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2013

## Competition Agencies with Complex Policy Portfolios: Divide or Conquer?

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### Recommended Citation

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## **Competition Agencies with Complex Policy Portfolios: Divide or Conquer?**

Current Draft: 20 February 2013

David A. Hyman & William E. Kovacic<sup>1</sup>

The worldwide adoption of competition law is a remarkable development in economic regulation. More than 120 jurisdictions have enacted competition laws, and roughly 90 of these have come into being since 1990.<sup>2</sup> Companies accustomed to regarding antitrust rules as the sum of commands issued by the European Union and the United States now must account for policies set in countries such as Brazil, China, and India. In only the past five years, major additions have included the establishment of a new antimonopoly law in China and a thorough overhaul of India's system.<sup>3</sup>

The attention now given to the formation of antitrust laws globally has obscured an important characteristic of the institutions entrusted with their implementation. The agencies established to enforce competition laws often have mandates that encompass other policy responsibilities. The U.S. Federal Trade Commission (FTC) is an informative example. The FTC is a policy conglomerate, a body whose mandate combines antitrust, a wide range of consumer protection functions (most notably, oversight of commercial advertising and marketing practices), and an increasingly important role as the principal U.S. data protection and privacy agency.<sup>4</sup>

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<sup>1</sup> Hyman is H. Ross & Helen Workman Chair in Law and Professor of Medicine, University of Illinois. From 2001-2004, he served as Special Counsel at the Federal Trade Commission. Kovacic is Professor at the George Washington University School of Law. From 2001-2011, he was, at various points, the General Counsel, Commissioner, and Chairman of the Federal Trade Commission.

<sup>2</sup> On patterns in the adoption of competition laws, see William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 Mich. L. Rev. 1019, 1042-43 & n. 82 (2012). One excellent repository of information on the establishment of new systems is the International Competition Network, whose members include the competition agencies of roughly 100 jurisdictions. Modern developments in the creation and implementation of competition systems can be followed on the ICN website, which is <http://www.internationalcompetitionnetwork.org>.

<sup>3</sup> On the modern competition law reforms in China and India, see *Competition Law in the BRICS Countries* (Vassily Rudomino et al. eds., 2012).

<sup>4</sup> On the FTC's diverse mandate, see Federal Trade Commission, *The FTC in 2012* (Mar. 2012), available at <http://www.ftc.gov/os/highlights/2012/ftc-highlights.pdf>.

The FTC's multi-dimension policy portfolio is the norm among jurisdictions with competition laws. Over half of the jurisdictions with competition laws assign to what often is called a "competition agency" important economic policy functions beyond competition law. For example, more than thirty jurisdictions rely on a single agency to enforce antitrust laws and to implement consumer protection statutes (especially measures that ban false advertising).<sup>5</sup> Other countries employ still more elaborate combinations such as Peru's INDECOPI (antitrust, consumer protection, trade, intellectual property, and bankruptcy), Russia's Federal Antimonopoly Service (antitrust, advertising, and public procurement), and the Australian Competition and Consumer Commission (antitrust, consumer protection, and regulatory matters involving the telecommunications sector). Still other countries, such as the Netherlands and Spain, are considering the formation of new government bodies that would merge the competition agency with various other regulatory authorities

The specific amalgamation of policy tasks within a single government body has important consequences for how competition agencies define their goals, allocate resources, and select programs to fulfill their duties. The assignment of multiple regulatory tasks can deeply affect a competition agency's performance, just as it affects the performance of other agencies. This issue has attracted little attention in competition policy circles,<sup>6</sup> although public administration scholars (and, to a far more limited extent, legal academics) have done important work on such issues in other areas.<sup>7</sup>

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<sup>5</sup> Some of the world's best known competition policy bodies share this design characteristic, including the United Kingdom's Office of Fair Trading ("OFT") and Canada's Competition Bureau.

<sup>6</sup> Noteworthy recent exceptions have examined the combination of competition and consumer protection duties in a single agency. See, e.g., Competition Committee of the Organization for Economic Cooperation and Development, Background Documentation for the Global Forum on Competition (Feb. 21-22, 2008) (collecting materials on "the interface between competition and consumer policies"); Katalin J. Cseres, *Integrate or Separate – Institutional Design for the Enforcement of Competition Law and Consumer Law* (Amsterdam Centre for European Law and Governance, Working Paper Series 2013-01, Jan. 2013).

<sup>7</sup> An abbreviated list of articles on the subject by legal scholars would include Jody Freeman & James Rossi, *Agency Coordination in Shared Regulatory Space*, 125 *Harvard L. Rev.* 1131 (2012); Keith Bradley, *The Design of Agency Interactions*, 111 *Columbia L. Rev.* 746 (2011); Jason Marisam, *Duplicative Delegations*, 63 *Admin. L. Rev.* 181 (2011); Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *Texas L. Rev.* 15 (2010); Jacob Gersen, *Designing Agencies: Public Choice and Public Law*, in *Research Handbook in Public Law and Public Choice*, D. Farber & A. O'Connell, eds. (2010); Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 *Harv. Envtl. L. Rev.* 1 (2009); Dara K. Cohen, Mariano-Florentino Cuéllar, and Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and*

Despite this gap, there is growing interest among government agencies in the links between institutional design and agency behavior. In scholarly commentary and in the work of multilateral organizations such as the International Competition Network (ICN), there is greater recognition that the quality of a nation's competition policy depends crucially on the effectiveness of the institutions entrusted with the formulation and implementation of that policy.<sup>8</sup> There is little point in discussing what substantive programs the world's competition agencies should pursue without a more careful examination of how they agencies will carry them out. As we have suggested in other work, the latter inquiry inevitably and necessarily involves an assessment of institutional design.<sup>9</sup>

In this article, we continue our analysis of the relationship between agency design and performance. We illuminate the dynamics that influence the assignment of regulatory duties to an agency, how those dynamics (and the allocation of responsibilities) can change over time, and how the specific combination of regulatory functions and purposes can affect agency performance. We focus on the organization of public competition agencies,

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*the Political Design of Legal Mandates*, 59 *Stan. L. Rev.* (2006); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 *Sup. Ct. Rev.* 201; Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 *Cal. L. Rev.* 1655 (2006); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 *Yale L. J.* 955 (2004); Jonathan Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 *J. L. Econ. & Org.* 93 (1992).

Public administration scholars and political scientists have spent decades on these issues. See, e.g., Karen M. Hult, *Agency Merger and Bureaucratic Redesign* (1987); Beryl A. Radin & Willis D. Hawley, *The Politics of Federal Reorganization: Creating the U.S. Department of Education* (1988); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 212 (2000); Amy B. Zegert, *Spying Blind: The CIA, the FBI, and the Origins of 9/11* (2007); David E. Lewis, *Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946-1997* (2003).

The literature on the organization of private firms is, of course, vast. See, e.g., Harold Demsetz, *Ownership, Control, and the Firm* (Blackwell 1990).

<sup>8</sup> See Daniel A. Crane, *The Institutional Structure of Antitrust Enforcement* (2011); Daniel A. Crane, *Antitrust Anti-Federalism*, 96 *Calif. L. Rev.* 1 (2008) (studying impact of institutional arrangements in shaping outcomes in U.S. antitrust system); William E. Kovacic, *The Digital Broadband Migration and the Federal Trade Commission: Building the Competition and Consumer Protection Agency of the Future*, 8 *J. Telecom. & High Tech. L.* (2010) (describing institutional elements for successful competition and consumer protection programs).

<sup>9</sup> William E. Kovacic & David A. Hyman, *Competition Agency Design: What's on the Menu?*, 8 *European Competition Journal* 527 (Dec. 2012). David A. Hyman & William E. Kovacic, *Institutional Design, Agency Life-cycle and The Goals of Competition Law*, *Fordham L. Rev.* (forthcoming, 2013).

but our analysis has obvious implications for agency design at other governmental levels (i.e. both trans-national, and sub-national),<sup>10</sup> and to the design of public and private universities,<sup>11</sup> and other nonprofit entities.

Part II provides a historical perspective on the complexities of designing a public agency. Part III spells out a basic analytical framework for analyzing the problem of agency design. It then identifies seven factors that have proven significant in predicting the success and failure (judging by both durability and popular and academic regard) of any given combination of functions. Part IV applies our analysis to the FTC and its combination of competition, consumer protection, and privacy responsibilities. Part V poses the question whether the correct solution is to “divide or conquer.” Part VI concludes.

## II. Public Agency Design

### A. First Principles

To create a public agency, one must specify at least five major institutional characteristics: (1) the agency’s relationship to the political process (the autonomy/accountability tradeoff), (2) the governance mechanism (management by a single executive or a multi-member board, (3) location within the government (stand-alone institution or sub-unit of a larger body), (4) exclusive or shared policy responsibilities; (5) single- or multi-purpose mandate, and (5) the policy instruments the agency may use

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<sup>10</sup> See, e.g., Nicholas Confessore, *Cuomo’s Deep Reach Into Regulatory Territory Could Provoke Clash in Albany*, N.Y. TIMES Feb. 15, 2011, available at <http://www.nytimes.com/2011/02/16/nyregion/16cuomo.html?hp> (describing proposal to merge “the state’s Insurance and Banking Departments, along with the Consumer Protection Board, into a new Department of Financial Regulation. . . [aides] said a single regulator with broad jurisdiction would be more effective than the patchwork of agencies charged with protecting New Yorkers from financial fraud. . . It could have the effect of transforming the superintendent of the new agency into a second “sheriff of Wall Street,” forcing [Attorney General] Schneiderman, a fellow Democrat with whom Mr. Cuomo has clashed in the past, to compete for high-profile cases.”)

<sup>11</sup> For example, at the University of Illinois, physics is in the College of Engineering, but chemistry and chemical engineering are in the College of Liberal Arts & Sciences. Agricultural economics is in the College of Agricultural, Consumer & Environmental Sciences, but the economics department is in the College of Liberal Arts & Sciences. And, there are a series of smaller units, institutes, and centers, whose independent status remains an open issue. See *Stewarding Excellence @ Illinois, Academic Unit Reviews at* <http://oc.illinois.edu/budget/projectteams.html#unitreviews> and *Initiatives and Small Centers*, at <http://oc.illinois.edu/budget/projectteams.html#smallcenters>. Similar issues are also raised within individual units. Should the law librarian be a member of the law faculty; the library faculty, or both?

in carrying out its duties (e.g., data collection and reporting, law enforcement, business and consumer education, rulemaking, administrative adjudication, civil and/or criminal authority).<sup>12</sup>

Our analysis focuses on the fifth of these questions: the assignment of policy tasks. In a rough sense, we are taking a step toward sketching out the public administration equivalent of Ronald Coase's *Nature of the Firm*.<sup>13</sup> Post-Coase, scholarship has recognized the complex issues raised by the specification of the boundaries of the firm, and the linkage between organizational and institutional choices and firm "outputs." When do firms carry out some functions themselves, and when do they contract with others? How do firms decide between contract, acquisition, and joint venture, when they are not able to do something themselves? Why do firms enter some product lines and geographic areas, and not others? Are conglomerates, which participate in multiple independent and unrelated lines of business, a good idea or not? How important are transaction costs (i.e., the relative costs of out-sourcing versus internal production) and product complementarities (i.e., should a manufacturer of mobile phones also make apps?) in specifying the boundaries of the firm?

How then should we think about the "optimal" boundaries for a government agency's substantive responsibility?<sup>14</sup> The polar solutions are obviously unacceptable: no one creates an agency and fails to give it something to do, and there are no takers in a modern nation state for a "Department of Everything." In between, the dividing lines are less obvious: how does one decide whether an administrative agency should have N or (N+1) or (N+10) areas of responsibility? What counts as a distinct area of responsibility? Does it depend on whether the areas involve separate substantive bodies of law – and how are the boundaries to be set? Should the same agency enforce both civil and criminal laws? Should the agency combine legislative, judicial, and executive functions, or just amalgamate two of the three – and which two? What arrangement minimizes the possibility of capture by those being regulated?<sup>15</sup> What arrangement will be most appealing to the legislators who create the agency in the first place – as well as those charged with oversight and budgetary authority? If another agency already occupies part of the field, is it better to

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<sup>12</sup> These and other important institutional choices are set out in Kovacic & Hyman, *supra* note 9.

<sup>13</sup> Ronald Coase, *The Nature of the Firm*, 4 *Economica* 286 (1937).

<sup>14</sup> Some of these parallels are explored in Oliver E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 17 *J. LAW, ECON. & ORG.* 306 (1999). See also Jonathan Klick, Francesco Parisi & Schulz, *The Two Dimensions of Regulatory Competition*, 26 *INT'L REV. L. ECON.* 56 (2006).

<sup>15</sup> Cf. Barkow, *supra* note 7.

expand capacity at the existing agency, add responsibility to the existing agency without expanding capacity, or create an entirely new agency? Should we have multiple agencies responsible for the same general area – and if so, how should their jurisdiction be defined and enforced? If we want closer coordination of policy and implementation, should we combine two (or more) agencies into one, or are other strategies (e.g., creating a coordinating council or a “czar”) more effective? What are the differing consequences of creating a new agency, adding new functions to an existing agency, and reorganizing governmental functions? And so on.

To address these questions, we first examine the forces that historically have shaped the assignment of regulatory tasks to agencies.

### B. Constructing The Regulatory Portfolio

Unlike business firms, which set their boundaries through acquisitions, contracts, expansion and contraction, government agencies acquire substantive responsibilities through one of four paths. The simplest case is the assignment of specific functions to a particular agency by *deliberate legislative choice*. Congress created the FTC in 1914 as an alternative to the Sherman Act’s prosecutorial model, which vested public enforcement in an executive body (the Department of Justice) and relied on the federal courts to adjudicate cases and shape doctrine.<sup>16</sup> Congress intended Section 5 of the FTC Act, which authorized the Commission to address “unfair methods of competition,” to enable the FTC to follow a more activist path in enforcing antitrust law and doctrine.<sup>17</sup> The agency was to apply this authority to develop norms of business conduct.

When it is allocated explicitly by statute, regulatory authority may be shared, concurrent, or exclusive. There are numerous instances where regulatory authority is shared between a sector-specific agency (e.g., the Federal Communications Commission in telecommunications) and a government body with a broader generic mandate to address certain categories of business transactions (e.g., the Department of Justice Antitrust Division and the control of mergers). Alternatively, Congress can grant concurrent authority to two agencies, as is the case with the grant of merger control authority under the Clayton Act to the DOJ and the FTC.

Agencies can also acquire regulatory or operational authority by *accident or fortuity*. As noted above, the original ambit of the FTC was antitrust law, and there is no evidence that Congress intended for it to play a

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<sup>16</sup> See Crane, *supra* note 8, at 13-26 (describing institutional choices underpinning adoption of the Sherman Act).

<sup>17</sup> 15 U.S.C. Section 45. The establishment of the FTC is examined in detail in Marc Winerman, *The Origins of the Federal Trade Commission: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

role in consumer protection. However, from its first years the FTC used Section 5 of the FTC Act to respond to complaints from business firms about their rivals' deceitful marketing campaigns, Congress explicitly expanded the FTC's authority so it could challenge "unfair" and "deceptive" business practices.<sup>18</sup>

More broadly, an agency with capabilities originally designed to serve one purpose may find those capabilities suitable for other analogous purposes – e.g., "if you've got a hammer, why not help other agencies with nails that need pounding?" Thus, helicopters and warships used to deliver troops into combat also can be used to assist civilians suffering from natural disasters, such as earthquakes or floods – explaining why the humanitarian programs of the Department of Defense have expanded considerably in recent years.

An agency's regulatory jurisdiction may also be affected by agency action in response to *changes in business products or technology*.<sup>19</sup> Consider privacy and data protection policies. Modern advances in communications and information services technology have dramatically expanded the ability of firms to collect and use information about consumer behavior and preferences. The United States does not have an omnibus privacy and data protection statute. Instead, the U.S. regime consists of federal and state statutes that regulate specific sectors (e.g., data collection and use by health care providers) or specific types of transactions (e.g., financial services), with regulatory authority dispersed among the agencies responsible for administering each of these statutes.

The resulting policy vacuum allowed the FTC to emerge as the leading federal privacy agency, by virtue of several cases it brought against firms that failed to fulfill promises concerning data protection.<sup>20</sup> The FTC

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<sup>18</sup> The formative legislation is the Wheeler-Lea Act, 52 Stat. 111 (1938). This evolution is described in Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921-1925*, 77 ANTITRUST L.J. 145, 193-95 (2010).

<sup>19</sup> We exclude technological developments that cause Congress to act. So, the emergence of powered flight resulted in a new branch in the Department of Commerce, which ultimately became the FAA.

<sup>20</sup> See, e.g., Federal Trade Commission, *Consumer Electronics Company Agrees to Settle Data Security Charges; Breach Compromised Data of Hundreds of Consumers*, Feb. 5, 2009, at <http://www.ftc.gov/opa/2009/02/compgeeks.shtml>; Federal Trade Commission, *Iconix Brand Group Settles Charges Its Apparel Web Sites Violated Children's Online Privacy Protection Act*, Oct. 20, 2009, at <http://www.ftc.gov/opa/2009/10/iconix.shtml>; Federal Trade Commission, *CVS Caremark Settles FTC Charges: Failed to Protect Medical and Financial Privacy of Customers and Employees; CVS Pharmacy Also Pays \$2.25 Million to Settle Allegations of HIPAA Violations*, Feb. 18, 2009, at <http://www.ftc.gov/opa/2009/02/cvs.shtml>; Federal Trade Commission, *FTC Says Mortgage Broker Broke Data Security Laws: Dumpster Wrong Place for Consumers' Personal Information*, Jan. 21, 2009, at <http://www.ftc.gov/opa/2009/01/navone.shtml>.



also issued reports in December 2010 and March 2012 which proposed a policy framework for handling privacy issues.<sup>21</sup> The Department of Commerce has sought to play a role into the same policy space, triggering a behind-the-scenes contest for regulatory primacy, which Congress has not yet settled.<sup>22</sup> In like fashion, the development of broadband networks has similarly sparked a dispute between the FTC and the FCC over which agency will oversee this element of the communications sector.

The same dynamic has played out in operational terms within the DOD on several occasions. Technological development invariably triggers intense contests to determine which of the uniformed services will control the deployment of weapons based on the new technology. Consider nuclear weapons. The Air Force, Army, and Navy all sought to occupy the relevant policy terrain, devising solutions that were based exclusively on each service's area of primary expertise. The Air Force emphasized long-range bombers and intercontinental ballistic missiles.<sup>23</sup> The Army developed intermediate range ballistic missiles and nuclear-capable artillery pieces. The Navy built ballistic missile submarines and acquired carrier-based aircraft with the capacity to deliver nuclear weapons. Congressional appropriations to each service and allocations to particular weapon systems functioned to indicate the winners and losers of the fight for operational dominance.

