers. Weinberger relied on consensus across Congress, the bar, and the policy community that major personnel changes were necessary. In contrast, although the Biden FTC team's view of the career staff implied that major changes were needed, widespread support for such changes was lacking, and they did not make them. Instead, Khan created the worst of all possible worlds, making her view of the staff's inadequacies all too well known, but without implementing the massive changes those views suggested.

Khan's arrival at the agency on June 15, 2021, was unusual in multiple aspects even beyond the norm-busting manner in which she was named Chair. Rather than rely on the acting Bureau Directors who had been appointed by the Acting Chair that President Biden had previously appointed, she immediately named two of Commissioner Rohit Chopra's attorney advisers as Acting Directors of the Bureaus of Competition and Consumer Protection.[121] She made both permanent directors two months later,[122] another abnormal step. Many attorney advisers are very talented, but the job requires much different skills than running one of the operating bureaus. We know of no other Chair who chose even their own attorney advisers to direct a bureau, let alone an adviser to another Commissioner. Khan also selected Chopra's Chief of Staff as her own, and named another Chopra adviser as the agency's chief technologist.[123]

The new Chair's relationship with the career staff began with a series of insults. A few weeks after her appointment, with Chair Khan at his side, the President of the United States told the world, including an FTC staff proud of its role in an agency widely acclaimed, largely bipartisan, and consensus driven that it was part of a 40 year failed experiment.[124] Khan's use of Chopra's advisers to form the heart of her senior staff itself sent an important signal, as Chopra "had a strong view that the FTC was a backwater and essentially a failed agency."[125] To many in the staff, it appeared that Chopra's views would control.

Chopra's apparent role caused concern because his disdain for the career staff as a key cause of this failure was open and notorious, and many current and former staff reciprocated those feelings. Chopra's views of the career staff and theirs of him were widely reported in dozens of conversations we had with staffers, including both those in the agency and those who had left. Two days after he took office, he circulated a memo about repeat offenders to all agency staff that was highly critical of the staff.[126] As we describe more fully below, the Commissioner, now Director of the Consumer Financial Protection Bureau, believed that many of the careerists suffered from perverse incentives that made them too close to the businesses they regulated. He referred to them working for a "lax"[127] and "feckless"[128] agency that had "fallen into deep decay and disarray over four decades,"[129] and even called for an Inspector General's investigation of the handling

[121] Josh Sisco, "New FTC Chair Lina Khan Appoints Antitrust Chief, Other Key Staffers," The Information, June 24, 2021, https://www.theinformation.com/articles/new-ftc-chair-lina-khan-appoints-antitrust-chief-other-key-staffers.

[122] Federal Trade Commission, "FTC Chair Lina M. Khan Appoints Directors of Bureau of Competition and Bureau of Consumer Protection," press release, September 28, 2021, https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-chair-lina-m-khan-appoints-directors-bureau-competition-bureau-consumer-protection.

[123] By August 2023, only one of these former Chopra advisers remained in their new position.

[124] See the discussion in the Introduction regarding "Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy," White House.

[125] Rohit Chopra, as quoted in Sheelah Kolhatkar, "Lina Khan's Battle to Rein in Big Tech," *The New Yorker*, November 29, 2021, https://www.newyorker.com/magazine/2021/12/06/lina-khans-battle-to-rein-in-big-tech.

[126] Memorandum from Commissioner Rohit Chopra to Commission Staff and Commissioner regarding Repeat Offenders, Federal Trade Commission Memorandum 2018-01, May 14, 2018, https://www.ftc.gov/system/files/documents/public_statements/1378225/chopra_-_repeat_offenders_memo_5-14-18.pdf.

[127] Prepared Opening Statement of Commissioner Rohit Chopra, for Hearing on "Transforming the FTC: Legislation to Modernize Consumer Protection," Before the U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Consumer Protection and Commerce, July 28, 2021, https://www.ftc.gov/system/files/documents/public_statements/1592970/prepared_opening_statement_of_commissioner_rohit_chopra_transforming_the_ftc_legislation_to.pdf.

[128] Mary Harris, "Trust-Busting Is Back: Could 'the Simone Biles of Antitrust' Break Up Amazon?," *Slate*, June 22, 2021, https://slate.com/business/2021/06/lina-khan-biden-ftc-amazon-big-tech-monopoly-antitrust.html.

[129] "Prepared Remarks of CFPB Director Rohit Chopra at the 2023 American Economic Liberties Project Anti-Monopoly Summit," Consumer Financial Protection Bureau, May 4, 2023, https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-rohit-chopra-2023-american-economic-liberties-project-anti-monopoly-summit/.

of pharmaceutical mergers.[130]

In our experience, the career staff Khan inherited had been primarily advocates at times, but overwhelmingly they were professionals in 2021, engaged in impartial law enforcement, not politics. Before she entered the FTC, Chair Khan had disagreed, stating that "I think all decisions are political in so far as government agencies are bringing them."[131] Reportedly, Khan repeated many of her and Chopra's criticisms in meetings with the staff.

Khan and her team greeted the career staff with open suspicion. In her first week, her chief of staff ordered agency staffers to cancel *all* public appearances, even the most routine, including those previously scheduled.[132] Although it could well make sense to suspend policy speeches, only senior political appointees normally make such speeches, not the careerists. Moreover, the ban on appearances even included those at consumer education events whose principal purpose was to warn consumers about how to avoid various scams. To rub salt into the already annoyed career staff's wounds, they were told to provide misleading reasons for cancelling, namely "pressing matters at the FTC."[133]

Disdain for the professional staff was also apparent in an early public Commission meeting on July 1, 2021. There, the Commission adopted a final rule governing Made In USA claims, revised its procedures for Section 18 rulemaking, rescinded a 2015 Policy Statement on unfair methods of competition ("UMC"), and accepted a package of omnibus resolutions authorizing competition investigations without further Commission involvement—all in a format that did not allow career staff participation.[134] Even more concerning, although some staffers may have been involved in the Section 18 rulemaking changes, it appears that knowledgeable career staff, including those with extensive experience, were generally not consulted in developing these policy changes.[135]

This exclusion of the career staff is highly unusual in the FTC's history. As in any agency, the Commission's "expertise" resides largely in its career staff, not in its political appointees. In our nearly half century of experience, the career staff virtually always participates in Commission meetings when such decisions are made, and were routinely given the opportunity to present their recommendations and answer questions from Commissioners. Certainly, Bureau Directors have always participated in such meetings. Yet the transcript of the public meeting reflects no comments from line career staff – none, zero. The only non-Commissioner who spoke was the agency's Secretary, a position that rarely impacts agency substance.[136] Moreover, among these agenda items were major policy issues, with the two Republican Commissioners dissenting on all, some with lengthy statements.[137] The omnibus resolutions, for example, were an unprecedented transfer of power from the full Commission to the Chair.[138]

Reluctance to deal with the career staff continued through the Biden team's early tenure. There was little or no effort to engage with incumbent senior managers for months.[139] A long tradition of frequent senior staff meetings with the Chair was suspended from Khan's arrival until late in 2021, and then replaced with less frequent meetings

[130] See Dissenting Statement of Commissioner Rohit Chopra, In the Matter of AbbVie, Inc. / Allergan plc, Federal Trade Commission, FTC File No. 1910169, May 5, 2020, https://www.ftc.gov/system/files/documents/public_statements/1574583/191-0169_dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_abbvie-allergan_redacted.pdf.

[131] "Break Up Amazon as a Monopoly?," Fox Business, June 23, 2017, YouTube video, 02:33, https://youtu.be/VI_DEYqWxqs.

[132] Leah Nylen and Betsy Woodruff Swan, "FTC Staffers Told to Back Out of Public Appearances," *Politico*, July 6, 2021, https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386.

[133] Nylen and Swan, "FTC Staffers Told to Back Out of Public Appearances."

[134] Dissenting Statement of Commissioner Christine S. Wilson, Open Commission Meeting on July 1, 2021, p. 2.

[135] The staff of the House Judiciary Committee concluded that "Documents from and testimony by FTC managers show that Chair Khan marginalized the litigators and investigators at the FTC who had the skills necessary to win cases." Committee on the Judiciary, *Abuse of Power, Waste of Resources, and Fear*, p. 3.

[136] See Open Commission Meeting, transcript, Federal Trade Commission, July 1, 2021, https://www.ftc.gov/system/files/documents/public_events/1591478/transcript_open_commission_meeting_7-1-21.pdf. Just as it limited the Commissioners, the public nature of the meeting would have limited the career staff from discussing non-public information. That limitation did not prevent Commissioners from participating, however, nor would it have prevented the FTC's staff.

[137] All four agenda items were approved on 3-2 votes. See "Open Commission Meeting – July 1, 2021," Federal Trade Commission, July 1, 2021, https://www.ftc.gov/news-events/events/2021/07/open-commission-meeting-july-1-2021.

[138] Omnibus resolutions have long been used in consumer protection, where the agency has hundreds of investigations. They had not been used in antitrust, where the much smaller number of investigations made the question of appropriate resource allocation more significant.

[139] One manager complained of "zero contact with the Chair" a year and a half into her tenure. Committee on the Judiciary, *Abuse of Power, Waste of Resources, and Fear*, p. 3.

that were predominantly one-way communication. Communications to the Chair routinely had to be submitted in writing, with responses often slow, sometimes not until after a relevant deadline had passed.[140]

Chair Khan's Chief of Staff, Jen Howard, became a symbol of the Biden team's hostility toward the career staff. She issued the order cancelling public appearances, and was widely known for her "polarizing reputation among FTC staff, and with some congressional Democrats, who described her as blunt and rude, bordering on mean." [141] Howard "often wears a silver necklace emblazoned with one word in a delicate, cursive script: 'fuck'."[142] When Commissioner Wilson complained of her inability to receive staff documents necessary for her to perform her duties, Howard responded publicly with an eye roll emoji on Twitter.[143] That she remained on Khan's personal staff for the first 19 months of the Chair's tenure,[144] almost all of it as chief of staff, sent an acrid message to the career staff.

Former senior managers reacted strongly. One who had served more than 27 years at the Commission stated at a public meeting that she was "alarmed and deeply concerned about the obvious disconnect currently between the agency's career staff and political leadership." She continued that "the FTC is not a failed agency, but it's on the road to becoming one."[145]

Staff members began voting with their feet. Within a month of Khan's confirmation, an unusual number of FTC staffers sought to leave.[146] Several senior managers soon left after decades of service.[147] In 2021, seven of the agency's 28 employees in leadership positions departed. In 2021 and 2022, 71 attorneys, among the agency's most experienced line staff, also left, the highest number of departures in a two year period since 2000.[148] As a former Bureau Director noted, "you lose a lot of institutional knowledge" when such senior careerists depart.[149] The "brain drain" has been substantial, reducing at least in the short run the agency's ability to implement the new team's policies.

Surveys of the career staff demonstrated their unhappiness: As the table below reveals, in 2020, a majority of employees strongly agreed that senior leaders maintained high levels of honesty and integrity, and almost half strongly agreed they had a high level of respect for senior leaders. It took Chair Khan and her team a remarkably short time to erode the trust that had been built over decades. In 2021, the honesty measure fell by almost half, and respect fell by more than half. Positive attitudes (combining those who agreed or strongly agreed) on both questions fell from the *best* among surveyed small agencies in 2020 to the *worst* in 2021, and fell further in 2022.[150] At the other extreme, strong disagreement in 2021 with the statements about honesty and integrity and respect increased more than eight-fold from a miniscule two percent in 2020.

[140] This paragraph reflects interviews with both current and departed FTC career staff.

[141] Nylen, Thompson, and Tani, "Trouble in Khan's Corner."

[142] Nylen, Thompson, and Tani, "Trouble in Khan's Corner."

[143] Nylen, Thompson, and Tani, "Trouble in Khan's Corner."

[144] Howard is now the chief competition officer at the Department of Transportation. David Dayen, "Anti-Monopoly Reformer Joins Department of Transportation," *The American Prospect*, January 18, 2023, https://prospect.org/infrastructure/transportation/2023-01-18-anti-monopoly-reformer-jen-howard/.

[145] Remarks of Eileen Harrington, FTC Open Commission Meeting - May 19, 2022, transcript, https://www.ftc.gov/system/files/ftc_gov/pdf/Transcript-Open-Commission-Meeting-May-19-2022.pdf. Early in the Biden team's tenure, Commissioner Wilson catalogued the many ways the career staff were being "shunned." See Christine S. Wilson, "The Neo-Brandeisian Revolution: Unforced Errors and the Diminution of the FTC," remarks for the ABA Antitrust Law Section's 2021 Fall Forum, November 9, 2021, pp. 12-16, https://www.ftc.gov/system/files/documents/public_statements/1598399/ftc_2021_fall_forum_wilson_final_the_neo_brandeisian_revolution_unforced_errors_and_the_diminution.pdf.

[146] Bruce Love, "'A Real Disquiet': FTC Staff Attorneys Are Job Hunting," *National Law Journal*, July 13, 2021, https://www.law.com/nationallawjournal/2021/07/13/a-real-disquiet-ftc-staff-attorneys-are-jobhunting/.

[147] Benjamin Din, "Broadband Dreams Hit a Snag," *Politico*, October 1, 2021, https://www.politico.com/newsletters/morning-tech/2021/10/01/broadband-dreams-hit-a-snag-797978.

[148] Dan Papscun, "FTC Lawyers Leave at Fastest Rate in Years as Khan Sets New Tone," *Bloomberg Law*, March 16, 2023, https://news.bloomberglaw.com/antitrust/senior-ftc-staff-departures-spike-as-ambitious-agenda-looms. The analysis considered only GS-15 and executive service attorneys.

[149] Debbie Feinstein, former BC Director, as quoted in Papscun, "FTC Lawyers Leave at Fastest Rate in Years as Khan Sets New Tone."

[150] U.S. Office of Personnel Management, *2020 Office of Personnel Management Federal Employee Viewpoint Survey: Report by Agency*, 2020, https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2020/2020-governmentwide-management-report.pdf; U.S. Office of Personal Management, *2021 Office of Personnel Management Federal Employee Viewpoint Survey: Report by Agency*, 2021, https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2021/2021-governmentwide-management-report.pdf. The problem is specific to senior leadership: staff satisfaction with their own immediate supervisor remained at high levels throughout this period. See George S. Ford, "An Agency in Crisis: Employee Satisfaction at the FTC Continues to Decline," *Phoenix Center Perspectives*, No. 23-01 (April 27, 2023), https://www.phoenix-center.org/perspectives/Perspective23-01Final.pdf.

Besides reaction to the open hostility the Biden team showed to career employees, the declines also likely reflect the substantial reduction in the staff's perception of the new leadership's ability to communicate[151] and motivate[152] employees. Managers found policy guidance from the Chair "was often general/thematic across the agency; hard for staff to translate that into case targeting."[153] Another manager found that "stated objectives sound more like progressive buzzwords than actual direction."[154]

Federal Employee Viewpoint Survey results for the FTC

	Percent who Strongly agree			
	2020	2021	2022	2020
My organization's senior leaders maintain high standards of honesty and integrity.	51.7	27.4	22.5	28.5
I have a high level of respect for my organization's senior leaders.	47.8	22.7	19.1	24.7

Source: Office of Personnel Management Federal Employee Viewpoint Survey: Report by Agency, various years.

The Biden FTC leadership has belatedly attempted changes that many of the remaining career staff view as cosmetic.[155] In particular, the Chair now praises the staff on occasion.[156] Nevertheless, departures of experienced senior managers and staff attorneys remained high throughout 2022.[157] Although there was some rebound in the integrity and respect questions in 2023, strong agreement remained at essentially the same levels as 2021, despite the departures and significant agency hiring.

This alienation of the career staff appears surprising, as the vast majority, like most civil servants, almost certainly voted for President Biden. Perhaps hoping to bridge their tenures with the more aggressive critics that had arisen after the Obama years, some former Clinton and Obama officials argued that more aggressive enforcement was necessary.[158] A message that previous Democrat and Republican enforcers were too cautious in case selection and too quick to compromise could have been well received by the many aggressive careerists and seen by others as well within the normal bounds of political change. Indeed, in our experience, such a message would have received enthusiastic support from a majority of the staff. Yet the Biden team eschewed this approach. Instead, they made clear that the agenda they inherited was the "experiment failed," effectively identifying the career staff themselves as significant contributors to the failure. Thus, they alienated these potential supporters[159] with a view that echoed former President Trump's skepticism of the "deep state," claiming that the "revolving door" made the existing staff unreliable.

Given their view of the career staff as the source of many problems, personnel changes similar in magnitude to those of the Weinberger-Kirkpatrick era would appear to be an appropriate solution. Weinberger, and Miller in the Bureau of Consumer Protection, recognized the compelling advantages of making such changes through an early reorganization, to end uncertainty and face inevitable disruption quickly, building a firm new foundation for new policies. Khan appears instead to be relying on attrition, a much less efficient and less selective approach. The Budget Appendix shows a 23 percent increase in staff from October 1, 2022 to September

[151] Federal employees are asked if "Managers communicate the goals of the organization." In 2020, 51.7 percent of FTC respondents strongly agreed. U.S. Office of Personnel Management, *2020 Office of Personnel Management Federal Employee Viewpoint Survey: Report by Agency*. In 2021, it was 33 percent, rising slightly to 34 percent in 2023. U.S. Office of Personal Management, *2021 Office of Personnel Management Federal Employee Viewpoint Survey: Report by Agency*; U.S. Office of Personnel Management, *2023 Office of Personnel Management Federal Employee Viewpoint Survey: Report by Agency*, 2023, https://www.opm.gov/fevs/reports/data-reports/data-reports/report-by-agency/2023/2023-agency-report.pdf.

[152] Federal employees are also asked if "In my organization, senior leaders generate high levels of motivation and commitment in the workplace." In 2020, 42.2 percent of FTC respondents strongly agreed; in 2021, it was 17.6 percent, and 19.4 percent in 2023. U.S. Office of Personnel Management, *2020 Office of Personnel Management Federal Employee Viewpoint Survey: Report by Agency*; U.S. Office of Personal Management, *2021 Office of Personnel Management Federal Employee Viewpoint Survey: Report by Agency*; U.S. Office of Personnel Management, *2023 Office of Personnel Management Federal Employee Viewpoint Survey: Report by Agency*.

[153] Committee on the Judiciary, *Abuse of Power, Waste of Resources, and Fear*, p. 30.

[154] Committee on the Judiciary, *Abuse of Power, Waste of Resources, and Fear*, p. 30.

[155] As one manager stated, [p]latitudes are never substitutes for action[.]" Committee on the Judiciary, *Abuse of Power, Waste of Resources, and Fear*, p. 4.

[156] One manager said that it "feels like the Chair's solution is to pat everybody on the head." Committee on the Judiciary, *Abuse of Power, Waste of Resources, and Fear*, p. 41.

[157] See Papscun, "FTC Lawyers Leave at Fastest Rate in Years as Khan Sets New Tone."

[158] Michael Kades, Testimony before the Subcommittee on Antitrust, Commercial, and Administrative Law regarding "Proposals to Strengthen the Antitrust Laws and Restore Competition Online," Washington Center for Equitable Growth, October 1, 2020, https://equitablegrowth.org/testimony-by-michael-kades-before-the-subcommittee-on-antitrust-commercial-and-administrative-law-on-digital-markets/.

[159] The House Judiciary Committee staff concluded that "Chair Khan alienated the managers and staff who wanted aggressive enforcement." Committee on the Judiciary, *Abuse of Power, Waste of Resources, and Fear*, p. 27.

30, 2024..[160] Nevertheless, it is crucial to ensure that staffers, particularly managers, are in fact willing to support the new team. Instead, the battles with the career staff continue.

Rather than immediate steps to build a broad management team, Khan brought in outsiders, most often as unpaid consultants. Although many new leaders have sought advice from outsiders, Khan's choice was unconventional for at least two reasons. First, the work of the enforcement bureaus is central to the Commission's mission. These newcomers were not placed in the bureaus, however; all nine unpaid outside consultants deployed through March 2022 were assigned to the Office of Policy Planning.[161] In fiscal years 2019 and 2020, there were only two unpaid consultants.[162] Second, consultants and experts are prohibited legally from performing certain tasks, including "to perform managerial or supervisory work ..., to make final decisions on substantive policies, or to otherwise function in the agency's chain of command."[163] Consultants cannot perform "inherently governmental functions," such a determination of enforcement or budgetary policy, selection of new federal employees, or direction or control of federal employees.[164] These, however, are precisely the tasks that are necessary to implement change.

The OIG examined position descriptions, rather than what the consultants actually did.[165] It found that "most indicated that the consultant or expert will be involved with policy," without including "clear restrictions on the scope of work"[166] to avoid violations. Although the regulations implementing the restrictions on consultants specify that agencies "must establish and maintain a system of controls and oversight necessary to assure compliance,"[167] the OIG found that "the FTC had neither a system of controls nor guidance on consultants' and experts' scope of work."[168]

Thus, this use of outsiders was not only ineffective as a management tool, it also skirted the relevant law. Khan's clear reluctance to follow Weinberger–Kirkpatrick and Miller in implementing firm controls over and through the enforcement bureaus at the beginning was a significant missed opportunity. Moreover, although there is nothing wrong with using outside experts as advisors—other administrations have done so—it apparently did not occur to the Chair and those advising her to engage outsiders through the normal processes used for governmental employees. This failure to follow the law is yet another management mistake, reflecting in part the Chair's unwillingness to consult with the career FTC staff, who would no doubt have advised her to follow proper procedures.

The recent staff increases are the most dramatic since the 1970s, raising multiple managerial opportunities and challenges. Additional staff obviously increases the ability to begin new projects, but in the 1970s many such new projects developed out of control of agency leadership.[169] The management challenge reached the level in BCP that, in the Carter administration, for some projects leadership created alternative staffs to evaluate and work on major projects, including rulemakings then underway.[170]

The distrust of career staff that Chopra and Khan displayed was particularly focused on those serving in Washington. Acting on this belief, Khan is placing a disproportionate share of the new staff in the

[160] *Budget of the U.S. Government: Fiscal Year 2024*, Appendix (Washington, D.C.: U.S. Government Printing Office, 2023), pp. 1233-1234, https://fraser.stlouisfed.org/title/budget-united-states-government-appendix-233/fiscal-year-2024-633904; *Budget of the U.S. Government: Fiscal Year 2025*, Appendix (Washington, D.C.: U.S. Government Printing Office, 2024), pp. 1177, https://www.whitehouse.gov/wp-content/uploads/2024/03/appendix_fy2025.pdf.

[161] See Office of Inspector General, Federal Trade Commission, *Audit of the Federal Trade Commission's Unpaid Consultant and Expert Program* (OIG Report No. A-22-06, August 1, 2022), p. 4, Figure 1, https://www.ftc.gov/system/files/ftc_gov/pdf/2022-08-01_OIGauditreport_unpaidconsultants_FINAL.pdf.

[162] Office of Inspector General, *Audit of the Federal Trade Commission's Unpaid Consultant and Expert Program*, p. 3.

[163] 5 C.F.R. § 304.103.

[164] Office of Inspector General, *Audit of the Federal Trade Commission's Unpaid Consultant and Expert Program*, p. 6.

[165] The report noted that "fieldwork for this audit was not designed to determine whether unpaid consultant or experts were involved in activities prohibited by the federal policies and guidance." Office of Inspector General, *Audit of the Federal Trade Commission's Unpaid Consultant and Expert Program*, p. 6.

[166] Office of Inspector General, *Audit of the Federal Trade Commission's Unpaid Consultant and Expert Program*, p. 7.

[167] 5 C.F.R. § 304.108.

[168] Office of Inspector General, *Audit of the Federal Trade Commission's Unpaid Consultant and Expert Program*, p. 7.

[169] When we were entering our last tour at the FTC, in June 2001, one of us discussed management issues with the outgoing Director of the Bureau of Consumer Protection, Jodie Bernstein, a legendary FTC executive who had spent many years in BCP during the 1970s. We reflected on several individuals who developed "fiefdoms" within the Bureau, difficult to control at best.

