THE LONG SHADOW OF *STANDARD OIL*: POLICY, PETROLEUM, AND POLITICS AT THE FEDERAL TRADE COMMISSION

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I. INTRODUCTION

In response to a request from President Barack Obama, on April 21, 2011, Attorney General Eric Holder announced the formation of the Oil and Gas Price Fraud Working Group to "monitor oil and gas markets for potential violations of criminal or civil laws to safeguard against unlawful consumer harm."[1] The working group, with representatives from various

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1. United States Department of Justice, Attorney General Holder Announces Formation of Oil and Gas Price Fraud Working Group to Focus on Energy Markets (Apr. 21, 2001), *available at* http://www.justice.gov/opa/pr/2011/April/11-ag-500.html. Other agency members of the working group are the Departments of the Treasury, Agriculture, and Energy, the Board of Governors of the Federal Reserve System, and the Securities and Exchange Commission. *Id*. The Financial Fraud Enforcement Task Force was established on November 17, 2009, by President Obama; the Task Force's purpose is to investigate and prosecute financial crimes and other laws prohibiting financial fraud. Office of the Press Secretary, White House, Executive Order 13519—Establishment of the Financial Fraud Enforcement Task Force (Nov. 17, 2009), *available at* http://www.whitehouse.gov/the-press-office/executive-order-financial-fraud-enforcement-task-force.

agencies, including the Commodity Futures Trading Commission ("CFTC") the Department of Justice ("DOJ"), the Federal Trade Commission ("FTC" or "Commission"), and the National Association of Attorneys General, is to:

> Explore whether there is any evidence of manipulation of oil and gas prices, collusion, fraud, or misrepresentations at the retail or wholesale levels that would violate state or federal laws and that has harmed consumers or the federal government . . . . Evaluate developments in commodities markets including an examination of investor practices, supply and demand factors, and the role of speculators and index traders in oil futures markets.[2]

In an admission inconsistent with the tenor of the task force announcement, Attorney General Holder noted that "work and research to date" suggested that it is "clear that there are lawful reasons for increases in gas prices, given supply and demand."[3] Even so, the task force would "be

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2. *See* Memorandum from the Attorney General to the Financial Fraud Enforcement Task Force 2 (Apr. 21, 2011) [hereinafter AG Memorandum], *available at* http://www.justice.gov/ag/AG_Memo_to_FFETF-Gas_Prices.pdf.

3. *Id*. Historically, the price of gasoline has closely tracked the price of crude oil. The FTC found that changes in the price of crude oil explained approximately 85 percent of the variation in the price of gasoline (for the period from January 1984 to October 2003). *See Market Forces, Anticompetitive Activity, and Gasoline Prices: FTC Initiatives to Protect Competitive Market: Hearing on the Status of the U.S. Refining Industry Before the H. Subcomm. on Energy and Air Quality, Comm. on Energy and Commerce*, 108th Cong. 2 n.2 (2004) (prepared statement of the FTC), *available at* http://www.ftc.gov/os/2004/07/040715gaspricetestimony.pdf. The Commission noted that this percentage may vary across states or regions, and has, separately, identified instances when increases in crude oil prices played a relatively minor role in the change in retail gasoline prices. *See Market Forces, Competitive Dynamics, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets Before the H. Subcomm. on Oversight and Investigations, Comm. on Energy and Commerce*, 110th Cong. 2 (2007) (prepared statement of the FTC) (finding that price increases in the three months between February and May 2007 appeared to be attributable to refinery outages, increased demand for gasoline, and decreased gasoline imports), *available at* http://www.ftc.gov/os/testimony/070522FTC_%20Initiatives_to_Protect_Competitive_Petroleum_Markets.pdf. Nevertheless, the Commission recently reviewed and reiterated the significant relationship between gasoline prices and crude oil prices, concluding that

> [c]hanges in crude oil prices have continued to be the main factor affecting gasoline price changes . . . Throughout most of the last decade, gasoline and crude oil prices have largely moved together. The biggest gasoline price change during the period—the sharp price decline in the last half of 2008—was almost entirely attributable to the collapse of crude oil prices during the recent global recession. Similarly, the increase in gasoline prices in late 2010 and early 2011 was largely attributable to increases in crude oil prices.