Finally, there is *legislative divestiture*. Perceived failure (especially catastrophic failure) can spur Congress to divest some of an agency's functions, or fold the entire agency into another institution. So, as detailed below, the Deepwater Horizon oil spill in the Gulf of Mexico resulted in a fundamental reorganization of the Minerals Management Service ("MMS") in the Department of Interior. The melt-down of the financial markets resulted in the shuttering of the OTS, and transfer of its functions to the OCC. The devastation of New Orleans in the wake of Hurricane Katrina

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<sup>21</sup> Federal Trade Commission, Protecting Consumer Privacy in an Era of Rapid Change (Mar. 2012), at <http://www.ftc.gov/os.2012/03/130326/privacyreport.pdf>; Federal Trade Commission, *FTC Staff Issues Privacy Report, Offers Framework for Consumers, Businesses, and Policymakers*, Dec. 1, 2010, at <http://www.ftc.gov/opa/2010/12/privacyreport.shtm>

<sup>22</sup> See Press Release, *Commerce Department Unveils Policy Framework for Protecting Consumer Privacy Online While Supporting Innovation*, Dec. 16, 2010, at <http://www.commerce.gov/news/press-releases/2010/12/16/commerce-department-unveils-policy-framework-protecting-consumer-priv>.

<sup>23</sup> The Air Force was originally unenthusiastic about ballistic missiles, since they threatened the supremacy of the bomber, which dominated the Air Force culture. When it became clear that DOD was going to acquire the missiles, the Air Force "faced an awkward choice: either preserve the culture at the cost of letting the army and navy have what may turn out to be the weapon of the century, or get on the bandwagon at the cost of modifying the culture." Wilson, *supra* note 7, at 105.

resulted in a reorganization of the Department of Homeland Security.<sup>24</sup>

In some instances, divestiture is the result of a planned incubation of a new regulatory function, and does not necessarily indicate dissatisfaction with the agency. This was the case with federal securities regulation in the United States. In the 1920s and early 1930s, the FTC used its consumer protection authority to challenge deception in the sale of securities. These cases made the FTC the principal federal entity ensuring honesty in the securities market. The FTC bolstered this role through hearings and reports involving the securities industry and the establishment and operation of public utility holding companies. Although Congress considered assigning responsibility for securities regulation to the FTC, it ultimately used the FTC as a transitional platform for the implementation of the 1933 and 1934 securities statutes, until the Securities and Exchange Commission (“SEC”) was set up. As part of this plan, James Landis served a short tenure with the FTC before moving to the new SEC as a commissioner.

The different ways by which agencies acquire (and sometimes lose) portions of their regulatory portfolio has two distinct implications. First, agencies seem inevitably to acquire multiple functions and purposes, with their precise portfolio of responsibilities changing over time. Whether this multiplicity is the result of deliberate legislative assignment, inadvertence, seizure of newly created policy terrain that emerges as a result of technological dynamism and other forms of industry change, or the periodic divestiture and reallocation of tasks, the reality is that purely single function/purpose agencies are the exception rather than the rule.

Second, agencies will often have actual or potential rivals for control of specific policy making functions. Some agencies share policy areas with other government bodies. In other instances, there is a common boundary, and agencies periodically contest the location of the property line. In still other cases (such as when technological change transforms an industry and its products), the property line shifts. The process is no different than when a deed defines real estate ownership according to the course of a river. A change in the course of the river creates predictable disputes over who owns what.<sup>25</sup> Finally, agencies sometimes approach legislators to request

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<sup>24</sup> Congressional Research Service, *Federal Emergency Management Policy Changes After Hurricane Katrina: A Summary of Statutory Provisions*, Nov. 15, 2006, at <http://training.fema.gov/EMIWeb/edu/docs/Federal%20EM%20Policy%20Changes%20After%20Katrina.pdf>

<sup>25</sup> In property, the boundary either moves along with the river (if the change is the result of accretion) or remains where it was originally (if the change is the result of avulsion). This rule explains why although the Mississippi River generally forms the border between Tennessee and Arkansas (with Arkansas on the east bank, and Tennessee on the West bank), some of the land on the west bank is in Tennessee, and other land on the eastern bank is in Arkansas. See *State of Arkansas v. State of Tennessee*, 246 U.S. 158

ownership of a previously uninhabited policy area or simply seek to expropriate another agency's portfolio. Secretary of Interior Harold Ickes was notorious for his raids on the territory (both real and regulatory) of other Departments.

Given these dynamics, it would be very useful to know which factors contribute to the success or failure of particular combinations, and the associated trade-offs. Part III turns to this issue.

### III. Who Should Do What: Seven Criteria

How should we decide who should do what? We offer seven criteria that reflect our reading of the mix of factors that have historically influenced agency design, location, and performance.<sup>26</sup> We note at the

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(1918).

<sup>26</sup> Importantly, each factor should be assessed at the level of the agency/department, rather than any subdivision or bureau within the agency/department. Otherwise, the entire debate becomes moot, since even facially absurd combinations can look sensible if you drill down far enough into each agency/department's organizational chart. See Weisbach & Nissim, *supra* note 7, at 958-959 ("Consider, for example, a proposal to have the IRS run the country's defense system, replacing the Department of Defense. The proposal is not as silly as it sounds. It would not mean that bespectacled revenue agents would be parachuting into the Hindu Kush wearing night goggles, camouflage, and pocket protectors. Instead, an intelligent Commissioner of Internal Revenue would allow his employees to specialize. Revenue agents would specialize in reading financial statements and soldiers would specialize in fighting. Policies under such a proposal might very well continue much as they do today.")

With all due respect to Weisbach & Nissim, we think the proposal is exactly as silly as it sounds. Weisbach & Nissim suggest that the main impediments to the proposal are the absence of benefits to coordinating tax administration and defense, and the additional costs of administration and oversight of two dramatically different functions. *Id.* We suspect that cultural differences between operators who perform these disparate functions have far more explanatory power for why we do not observe the imagined combination.

Indeed, the FBI's repeated failures in the area of domestic intelligence provide an ideal case study of what happens when one ignores operator culture. See generally Richard Posner, *Remaking Domestic Intelligence* 10, 14-34 (2005). See also Luis Garicano & Richard Posner, *Intelligence Failures: An Organizational Economics Perspective*, 19 J. Econ. Persp. 151, 166 (2005) ("If crime fighting requires a geographically decentralized organization with limited sharing of information and strong individual incentives based on outputs, but national-security intelligence requires a geographically centralized organization with extensive sharing of information and careful screening of inputs but low-powered incentives, the organization's geographical, incentive, and information-sharing structure will either be an unhappy compromise or assure poor performance of one of the two missions.") The Air Force is currently facing similar difficulties, in trying to adapt its longstanding officer-pilot based culture to the increasing use of unmanned aerial vehicles. Mark Mazzetti, *The Drone Zone*, N.Y. Times M32 (July 8, 2012); David Zucchino, *Drone pilots have a front-row seat on war, from half a world away*, L. A. Times (Feb. 21, 2010); Rachel Martin, *Drone Pilots: The Future of Aerial Warfare*, NPR Nov. 29, 2011 at

outset that the factors are “squishy,” inter-related, and are framed at a high level of generality. We offer them in the spirit of Professors David Weisbach and Jacob Nissim: even “relatively crude ideas. . . can help policymakers muddle through the problems they face.”<sup>27</sup>

## A. Evaluative Criteria

### 1. Policy Coherence

A fundamental question posed by a combination of policy duties is policy coherence: how related and consistent are the functions that will reside in the same agency? Do the functions engage the agency in the pursuit of a single set of internally consistent goals, or do the multiple functions command the agency to accomplish inconsistent or unrelated objectives?

In economic terms, one can ask whether are the functions to be combined are complements or substitutes. If they are complements, the combination has the potential to result in synergies and efficiencies; if they are substitutes, the combination is unlikely to result in synergies and efficiencies, and may actually degrade overall performance if it gives rise to internal disagreements over which function should be given primacy. Stated broadly, synergies and efficiencies are more likely to result if there are commonalities among the functions, whether they are derived from a common client population or type of regulated entity, temporal or physical commonalities (including but not limited to common inputs and/or outputs), or even just a shared intellectual framework regarding means and ends.

To be sure, the level of generality at which policy coherence is assessed can result in radically different organizational outcomes. For example, in 1930, the Veterans Administration (“VA”) was created by uniting three bureaus — the Veterans’ Bureau (which was itself created in 1921 by combining programs offered by the Bureau of War Risk Insurance, the Public Health Service and the Federal Board of Vocational Education), the Bureau of Pensions (located in the Department of the Interior) and the National Homes for Disabled Volunteer Soldiers. The common element of these combinations was the nature of the client population (veterans), even though the nature of the services being delivered to the client population varied tremendously (e.g., pensions, health care services, education, and housing/nursing home care). But the VA does not run all programs for which veterans qualify; if a veteran is homeless and also has substance

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<http://www.npr.org/2011/11/29/142858358/drone-pilots-the-future-of-aerial-warfare>

<sup>27</sup> Weisbach & Nissim, *supra* note 7, at 997.

abuse problems, the Department of Housing and Urban Development (HUD) is responsible for the veteran's housing issues, and the VA is responsible for the substance abuse issues.<sup>28</sup>

Further, Congress need not organize services around client populations. For Native Americans, Congress focused instead on the nature of the underlying services being delivered. Accordingly, it allocated responsibility for native lands and native education to the Bureau of Indian Affairs (in the Department of Interior), while responsibility for health care services rendered to the same population was vested in the Indian Health Service (in the Department of Health & Human Services).

Of course, policy coherence is not necessarily of the highest priority – which explains why some Departments are little more than a collection of odds and ends. Consider the Department of Interior, which was created in 1849 by combining the General Land Office (from the Department of the Treasury), the Patent Office (from the Department of State), the Indian Affairs Office (from the War Department) and the military pension offices in the War and Navy Departments.<sup>29</sup> Interior's authority subsequently expanded to cover such functions as the census, regulation of territorial governments, exploration of the western United States, management of the jail and water systems in the District of Columbia, management of hospitals, universities, and public parks, and the colonization of freed slaves in Haiti.<sup>30</sup> Not surprisingly, “serious observers and satirists alike regularly decried an absence of unifying purpose in the seemingly disparate collection of offices,”<sup>31</sup> and Interior was widely described as “the Department of Everything Else” and the “Great Miscellany.”<sup>32</sup> Less kindly disposed commentators described it as “a slop bucket for executive fragments,” and a “hydra-headed monster.”<sup>33</sup> John C. Calhoun predicted that “everything upon the face of God's earth will go into the Home Department.”<sup>34</sup>

The Department of Commerce, which houses bureaus responsible for the census, patents and trademarks, weather forecasts, and weights and standards, has many of the same difficulties. Former Secretary of

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<sup>28</sup> David Brooks, *What Government Does*, N.Y. TIMES, Apr. 28, 2011.

<sup>29</sup> Department of Interior History, available at <http://www.doi.gov/archive/history.html>

<sup>30</sup> Id.

<sup>31</sup> Robert M. Utley & Barry Mackintosh, *The Department of Everything Else: Highlights of Interior History* (1989), available at [http://www.nps.gov/history/history/online\\_books/utley-mackintosh/interior2.htm](http://www.nps.gov/history/history/online_books/utley-mackintosh/interior2.htm)

<sup>32</sup> Id.

<sup>33</sup> Horace S. Merrill, William Freeman Vilas, *Doctrinaire Democrat* (Madison, Wisc., 1954), pp. 134,139.

<sup>34</sup> Henry B. Learned, *The Establishment of the Secretaryship of the Interior*, 16 AM. HISTORICAL REV. 751, 768 (1911).

Commerce William Daley observed that because the Department of Commerce includes the National Oceanic and Atmospheric Administration, the secretary of Commerce “spent 60 percent of his time dealing with fish.”<sup>35</sup>

This dynamic can also become self-reinforcing; the less coherent the combination of functions in a Department to begin with, the easier it becomes to add the next unrelated function or functions. Not surprisingly, some departments have become little more than a dumping ground (or less charitably, a rubbish bin) for bureaus with dissimilar portfolios.

Even if the purposes are related, if they are at odds with one another the combination can lead to schizophrenia, if not outright paralysis.<sup>36</sup> Combining the proposed Department of Peace and Nonviolence and the Department of Defense is unlikely to be a good strategy, regardless of ones position on the optimal budget for either department.<sup>37</sup> An agency responsible for both antitrust and trade will have to reconcile the belief that low prices are generally good (antitrust) with the belief that low prices of imported goods are generally bad (anti-dumping authority). An agency charged with the promotion of trade (U.S. Trade Representative) will not be a good partner for an agency predisposed to regard trade as dumping (International Trade Commission). An agency charged with the protection of workers (i.e., the Department of Labor) is unlikely to be a good combination with an agency charged with the promotion of business (i.e., the Department of Commerce) – making it understandable why this particular combination only lasted a few years, after which the Department of Commerce and Labor was split in two. When President Johnson proposed to recombine these two departments in 1963 and again in 1964, the proposal went nowhere.

Other examples of such difficulties are easy to find. Between 1967 and 1974, the National Transportation Safety Board (NTSB) was part of the Department of Transportation (DOT). NTSB was charged with investigating every civil aviation accident and all significant highway, marine, railroad, pipeline, and hazardous-materials accidents. In 1974,

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<sup>35</sup> Jim Kuhnhen, *Commerce Cuts Coming in Obama’s Reorganization*, AP, Jan, 29, 2011, at <http://abcnews.go.com/US/wireStory?id=12792513>

<sup>36</sup> We focus on inconsistencies in ends or goals, but there can also be inconsistencies in preferred means, even when there is agreement on ends, at least at a high level of generality.

<sup>37</sup> See Department of Peace and Nonviolence Act, H.R. 808, 110<sup>th</sup> Cong. (2007). The Department of Peace was to include offices of peace education and training, domestic and international peace activities, technology, arms control and disarmament, peaceful coexistence and nonviolent conflict resolution, and human and economic rights. But see P.J. O’ROURKE, *GIVE WAR A CHANCE* (2002) “the Marine Corps does more to promote world peace than all the Ben & Jerry’s ice cream ever made.”)

Congress spun NTSB off from DOT in 1974 because it concluded NTSB could not perform its investigatory functions properly if it was part of a department also responsible for regulating and promoting transportation.<sup>38</sup> A similar dynamic explains the separation in 1974 of the Atomic Energy Commission (responsible for encouraging the use of nuclear power and regulating safety) into the Energy Research and Development Administration (ultimately merged into the Department of Energy, and charged with promoting the use of nuclear power) and the Nuclear Regulatory Commission (regulating safety).<sup>39</sup>

Similarly, until it was reorganized in the wake of the Deepwater Horizon oil spill, the Minerals Management Service in the Department of Interior was “charged both with collecting revenue generated by oil and gas drilling to fund the government, and with approving the permits that generate that revenue. . . [leaving the MMS] torn between whether to be a regulator or friend to industry.”<sup>40</sup> The Bureau of Land Management (in the Department of Interior) is responsible for mining and grazing on federal lands, but it also houses the National Landscape Conservation System, whose priorities are, to say the least, quite different.

When Congress created the Federal Reserve in 1913, its original mandate was to maintain price stability (i.e., to combat inflation and deflation). Congress subsequently added to this mandate. Since 1977 the Federal Reserve is charged with “promot[ing] effectively the goals of

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<sup>38</sup> This background is recounted in National Transportation Safety Board, *History of the National Transportation Safety Board*, at <http://ntsb.gov/about/history.html>.

<sup>39</sup> This split solved one problem but created another. The NRC is now far more susceptible to capture than was the case when it was part of a larger entity with a more diversified portfolio. See Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 465 (1999); Barkow, *supra* note 7.

<sup>40</sup> Mark Jaffee & David Olinger, *Tracking down Minerals Management Service’s dysfunctional history of drilling oversight*, DENVER POST, June 6, 2010, at [http://www.denverpost.com/headlines/ci\\_15236764](http://www.denverpost.com/headlines/ci_15236764). In response to these criticisms, and the firestorm of Congressional disapproval that followed the Deepwater Horizon disaster, Secretary of the Interior Salazar reorganized MMS into three separate entities: the Bureau of Ocean Energy Management, which is responsible for “the sustainable development of the Outer Continental Shelf’s conventional and renewable energy resources, including resource evaluation, planning, and other activities related to leasing;” the Bureau of Safety and Environmental Enforcement, which is “responsible for ensuring comprehensive oversight, safety, and environmental protection in all offshore energy activities;” and the Office of Natural Resources Revenue, which is “responsible for the royalty and revenue management function including the collection and distribution of revenue, auditing and compliance, and asset management.” Press Release, *Salazar Divides MMS’s Three Conflicting Missions*, May 19, 2010, at

<http://www.doi.gov/news/pressreleases/Salazar-Divides-MMSs-Three-Conflicting-Missions.cfm>

maximum employment, stable prices and moderate long-term interest rates.” There is an obvious inconsistency between these goals; if price stability were the only priority, a zero interest rate would be the relevant target, but maximum employment might require a higher interest rate.<sup>41</sup> The dual mandate also makes the actions of the Federal Reserve less predictable, harder to assess critically, and more susceptible to political interference.<sup>42</sup>

The Federal Aviation Administration (“FAA”) has encountered similar difficulties, since it is charged with “fostering air commerce,” as well as safety.<sup>43</sup> According to a former DOT Inspector General, the FAA has generally responded by favoring commerce at the expense of safety.<sup>44</sup> When the issue attracted public attention, Congress responded by modifying the dual mandate, but the change had limited impact on the culture of the FAA.<sup>45</sup>

Similar conflicting mandates also help explain why the problems with Fannie Mae and Freddie Mac got as bad as they did. As former-Treasury Secretary Lawrence Summers noted, “the illusion that the companies were doing virtuous work made it impossible to build a political case for serious regulation. When there were social failures the companies always blamed their need to perform for the shareholders. When there were business failures it was always the result of their social obligations.”<sup>46</sup> Stated more broadly, a department with multiple mandates can come up

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<sup>41</sup> Ben Bernanke, *Federal Reserve Communications*, Nov. 14, 2007, at <http://www.federalreserve.gov/newsevents/speech/bernanke20071114a.htm>

(“Were price stability the only objective mandated for the Federal Reserve, the FOMC presumably would strive to achieve zero inflation. . . . But under the Federal Reserve’s dual mandate, the determination of the appropriate long-run inflation rate must take account of factors that may affect the efficient functioning of the economy at very low rates of inflation. . . . [t]hus, the (properly measured) long-run inflation rate that best promotes the dual mandate is likely to be low but not zero.”)

<sup>42</sup> George F. Will, *The Trap of the Federal Reserve’s Dual Mandate*, WASH. POST, Nov. 18, 2010 (“The Fed cannot perform such a fundamentally political function and forever remain insulated from politics. Only repeal of the dual mandate can rescue the Fed from the ruinous - immediately to its reputation; eventually to its independence - role as the savior of the economy, or of any distressed sector (e.g., housing) that clamors for lower interest rates.”)

<sup>43</sup> MARY SCHIAVO FLYING BLIND, FLYING SAFE 51 (1997).