[170] See, for example, the discussion of the schism within the Bureau of Consumer Protection between the "new staff" and the "original staff" on the Funeral Rule in Dorsey D. Ellis Jr., "Legislative Powers: FTC Rule Making," in Clarkson and Muris, *The Federal Trade Commission Since 1970*, p. 170.

regional offices. Because of the small size of the individual offices and historic geographic difficulties in management, as well as the perceived uneven quality of the various regions, such an allocation will necessitate extra care. (Khan initially favored even higher allocations to the regions but acquiesced to concern from her fellow commissioners.)

'Revolving door' fears hurt Khan's agenda

Chopra and Khan's view of the "revolving door" drove concern over the staff they inherited. Allegedly, staff attorneys, desiring eventual employment in the private sector, have an inherent conflict of interest, and will pull their punches, offering softer enforcement than they might otherwise to curry favor with potential future employers.

Among progressives, the Revolving Door Project ("RDP") of the Center for Economic and Policy Research[171] reflects this view. RDP exists to "scrutinize executive branch appointees to ensure they use their office to serve the broad public interest, rather than to entrench corporate power or seek personal advancement."[172] One of the fullest progressive statements on the revolving door is from another progressive group, the Roosevelt Institute, which lists Rohit Chopra as the first contributor to its report "Unstacking the Deck: A New Agenda to Tame Corruption in Washington," released the same month Chopra took office at the FTC.[173] Although one can read the report's broad language to encompass career bureaucrats, the report's examples focus more narrowly on the short-term political appointees who direct policy, most commonly associated in the academic and popular literature with the term "revolving door." Examples of this traditional revolving door concern have generally involved policy jobs, such as a director of the SEC's enforcement division, the EPA's deputy general counsel,[174] and similar subcabinet positions. The paradigmatic FTC example would be a law firm partner who comes to the agency for a few years to run one of the enforcement bureaus, and returns to a comparable law firm. Other examples include agency heads and cabinet secretaries.[175]

This theory of the revolving door appears to be a version of the capture theory much discussed in the literature about public choice and the economics of regulation. Ironically, this version of capture seems to be one idea originated at the University of Chicago, by Nobel Laureate George Stigler, with which progressives actually agree. Capture theories hold that the self-interest of regulators leads them to grant favors to special interest groups. Self-interest might include self-gratification from exercising power, job retention, or pursuit of post-government wealth. Although controversial among academics as a widely applicable description of bureaucratic behavior, they have clear applicability to special purpose agencies, such as the old transportation regulatory agencies. Capture is unlikely, however, for a general purpose agency like the FTC, which is not the most important regulator for any interest group and does not produce output that objective observers can easily evaluate or measure.[176] Applying this version of capture to the career staff is not widely recognized in the academic literature, and has little empirical support.

Certainly, there is significant job mobility between the FTC and the private sector, although the enforcement bureaus differ.[177] For decades, some of the best FTC competition lawyers left the agency for large New York and Washington law firms, frequently returning to represent clients. These young attorneys came to the agency, acquired experience and expertise, and moved

171 Dan Beeton, "Here's What You Helped CEPR Accomplish in 2020. Where Do You Want to Go in 2021?," Center for Economic and Policy Research, December 23, 2020, https://cepr.net/heres-what-you-helped-cepr-accomplish-in-2020-where-do-you-want-to-go-in-2021/.

172 "About Us," Revolving Door Project, accessed April 1, 2024, https://therevolvingdoorproject.org/about-us/.

173 The Roosevelt Institute, *Unstacking the Deck: A New Agenda to Tame Corruption in Washington*, May 2018, https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Unstacking-the-Deck-201805.pdf. Jeff Hauser, the Executive Director of the Revolving Door Project, provided "detailed feedback."

174 See David Zaring, "Against Being Against the Revolving Door," *University of Illinois Law Review*, Vol. 2013, No. 2 (2013), pp. 513-514, https://www.illinoislawreview.org/wp-content/ilr-content/articles/2013/2/Zaring.pdf.

175 See Wentong Zheng, "The Revolving Door," *Notre Dame Law Review*, Vol. 90, No. 3 (2015), https://scholarship.law.nd.edu/ndlr/vol90/iss3/7/.

176 See James Q. Wilson, *The Politics of Regulation* (Basic Books, 1992); Timothy J. Muris, "Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control," *Journal of Political Economy*, Vol. 94, No. 4 (August 1986), pp. 884-889, http://www.jstor.org/stable/1833208. For an analysis contrasting the capture risk of a new agency to regulate digital technology with the risk at the FTC, see Neil Chilson, "Does Big Tech Need Its Own Regulator?," in *The Global Antitrust Institute Report on the Digital Economy* (2020), https://gaidigitalreport.com/2020/08/25/does-big-tech-need-its-own-regulator/.

177 One study found that over 60 percent of competition attorneys who left the FTC went to large, profitable law firms that represent corporate clients. See Andrea Beaty, *The Revolving Door in Federal Antitrust Enforcement* (The Revolving Door Project, June 2022), https://therevolvingdoorproject.org/wp-content/uploads/2022/06/The-Revolving-Door-In-Federal-Antitrust-Enforcement.pdf. We are not aware of similar data for consumer protection attorneys.

to the private sector. Other antitrust attorneys went to corporations or smaller law firms. In consumer protection, the predominant flow is different. Young attorneys frequently start their careers in the private sector or sometimes other government or nonprofit entities, acquire litigation or other relevant experience, and then come to the FTC, usually for a better work-family balance. (BCP has been well known for attracting many talented lawyers this way.)

Former FTC General Counsel Steve Calkins noted the differences between the senior management of the bureaus in 2004. Consumer protection division heads, the level that reports to the Director and Deputy Bureau Directors, tend to have long experience with the agency, "career people of great talent who are doing a great job." In senior competition jobs, however, "you have people of great ability and great talent, but the reality is they come in and they leave."[178] Despite substantially different career dynamics, progressive concerns about the revolving door do not distinguish between the bureaus. Moving to the private sector has become more common in BCP in the last decade, mostly reflecting demand for expertise in privacy regulation, and, as noted above, the Khan regime has accelerated that flow, but the Calkins generalization certainly described the agency Khan inherited.

More important, the incentives facing career staff are more complex than the conflict of interest story suggests. Staffers want to please their superiors, because good performance evaluations surely generate better references and greater opportunities, both inside and outside the agency. Supervisors in turn likely prefer employees who advance the FTC's mission as they understand it. The staff who are especially talented, e.g. in managing cases, litigation, or understanding emerging information technologies, are also in high demand. This supervisory function is one reason why clear leadership about the details of the agency's mission is so important, especially when seeking to implement changes, because managers need to identify those actions that advance the mission. Failure to execute an ill-defined or poorly communicated mission is a leadership problem, not the result of a conflict of interest.

Beyond potential conflicts of interest, staffers seeking to signal their worth to the private sector do so by being *more*, not less, aggressive.[179] Aggressive prosecutors are those who run for higher office, and law firms hiring prosecutors often tout the tough cases or theories they pursued.[180] As one study noted, "when industry employers look for regulatory expertise in their agency hires, regulators will have incentives to be more aggressive towards the industry."[181] Moreover, staffers who create an aggressive approach or a new area of enforcement, such as litigating mergers or data security, are particularly likely to create private sector demand .

Empirical studies generally have not found any significant relationship between subsequent employment and the poor performance that the simple conflict of interest story predicts. Zheng reviewed the available studies of the capture theory of the revolving door and concluded that "The effects of the revolving door on regulators' performance, if any, appear to vary from agency to agency, and do not lend support to a coherent behavioral pattern."[182]

Of particular interest is one study that specifically included the FTC. Quirk interviewed 50 high level officials from four agencies, including the FTC. He found that respondents did not believe their level of support for industry positions would affect their subsequent employment. At the FTC in particular, "the largest group of respondents perceived incentives in exactly the opposite direction, that is, favoring anti-industry behavior."[183] Quirk concluded: "In short, the more damage they do to industry prerogatives while in the agency, the more ably they can be expected to protect them after leaving it. And, thus, the best way for FTC officials to ensure themselves subsequent jobs in the private sector is to demonstrate the qualities that produce severe enforcement while in the agency."[184]

178 Stephen Calkins, "90 Years and Two Days in 45 Minutes," transcript, FTC 90th Anniversary Symposium, September 22, 2004, https://www.ftc.gov/sites/default/files/documents/public_events/ftc-90th-anniversary-symposium/040923transcript012.pdf.

179 See Zaring, "Against Being Against the Revolving Door," p. 520.

180 Zaring, "Against Being Against the Revolving Door," p. 521.

181 Zheng, "The Revolving Door," p. 1277.

182 Zheng, "The Revolving Door," p. 1275.

183 Paul J. Quirk, *Industry Influence in Federal Regulatory Agencies* (Princeton University Press, 1981).

184 Quirk, *Industry Influence in Federal Regulatory Agencies*.

A new study examined salary records for all federal employees from 2004-2021. [185] If the capture hypothesis is correct, employees would have an incentive to avoid crossing the salary threshold that triggers post-employment conflict of interest restrictions. The result would be "bunching" of employees just below the threshold, as they avoided promotions or salary increases that would reduce their value in the private sector because of the restrictions. Bunching indicates that the post employment restrictions influence workers, but it says nothing by itself about how on the job behavior would change. As we discuss above, being more aggressive rather than less may be the most effective way to signal an employee's value to the private sector.[186]

The authors distinguish between "revolving" agencies, where significant bunching indicates employees are considering their post-government prospects, and "indifferent" agencies, where the lack of bunching indicates private sector employment prospects do not have a significant effect. Of the 166 agencies included, 33 were revolving, exhibiting statistically significant bunching, while the remaining 133 were indifferent. Revolving agencies have significantly fewer paperwork requirements than indifferent ones, and their average requirement is less burdensome. The FTC was *not* among the agencies with significant bunching. That is, there is no statistical evidence of potential capture at the FTC.

An article from the Revolving Door Project[187] illustrates both the hold of the revolving door hypothesis on the progressive mind – and its inaccuracies. The article is highly critical of James Kohm, a career official in the FTC's Bureau of Consumer Protection, who has worked at the agency for over 20 years and is an Associate Director. Kohm's lengthy tenure is typical; for at least 30 years prior to Khan's arrival, almost all Associate Directors had been career staffers, and moving to a law firm or corporation was quite rare. The article focused on Kohm's role in the Commission's $5 billion civil penalty settlement with Facebook, now Meta,[188] and in effect assumes the settlement was essentially the product of this long time career manager. On a matter of such significance, however, both the bureau director and the Chairman invariably would be heavily involved in the investigation, the formulation of the recommendation, and the negotiations with the party under investigation. Moreover, Chairman Simons convened the full Commission early in the investigation in a failed effort to seek consensus on how to proceed. In our long experience with the agency, such a step is quite rare; the Commission could go years without such action in a consumer protection case. Thus, the entire Commission was involved at an early stage in the Facebook case; the matter was hardly delegated to the staff.

Despite the article's suggestion that Kohm would "slide into a job working directly or indirectly for Zuckerberg or Big Tech soon," he is still at the agency, functioning, as career staff often do, to implement the policy desires of their political leaders. In particular, his division is the locus of some of the most aggressive of Khan's initiatives, including an extraordinary, almost never used, procedure against Meta[189] and the aggressive investigation of Twitter after it was acquired by Elon Musk, including its interactions with journalists.[190] That order to show cause (OSC) allows the Commission to modify the existing order, a process mostly used to adapt orders to changes in the facts or in the law. An OSC may be appropriate if the Commission finds an order issued after a litigated decision is inadequate, but there has been no determination or admission of liability by Meta – there is only a consent agreement. Such agreements have always been regarded as contracts,

185 Joseph Kalmenovitz, Siddharth Vij, and Kairong Xiao, *Closing the Revolving Door* (November 11, 2022), http://dx.doi.org/10.2139/ssrn.4275137.

186 The study also includes an analysis of the impact when the post-employment restrictions were applied to the SEC in 2013, finding increased enforcement activity by attorneys who were above the threshold and therefore subject to the restrictions. Kalmenovitz, Vij, and Xiao, *Closing the Revolving Door*.

187 Donald Shaw, "Op-Ed: After Slapping Facebook on the Wrist, Will Kohm Go Through the Revolving Door?," Sludge, August 1, 2019, https://readsludge.com/2019/08/01/after-slapping-facebook-on-the-wrist-will-kohm-go-through-the-revolving-door/. Although the article is under the byline of Shaw, who is a Senior Fellow and Research Director of the Personnel Team at the Revolving Door, the first line of the article states that it was authored by research assistant Max Moran.

188 We advised the company while the matter was before the Commission.

189 Federal Trade Commission, Order to Show Cause Why the Commission Should Not Modify the Order and Enter the Proposed New Order, In the Matter of Facebook, Inc., Docket No. C-4365, May 3, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/C4365-Commission-Order-to-Show-Cause-%28Redacted-Public%29.pdf.

190 The House Judiciary Committee criticized the FTC's investigation. See Committee on the Judiciary and the Select Subcommittee on the Weaponization of the Federal Government, U.S. House of Representatives, *The Weaponization of the Federal Trade Commission: An Agency's Overreach to Harass Elon Musk's Twitter*, interim staff report, March 7, 2023, https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/Weaponization_Select_Subcommittee_Report_on_FTC_Harrassment_of_Twitter_3.7.2023.pdf.

and the Commission has long held that unilateral contract modification is an unfair practice.[191] Unilateral modification, however, is exactly what the Commission is proposing. We know of no other instance when an order to show cause has been used to address alleged violations of an existing order, particularly a consent agreement.

In fact, the RDP attack on Kohm appears to contradict directly its own view of how government should work. In its "About Us" statement, RDP states that "the executive branch needs to empower dedicated civil servants rather than self-interested people rotating between relatively short stints in government and longer stints in the very industries they're supposed to regulate."[192] Jim Kohm's long FTC career bespeaks dedication. Before joining the FTC, Kohm represented low-income tenants. Or, do RDP's views instead turn on whether it agrees with the position the FTC takes? A recent paper by progressive former FTC technologists takes that position explicitly: conflict restrictions should not apply if former employees are on the "same side" as the FTC.[193] If so, the blame, or credit, depending on one's point of view, should be on Kohm's political superiors, not on the career civil servant.

As misguided as the Kohm attacks were, it is easier to see why those who desire to change the existing agency agenda would be suspicious of such careerists or former agency staff members to set policy. These individuals are likely expert in the established way of doing things, and may therefore be unlikely agents of successful change. Thus, in each of the three change eras, FTC leaders often sought non-traditional personnel to lead the agency in a new direction.

The studies showing careerist incentives to be aggressive enforcers provide a particular reason for conservatives seeking change to be wary of career staff. Such concern about aggressive behavior helped lead Chairman Miller admittedly to overestimate the problem he would have with the staff he inherited. Miller, however, sought experienced attorneys to implement the new policies that he desired, regardless of political backgrounds, because such experience would be necessary both to implement the policy and to succeed in court. The Khan administration, on the other hand, especially early in her tenure, was generally unwilling to hire such experience, presumably because these individuals gained their knowledge in service of projects or corporations the progressives disfavored.[194] Reluctance to employ experienced agents, not to set policy but to implement it, was another important flaw of the early Biden FTC.

This flaw was particularly glaring. In our experience, the majority of lawyers in the large law firms are Democrats, a tendency reinforced in 2020 by the animosity in such circles toward the particular Republican nominee. It would have been extraordinarily easy for the new FTC leaders to hire numerous, experienced lawyers expert in key areas, such as litigation and rulemaking. From the beginning, the new leadership should have known such expertise would be needed in the battles they planned to initiate, especially given their aggressive agenda and their alienation of the career staff. Nevertheless, their view of the revolving door and of the resulting corrupt nature of large law firms, who, after all, represented many of the corporations the progressives disliked, limited their initial personnel search.

Chair Khan will be aided by the favorable publicity she enjoys, including in Europe, where her message condemning her American predecessors was well received, and in law schools where many students find her youth and anti-bigness program attractive.[195] Yet, the relative youth and inexperience of new law school graduates creates problems that have long caused the Bureau of Consumer Protection to prefer hires with litigation or other relevant experience. Indeed, experience is a necessary complement to youthful enthusiasm.

[191] Company policy to rewrite customer contracts unilaterally found unfair. In the Matter of Orkin Exterminating Company, 108 F.T.C. 263 (1986).

[192] "About Us," Revolving Door Project.

[193] Lindsey Barrett et al., "Illusory Conflicts: Post-Employment Clearance Procedures and the FTC's Technological Expertise," *Berkeley Technology Law Journal*, Vol. 35, No. 3 (2020), https://btlj.org/data/articles2020/35_3/04-Ohm_WEB.pdf.

[194] The new Director of the Bureau of Competition, who began more than two years into Khan's tenure, and came from the "big law" that the revolving door advocates decry, may reflect a change in this approach. See Federal Trade Commission, "FTC Chair Khan Names Henry Liu as the Agency's Bureau of Competition Director," press release, August 22, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-chair-khan-names-henry-liu-agencys-bureau-competition-director.

[195] Marcia Brown, "The Next Generation of Law Students is Obsessed with Lina Khan," *Politico*, November 6, 2023, https://www.politico.com/news/magazine/2023/11/06/law-students-antitrust-lina-khan-00124240.

The evidence does not support the proposition that the revolving door leads FTC careerists to pull their punches in enforcement actions. If anything, it appears to encourage more aggressive enforcement. In fact, the progressives' view of the revolving door has turned on its adherents in the Biden administration, causing them to forego experienced senior employees who could have made significant contributions to the desired change in direction.

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4

The winning formula for policy change

Miles Kirkpatrick replaced Weinberger as FTC Chairman in September 1970, and even before the end of his tenure in early 1973, the agency was regarded as having been effectively revitalized. The FTC had reorganized, hired new staff, and set a new policy agenda, featuring new regulation of advertising and the initiation of antitrust cases using the structure, conduct, performance paradigm then favored in industrial organization economics.

Similarly, Miller spent his initial months laying institutional foundations to enhance rigor and establish policy guardrails following the widespread criticism of agency overreach. He reorganized consumer protection enforcement, initiated the fraud program, revisited the law of deception, instituted a review of the advertising substantiation program, devised criteria to evaluate pending rule proposals, and began working through the backlog of proposed rules. In antitrust, he established foundations for challenging misuse of government to restrict competition, promoting competition in the professions, challenging anticompetitive actions by trade associations, and developing the criteria for evaluating oil mergers. He also relied on the 1982 rewrite of the merger guidelines from his fellow Reagan appointee, Assistant Attorney General for Antitrust William Baxter.

We here address the key elements of past successes in implementing change at the FTC. To assess agency policy success in earlier change eras, we build on previous scholarship that emphasizes, inter alia, how the agency is perceived among its key constituencies, including its staff, the regulated community, and the courts.[196] We address two specific questions. First, was there agreement that change was needed, and second, were there widely accepted new policies to implement? In the Nixon years, there was a strong consensus about the need for overall change, and, as we consider in detail below, a strong academic consensus about appropriate directions for competition policy. With the consumer movement ascendant and expanding, there was also strong public support for a more activist agency. Similarly, when Reagan took office, there was widespread recognition that the agency had overreached. Regarding antitrust, the emergent consumer welfare standard provided clear direction and intellectual support for the policies to follow. There was less consensus about appropriate consumer protection policies, but the Reagan team began building a consensus that ultimately proved durable and included major parts of the advertising policy that Kirkpatrick had developed.

Was there widespread recognition of the need for change?

Nixon's change consensus: Caspar Weinberger arrived as Chair on New Year's Day in 1970 with an unambiguous mandate for change. Echoing many previous scholarly assessments of the Commission's inadequacies,[197] the Nader Report on the FTC concluded in January 1969 that the agency was a failure, in near total disarray. It had failed to detect violations systematically, to establish priorities, to enforce its statutes, and to seek the necessary resources.[198] The report was reviewed favorably in numerous articles and editorials, supported in Congress, and even praised by some within the Commission.[199]

At the request of President Nixon, the more prestigious and authoritative American Bar Association Report weighed in later in 1969. The special commission of 16 scholars and practitioners criticized the FTC for mismanagement, excessive delay, a focus on trivia, and ineffective direction. It concluded that:

[196] For an elaboration of these criteria for success, see Timothy J. Muris, "Principles for a Successful Competition Agency," *University of Chicago Law Review*, Vol. 72, No. 1 (2005), pp. 167-168, https://chicagounbound.uchicago.edu/uclrev/vol72/iss1/9/.

[197] See Muris and Clarkson, "Introduction," p. 1.

[198] Cox, Fellmeth, Schultz, *The Nader Report*.

[199] See Muris and Clarkson, "Introduction," pp. 2-3, and the sources cited therein.

it should be the last such assessment of the long series of committees and groups which have earnestly insisted that drastic changes were essential to re-create the FTC in its intended image. The case for change is plain. What is required is that changes now be made, and in depth. Further temporizing is indefensible. Notwithstanding the great potential of the FTC in the field of antitrust 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.[200]

It is hard to imagine a clearer consensus for change, and Weinberger began immediately. The previous chapter describes his organizational and personnel changes in detail, and we discuss the specific policies that Nixon's Chairmen began below.

By late 1972, the agency was regarded as revitalized.[201] One scholarly study termed the transformation of the Commission in the 1970s "a remarkable metamorphosis."[202] Congress was supportive, particularly the Senate Commerce Committee. Its leader, Warren Magnuson, pursued a consumerist agenda "to revitalize a flagging political career," with its chief consumer counsel, Michael Pertschuk.[203]

From success to overreach: How did the agency find itself threatened by the end of the decade with significant legislative curbs, and its very existence seemingly at stake? Although hardly obvious at the time, an event seen initially as an important victory in the United States Supreme Court proved of special significance.

On March 1, 1972, the Court decided the Sperry & Hutchinson case, appearing to bless an expansive reading of the FTC's authority to prohibit "unfair" practices, an authority distinct from the prohibition on "unfair methods of competition"[204] The decision inspired the newly-created Bureau of Consumer Protection to form a special unit dedicated to exploring the limits of unfairness.[205] The Supreme Court had cited, in a passage unnecessary to the court's ruling (i.e., in dicta), the FTC's cigarette rule three-part definition of unfairness, which included reliance on public policy, as well as the even more flexible "immoral, unethical, oppressive, or unscrupulous" prong.[206] We were to see the Court's blessing of this test quoted dozens of times in internal memoranda during our tenure at the FTC in the 1970s,[207] and the temptation for the Commission to use unfairness in rules to try to remake major parts of the American economy proved irresistible.

When Congress codified the Commission's rulemaking authority, effective at the beginning of 1975,[208] a volcano of proposals erupted. The Commission published rules to govern its new authority in April 1975, and by April 1976, it had begun 16 rulemakings under the Act, most designed to reshape major industries.[209] This would have been an ambitious rulemaking agenda for any agency, but especially so for an agency with relatively little rulemaking experience and implementing a largely untested "hybrid" model for rulemaking.

Even without the Supreme Court's S&H opinion, rules would likely have become a more prominent part of the FTC as the 1970s continued. Weinberger and Kirkpatrick had inherited a rule requiring the posting of octane ratings on gasoline pumps. Although the district court ruled, in a challenge to the octane rule, that the FTC lacked broad rule making power, the District of Columbia Circuit Court of

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200 American Bar Association, *Report of the ABA Commission to Study the Federal Trade Commission*, p. 3.

201 Muris and Clarkson, "Introduction," p. 5, and sources cited therein.

202 Harris and Milkis, *The Politics of Regulatory Change*, p. 141.

203 Harris and Milkis, *The Politics of Regulatory Change*, p. 171.

204 *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n. 5 (1972).

205 See Beales and Muris, *Back to the Future*, p. 7.

206 *Sperry & Hutchinson Co.*, 405 U.S. at 244 n. 5.