FEDERAL TRADE COMM'N, BUREAU OF ECONOMICS, GASOLINE PRICE CHANGES AND THE PETROLEUM INDUSTRY: AN UPDATE (2011), *available at* http://www.ftc.gov/os/2011/09/110901gasolineprice report.pdf.

The FTC has argued that the "Organization of Petroleum Exporting Countries ("OPEC") . . . plays a significant role in the pricing of crude oil and, accordingly, in the pricing of gasoline." *FTC Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases: Hearing Before the S. Comm. on Commerce, Sci. and Transp.*, 109th Cong. 2 (2006) (prepared statement of the FTC), *available at* http://www.ftc.gov/os/testimony/0510243 vigilant in monitoring for any wrongdoing . . . so that Americans . . . are not paying a penny more than they should at the gas pump."[4]

For the last three decades, the FTC—an independent agency—has had the primary responsibility for investigating allegations of anticompetitive conduct in the petroleum industry. President Obama announced the task force shortly after announcing he was seeking reelection. Fearing an attempt to diminish the FTC's stature, FTC Commissioner Thomas Rosch called the timing of the announcement "blatantly political."[5] Nevertheless, perhaps in response to similar political concerns, on June 20, 2011, the FTC announced its own, separate, major investigation ("2011 Investigation") of the petroleum industry,

> to determine whether certain oil producers, refiners, transporters, marketers, physical or financial traders, or others (1) have engaged or are engaging in practices that have lessened or may lessen competition—or have engaged or are engaging in manipulation—in the production, refining, transportation, distribution, or wholesale supply of crude oil or petroleum products; or (2) have provided false or misleading information related to the wholesale price of crude oil or petroleum products to a federal department or agency . . . . The information to be secured through this investigation may include, but is not limited to, utilization and maintenance decisions, inventory holding decisions, product supply

CommissionTestimonConcerningGasolinePrices05232006Senate.pdf. OPEC is an international organization of countries, including, at present, Algeria, Angola, Ecuador, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, United Arab Emirates, and Venezuela. *See Member Countries*, OPEC, http://www.opec.org/opec_web/enabout_us/ 25.htm (last visited May 14, 2012). Its mission is to "coordinate and unify the petroleum policies of its Member Countries and ensure the stabilization of oil markets in order to secure an efficient, economic and regular supply of petroleum to consumers, a steady income to producers and a fair return on capital for those investing in the petroleum industry." *See Our Mission*, OPEC, http://www.opec.org/opec_web/en/about_us/23.htm (last visited May 14, 2012). OPEC's success in stabilizing oil prices is discussed by the FTC in two reports: FEDERAL TRADE COMM'N, GASOLINE PRICE CHANGES: THE DYNAMIC OF SUPPLY, DEMAND, AND COMPETITION 14–16, 22–25 (2005) [hereinafter FTC, GASOLINE PRICE CHANGES], *available at* http://www.frc.gov/reports/gasprices05/050705gaspricesrpt.pdf; FEDERAL TRADE COMM'N, BUREAU OF ECONOMICS, GASOLINE PRICE CHANGES AND THE PETROLEUM INDUSTRY: AN UPDATE 10–14 (2011), *available at* http://www.ftc.gov/os/2011/09/110901gasolineprice report.pdf. OPEC's actions, if performed by a collection of private firms, could be challenged as a criminal violation of the Sherman Act's prohibition on restraints of trade. Nevertheless, an antitrust challenge to the conduct of sovereign nations would be difficult because they have jurisdictional and substantive defenses that are not available to private firms. The FTC discusses these defenses, and the legal impediments to an action against OPEC, in *Solutions to Competitive Problems in the Oil Industry: Hearing Before the H. Comm. on the Judiciary*, 106th Cong. 2 (2000) (prepared statement of the FTC), *available at* http://www.ftc.gov/os/2000/03opectes timony.htm.