<sup>44</sup> *Id.* at 65 (“If outsiders viewed the FAA as encumbered by a divided loyalty and hamstrung by its dual mandate, the FAA didn’t seem to share that confusion. The tombstone mindset made plain its loyalty to the cost-conscious interests of the aviation industry.”)

<sup>45</sup> *Id.* at 203, 206.

<sup>46</sup> Lawrence Summers, *You Want Creative Capitalism? Try This*, 195, 196 in CREATIVE CAPITALISM: A CONVERSATION WITH BILL GATES, WARREN BUFFETT, AND OTHER ECONOMIC LEADERS (Michael Kinsley & Conor Clarke, eds.) (2008).



with a plausible justification for almost any decision under the sun.

One should not overstate the necessity for consistency within a single department or agency, since sound policy-making usually requires the balancing of competing interests. Consider banking regulation, where solvency must be balanced against consumer protection. If solvency and consumer protection are handled by distinct agencies, each will focus on the areas within their respective domains, and either discount or ignore entirely the other's area of responsibility. Yet, that approach is a recipe for regular battles between the agencies as to which should prevail on an issue that implicates both sets of interests. A decision balancing the relevant considerations will eventually have to be made by someone – either within a single agency, if both functions are combined, or at a higher level if the two (or more) involved agencies are unable to agree amongst themselves. Obviously, the mission and location of the Consumer Financial Protection Bureau (“CFPB”), and the reorganization of MMS raise these issues in a very concrete way.<sup>47</sup>

The problem gets stickier when the interests that must be balanced fall in different legal domains, or are incommensurable. Consider the risks (whether real or hypothetical) posed to endangered species and the general population by military training and technology.<sup>48</sup> If DOD is put in charge of deciding whether military training/technology is more important than the risks created by such training/technology, it will predictably focus on the benefits, and decide accordingly. If Interior or EPA get to decide the same dispute, they will predictably focus on the risks of training/technology, and

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<sup>47</sup> The press release announcing the reorganization of MMS highlights the benefits of avoiding agencies with conflicting missions – but it says nothing about the necessity of integrating the conflicting decisions that will result from separate agencies. *See* Press Release, *supra* note 40 (“The Minerals Management Service has three distinct and conflicting missions that – for the benefit of effective enforcement, energy development, and revenue collection – must be divided,” said Secretary Salazar. “The reorganization I am ordering today is the next step in our reform agenda and will enable us to carry out these three separate and equally-important missions with greater effectiveness and transparency.”)

<sup>48</sup> *See, e.g., State of Wisconsin v. Weinberger*, 736 F.2<sup>nd</sup> 438 (7<sup>th</sup> Cir. 1984) (dispute over whether the Department of Defense was required to prepare a supplemental environmental impact statement pursuant to the National Environmental Policy Act with respect to construction of a new extremely low frequency (“ELF”) submarine communications system based in Michigan and upgrading of ELF system in Wisconsin when new information was available on the biological effects of ELF). A similar dispute raged over the use of Vieques Island as a bombing range by the U.S. Navy. *See, e.g., Edward Walsh, Despite protest, Navy resumes bombing exercises on Vieques/Training interrupted briefly -- 14 arrests*, Wash. Post, Apr. 28, 2001 (“The Navy resumed practice bombing on the small Puerto Rican island of Vieques yesterday, intensifying a debate that has pitted what the Navy says is the vital need for realistic training exercises against the health concerns of the island's population and the Puerto Rican government.”)

decide accordingly. Similarly, if there is an environmental issue on a military base, DOD and EPA are likely to have very different assessments of the seriousness of the problem.<sup>49</sup> The dispute over the Keystone XL pipeline provides another example of this phenomenon; the Department of State found no material environmental problems with the project, and Secretary of State Clinton stated that she was “inclined” to approve it – but EPA had a dramatically different perspective on the environmental risks, and was viewed by project supporters as a “*de facto* ally of environmentalists.”<sup>50</sup> Similar dynamics play out across other domains, including the balancing of environmental protection against nuclear energy, balancing industrial development (and the associated employment) against population health and environmental justice claims, and so on.<sup>51</sup>

Thus, which agency is the “decider” will significantly affect the outcome of any given dispute, as well as whether particular circumstances count as “disputes.” Stated differently, despite the rhetoric that typically surrounds reorganization, the issue is not just about process efficiencies – it is also about outcomes.

## 2. Credibility/Branding

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<sup>49</sup> Lyndsey Layton, *Pentagon Fights EPA on Pollution Cleanup*, WASH. POST, June 30, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/29/AR2008062901977.html>.

<sup>50</sup> See *Secretary Clinton speaks about Innovation and American Leadership*, <http://newsblaze.com/story/20101017130926stat.nb/topstory.html> (“[W]e’ve not yet signed off on it. But we are inclined to do so and we are for several reasons - going back to one of your original questions - we’re either going to be dependent on dirty oil from the Gulf or dirty oil from Canada.”); Elana Schor, *Canada-U.S. Oil Pipeline Poses Few Environmental Risks* -- *State Dept.*, N.Y. Times, Aug. 26, 2011 (“Among the entities that now could scrutinize the document during a 90-day comment period are other federal agencies -- including EPA, which called for more in-depth review of the project’s footprint in June comments that called an earlier EIS ‘insufficient.’ That stance has led some green groups to look to EPA to expose any potential flaws they might see in the final EIS, while some of the pipeline’s supporters view the agency as a *de facto* ally of environmentalists. Robert Jones, vice president of the Keystone pipeline system at TransCanada, said earlier this month that ‘I want to be responsive’ to EPA’s concerns, but ‘the frustration I have is that I might as well be talking to NRDC or the Sierra Club.’”)

<sup>51</sup> See HOWARD SEIDMAN, *POLITICS, POSITIONS AND POWER: THE DYNAMICS OF FEDERAL ORGANIZATION* (5<sup>th</sup> ed. 1998) (“If agencies are to work together harmoniously, they must share at least some community of interests about basic goals. . . Senator Frank Moss ascribed the conflict between the National Park Service and the Army Corps of Engineers over the Florida Everglades to ‘uncoordinated activities. Park service officials complained that the engineers drained the Everglades National Park almost *dry* in their efforts to halt wetlands flooding and reclaim glade country for agriculture. The Army Corps of Engineers argued that wetlands were ‘for the birds’ and flood control for the people.”)

A public agency's "brand" conveys a message about the agency's priorities and aims to both internal and external constituencies. The brand can become diluted and/or confused if the agency has too many responsibilities, or if the responsibilities are not complementary and consistent. For agency insiders, a diluted/confused brand can create confusion about what projects ought to be selected, what theory ought to motivate the pursuit of individual matters, and the relative priority and seriousness of particular projects/matters.<sup>52</sup> A diluted/confused brand can also affect the agency's decision rules: personnel working for an agency with a diluted/confused brand will find it easier to adopt amorphous standards and employ ad hoc reasoning when justifying their decisions.<sup>53</sup> A diluted/confused brand can also distract the agency from its core mission, and may even affect the culture of the agency. Those who interact with an agency with a diluted/confused brand are more likely to complain that it operates inconsistently and unreliably.

These branding dynamics also influence agency credibility. The better the reputation an agency has with Congress and congressional staffers, the more likely it is to receive adequate funding, and not be subjected to routine second-guessing/reversal. The better the reputation an agency has with courts, the greater the deference it is likely to receive for its decisions. The better the reputation an agency has with the parties it regulates, the more likely it is to be able to work out a cost-effective solution in a timely way, without resorting to full-blown adversarial proceedings.

Although credibility obviously depends on multiple factors, including the particulars of the involved agencies, and their respective histories and past decisions, the bundling of functions influences an agency's reservoir of political capital. Regulatory bodies are continually

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<sup>52</sup> Cf. Wilson, *supra* note 7, at 55-59 (describing how the Economic Cooperation Administration and the Central Intelligence Agency were profoundly affected by the personnel they acquired from other agencies, given the open-ended nature of the original mandate (i.e. the brand) for each agency). Indeed, as Wilson concisely observes, "if a new agency has ambiguous goals, the employees' prior experience will influence how its tasks get defined.") *Id.* at 55.

<sup>53</sup> See Summers, *supra* note 46; Janice Revell, *Interview with John Taylor*, *Money Magazine* 93, 96 (Aug. 2012) ("The Fed needs to focus on a single goal of long-run price stability. We should remove the Fed's dual mandate of maximum employment and stable prices, which was put into effect in the 1970s. From 2003 to 2005, the Fed held interests rates too low for too long. A primary reason was its concern that raising rates would increase unemployment. . . More recently, the Fed has cited concerns over employment to to justify its interventions, including quantitative easing. *Removing the dual mandate would take away that excuse.*") (emphasis supplied).

engaged in a process of accumulating and spending political capital. Combining a function that generates political capital surpluses with a function that runs political capital deficits may give an agency greater ability to perform deficit-prone functions that are important to the larger economy. Conversely, an agency whose portfolio of responsibilities ensures that it always runs a political deficit is an agency that has no constituency. The Office of Information and Regulatory Affairs (OIRA) is a case study of precisely this phenomenon.<sup>54</sup>

Such considerations help explain why agencies sometimes resist the addition of new responsibilities, even when acceptance would result in a greater budget and more visibility. For several decades, the FBI vigorously resisted attempts to expand its jurisdiction to encompass federal drug laws.<sup>55</sup> The State Department did not want the United States Information Agency and the Agency for International Development.<sup>56</sup> On at least two occasions, the Secret Service declined requests from the CIA to spy on visiting foreign dignitaries.<sup>57</sup>

A similar dynamic explains why agencies sometimes try to get rid of responsibilities that senior agency personnel believe detract from the agency's core mission. In 1973 and again in 1974, the Department of Agriculture tried to get rid of responsibility for the Food Stamp program, since it viewed itself as being in the "food business" – not the "welfare business."<sup>58</sup> As these examples indicate, agency personnel have complex interests and incentives, and do not simply seek to grow their domains and budgets.

Another factor affecting an agency's brand and credibility is its susceptibility to capture. In general, the broader an agency's portfolio, the harder it is to capture, since all of the covered industries must bid against one another to capture the regulator. This dynamic may raise the price of capture so high as to make it no longer cost-effective for any given industry or market participant to attempt to do so. Thus, the Interstate Commerce

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<sup>54</sup> See Susan E. Dudley, *Lessons Learned, Challenges Ahead: Is There a Constituency for OIRA*, REGULATION 7-8 (Summer, 2009) ("OIRA's mandate is to advance the general public interest. . . Hence there is no concentrated constituency for OIRA.")

<sup>55</sup> Wilson, *supra* note 7, at 180 ("For years members of Congress tried to persuade J. Edgar Hoover that the FBI should take over federal responsibility for investigating drug trafficking.")

<sup>56</sup> *Id.*

<sup>57</sup> Marc Ambinder, *Inside the Secret Service*, HARPERS, Mar. 2011, available at <http://www.theatlantic.com/magazine/archive/2011/03/inside-the-secret-service/8390/> ("over the past 10 years, the CIA had asked the service on at least two occasions to help develop intelligence on a visiting foreign leader—that is, essentially, to spy on the very person it was assigned to protect. Both times, the service refused.")

<sup>58</sup> Wilson, *supra* note 7, at 108-109.

Commission (ICC) was much harder for a single industry to capture, because it covered both trucking and railroads, compared to the dynamic in financial services, where Congress allocated responsibility for regulating insurers, banks, and securities to entirely separate regulators. (We leave to the side the question of whether the ICC performed well or poorly; our point is simply about the relative likelihood of capture). The EPA presents a similar dynamic; because it is responsible for pollution of the air, water, and land, it is harder for polluters in a single industry to capture the agency. To be sure, the prospect of capture may be the whole point of creating an agency in the first place.

### 3. Capacity/Capability

Agency resources are scarce, just like everything else. Assigning  $N+1$  functions to an agency that only has the resources (whether measured by headcount, band-width, or credibility) to handle  $N$  responsibilities is asking for trouble. Stated differently, an agency with multiple discrete functions can easily find itself with too many things to do, relative to the pool of talent that it has available. One needs a critical mass of talent to do any one thing well; to do multiple things well requires both sufficient capacity and continuous fine-tuning of the agency's allocation of resources.<sup>59</sup> Absent such conditions, agencies will necessarily give superficial treatment to areas that, at any particular point in time, are deemed less central to the agency's mission. Agency employees are not stupid, and will respond accordingly, sorting themselves to work in particular areas – with their choices dictated by their ambition and enthusiasm. The result is that some areas will flourish and others will languish – even if budgets keep pace with new responsibilities (which they almost never do).

Congress already has a tendency to assign new responsibilities to existing agencies without providing much in the way of additional funding. For example, expansions in the responsibilities of the Food and Drug Administration (“FDA”) have not been accompanied by similar expansions in funding.<sup>60</sup> To be sure, there will always be competition for resources,

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<sup>59</sup> Wilson, *supra* note 7, at 378 (“[W]e live in a country that despite its baffling array of rules and regulations and the insatiable desire of some people to use government to rationalize society still makes it possible to get drinkable water instantly, put through a telephone call in seconds, deliver a letter in a day, and obtain a passport in a week. . . One can stand on the deck of an aircraft carrier during night flight operations and watch two thousand nineteen-year-old boys faultlessly operate one of the most complex organizational systems ever created. There are not many places where all this happens. It is astonishing that it can be made to happen at all.”)

<sup>60</sup> See, e.g., Ladd Wiley & Steven A. Grossman, *Does FDA Have Enough Funding to Fulfill its Critical Role in Protecting the Public Health?* 1 FDLI FOOD AND DRUG POLICY

regardless of how many functions an agency performs. But, combining functions within a single department does not eliminate the problem. Instead, it is merely shifted to a less transparent setting for resolution.

The funding/resource allocation problem noted above will necessarily be less visible if it is resolved within a single agency. The agency will present a funding request that reflects its internal resolution of the budgetary fight, and its assessment of its overall priorities. The same dynamic applies to the allocation of effort within the agency. Barring a whistle-blower, external constituencies will never learn the details of who wanted what – and what is no longer being done with the same enthusiasm, if at all. If the funding debate involved multiple agencies, there would be a higher degree of transparency, since each agency would be required to make its case individually.<sup>61</sup>

Capacity is not the same thing as capability. Capability determines whether an agency has the tools to make good decisions, and does so. An agency with enforcement responsibilities first needs the statutory authority to exercise its will, and an adequate set of remedies with which to enforce compliance. Once it is so armed, it will predictably make two types of errors: Type I (intervening when it should not, or a false-positive), and Type II (not intervening when it should, or a false negative). The institutional design question is whether an agency with multiple (and potentially competing) functions and purposes is likely to make more or fewer mistakes – and perhaps, of which type. In principle, both types of error are equally problematic; it is the overall frequency of error that matters. In practice, false positives are viewed as more problematic than false negatives, since they are more visible, and the aggrieved constituency can readily mobilize in opposition. Such issues should be considered in deciding how to allocate regulatory authority.

A related point concerns the agency's own ambitions. Expansion of the agency's substantive mandate can degrade capability. As the agency's authority grows, its leadership and staff may acquire an exaggerated sense of the institution's ability to perform effectively, and pay less attention to whether the agency's commitments match its capabilities. These circumstances can result in agency leadership "over-promising and under-delivering."

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FORUM (2011).

<sup>61</sup> To be sure, the budgeting process is not fully transparent. If the Administration decides not to include funding for an initiative that agency personnel would like to pursue, Congress may never learn of that fact. Agency personnel are not allowed to request from Congress a budgetary allocation in excess of the amount in the Administration's budget – which can lead to considerable frustration during Congressional hearings, if the recent fight over the funding of the Consumer Product Safety Commission is any indication.

A second problem arises from legislative perceptions that the breadth of an agency's mandate gives it the capability to address all troublesome phenomena. The more expansive an agency's mandate, the more likely it is that Congress will turn to the agency to address developments that do not fit neatly elsewhere – even if those problems do not actually play to an agency's strengths. Thus, an agency with expansive powers becomes a default option for handling the latest problem, regardless of whether the agency's actual capacity and capabilities supply effective means for achieving a good solution.

More broadly, inadequate capacity forces a bureau or agency to set priorities (and accordingly, triage the issues in its regulatory portfolio). Some issues will receive close attention, while others will only get attention in response to complaints or crises. Such triage is necessary if the agency is to keep its head above water, but it means that “law in action” is quite different than “law on the books.” It is also a recipe for recriminations and oversight hearings when an issue on the losing end of the triage process blows up in the face of the agency. The FDA's attempts to do both food and drug safety provide an obvious example of how this sequence can play out.<sup>62</sup>

Capability is also influenced by the degree to which agency personnel self-critically assess both means and ends. When multiple agencies share responsibility for a particular area, there is a feedback loop for surfacing and resolving disagreements regarding such matters. When a single agency has sole responsibility, and seeks to handle such matters internally, the risks of groupthink and tunnel vision increase. Conversely, the increased transparency that results from two agencies disagreeing on such matters lowers these risks – particularly if those on the “losing” side of the dispute are willing to leak the information, as is often the case.

For example, the Departments of State and the CIA have been at odds over the use of drones in Pakistan. In one recent incident, the ambassador sought to postpone a strike for what he believed to be good reasons, but was overruled by the CIA director, for what he believed to be good reasons.<sup>63</sup> Reasonable people can disagree as to whether the CIA or the Department of State had the better of the argument in this particular case, but it seems clear that the dispute was much less likely to come to

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<sup>62</sup> AP, *Risks of tainted food rise as inspections drop*, Feb. 26, 2007, at [http://www.msnbc.msn.com/id/17349427/ns/health-infectious\\_diseases/t/risks-tainted-food-rise-inspections-drop/](http://www.msnbc.msn.com/id/17349427/ns/health-infectious_diseases/t/risks-tainted-food-rise-inspections-drop/)

<sup>63</sup> Adam Entous, Siobhan Gorman & Julian E. Barnes, *U.S. Tightens Drone Rules*, WALL ST. J., Nov. 4, 2011, at [http://online.wsj.com/article/SB10001424052970204621904577013982672973836.html?mod=WSJ\\_hp\\_LEFTTopStories](http://online.wsj.com/article/SB10001424052970204621904577013982672973836.html?mod=WSJ_hp_LEFTTopStories).

light if the issue was being decided by (and within) a single entity than when two agencies/departments with different views were involved.