207 The Court said that the FTC "does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond those enshrined in the letter or encompassed in the spirit of the antitrust laws." *Sperry & Hutchinson Co.*, 405 U.S. at 244 n. 5. Perhaps because of the Congressional reaction to the Cigarette Rule itself, the Commission made little use of the cigarette rule unfairness standard until after this decision. See Beales and Muris, *Back to the Future*, p. 6.

208 Magnuson Moss Warranty—Federal Trade Commission Improvements Act, Public Law 93-637 (1975).

209 Beales and Muris, *Back to the Future*, p. 8.

Appeals reversed that decision 14 months later.[210] Such disclosure rules were less aggressive than those that followed using the powerful unfairness authority. The combination of FTC rule making power, coupled with the broad discretion to use unfairness, was one of the main reasons why Congress eschewed traditional administrative rulemaking procedures, and instead created the FTC's special procedures to make rules.[211]

Rather than pursuing a moderate course of disclosure style rulemaking, by the late 1970s the Commission "was pronouncing programs that had the breadth and force of major pieces of legislation"[212] affecting numerous industries, leading some to call it the second most powerful legislature in Washington.[213] Often based on unfairness, the proposals sought to restructure industries that touched numerous aspects of everyday life, from antacid advertising to funerals to used cars to vocational schools.

The surge of proposals provoked a political backlash, and industry groups sought to restrict the agency's authority. The political tidal wave crested in 1978 when the Commission issued a proposed rule potentially to ban all advertising to young children. Dubbed "Kid Vid," it "galvanized opposition that went well beyond the powerful television and breakfast cereal industries,"[214] leading the *Washington Post*, "the liberal establishment organ,"[215] to mock the FTC as the "National Nanny."[216] Many in industry and even academia saw the rules as imposing significant burdens and demonstrating hostility to legitimate business practices. As Harris and Milkis summarized, proposals "such as children's advertising were not pursued for the attainment of competition or economic efficiency, but to free the oppressed and manipulated consumer from the throes of corporate immorality."[217] Critics saw that as the role of Congress, if anyone, not the job of an unelected Commission.

Congress agreed. An FTC reauthorization bill backed by the House leadership was rejected on the floor, with legislators in both parties voting against the bill because it did not include sufficient controls over the FTC.[218] In what was probably the first time Congress refused to fund an agency over policy disputes, the agency was shut down briefly in May, 1980.[219] Later that month, Congress enacted the FTC Improvements Act, restricting the children's advertising proceeding and adding additional requirements to the FTC rulemaking process and elsewhere.[220] Thus, a Democratic controlled Congress with bipartisan majorities passed significant restrictions on the FTC.

A widely respected antitrust agenda might have helped the FTC overcome its consumer protection woes. The collapse of the intellectual foundations of the competition agenda, discussed below, meant the decline of academic and judicial support for the core of the agency's antitrust program. That in turn reduced the defense of the agency among the business community, the bar, and opinion leaders, leaving Congress to work its will.

Reagan's change consensus: The election of Ronald Reagan in 1980, who had campaigned for significant regulatory reform, guaranteed continued momentum for change at the already chastised FTC. In his first weeks in office, he issued an executive order requiring benefit-cost analysis of regulatory proposals and providing for review by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget of proposed or final executive branch rules before publication. The point person for those efforts, James Miller, the coordinator for the Taskforce on Regulatory Relief and the head of OIRA, became FTC Chair in October, 1981. In late 1980, Miller had chaired the Reagan transition team for the FTC, and the new Republican President

210 *National Petroleum Refiners Association v. Federal Trade Commission,* 482 F.2d 672 (D.C. Cir. 1973). Rules under this authority allowed less powerful remedies than so-called Magnuson-Moss Rules. See Beales and Muris, *Back to the Future,* p. 7.

211 Beales and Muris, *Back to the Future,* pp. 7-8.

212 Harris and Milkis, *The Politics of Regulatory Change,* p. 182.

213 "In fact, the Federal Trade Commission may be the second most powerful legislature in the country." Barry Goldwater and Harrison Schmitt, Senate Report No. 96-184, p. 18 (1980).

214 Harris and Milkis, *The Politics of Regulatory Change,* p. 184.

215 Harris and Milkis, *The Politics of Regulatory Change,* p. 184.

216 "The FTC as National Nanny," *Washington Post,* March 1, 1978, https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/.

217 Harris and Milkis, *The Politics of Regulatory Change,* pp. 185-186.

218 *Congressional Record,* Vol. 124, Part 4 (February 28, 1978), pp. 5,017-5,018.

219 See Beales, "The Federal Trade Commission's Use of Unfairness Authority," p. 193.

220 See Beales and Muris, *Back to the Future,* pp. 12-13.

thus had appointed an advocate of deregulation as Chairman. As with Weinberger's arrival, there was a bipartisan consensus that the FTC's policies he inherited needed change.

We discuss the specific policies implemented in the Reagan FTC below. Although sometimes controversial at the time, Miller helped establish what became a bipartisan consumer protection and competition policy. Of course, the subsequent success of the Reagan FTC in implementing an agenda that lasted for four decades required much more than the efforts of Miller and his team. Subsequent administrations accepted the basic approach, and then built and developed it in important and sometimes different directions. Crucially, during the Clinton administration, Chairman Robert Pitofsky followed the outline of an FTC agenda presented in the ABA Antitrust committee's 1989 Kirkpatrick II report.[221] Pitofsky and one of the present authors served on the committee, whose report provided a blueprint for what the Biden administration now condemns as the failed experiment of the last 40 years.[222]

Besides support from subsequent FTC chairs, the approach that Miller began eventually enjoyed considerable support from Congress, sometimes through favorable publicity and requested legislative support. On many occasions, Congress left the FTC largely alone to do the work it appeared to approve, a welcome relief from the turmoil of the late 1970s. Examples of explicit Congressional support included strengthening the agency's fraud program[223] and granting the FTC simplified Administrative Procedure Act ("APA") rulemaking to implement specific statutes, such as the Telemarketing and Consumer Fraud and Abuse Prevention Act,[224] the Children's Online Privacy Protection Act of 1998,[225] and the Fair and Accurate Credit Transactions Act of 2003.[226]

In the courts, the agency enjoyed widespread acceptance, rarely losing cases. Its reputation as a premier antitrust and consumer protection agency grew throughout these decades. Since 2001, Global Competition Review has published an annual ranking of about 40 competition enforcement agencies. The ranking uses a star rating system, with five stars for an "elite" agency and one star for an agency that is merely adequate. The FTC is the *only* competition agency that received a 5 star rating *every year* from 2001 through 2020.[227] Perhaps unsurprisingly, given the decline in support for the Biden FTC in the OPM surveys,[228] Chair Khan ended the FTC's participation in this international ranking exercise, and the FTC did not appear in the 2022 report.[229]

Is there widespread agreement about the new policies?

Implementing change is easier with widespread agreement about what new policies should replace the old. We consider the degree of consensus for policy change in both of the prior "change" eras.

Consensus spurred new Nixon policies: The 1969 ABA Report helped provide the competition agenda for the Weinberger-Kirkpatrick administration. That agenda reflected what was then a broad consensus among antitrust lawyers and economists about both how to analyze policy and the proper role for government regulation.

One key feature of this approach to the competition mission was to deemphasize enforcement of the Robinson Patman Act. Enacted in 1936, a year after the Supreme Court declared the National Industrial Recovery Act (NIRA) unconstitutional, the act sought to protect traditional retailers from the emerging competition of chain stores, most notably the Great Atlantic and Pacific Tea Company (A&P). Unable to enact the industry codes that had been written under the NIRA for this purpose, Congress instead

221 Miles W. Kirkpatrick, *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, reprinted in *Antitrust Law Journal*, Vol. 58, No. 1 (April 1989) (Kirkpatrick II), https://www.jstor.org/stable/40841199.

222 For a fuller discussion of Pitofsky's term as Chair and its relationship to Kirkpatrick II, see Timothy J. Muris, "Robert Pitofsky: Public Servant and Scholar," *Case Western Reserve Law Review*, Vol. 52, No. 1 (2001), https://scholarlycommons.law.case.edu/caselrev/vol52/iss1/5/.

223 See Beales and Muris, "FTC Consumer Protection at 100," Section II.

224 Public Law No. 103-297, 108 Stat. 1545, codified at 15 U.S.C. §§ 6101-6108. The Act originally passed in 1994 and was subsequently amended.

225 Public Law No. 105-277, title 13, codified at 15 U.S.C. §§ 6501-6506.

226 Public Law No. 108-159, sec. 3, 117 Stat. 1953, codified at 15 U.S.C. § 1681s.

227 Kovacic, "Keeping Score: Improving the Positive Foundations for Antitrust Policy," p. 61.

228 See the discussion above, Section III B.

229 See "Rating Enforcement 2022," Global Competition Review, accessed April 2, 2024, https://globalcompetitionreview.com/survey/rating-enforcement/2022.

passed language that is vague, frequently self-contradictory, and open to varying interpretations. The Act quickly became the centerpiece of the Commission's antitrust agenda, with the agency frequently pursuing aggressive interpretations that raised costs for consumers. Although there was already some reduction during the later part of the 1960s, the 1969 Kirkpatrick report excoriated the FTC's enforcement. Nixon's FTC deemphasized Robinson Patman enforcement. A devastating 1977 Department of Justice report on the Act found the Act protectionist with adverse effects on competition and consumers, and court decisions that significantly tried to interpret the statute consistent with the larger body of antitrust law also helped lead to virtual abandonment of government enforcement.[230]

Praise for Robinson Patman has been scarce among prominent scholars or antitrust enforcers since the mid-1970s, and virtually nonexistent in this century – until the neo-Brandeisians. Lina Khan pointed to Robinson-Patman as a weapon to rein in the perceived excessive power of the latest disruptive retailer, Amazon.[231] As Chair, her praise of this discredited statute has continued,[232] and the FTC is attempting both to revive the statute and to apply Robinson Patman principles in some of its FTC Act cases.

Instead of Robinson Patman, with its populist animus toward bigness, the 1970s FTC relied on industrial organization economics, which on a much different basis also criticized many large businesses. In 1970, there was a widely shared belief among industrial organization economists, antitrust scholars, and enforcers that a close correlation existed between industry concentration and economic performance. The prevailing paradigm, using structure, conduct, performance to understand the economy, was the organizing principle of a widely used textbook on industrial organization, first published in that year.[233] Industry structure influenced firm conduct – the strategies firms would pursue, as well as how they would organize production. In turn, conduct influenced performance, usually measured by profitability or industry prices and output. High profits were regarded as an indicator of market power, leading to poor economic performance.

During that era, numerous empirical studies claimed to find a relationship between concentration and profitability: using accounting data, firms in industries with high concentration ratios (usually the market share of the four largest firms) allegedly had statistically significantly greater profitability, although the actual differences in many prominent studies were often not large.[234] Profitability was thought to increase because decreased competition that raised prices was more likely even at concentration levels regarded as modest by later enforcers and scholars. The implications for antitrust policy seemed straightforward. Merger policy should prevent mergers in these concentrated markets, and antitrust laws should be used to dismantle highly concentrated industries. This was the deconcentration or simple market concentration doctrine, and it formed a centerpiece of the Nixon FTC's competition agenda. It also provided mainstream economic support for the populist "big is bad" notion that had motivated much of merger policy in the 1950s and 1960s.[235]

The simple market concentration doctrine dominated FTC antitrust throughout the 1970s, with several major initiatives. Most of these cases came to naught. One of the first was the "shared monopoly" complaint against the breakfast cereal industry, filed in 1972, seeking divestiture and mandatory trademark licensing. The case was dismissed ten years later.[236] In 1973, the Commission filed a complaint against the eight leading petroleum refiners seeking horizontal and vertical divestitures. The case was dismissed in 1981.[237] In 1976, the FTC launched an investigation of General Motors

[230] For a detailed discussion of the history and adverse effects of the Robinson Patman Act, including discussion of the extensive scholarship critical of the Act, see Muris, *Neo-Brandeisian Antitrust*, Chapter 2.

[231] Lina Khan, "A Remedy for Amazon-Hachette Fight?," CNN, May 30, 2014, https://www.cnn.com/2014/05/30/opinion/khan-amazon-hachette-antitrust/index.html.

[232] Lina Khan, "Introduction and Keynote Address - Lee E. Teitelbaum Utah Law Review 2022 Symposium," University of Utah S.J. Quinney College of Law, October 21, 2022, YouTube video, November 1, 2022, https://www.youtube.com/watch?v=UpDDSOi7dtg.

[233] F.M. Scherer, *Industrial Market Structure and Economic Performance* (Chicago: Rand McNally & Co., 1970). Scherer became Director of the FTC's Bureau of Economics in 1973.

[234] Scherer's textbook includes an encyclopedic review of this literature.

[235] See Muris, *Neo-Brandeisian Antitrust*, Chapter 3.

[236] The complaint was issued April 26, 1972, and dismissed in January 1982. See In the Matter of Kellogg Company et al., 99 F.T.C 8 (1982).

[237] For a description of the FTC's 1972 complaint, see Exxon Corp., 98 F.T.C. 453, 454-459 (1981).

on the premise that GM, and perhaps Ford, should be broken up, but closed the matter in 1981, unable to find any evidence of monopoly profits.[238] Other cases alleged monopolization through exploitation of patents. A 1973 complaint against Xerox yielded a consent agreement in 1975 that required the company to license all of its patents, with the first three licenses to each firm royalty-free.[239] Importantly, these cases were "premised substantially or wholly upon the capacity of Section 5 of the FTC Act to reach beyond existing interpretations of the other antitrust laws."[240]

The Commission also aggressively pursued allegations of predatory pricing, also with limited success. A 1974 complaint charged IT&T, the maker of Wonder Bread, with attempted monopolization through predatory pricing. The case was dismissed a decade later.[241] The agency also alleged predatory pricing by the largest roaster of coffee[242] and the largest producer of reprocessed lemon juice.[243]

Although Chicago economists had long questioned predatory pricing cases,[244] it was Harvard scholars Phillip Areeda and Donald Turner who formulated what quickly became the prevailing legal test for predatory pricing.[245] A violation requires sales below cost, as well as likely recoupment – the violator can reasonably anticipate recovering the inevitable losses from prices that are predatory.[246] The article substantially undermined the rationale for the Commission's cases, which could not meet the Areeda-Turner test.

There was always an alternative explanation for the concentration-profitability relationship, namely that the leading firms in more concentrated industries were either more efficient or offered superior products. Harold Demsetz noted that if anticompetitive behavior explained the relationship, then smaller firms in the industry should benefit as well – but they do not.[247] The higher profits arose from better performance, and Sam Peltzman found that lower costs in more concentrated industries, resulting from the expansion of more efficient firms, was primarily responsible for the concentration-profitability relationship.[248] Thus, the main plank of the antitrust agenda, based on the simple market concentration that had unified populism and mainstream economics, lost intellectual support. A crucial conference in 1974, with papers published in a highly influential book,[249] summarized much of this research.

Although the consensus behind deconcentration was crumbling, and gone before the end of the 1970s, the FTC continued to pursue policies based on the old learning throughout the decade. Thus, the FTC clung to the discredited analysis long past its "sell by" date. In part, this reflected the sometimes lengthy process of litigation. The "shared monopoly" case against the cereal industry, for example, started with a complaint issued in the Nixon years, but was still awaiting a final Commission decision after Reagan's election.[250] The Commission also continued the effort to break up the oil industry and the predatory pricing cases

[238] See the discussion at note 114.

[239] See Xerox Corp., 86 F.T.C. 364, 379-380 (1975), modified, 91 F.T.C. 728, and modified, 100 F.T.C. 455 (1982), and modified, 102 F.T.C. 1107 (1983).

[240] William E. Kovacic, "'Competition Policy in Its Broadest Sense:' Michael Pertschuk's Chairmanship of the Federal Trade Commission 1977-1981," *William & Mary Law Review*, Vol. 60 No. 4 (2019), p. 1286, https://scholarship.law.wm.edu/wmlr/vol60/iss4/6/.

[241] International Telephone & Telegraph Corp., 104 F.T.C. 280 (1984). The complaint was issued in 1974.

[242] General Foods Corp., 103 F.T.C. 204, 204-208 (1984) (dismissing complaint). The complaint was issued in 1976. See the discussion in Tim Muris and Joseph Coniglio, "What *Brooke Group* Joined Let None Put Asunder: The Need for the Price-Cost and Recoupment Prongs in Analyzing Digital Predation," in *The Global Antitrust Institute Report on the Digital Economy* (2020), https://gaidigitalreport.com/2020/10/04/the-law-and-economics-of-predation-in-digital-markets/.

[243] For a description of the FTC's 1974 complaint, see Borden Inc., 92 F.T.C. 669, 669-672 (1978), aff'd, 674 F.2d 498 (6th Cir. 1982), modified, 102 F.T.C. 1147 (1983).

[244] John S. McGee, "Predatory Price Cutting: The Standard Oil (N.J.) Case," *Journal of Law & Economics*, Vol. 1 (October 1958), https://www.jstor.org/stable/724888.

[245] Phillip Areeda and Donald F. Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act," *Harvard Law Review*, Vol. 88, No. 4 (February 1975), https://www.jstor.org/stable/1340237; see also Herbert J. Hovenkamp, "Predatory Pricing under the Areeda-Turner Test," All Faculty Scholarship 1825 (March 2015), https://scholarship.law.upenn.edu/faculty_scholarship/1825. "Few works of legal scholarship have had the impact enjoyed by Areeda and Turner". Hovenkamp, "Predatory Pricing under the Areeda-Turner Test," p. 1.

[246] Areeda and Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act." Areeda and Turner viewed average variable cost as the proper measure of cost, but judicial opinions have been flexible in defining costs.

[247] Harold Demsetz, "Industry Structure, Market Rivalry, and Public Policy," *Journal of Law and Economics*, Vol. 16, No. 1 (1973), https://www.journals.uchicago.edu/doi/abs/10.1086/466752.

[248] Sam Peltzman, "The Gains and Losses from Industrial Concentration," *Journal of Law and Economics*, Vol. 20, No. 2 (April 1977), pp. 229-263, https://www.journals.uchicago.edu/doi/abs/10.1086/466902.

[249] Harvey J. Goldschmid, H. Michael Mann, and J. Fred Weston, eds., *Industrial Concentration: The New Learning* (Boston: Little, Brown, 1974). For a recent discussion, see Bruce H. Kobayashi and Timothy J. Muris, *Turning Back the Clock: Structural Presumptions in Merger Analysis and Revised Merger Guidelines* (Competitive Enterprise Institute, February 2023), https://cei.org/wp-content/uploads/2023/02/KobayashiMuris-FINAL-Layout-RY-approved.pdf.

[250] In the Matter of Kellogg Company et al., 99 F.T.C 8 (1982).

in administrative litigation after the intellectual foundations had evaporated.

Despite the loss of intellectual support, in 1979 the Carter administration endorsed no-fault monopoly based on the deconcentration theory.[251] The Commission even initiated new cases based on the old doctrine. For example, in 1978 the Commission alleged that plant expansion announcements constituted strategic entry deterrence and were an unfair method of competition. First the Administrative Law Judge and then the Commission itself dismissed the case.[252] The Commission also brought a test case seeking to overturn a Supreme Court decision creating a safe harbor for firms that announced a policy of not selling to discounters and terminating those who nevertheless discounted.[253] The Court of Appeals reversed the Commission's order.[254] As these old cases wound down, the massive resource expenditure on that old learning declined sharply.

As in antitrust, the ABA Report guided the Nixon administration's consumer protection agenda. The report called for a more effective campaign against deceptive advertising, strengthened remedies, reduced delays, more guidance for industry, and increased incentives for both compliance and self-regulation. The report also recommended more studies, reports, and legislative recommendations on key consumer issues.[255] The ABA reflected a substantial consensus among academics and practitioners, while the earlier Nader's Raiders report made clear the consensus also included consumer activists.[256]

Weinberger and Kirkpatrick moved rapidly to implement this agenda. The Director of the newly created Bureau of Consumer Protection, Robert Pitofsky, a principal author of the ABA Report (and later Commissioner and Chairman), transformed consumer protection. The Bureau held early hearings on Advertising and the Public Interest, issuing a report and recommendations in 1973.[257] The Commission launched an aggressive array of advertising cases, attacking deception in food and drug advertising, energy and environmental claims, and advertising to children.[258] A cornerstone of the advertising agenda was developing the principle of advertising substantiation, requiring advertisers to have a "reasonable basis" to support their claims before making them. A complaint challenging claims that a sunburn remedy could actually anesthetize nerves was issued in July, 1970, and the Commission's decision establishing the reasonable basis doctrine issued two years later. [259]

The substantiation requirement was a foundation of the Commission's successful case by case approach to advertising regulation. It was also the basis for increased advertising industry self-regulation. When the highly successful National Advertising Review Board (NARB) was established in 1971, one of its first principles was that advertisers must have reasonable substantiation for their claims.[260]

The Weinberger-Kirkpatrick Commission also acted to facilitate the flow of information to consumers. It regarded comparative advertising as useful for consumers, and persuaded the television networks to eliminate the prohibitions then in place for such ads.[261] This policy was codified in 1979, when the Commission adopted a comparative advertising policy statement.[262]

The FTC's consumer protection enforcement and self-regulation efforts succeeded, but consumer protection rulemaking, after Kirkpatrick had left, sowed the seeds of the political disaster for the

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251 See *Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures* (January 22, 1979).

252 E.I. Du Pont de Nemours & Co., 96 F.T.C. 653 (1980).

253 Russel Stover Candies, Inc., 100 F.T.C. 1 (1980). The Supreme Court case was *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

254 *Russel Stover Candies, Inc. v. Federal Trade Commission*, 718 F.2d 256 (8th Cir. 1983).

255 American Bar Association, *Report of the ABA Commission to Study the Federal Trade Commission*, p. 3.

256 Cox, Fellmeth, Schultz, *The Nader Report*.

257 John A. Howard and James Hulbert, *Advertising and The Public Interest: A Staff Report to the Federal Trade Commission* (Chicago: Crain Communication Inc., 1973).

258 See the discussion and the cases cited in Muris, "Robert Pitofsky: Public Servant and Scholar."

259 Administrative Order, Pfizer, Inc., 81 F.T.C. 23 (1972).

260 For a discussion of the need for advertising substantiation, see, e.g., Stanley E. Cohen, "Who'll Demand Ad Proof Is Lively Question, But Someone Clearly Will," *Advertising Age*, June 21, 1971, p. 70.

261 For a discussion of the efforts initiated by Pitofsky to persuade the major television networks to end voluntary bans on comparative advertising, see Federal Trade Commission, Consumer Information Remedies: Policy Review Session (Washington, DC: U.S. Government Printing Office, 1979), pp. 221-233.

262 16 C.F.R. § 14.15.

FTC discussed above.[263] In part, the tidal wave of rulemaking proposals simply overwhelmed the agency's capacities. The early proposals resulted from investigations that did not contemplate hybrid rulemaking, such as building support for case by case enforcement, or perhaps for Administrative Procedure Act rulemaking. The material supporting the proposals consisted of "large quantities of almost random information,"[264] and the agency tended to put it all on the rulemaking record. Placing material on the public record "in an orderly fashion" was frequently difficult, however, and once there, it was "practically inaccessibl[e]."[265] Public comments posed some of the same problems.[266]

The rulemakings also posed significant managerial challenges when leadership changed with the Pertschuk administration. As we have discussed in detail elsewhere, there was often no clear legal or substantive theory of why the rule was necessary or appropriate.[267] As a practical matter, the new leadership learned the details of each rule when it advanced to the next stage requiring management review, which was often the Bureau's review of a draft staff report.