4. AG Memorandum, *supra* note 2, at 2.

5. J. Thomas Rosch, Letter to the Editor, *Obama's Political 'Price-Gouging,'* WALL ST. J., May 3, 2011, *available at* http://www.ftc.gov/speeches/rosch/110502roschlettertoeditor.pdf.

> decisions, product import and export strategies and volumes, product output decisions, capital planning decisions, [and] product margins and profitability . . . .[6]

Through this investigation, "[t]he Commission seeks to determine . . . whether there is a reason to believe" that any person is engaging in practices that "are in violation of Section 5 of the Federal Trade Commission Act . . . the Commission's Prohibition of Energy Market Manipulation Rule . . . or Section 811 or Section 812 of the Energy Independence and Security Act of 2007."[7] This is the third FTC industry-wide investigation of gasoline prices in the last six years, and the fifth since the late 1990s.[8]

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6. Federal Trade Comm'n, Information to Be Publicly Disclosed Concerning the Commission Petroleum Industry Practices and Pricing Investigation, File No. 111 0183 (July 20, 2011) [hereinafter 2011 Investigation Notice], *available at* http://www.ftc.gov/os/2011/06/110620petroleuminvestigation.pdf.

7. 2011 Investigation Notice, *supra* note 6. Section 5 of the FTC Act, as amended, prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." Federal Trade Commission Act § 5, 15 U.S.C. § 45 (2006). For a discussion of the FTC's Section 5 competition authority and case law interpreting that authority, see ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 647–56 (6th ed. 2007). The FTC is currently reconsidering the proper application of its Section 5 authority, building on discussions and papers presented at its October 2008 conference on Section 5. *See Section 5 of the FTC Act as a Competition Statute*, FEDERAL TRADE COMM'N, http://www.ftc.gov/bc/workshops/section5/index.shtml (last visited Apr. 2, 2012).

8. These investigations are discussed in the text. In the same period, there have been a number of investigations at the state level. *See, e.g.*, OFFICE OF THE ATT'Y GEN., STATE OF ALASKA, RURAL FUEL PRICING IN ALASKA: A SUPPLEMENT TO THE 2008 ATTORNEY GENERAL'S GASOLINE PRICING INVESTIGATION 6 (2010) ("[W]hile this study does not categorically conclude that there have been no illegal practices in rural wholesale and retail fuel pricing, investigators found no evidence of such illegal activity."); OFFICE OF THE ATT'Y GEN., STATE OF ALASKA, 2008 ALASKA GASOLINE PRICING INVESTIGATION 30 (2009) ("[N]o evidence of collusion or other illegal antitrust behavior among Alaska's refiners, wholesale marketers or retailers to fix output or prices."); ALASKA DEP'T OF LAW, ALASKA PETROLEUM PRODUCTS PRICING INVESTIGATION: CLOSING REPORT (Nov. 21, 2002) (three year investigation by the Alaska Department of Law "has not produced any evidence of an express or implied agreement to set prices or to otherwise violate the antitrust laws"; thus, the investigation was closed without further action); OFFICE OF THE ATTY GEN., STATE OF ARIZ., 2005 GASOLINE REPORT, HURRICANE KATRINA 2 (2006) ("[I]nvestigation did not uncover any illegal conduct."); CALIFORNIA ENERGY COMMISSION, SPRING 2006 PETROLEUM FUELS PRICE SPIKE REPORT TO THE GOVERNOR (2006); CAL. ENERGY COMM'N, 2005 GASOLINE PRICE MOVEMENTS IN CALIFORNIA (2005); OFFICE OF THE ATT'Y GEN., CAL. DEP'T OF JUSTICE, REPORT ON GASOLINE PRICING IN CALIFORNIA (Update 2004); CAL. ENERGY COMM'N, CAUSES FOR GASOLINE & DIESEL PRICE INCREASES IN CALIFORNIA (2003); OFFICE OF THE ATT'Y GEN., CAL. DEP'T OF JUSTICE, REPORT ON GASOLINE PRICING IN CALIFORNIA (2000) (task force report discussing, among other factors, market structure and infrastructure limitations as potentially contributing to high gasoline prices, but no identification of illegal conduct); STATE OF CONN., DEP'T OF CONSUMER PROT., EXECUTIVE REPORT ON GASOLINE PRICE INCREASES (2003) (rapid rise in gasoline prices related to a wide variety of factors, including depleted inventory stocks, west coast refinery outages, pipeline failure required diversion of California supply to Arizona; no finding of illegal conduct); OFFICE OF THE ATTY. GEN., STATE OF FLA., REPORT ON GASOLINE PRICING IN FLORIDA xii (2005) (Attorney General investigation of price spikes in early