#### 4. Resilience: Is the Assignment of Functions Adaptable and Sustainable?

Statutes routinely allocate jurisdiction according to the technology used to supply a product or the status of the organization that provides the service. What happens when the character of the industry is altered by technological change or the emergence of new categories of suppliers of the sector's goods or services? As suggested earlier, regulatory jurisdictional boundaries can shift over time in much the way that the movement of a river will sometimes alter rights in real property.<sup>64</sup> When such changes take place, multiple agencies may seek to exercise authority by arguing that the reconfigured industry falls within their purview. A sustainable assignment of functions will be able to adapt to such changes; a non-sustainable assignment will not – making bureaucratic warfare between the rival agencies a very real possibility.<sup>65</sup>

One obvious example is the almost decade-long dispute between the SEC and the Commodity Futures Trading Commission (“CFTC”) over products that arose at the interface of regulatory authority of these two agencies. The SEC regulates securities; the CFTC regulates futures contracts. But what happens when a futures contract is for the delivery of securities? The SEC took the logical (and self-interested) position that a futures contract involving a security was subject to its jurisdiction. The CFTC took the logical (and self-interested) position that it had exclusive jurisdiction over all futures contracts. Both agencies pointed to their enabling legislation. When the CFTC approved the Chicago Board of Trade's trading of futures contracts on GNMA certifications and the Chicago Mercantile Exchange's trading of futures contracts on T-bills, the SEC took the position that it might view such trading as illegal, notwithstanding the CFTC's approval. The Chicago Board of Trade brought a lawsuit against the SEC, challenging its assertion of jurisdiction.<sup>66</sup> The SEC also brought several lawsuits challenging the CFTC's assertion of

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<sup>64</sup> Whether the property right moves with the course of the water depends on whether the movement was the result of avulsion (no change in property right) or accretion (change in property right).

<sup>65</sup> Cf. DAVID C. KING, *TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION 2* (1997) (“As with nations and hunting groups, poorly defined boundaries lead to wasteful skirmishes.”)

<sup>66</sup> *Board of Trade v. SEC*, 677 F.2d 1137 (7<sup>th</sup> Cir. 1982), vacated as moot, 459 U.S. 1026 (1982)



exclusive jurisdiction.<sup>67</sup> The dispute was finally settled with a negotiated agreement between the two agencies, which was ultimately enacted into formal law.

The regulation of financial services routinely raises this problem, because regulatory authority is generally tied to the type of entity being regulated, rather than the type of product being offered. Consider the comments of a Federal Deposit Insurance Corporation (“FDIC”) associate director, noting the complexities of determining whether a particular depository institution was indeed a bank:

First, you have to figure out, what in the hell is a bank? And what is the intent of deposit insurance? It’s a far cry from when they set it up. A typical commercial bank was one that made agricultural loans, commercial loans, and held demand deposits. . . Congress had in mind what a bank was. . . Now you may have a furniture company and they may say “we will sell a lot of couches on credit, and we borrow money to do that. We could [finance the credit] with commercial paper, but by and large we use a commercial bank for our needs. . . Why don’t I establish a bank and get insurance. . . I could go out and sell CDs. . . Then I’ve got back up and my financing rates go way down. . . Now I am a lender for couches; instead of selling the loans to the bank or borrowing, I just put the loans on my books.” Well that isn’t what anyone was thinking of or imagined at first. . . They get deposit insurance and they play on the federal guarantee to reduce interest costs and financing.<sup>68</sup>

Such border disputes can easily trigger a turf war between agencies. These dynamics are also affected by the demand side, as firms maneuver to “choose” their regulator.

An adaptive regulatory framework would have clearly allocated regulatory authority over a particular area to a specific regulatory agency -- instead of forcing personnel at multiple agencies to spend considerable time and effort disputing the allocation of responsibility. Various strategies are available to proactively address adaptability, but to a considerable degree, Congress only examines such matters in response to train wrecks and crises, in which perceived and/or real failures in the regulatory process give rise to reassessment. Dodd-Frank presents an obvious example of the end game of

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<sup>67</sup> SEC v. American Commodity Exchange, 546 F.2d 1361 (10<sup>th</sup> Cir. 1976); SEC v. Univest, Inc., 410 F. Supp 1029 (D. Ill. 1976).

<sup>68</sup> ANNE M. KHADEMIAN, CHECKING ON BANKS: AUTONOMY AND ACCOUNTABILITY IN THREE FEDERAL AGENCIES 126-127 (1996).

this dynamic – albeit one that did not provide a resilient solution to the broader problem it sought to address, with the exception of creating the CFPB.

Resilience is obviously not as important as some of the other factors, because problems will emerge, if at all, over time. But, the absence of properly defined jurisdictional boundaries will eventually lead to border wars between agencies/departments, and turf wars among congressional committees. Creating an adaptable and sustainable grant of regulatory authority helps reduce the amount of time spent on such activities.

## 5. Internal Organizational Cohesion

When discrete functions are combined in a single agency or department, the result is usually the creation of separate operating units for each function. As individual operating units become more specialized and autonomous, they quickly develop norms, goals, and priorities that predictably differ from other units in the same agency or department. Over time, this process results in units being staffed by personnel whose interests, training, and abilities focus narrowly on the work of their unit and have little understanding of the backgrounds and activities of other units underneath the same institutional roof. Predictably enough, each individual operating unit starts to see the other units as rivals for prestige, headcount, and budgetary resources.

This rivalry can be beneficial if it results in synergies that serve the larger aims of the agency. Conversely, the rivalry will be destructive if it manifests itself in credit-claiming or other measures designed to enhance the visibility of the operating unit as an end in itself. The third possibility is there will be neither beneficial nor destructive rivalry; individual units will simply not acknowledge the existence of the other units. Issues of culture and history loom large in determining which of these three outcomes will result.

To be sure, such difficulties are likely to arise whether we are dealing with a single agency or multiple agencies that are expected to coordinate their efforts. And, such difficulties can exist within a single department: consider the intra-service rivalries in the U.S. Air Force (bomber v. fighter pilots) and the U.S. Navy (surface navy v. aviators v. submarines).<sup>69</sup> But, matters are often much worse across divisions within a single agency or department, such as the legendary conflicts between the rival military services contained within a single Department of Defense:

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<sup>69</sup> More colloquially, these are referred to as the brown shoe, black shoe, and felt shoe Navy. Wilson, *supra* note 7, at 106.

It was the late 1950s and General Curtis LeMay was the Chief of Staff of the Air Force. The Air Force and the Navy at that time were vying for who would have the primary mission of the strategic defense of the country. The Air Force was advocating its land based strategic bombers and intercontinental ballistic missiles. The Navy was advocating its ballistic missile submarines and putting nuclear capable aircraft aboard aircraft carriers. The debate was heated and there was not enough money to do both. The future missions of both services were at stake. An Air Force Colonel was briefing General LeMay on the Soviet threat versus the strategic requirements funded in the budget. The Colonel told General LeMay that the Russians, our enemy, were capable of . . . and at that point General LeMay stopped him. LeMay was quoted as saying, “The Russians are our adversary. The Navy is our enemy.”<sup>70</sup>

LeMay’s assessment echoes in another story of institutional narrow-mindedness that circulates in the folklore of World War II. In this story, a journalist interviews a Marine Corps pilot after VJ Day in 1945. The exchange goes like this:

Journalist: “What was the enemy like in the Pacific?”

Marine Corps pilot: “Terrible.”

Journalist: “What do you mean, terrible?”

Marine Corps pilot. “They were savage, merciless, and relentless. Every time we thought we had them beat, they’d do something despicable and underhanded, and we’d have to start over again.”

Journalist: “It must have been a relief to hear that Japan had surrendered.”

Marine Corps pilot: “Japan? I was talking about the U.S. Navy!”

Other examples of inter-service attitudes (and their consequences) are not hard to find. The Air Force is responsible for close air support of ground operations, but, air force culture is “based on flying high-performance fighters and long-range bombers, especially the latter.”<sup>71</sup> Not surprisingly, the Air Force historically gave “minimal attention to close air

<sup>70</sup> John Melchner, *Managing the Budget Process*, J. PUB. INTEGRITY 11, 13 (Fall/Winter, 1998), available at <http://www.ignet.gov/randp/jpifw98.pdf>.

<sup>71</sup> Wilson, *supra* note 7, at 186.

support and buys just enough attack aircraft to protect its claim to the close air support mission. Meanwhile, the Army, unsure that it can rely on Air Force support when it is needed, purchases a vast fleet of attack helicopters which, while more expensive than attack planes and potentially far more vulnerable, can be placed under direct Army command.”<sup>72</sup> When U.S. armed forces invaded Grenada in 1983, there were problems with the interoperability of communications systems between Marines in the north and Army Rangers in the south: “since their radios could not communicate with the ships of the Independence battle group, Army radiomen were forced to send their request for fire support to Fort Bragg which in turn relayed them by satellite to the ships.”<sup>73</sup>

Stated more broadly, the coordination of functions and responsibilities will not happen merely because previously separate bureaus are combined into a single department.<sup>74</sup> Indeed, the more each bureau attempts to build esprit de corps and signal that it is truly elite, the less likely “joint-ness” will result. Such dynamics have long complicated attempts to deploy “special ops” teams from different branches of the military in an integrated fashion – particularly when one adds in that special ops has collectively been long regarded with collective suspicion by the “regular” military. When one adds the CIA into the mix, it is easy to understand why joint-ness has been such a challenge – although there have been significant improvements in recent years.<sup>75</sup>

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<sup>72</sup> RICHARD A. STUBBING, *THE DEFENSE GAME* 142 (1986)

<sup>73</sup> <http://www.dtic.mil/doctrine/jel/history/urgfury.pdf>. In the Hollywood version, a Marine squad was in danger of being overrun, and was unable to request air support because its radio had been destroyed. A young Marine (played by Mario Van Peebles) patched together a phone line, and placed a call to Camp Lejeune in North Carolina, using a credit card that he had carried into battle. The call was relayed to a Navy ship stationed off Grenada, which coordinated the necessary close air support. See *Heartbreak Ridge* (1986).

<sup>74</sup> See, e.g., DENNIS D. RILEY & BRYAN E. BROPHY-BAERMANN, *BUREAUCRACY AND THE POLICY-MAKING PROCESS* 71 (2006) (“A specialist in marine biology may in some sense work for the Department of Commerce, but in his or her mind, the job is not with the Commerce Department or even with the NOAA, but with the National Marine Fisheries Service.”)

<sup>75</sup> Marc Ambinder, *The Secret Team that Killed Bin Laden*, NATIONAL J. May 3, 2011, at <http://www.nationaljournal.com/whitehouse/the-secret-team-that-killed-bin-laden-20110502> (“Sunday’s operation provides strong evidence that the CIA and JSOC work well together. . . . In an interview at CIA headquarters two weeks ago, a senior intelligence official said the two proud groups of American secret warriors had been “deconflicted and basically integrated” -- finally -- 10 years after 9/11.”); Greg Miller & Julie Tate, *CIA Shifts Focus to Killing Targets*, WASH. POST, Sep 1, 2011 at A1 (“The CIA was heavily involved in the raid by U.S. Special Operations troops on a compound in Abbottabad, Pakistan, in May. Osama bin Laden was killed by U.S. Navy SEALs, but the

In like fashion, the CIA has had a long-standing cultural conflict between analysts and field agents, as well as ongoing debates between internal communities that favor either reliance on high technology monitoring systems (e.g., reconnaissance satellites) or “Humint” (on the ground in-person collection of intelligence). Those who design and manage intelligence gathering through advanced technology systems tend to have backgrounds in science and engineering. The human intelligence community tends to be drawn from individuals with skills in the social sciences. Not surprisingly, each individual unit believes it has a monopoly (or near-monopoly) on the optimal approach to intelligence gathering and analysis, and the efforts of other units are viewed with disdain.

The problem is not limited to the uniformed services: the U.S. Forest Service has experienced similar difficulties as it has expanded from an agency staffed solely by foresters to a more diversified ecosystem. As James Q. Wilson observed, “today foresters have to contend with engineers, biologists, and economists, among others. The foresters dislike the tendency of engineers to elevate mechanical soundness over natural beauty, of biologists to worry more about endangered species than about big game, and of economists to put a price on things foresters regard as priceless.”<sup>76</sup>

As these examples illustrate, the combination of related functions within a single department or agency does not mean that good things will inevitably result. Indeed, destructive rivalry can mean that  $2+2 = 1$ , instead of 4.

## 6. Collateral Effects on the Regulatory Ecosystem

The government is already thickly planted with bureaus, agencies and inter-agency working groups, departments and commissions. Many of these institutions have overlapping authority – sometimes by reason of deliberate legislative choice and sometimes by accident. As noted previously, in some instances shared authority stems from conscious congressional decisions to dedicate policymaking responsibilities to two or

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operation was carried out under CIA authority, planned in a room at agency headquarters and based on intelligence gathered over a period of years by the CTC.

The assault was the most high-profile example of an expanding collaboration between the CIA and the U.S. Joint Special Operations Command, which oversees the nation’s elite military teams. Their comingling at remote bases is so complete that U.S. officials ranging from congressional staffers to high-ranking CIA officers said they often find it difficult to distinguish agency from military personnel. “You couldn’t tell the difference between CIA officers, Special Forces guys and contractors,” said a senior U.S. official after a recent tour through Afghanistan. “They’re all three blended together. All under the command of the CIA.”)

<sup>76</sup> Wilson, *supra* note 7, at 65.

more public bodies. Sometimes the deliberate duplication of responsibility stems from Congressional desire to test alternative institutional means of delivering a desired policy result.<sup>77</sup> On other occasions it reflects an explicit desire to use interagency rivalry to spur performance improvements.<sup>78</sup> Finally, as we describe below, technological change and market developments can give rise to regulatory overlaps “by accident.”

Whatever the origins, the fact of overlapping authority typically elicits effort by the agencies with shared jurisdiction to coordinate their efforts. These efforts do not arise because the agencies in question like each other. In many circumstances, rivalry among agencies to be seen as the lead institution in a given field of regulation is inevitable, as perceptions of primacy influence congressional decisions about budgets, affect the recruitment of skilled staff, and generally shape the agency’s self-image. In analyzing the conduct of public institutions, one rarely goes wrong by overestimating the power of parochialism and self-interest to warp behavior.

Even though agencies with contested or contestable functions compete aggressively with each other, they often come to realize the need, at least on some level, to avoid destructive duplication and to invest in joint activities to deliver better policy results. The means of cooperation and coordination are myriad, and range from formal exchange of written instruments (e.g., memoranda of understanding) to the creation of interagency working groups to less formal (but still important) personal interaction among agency heads, senior managers, and case handlers. In ways that are sometimes visible but more often invisible to external observers, agencies with overlapping authority and responsibilities routinely create a vibrant and interlocking ecosystem of cooperation.

When regulatory tasks are reallocated, or a new agency is inserted into the mix, or new powers are given to an existing agency, there is a significant potential to disrupt this regulatory ecosystem. Disruption can take a variety of forms. The new entrant may siphon off money and

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<sup>77</sup> This is probably the best interpretation of the decision of Congress in 1914 to establish the FTC and to give the Commission concurrent authority with the Department of Justice over the Clayton Act. The decision permitted a test of the relative efficacy of competition policymaking through administrative elaboration by a multimember commission (the FTC model) versus litigation in the federal courts by a single-headed executive branch body (the Justice Department model). See William E. Kovacic, *Downsizing Antitrust: Is It Time to End Dual Federal Enforcement?* 41 ANTITRUST BULLETIN 505 (1996).

<sup>78</sup> See William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN. LAW J. AM. UNIV. 461 (1995) (discussing congressional decision in 1980s to give General Services Board of Contract Appeals broader bid protest authority and create an alternative to protest oversight by the General Accounting Office).

personnel, making it difficult for incumbent agencies to perform their existing responsibilities. Reallocation of authority may also upset long-standing understandings that formed the basis for fruitful inter-agency collaboration. The entrant may receive a substantive mandate whose formal commands resemble the language that appears in the statutes of other regulatory authorities. The interpretation of the new entrant's mandate in one judicial could spill over into the interpretation of the mandates of other agencies in separate cases.

To be sure, Congress certainly has the authority to close down an agency entirely, or substantially limit its jurisdiction and authority – and it knows how to do that when it wants to. But, the kinds of regulatory reorganizations we have been describing usually do not reflect that objective – meaning that the damage to the regulatory ecosystem is often an unintended consequence of Congressional failure to understand that personnel would migrate to the new and more glamorous and higher paying outpost – leaving other parts of the regulatory ecosystem permanently blighted. To summarize, the wisdom and net functional benefits of any specific realignment of regulatory authority will depend heavily upon whether the changes build upon a sophisticated understanding of the existing regulatory ecology.

## 7. Political Implications

Politics is a major factor in the design and location of government agencies and functions. When the House of Representatives was considering a climate change bill in 2009, the chair of the House Agriculture Committee made it clear he would kill the bill if it allocated responsibility for determining whether farmers would receive credit for “tilling and conservation practices that keep carbon dioxide stored in the soil” to the EPA, but would allow it to proceed if responsibility for the same task resided in the Agriculture Department.<sup>79</sup> The choice of location had real significance; “environmentalists and the bill's main sponsors feared that the Agriculture Department might use lax standards, which would blow a

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<sup>79</sup> Derek Thompson, *The Collin Peterson Climate Change Compromise*, THE ATLANTIC, available at [http://business.theatlantic.com/2009/06/the\\_collin\\_peterson\\_climate\\_change\\_compromise\\_1.php](http://business.theatlantic.com/2009/06/the_collin_peterson_climate_change_compromise_1.php) (“So it looks like the Waxman-Markey climate change bill will pass in the House this week: The sponsors hammered out an agreement last night with Collin Peterson, the chair of the Agriculture Committee. The main sticking point was over whether the EPA or the Department of Agriculture would administer a carbon offset program intended for farmers. . Peterson got his way: The (more sympathetic) Department of Agriculture will do the work.”)

hole through the nationwide cap on carbon dioxide emissions.”<sup>80</sup> When President Franklin Roosevelt’s reorganization committee propose to consolidate all federal loan programs under the Treasury Department, FDR vetoed the suggestion, observing “that won’t work. If they put them in the Treasury, not one of them will ever make a loan to anybody for any purpose. There are too many glass-eyed bankers in the Treasury.”<sup>81</sup> More recently, privacy advocates have expressed skepticism about the Obama Administration’s Internet privacy proposals because the Commerce Department is taking the lead, instead of a more pro-consumer agency, like the FTC.<sup>82</sup>

As these examples illustrate, decisions about *where* to place certain responsibilities are simultaneously decisions about *who* will resolve certain disputes, and, in turn, *what* the outcome is likely to be.

Once regulatory authority has been allocated in the first instance, Congressional committees are extremely reluctant to cede authority. Like elsewhere, there are gains from expertise; individual members gain knowledge and experience with an agency’s operations over a period of years, and proposals to transfer regulatory authority to an agency that is overseen by a different committee places that investment of intellectual capital at risk. In like fashion, a committee that is comfortable with the way a particular agency handles matters may be reluctant to allow others to take ownership of “their baby,” fearing their successors may not share their priorities. Finally, individual members of Congress derive important electoral advantages from the committees on which they service, including

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<sup>80</sup> Steven Mufson, *Vote Set on House Climate Bill*, Wash. Post, June 24, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/23/AR2009062303456.html>

<sup>81</sup> A.J. WANN, *THE PRESIDENT AT CHIEF ADMINISTRATOR – A STUDY OF FRANKLIN D. ROOSEVELT* 103-04 ( PUBLIC AFFAIRS PRESS 1968), See also Harold Seidman, *Politics, Position and Power* 88 (Oxford U. Press, 1970). For a similar observation about the Federal Housing Authority, see DENNIS D. RILEY & BRYAN E. BROPHY-BAERMANN, *BUREAUCRACY AND THE POLICY-MAKING PROCESS* 71 (2006) (noting that FHA was initially staffed by “real estate people and mortgage brokers,” and the “values and prejudices” of those individuals resulted in a definition of agency success tied to “the number of loans made and the repayment record” – leading it to spend most of its resources on loan guarantees for newly constructed single family owner occupied homes – which resulted in the suburbs.