Reagan helped build new policy consensus: By the time Jim Miller arrived, widespread support for the simple market concentration doctrine had disappeared. 1970s antitrust had married this doctrine to the populism of previous decades while retaining aggressive competitor protection through the predatory pricing cases discussed above, but rejected in the academy. Moreover, the Supreme Court was changing antitrust law, rejecting the protection of competitors and embracing the consumer welfare standard.[268] The FTC in the 1970s had failed to recognize those changes, particularly the changes in judicial standards, which had occurred well before the decade ended. The turnaround in court shocked the agency. From 1970 to 1976, the Commission won 21 of 23 antitrust cases heard on appeal. From 1977 to 1983, it won only 13 of 35 cases filed in the 1970s, including only 8 of 22 merger cases.[269]

When Miller arrived, antitrust reflected the new consensus, including a growing recognition that vertical restraints, which had been a major focus of antitrust attack in the 1960s and 1970s, were rarely anticompetitive. Yet, the Carter FTC had resisted the Supreme Court's 1977 decision abandoning the per se rule against non-price vertical restraints. For example, a 1971 complaint challenged the use of exclusive territories in the soft drink industry, with the Commission finding a violation in 1978 despite the Court's decision the previous year.[270] Congress soon overturned the FTC's decision.[271] Moreover, antitrust's sole focus on the welfare of consumers was replacing the populist tendencies in the law, exemplified by those vertical cases, as well as by attacks on so-called predatory pricing and by much of merger law.

Consistent with his long-held beliefs that market forces were ordinarily preferable to government regulation, Miller created task forces to study the legal and factual issues that government restraints on competition create. Various legal doctrines can protect business use of government to restrain competition, including the right to petition the government, known in antitrust law as the Noerr-Pennington doctrine, after the first two major Supreme Court cases discussing the issues.[272] Moreover, states, if they meet certain conditions, can regulate to protect activity that would otherwise violate the antitrust laws. After Miller's task forces evaluated the legal parameters

263 See text accompanying notes 200-220.

264 Barry B. Boyer, "Executive Summary of Barry B. Boyer Report. Trade Regulation Rulemaking Procedures of the Federal Trade Commission," Consultant Report in Support of Recommendations 79-1, in Administrative Conference of the United States, *Recommendations and Reports* (1979), p. 57, https://archive.org/details/gov.acus.1979.rec/page/n1/mode/2up?view=theater.

265 Boyer, "Executive Summer of Barry B. Boyer Report," p. 59.

266 Boyer, "Executive Summer of Barry B. Boyer Report," p. 59.

267 See Beales and Muris, *Back to the Future*, p. 8.

268 See, e.g., *Brunswick Corp. v. Pueblo Bowl-O-Matt, Inc.*, 429 U.S. 477, 488 (1977). "The antitrust laws were enacted for the protection of competition, not competitors." In the same year, the Court overturned a 10-year-old precedent, built on competitor protection, and found nonprice vertical restraints were no longer per se illegal. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

269 See Muris, *Neo-Brandeisian Antitrust*, Chapter 3 Conclusion, p. 81, citing Carol Crawford, Timothy Muris, and John Peterman, "Federal Trade Commission Law Enforcement in the 1980s," October 1984, p. 41 (on file with the authors).

270 Coca-Cola Co., 91 F.T.C. 517 (1978).

271 Soft Drink Interbrand Competition Act, 15 U.S.C. §§ 3501-3503 (July 9, 1980). For a full discussion, see Timothy J. Muris, David T. Scheffman, and Pablo T. Spiller. *Strategy, Structure, and Antitrust in the Carbonated Soft-Drink Industry* (Westport, CT; Quorum Books, 1993).

272 *Eastern R. Conference v. Noerr Motors,* 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

of both areas, the agency filed cases to test those parameters.[273]

Reflecting the change in the law that the Supreme Court had enunciated toward vertical restraints, Miller instituted an aggressive program of modifying consent orders that were inconsistent with the Supreme Court's changing positions. He also expanded the agency's efforts involving health care, the professions, and trade associations. Many court victories followed, including three in the Supreme Court.[274]

Regarding mergers, the agency implemented the DOJ 1982 merger guidelines. Although the FTC did not join in issuing the guidelines – the 1968 guidelines were DOJ only, and Miller lacked a clear majority in 1982 in any event – the agency did issue its own, weaker statement. Miller and his team had discussed the guidelines with the Justice Department during their drafting, and in evaluating mergers sought to apply them. Those guidelines were an important rejection of previous merger policy, necessitated by the rejection of the simple market concentration doctrine and the Commission's repeated court losses in merger challenges. Change was necessary, if for no other reason than to reverse this disastrous record. Oil mergers were a major issue throughout Miller's tenure, and the agency developed the template for approaching this politically sensitive area.[275]

Thus, during the Reagan first term, the foundations of what President Biden and the Neo-Brandeisians criticize today were already in place, although in the early stages of policy development and implementation. The modern approach within the agencies, which relied on a robust manifestation of what lawyers call the "rule of reason" did not become fully apparent for many years. Over time, with experience and amendments to the guidelines, the bipartisan approach to mergers that the Biden team seeks to overthrow developed. Moreover, the Reagan administration largely moved from single firm cases under Sherman Act Section 2, rejecting the approach it inherited, with the notable exception of the AT&T settlement.[276] The Commission also began to focus on the state action and Noerr Pennington doctrines, laying the groundwork for a more refined approach to single firm cases that developed later in the so-called 40 years.

Particularly noteworthy in Miller's early tenure was his personal fight to save the FTC's jurisdiction over the professions. Especially after an equally divided Supreme Court early in 1982 affirmed a circuit court decision that the FTC could sue nonprofit professional associations that restricted trade,[277] pressure to exempt professions from the FTC Act increased, with considerable prospects for success. Even though some in the Reagan White House wanted to compromise, Miller risked his personal prestige to lead the effort to defeat the exemption. Even Miller's opponents, including Commissioner Pertschuk,[278] praised the Chairman's efforts and recognized that his reputation as a market-oriented economist critical of the FTC in the 1970s was essential to rally support for this crucial part of the agency's mission.[279]

When Miller arrived at the FTC in 1981, there was a clear consensus that the Commission's consumer protection program was amiss. There was, however, no broad consensus about sensible consumer protection policy. In fact, many industries opposed to the Commission's past actions simply argued that they should be excluded from FTC jurisdiction. Moreover, as noted above, Miller faced a substantial backlog of eleven rulemaking proceedings[280] that continued to consume substantial time and energy among the staff, managers, and at the Commission itself.

[273] See, e.g., *Federal Trade Commission v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992); Amerco, 109 F.T.C. 135 (1987); In the matter of The City of New Orleans, 105 F.T.C. 1 (1985); In the Matter of the City of Minneapolis, 105 F.T.C. 304 (1985).

[274] *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). This case, started in the Carter Administration, reflected work on the professions and health care that began in the Nixon/Ford years. See also *Ticor Title Insurance Co.*, 504 U.S. 621 (1992); *Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990).

[275] For a discussion on the FTC's long history with this industry, see Timothy J. Muris and Bilal K. Sayyed, "The Long Shadow of *Standard Oil*: Policy, Petroleum, and Politics at the Federal Trade Commission," *Southern California Law Review*, Vol. 85, No. 3 (March 2012), https://southerncalifornialawreview.com/2012/03/07/the-long-shadow-of-standard-oil-policy-petroleum-and-politics-at-the-federal-trade-commission-article-by-timothy-j-muris-bilal-k-sayyed/.

[276] *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1983).

[277] *American Medical Association v. Federal Trade Commission*, 455 U.S. 676 (1982).

[278] One of the authors met routinely with each Commissioner during this period, discussing numerous issues, including the professions.

[279] For discussion of the key events in Congress, see "The Senate, in a Move a Consumer Activist Said...," UPI Archive, December 17, 1982, https://www.upi.com/Archives/1982/12/17/The-Senate-in-a-move-a-consumer-activist-said/9239408949200/.

[280] Harris and Milkis, *The Politics of Regulatory Change*, p. 197.

The rulemaking backlog posed particular challenges. The Commission and its staff tend to regard sunk costs as investments, and substantial resources had been committed in the earlier stages of the process. Although these costs obviously could not be recovered, there was strong reluctance to see past commitments "wasted."[281] Thus, there was considerable momentum for the rules to continue on their course.

Moreover, Miller initially lacked a Commission majority,[282] making the likely fate of the rules unclear to the staff. Miller demonstrated by his early opposition to rules coming before the Commission, even if he was outvoted, that rulemaking would be evaluated on cost-benefit grounds, and that the records would have to support an affirmative conclusion of net benefits.[283] The Commission in the 1970s did not attempt to justify most rules on that basis, however, and as a result rulemaking records often contained little evidence addressing these key questions. Many of the proposals were flawed from their inception, and very few rules from that era became law. Those that did were significantly weaker versions of the original proposals.[284]

Miller implemented an agenda using enhanced economic analysis.[285] The economic well-being of consumers provided a firmer basis for FTC policy than the ad hoc antagonism toward various market outcomes that characterized many FTC actions. Brandeis and other opponents of bigness "angrily denounced conspicuous consumption. But in so doing, he drifted imperceptibly into an attack on consumer preference, a principle that lies at the very core of a market economy."[286] As Harris and Milkis noted, the consumer "movement was inspired by the view that 'irrational' behavior on the part of the consumer was due to responses conditioned by an immoral society, an immorality bred primarily by powerful business interests."[287] Miller's contrary view was clear: consumer preferences were the touchstone for consumer protection. This framework provided "an intellectual alternative to the public lobby regime [and] contributed greatly to the substantial success Miller had in redirecting the Commission."[288]

One key aspect of Miller's agenda was mobilizing the Commission's resources to attack fraud.[289] The FTC in the 1970s did not follow the recommendations of the ABA Commission and others that the agency prosecute fraud,[290] although fighting fraud is a fundamental role of government. Fraud is tantamount to theft, distorting the market and frustrating consumer preferences. Fraud also harms legitimate competitors, by reducing the credibility of all advertising, forcing the honest to provide more assurances of performance to overcome consumers' suspicions.

To attack fraud successfully, the agency needed the authority to freeze assets pending a final judicial determination on the merits. The FTC used Section 13(b), asking, in federal district court, for an *ex parte* order freezing assets and preliminarily enjoining ongoing conduct, then disposing of the case on the merits, ordering, if appropriate, that the frozen assets be returned to consumers while issuing a permanent injunction. This approach became known as the "Section 13(b) Fraud Program."[291]

Miller faced some reluctance within the staff and by some Commissioners to attack fraud systematically. As discussed above, foreshadowing today's progressives they argued that the Commission should do more important work, and that other agencies should

[281] See Clarkson and Muris, "Commission Performance, Incentives, and Behavior," p. 291. The same phenomenon contributed to the continued litigation of the major competition cases discussed above.

[282] Although the four-member Commission included three Republicans, Miller was the only Reagan appointee, while one of the Republicans, Patricia Bailey, appointed by President Carter, was a frequent opponent. Miller achieved a working majority when President Reagan appointed Democrat George Douglas in 1982 and Republican Terry Calvani in 1983. Since the Clinton Administration, however, Presidents have deferred to the Senate leader of the other party in choosing Commissioners from that party. Thus, political party matters more today than in the past, and the ideological orientation of Commissioners matters less.

[283] See Muris, "Rules Without Reason."

[284] See Beales and Muris, *Back to the Future*, pp. 8-11.

[285] Harris and Milkis, *The Politics of Regulatory Change*, p. 188.

[286] Thomas K. McGraw, *Prophets of Regulation* (Cambridge, MA: Belknap Press of Harvard University Press, 1984), pp. 107-108, as quoted in Harris and Milkis, *The Politics of Regulatory Change*, p. 148.

[287] Harris and Milkis, *The Politics of Regulatory Change*, p. 185.

[288] Harris and Milkis, *The Politics of Regulatory Change*, pp. 189-190.

[289] For a detailed discussion of the fraud program, see Beales and Muris, "FTC Consumer Protection at 100," pp. 2175-2182.

[290] See American Bar Association, *Report of the ABA Commission to Study the Federal Trade Commission*, pp. 50-52; Cox, Fellmeth, Schultz, *The Nader Report*, pp. 163-168.

[291] See David R. Spiegel, "Chasing the Chameleons: History and Development of the FTC's 13(b) Fraud Program," *Antitrust* (Summer 2004), p. 43.

solve the fraud problem. As the nation's consumer protection agency, however, the FTC was best suited to coordinate a nationwide attack on all forms of fraud. Other agencies, even those that had criminal remedies, often lacked the necessary geographic scope, staff resources, market expertise, and willingness to tackle the problem, given their many responsibilities.

The fraud program has been enormously successful. A second ABA Commission in 1989, which included Kirkpatrick as Chair and later Chairmen Muris and Robert Pitofsky as members, wrote enthusiastically about the program.[292] Although other Chairs after Miller continued to develop the program, when Pitofsky became Chair fraud enforcement took an especially significant step forward. The agency built the Consumer Sentinel database to assemble consumer complaints, to identify emerging fraud trends, identify potential enforcement targets, and locate potential witnesses.[293] It also developed a core of professional investigators trained to uncover fraud, trace assets, develop evidence for trial, and testify in court. These investigators in turn have trained hundreds of local, state, federal, and international criminal and civil law enforcement officials.[294] The fraud program became international in scope, especially with passage in 2006 of the SAFE WEB Act,[295] extending the Commission's authority in information sharing, investigative assistance, cross border jurisdiction, and enforcement relationships. The Commission also extended the program to Spanish language media and created the Criminal Liaison Unit to encourage and work with the many agencies with criminal authorities, that may otherwise lack the time, expertise, and ability to prosecute fraud.

Unfortunately, success led, as too often in FTC history, to overreach. The Commission began seeking monetary relief in cases farther and farther removed from fraud,[296] eventually claiming the authority to obtain restitution or disgorgement in *any* case.[297] In AMG, a unanimous Supreme Court disagreed, ruling that the Commission did not have the authority to seek equitable monetary relief in district court cases, despite the fact that it has been claiming and exercising that power for almost 40 years.[298] As we discuss below, the response to this decision is a significant component of the current Commission's consumer protection agenda.

The Miller FTC also laid the basis for durable change with the Deception Policy Statement.[299] Over the decades, the Commission had developed an extensive and expansive body of case law that, read broadly, gave the Commission the authority to do almost anything based solely on its own extreme interpretations of advertising claims.[300] This "fools test"[301] had been the subject of withering academic criticism, including from then Professor Robert Pitofsky, who noted that past Commissions had carried their supposed mandate to "astonishing lengths."[302] A more sensible line of cases focused on what messages advertisements conveyed to

[292] See Kirkpatrick, *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, reprinted in *Antitrust Law Journal*, Vol. 58, No. 1, pp. 77-82.

[293] See Federal Trade Commission, *The FTC's First Five Years Protecting Consumers Online*, December 1999, pp. 4-5.

[294] See Federal Trade Commission, "FTC Testimony Portends Increase in Privacy Protection Efforts and Aggressive Antitrust Law Enforcement," press release, March 19, 2002, https://www.ftc.gov/news-events/press-releases/2002/03/ftc-testimony-portends-increase-privacy-protection-efforts-and.

[295] See Federal Trade Commission, "FTC Chairman Announces New International Affairs Office," press release, February 5, 2007, http://www.ftc.gov/news-events/press-releases/2007/02/ftc-chairman-announces-new-international-affairs-office; see also U.S. SAFE WEB Act of 2006, Public Law No. 109-455, 120 Stat. 3372, https://uscode.house.gov/statutes/pl/109/455.pdf.

[296] See J. Howard Beales III and Timothy J. Muris, "Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act," *Antitrust Law Journal*, Vol. 79, No. 1 (2013), p. 2, https://www.jstor.org/stable/43486952. That article's warning that expansive use of 13(b) put the fraud program at risk unfortunately proved correct.

[297] See Brief for the Federal Trade Commission, AMG Services Inc., No. 212-cv-00536, November 30, 2020, https://www.ftc.gov/system/files/documents/cases/amg_capital_management_llc_v._ftc_brief_for_the_ftc.pdf.

[298] *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341 (2021).

[299] James C. Miller III, *FTC Policy Statement on Deception* (October 14, 1983), appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

[300] See J. Howard Beales III, "Brightening the Lines: The Use of Policy Statements at the Federal Trade Commission," *Antitrust Law Journal*, Vol. 72, No. 3 (2005), p. 1968, https://www.jstor.org/stable/40843658.

[301] The test derives from an early court opinion declaring that the Commission "should have the discretion, undisturbed by the courts, to insist if it chooses 'upon a form of advertising clear enough so that, in the words of the prophet Isaiah, "wayfaring men, though fools, shall not err therein."'" *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 143 F.2d 676, 680 (2d Cir. 1944) (quoting *General Motors Corp v. Federal Trade Commission*, 114 F.2d 33, 36 (2d Cir. 1940)).

[302] Robert Pitofsky, "Beyond Nader: Consumer Protection and the Regulation of Advertising," *Harvard Law Review*, Vol. 90, No. 4 (February 1977), p. 676, https://www.jstor.org/stable/1340281. In one such case, the Commission solemnly opined that a one-volume desktop encyclopedia did not in fact contain "everything you ever wanted to know about every conceivable subject." National Committee for Education, 39 F.T.C. 171 (1944).

"average" or "ordinary" audience members.[303] The Policy Statement adopted this later approach, stating that a claim is deceptive if it "is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[304]

The Deception Policy Statement was intensely controversial at the time, with dissenting Commissioners predicting it "could substantially narrow the Commission's authority to prosecute a wide range of dishonest and deceptive conduct."[305] As the fraud program makes clear, that never happened. Instead, the statement formed the basis of a strong bipartisan consensus about the kinds of cases the Commission should bring and has been widely accepted in the courts.[306] Although we have criticized some of the Commission's more exotic applications,[307] the Policy Statement remains the foundation of FTC enforcement efforts.

Based on his initial skepticism and criticism from some economists, Miller also launched a review of the advertising substantiation program, seeking public comments on the program's costs and benefits, and on its implementation.[308] The review led to the Advertising Substantiation Policy Statement, adopted in 1984, which reaffirmed the program's basic legal and policy foundations.[309] The statement explained that balancing the risk of mistakenly allowing false claims against mistakenly prohibiting the flow of truthful information is the key factor in determining how much evidence is necessary to constitute a "reasonable basis."[310] It also examined the role of substantiating evidence developed after a claim is initially made, explaining that subsequent evidence is always relevant in evaluating the truth of a claim and the merits of an enforcement action.

As Harris and Milkis observed, Miller's "leadership played a critical role in focusing what had been a rather ad hoc approach to regulatory reform at the FTC into a more systematic effort to redefine the mission and reconstitute the institutions of the agency."[311] That effort led to the well accepted approach to consumer protection that has lasted for over 40 years, and has gone international, as the FTC's leadership in worldwide fraud control efforts makes clear.

303 Pitofsky, "Beyond Nader," p. 675.

304 Miller, *FTC Policy Statement on Deception*.

305 Dissenting Statement of Commissioner Patricia P. Bailey, Concerning the Commissioner's Statement on Deception, October 21, 1983, reprinted in *Deception: FTC Oversight,* Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, House of Representatives, 98th Congress, Second Session, March 26, 1984, Serial No. 98-132 (Washington, D.C.: U.S. Government Printing Office, 1984), p. 209.

306 Beales, "Brightening the Lines," p. 1071.

307 See Beales and Muris, "FTC Consumer Protection at 100," pp. 2186-2191.

308 Federal Trade Commission, "Advertising Substantiation Program," request for comments, *Federal Register*, Vol. 48, No. 49 (March 11, 1983), pp. 10471-10474, https://www.loc.gov/item/fr048049/.

309 Federal Trade Commission, "Policy Statement Regarding Advertising Substantiation," November 23, 1984, appended to Thompson Medical. Co., Inc., 104 F.T.C. 648, 839 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-regarding-advertising-substantiation.

310 See J. Howard Beales III, Timothy J. Muris, and Robert Pitofsky, "In Defense of the *Pfizer* Factors," in James Campbell Cooper, ed., *The Regulatory Revolution at the FTC: A Thirty-Year Perspective on Competition and Consumer Protection* (New York: Oxford Academic, 2013).

311 Harris and Milkis, *The Politics of Regulatory Change*, pp. 193-194.

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The Biden administration's approach to change

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Unlike Jim Miller and the Nixon combination of Caspar Weinberger and Miles Kirkpatrick, Lina Khan did not move quickly to develop and implement a comprehensive plan for the agency. In contrast, the Biden FTC's initial policy efforts appeared more focused on advocating new substantive antitrust laws, along with planning for massive amounts of money in proposed legislation moving through Congress to become a more technology focused agency to regulate both privacy and antitrust. When legislative proposals foundered and the historic funding increases proposed in reconciliation legislation were not enacted, there was no immediate alternative strategy upon which to rely. This chapter discusses these initial Biden efforts to change the FTC.

There was no widespread recognition of the need for change

As we have seen, the FTC that Khan inherited was one of the most widely respected government institutions in the world. Nevertheless, in 2021, President Biden proclaimed the previous 40 years of antitrust an "experiment failed."[312] Biden, and Khan, rejected the longstanding reliance on the welfare of consumers as the basis for the bipartisan approach to antitrust policy. The Biden administration's conclusions are controversial, and do not enjoy the widespread support shared by the simple market concentration doctrine that grounded FTC antitrust in 1970 and the consumer welfare standard in the decades preceding 2020.

Certainly, by 2021, there was recent dissatisfaction with the agency in some quarters, including about competition issues, despite the agency's stellar reputation. As we noted above, Commissioner Chopra regarded the FTC as a failure, and frequently reminded the staff of that view. He argued the Commission was "battling its most serious credibility crisis in decades," because too many "enforcement actions provide no help whatsoever and do nothing to deter misconduct."[313] He told Congress that "the FTC has shown it is willing to be lax and forgiving,"[314] and claimed "there simply is lawlessness in our economy writ large, and the FTC is a big part of it."[315] In frequent dissents from Commission decisions to accept consent agreements, he disparaged orders for not providing meaningful accountability and for not being credible,[316] criticized the staff's approach to pharmaceutical mergers as "narrow, flawed, and ineffective,"[317] and suggested that the remedies used in cases of fraudulent conduct bordering on criminal should be applied routinely to non-fraud cases involving executives of publicly traded companies.[318] The other minority Commissioner in the Trump administration, Rebecca Slaughter, after a few early disagreements in votes with Chopra, frequently also dissented, but often with separate and more tempered statements.

In antitrust, the Biden administration reflects the views of the neo-Brandeisians, for which Khan and Tim Wu, the White House competition advisor for the first two years of the administration, are prominent advocates. Even a few years before the 2020 election, their views were outside the mainstream. Indeed, the 40 years President Biden condemned included 16 years of Democratic control, under Bill Clinton and Barack Obama, years in which the Commission followed policies widely endorsed across the political and academic spectrum. As we discuss below in analyzing the sharp departure in merger policy the Biden appointees propose, former Clinton and Obama antitrust officials have been forced to choose between defending their previous views or supporting their party's current political leadership.

In consumer protection, Chopra was especially skeptical of the fraud program as a centerpiece of the Commission's consumer protection mission, criticizing its "heavy focus on shutting down fly-

312 "Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy," White House.

313 Statement of Commissioner Rohit Chopra, In the matter of Vivint Smart Home, Federal Trade Commission, File No. 192 3060, April 29, 2021, https://www.ftc.gov/system/files/documents/public_statements/1589544/final_chopra_statement_on_vivint.pdf.

314 Prepared Opening Statement of Commissioner Rohit Chopra, for Hearing on "Transforming the FTC: Legislation to Modernize Consumer Protection."

315 Harris, "Trust-Busting is Back."

316 Dissenting Statement of Commissioner Rohit Chopra, Regarding Zoom Video Communications, Inc., Federal Trade Commission, File No. 1923167, November 9, 2020, https://www.ftc.gov/system/files/documents/public_statements/1582914/final_commissioner_chopra_dissenting_statement_on_zoom.pdf.