<sup>82</sup> See Edward Wyatt, *White House, Consumers in Mind, Offers Online Privacy Guidance*, N.Y. TIMES, Feb. 23, 2012, at B1 (“The real question is how much influence companies like Google, Microsoft, Yahoo and Facebook will have in their inevitable attempt to water down the rules that are implemented and render them essentially meaningless,” John M. Simpson, privacy project director for Consumer Watchdog, said in response to the administration’s plan. ‘A concern is that the administration’s privacy effort is being run out of the Commerce Department.’”)



access to campaign contributions from those who are affected by the activities of government agencies subject to the oversight of the committees. Oversight of a specific government agency creates a revenue stream that flows from the affected industry to the committee's members. Reorganization measures that alter an agency's powers can reduce or eliminate the revenue stream to a given committee. This dynamic makes it clear why Congress takes a keen interest in reorganization.<sup>83</sup>

Agency personnel are acutely conscious of these considerations, and they will dismiss out of hand organizational changes that create political difficulties. For example, NOAA resulted from a blue-ribbon commission set up by the Johnson Administration, which recommended the creation of an independent agency focused on the ocean and atmosphere, including bureaus drawn from various civilian departments plus the Coast Guard (which was then part of DOT).<sup>84</sup> After NOAA was created and placed in the Department of Commerce, a senior Commerce administrator contacted the Secretary of Transportation to discuss the possibility of transferring the Coast Guard, in keeping with the recommendations of the blue-ribbon commission. The Secretary of Transportation responded that he was supportive of the move, but in exchange he wanted the Maritime Administration to be transferred from Commerce to DOT. The senior administrator immediately responded "no deal," because he recognized that the swap would rob the Department of Commerce of the political support of the maritime industry, and would alienate a key congressman.<sup>85</sup>

The same considerations also help explain why the reorganization that yielded the Department of Homeland Security was so politically difficult. No committee was inclined to surrender oversight authority unless it got something of at least equal value in return. Even after the politics made reorganization inevitable, individual Congressional committees insisted on retaining regulatory oversight of "their" part of DHS.<sup>86</sup>

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<sup>83</sup> See generally DAVID C. KING, *TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION* 2 (1997) ("For individual legislators, the payoffs for winning in turf wars include expanded power, greater prestige, opportunities to make a personal mark on important legislation, and improved services to voters.")

<sup>84</sup> [http://www.tos.org/oceanography/issues/issue\\_archive/issue\\_pdfs/14\\_2/14.2\\_merrell\\_et\\_al.pdf](http://www.tos.org/oceanography/issues/issue_archive/issue_pdfs/14_2/14.2_merrell_et_al.pdf)

<sup>85</sup> Steven Eli Schanes, *Creating NOAA – The Coast Guard*, at <http://schanes.wordpress.com/2008/05/24/creating-noaa-the-coast-guard/>

<sup>86</sup> See Karen Tumulty & Ed O'Keefe, *The Government tends to resist reorganization*, Washington Post, Jan 28, 2011, at A1. ("After the Sept. 11, 2001, attacks, nearly two dozen agencies were melded into the new Department of Homeland Security, to better coordinate the government's resources for handling terrorism and other national emergencies. But the members of Congress overseeing those agencies were loath to give up any authority. That is why DHS gets marching orders from more than 100 congressional committees and

These dynamics tend to freeze in place existing allocations of policymaking power and to disable reform proposals that would move authority away from some government agencies and give it to others. In his State of the Union addresses in 2010 and 2011, President Barack Obama proposed to reorganize and simplify various elements of the federal government. This proposal seems certain to run afoul of the constraints discussed here, even in the most harmonious political environment.

In light of the political phenomena described here, it is tempting to simply acquiesce in the inevitability of the existing distribution of agency responsibility. But, major exogenous shocks (such as budget crises) can make substantial reorganizations politically possible (if not inevitable) – at which point the other six factors become more important in determining the allocation of responsibilities among the various bureaus, commissions, agencies, and departments that make up the United States government.

Finally, the simple fact there is an ongoing demand for reorganization, even in the absence of major exogenous shocks, means that these issues are constantly in play. No one ever permanently surrenders, and there is no final judgment rule enforced on the disputants.<sup>87</sup>

#### B. Which Criteria Matter Most?

What matters most in our list of seven criteria? The problem is straightforward: as Judge Frank Easterbrook has noted, “Lists without metes, bounds, weights, or means of resolving conflicts do not identify necessary or sufficient conditions; they never prescribe concrete results.”<sup>88</sup> We believe that three factors matter most in predicting the long-term success of any given agency design: political implications, coherence, and capacity/capability.

In our view, the most important factor is political support, or the lack thereof. An agency is doomed if it lacks a supportive constituency, or

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subcommittees - a number that has grown in the past seven years, despite the 9/11 Commission's recommendation that those tangled lines of authority be consolidated.”)

<sup>87</sup> Cf. Wilson, *supra* note 7, at 299-300 (“Public policy making in Europe is like a prize-fight: two contenders, having earned the right to enter the ring, square off against each other for a prescribed number of rounds; when one fighter knocks the other one out, he is declared the winner and the fight is over. Policy-making in the United States is more like a barroom brawl: Anyone can join in, the combatants fight all comers and sometimes change sides, no referee is in charge, and the fights last not for a fixed number of rounds but indefinitely or until everybody drops from exhaustion. To repeat former Secretary of State George Shultz’s remark, ‘its never over.’”)

<sup>88</sup> *Sears, Roebuck & Co. v. Commissioner*, 972 F.2d 858, 863-64 (7<sup>th</sup> Cir. 1992).

if the performance of its duties generates crippling political opposition.<sup>89</sup> More broadly, an agency will not be able to operate effectively if its structure raises serious doubts about its legitimacy or increases the vulnerability to political pressure that the performance of its duties will arouse.

The second most important factor is policy coherence. Greater coherence increases the likelihood the agency will define its aims more clearly, set priorities and design programs appropriately, and develop a well-recognized brand. Coherence makes it easier to recruit qualified staff and build the necessary capacity to implement whatever programs are prioritized. An agency with policy coherence is accordingly better able to establish its credibility with external audiences, including the legislators who will determine funding and otherwise oversee agency operations.

The third most important factor is the agency's capacity/capability to perform its assigned functions. A severe mismatch between the commitments in an agency's policy portfolio and its capacity and capability to deliver results is likely to result in highly visible failures, of which Congress is usually quite unforgiving. Agencies with an inadequate talent pool and frail resources are more likely to generate poorly conceived programs, and less likely to execute tasks effectively. The mismatch between commitments and capacities creates a grim set of options. An agency can engage in policy triage, in the hope there will be no disasters in the ignored policy space and that no one cares enough about the tasks that are being ignored to make a fuss. Alternatively, an agency can try to cover all the assigned responsibilities with the predictable consequence of doing few (if any) of them well.

Of course, these factors are not fully independent: an agency is more likely to have the necessary resources (i.e., capability) if it has strong political supporters. An agency that slights or over-emphasizes a portion of its regulatory portfolio is skating on thin ice unless its political supporters are on board with that decision. (If those political supporters are voted out of office, the agency needs to quickly adapt, or there will be significant blow-back to subsequent initiatives, as the FTC learned to its dismay in the late 1970s.) Similarly, without policy coherence, an agency is less likely to attract and maintain political support in the first instance. Finally, there are further levels of complexity imbedded within some of the factors.<sup>90</sup>

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<sup>89</sup> See, e.g., Norton Long, *Power and Administration*, 2 PUBLIC ADMINISTRATION REV. 257 (1949) ("There is no more forlorn spectacle in the administrative world than an agency and a program possessed of statutory life, armed with executive orders sustained in the courts, yet stricken with paralysis and deprived of power, an object of contempt to its enemies and of despair to its friends. The lifeblood of administration is power.")

<sup>90</sup> For example, we have identified capacity as a factor. Capacity is obviously affected

Our typology raises other difficult questions. Are all of the factors scalable? Are any of them? Can one compensate for weakness on one factor with strength on another? Does one need a minimum quantum of all of the factors to get off the launching pad? And so on. These issues must await better data and require further research.

#### IV. Application of Our Analysis to the FTC

We use the FTC as a case study because the Commission's experience provides an especially rich context in which to apply the criteria we have described above. Established in 1914, the FTC is the oldest and most closely studied independent regulatory commission in the federal government.<sup>91</sup> The FTC has inspired an immense body of scholarship and figured prominently in blue ribbon reports that examine the organization of government. No public regulatory body (much less an agency with roughly 1300 employees and a budget of under \$300 million today) has elicited comparable scrutiny.

##### A. The FTC as a Multi-Purpose Agency

In the FTC's near-century of experience provides superb material to assess the wisdom of combining variations functions in a single government agency. Two closely-related characteristics of the FTC's history make it an ideal test bed for our inquiry. The first is the breadth of the agency's charter. The FTC is a diversified policy conglomerate. It enforces the federal antitrust laws, performs economic research, publishes studies, and holds a broad consumer mandate that reaches advertising, non-bank financial services, marketing practices, product labeling, and privacy. Among other tasks, it is the agency that reviews mergers in the petroleum industry, enforces the Do-Not-Call telemarketing rule, defines energy labeling requirements for television sets, polices debt collection practices, reports on how media and entertainment companies disclose content unsuited for children, and prosecutes failures by companies to safeguard confidential data about their customers.

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by the allocated budget, but does it make a difference if the agency is funded with user fees v. dedicated taxes v. general appropriations? To what extent does the mix of funding among these choices reflect the impact of other factors – most importantly, political support?

<sup>91</sup> The Interstate Commerce Commission, established in 1887, was the first independent federal regulatory agency. Its sole surviving component today is the Surface Transportation Board, whose chief function is to regulate tariffs and other terms of surface by railroads.

The second notable aspect of the Commission's history is the malleability of its policy making portfolio. In 1914 Congress intended the Commission to focus on competition policy – to advance the development of antitrust legal norms through administrative adjudication, consultation with the federal courts and the Department of Justice, and through the publication of studies for Congress and other public bodies. The boundaries of the original remit have shifted dramatically over time. In some instances, the FTC absorbed new functions by accident.<sup>92</sup> The Commission became the nation's advertising and marketing practices regulator as an unintended consequence of its work to address complaints by firms that their rivals had gained an undue competitive advantage through dishonest sales tactics. In other instances the FTC obtained new duties because Congress deliberately added new functions by measures such as credit practices legislation enacted in the 1960s.

Additions of authority have been pronounced in periods, such as the early- to mid-1970s, when Congress enacted numerous extensions of the FTC's duties. The Commission's history features divestitures as well as acquisitions. In some cases, the Commission effected incubated regulatory functions that Congress later chose to spin-off and assign to new, stand-alone regulatory institutions.<sup>93</sup> For example, this process led to the establishment of the Securities and Exchange Commission in the 1930s. These adjustments appear to have reflected a legislative judgment that the regulatory functions in question were so substantial that they warranted implementation by agencies dedicated to those activities alone. On other occasions Congress has divested or restricted FTC functions out of anger. Political backlash to FTC initiatives led Congress to enact curbs in the 1920s on the agency's authority involving agriculture and to adopt restrictions in 1980 upon the Commission's work concerning insurance and advertising directed toward children.<sup>94</sup>

## B. The Evaluative Criteria Applied to the FTC

We organize our discussion around the seven factors identified in Part III. We consider to which the FTC's combination of functions is consistent with each criterion, and we use examples from FTC experience to illustrate our assessment.

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<sup>92</sup> See *supra* footnote 18 and accompanying text.

<sup>93</sup> This history is recounted in Marc Winerman, *The FTC at Ninety: History Through Headlines*, 72 *Antitrust L.J.* 871, 880 n.44 (2005).

<sup>94</sup> On the limitations imposed in the 1920s and in 1980, see William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 *Tulsa L.J.* 587, 623-25, 664-67 (1982).

## 1. Policy Coherence: Are the Functions Related and Consistent?

In principle, the combination of competition and consumer protection functions within the FTC is a coherent policy design. The two areas exhibit strong conceptual policy complementarities, and the agency's implementation of its competition and consumer protection powers achieves substantial policy consistency: in performing its responsibilities in both policy domains, the agency generally seeks to improve consumer well-being. As we discuss below, the interaction of the two policy areas can create tension, as each discipline can display a different view about how best to advance consumer interests. The attainment of the best policy outcome sometimes will require balancing between competing perspectives.

### a. Relatedness: Significant Policy Complementarities

Competition policy and consumer protection policy have important complementarities. They share significant intellectual foundations in the economics of information and consumer behavior.<sup>95</sup> In general terms, antitrust seeks to improve performance on the supply side – to sustain the competitive pressures that drive firms to offer best possible array of goods and services. Antitrust agencies pursue this end by prosecuting private anticompetitive behavior (such as supplier cartels) and opposing public policies that restrict entry or expansion for the sake of protecting the interests of incumbent firms. Consumer protection seeks to improve the choice process on the demand-side. This principally involves programs to challenge deception and fraud, a consumer protection program helps ensure that sellers provide truthful information, which enables consumers to purchase goods or services that best satisfy their preferences. Transactions induced by deception and outright fraud do not satisfy the necessary conditions for making consumer sovereignty the force that determines what the economy will produce. A consumer protection also can enhance the quality of consumer decision making by ensuring that product and service disclosures, such as information required by legal mandates, are comprehensible to consumers.<sup>96</sup>

The complementarities between competition policy and consumer

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<sup>95</sup> See Timothy J. Muris, *The Interface of Competition and Consumer Protection* (Oct. 31, 2002) (Fordham Corp. Law Institute, 29<sup>th</sup> Annual Conference on International Antitrust Law and Policy), at <http://www.ftc.gov/speeches/muris/021031fordham.pdf>.

<sup>96</sup> James M. Lacko & Janis K. Pappalardo, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms* (Federal Trade Commission, Bureau of Economics, June 2007), at <http://www.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf>.

protection policy, as well as possibilities for substitution between them, here provide at least a theoretical basis for supposing that a competition agency with consumer protection responsibilities will realize synergies between the two fields and improve the quality of public policy. A unity of functions might put an agency in a better position to identify the source of market failures more accurately and proscribe superior cures that involve an optimal mix of regulatory strategies.<sup>97</sup> Many of the world's 120 competition agencies perform consumer protection functions, such as policing deceptive advertising.<sup>98</sup> We make no claim that the existing dual-function agencies ordinarily attain the theoretical synergies in practice, or that the combination of functions affords them superior insight into the causes of economic problems. In principle, the presence of strong policy complementarities indicates that the integration of these functions within a single agency has potential to improve policy making.

The presence of strong policy complementarities suggests a general principle that would apply in jurisdictions that do not choose to bundle complementary functions into the same agency. If policy complementarities are strong and policy responsibilities are assigned to single-function agencies, there should be close cooperation between the single-function agencies. In other words, if integration by ownership does not occur, close integration by inter-agency contract is desirable. Close cooperation by a single-function antitrust agency and a single-function consumer protection agency likely will yield better policy results than having the two institutions operate without regard to the other's activities.

#### b. Consistency: Common Consumer Orientation

As the discussion above suggests, competition and consumer protection share a common objective or promoting consumer well-being. This common objective imparts a substantial degree of consistency to policies adopted in the two domains. We can contrast this condition with other policies that might be considered to be related but not consistent. Antitrust law and trade restrictions can be considered to be complimentary to the extent that both regimes seek to prevent market distortions that arise when firms make certain sales below cost. The goals of the two regimes, however, are dissimilar. In antitrust law, the purpose of restrictions on predatory pricing is to preclude behavior that results in the exclusion of firms whose continued presence in the market would have driven suppliers

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<sup>97</sup> See Richard Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 Boston University L.Rev. 661 (1982) (analyzing tying as a consumer protection problem).

<sup>98</sup> See supra note 6 and accompanying text.

to engage in activities (such as cost reduction and innovation) that serve consumer interests. An important aim of the anti-dumping regime, reflected in its operational standards, is the protection of domestic firms and the preservation of jobs they provide, even at the expense of purchasers of the products such firms manufacture.

Notwithstanding their complementarities, it also is possible to view competition policy and consumer protection policy as substitutes. As this simple example illustrates, competition can serve as a valuable form of consumer protection. We can imagine a hypothetical market in which the government can choose one of two approaches to encourage performance that best satisfies consumer preferences. One approach is to have a single firm serve the entire market, with the monopolist supplier being subject to comprehensive oversight with respect to pricing and quality. Even with extensive regulatory oversight, the monopolist may have relatively weak incentives to identify and satisfy consumer tastes, especially by introducing new products and services. A second approach is to encourage rivalry among suppliers to provide the best range of alternatives. The latter approach also involves greater reliance on market forces to counteract fraud and other forms of overreaching by suppliers. The pro-competition policy contemplated here includes efforts to preclude supplier collusion that would restrict the flow of truthful product information to consumers or would impede the work of expert intermediaries to give consumers advice about how to select among product options.

In a number of instances, the solution set for policy making will include a range of alternatives that include more or less relative emphasis on these two models. In most instances, the lawyers who practice in the fields of antitrust or consumer protection will be inclined to favor one model or the other, depending upon their training and experience. Specialists in one field rarely have extensive familiarity with the other. This form of specialization gives the two practice areas distinctive cultures, each with different preferences for the form of government intervention. Most antitrust lawyers are likely to have relatively greater confidence in the capacity of competition and related market-oriented processes to provide a desired level of consumer protection. By contrast, the consumer protection lawyer may be less trusting of market processes and more inclined to perceive consumers as vulnerable and prone to supplier manipulation. This orientation will incline a consumer protection attorney to favor policies that more directly control business practices – for example, by setting greater limits upon the content of advertising. This orientation can be reinforced by an attorney's extensive experience in dealing with serious fraud. A heavy dose of cases involving products that are claimed to cure cancer, yield immense wealth, or secure lasting beauty can engender an underlying



suspicion of the market system. Like an experienced homicide detective who fears that all of humankind is dangerously prone to violent crime, an experienced consumer protection attorney may come to think that most advertising is a form of falsehood.

These differences in culture and perspective between the two disciplines can be important for the operation of the regulatory process even within an agency that has both competition and consumer protection duties. The integration of perspectives to achieve the best policy result (for example, by designing an anti-fraud program that properly accounts for the role of advertising in promoting competition that serves consumer interests) will not occur automatically. Within the FTC, the Bureau of Economics is a major source of agency's policy integration. BE functions as an independent unit, and it supports the agency's competition and consumer protection groups. Among other contributions, BE has helped the agency account for the economics literature concerning the collection, analysis, and transmission of information and has highlighted its implications for the behavior of individual firms and groups of firms. This has improved the agency's understanding of how consumers make choices among the array of products and services available to them.<sup>99</sup> The FTC's experience shows that a dual function agency will need to take conscious steps to achieve effective integration and resolve tensions that can arise concerning the correct mix of regulatory measures.