317 Dissenting Statement of Commissioner Rohit Chopra, in the Matter of AbbVie, Inc. / Allergan plc, p. 3.

318 See Memorandum from Commissioner Rohit Chopra to Commission Staff and Commissioner regarding Repeat Offenders.

by-night criminal scams."[319] Instead, he argued for "reorienting the Agency to focus on the largest problems in the marketplace."[320] His concerns channel those of an earlier progressive when the fraud program was starting, with Michael Pertschuk, Chair during the Carter administration, contending that such cases had "only marginal deterrent effect"[321] and "relatively little impact."[322] Some modern progressives, like their earlier counterparts determined to remake the economy, find focus on criminal scams beneath the FTC, contending fraud is work for someone else.

As with its competition views, these progressive policies are controversial. Because of the need for an agency to lead and coordinate at first the national, and then increasingly the international, fight against fraud, the FTC has assumed a central role, with great success, as we have detailed elsewhere.[323] Attacking fraud has become an immensely popular program with Congress, the press, and the public.

There was no widespread agreement about new policies

The return to "Big is bad": With the success of modern technology companies, it was perhaps inevitable that both their economic and political power would be challenged. Under the acronym GAFA for Google, Apple, Facebook, and Amazon, with occasionally an M added for Microsoft, press, political, and academic attention to "big tech" increased. Lina Khan's nearly 100 page student note in the 2017 Yale law Journal was well timed and widely cited,[324] making its author a celebrity among progressives, and eventually catapulting her to the head of the FTC.

Although attacking bigness for its own sake had long disappeared in antitrust's mainstream, such concerns remained on the fringes. For example, when Wal-Mart became the largest retailer in the United States, Barry Lynn, one of Khan's mentors[325] and Executive Director of the Open Markets Institute, for which Khan worked, complained of its alleged dominance and called for antitrust action.[326] Perhaps because Wal-Mart achieved prominence with at most a small presence in the major American media centers, and business writers did not use its products as they use those of today's large technology companies, Wal-Mart never became the target Lynn and similar critics hoped.

While skepticism about the large tech companies grew under Trump, his antitrust agencies rejected Khan's fundamental conclusion that antitrust law under the consumer welfare standard was inadequate to police the modern technology corporation. In 2020, the FTC sued Facebook[327] while the DOJ sued Google,[328] both with broad allegations of anticompetitive conduct, that, if proven, could lead to some form of at least partial divestiture. Moreover, the Trump DOJ brought a major (albeit unsuccessful) vertical merger challenge, an area progressives faulted the 40 years for allegedly abandoning.[329]

These lawsuits ran counter to the narratives of the press, progressives, and President Biden, as well as counter to Khan's and similar scholarship that antitrust was obviously inadequate. Throughout the 21st-century, the FTC had continued to bring cases charging single firms with monopolization.[330]

319 Rohit Chopra and Samuel A.A. Levine, "The Case for Resurrecting the FTC Act's Civil Penalty Offense Authority," *University of Pennsylvania Law Review*, Vol. 170, No. 1 (2021), p. 73, https://scholarship.law.upenn.edu/penn_law_review/vol170/iss1/3/.

320 Chopra and Levine, "The Case for Resurrecting the FTC Act's Civil Penalty Offense Authority," p. 78.

321 Pertschuk, *FTC Review (1977-84)*, p. 83.

322 Pertschuk, *FTC Review (1977-84)*, p. 1.

323 See Beales and Muris, "FTC Consumer Protection at 100," pp. 2174-2182.

324 Lina M. Khan, "Amazon's Antitrust Paradox," *Yale Law Journal*, Vol. 126, No. 3 (January 2017), pp. 710-905, https://www.yalelawjournal.org/note/amazons-antitrust-paradox. Each of the authors has advised Amazon on a variety of antitrust and consumer protection issues.

325 Rana Foroohar, "Lina Khan: 'This Isn't Just About Antitrust. It's About Values,'" *Financial Times*, March 29, 2019, https://www.ft.com/content/7945c568-4fe7-11e9-9c76-bf4a0ce37d49.

326 See Barry C. Lynn, "Breaking the Chain: The Antitrust Case Against Walmart," *Harper's Magazine*, July 2006, https://harpers.org/archive/2006/07/breaking-the-chain/; Barry C. Lynn, "The Case for Breaking Up Walmart," *Foreign Policy*, April 29, 2013, https://foreignpolicy.com/2013/04/29/the-case-for-breaking-up-walmart/.

327 Federal Trade Commission v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. January 13, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/191-0134-facebook-inc-ftc-v. After the first complaint was dismissed (Memorandum Opinion, June 28, 2021), the Khan FTC successfully refiled an amended complaint (First Amended Complaint, August 19, 2021; Substitute Amended Complaint, September 8, 2021). As noted above, the district court rejected a motion to recuse Chair Khan from participation.

328 United States v. Google LLC, No. 20-CV-3010 (APM), 2023 WL 6291644 (D.D.C. September 8, 2023).

329 *United States v. AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018), aff'd sub nom, *United States v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019).

330 See, e.g., In the Matter of Union Oil Co. of California, 138 F.T.C. 1 (2004); In the Matter of Bristol-Meyers Squibb Company, Docket No. C-4076 (2004); In the Matter of Intel Corp., 150 F.T.C. 420 (2010); *Federal Trade Commission v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020).

The Clinton administration had pursued an aggressive single firm monopoly agenda, but surprisingly in contrast to the FTC, the Justice Department, after its success on the merits against Microsoft, virtually abandoned the field for almost 20 years until the Google case.

Echoing the progressive narrative and following the 2018 election that gave the Democrats control of the House of Representatives, efforts to pass new legislation regulating the largest technology companies gained some momentum in the next two Congresses, although the legislation was never debated on the floor of either the House or the Senate.[331] The House Judiciary Committee Report discussed above, in which then Professor Khan had a major role, was a significant Congressional statement about the alleged problems of these companies. Legislation would have created new substantive standards for liability, under which it would have been easier to prosecute than under current law. Most versions would have given the FTC power to draft regulations that presumably would have facilitated the progressive desires to "rein in Big Tech."

The Khan leadership appeared to have placed heavy reliance on the prospects of new legislation and the promises of enormous new budget increases.[332] Although the Commission did receive a significant budget increase for fiscal 2022 and 2023,[333] one version of the 2021 Build Back Better bill had a massive increase in FTC spending, promising $1 billion over 10 years, including a planned new third enforcement Bureau, involving privacy and technology. Because Chair Khan repeatedly emphasized both the competition and consumer protection aspects of privacy,[334] presumably the money would have been used for tech sector competition initiatives as well. In fact, the Trump administration had already created a technology enforcement division within the Bureau of Competition, which would have fit well in the new Chair's vision of the problems in privacy and technology.

Perhaps assuming that new legislation would pass,[335] Khan did not begin planning and case development initiatives immediately, unlike leaders of the two previous change eras. Moreover, she faced significant headwinds not present earlier. The agency she inherited was widely praised, not widely condemned. Although progressives and those directing the President's economic policy wanted dramatic change, just a few years before they were "hipster antitrust," virtually outside of the debate of how antitrust policy should proceed. Not surprisingly, although many in the President's political party saluted and joined the effort, others did not, having developed and enforced the now castigated policies, as has occurred in the debate over merger policy.[336]

Importantly, Chair Khan faces a judiciary likely to be as hostile to her efforts to change the law as it was to the FTC in the late 1970s when the agency refused to change. Unlike the Reagan administration, which prioritized appointing judges with a law and economics background who were uniformly sympathetic to antitrust's consumer welfare standard, President Biden has not made the appointment of judges with an antitrust, or even economics background, an important criteria.[337] Although the Biden administration continues the success of its predecessors in litigating up or down challenges to horizontal mergers with a few competitors in well-defined product markets, it is largely unsuccessful

331 Ariel Shapiro, "Democratic Sen. Warner Has a New Policy Paper with Proposals to Regulate Big Tech Companies," CNBC, July 30, 2018, https://www.cnbc.com/2018/07/30/sen-warner-proposes-20-ways-to-regulate-big-tech-and-radically-change.html.

332 See Cristiano Lima-Strong, "Why Democrats Are Rallying Around Creating a New FTC Privacy Bureau to Police Big Tech," *Washington Post*, September 16, 2021, https://www.washingtonpost.com/politics/2021/09/16/why-democrats-are-rallying-around-creating-new-ftc-privacy-bureau-police-big-tech/.

333 See the discussion at note 160.

334 Statement of Chair Lina M. Khan, Regarding the Report to Congress on Privacy and Security, Federal Trade Commission, File No. P065401, October 1, 2021, https://www.ftc.gov/system/files/documents/public_statements/1597024/statement_of_chair_lina_m_khan_regarding_the_report_to_congress_on_privacy_and_security_-_final.pdf.

335 Some career managers thought Khan was not concerned about ultimate success because she "wants to show that we can't meet our mission mandate without legislative change." Committee on the Judiciary, *Abuse of Power, Waste of Resources, and Fear*, p. 3.

336 For example, compare the remarks of two officials in both the Clinton and Obama Antitrust agencies, William Baer, supporting the proposed Biden revisions to the merger guidelines, and Carl Shapiro, criticizing them. "Revising the Horizontal Merger Guidelines: The Path Forward," event hosted by American Enterprise Institute, transcript, September 19, 2023, https://www.aei.org/wp-content/uploads/2023/08/230919-Revising-the-Horizontal-Merger-Guidelines-The-Path-Forward-transcript.pdf?x91208. One of us participated in this forum.

337 See Tiana Headley, "Biden's Recent Court Picks Diverge From Progressive Strategy," *Bloomberg Law*, August 31, 2023, https://news.bloomberglaw.com/us-law-week/biden-court-picks-have-less-diverse-resumes-sought-by-liberals.

elsewhere.[338] Thus, the FTC recently prevailed in IQVIA's attempted acquisition of its competitor, Propel Media[339] while losing both of its most high profile challenges, Meta's acquisition of Within, and Microsoft's of Activision. Neither involved acquisition of competitors; they involved theories rarely used in recent decades, and the agency challenged both in the northern District of California, hardly known for its conservatism. Moreover, judges appointed by Presidents Obama (Meta-Within) and Biden (Microsoft- Activision) rejected the FTC motions for preliminary injunction.[340]

The Commission did win a vertical merger challenge against Illumina's proposed acquisition of Grail. The result is not the vanguard of a progressive revolution. Although rare, vertical mergers were challenged during prior administrations, for example, while we were last at the Commission, the Cytyc/Digene vertical merger was abandoned following the Commission's decision to challenge the transaction.[341] The Illumina complaint was approved 4-0, before Chair Khan's arrival, with support from both Republican Commissioners, and the one Republican who remained on the Commission supported liability when the administrative case returned to the Commission.[342] On appeal, the Fifth Circuit affirmed the Commission's approach to a prima facia antitrust case, but because the court held that the FTC analyzed the merging party's proposed fix to the anti-competitive problems improperly, it reversed the Commission's order.[343] In so ruling, it rejected Chair Khan's views on the issues in favor of Commissioner Wilson's. Wilson, of course, was an outspoken proponent of antitrust's consumer welfare standard that the Biden team disfavors. Faced with opposition from the European Union and the necessity of continued fighting with the FTC, Illumina abandoned the deal.[344]

Even with judicial opposition, law reform is still possible. It requires, however, a carefully planned strategy to persuade the courts to change. For example, Thurgood Marshall and others famously implemented a long, successful strategy of civil rights litigation, including the court's decision in *Brown vs. Board of Education*.[345] There is little, if any, indication that the Biden administration has such a plan. Congress seems unlikely to enact new legislation during Khan's tenure, and filing cases with little chance of success under existing law seems an inefficient and strange method of law reform.

A good example of a legal strategy for change was the FTC's 21st century approach to hospital mergers. Although the FTC and the DOJ had successfully challenged anticompetitive mergers in the 1980s, they met serious judicial resistance in the 1990s. Some courts accepted that nonprofit hospitals had non-financial motives, and would not translate market power into higher prices. Other courts followed an approach to market definition derived from markets for physical goods that could place hospitals 100 miles away in the same geographic market.[346] When we returned to the FTC in 2001, the government had lost

338 Unlike previous enforcers, the Biden hostility to settlement and proclivity to bring non-horizontal challengers has met resistance in the judiciary. See Jon B. Dubrow, "Assessing the State of Affairs in FTC/DOJ Merger Enforcement," Reuters, July 10, 2023, https://www.reuters.com/legal/transactional/assessing-state-affairs-ftcdoj-merger-enforcement-2023-07-10/.

339 Federal Trade Commission v. IQVIA Holdings Inc. and Propel Media, Inc., No. 23 Civ. 06188, 2024 WL 81232 (S.D.N.Y. January 8, 2024).

340 *Federal Trade Commission v. Meta Platforms Inc.*, 654 F. Supp. 3d 892 (N.D. Cal. 2023) (Edward J. Davila); Federal Trade Commission v. Microsoft Corp., No. 23-CV-02880-JSC, 2023 WL 4443412 (N.D. Cal. July 10, 2023) (Jacqueline Scott Corley).

341 Nicholas Johnston, "Digene Calls Off Merger with Cytyc, Citing FTC Opposition," *Washington Post*, July 1, 2002, https://www.washingtonpost.com/archive/business/2002/07/02/digene-calls-off-merger-with-cytyc-citing-ftc-opposition/961d22c5-f35b-407a-8a10-13f482c2cabc/.

342 Decision and Order, In the Matter of Illumina, Inc. and GRAIL, Inc., FTC Docket No. 9401, March 31, 2023 (final order), https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalorder.pdf.

343 Illumina, Inc. v. Federal Trade Commission, No. 23-60167, 2023 WL 8664628 (5th Cir. December 15, 2023).

344 Illumina, "Illumina Announces Decision to Divest GRAIL," press release, December 17, 2023, https://investor.illumina.com/news/press-release-details/2023/Illumina-Announces-Decision-to-Divest-GRAIL/default.aspx.

345 Beginning in the 1930s, Marshall challenged the "separate but equal" doctrine by presenting "a litigation theory which would permit [courts] to grant relief without squarely confronting the necessity of overruling the precedent." Challenges began with law schools, then other professional schools, only later moving to challenges in elementary and secondary education where it was far more difficult to establish that "separate" was in fact not "equal." See Kenneth F. Ripple, "Thurgood Marshall and the Forgotten Legacy of Brown v. Board of Education," *Notre Dame Lawyer*, Vol. 55 (April 1980), https://scholarship.law.nd.edu/law_faculty_scholarship/916.

346 See the discussion in Jonathan Nuechterlein, "How the FTC Works: Lessons from the Commission's Supreme Court Trifecta," prepared remarks for Administrative Law Review Annual Symposium: "Antitrust: At the Intersection of Private and Public Regulation," March 20, 2015, p. 4, https://www.ftc.gov/system/files/documents/public_statements/632081/150320adminlawreview.pdf. For a contemporaneous discussion, see Timothy J. Muris, "The FTC And Health Care," *Health Affairs*, Vol. 23, No. 3 (May/June 2004), https://www.healthaffairs.org/doi/10.1377/hlthaff.23.3.288-a.

its previous seven hospital merger challenges and had essentially given up.[347]

Because some hospital mergers harmed consumers, we disagreed, thought abandonment was intolerable, and adopted a new strategy. The Bureau of Economics published a series of retrospective case studies of prior hospital mergers, some using data obtained under the Commission's unique compulsory process authority to collect data for studies. These studies documented the clear consumer harms from various prior mergers, and exposed the flaws in the economic assumptions that had been used to defend them.[348] The author of the geographic market definition test that had led courts to accept such large markets testified that courts were misusing his test in hospital mergers.[349] The FTC and the Justice Department conducted public workshops on hospital mergers and other healthcare competition issues, leading to a joint report.[350] In 2004, the Commission filed an administrative test case challenging a hospital merger, and in 2007 it found against the merger.[351] Courts blessed the Commission's new approach during the Obama administration.[352]

Although the process took many years, the Commission thereby successfully reversed the string of court defeats. The history of the "failed" 40 years shows many other successful efforts at legal reform, including fraud and privacy in consumer protection, evolving merger guidelines, attacking anticompetitive restraints in the professions, and competitor misuse of government in antitrust.

The current FTC leadership would no doubt protest that they have been quite active in establishing new policies. To return to the John Wooden quote that leads this paper, they appear guilty of mistaking activity for achievement.[353] Rather than building a program, many of Khan's early initiatives appeared more focused on press releases than winning in court. (Some were quite expensive, involving cases destined for defeat.) Career FTC managers also expressed this concern.[354] The Biden team did change the process for Section 18 rulemaking (also called Magnuson-Moss), which remains untested, and repealed a number of previous Commission policy statements. Among those that have been replaced, there is an apparent desire to maximize discretion, at the expense of both providing guidance to those the Commission regulates and raising the prospects for success with the modern judiciary.

Consider for example the new policy statement on "unfair methods of competition." Section 5 of the FTC Act has two prohibitions, one against unfair methods of competition (unfair methods), the other against unfair or deceptive acts or practices (unfairness). For the latter, the Commission engaged in a lengthy process to establish a careful, well-articulated policy that Congress codified in 1994: unfair acts or practices are those that cause substantial consumer injury, without offsetting benefits to consumers or competition, that consumers cannot reasonably avoid. By design, following criticism of Commission overreach after the 1970s rulemaking binge built in part on expanded use of unfairness and its failure to articulate clear legal standards, the unfair acts or practices policy statement and its codification

347 See, e.g., Adventist Health Sys.-West, No. 9234, 117 F.T.C. 224 (1994); *Federal Trade Commission v. Freeman Hospital*, 911 F. Supp. 1213 (W.D. Mo. 1995), aff'd 69 F.3d 260 (8th Cir. 1995); *Federal Trade Commission v. Butterworth Health*, 946 F. Supp. 1285 (W.D. Mich. 1996), aff'd mem., 121 F.3d 708 (6th Cir. 1997); *United States v. Mercy Health Services*, 902 F. Supp. 968 (N.D. Iowa 1995), vacated as moot, 107 F.3d 632 (8th Cir. 1997); *United States v. Long Island Jewish Medical Center*, 983 F. Supp. 121 (E.D.N.Y. 1997); *Federal Trade Commission v. Tenet Health Care*, 186 F.3d 1045 (8th Cir. 1999); *Federal Trade Commission v. Hospital Board of Directors of Lee County*, 38 F.3d 1184 (11th Cir. 1994).

348 Nuechterlein, "How the FTC Works," p. 4.

349 See Memorandum in Support of Respondent's Anticipated Objections to the Testimony of Dr. Kenneth G. Elzinga and/or Motion to Preclude His Testimony, In the Matter of Evanston Northwester Healthcare Corp., Docket No. 9315, February 24, 2005, https://www.ftc.gov/sites/default/files/documents/cases/2005/02/050224memosuppprecluelzinga.pdf.

350 Department of Justice and Federal Trade Commission, *Improving Health Care: A Dose of Competition*, July 2004, https://www.ftc.gov/reports/improving-health-care-dose-competition-report-federal-trade-commission-department-justice.

351 Administrative Complaint, In the Matter of Evanston Northwestern Healthcare Corporation and ENH Medical Group Inc., Federal Trade Commission, Docket No. 9315, February 10, 2004, https://www.ftc.gov/sites/default/files/documents/cases/2004/02/040210emhcomplaint.pdf; Final Order, In the Matter of Evanston Northwestern Healthcare Corporation, Federal Trade Commission, Docket No. 9315, April 28, 2008, https://www.ftc.gov/sites/default/files/documents/cases/2008/04/080424finalorder.pdf.

352 *ProMedica Health System, Inc. v. Federal Trade Commission*, 749 F.3d 559 (6th Cir. 2014); *St. Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd.*, 778 F.3d 775 (9th Cir. 2015).

353 Impelman, "Never Mistake Activity for Achievement"; Feinstein, "John Wooden: Untouchable Record, Incomparable Man."

354 Committee on the Judiciary, *Abuse of Power, Waste of Resources, and Fear*, p. 2.

limited the Commission's discretion.[355] The FTC's 1983 Deception Policy Statement, of which we were the principal staff draftsmen, similarly sought to restrain agency discretion.[356] The Obama Commission's bipartisan Statement of Enforcement Principles regarding unfair methods,[357] a statement that was disavowed in the Khan administration's first public meeting, also sought to restrain agency discretion.[358]

In contrast, the new unfair methods definition, issued in November, 2022, returns to unfettered enforcement discretion.[359] To the extent the document uses any standards at all, it relies on the vacuous ones the Commission abandoned in its modern definition of unfair acts. In the first attempt to define unfairness, the 1964 cigarette rule stated that a practice could be unfair if it was "immoral, unethical, oppressive, or unscrupulous."[360] The 1980 Unfairness Policy Statement explicitly disavowed this prong. The unfair methods statement appears to resurrect it, citing conduct that is "oppressive" twelve separate times;[361] the word only appears twice in the 1980 statement.

The result, as Commissioner Wilson noted in dissent, is a statement that amounts to little more than a "we know it when we see it" standard.[362] Under the new statement, the Commission will presumably use its administrative process to bring cases, developing records that help articulate broad new legal powers beyond the reach of the Sherman Act.

The Khan Commission also seeks to use rulemaking to address unfair methods of competition. As argued in an article chair Khan co-authored with Commissioner Chopra while on his staff,[363] the agency proposed a UMC rule against covenants not to compete, the first such action in decades, and one on which the FTC's authority will be challenged.[364] Combined with the Commission's assertion of authority to write rules governing unfair methods of competition,[365] this formless standard threatens to re-create the broad legislative powers[366] that Congress sought to constrain with extra procedural requirements when it authorized consumer protection rules.[367]

As we have seen, extensive use of unfairness fared poorly in the 1970s in both consumer protection and antitrust. It is difficult to see that the new UMC statement provides the kind of authoritative and objective assessment of a body of law upon which a reviewing court might rely.

355 Letter from the Federal Trade Commission to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science, and Transportation, U.S. Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, December 17, 1980, reprinted in International Harvester Co., 104 F.T.C. 949, 1070, 1073 (1984); Federal Trade Commission, FTC Policy Statement on Unfairness, December 17, 1980, https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness; Letter from the Federal Trade Commission to Hon. Bob Packwood and Hon. Bob Kasten, Committee on Commerce, Science, and Transportation, U.S. Senate, reprinted in FTC Antitrust & Trade Regulation Reporter (BNA) 1055, pp. 568-570.

356 See Beales, "Brightening the Lines," pp. 1057-1074.

357 Federal Trade Commission, "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act," August 13, 2015, https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

358 The decision was made on July 1, 2021, but the Commission's Statement only appeared 8 days later. See Federal Trade Commission, "FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act," press release, July 1, 2021, https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act; Federal Trade Commission, "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act," July 9, 2021, https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf.

359 Federal Trade Commission, "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act," Commission File No. P221202, November 10, 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

360 Federal Trade Commission, "Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking," *Federal Register*, Vol. 29, No. 129 (July 2, 1964), p. 8355, https://archives.federalregister.gov/issue_slice/1964/7/2/8323-8375.pdf.

361 The count includes two instances of "oppressiveness."

362 Dissenting Statement of Commissioner Christine S. Wilson, Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act," Federal Trade Commission, File No. P221202, November 10, 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf; see also Wilson, "The Neo-Brandeisian Revolution," pp. 9, 16-17.

363 Rohit Chopra and Lina M. Khan, "The Case for 'Unfair Methods of Competition' Rulemaking," *University of Chicago Law Review*, Vol. 87, No. 2 (2020), https://chicagounbound.uchicago.edu/uclrev/vol87/iss2/4/.