### c. Examples from FTC Experience

The FTC's experience with the health care, health-related advertising issues, and data protection provides illuminates the synergies and tensions that can arise between competition and consumer protection. In the 1970s, the Commission introduced pioneering programs to liberalize the provision of health care services and products.<sup>100</sup> Before the 1970s, regulatory policy at the federal and state levels tended to establish severe restrictions on advertising by physicians and strong limits on the ability of consumers to seek alternative suppliers for health care products such as eyeglasses.

To address these restrictions, the FTC used a mix of litigation,

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<sup>99</sup> The literature on information economics provides the principal basis for the category of research now known as behavioral economics. See *The Law and Economics of Irrational Behavior* (Francesco Parisi & Vernon Smith eds., 2005, Stanford University Press).

<sup>100</sup> See William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development*, 72 *Antitrust L.J.* 861 (2005) (discussing development of FTC health care program).

rulemaking, research, public consultations, and advocacy. The Commission initiated a series of cases that struck down absolute restrictions on physician advertising and precluded medical societies from forbidding the revelation of truthful information. The agency also adopted a trade regulation rule (Eyeglasses I) that, among other measures, required optometrists to give a copy of eyewear prescriptions to their patients. The rule originated within the FTC's Bureau of Consumer Protection, and the agency's Bureau of Economics and Bureau of Competition played major roles in its design. Eyeglasses I fostered a dramatic increase in competition among eyewear manufacturers and retailers. Over the past decade, the FTC has used experience with the eyeglasses rule to implement legislation mandating steps to liberalize the sale of contact lenses. The agency also has filed an extensive series of comments with state legislatures to address existing or proposed adjustments to controls on the sale of health care services and products. To identify commercial trends and promote debate about its programs, the Commission also has held public consultations and published reports.

These elements of the FTC's health care program have built upon a generally effective collaboration among the agency's different disciplines. A major source of policy integration has been the Bureau of Economics, whose research and analysis have played a crucial role in assessing the asserted quality control justifications for the regulatory status quo. A second important force for integration has been the agency-wide Office of Policy Planning and the Policy Studies group of the Office of the General Counsel. Relatively few internal tensions have arisen in the formulation of this program, perhaps because the Commission ordinarily has been in the position of attacking fairly categorical competitive restraints that bear no plausible relationship to the quality control rationales that are said to justify limitations on advertising or marketing. Some of the agency's more recent initiatives, such as the contact lens matters, have involved practices with more subtle and complex quality control concerns. The Commission has analyzed these issues with care, a reflection of the Commission's awareness that a failure to account for legitimate quality control considerations could cause serious consumer injury and endanger the agency's entire program in this field.

An initiative with more mixed results and greater internal tension is the FTC's treatment of health-related advertising claims. For many years, public policy developed by the FTC and federal health agencies such as the Food and Drug Administration displayed an acute suspicion of food advertisements that attributed beneficial health effects to the consumption of a product. Federal policy tended to frown upon producer efforts to link product attributes to a reduction in the risk of disease. Research by the

FTC's Bureau of Economics in the 1980s and 1990s called this approach into question. The FTC's economists raised the possibility that a more liberal approach would provide consumers with valuable nutritional information and promote product innovations (such as the introduction of higher fiber content into breakfast cereals) with generally positive health effects. The FTC has relied upon this line of research to loosen its own controls upon health claims and to advocate similar adjustments by the FDA.<sup>101</sup>

These initiatives have inspired considerable tension within the FTC and the larger policy making community. A task force consisting of the FTC, the FDA, the Department of Agriculture, and the Department of Health and Human Services recently released proposed guidelines for food advertising directed toward children. The guidelines are cast as voluntary measures, although the agencies suggest that the industry's failure to embrace them or to take similar steps could result in additional government intervention. For the most part, the proposed guidelines reflect the longstanding tradition of suspicion that anchored public policy before the Bureau of Economics research of the 1980s and 1990s. A similar effort to toughen limits on nutritional advertising is evident in settlements that resolve recent FTC advertising cases. The Commission's settlements require producers to use more elaborate scientific testing to substantiate health-related claims. These measures reflect, at least implicitly, a doubtful view of the market-oriented prescriptions that came out of the Bureau of Economics studies of the 1980s and 1990s.

Issues related to data protection and information privacy provide another context in which debates have arisen about what mix of competition and consumer protection initiatives will best serve consumer interests. In December 2010 and March 2012, the FTC released reports with proposals that firms to strengthen data security safeguards and increase the ability of consumers to control the collection and use about their purchasing and searches on the internet.<sup>102</sup> The reports recommended consideration of a 'Do-Not-Track' mechanism that would enable a consumer to instruct firms not to maintain records of the consumer's online activity. The FTC's reports revealed little evident input from the Commission's competition or economics operating bureaus.

## 2. Credibility: Does the Combination Create A Recognizable and Respected Brand?

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<sup>101</sup> See Pauline M. Ippolito, *What Can We Learn from Food Advertising Policy Over the Last 25 years?*, 12 *George Mason L. Rev.* 939 (2004).

<sup>102</sup> See supra note 21 and accompanying text.

The FTC has strived to establish general recognition that it is the principal federal agency for safeguarding consumer interests. This is common element of branding by agencies with a dual competition and consumer protection mandate. The United Kingdom's Office of Fair Trading (OFT), which has largely the same remit as the FTC, states its purpose as "making markets work well for consumers."<sup>103</sup> This short and statement of purpose is one of many ways that similarly situated agencies identify themselves with the promotion of consumer well-being.

In this aim, the Commission appears to have been generally successful. Its public reputation and its stature within Congress largely derive from its consumer protection work, especially highly visible initiatives such as the Do Not Call program.<sup>104</sup> There is only modest awareness of the Commission's role as a competition policy institution, and perhaps still weaker understanding of how the agency's combination of functions informs its choice and execution of programs. Thus, the agency is largely associated with consumer protection issues. The breadth of the agency's mandate can create unwanted expectations that the agency is the appropriate solution for all difficult economic problems that affect consumers.

#### a. Branding a Policy Conglomerate

As a policy conglomerate, the FTC faces the same difficulties that confront many diversified enterprises: How does the entity create a brand that internal observers (agency managers and staff) and external constituencies (e.g., legislators, businesses, and consumers) recognize and respect? The FTC's purpose is not evident from its name. In the modern world, a "federal trade commission" evokes associations with agencies that scrutinize imports and penalize foreign firms that sell goods below cost in the United States. When FTC employees return from overseas travel and present their official passports to U.S. immigration officers, they are to be asked if they made progress in trade negotiations with foreign governments. Over the years, the FTC has used various phrases to identify its purpose. In general, most of the agency's branding activities have sought to identify the Commission with the promotion of consumer interests.<sup>105</sup> Most of this

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<sup>103</sup> This phrase appears on the OFT's website and on the agency's promotional materials. The OFT website is [www.of.gov.uk](http://www.of.gov.uk).

<sup>104</sup> On the Do Not Call Rule and its political implications for the FTC, see Sidney M. Milkis, *The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism*, 72 *Antitrust L.J.* 911 (2005).

<sup>105</sup> The Commission underscores its connection to consumers in various documents, and promotional materials. See, e.g., Federal Trade Commission, *The FTC in 2008: A*

branding effort takes place in official reports and speeches by top agency leadership, particularly the FTC Chair.

Within the FTC, administrative and professional staff members appear to share a general sense of purpose. If asked to respond to a survey, most would say that the agency seeks to protect consumer well-being. At the same time, we doubt that many could explain how the two principle mandates of the agency combine to fulfill that purpose. In 2008, the FTC performed a self-study and conducted internal and external interviews to identify paths for improvement.<sup>106</sup> Agency staff members ordinarily define the agency's brand and purpose in terms of the projects of their own operating units. It is relatively unusual to find personnel in the Bureau of Competition or Bureau of Consumer Protection who could identify five major pending initiatives of the other Bureau.

This raises a basic question about agency organization: is a dual purpose competition and consumer protection agency more likely to reinforce awareness of its dual, complementary nature among its own personnel and increase external understanding of its character if it takes formal steps to integrate these functions internally. We know of a single agency – the OFT – that has undertaken internal organizational reforms to create integrated operating units (both policy offices and teams of case handlers) that combine the disciplines of competition and consumer protection. The OFT adopted these reforms within the past decade, and it is difficult to tell how this has affected internal and external perceptions of the agency's brand and purpose. It is clear that efforts by OFT leadership to emphasize the conceptual and organizational fusion of the two disciplines have made internal and external constituencies increasingly aware of the combination of functions.

In testimony and speeches, FTC leaders have emphasized the conceptual links between competition and consumer protection, but the Commission has not undertaken the ambitious internal restructuring carried out by the OFT. The FTC has relied on much looser forms of integration to achieve a synthesis of competition and consumer protection policy internally and enhance its external branding efforts. There is relatively little routine collaboration between the Bureau of Competition and Bureau of Consumer Protection. The agency relies mainly on the agency's commissioners, the Bureau of Economics, the Office of Policy Planning, and the General Counsel's office of policy studies to see that both perspectives inform the treatment of problems facing the agency. An attempt to create dual purpose operating groups from the existing Bureaus

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Force for Consumers and Competition (Mar. 2008) (annual report).

<sup>106</sup> William E. Kovacic, *The Federal Trade Commission at 100: Into Our 2<sup>nd</sup> Century* (Jan. 2009), at <http://www.ftc.gov/ftc.workshops/ftc100/docs/ftc100rpt>.

of Competition and Consumer Protection will be prohibitively expensive in the eyes of most FTC chairs. Internal resistance will be ferocious and durable – good reasons for a chair to use precious time (a tenure of three or four years) and energy on other matters. Yet there are milder alternatives worth exploring. These include greater reliance on inter-bureau task forces and a routine program of secondments that assign personnel from one unit to work in another.

The desire to create broad awareness of an agency as a pro-consumer agency can affect, and distort, the agency's allocation of resources. As noted above, consumer protection initiatives generally have the greatest impact on consumer perceptions. The Do Not Call registry, cases that return monetary redress to victims of fraud, and educational materials on ID theft are but some of the many FTC initiatives that provide services which consumers readily understand. Antitrust matters (particularly matters involving widely known providers of consumer goods and services) sometimes create broad public awareness. Nonetheless, the typical antitrust case (such as a challenge to a merger involving suppliers of inputs to the production of industrial goods) has less ability than the typical consumer protection case to raise public awareness of the agency. To this one can add the generally accurate proposition that what might be called routine consumer protection cases (e.g., a case against fraud) are less expensive to prepare than routine antitrust cases.

A dual purpose agency that sees a greater return to its reputation (and stronger approval by its legislature) may choose to invest more resources in consumer protection, even though the investment of the same resources in an antitrust case would contribute more to economic performance. The FTC now spends about 55 percent of its resources on consumer protection, and the balance on competition. As a rough matter, the greatest legislative pressures in recent years have demanded more attention to consumer protection matters involving financial services and privacy. Competition issues (notably, involving prices for petroleum products) receive significant congressional attention, as well, but the focus of concern has been on consumer protection matters. This also creates strong incentives for a dual purpose agency to shift resources toward the consumer protection agenda. Thus, for dual purpose agencies it is worth examining their distribution of resources over time to determine whether different responsibilities are receiving suitable emphasis.

#### b. Branding and the Assignment of Regulatory Tasks

The assignment and performance of regulatory tasks can either reinforce or undermine the creation of a strong and favorable consumer-

oriented brand. The FTC's deepest impact on consumer perceptions has come through its consumer protection activities. Like the FTC, most dual-function agencies derive the highest levels of public recognition from interventions dealing with consumer goods and services. Competition matters generally do not diminish recognition of the agency's consumer orientation, but they rarely reinforce it. Compared to consumer protection, competition policy activity tends to have a neutral impact on the FTC brand.

The consumer protection portfolio is not always an unmixed blessing for branding purposes. Under a large umbrella of consumer protection, a dual purpose agency is likely to find specific duties that blur or damage its image. In a number of instances, the FTC has sought to off load responsibilities that undermined its brand. One of these deals with cigarettes. The FTC was the first federal agency to propose regulatory action on cigarettes after the issuance of the Surgeon General's report on the hazards of smoking in 1964.<sup>107</sup> The FTC proposed a trade regulation rule that would have required tobacco companies to place health warnings on cigarette packages. Congress eventually adopted legislation mandating such labeling, but it assigned responsibility for testing tar and nicotine levels in cigarettes to the FTC – even though the agency had no particular expertise in testing, or in assessing the health risks of different levels of tar and nicotine.

For roughly twenty years, the FTC dutifully ran a “smoking laboratory,” using machines that measured the tar and nicotine content of cigarettes smoked using a specified method. In 1987, the FTC ceased conducting the tests after concluding that it had no comparative advantage in running a testing laboratory. The FTC outsourced the work to an independent testing laboratory under the agency's supervision.<sup>108</sup> This mitigated but did not solve the FTC's problems. Health researchers identified that testing regime – which continued to be called “the FTC method” – did not account for how smokers adjusted their behavior. Smokers offset the lower tar and nicotine levels by smoking more cigarettes and inhaling more deeply. Aware of the deficiencies of the testing regimen and the harm to the agency's image from being associated with the tests, the FTC asked Congress to assign all responsibility for the testing program and

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<sup>107</sup> Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed Reg. 8324 (1964). The FTC's cigarette rule was drafted by Richard Posner, then an attorney advisor at the FTC.

<sup>108</sup> The independent testing laboratory was the Tobacco Institute Testing Laboratory. On the history of the FTC's involvement in testing cigarettes for tar, nicotine, and carbon monoxide, see Prepared Statement of the Federal Trade Commission on Cigarette Tar and Nicotine Testing Before the House Commerce Subcommittee on Transportation, Tourism, and Hazardous Materials, United States House of Representatives (May 7, 1987).

the reporting of results to one of the federal departments responsible for health and science.<sup>109</sup>

The FTC also has sought to wave off the addition of new functions that might blur its brand or so divert resources that the enhancement of well-recognized product lines suffers. One contentious issue during the debates over the Dodd-Frank Wall Street Reform and Consumer Protection Act was the treatment of credit transactions carried out in connection with the purchase of a motor vehicle. The automobile dealers fought vigorously, and successfully, to keep these transactions outside the supervision of the new Consumer Financial Protection Bureau. However, they did not escape new regulatory oversight completely. Congress insisted that the new financial services framework place motor vehicle transactions under the oversight of some federal agency. Scanning the landscape of possibilities, Congress gazed at the FTC.<sup>110</sup> Fearing that it would receive a major new mandate without a commensurate increase in funds to carry it out, the Commission argued against receiving the new authority. These pleas were unavailing, as was the request for more funds. This experience highlighted a broader phenomenon that occurs as Congress assigns new duties to an agency with some experience in the general policy domain: it seldom provides appropriations to carry out the new commands. The Commission has competence in credit practices matters going back to the 1960s. Adapting this expertise to address automobile sales is manageable in concept, but the resource demands of the new oversight role could be daunting. With no additional funding, the only way to pay for the new program is to withdraw support internally from the fulfillment of other legislative commands

#### i. Portfolio Adjustments, Branding, and Planning

The addition or subtraction of functions has important implications for the definition of the agency's aims and its branding activities. As functions expand or contract, the agency must focus on how the adjustments will influence perceptions inside and outside the agency about what it does.

The need for greater attention to planning, priority setting, and brand positioning is perhaps greatest when an agency gains functions, or when possibilities for addition emerge. Augmentations can greatly affect the allocation of resources and the mix of programs the agency pursues. Will

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<sup>109</sup> Prepared Statement of the Federal Trade Commission Concerning Tobacco Advertising Before the Committee on Commerce, Science, and Transportation, United States Senate (Nov. 13, 2007), at <http://www.ftc.gov/os/testimony/PO64508tobacco.pdf>.

<sup>110</sup> The FTC's responsibilities for protecting consumers in the sale and leasing of automobiles are described at 78 Fed. Reg. 14014 (Mar. 15, 2011).



an expansion of existing activity to encompass an emerging area of concern dramatically alter the agency's character?

Over the past decade, privacy and data protection have ascended as FTC priorities. As the FTC's privacy program (now overseen in BCP's Division of Privacy and Identify Protection) grows, several paths are possible. One is a significant redirection of resources that inevitably has the effect of reorienting the mix of policy outputs and skewing the overall allocation of funds more heavily toward the consumer protection side of the FTC's house. If the FTC moved from a 55/45 split between consumer protection and competition to something like a 65/35 or 70/30 distribution, would the wisdom of retaining a competition competence within the FTC, rather than moving the function entirely to the Antitrust Division of the Justice Department, come into question? Would the growth of the agency's privacy role give rise to suggestions that Congress spin the unit off as a stand-alone data protection body – a move that would put the U.S. national data protection system on the same institutional footing used by most other jurisdictions? To answer these and other questions, a multi-function agency must have a mechanism for considering how dramatic and more subtle changes in its authority affect its ability to define its brand clearly and coherently.

### 3. Capacity and Capability

As described earlier, capacity refers to the pool of knowledge and resources that the agency can bring to bear, and capability refers to the range of policy levers and quality of the resulting decisions.

Throughout its history, the FTC has struggled to see that the commitments entailed by its multifaceted mandate do not outrun its capacity to deliver good policy results. Through most of its history, the Commission has suffered from a tendency to initiate ambitious programs without adequate attention to the basic prerequisites of effective implementation. These flaws played a major part in placing the agency in peril in the late 1970s and early 1980s.<sup>111</sup> The agency's extraordinary combination of competition and consumer protection measures elicited harsh political backlash and enmeshed the Commission in destructive turmoil with Congress. Although some FTC initiatives from this period (such as the Eyeglasses I rule and the beginnings of the antitrust health care program) succeeded splendidly, many litigation and rulemaking proceedings foundered in the courts.

The FTC's performance on this score has improved greatly over the

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<sup>111</sup> See Kovacic, *supra* note 94, at 664-71.

past 30 years. The agency has learned the hard way to ask basic questions about each new undertaking: How much will it cost? Who will do it? How long will it take? What do we expect to accomplish? What are the doctrinal, political, and management risks? How will we know if it's working? The bruising experiences of the late 1970s and early 1980s inspired stronger attention to planning and program management. The matching of the FTC's commitments to capabilities remains a massive challenge for the institution

#### a. Chronic Underfunding of Mandates

Agencies seldom will receive the resources needed to fulfill all the regulatory commands assigned to them. This is the case of the modern FTC. In many instances, such as the automobile credit sales provision of Dodd Frank, Congress assigns major new responsibilities without providing resources to carry them out. The legislative process that generates new substantive legislation is detached from the process that appropriates funds. Thus, Congress rarely considers the resource implications of requirements that the agency enforce new laws, issue new rules, or prepare reports.

Agencies respond to these imperatives in one of two ways, both of which undermine agency effectiveness. The first is to undertake programs that exceed the agency's ability to execute them effectively. The agency will be tempted to cut corners by weakening internal quality control measures, understaffing ambitious projects, or assigning difficult litigation or rulemaking tasks to relatively inexperienced personnel. Even though senior personnel may recognize how much resource constraints limit agency capacity, they may still acquiesce in Congressional demands for the initiation of new projects. A short term political appointee may regard the initiation of a new measure as a credit-claiming event and may see the risk that an improvidently conceived project may fail as a cost that will be borne by future agency leaders and will not be attributed fully, or at all, to the appointee who originated it. Without an effective feedback mechanism that forces the incumbent appointee to internalize such costs, it is easy to begin such projects, even when they outrun the agency's capacity.

A second mechanism is to fund new projects adequately by a relatively silent form of triage. This consists of draining resources away from other programs ostensibly designed to implement congressionally imposed duties. To support new programs in areas such as privacy, data protection, and mortgage lending fraud, the FTC over time has quietly abandoned other programs that used to be mainstays of enforcement. To some extent this is done with at least the implicit approval of Congress. Through official budget requests and oversight hearings, Congress is at least

generally aware of how the Commission is spending its money. It can detect that some areas of policy responsibility seem to be inactive. Congress can observe, for example, that the FTC has brought two Robinson-Patman Act price discrimination cases in the past 23 years.<sup>112</sup> This reliably indicates diminished attention to a statute whose enforcement in the 1960s yielded hundreds of cases. For the most part, the FTC has constructed or retooled major programs involving privacy, financial services, mergers, horizontal restraints, and single firm conduct by severely reducing outlays for the enforcement of the Robinson-Patman Act and consumer protection statutes dealing with fur and textile labeling.

Even if one accepts the notion that Congress has acquiesced in this repositioning, there is still a unsettling lack of accountability and transparency in this pattern. Nominal legal commands remain in place, yet the agency walks away from them without the type of public deliberation and debate that arguably ought to proceed an important redirection of policy. Quiet abandonment and repositioning allow Congress and the agency to maintain an outward commitment to statutes whose implementing programs are hollow due to a lack of resources. A more honest approach would be to consider repeal of unenforced laws or to confront the commitments vs. resources issue more directly in discussions about new legislation. The agency also knows that if, for some reason, a seemingly dormant and neglected policy area comes to life, legislators will chastise it for not sustaining an adequate presence in the area. It is not honorable to make policy by crossing one's fingers and hoping that certain contingencies do not come to pass.

#### b. The Sirens of Expansive Authority

The FTC's history features a painful tendency to over-promise and under-deliver. One important cause of the mismatch between promises and performance is the exaggerated sense of capacity that can come from the broad grants of authority that a multi-function agency often possesses. As the agency's powers expand, and Congress urges the agency to use new authority aggressively, the Commission's leadership and professional staff sometimes have perceived that the agency has the ability and the obligation to solve all economic problems that come to its attention. In the 1970s, Congress dramatically enhanced the scope and power of the FTC's powers.<sup>113</sup> In addition, Supreme Court decisions early in the decade

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<sup>112</sup> William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norm*, 71 *Antitrust L.J.* 377, 410-15 (discussing patterns of federal government enforcement of the Robinson-Patman Act).

<sup>113</sup> Kovacic, *supra* note 94, at 631-42 (discussing congressional expansion of FTC

interpreted the Commission's existing powers broadly. Some FTC officials have found the possibilities inherent in these developments to be enervating and willingly grasped new opportunities to exercise them. Others were more cautious, but they felt a duty to use the agency's elastic mandates to address various forms of business behavior, even though the behavior takes place at or beyond the boundary of the agency's statutes.

In either case, the zone of what the agency and its leadership perceive to be appropriate forms of and occasions for intervention will tend to expand as Congress adds regulatory tools to its portfolio. This is especially true if the agency's mandates tend to be far-reaching and relatively open-ended. This arguably is the case of the FTC, whose foundational statute permits the agency to condemn "unfair or deceptive acts or practices" and to proscribe "unfair methods of competition." Over time, agency staff has tended to read these statutes in increasingly expansive ways. For example, in the 1970s, the FTC undertook an exceptionally ambitious program of competition and consumer protection matters. Some initiatives produced successful outcomes, but many ambitious endeavors failed in ways that caused long-lived harm to the Commission's reputation and endangered various areas of the FTC's mandate.<sup>114</sup>

The presence of seemingly expansive authority also makes the Commission an attractive congressional choice to solve any urgent economic problem that may emerge. If gasoline prices increase sharply in the wake of a natural disaster, Congress is likely to turn to the FTC, whose charter enables it to attack "unfair methods of competition" and "unfair or deceptive acts or practices,"<sup>115</sup> and demand that the agency use these broad grants of authority to do something about the problem. Any jarring dislocation in the economy – a price surge in a one sector, or a supply shortage in another – becomes fair game for legislators to demand that the FTC bring its seeming open-ended powers to bear upon the problem.<sup>116</sup> In December 2007, Congress enacted legislation to prohibit the manipulation of petroleum markets and gave the FTC authority to promulgate rules to enforce the measure.<sup>117</sup> In 2009 the FTC adopted an implementing regulation that Congress will call for the agency to enforce vigorously

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powers from 1970 to 1976).

<sup>114</sup> This history is recounted in William E. Kovacic, *Congress and the Federal Trade Commission*, 57 *Antitrust Law Journal* 517 (1989).

<sup>115</sup> 15 U.S.C. Section 45.

<sup>116</sup> These measures are described in William E. Kovacic, *Standard Oil Co. v. United States and Its Influence on the Conception of Competition Policy*, 11 *Competition Law Journal* 89 (2012).

<sup>117</sup> This authority was created in Title VIII of the Energy Independence and Security Act of 2007, 42 U.S.C. §§ 17301-17305.

whenever gasoline prices rise significantly.<sup>118</sup> This measure has little prospect of addressing the two factors that most account for the prices of petroleum products: the supply of crude oil and the consumption demand of American consumers and business.

### c. Recruiting and Retaining Human Capital

Whether an agency performs one function or many, its performance depends on whether it has the human resources to accomplish its assigned tasks. The decision to add a new area of policy responsibility requires an internal assessment of whether the institution has the right skills to perform the function. The FTC's expansion of efforts involving data security and privacy has led to an increase in personnel with forensic skills in computer technology, mobile telephony, and internet operations. To support the work of these professionals, the agency also has made major investments in internal laboratories and other investigative resources to deal with online fraud. Likewise, the FTC's initiatives to work more actively at the intersection between antitrust law and patent law have led to the hiring of patent attorneys to serve in the Bureau of Competition.

The failure to maintain a good fit between program demands and personnel capabilities has crippled FTC programs on a number of occasions in the past. From 1970 through the middle of the decade, the Commission undertook an ambitious agenda of programs.<sup>119</sup> On the competition side, the FTC initiated a broad program to challenge monopolization and shared monopolization in industries such as breakfast cereal, bread, petroleum, photocopying, and pharmaceuticals. The FTC also began challenge, described above, to restrictions on advertising imposed by the American Medical Association. The agency also attacked distribution practices in the soft drink sector and sought to forbid the parallel, non-collusive adoption of certain pricing and marketing practices by competitors.

The agency's consumer protection work during the 1970s was no less ambitious and perhaps more expansive. The FTC initiated over fifteen rulemaking proceedings. Some of these measures sought to modify doctrines with universal application in the economy, such as the holder in due course rule. Others attempted to impose requirements governing the provision of specific types of goods or services, including funerals, used cars, vocational schools, eyeglasses, dietary supplements, hearing aids, and advertising directed toward children.

The FTC's economic research program also pursued far-reaching

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<sup>118</sup> Federal Trade Commission, Prohibitions on Market Manipulation: Final Rule, 74 Fed. Reg. 40686 (Aug. 12, 2009), codified at 16 Code of Federal Regulations 317.

<sup>119</sup> Kovacic, *supra* note 94, at 643-51.

objectives in the 1970s. The agency established a line-of-business reporting program that compelled a large number of enterprises to provide detailed information about their sales and profits in specific product groups. The Commission also undertook high profile studies involving specific sectors, including the business of insurance.

This impressive list of projects pressed against the weakest joints of the Commission's human capital infrastructure. The agency paid little attention to the fit between these ambitious measures, many of which involved novel legal theories and complex facts, and the FTC's capacity to execute them skillfully. FTC leadership blithely added new bet-your-agency initiatives to Commission's agenda without a careful examination of the human capital needed to handle difficult matters successfully. Nor did the agency anticipate what kinds of talent the affected industries would muster in opposition. Many of the FTC's antitrust cases and consumer protection rulemakings sought powerful remedies to transform the structure and behavior of the sectors in question. With massive commercial interests at stake, companies hired the best of the defense bar and the economic consultancies to represent them. In too many instances, the FTC sent small and relatively inexperienced teams to face legions of highly capable opposing counsel.

#### 4. Resilience: Is the Existing Assignment of Functions Adaptable and Sustainable?

The FTC's mix of competition and consumer protection has proven to be adaptable and resilient. As described earlier, the agency's portfolio has changed substantially over time. Sometimes through its own repositioning and sometimes with congressional approval, the agency has entered new policy terrain. In the jargon of computer technology, the Commission's powers have proven to be highly scalable. At the same time, the Commission has undergone important divestitures, most notably the securities regulation remit in the 1930s, consumer product safety in the 1970s, and some elements of financial services in 2010. Each divestiture principally involved a consumer protection mandate.

On several occasions, the FTC has confronted circumstances where the original Congressional allocation of regulatory oversight turns out to be non-adaptive. Consider broadband information services. These products did not exist (nor were they even imagined) when Congress created the Federal Communications Commission. Indeed, the FCC's statutory framework is premised on the belief that the lowest cost way to provide telecommunications services is to have a single firm in each geographic area, and subject that firm to comprehensive oversight by a specialist public

utility body. Over the past thirty years, changes in technology have made it apparent that this model is neither inevitable nor optimal, and that competition in a variety of areas is both feasible and desirable. The development of the internet and broadband information services have resulted in considerable dispute over whether the FCC has exclusive regulatory authority, or whether the FTC has a role to play.<sup>120</sup> Jurisdiction over privacy on the internet has created similar difficulties, as noted previously.

The FTC's experience shows both the promise and peril of scalable allocations of regulatory authority. On numerous occasions, the federal courts have declared that the FTC's unfairness authority under section 5 of the FTC Act confers broad powers to reach a range of conduct not previously condemned by statute or judicial decisions.<sup>121</sup> This expansive authority gives the FTC the ability to address new commercial phenomena and create new norms of conduct. For example, the FTC's emergence as the principal federal enforcement body concerning data protection and privacy built upon the application of the Commission's unfairness authority, but no one was thinking about the Internet and online privacy in 1914, when Section 5 of the FTC Act was written.

The FTC's experience also demonstrates that the application of a highly scaleable mandate can create three distinct traps. First, legislators and other external observers come to regard the agency as a solution for all problems that have an apparent connection to the expansive mandate. For example, substantial increases in the prices of certain commodities can be depicted as the result of "unfair" or overreaching behavior by the suppliers of those goods. Suppose that armed conflict in a major crude oil production region causes crude oil prices soar. This shock, in turn, forces gasoline prices upward. Gasoline prices increase because the cost of the principal input for making gasoline has risen, yet legislators may attribute the price changes to collusion or unconscionable conduct by petroleum industry refiners. The agency with the highly elastic mandate will be urged to take steps (e.g., attacking "price gouging") to push prices downward, yet any

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<sup>120</sup> Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (broadband services deemed not to be telecommunications services within meaning of Telecommunications Act); see also William E. Kovacic, FTC Jurisdiction Over Broadband Services, Testimony Before the U.S. Senate Committee on the Judiciary (June 14, 2006) (FTC prepared statement stating that *Brand X* gives FTC jurisdiction over broadband services), available at <http://www.ftc.gov/Os/2006/06/pd52103commissiontestimonybroadbandinternetaccessservices06142006Senate.pdf>.

<sup>121</sup> The formative analysis of this jurisprudence is Neil W. Averitt, *The Meaning of 'Unfair Methods of Competition' in Section 5 of the Federal Trade Commission Act*, 21 Boston College Law Review 227 (1980).

measures taken will not address the underlying cause and may retard market responses that eventually would cure the problem.

Second, an agency with a sweeping and adaptable mandate has every incentive to push the outer boundaries of its authority, to show it is fulfilling the goals set for it by Congress. Unless the agency binds itself to do otherwise, it will find it easy to expand its claimed authority without grounding its initiatives in a rigorous conceptual framework that specifies the logic for intervention and simultaneously delimits the outer boundaries of the agency's assertion of authority. Open-ended assertions of authority invite carelessness in the application of the agency's powers and blind it to the broader institutional and political implications of expansive forms of intervention. These lapses can trigger rebukes from reviewing courts and provoke severe political backlash.<sup>122</sup> Spiderman said it best: with great power comes great responsibility. Agencies engaged in hot pursuit of what they perceive to be evil-doers have a distinct tendency to ignore this point.

The third trap arises from the possibility for the agency to exploit opportunities for what might be called regulatory leveraging across its range of policy duties. This is evident in recent FTC matters involving mainstays of the information services sector such as Google. In the development of the agency's privacy program, the Commission in recent years has expressed a keen interest in encouraging companies to adopt stronger data protection measures and to afford consumers more control over the use of information that companies collect about their preferences. Some of the targets of the FTC's privacy related interests (e.g., Google) have appeared before the FTC in the course of inquiries related to issues arising under the Commission's competition authority. Google, for example, underwent extensive FTC antitrust reviews concerning its acquisition of Doubleclick and Admob, respectively.

During the FTC's deliberations over Google's mergers, some Commission officials and staff advocated that the agency use the merger review process (where companies are obliged by law to notify the federal antitrust agencies in advance of certain mergers) to exact concessions from the merging parties concerning their privacy policies and data protection practices. The Commission resisted this impulse in the Doubleclick and Admob matters, but it subsequently carried out parallel competition and consumer protection inquiries in connection with Google's search practices. These matters point to a scenario that might unfold in the future. An agency with multiple functions might use its gatekeeping powers under one function to induce a company to make concessions with respect to issues

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<sup>122</sup> This history is recounted in William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 Antitrust L.J. 929 (2010).



arising under separate elements of the agency's policy portfolio. For example, the FTC might tell an information services firm that it will approve a merger (or accelerate approval of a merger) if the enterprise promises to make changes to its privacy practices – a matter normally implicating the FTC's consumer protection powers. In this way, an multipurpose agency might achieve policy outcomes that a single purpose agency might find more difficult to realize.

#### 5. Internal Organizational Cohesion: Will the Combination Result in Synergies, Distrust, or Civil War?

The FTC features a substantial degree of insularity with its Bureaus of Competition and Consumer Protection. The relationship between these two groups is more one of rivalry or indifference rather than cooperation. Policy integration takes place mainly at the Commission level and through the work of the Bureau of Economics and the FTC's Office of Policy Planning. This means that, if the analytical synergies between the two disciplines are substantial, a less than ideal amount of combined consumer protection and competition analysis takes place at the case handling and middle management levels.

We have mentioned earlier that multi-purpose agencies typically create single-purpose operating units to carry out specific duties. These units, in turn, tend to compete with each other for attention and resources, including outlays for personnel, office space, and control over infrastructure assets such as the information technology network. This phenomenon can be observed at the FTC and a number of other agencies that combine competition and consumer protection duties. Intramural competition for prestige and resources can cause agency officials to spend substantial effort refereeing disputes among rival divisions. These are resources that otherwise would be applied to serving program needs.

Intramural rivalry also can have other costs. If the rationale for combining functions is to realize synergies between discrete areas of responsibility, the rivalry for prestige and resources can create internal tensions that defeat the realization of synergies in practice. Where individual operating units strive to create separate identities, personnel within those units may establish strong loyalties to their own units and define success by the achievements of their units. Projects that entail cooperation across operating units may be seen by group as relatively unimportant or simply contrary to each group's interests, even though greater collaboration across units would advance projects that serve the larger aims of the institution as a whole. Where its main operating units are assigned specific functions, a multi-purpose agency may find it difficult to

mobilize resources across units unless it can create a “we’re all in this together” ethos. Otherwise, top agency leadership may have to spend substantial effort refereeing disputes among rival divisions. These are resources that otherwise would be applied to serve program needs.

That said, some dynamic tension across units can be helpful. As noted previously, at the FTC, the formulation of consumer protection policy (including financial services) has been informed by the analysis and research of the agency’s Bureau of Economics (BE). In general terms, BE serves as a voice for the value of competition, for the inclusion of market-oriented strategies in the mix of regulatory tools, and for the awareness of costs associated with specific regulatory choices. BE also performs empirical research that has yielded major insights into how consumers perceive disclosures provided in financial services instruments. In all matters, BE makes an independent recommendation to the Commission about the desirability of specific cases, rules, or other proposed initiatives. BE has emphasized that excessively stringent regulatory controls can (a) overlook strategies that harness market processes to achieve social policy goals, and (b) suppress forms of competition that themselves can yield significant benefits to consumers.

The institutional arrangements through which the Bureau of Economics makes an independent recommendation to the board helps prod the board to pay attention to regulatory costs and to the role of competition and market-based responses in protecting consumer interests. The FTC’s Bureau of Economics (and, to a lesser extent, the FTC’s Bureau of Competition) help ensure the FTC takes account of the economic costs and benefits of law enforcement and rulemaking proposals from the Bureau of Consumer Protection – and the knowledge that their proposals will be scrutinized in this fashion forces the FTC’s Bureau of Consumer Protection to explicitly take account of these matters in making its recommendations in the first instance.<sup>123</sup>

Consider a concrete example. In 2007, Michael Sallinger, the head of the FTC’s Bureau of Economics, spoke at a conference jointly sponsored by the FTC and the National Association of Attorneys General to discuss policy toward the gasoline industry, including the enforcement of price gouging laws. His narrative underscores the value of economic analysis as a discipline upon the FTC’s decision making process:

After hurricane Wilma, a man in Miami with a flatbed truck drove it to North Carolina – several hundred

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<sup>123</sup> Luke Froeb et al, *The Economics of Organizing Economists*, July, 2008, at <http://ssrn.com/abstract=1155237>.

miles away – and purchased a set of portable generators, paying roughly \$300 for some and \$500 for others. He drove the truck back to Miami and sold the generators for approximately double what he had paid for them. The state sued him for price gouging.

As a matter of economics, this suit was seriously misguided policy. The initiative shown by this truck owner helped alleviate the shortage of electricity. We do not need to give him an award for his initiative. The market did that, or at least it would have if he had not had to pay a fine to the state. But we certainly should not be penalizing him. The next time a disaster strikes Miami, perhaps the truck owner will try to think of ways to help ease a shortage and simply decline to profit from it. Perhaps. But that's not where I would put my money. More likely, he will just stay put; and those people who would have voluntarily purchased whatever supplies he chose to provide will simply go without. I am confident that professional economists would agree with my assessment of this case.