364 Federal Trade Commission, "Non-Compete Clause Rule," notice of proposed rulemaking, *Federal Register*, Vol. 88, No. 12 (January 19, 2023), pp. 3482-3546, https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule. The theory relies heavily on a 1973 opinion of the circuit court of appeals for the District of Columbia, which many scholars believe does not represent current law. For example, see Thomas W. Merrill, "Antitrust Rulemaking: The FTC's Delegation Deficit," *Administrative Law Review*, Vol. 75, No. 2 (Spring 2023), https://administrativelawreview.org/wp-content/uploads/sites/2/2023/07/ALR-75.2_Merrill.pdf.

365 Federal Trade Commission, "Non-Compete Clause Rule."

366 Thomas A. Lambert and Tate Cooper, "Neo-Brandeisianism's Democracy Paradox," *Journal of Corporation Law*, Vol. 49, No. 2 (2024), https://jcl.law.uiowa.edu/articles/2024/01/neo-brandeisianisms-democracy-paradox.

367 See Beales and Muris, *Back to the Future*, p. 9.

Often building on the FTC's potential to act beyond the antitrust laws, the Biden FTC has pursued potentially important antitrust activities. The agency filed a monopolization claim against a private equity backed healthcare business that it had purchased multiple anesthesiology businesses across Texas and raised prices.[368] As widely predicted when she was named Chair, the FTC filed a major antitrust challenge against Amazon, although the allegations of the case itself do not follow her famous Yale student note.[369]

Surprisingly, given that the case relies heavily on the FTC's power to use its unfair methods of competition jurisdiction beyond the parameters of the Sherman or Clayton Acts, the case was filed in federal court, not administratively. One might have expected the FTC to first test its claim of expanded power within its own internal administrative litigation process. Instead, with Amazon, the FTC is asking a generalist federal judge to opine on the meaning of unfairness under the FTC Act without the record and analysis the FTC first developed administratively. Had the Commission filed administratively, however, the agency would likely have confronted recusal issues as in the Meta-Within case discussed earlier. The Chair's arguably stronger views of Amazon's alleged anti-competitive behavior that launched her career, in contrast to the lack of any specific statement about the Meta-Within merger, would have presented a very strong argument for recusal under traditional legal standards.

Biden merger policy: One area of Biden FTC "success" began even before the appointment of Chair Khan, reflecting the deep hostility of the Neo-Brandeisians toward big business in general and mergers in particular. We use quotation marks around "success" because most of the relevant policies have as one of their main purposes, not direct law reform, but instead essentially to cause delay and create uncertainty. Because they are so ephemeral, the next administration can reverse them immediately.

Federal merger law, by its very nature, is not anti-merger. In the law's long legislative history, statutes that would have required prior approval of mergers were offered, debated, and rejected, despite populist animosity toward mergers. For decades, the law, the regulatory process, and government enforcers have recognized both the potential benefits and costs of proposed mergers. The thrust of the Biden administration's policy rejects this measured approach in favor of overt hostility.

At the end of the Obama administration, while still a law student, Lina Khan wrote "How to Reboot the FTC," castigating that administration and its predecessors for lax merger policy that allowed "mergers [to] reach record highs" and demanding that "the agency should commit to blocking anticompetitive mergers outright, rather than trying to fix them…."[370] As Chair, Khan leads an assault on mergers. Neo-Brandeisians believe mergers are a main cause of their bleak picture of the American economy. They also apparently find no positive results from mergers. Thus, Khan's original Director of the Bureau of Competition "when asked, could not identify a single positive thing about mergers."[371]

This animosity has taken root in FTC policy in multiple ways. The surprising deletion from the agency's mission statement of the seemingly innocuous phrase that it would enforce its laws "without unduly burdening legitimate business activity" set the tone. Within the agency, the deletion was taken to reflect the views of individuals extraordinarily suspicious of business in general, and mergers in particular.[372]

[368] Complaint for Injunctive and Other Equitable Relief, Federal Trade Commission v. U.S. Anesthesia Partners, Inc, et al., No. 2010031 (S.D. Tex. September 21, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/2010031-us-anesthesia-partners-inc-ftc-v. Although the complaint's description of the case sounds in traditional antitrust at least in part, Chair Khan has demurred, explaining it is part of a broader strategy to change merger and the rest of antitrust policy. See Tracy Alloway and Joe Wiesenthal, "Lina Khan Has a Warning for the World of Private Equity," *Bloomberg Law*, November 16, 2023, https://news.bloomberglaw.com/antitrust/lina-khan-has-a-warning-for-the-world-of-private-equity.

[369] Will Oremus, "Lina Khan's Amazon Lawsuit is Nothing Like Her Famous Law Article," *Washington Post*, September 27, 2023, https://www.washingtonpost.com/technology/2023/09/27/lina-khan-amazon-antitrust-paradox/; Dave Michaels, "Lina Khan Once Went Big Against Amazon. As FTC Chair, She Changed Tack," *Wall Street Journal*, September 28, 2023, https://www.wsj.com/tech/in-suing-amazon-ftcs-lina-khan-turns-her-earlier-pricing-argument-on-its-head-e45b91e9. The authors have advised Amazon on a variety of antitrust and consumer protection matters.

[370] Lina Khan, "How to Reboot the FTC," *Politico*, April 14, 2016, https://www.politico.com/agenda/story/2016/04/ftc-antitrust-economy-monopolies-000090/.

[371] Wilson, "Marxism and Critical Legal Studies Walk into the FTC." For a recent summary of the literature on the benefits of mergers, see Maureen K. Ohlhausen and Taylor Owings, *Evidence of Efficiencies in Consummated Mergers* (U.S. Chamber of Commerce, June 1, 2023), https://www.uschamber.com/assets/documents/20230601-Merger-Efficiencies-White-Paper.pdf.

[372] For the analysis of a recently departed, long-time career FTC staff member on the significance of this and other changes in the FTC strategic planning reports, see Daniel Kaufman, "So Many Words – The FTC's Recent Strategic Planning Reports Do Actually Matter," BakerHostetler, September 6, 2022, https://www.bakerlaw.com/insights/ftc-recent-strategic-planning-reports-actually-matter/.

Ephemeral though it may be, the new approach has imposed substantial costs. Former FTC Commissioner and Acting Chairman Terry Calvani and Thomas Ensign recently summarized the new policy:

> *. . . raising the cost of merger review imposed on the parties will, at the margin, reduce the number of transactions. Using procedural tools, Chair Khan has been successful in making mergers more difficult and costly. Moreover, she has been successful primarily through changes in the Commission's process without litigation or substantive changes to the antitrust laws. Some of these changes fall into the minor irritant category, but others are significantly more onerous on merging parties.*[373]

Scott Barshay, the Chair of one of the leading law firm's corporate departments, concluded in March 2023 that the agencies have been "very successful" in subduing deals not through litigation, but because of the "in terrorem" effect of threatened actions, including creating uncertainty and serious delay.[374] Other observers characterized the approach as "a broader effort by the FTC to slow things down, run the clock and see if parties walk away from deals they might not have walked away from in the past."[375] An empirical study of practitioners before the Biden antitrust agencies found both agencies perceived as "less transparent and less fair in their interactions with merging parties."[376]

The problems far exceeds the direct, albeit significant, costs of lawyers, bankers, and other specialists associated with deals. As Barshay notes, the cost of delay to the merging companies from the extra year or two that it takes to complete the transaction increases with the importance of the deal— "who knows what happens to the asset in the meantime. They [the merging parties] just don't want to think about it..."[377] The problem exists for both the purchaser and the seller. Examples abound: for the seller, when personnel are crucial to the deal, delay and uncertainty about whether and when the transaction will occur increases the risk that highly talented managers and other employees will seek employment elsewhere. For the buyer, the disruption in the company's plans may force redeployment of key personal and other assets while awaiting a decision. Moreover, the antitrust laws forbid collaboration between the two companies, especially if they are even minor competitors, before the merger is consummated. Barshay concludes that, cumulatively, such problems have "resulted in many, many fewer deals."[378]

The opportunity to create delay is exacerbated because of the manifest inefficiency of the system for reporting mergers to the government before consummation. The fate of merger filings is shown in Figure 1. From 1993 through 2021, there were 61,394 merger filings,[379] vastly more than the less than 4,500 transactions predicted for this period when the act was adopted.[380] Most transactions are never investigated: either the FTC or DOJ requested clearance to investigate in only 13.66 percent of

373 Terry Calvani and Thomas Ensign, "The New Brandeisians Are Here," *Journal of Antitrust Enforcement*, Vol. 11, No. 2 (2023) (footnote omitted), https://academic.oup.com/antitrust/article-abstract/11/2/168/7188272.

374 Al Barbarino, "Paul Weiss Corp. Chair Calls FTC, DOJ Officials 'Anti-Deal,'" Law360, March 23, 2023, https://www.law360.com/articles/1589297. For an excellent discussion of the adverse effects of regulation via uncertainty, both in the context of the FTC and more generally, see Adam J. White, "The Power Broke Her: The Rise and (Maybe) Fall of Lina Khan," *Commentary*, March 2024, https://www.commentary.org/articles/adam-white/ftc-lina-khan-regulatory-uncertainty-power/.

375 Luuk de Klein and Aldrin Brown, "Biden's FTC Increased Large Pharma Deal Scrutiny, but Approval Remains Possible – Analytics," Mergermarket, July 24, 2023, https://www.lowenstein.com/media/wrkfdap0/mm-biden-s-ftc-increased-large-pharma-deal-scrutiny-but-approval-remains-possible-analytics-_-mergermarket.pdf.

376 D. Daniel Sokol et al., "Antitrust Mergers and Regulatory Uncertainty," *The Business Lawyer*, Vol. 78, No. 4 (Fall 2023), https://www.americanbar.org/groups/business_law/resources/business-lawyer/2023-fall/antitrust-mergers-regulatory-uncertainty/.

377 See Barbarino, "Paul Weiss Corp. Chair Calls FTC, DOJ Officials 'Anti-Deal.'"

378 See Barbarino, "Paul Weiss Corp. Chair Calls FTC, DOJ Officials 'Anti-Deal.'" Statistics of government merger enforcement would not reflect such a decline in merger activity and thus would not be implicated in the recent controversy regarding the level of Biden administration enforcement. While the administration claims record enforcement, based significantly on apparently non-public information about abandoned deals, more traditional measures show an enforcement decline. See Serafina Smith, "US Merger Enforcement Declined in 2023, Law Firm Dechert Says," Mlex Market Insight, January 31, 2024, https://mlexmarketinsight.com/news/insight/us-merger-enforcement-declined-in-2023-law-firm-dechert-says; Al Barbarino, "After Dechert Says M&A Probes Hit Low, FTC Fires Back," Law360, February 2, 2024, https://www.law360.com/articles/1792568/after-dechert-says-m-a-probes-hit-low-ftc-fires-back.

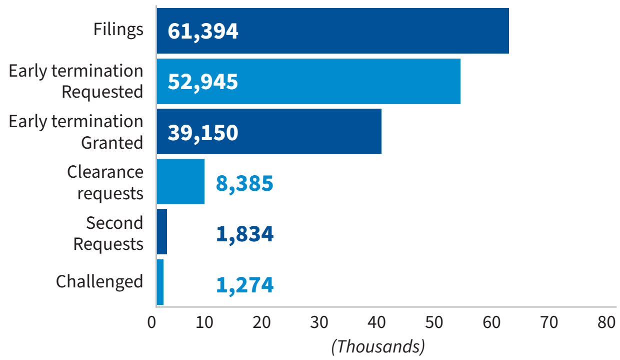
379 Comments of TechFreedom and Bilal Sayyed in the Matter of Proposed Changes to the HSR Notice and Reporting Form, Docket ID No. FTC-2023-0040-0001, September 27, 2023, p. 3, https://www.regulations.gov/comment/FTC-2023-0040-0720. 1993 most closely matches the release of the 1992 merger guidelines, and 2021 is the last year for which complete data are publicly available. Sayyed, with whom we worked at the FTC, is one of the few individual experts on both the substance of Section 7 merger law and the Hart Scott Rodino Act procedures.

380 Comments of TechFreedom and Bilal Sayyed in the Matter of Proposed Changes to the HSR Notice and Reporting Form, p. 6, n. 12. The drafters expected "no more than around 150 transactions per year, or 4,350 over the 29-year period.

transactions.[381] The government normally has 30 days to decide whether to seek additional information about the deal, called a second request, which extends the waiting period until the companies "substantially comply." Second requests occurred in just under three percent of filings, with compliance usually taking 3 to 6 months, but can be substantially longer.[382] Even before the Biden administration, compliance involves production of massive amounts of information electronically.[383] Only then must the government decide whether to challenge the merger, which occurred in 2.08 percent of all filings.

In this small fraction of filings, challenges were usually resolved through an agreement allowing the merger to proceed only with divestiture of the assets that the government felt would cure any competitive problems. Litigation was rare; instead, a complex regulatory system developed, a system that the Biden administration now manipulates to implement its anti-merger animus.

Figure 1. Premerger Filing Notifications, 1992-2021[384]



There are multiple ways to increase delay and uncertainty, both informal and formal. Previous administrations used early terminations extensively, requested in 86 percent of filings and granted in 64 percent,[385] which helped to reduce the delay costs resulting from the overly broad filing requirements (An early termination allows the merger to consummate before the 30 day waiting period expires.) In February, 2021, the FTC and DOJ suspended early terminations on the somewhat implausible argument that they "consume agency resources," even though nothing other than a Federal Register notice is required.[386] Moreover, the FTC has expanded the scope of second requests to investigate areas "not relevant in mainstream antitrust analysis" that "would not support litigated challenges,"[387] increasing the time and resource costs of complying. It has also sent letters to merger partners warning them that their deal is still under investigation even though the statutory review period has expired, and that they close at their own peril.[388]

The FTC has in some cases relied on administrative litigation, where it almost always wins and can only be challenged by appealing to the Court of Appeals, "a journey of several years from beginning to end."[389] In contrast, the Justice Department must pursue an injunction in federal district court, a process usually resolved far more expeditiously.

While previously most cases were resolved by settlements, Khan has stated that "we're going to be focusing our resources on litigating, rather than on settling."[390] The Commission also reinstated a policy of requiring prior approval for future acquisitions

[381] Because both agencies have authority, to avoid duplication, each agency requests "clearance" from the other before opening an investigation.

[382] Comments of TechFreedom and Bilal Sayyed in the Matter of Proposed Changes to the HSR Notice and Reporting Form, p. 3.

[383] One study found the median cost of complying with a second request was $4.3 million. See Peter Boberg and Andrew Dick, "Findings from the Second Request Compliance Burden Survey," *The Threshold*, Vol. 14, No. 3 (ABA Section of Antitrust Law, Summer 2014), pp. 26, 33, https://media.crai.com/wp-content/uploads/2020/09/16164357/Threshold-Summer-2014-Issue.pdf.

[384] Chart prepared from data submitted as an attachment to Comments of TechFreedom and Sayyed in the Matter of Proposed Changes to the HSR Notice and Reporting Form. For an updated version of the data, see "Updated-HSR-and-Merger-Enforcement-Data-1993-2022, TechFreedom, last accessed April 6, 2024, https://techfreedom.org/wp-content/uploads/2024/03/Updated-HSR-and-Merger-Enforcement-Data-1993-2022.xlsx. It includes data for 2022 and corrects an error in the number of transactions challenged, which should be 1,246 instead of the 1,274 shown in the chart. Other numbers are unchanged.

[385] Comments of TechFreedom and Bilal Sayyed in the Matter of Proposed Changes to the HSR Notice and Reporting Form, p. 3.

[386] FTC Chair Khan's Responses to Additional Questions for the Record, p. 7. The decision not to investigate is made regardless of whether early termination is granted.

[387] Christine S. Wilson, "Governing is Hard: Antitrust Enforcement in the First Year of the Biden Administration," remarks for the Mercatus Antitrust Forum: One Year of Biden Antitrust, January 26, 2022, pp. 21-22, https://www.ftc.gov/system/files/documents/public_statements/1600479/governing_is_hard_antitrust_enforcement_in_the_first_year_of_the_biden_administration_0.pdf.

[388] Wilson, "Governing is Hard," p. 21.

[389] Calvani and Ensign, "The New Brandeisians Are Here," p. 3.

[390] Margaret Harding McGill, "FTC's New Stance: Litigate, Don't Negotiate," Axios, June 8, 2022, https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan.

as part of a settlement agreement if there is one,[391] an approach that has no defined period and no fixed standard for evaluation of the acquisition,[392] and thus can be a significant cost to any settlement.

A belief that litigation is preferrable to settlement may of course make sense in individual cases; the ultimate question is whether settlement can cure the competitive problem. Critics point to failed settlements, but litigation is costly and can fail as well. Moreover, the fact that failure is possible is no more persuasive for killing settlement as an antitrust tool than claiming that automobiles should be banned because they lead to accidents. The challenge in both cases is to improve the process, reducing accidents and bad settlements. There is nothing so inherently dangerous about either that they should be banned.

To illustrate the appeal of settlement, one need only look to how the sitting Commissioners' views have changed. Under the Trump administration, then-minority Commissioners were highly critical of negotiated settlements in pharmaceutical mergers, arguing for litigating instead.[393] Commissioner Chopra even called for an inspector general investigation of the process, including the staff involved.[394] Nevertheless, in the ANI Pharmaceuticals acquisition of Novitium Pharma, the Biden Commission accepted a settlement that was "strikingly similar to every prior settlement in the pharma merger space."[395] More difficult to understand is the Khan FTC's seeming hostility to settlements even when they have no intention of litigating. Of eight large pharmaceutical deals that received second requests since 2021 (and no longer pending in July 2023), six were cleared unconditionally. In contrast, of the 20 deals resulting in second requests in 2015-2020, only one was cleared without conditions.[396] Perhaps the population of deals was significantly different than in the earlier period, but this FTC appears reluctant to accept a settlement under all but rare circumstances.

Because none of these changes to the merger process required Congressional or judicial approval, from the Biden team's perspective, they are without risk. Their impact in the longer run is uncertain, however. For example, if the government continues to lose the non-traditional merger cases it files, the threat to litigate them becomes increasingly hollow. And, in some cases, the Commission has accepted settlements rather than risk a likely loss in litigation. For example, in June, 2023 the Commission sued to block Amgen's acquisition of Horizon on theories long discarded.[397] It settled the case in September, on terms that didn't "require Amgen to give up anything significant and allow[s] the FTC to bow out of litigation rather than risk a loss in district court."[398] Even meritless litigation is costly, however, a cost that potential merger partners must consider in deciding whether to go forward. As noted above, moreover, such informal changes in approaching mergers are essentially ephemeral, easy to reverse.

The Commission is also pursuing more formal measures that would increase the costs and uncertainties of mergers whether or not they are likely to be anticompetitive. Law firms have described to their clients as "dramatic,"[399] "drastic,"[400] and

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391 Federal Trade Commission, "Statement of the Commission on the Use of Prior Approval Provisions in Merger Orders," July 21, 2021, https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

392 Calvani and Ensign, "The New Brandeisians Are Here," p. 3.

393 Wilson, "Governing is Hard," p. 11.

394 See the discussion in Section III B.

395 Wilson, "Governing is Hard," p. 13.

396 Klein and Brown, "Biden's FTC Increased Large Pharma Deal Scrutiny."

397 Administrative Complaint, In the Matter of Amgen, Inc. and Horizon Therapeutics, plc, Federal Trade Commission, No. 231 0037, June 23, 2023, https://www.ftc.gov/legal-library/browse/cases-proceedings/231-0037-amgen-inc-horizon-therapeutics-plc-matter.

398 Dave Michaels and Joseph Walker, "Amgen's $27.8 Billion Deal for Horizon Therapeutics Clears Key Hurdle," *Wall Street Journal*, September 1, 2023, https://www.wsj.com/business/ftc-settles-with-amgen-over-27-8-billion-deal-for-horizon-therapeutics-b96a2d69. Amgen had offered the key element of the settlement, the prohibition on bundling with Horizon's products, before the complaint was filed. One of us advised Horizon on an issue unrelated to the litigation.

399 Joseph M. Rancour et al., "FTC and DOJ Propose Dramatic Expansion of HSR Filings' Scope," Skadden Insights, July 6, 2023, https://www.skadden.com/insights/publications/2023/07/ftc-and-doj-propose-dramatic-expansion; Steve Weissman et al., "FTC Proposes Dramatic Expansion and Revision of HSR Merger Notification Form," Gibson Dunn, June 29, 2023, https://www.gibsondunn.com/ftc-proposes-dramatic-expansion-and-revision-of-hsr-merger-notification-form/.

400 Richard Falek, Conor Reidy, and Kelton E. Anderson, "FTC and DOJ Propose Drastic Overhaul of HSR Requirements: New Form, New Frontier," Winston & Strawn LLP, June 28, 2023, https://www.winston.com/en/blogs-and-podcasts/competition-corner/ftc-and-doj-propose-drastic-overhaul-of-hsr-requirements-new-form-new-frontier.

"sweeping"[401] the FTC's and DOJ's proposed changes to the rules that govern the initial HSR filing.[402] The changes would require essentially all parties to produce certain information that today can only be requested from the small minority (3 percent) of transactions with a second request.[403] The proposed changes would require narrative descriptions of the strategic rationales for the transaction, any horizontal overlaps, supplier relationships, and labor markets. Unlike even most past second requests, the agencies would require detailed labor market data in *all* filings, including employee occupational classifications using a system with no necessary relationship to either geographic or product market definition, as well as employee commuting zones and occupational safety data.[404] They would require more documents related to the deal, including drafts produced along the way, and more details about the financial structure that "could require private equity and venture capital firms, in particular, to disclose additional holdings."[405]

Like all government information requests, the paperwork requirements in the proposed rule changes require approval from OMB's Office of Information and Regulatory Affairs, after public comment. By the FTC's own estimate, the paperwork burden alone would multiply almost four times, from 37 hours to 144 hours.[406] This burden would apply to *all* filers, including the 86 percent of transactions that, over the past 29 years, *have not even been investigated*, and the nearly 64 percent of transactions in which early termination would have been granted under pre-Biden policy. It is difficult to imagine how, at least for such filings, the additional information can meet the Paperwork Reduction Act's requirement that information is "necessary for the proper performance of the functions of the agency," and has "practical utility."[407] Even if the Biden administration dramatically increases enforcement to double, or even triple the number of deals it investigates and prosecutes, the overwhelming majority of filings would still receive no attention.

Instead, the new requirements, if adopted, will increase the system's complexity and substantially increase the burden on all who must file. They are a formal mechanism to increase the ability of the government to increase delay and the accompanying uncertainty about the timing and ultimate disposition of mergers, a mechanism that, if adopted, will be more difficult to reverse. Like the informal mechanisms discussed above, they will act to tax each merger.[408] The tax, imposed without regard to the likely competitive impact of a transaction, ignores the potential benefits to consumers in the form of lower prices or more innovative products, reflecting the progressive inclination that mergers provide no benefits.

Another formal step to restrict mergers is the revised merger guidelines from the Commission and the Department of Justice.[409] Unlike past editions, these guidelines cite and rely on numerous cases, the majority of which occur before the Supreme Court embraced the consumer welfare standard that the Biden administration rejects. Although some more recent cases were added to the final version, the emphasis remains on long abandoned law and

[401] Leon B. Greenfield et al., "FTC and DOJ Propose Sweeping Changes to HSR Notification form: Convergence and Intensifying *Idio*syncrasy," WilmerHale, July 6, 2023, https://www.wilmerhale.com/insights/client-alerts/20230706-ftc-and-doj-propose-sweeping-changes-to-hsr-notification-form-convergence-and-intensifying-idiosyncrasy; "FTC Proposes Sweeping Changes to HSR Rules that Could Substantially Increase Burden, Time to Prepare Filings," Cooley, June 30, 2023, https://www.cooley.com/news/insight/2023/2023-06-30-ftc-proposes-sweeping-changes-to-hsr-rules-that-could-substantially-increase-burden-time-to-prepare-filings.

[402] Federal Trade Commission, "Premerger Notification; Reporting and Waiting Period Requirements," notice of proposed rulemaking, *Federal Register*, Vol. 88, No. 124 (June 29, 1993), pp. 42178-42218, https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements.

[403] See "FTC Proposes Sweeping Changes to HSR Rules," Cooley.

[404] Comments of TechFreedom and Bilal Sayyed in the Matter of Proposed Changes to the HSR Notice and Reporting Form, p. 11.

[405] See "FTC Proposes Sweeping Changes to HSR Rules," Cooley.

[406] Federal Trade Commission, "Premerger Notification; Reporting and Waiting Period Requirements," p. 42208.

[407] 44 U.S.C. § 3508. We are both alumni of OIRA. On the statute, see Cass R. Sunstein, Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies regarding Information Collection under the Paperwork Reduction Act, April 7, 2010, https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/inforeg/PRAPrimer_04072010.pdf. Even if future regulators, more conscious of the burdens they impose, attempt to reduce over inclusiveness, they would face the problem that filing fees count outside the totals in budget caps, such as those in 2023 between President Biden and former House Speaker McCarthy to extend the debt ceiling. This artifact means that reducing the antitrust agency budgets from reduced filing fees could force Congress to use allocations within the spending caps for the shortfall. See John F. Cogan, Timothy J. Muris, and Allen Schick, *The Budget Puzzle: Understanding Federal Spending* (Stanford University Press, 1994), Chapter 4.

[408] Noah Joshua Phillips, "Disparate Impact: Winners and Losers from the New M&A Policy," remarks for the Eighth Annual Berkeley Spring Forum on M&A and the Boardroom, April 27, 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/Phillips_Keynote-Berkeley_Forum_on_MA_FINAL.pdf. Phillips was a Commissioner as the policies discussed here developed, and details the Biden FTC's anti-merger mindset.

[409] U.S. Department of Justice and the Federal Trade Commission, *Merger Guidelines*, December 18, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

concepts. Indeed, in the joint press release issuing the new guidelines, Chair Khan returned to her familiar "fidelity to precedent" she has used in criticizing the "failed" 40 years for abandoning the old law.[410] Consistent with that rejection, and with the progressive disdain for mergers, the guidelines return to a much more aggressive stance against mergers.

As with other actions of the Biden FTC, and unlike the efforts to promote change in prior eras, these guidelines lack the foundation necessary to make them persuasive to courts, scholars, the antitrust bar, and other opinion leaders. The reliance on old case law is particularly problematic.[411] As a letter from 17 former chief economists at both the FTC and DOJ states,

> *we observe that the current draft contains a large amount of legal analysis, argument, and interpretation. We strongly advise you to separate that material from the economic analysis. We fear that unless there is a document that reflects only durable, useful, and consensus economic understanding, the Guidelines will cease to remain a document that businesses and courts rely on in order to understand how the enforcement agencies interpret economic evidence.*[412]

The former chief economists continue that rather than laying foundation for law reform, "there is a substantial risk of turning the Merger Guidelines into an advocacy piece reissued by each administration that inevitably has little weight with courts."[413]

Although the letter was sent before the final guidelines issued on December 19, the changes from the original proposal did not resolve the economist's complaints, nor the reliance on outdated law. Without an empirical, legal, or policy consensus for the change to a much more aggressive opposition to mergers, the new guidelines are unlikely to gain the same approval that past editions received.

Although it has yet to do so, the FTC is especially well positioned to address the empirical foundations of the progressive argument. In particular, they could address one of the most aggressive changes in the new guidelines, moving the goalpost for presumptively problematic mergers from the stylized example of industries with four equally sized firms to industries with six such firms. Because mergers were rarely challenged, or even investigated in depth, under the previous guidelines with six or more significant competitors, this change by itself, if pursued seriously through the agency investigative process, will deter mergers that now occur routinely, as some firms will be unwilling to run the investigatory gauntlet, with its associated time delay, including potential litigation, to obtain merger clearance.

Academic assertions that the goal line must be moved because merger policy has been too permissive lack sufficiently detailed data to replicate antitrust markets as modern enforcers define them. The FTC has the data and expertise necessary to test those hypotheses. Beginning with our tenure at the FTC in 2003 and continuing into the Obama administration, the FTC analyzed all second requests to prepare and release detailed studies on its merger enforcement policies.[414] Such data support the current guideline use of four equally sized firms as a key metric. Working with outside experts, such as those former officials who signed the recent letter, the FTC could study a large sample of mergers to determine their effects. If the Biden antitrust agencies have the courage of their convictions, they should develop such empirical evidence, which was a crucial contributor to changing hospital merger policy discussed earlier,[415] as well as for abandoning the much more aggressive merger policies of the 1960s and early 1970s.

410 Federal Trade Commission, "Federal Trade Commission and Justice Department Release 2023 Merger Guidelines," press release, December 18, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines. One of us has analyzed both the old law and Chair Khan's claims of fidelity. See Muris, *Neo-Brandeisian Antitrust*, Chapter 3.

411 Corbin K. Barthold, "Failing Upward: For Lina Khan's Federal Trade Commission, Dysfunction Is No Bar to Ambition," *City Journal*, August 17, 2023, https://www.city-journal.org/article/ftc-chair-lina-khan-fails-upward. According to Gus Hurwitz and Geoff Manne, weighted by citations, the average age of the 50 cases originally cited was 1975, "ages ago in antitrust law."

412 Jonathan B. Baker et al., "Letter to the Editor: Former FTC and DOJ Chief Economists Urge Separation of Economic and Legal Analysis Separation of Economic and Legal Analysis in Merger Guidelines," ProMarket, November 27, 2023, https://www.promarket.org/2023/11/27/letter-to-the-editor-former-ftc-and-doj-chief-economists-urge-separation-of-economic-and-legal-analysis-in-merger-guidelines/?mc_cid=3d94abffdf&mc_eid=f0994ca833. Commissioner Wilson spoke of the dangers of ignoring the judiciary across a variety of issues, warning the Biden leaders against "Going it Alone." See Wilson, "The Neo-Brandeisian Revolution," pp. 6-11.

413 Baker et al., "Letter to the Editor."

414 For a discussion of changes in the merger guidelines based on these analyses, see Muris, *Neo-Brandeisian Antitrust*, Chapter 3, p. 62.

415 See the discussion at notes 346-352.

Consumer protection under Biden: Although she had well-formed views on antitrust, Lina Khan did not arrive at the Commission with a clear consumer protection agenda. There was no significant critical literature similar to that of the Neo-Brandeisians rejecting the previous 40 years as a failed experiment. Nevertheless, Khan's approach to consumer protection shares some similarities with her antitrust approach. The new leadership felt the policies it inherited were too small, too timid, and did not use all available tools aggressively. Commissioner Chopra in particular frequently criticized the agency's fraud program because the defendants were often more akin to criminal fly by night operations than to the major corporations who progressives saw as the real culprits in the modern economy.[416]

The new leadership thus believed the agency had overreacted to the 1970s and should use its unfairness jurisdiction more aggressively. They cited an academic article by Luke Herrine[417] claiming that in fact "the regulatory initiatives of the 1970s were actually quite popular," except of course with those who would be regulated. In Herrine's view, the FTC's unfairness authority was narrowed not by a Congressionally codified policy statement, but by "the ideology of regulators charged with its enforcement." The FTC, in short, should return to the long-abandoned approach to unfairness that prevailed in the 1970s.[418] Indeed, one of the new leadership's first "all hands" meetings with the staff was reportedly to hear a presentation by Herrine urging them again to take up the old mantle.

Consumer welfare was the lodestar of the Reagan FTC's approach to consumer protection, and that approach appears no more popular with progressives than it is with the Neo-Brandeisians in antitrust. Crucially, the legal environment has changed substantially since the 1970s. Attractive as assertions of "oppressive" or "unscrupulous" conduct may be to progressives eager to restructure the economy, Congress in 1994 enacted, with the Commission's support, a statutory definition of unfairness based fundamentally on economic principles: A practice is only unfair if it causes or is likely to cause substantial consumer injury, without offsetting benefits to consumers or competition, that consumers cannot reasonably avoid.[419] The Biden administration will have to fit unfairness-based initiatives into this framework.

We consider two key aspects of the administration's consumer protection agenda to date. First, the search for alternative strategies after the Supreme Court's AMG decision has been a priority. Second, the agency has recommitted itself to rulemaking, in part to obtain monetary relief and in part to restructure industry practices consistent with progressive ideals rather than marketplace fundamentals. Unlike antitrust policy, there appears to have been an effort to approach the monetary relief question systematically, identifying and exploring possible alternatives. Like antitrust, however, these efforts have not always considered relevant legal constraints.

Search for monetary authority. A key driver of the new leadership's consumer protection agenda actually started before Lina Khan arrived, with the Supreme Court's AMG decision in April 2021.[420] The unanimous decision held that the Commission had no authority for equitable relief under Section 13(b). Attempts to replace the lost tool for obtaining financial sanctions to deter misconduct have driven consumer protection policy since that decision.

An obvious solution is legislation to restore the Commission's authority. The Commission, however, sought Congressional blessing for the same overly broad authority it claimed to the Supreme Court it already had, authority to obtain monetary relief in any and all cases.[421] As in the 1970s, that claim foundered against the belief of many in Congress that for a prohibition as broad as one on "unfair or deceptive acts or practices," monetary relief was sometimes

[416] See the discussion above at 319.

[417] Luke Herrine, "The Folklore of Unfairness," *New York University Law Review,* Vol. 96, No. 2 (May 2021), https://scholarship.law.ua.edu/fac_articles/719.

[418] Herrine implausibly argues the addition of Section 45(n) to the FTC Act defining unfairness in essentially cost-benefit terms "cannot fairly be read as an attempt to rein in the FTC or to compel it to adopt neoclassical theories of the market." Herrine, "The Folklore of Unfairness," p. 519. The article concludes by arguing that a "new coalition does seem to be developing" to "democratize control over business conduct. If this coalition is anything like those that came before, we can expect it to revisit standards for fair dealing . . . " Herrine, "The Folklore of Unfairness," p. 528.

[419] 15 U.S.C. § 45(n).

[420] *AMG Capital Management, LLC v. Federal Trade Commission,* 141 S. Ct. 1341 (2021).

[421] See Opening Statement of Acting Chairwoman Rbecca Kelly Slaughter before the House Committee on Energy and Commerce, Subcommittee on Consumer Protection and Commerce on "The Urgent Need to Fix Section 13(B) of the FTC Act," Federal Trade Commission, April 27, 2021, https://www.ftc.gov/system/files/documents/public_statements/1589456/opening_statement_april_27_house_13b_hearing_427.pdf.

inappropriate.[422] In enacting Section 19 in 1975, Congress limited monetary relief to rule violations and practices that a reasonable person would have known under the circumstances were "dishonest or fraudulent."[423] Despite a clear need for legislative action,[424] it does not appear that Congress will resolve the issue soon.

Pending legislation, the Commission has sought monetary relief elsewhere. Barely a month after the Court's decision, the Commission expanded its interpretation of the Restore Online Shoppers' Confidence Act of 2010 ("ROSCA"), which authorizes civil penalties against violators. The act requires sellers of products with a negative option feature to "disclose[] all material terms of the transaction,"[425] to obtain express informed consent, and to provide an easy mechanism to cancel. The Commission had previously understood the disclosure requirements to refer to the negative option features or details of an offer. The Commission now interprets this provision as applying to *any* product feature, greatly expanding the scope for civil penalties.[426] The Commission continues to maintain this position in consent agreements, although it remains untested in litigation.

Another possible route to monetary sanctions is Section 5(m)(1)(b) of the FTC Act, which allows civil penalties against a party that commits acts or practices that it knows the Commission previously found were violations in a litigated case with another party.[427] In operation, the Commission sends a "synopsis" or "notice of penalty offense" to myriad companies to establish their knowledge, and then seeks civil penalties against companies that engage in the prohibited practices. When the section was first enacted, the Commission launched a pilot project sending several synopses to about 100 companies.[428] When the Reagan administration reviewed these early synopses, the staff found a widespread problem: past Commission decisions were adamant that a violation had occurred, but they often lacked clear or specific holdings about what exactly constituted the unfair or deceptive practice. As David Bickart noted in the most comprehensive early analysis of the statute, "Even a firm against whom a cease and desist order has been issued cannot always identify with any precision the practice that the Commission deemed violative of the act."[429]

One synopsis, regarding Truth in Lending violations, seemed more specific, and the Commission used it to challenge advertising of multiple automobile dealers, until an appeals court sharply limited its ability to do so.[430] The court ruled that while there were clear violations of the Truth in Lending regulations, the cases on which the synopsis relied had not included a finding that the particular violations were also "unfair or deceptive."[431] Order language offers greater clarity about what the Commission thought was necessary, and is itself enforceable, but does not constitute a determination that a violation of the order is an unfair or deceptive practice.[432] Without confronting these problems, then Commissioner Chopra argued for "resurrecting" this civil penalty authority in an article coauthored with the current Bureau Director, Samuel A.A. Levine,[433] and the Commission is attempting to do so.

422 For the discussion of the legislative history of Section 19, see Beales and Muris, "Striking the Proper Balance," pp. 18-21.

423 15 U.S.C. § 57b.

424 See Testimony of J. Howard Beales III before the Subcommittee on Consumer Protection and Commerce, House Committee on Energy and Commerce, U.S. House of Representative, on the Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers, April 27, 2021, https://www.congress.gov/117/meeting/house/112501/witnesses/HHRG-117-IF17-Wstate-BealesJ-20210427.pdf.

425 15 U.S.C. § 8403.

426 Federal Trade Commission, Analysis of Proposed Consent Order to Aid Public Comment, In the Matter of MoviePass, Inc., No. 192 3000, June 7, 2021, p. 2, https://www.ftc.gov/system/files/documents/cases/192_3000_-_moviepass_analysis.pdf; see also the Dissenting Statement of Commissioner Noah Joshua Phillips, In the Matter of MoviePass, Inc., Federal Trade Commission, No. 1923000, June 7, 2021, https://www.ftc.gov/system/files/documents/public_statements/1590712/moviepass_statement_phillips_final.pdf.

427 15 U.S.C. § 45(m)(1)(B).

428 David O. Bickart, "Civil Penalties under Section 5(m) of the Federal Trade Commission Act," *University of Chicago Law Review*, Vol. 44, No. 4 (1977), p. 768, https://chicagounbound.uchicago.edu/uclrev/vol44/iss4/3/.

429 Bickart, "Civil Penalties under Section 5(m) of the Federal Trade Commission Act," p. 779.

430 *United States v. Hopkins Dodge, Inc*, 849 F.2d 311 (8th Cir. 1988). When it attempted to fix this problem in an order to show cause proceeding, the Commission itself also rejected the proposition. In the Matter of Reliable Mortgage Corporation, 113 F.T.C. 816 (September 21, 1990).

431 *Hopkins Dodge*, 849 F.2d at 314.

432 Bickart, "Civil Penalties under Section 5(m) of the Federal Trade Commission Act," pp. 761-762.

433 Chopra and Levine, "The Case for Resurrecting the FTC Act's Penalty Offense Authority."

A related problem, as a matter of both law and policy, is that finding a violation is often highly fact dependent.[434] It is easy, for example, to find cases that state clearly failure to have a reasonable basis consisting of competent and reliable evidence for a specific claim is deceptive, but finding that the evidence violates this standard depends very much on the particular facts of the case. The legal problem is that knowing the general principle does not inform third parties whether their evidence is inadequate. The policy problem is that subjecting such uncertain violations to civil penalties is likely to chill the provision of truthful and useful information to consumers.[435] First Amendment protection for commercial speech makes this risk of a chilling effect particularly problematic.

The Commission's aggressive use of civil penalty notices faces considerable uncertainty. Some of the notices of penalty offenses issued to date have not been particularly cautious in their reading of the cases on which they rely,[436] and there appears to be no recognition of the risks of over deterrence. The penalty offense notice concerning endorsements substantially overlaps the Commission's longstanding Guides Concerning the Use of Endorsements and Testimonials,[437] which do not trigger civil penalties. Similarly, the notice concerning Education overlaps with a Guide[438] and a trade regulation rule that would have imposed civil penalties but was rejected first by the courts[439] and later by the Commission.[440] There is no clear reason why the sanctions for similar conduct should differ depending on whether a company received the notice. In general, there is considerable risk of judicial reversal if and when attempts to enforce the notices are litigated. In a reversal of Theodore Roosevelt's famous aphorism, the Commission is speaking loudly, but it may not have much of a stick.

The return to rulemaking. The clearest, but far from easiest, legal path to monetary relief without Congressional action is rulemaking. The ability to obtain civil penalties for rule violations is clear, but perhaps most important, the Commission also has clear authority for equitable relief for rule violations, including refunding money, rescission or reformation of contract, and damages.[441] That relief enables the agency to proceed essentially as it did in fraud cases that relied solely on Section 13(b). For example, it so acted recently against Automators, obtaining an ex parte asset freeze and temporary restraining order in a case including alleged violations of the Business Opportunity Rule.[442]

In July, 2021, the Commission substantially revised its rulemaking procedures, based solely on the need for speed in rulemaking. The actual problems that led to the failures of rulemaking in the 1970s were not considered, nor was the impact of procedural changes on the quality of any resulting rules. As we have written extensively elsewhere,[443] some of the procedures are also inconsistent with statutory requirements, and will both increase political control of rulemaking and reduce the opportunities for public participation.

Since these rule changes, the Biden Commission has launched a new wave of rulemaking using its general authority to define unfair or deceptive acts or practices or special statutes authorizing APA rulemaking. Some, such as a rule prohibiting impersonation of government or other businesses[444]

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434 See Beales, Muris, and Pitofsky, "In Defense of the *Pfizer* Factors," for a discussion of the flexibility of the reasonable basis doctrine and the determination of the amount of evidence necessary to substantiate a claim.

435 See Beales and Muris, "Striking the Proper Balance," pp. 34-38, for a discussion of the problems of seeking monetary relief in substantiation cases.

436 For example, Bickart in 1977 discussed problems with relying on a 1950 case against R.J. Reynolds that is still cited in the Penalty Offense Notice. In particular, the final order in that case does not cover the conduct the Commission found deceptive, but 5(m)(1)(b) requires a final order. Bickart, "Civil Penalties under Section 5(m) of the Federal Trade Commission Act," p. 788.

437 16 C.F.R. § 255.

438 16 C.F.R. § 254.

439 *Katharine Gibbs School (Inc.) v. Federal Trade Commission*, 612 F.2d 658 (2d Cir. 1979).

440 Federal Trade Commission, "Proprietary Vocational and Home Study Schools," termination of proposed rulemaking, *Federal Register*, Vol. 53, No. 151 (August 5, 1988), pp. 29482-29483, https://www.govinfo.gov/content/pkg/FR-1988-08-05/pdf/FR-1988-08-05.pdf.

441 15 U.S.C. § 57b(b).

442 See Complaint for Permanent Injunction, Monetary Relief, and Other Relief, Federal Trade Commission v. Automators LLC, No. 23-cv-1444-BAS-KSC (S.D. Cal. August 8, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/automators.

443 Beales and Muris, *Back to the Future*.

444 Federal Trade Commission, "Trade Regulation Rule on Impersonation of Government and Businesses," notice of proposed rulemaking, *Federal Register*, Vol. 87, No. 199 (October 17, 2022), pp. 62741-62751, https://www.federalregister.gov/documents/2022/10/17/2022-21289/trade-regulation-rule-on-impersonation-of-government-and-businesses.

and a rule banning fake reviews and testimonials,[445] appear relatively innocuous, address practices common to many frauds, and may enable the Commission to use its full set of anti-fraud tools. Even for simple rules, however, innocent practices may be caught as violations. On its face, for example, the impersonation rule as proposed appeared to prohibit well known advertising, such as Alec Baldwin as a police officer informing a driver she could go twice as fast if she had a Capital One card with double miles, or John Hancock Life Insurance, started in 1862, using the distinctive signature of the famous founding father who was of course not affiliated with the company.[446]

Other rule proposals, however, show signs of the Commission seeking to reprise its role as the second most powerful legislature in Washington. The Combating Auto Retail Scams Rule (CARS Rule), for example, seeks to restructure the car buying process, requiring extensive disclosures regarding financing and optional add-on products and forcing buyers to decline, in writing, to purchase the car at the "offering price" without any add-ons before they can discuss any aspect of financing or optional purchases.[447] The Negative Option Rule requires a cancellation method for goods and services sold with a negative option feature that is as easy as the signup process, and require the consumer's express consent before offering any alternative to cancellation.[448] The economy-wide Unfair or Deceptive Fees Rule[449] regulates the details of pricing structures, replacing market determination of pricing strategies,[450] changing fundamentally how companies advertise and compete on price and product features. With each of these proposals, there have certainly been instances warranting case by case enforcement, but there are also entirely legitimate, long-standing uses of similar practices that do not appear to harm, and may benefit consumers. Under both the law and sound policy, the Commission should do more than attempt to generalize its enforcement experience with actual frauds to impose uniform solutions on all affected businesses and consumers, many in vastly different circumstances. Nevertheless, the agency appears to be giving short shrift to such basic questions as it attempts to avoid rigorous application of Section 18 rulemaking procedures.

Although there was an informal hearing in the impersonation rulemaking, only one seriously contested rule, the negative option rule, saw multiple requests for hearings and proposals for disputed issues. As the first actual test of the Commission's revised procedures, this rulemaking is discouraging. Six parties requested hearings, and two proposed numerous disputed issues. In the NPRM, the Commission said only that anyone interested in making a presentation must make a request, identify their interest, and "indicate whether there are any disputed issues of material fact that need to be resolved . . . ."[451] Neither the NPRM nor the Commission's rules offer any definition of a disputed issue, or how the Commission would evaluate those requests. In responding to these "indications" of disputed issues, the Commission made clear that it was expecting, in essence, a response sufficient to defeat a motion for summary judgment: "As in summary judgment, the challenging party must do more than simply assert there is a dispute regarding the Commission's findings."[452] Thus, *after the fact*, the Commission demanded that parties do far more than

[445] Federal Trade Commission, "Trade Regulation Rule on the Use of Consumer Reviews and Testimonials," notice of proposed rulemaking, *Federal Register*, Vol. 88, No. 145 (July 31, 2023), pp. 49364-49382, https://www.federalregister.gov/documents/2023/07/31/2023-15581/trade-regulation-rule-on-the-use-of-consumer-reviews-and-testimonials.

[446] William MacLeod, "Proposed FTC Impersonation Rule's Reach is Too Broad," Law360, December 16, 2022, https://s3.us-east-1.amazonaws.com/cdn.kelleydrye.com/content/uploads/viewpoints/Proposed-FTC-Impersonation-Rule-s-Reach-Is-Too-Broad_Law360_MacLeod_12-16-22.pdf. The final rule, by requiring the misrepresentation to be material, reduces this risk. Federal Trade Commission, "Trade Regulation Rule on Impersonation of Government and Businesses," final rule, *Federal Register*, Vol. 89, No. 42 (March 1, 2024), pp. 15017-15031, https://www.federalregister.gov/documents/2024/03/01/2024-04335/trade-regulation-rule-on-impersonation-of-government-and-businesses, codified at 16 C.F.R. Part 461.

[447] Federal Trade Commission, "Motor Vehicle Dealers Trade Regulation Rule," notice of proposed rulemaking, *Federal Register*, Vol. 87, No. 133 (July 13, 2022), https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule.

[448] Federal Trade Commission, "Negative Option Rule," notice of proposed rulemaking, *Federal Register*, Vol. 88, No. 78 (April 24, 2023), pp. 24716-24739, https://www.federalregister.gov/documents/2023/04/24/2023-07035/negative-option-rule. We have advised companies on issues under this proposal.

[449] Federal Trade Commission, "Trade Regulation Rule on Unfair or Deceptive Fees," notice of proposed rulemaking, *Federal Register*, Vol. 88, No. 216 (November 9, 2023), pp. 77420-77485, https://www.federalregister.gov/documents/2023/11/09/2023-24234/trade-regulation-rule-on-unfair-or-deceptive-fees.