But not everyone in the workshop did. As the discussion of the episode unfolded, it was clear that there was a divide in the room between the people who work on antitrust for the states and those who work on consumer protection. The consumer protection people in the room generally approved of the case and of price gouging laws more generally. It was that discussion that made me realize how valuable economics is to the consumer protection mission of the FTC. I cannot imagine people from our Bureau of Consumer Protection arguing for such a case; and I cannot help thinking that it is the result of the ongoing dialog between lawyers and economists at the Commission about what sorts of consumer protection cases make economic sense that the cases we bring do make economic sense.<sup>124</sup>

## 6. Collateral Effects Upon the Regulatory Ecosystem

As noted earlier, Congress frequently assigns regulatory responsibility for a specific sector or practice to more than one federal

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<sup>124</sup> Michael A. Salinger, *Economics Supporting the Twin Missions of the FTC*, Apr. 20, 2007, at <http://www.ftc.gov/speeches/salinger/070420breakfast.pdf>

agency. The FTC's expansive competition and consumer protection responsibilities overlap with or share boundaries the duties of numerous other federal agencies, as well as a host of state public bodies. The FTC's very formation in 1914 and the agency's subsequent movement into other policy domains, some by legislative fiat and others through the exercise of the FTC's discretion, have affected the larger regulatory ecosystem. To a large degree, the FTC coexists peacefully with its public agency counterparts. At the same time, the existing distribution of authority complicates the execution of routine regulatory tasks.

#### a. Inter-Agency Coordination

The agency devotes substantial resources to inter-government coordination. The need in many instances to collaborate with other public institutions delays the implementation of new initiatives. In a wide range of areas, the FTC cannot act unilaterally. Adjustments in the oversight of advertising involving food and health claims require close consultation with the Food and Drug Administration. The implementation of new legislative mandates involving market manipulation of petroleum products demands collaboration with the Commodity Futures Trading Commission, which pressed the FTC to narrow as much as possible the scope of its market manipulation rule. The drafting by the Department of Health and Human Services of the new rule on Accountable Care Organizations took place through an often contentious collaboration among the FTC, DOJ, and HHS. Dodd Frank mandates coordination between the CFPB and the FTC over the future allocation of enforcement tasks related to non-bank financial institutions. The fact of shared responsibility and common mandates means that few collaborative exercises in setting rules or bringing cases proceed expeditiously.

#### i. New Entry in an Existing Regulatory Arena: The Case of Antitrust

The FTC's establishment in 1914 placed the FTC into a policy domain already occupied by two other institutions. First, the Clayton and FTC Acts ended the Justice Department's position of exclusivity in the federal government's enforcement of the antitrust laws. In particular, the Clayton Act gave DOJ and FTC concurrent authority to enforce its provisions and did not specify a decision making rule to determine which agency would handle specific matters. The FTC Act moved the FTC into the adjudication of federal antitrust matters, a realm that had been the exclusive responsibility of the federal judiciary.

Neither of these incursions into the existing ecosystem pleased the incumbents. In its first decades, the FTC suffered many debilitating defeats in the federal courts. Some setbacks stemmed from serious weaknesses in the FTC's process. The Commission's early custom was to issue decisions without elaboration of their legal reasoning and to present the rationale for decisions only in briefs before the courts. This habit did the agency no favors when it came time to argue that it deserved deference before the appellate courts. Yet appellate decisions of this period also reveal a hostility that cannot be explained solely by the Commission's poor opinion-writing. The courts did not welcome the introduction of a new adjudication institution – to some degree, a rival – with open arms.

Nor was the Department of Justice pleased with the arrival of a new body with whom it would henceforth share decision making tasks. From early days until the present, the most frequent point of friction has been the allocation of files where both agencies have competence to review a matter. At times in the 1920s, the two agencies each opened a file to deal with the same conduct. The agencies devised informal methods of consultation to avoid duplicative parallel inquiries and embodied these understandings in a formal instrument in the late 1940s. The agreement established the process by which one agency would “clear” matters to the other.

Since the late 1940s, this liaison arrangement (commonly called “clearance”) has provided the means by which the agencies avoid conflicts in the exercise of their concurrent power under the Clayton Act.<sup>125</sup> A 2002 press release describes how this process has worked (and not worked) over time, with agencies handling particular cases based primarily on their previous expertise in a particular industry:

[B]ecause the FTC had experience with automobiles, it conducted investigations in that industry; similarly, DOJ investigated steel matters. . . .

In recent years, the process has become more contentious as the convergence of industries has blurred bright lines between industry boundaries. For example,

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<sup>125</sup> James C. Grimaldi, *Enron Case Attracts Lawyers Like a Flame Attracts Moths, More than You Can Shake A Stick At*, Washington Post, Jan. 28, 2002, at E2 (“There are a handful of industries in which both the FTC and Justice Department have expertise. So when a hot merger comes up, and the staff of each agency wants a piece of it, the assistant attorney general for antitrust and the FTC chairman have to sort it out. This had been done in an ancient ritual that included a series of athletic events such as arm wrestling, mud wrestling, greased-pig wrestling and a bull-riding competition, and an essay contest. Okay, we're making that up. Well, most of it. The agencies really *do* write essays explaining why they are best to review the mergers.”). See also Lauren Kearney Peay, *The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 *Vanderbilt L. Rev.* 1307 (2008).

because the DOJ historically has investigated electricity, while the FTC has investigated all other energy matters, convergence mergers between electricity and natural gas companies have led to contentious disputes regarding which agency should investigate. Moreover, although the FTC predominantly has investigated computer hardware and the DOJ has investigated computer software, matters involving both have become increasingly common, resulting in clearance disputes.

In the 1980s, there were only about 10 disputes per year. Since then, the average has exceeded 80. These disputes result in significant delays. Delays averaging three weeks occurred in 24 percent of the matters on which clearance was sought from the beginning of FY 2000 through January 28, 2002. . . . During this time, neither agency could investigate potentially serious allegations of illegal behavior.<sup>126</sup>

As this passage suggests, most matters are cleared quickly and unobtrusively. Some are highly contentious. The contested matters, though few in number, imbue the DOJ/FTC relationship with an undercurrent of suspicion and distrust that undermines the effectiveness of the relationship. The element of tension has become more acute with the ascent of the FTC in the modern era to a position of peer status with the DOJ. From 1914 through the 1960s, DOJ was clearly the preeminent U.S. antitrust body. Through a slow and at times uneven process of improvement, the FTC over the past twenty years has matched DOJ in prestige. This transformation has increased the stakes of clearance disputes as each agency seeks to claim policy terrain that will increase its visibility and accomplishments.

The FTC's dual identity as a competition and consumer protection agency promises to be a source of instability in the agency's relationship

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<sup>126</sup> <http://www.ftc.gov/opa/2002/04/clearanceoverview.shtm>. See also Grimaldi, *supra* at E2 (“The 'discussions' would last more than two weeks sometimes, and that's almost half the 30 days in which investigators must decide whether to launch a more detailed review, called a "second request" for documents. Delays of more than 15 days occurred 32 times in 2000.”)

The clearance process also created other problems not mentioned in the press release. Resolution of clearance disputes was supposed to be based on the comparative expertise of each agency – but the agencies controlled whether or not they initiated cases in each area – and both knew that the first agency to bring a case in a new area would be more likely to get all cases arising out of that area into perpetuity. The clearance process thus encouraged “gun-jumping” by the agencies – each seeking to be the first-mover, irrespective of the relative strength of the case(s) in question.

with DOJ. As noted above, consumer protection and competition law have important conceptual complementarities. In principle, the unification of supply and demand side perspectives can yield a better understanding of specific commercial phenomena, a better diagnosis of apparent problems, and the design of a more effective solution. In recent years, the FTC has made a point of issuing complaints that invoke an amalgam of competition and consumer protection theories of harm. The FTC's settlement in 2010 of claims of improper single firm conduct by Intel relied upon competition and consumer protection theories of liability, and FTC officials have emphasized the hybrid nature of this resolution.<sup>127</sup> Earlier FTC decisions, such as the settlement in Negotiated Data Solutions (N-Data), also featured a mix of competition and consumer protection rationales.<sup>128</sup> Most recently, the FTC initiated parallel competition and consumer protection inquiries involving Google's practices in the market for internet-based search.

DOJ might view the FTC's application of hybrid competition/consumer protection theories with suspicion. DOJ might see the FTC's recent practice as a strategic move to establish a superior basis to claim clearance. The FTC might be preparing to assert that individual matters pose a mix of competition and consumer protection issues and therefore should be analyzed by an agency with jurisdiction over both domains. Let us assume that the FTC's move is not a strategic ploy to claim more policy terrain. Suppose, instead, that the FTC's work reflects the view that the application of the two disciplines can product better policy outcomes in some cases. Three solutions are possible in these situations. One is to allocate such files to the FTC because the FTC's mandate encompasses both competencies. The second solution is to give the file to the DOJ on the condition that the two agencies cooperate closely to permit the FTC to contribute its consumer protection expertise to DOJ's analysis. The third is for DOJ to hire officials with consumer protection backgrounds to work on its cases.

There is another way in which the FTC's application of a fusion of competition and consumer protection perspectives could upset the existing order of federal antitrust enforcement. That is the possibility for regulatory leveraging described above. The FTC could be tempted to use its competition policy mandate to obtain policy concessions that relate mainly to consumer protection. In the guise of doing a competition policy analysis, the FTC might inform the firm that it will allow the transaction to proceed if the firm makes commitments with respect to other policy commands (e.g.,

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<sup>127</sup> In re Intel Corp., D. 9341 (FTC Oct. 29, 2010) (decision and order), at <http://www.ftc.gov/os/adpro/d9341/101102inteldo.pdf>.

<sup>128</sup> In re Negotiated Data Solutions LLC, C-4234 (FTC Sept. 22, 2008) (decision and order), at <http://www.ftc.gov/os/caselist/0510094/080923ndsd0.pdf>.

data protection) within the Commission's policy portfolio at a protection regime. For example, regulatory leveraging could enable the FTC to realize privacy policy objectives that might not be obtainable directly through the prosecution of a consumer protection case or the promulgation of a consumer protection rule.

There is a constraint on the FTC's ability to engage in this type of leveraging. If it became apparent that the FTC was using merger review to advance a consumer protection agenda, the existing framework of merger analysis (which does not incorporate consumer protection considerations) would be called into question. Success with such an approach would depend on the FTC's ability to depict the consumer protection issues as elements of a more sophisticated form of competition analysis.

Whether its duties encompass only competition law or competition law plus other functions, an agency rarely has exclusive power to shape policy within the policy domains assigned to it. Single-purpose and multi-purpose agencies often share responsibility for a given field of oversight with still another government agency or agencies. By the conscious design of a legislature or by accident, a multiplicity of regulatory decision makers for the same policy area tends to emerge over time. In the field of competition and consumer protection policy, for example, it is common for the competition agency to share policy making responsibility with sectoral regulators that have concurrent or sequential power to review mergers or allegations of abusive behavior by dominant firms.

## 7. Political Implications

The dual-role nature of the FTC presents the agency with political benefits and disadvantages. The principle benefit, mentioned above, is the possibility of cross subsidization that improves the effectiveness of the FTC competition program. Consumer protection measures such as the Do Not Call registry have created substantial policy capital surpluses for the Commission, and these can be spent effectively to initiate difficult new matters or to resist political pressure to engage in programs that the agency believes to be improvident.

There are disadvantages in the existing distribution of power, although these may be rooted mainly in the FTC's inherently close relationship to Congress. The FTC's ties to Congress introduce severe rigidities into the agency's ability to allocate tasks to other agencies with whom it shares policy responsibilities. In 2002, the Agencies sought to implement a permanent structural solution to the clearance problem by explicitly allocating exclusive responsibility for particular sectors of the



economy to either the FTC or the DOJ.<sup>129</sup> Among other features, the agreement would have dedicated the telecommunications and media sectors to DOJ while reserving electric power, health care, and aerospace to the FTC.<sup>130</sup> Although the proposal attracted bipartisan support and was hailed by antitrust practitioners, business groups, and former FTC and DOJ personnel, it was ultimately sunk by the vehement opposition of Senator Ernest Hollings, who argued that mergers among media corporations should be reviewed by the FTC. Senator Hollings, as chairman of the Commerce Committee, had oversight authority over the FTC, but not over the DOJ (which fell within the jurisdiction of the Senate Judiciary Committee). Hollings had one other important pressure point to exploit. He chaired the Senate Appropriations Subcommittee that oversees the funding of both the Justice Department and the FTC, and he threatened to reduce the budgets of both agencies unless the clearance agreement was abrogated.

Senator Hollings and his staff feared that adoption of the FTC and DOJ's clearance agreement would have largely eliminated the flow of campaign contributions from telecommunication and media corporations to members of the Senate Commerce Committee, and he apparently concluded that any new campaign contributions from electric power, health care, and aerospace firms would not be enough to make up the deficit.<sup>131</sup>

In the 1970s, FTC management failed to foresee the political consequences of programs that applied the agencies expansive powers in a broad manner. The FTC did not anticipate the political feedback generated by matters that affected significant economic interests. The Commission's competition, consumer protection, and economic research programs cut an astonishingly broad swath through American commerce. Not only did the Commission take on well-known giants of U.S. industry and, in many cases, threaten them with remedies such as divestiture and compulsory trademark licensing, it also attacked sectors that provided the backbone of small and medium-sized enterprise across the country. This dynamic set in motion powerful lobbying campaigns before Congress, resulting in strong legislative backlash. In its selection of measures, the FTC was inattentive to the political risk associated with each new initiative and to the aggregate political significance of its sweeping portfolio of programs.

Expansive grants of authority may also serve the electoral needs of individual legislators.<sup>132</sup> Once Congress has delegated an ambitious range

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<sup>129</sup> <http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf>.

<sup>130</sup> *Id.*

<sup>131</sup> This episode is described in William E. Kovacic, *Antitrust in High-Tech Industries: Improving the Federal Antitrust Joint Venture*, 19 *George Mason L. Rev.* 1097, 1111-12 (2012).

<sup>132</sup> Fred McChesney, *Rent Extraction and Rent Creation in the Economic Theory of*

of regulatory tasks to an agency, individual legislators or committees will predictably urge the regulatory agency to use its powers aggressively. Firms affected by the agency's activities will predictably complain to the Congress, especially to oversight committees whose members are recipients of contributions supplied by the regulated industry. Individual members or committees will predictably demand that the agency temper its intervention. One can accomplish some of the same objectives by introducing a bill to regulate the industry, but using a middleman leaves fewer fingerprints. Such strategies need not be deployed very often; affected firms will make campaign contributions even if there is not a live controversy, to ensure they will have access to members when they need it -- meaning that service on an oversight committee is accompanied by an annuity from the affected firms.

#### V. Divide or Conquer?

If a particular competition policy conglomerate is not "working," then there are at least two different ways of solving that problem: one can divide (separating the conglomerate into distinct entities, each of which has a sole area of policy responsibility), or conquer (turn responsibility for the conglomerate over to new management, drawn from a different part of the government.)<sup>133</sup> Part III contains multiple examples of such initiatives. Examples of division include the decision by Congress in 1947 to establish the Air Force as a separate body by divesting functions previously performed by the U.S. Army and its Air Corps, the spinning off in the 1974 of the National Transportation Safety Board from the Department of Transportation, and the repositioning of the Nuclear Regulatory Commission as a distinct institution removed from its former home within the Atomic Energy Commission. Prominent illustrations of conquest include the absorption of numerous border protection institutions (such as the U.S. Coast Guard) into the Department of Homeland Security, the amalgamation of various financial services regulatory functions into the Consumer Protection Financial Bureau, and the removal of the Fish and Wildlife Service from the Departments of Agriculture and its relocation inside the Department of the Interior.

Experience with competition agencies also features examples of division and conquest. A major example of division occurred in the 1930s, when the FTC incubated the securities regulatory functions eventually

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*Regulation*, 16 J. Legal Studies 101 (1987).

<sup>133</sup> We do not view the addition of additional divisions to the competition policy conglomerate as an example of "conquer," since it will not solve the underlying problem.

transferred to the new Securities and Exchange Commission. Conquest episodes include the assimilation in 2011 by Ireland's Competition Authority of the country's consumer protection agency. A complex variation that exhibits elements of both is the pending restructuring of the United Kingdom's competition policy system. The existing Office of Fair Trading and the Competition Commission will be reconstituted as a new Competition and Markets Authority, with many of the OFT's consumer protection functions divested to other government bodies.

	<b>Divide</b>	<b>Conquer</b>
<b>Competition Agencies</b>	<b>SEC spin-off from FTC</b>  <b>Consumer protection spin-off from OFT</b>	<b>Absorption by Ireland Competition Agency of consumer protection</b>
<b>Other Agencies</b>	<b>US Army Air Corps recreated as US Air Force</b>  <b>NTSB spun off from DOT</b>	<b>DHS absorption of border protection agencies</b>  <b>CFPB absorption of financial services bodies</b>

How should we decide between these two possibilities? Space precludes a full answer, but a campaign speech by then-Candidate (and later) President Franklin Delano Roosevelt suggests a framework for thinking about the decision, and for answering which agency (among the many that are available) should do the conquering.

There are four different kinds of bears in the United States, and, of course, all these bears come under the jurisdiction of one Government department or another. I think it is the brown bear that comes under the jurisdiction of the Department of the Interior, and I think the black bear comes under the Department of Agriculture; and the Alaska

bear comes under the Department of Commerce; and jurisdiction over the grizzly bear is held by the Department of War. That has been going on from time immemorial in Washington. Each bear - the care of the bear and everything else about the bear -falls under a different department, depending on the genus of the bear. And I am told confidentially that sometimes there is a most awful mixup, because sometimes a black bear falls in love with a brown bear, and then nobody knows under what department the puppies belong.<sup>134</sup>

Consider how each of the four listed “parent” agencies would behave in response to misconduct by their respective “bear-children” and “grand-bear-children.” Those same characteristics are likely to inform the conquering agency’s behavior if they are given responsibility for the competition agency.

## VI. Conclusion

Why should anyone care about the organization of the agency charged with implementing competition law? Professor Amy Zegart concisely answered the first question:

Organization is never neutral. As any Washington taxi driver can point out, government organization has serious implications for policy outcomes. . . . When it comes to selecting, shaping, and implementing. . . policy, the devil often lies in the details of agency design.<sup>135</sup>

On the issue of whether the agency should be divided or conquered, not every problem in competition law and policy requires a “shoot first, shoot later, and then when everybody's dead try to ask a question or two” mindset.<sup>136</sup> If your competition agency behaves like that, it may be time for a change.

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<sup>134</sup> Franklin Delano Roosevelt, *Extemporaneous Campaign Address*, Binghamton, N.Y., Oct. 17, 1928, available at 1 Public Papers and Addresses of Franklin D. Roosevelt 16 (1938).

<sup>135</sup> AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC I-II* (1999).

<sup>136</sup> Cf. Wild, *Wild West* (1999) (“Mr. West, not every situation requires your patented approach of shoot first, shoot later, shoot some more and then when everybody's dead try to ask a question or two.”) available at <http://www.imdb.com/title/tt0120891/quotes>