[450] Howard Beales and Todd Zywicki, "Junkyard Dogs: The Law and Economics of 'Junk' Fees" (working paper, George Mason Law & Economics Research Paper No. 23-10, May 2023), https://www.law.gmu.edu/pubs/papers/2310.

[451] Federal Trade Commission, "Negative Option Rule," p. 24730.

[452] Federal Trade Commission, initial notice of informal hearing for Negative Option Rule, https://www.ftc.gov/system/files/ftc_gov/pdf/p064202_negative_option_-_informal_hearing.pdf.

"indicate" an issue. And parties must have done so *before* they saw the entire record!

The Commission's substantive response to the proposals reflects an attitude that is at best difficult to reconcile with the tougher rulemaking requirements of Section 18. The NCTA indicated as a designated issue whether failures to provide information or deception are prevalent in a specific industry (broadband, cable, voice, and video streaming). One would think those are factual questions that are highly relevant to whether the rule should cover these industries. The Commission instead dismisses this as a challenge to its finding of prevalence generally,[453] even though the NPRM includes no mention of, e.g., "cable" or "broadband." The only mention of video streaming is in Commissioner Wilson's dissent: "we know that negative option marketing is used lawfully and non-deceptively in a broad array of common transactions," including video streaming.[454] Similarly, the costs and benefits of the proposed click-to-cancel remedy likely differ substantially for a complex bundle of services than for an auto ship renewal for a dietary supplement. Again, the Commission treats this as "challenging the Commission's findings" – presumably the point of further proceedings in the first place – and asserts its "findings are supported by ample evidence in the record, and neither interested person identified any evidence challenging the FTC's conclusions."[455] This is not the "reasoned decision making"[456] that Congress sought. Surprisingly, the Commission, which had all of the comments before it when responding, criticized commentators who had not seen that factual record.

Moreover, the Commission relies heavily on a distinction between "legislative facts" and "specific facts"[457] – a distinction that the Commission specifically rejected in its implementing rules when the statute was first passed.[458] It therefore found "that there are no 'disputed issues of material fact' to resolve at the informal hearing,"[459] and therefore no need for rebuttal submissions or cross examination. This decision is particularly dubious as the statute provides that a court "shall" set aside the rule if it finds that the lack of cross examination or rebuttal submissions "has precluded disclosure of disputed material facts which was necessary for fair determination."[460]

Nevertheless, the Commission scheduled a hearing, limiting each party to a 10 minute presentation, and allowing all of two weeks, over the December holidays, for them to submit their presentation or additional documents. It appointed a Presiding Officer with no FTC experience, and noted that because there are no disputed issues, "the presiding officer is not anticipated to make a recommended decision,"[461] despite the clear statutory requirement that the presiding officer "make a recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence."[462] After the first hearing, the Presiding Officer, responding to requests from interested parties, rejected requests to designate prevalence in particular industries and the effectiveness of the remedy as "'generalized conclusions' that would not be aided by 'trial type' fact finding." She did, however, designate two issues, regarding whether the rule would have an annual effect of over $100 million and the recordkeeping and disclosure costs of the rule, and scheduled additional hearings for January 31.[463] She gave participants less than a week to prepare. (After that hearing, she scheduled a final session for February 14.)

Perhaps the clearest threat of the Commission assuming an essentially legislative role is its privacy rule Advance Notice of Proposed Rulemaking ("ANPR"), or, in the Commission's current rhetoric, "Commercial Surveillance and Data Security." The ANPR covers the waterfront of privacy concerns, but it does not reveal how the Commission approaches

[453] Federal Trade Commission, initial notice of informal hearing for Negative Option Rule, p. 8.
[454] Federal Trade Commission, "Negative Option Rule," p. 24738.
[455] Federal Trade Commission, initial notice of informal hearing for Negative Option Rule, p. 8.
[456] Beales and Muris, *Back to the Future*, p. 9.
[457] Federal Trade Commission, initial notice of informal hearing for Negative Option Rule, pp. 9-10.
[458] Beales and Muris, *Back to the Future*, p. 10.
[459] Federal Trade Commission, initial notice of informal hearing for Negative Option Rule, p. 10.
[460] 15 U.S.C. § 57a(e)(3)(B).
[461] Federal Trade Commission, initial notice of informal hearing for Negative Option Rule, p. 12
[462] 15 U.S.C. § 57a(c)(1)(B).
[463] Order, Negative Option Rule, Rulemaking Proceeding, January 25, 2024.

privacy, what might constitute unfair or deceptive acts or practices, or how the Commission might regulate them in a forthcoming rule. As one dissenter noted, the ANPR "provides no notice whatsoever of the scope and parameters of what rule or rules might follow; thereby, undermining the public input and congressional notification processes."[464] Outside observers called it "remarkably sweeping in scope … and raising issues that reach beyond the FTC's legal authority," noting that "at times, the FTC seems to be *flaunting* its lack of focus."[465] Although press reports indicate a proposal is likely in the first part of 2024, [466] few clues have emerged about where the proceeding might actually head. By acting in an essentially legislative role, both dissenting commissioners noted the FTC risked derailing Congressional action on national privacy legislation.[467]

464 Dissenting Statement of Commissioner Noah Joshua Phillips, Regarding the Commercial surveillance and Data Security Advance Notice of Proposed Rulemaking, Federal Trade Commission, August 11, 2022, p. 2 https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Phillips%20Dissent%20to%20Commercial%20Surveillance%20ANPR%2008112022.pdf.

465 Jessica L. Rich et al., The FTC's Privacy Rulemaking: Broad and Far-Reaching, but Unlikely to Lead to a Rule Anytime Soon, Kelley Drye Blog, August 15, 2022, https://www.kelleydrye.com/viewpoints/blogs/ad-law-access/the-ftcs-privacy-rulemaking-broad-and-far-reaching-but-unlikely-to-lead-to-a-rule-anytime-soon (emphasis in original). Jessica Rich was the original leading author but has since been removed from the piece since leaving Kelley Drye & Warren LLP. Rich was an FTC Bureau of Consumer Protection Director in the Obama Administration.

466 Mike Swift, "Comment: US FTC Poised to Move Forward with Data-protection Rulemaking," MLex Market Insight, January 26, 2024, https://mlexmarketinsight.com/news/comment/comment-us-ftc-poised-to-move-forward-with-data-protection-rulemaking.

467 Dissenting Statement of Commissioner Noah Joshua Phillips, Regarding the Commercial surveillance and Data Security Advance Notice of Proposed Rulemaking; Dissenting Statement of Commissioner Christine S. Wilson, Trade Regulation Rule on Commercial Surveillance and Data Security, Federal Trade Commission, August 11, 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Wilson%20Dissent%20ANPRM%20FINAL%2008112022.pdf.

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6 Lessons learned

Like their predecessors in 1970 and 1981, the new Biden team in 2021 believed that they inherited an agency with fundamental flaws. The Nixon FTC saw a lethargic, counterproductive agency. The Reagan FTC saw an overreaching, arbitrary agency. Both engaged in concerted efforts at reform.

The Biden team saw an FTC that had handcuffed itself while technology companies grew ever larger. They called for an end to forty years of alleged failure, demanding aggressive action on virtually every front, claiming giants dominated American business, antithetical to their progressive views of the virtues of small enterprises. The FTC would help lead Biden's effort to reshape the very basis of the economy.

Unlike those earlier eras, the Biden team began with significant headwinds. The FTC in both 1970 and 1981 was widely regarded to need fundamental change, albeit for significantly different reasons. The agency that Casper Weinberger and Miles Kilpatrick transformed had been mired in poor management, trivia, and the anti-consumer Robinson Patman Act. The Reagan administration followed the late 1970s FTC that had so overstepped its very survival was threatened by a bipartisan revolt begun by rank and file members of the House of Representatives against their leadership. In contrast, the FTC of 2021 was not widely criticized or ridiculed; it was the world's only consistently five star rated competition agency in the first two decades of the 21st century. Within Washington itself, the Commission enjoyed bipartisan support across multiple Democratic and Republican administrations, as well as widespread praise in the academic community and the practicing bar.

Although President Biden could count on most elected Democrats, much of the mainstream press, and many opinion leaders to support radical change at the FTC, important institutions supported the Commission's existing course. The agency's renowned career staff would likely have supported more aggressive policies, but the Biden team made clear their belief, like President Trump, that those careerists were a major source of the problem, not part of the solution. Unsurprisingly, the career staff reciprocated the hostility. The new leadership also faces a likely hostile judiciary, which had helped develop the consumer welfare standard that Neo-Brandeisians decry. Finally, although minority Commissioners, the Republicans in Congress, and businesses targeted under new legal standards would no doubt have resisted change, the Biden team significantly exacerbated the problem by violating well established norms of conduct between agency leadership and those groups.

The career staff

Change agents must deal with the resources available, and that includes the existing staff. Both the Nixon and Reagan administrations acted immediately to determine which staffers would support a new direction. Because the FTC circa 1970 was in such disrepute, major staff overhaul was necessary, accomplished quickly, and well received by those who remained. The Reagan team inherited a much less entrenched staff than their predecessors a decade earlier, and only made significant changes in consumer protection, the Bureau that was the focal point of most complaints about agency overreach.

Both of the earlier FTCs used reorganization as a prominent tool to accomplish their goals. Reorganization has several advantages. It can improve efficiency and reduce turf battles, as with Jim Miller's combining three advertising divisions into one, and Casper Weinberger reducing the number of operating bureaus. It also greatly increased the new team's control: managers owed their jobs to the new leaders. Reorganization further served as a starting point from which to launch new policies, as well as ending the inevitable uncertainty about staffing assignments when policies clearly change.

Reorganization does have costs, as the uncertainty and anxiety about how a new organization will function in practice reduces agency output for a time. Recognizing the problem, both Chairmen Weinberger and Miller reorganized very early in their administrations.

From the start, the Biden FTC team's disdain for the career staff was clear. The known hostility of Commissioner Chopra, the elevation of his staff to lead the agency, and the antipathy revealed in steps such as the immediate ban on public appearances and the failure to meet with the staff early in the Chair's tenure demonstrated to the career staff that the new team viewed them with deep antagonism. A recent analysis of the Biden FTC highlighted the open conflict with the careerists and noted, "'the career staff as a general statement was totally sidelined and quite frankly treated with a huge amount of disrespect and suspicion' by Khan and her allies ..."[468]

The Biden team's distain for the staff was reciprocated, as the survey results demonstrate. Although the 2023 survey showed marginal improvement, the surprise is that, despite the staff exodus and considerable new hiring, the low repute in which the FTC staff continues to hold their leadership is at the same levels of the early days of the new team's arrival; improvement, such as exists, is modest indeed.

If the career staff was the massive problem the Biden team believed, massive changes akin to the Weinberger era were the obvious solution. Yet, despite the hostility, the new leaders did not act on their progressive beliefs about the staff; in the end, they lacked the courage of those convictions. They did not reorganize, nor adopt the systematic efforts of their earlier change predecessors to identify supportive staff. Instead, they proceeded ad hoc, with the Chair micromanaging investigations and causing delay, points which the Chair's first chief of staff appears to have acknowledged in internal communications.[469] This approach extended anxiety, which no doubt contributed to continued high attrition – hardly an effective substitute for systematic efforts to identify employees who are enthusiastic about the new agenda. If the Biden team's view of the career staff is correct, they failed to confront directly a crucial problem that needed to be addressed. If, as we believe, this view is wrong, the high levels of anxiety were costly and pointless.

The progressive revolving door view of the career staff as the enemy included hostility to an obvious source of needed expertise, the many experienced lawyers in major law firms. Because some had previous government experience, and all had represented the corporate economy the progressives wished to remake, such experts were largely persona non grata throughout Khan's early tenure, regardless of whether they were committed Democrats. The view was particularly odd as the experts could have been hired to implement, not set, policy. The earlier change administrations had followed this course with considerable success. For example, the Reagan administration's consumer protection leaders, including the current authors, desired to make prosecuting fraud a major prong of FTC consumer protection, but lacked the generalized knowledge to accomplish that objective. They found the necessary expertise, both inside and outside the agency, and simply did not care whether those individuals were committed Reaganites. What mattered was their expertise and their commitment to attacking fraudsters.

Rather than using reorganization and related steps to gain firm control of the key agency enforcement bureaus and launch a new era, the Khan administration turned to personnel outside of the agency's enforcement structure. Surprisingly, some were unpaid consultants hired without regard to the legal constraints on what consultants, as opposed to employees, may do. The Chair's office and the Office of Policy Planning both expanded greatly, but neither were the direct and immediate supervisors of those actually doing the work.

Changing policy and the courts

Legal change requires winning in court. Initially, the Nixon FTC had a receptive judiciary, led by the Warren Court, as well as the famously liberal Circuit Court of Appeals for the District of Columbia. The courts had changed dramatically by the end of the 1970s, however, and the Commission's court record became abysmal for cases filed in the later part of that decade, especially in antitrust. Instead of rarely losing, in antitrust cases filed after 1976 it won barely over a third. It was this judiciary, again with support in the Supreme Court, that was so receptive to what became known as the consumer welfare standard in antitrust. In consumer protection, Congress adopted the FTC's economic cost-benefit test for unfairness, a standard crucial for anyone wishing to use the FTC Act for major reform.

Legal reform requires a strategy. Chairman Kirkpatrick developed such a strategy for advertising and relied on the simple market concentration doctrine to guide antitrust policy. The Reagan administration similarly adopted overall strategies for multiple topics, including mergers in general, oil mergers in particular, business use of government to restrict competition, and fighting fraud and

468 Khardori, "Lina Khan's Rough Year."

469 Committee on the Judiciary, *Abuse of Power, Waste of Resources, and Fear,* p. 20.

marketplace deception. In antitrust, the Reagan administration's approach to mergers recognized the rejection of the simple market concentration doctrine and the need to evaluate mergers more comprehensively than relying on concentration statistics. The DOJ's 1982 guidelines adopted these views, which the FTC followed, and the Commission also provided a detailed template to analyze the politically sensitive oil mergers.

The strategy earlier administrations followed for achieving legal change is instructive. Following significant, successful steps toward deregulating transportation by President Carter, President Reagan launched a systematic effort at regulatory relief. His FTC team believed that antitrust could attack rent seeking – the use of government to restrict competition to favor certain businesses. Some rent seeking enjoys protection under the state action and Noerr Pennington doctrines, and throughout the forty years the FTC has devised careful strategies to test and limit those legal protections appropriately. For example, the Reagan FTC established task forces to consider both doctrines, and help select test cases. Multiple cases followed over the decades that followed, including important victories in the Supreme Court and elsewhere.

In consumer protection, the move for legal change began with Commission policy statements, first on unfairness in the last year of the Carter administration, and then on deception in the Reagan administration. Both statements reviewed past cases to synthesize a new articulation of the legal meaning of those terms, and proved persuasive to Congress and highly influential in the courts. The unfairness statement was eventually codified as modified by the Reagan FTC, and numerous courts have approved the deception policy statement, which remains the foundation of the Commission's deception analysis.

In contrast, Khan "came in with a bunch of answers" and a bunch of targets – big tech companies first and foremost – "but no actual strategy for how to achieve her objectives within the agency's legal and resource constraints."[470] The failure to approach problems as systematically as her predecessors did to accomplish change was exacerbated by the mutual hostility with the career staff and the failure quickly and clearly to manage the agency through the organizational structure she inherited. Even a case widely known that Chair Khan would bring, the antitrust action against Amazon, took 27 months to file. The delay was all the more surprising, as the Commission was in the midst of a long investigation when the Biden team arrived, had already obtained millions of documents, and the new Chair obtained her original fame as a critic of Amazon.

The Commission's approach to unfair methods of competition also contrasts sharply with earlier attempts to change the law. The policy statements on unfairness and deception were influential precisely because they identified the key questions in the analysis, both offering meaningful guidance and narrowing agency discretion. The Khan Commission's unfair methods statement does the opposite, returning to a "we know it when we see it" view of the law. To the extent it offers standards at all, it uses parts of the rhetorically attractive but substantively empty standard the 1980 Unfairness statement abandoned – conduct that is "oppressive," "exploitive," "abusive," or "otherwise restrictive." Its "reject[ion of] a vast body of relevant precedent"[471] offers little reason for courts to take it seriously.

Because the Biden FTC, unlike Nixon and Reagan, faces a hostile judiciary, a careful strategy for law reform was even more essential. Such a strategy is not apparent. Thus, in competition rulemaking, they rely on a 1973 opinion without confronting developments that highly respected legal scholars conclude reject the earlier opinion.[472] The new merger guidelines rely on case law that the FTC and DOJ claim is controlling, while ignoring more recent cases inconsistent with the new guides. Similarly, the new procedures for consumer protection rulemaking ignored some specific statutory requirements and strained others to, and perhaps beyond, the breaking point. The Commission is also pursuing tenuous and untested expansions of its authority, such as the unprecedented use of a show cause order to address alleged violations

470 Khardori, "Lina Khan's Rough Year."

471 Dissenting Statement of Commissioner Christine S. Wilson, Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act."

472 See Merrill, "Antitrust Rulemaking: The FTC's Delegation Deficit"; Richard Pierce, "The FTC Doesn't Have the Power to Issue Substantive Rules," *Bloomberg Law*, August 9, 2023, https://news.bloomberglaw.com/us-law-week/the-ftc-doesnt-have-the-power-to-issue-substantive-rules.

of a consent agreement, expanding the FTC's interpretation of ROSCA that had been in place since the statute was enacted, and renewed reliance on an expansive use of questionable civil penalty notices.

The FTC has succeeded many times in moving the law, with hospital mergers a recent example. That multifaceted effort took years, across many FTC administrations. The empirical work by the agency's large staff of well-respected industrial organization economists was crucial to the hospital merger success, but the Biden Administration's intense hostility to economics and economists has sidelined this resource. Indeed, the FTC's chief economist, appointed by Biden's Acting Chair, left after less than a year, "amid fierce internal debate about the agency's plans" for a study of the PBM industry.[473] There is simply no evidence that the Biden team is sowing the seeds necessary to convince a hostile judiciary.

Congress, of course, can change the law without the need for building a careful foundation, and the Biden Administration apparently relied initially on this deus ex machina of new laws. They appeared, however, to lack a backup plan.

We do not deny the Biden FTC has engaged in considerable activity, bringing rules and cases, garnering headlines and favor with progressive constituencies. Nevertheless, there is considerable doubt about whether the activity will accomplish the transformative goals of the progressives. The failure to emulate the approaches that led to successful transformations in the Nixon and Reagan years could doom the Biden agenda.

Breaking norms

From the very beginning, when immediately upon her confirmation President Biden surprisingly named Lina Khan Chair, the administration has obliterated many long standing norms. From surprising "big tech" companies with major actions without the opportunity for agency meetings, to withholding information from minority Commissioners and Congress, to overt hostility, silencing, and ignoring the agency's highly regarded career staff, the new FTC leaders have seemingly relished norm-busting.

Abandoning norms is not costless. Norms serve useful purposes, especially in institutions where individuals with strong, but different opinions, must work together. The cavalier attitude of the Biden team toward well-established norms reveals their indifference to collegiality and cooperation. An agency like the FTC engages in numerous issues, some controversial, but others routine. Following norms lubricates completion of routine tasks, and still allows for productive disagreement on other matters. When the agency confronts powerful outside interests, as the Reagan FTC did in its battle to preserve jurisdiction over the professions, even Commissioners who had fundamentally different visions for the rest of the agency could work together on this issue. Had Miller burned bridges in the manner of Khan, even that level of cooperation would have been extraordinarily difficult.

What did the Biden team gain from abandoning norms? It may have delayed some potentially embarrassing matters from becoming public, but as the DAEO memorandum issue demonstrates, in Washington sensitive documents are likely to emerge eventually. In the end, the reactions from Chair Khan's staff to Commissioner Wilson's objections about failure to receive important documents may reveal one of the chief benefits – thumbing their noses at those with whom they disagree and may even dislike. That personal benefit seems hardly worth the institutional costs if one is concerned with achieving sustainable legal change.

Of all of the norms broken, the Meta recusal episode is the most baffling. The case was unlikely ever to be tried, and even if it was the Chair may not have been at the Commission when it returned. Why did Khan not simply follow the DAEO's advice and recuse herself? Perhaps she was worried about setting a precedent for the Amazon case to follow? If so, participating in Meta did not help, as the Chair avoided the issue of participating as a judge by filing Amazon instead as a prosecutor in federal court.

[473] Leah Nylen, "FTC's Top Economist Resigned Amid Dispute Over Pharma Study," *Politico*, February 25, 2022, https://www.politico.com/news/2022/02/25/ftcs-top-economist-resigned-amid-dispute-over-pharma-study-00011878.

Today . . . and tomorrow

As we write, the Biden FTC is in its 34th month. At similar points of the two previous change eras, October 1972 and July 1984, one would have likely drawn different conclusions, at least superficially. The revitalized FTC of 1972 appeared triumphant. The staff and the agenda had been remade, in an agency growing in power, prestige, and popularity. The Commission's major constituencies, Congress, the practicing bar, the press, and the academy, all applauded. By contrast, the FTC of 1984 was closely divided, with considerable rancor between its current Chair and his immediate predecessor. Outside attitudes were divided, politically and ideologically.

Yet, 1972 was a false spring. The intellectual foundations of the FTC's competition program, focused on attacking concentration, were beginning to crack, as was judicial support for the heart of FTC antitrust. Those cracks became chasms, to which the FTC never adjusted throughout the decade. In consumer protection, the Commission succumbed to the temptation to use unfairness to remake the American economy, fundamentally changing its direction. Support from the FTC's constituencies fractured, and in some cases collapsed, as the agency overreached and seemed out of control.

The contention of 1984 receded; the former chairman's term expired that September. The internal groundwork to build new consumer protection and antitrust programs was already producing dividends, many of which were becoming apparent. The fraud program was returning money to consumers, attacking an increasing number of fraudsters, and beginning the long process of establishing enforcement partners across America. Competition cases produced many victories, including three in the Supreme Court, beginning shortly after the original Reagan team departed. The template for oil mergers was tested, successfully, in the oil merger wave of 1984.

Of course, the success (or failure if you are the Biden team) of the 40 years that started with President Reagan was only dimly apparent in 1984. That outcome required much effort from successive administrations, and, perhaps most crucially, bipartisan agreement on a basic agenda, evolved and modified in significant respects from the early Reagan years, by the Clinton and Obama administrations. That bipartisanship at the FTC, a rare island in the increased political hostility of 21st-century Washington, was swept away with the election of 2020.

What of 2024? The Biden FTC has been active, but has not laid the foundation to achieve the transformation it desires. Chair Khan inherited a career staff that Rohit Chopra, who provided so much of the intellectual and staff support for the new team, blamed for the FTC's perceived failures. Like 1970, that belief called for massive, carefully orchestrated changes, but no such changes occurred.

The new leaders want transformative policies in both antitrust and consumer protection to restrain what they call the excessive power of major American corporations—policies likely impossible under existing law. We see no evidence of efforts to replicate the brick by brick approach that built the legal underpinnings of the past 40 years, widely accepted by the current judiciary. The FTC's world class industrial organization economists could attempt to produce empirical studies, but are mistrusted, as is the entire field of economics. More modest reform in individual areas, as happened with hospital mergers, are still difficult and require many years. Such focused reforms do not appear to be underway either.

Instead of a strategy to achieve change, there was a hope, perhaps a faith, that new laws would provide the tools to obliterate the alleged mistakes of the 40 years. In the 110 years of FTC history, transformative laws have been scarce. If they do happen, they will not likely be on the watch of the current FTC leadership.

What we have seen is an impressive norm-busting campaign, but to what end? If they meant to increase opposition, the Biden team surely succeeded. In the hyper politicized world of modern Washington, perhaps that is itself the new norm. Even civility may have no place in today's FTC. If so, we mourn its passage.

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