The President's creation of the Oil and Gas Price Fraud Working Group and the FTC's current investigation are the latest instances of the intense political interest in the competitive dynamics of the petroleum

and mid 2004 found that the "unusual price spike . . . was generally consistent with the changes in supply and demand variables," and while "analysis does not disprove . . . anticompetitive behavior" the investigation "does not find evidence that such behavior has occurred"); DEP'T OF THE ATTY. GEN., STATE OF HAW., THE ATTORNEY GENERAL'S 1994 INTERIM REPORT ON THE INVESTIGATION OF GASOLINE PRICES 2, 10 (1994) ("Attorney General concludes that the exchange agreements [entered into by incumbents without refineries in Hawaii for gasoline refined on the mainland] are not clearly anticompetitive" and "the [Federal Trade Commission's Bureau of Competition] concluded that on balance, the procompetitive effects outweigh the anticompetitive."); DEP'T OF THE ATT'Y GEN., STATE OF HAW., AN INVESTIGATION OF GASOLINE PRICES IN HAWAII: A PRELIMINARY REPORT 22 (1990) (recommending that attorney general's investigation be continued because of concern of potentially illegal agreements); OFFICE OF THE ATT'Y GEN., STATE OF IDAHO, REPORT ON MOTOR FUEL PRICES IN IDAHO 16 (2008) ("[N]ot aware of information suggesting that state antitrust laws have been violated."); OFFICE OF THE ATTY. GEN., STATE OF IDAHO, REPORT ON POST-HURRICANE KATRINA GASOLINE PRICES IN IDAHO 2–3 (2006) (the Attorney General's investigation of gasoline prices in August and September 2005 "obtained no information suggesting that state antitrust laws had been violated, nor information warranting an investigation of any retailers under the provision of the Idaho Competition Act that prohibits conspiracies to fix prices"); OFFICE OF THE ATTY. GEN., STATE OF IDAHO, REPORT OF THE ATTORNEY GENERAL'S ADVISORY COMMITTEE ON GASOLINE PRICING 5–6, 8–9 (1999) (advisory committee finds "enough indications of possible price fixing by the [seven] Salt Lake suppliers/refiners" to recommend the Attorney General "call upon the Justice Department and/or Federal Trade Commission to conduct an investigation" of whether rack prices within "a few cents of one another" are based on independent pricing decisions or collusion"); OFFICE OF THE ATTY. GEN., NEB. DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S TASK FORCE ON MOTOR FUEL PRICING IN NEBRASKA 13 (2006) ("Although Nebraska consumers have experienced significant price changes [during the one year period of this study], these price changes appear to be a consequence of broader market forces affecting the supply chain."); STATE OF N.Y., ATTY. GEN., REPORT ON NEW YORK GASOLINE PRICES (2011) (analysis of possible price-gouging and use of zone pricing); STATE OF OR., DEP'T OF JUSTICE, OREGON DEPARTMENT OF JUSTICE'S REPORT ON FUEL PRICES: 2004–2005, at 1 (2006) ("[I]nsufficient evidence exists to conclude that high prices . . . resulted from illegal anticompetitive behavior [and] [h]igh gasoline and diesel prices . . . appear to have been the result of national and local market factors rather than local unlawful collusion."); WASH. STATE ATTY. GEN. & WASH. STATE DEP'T OF CMTY., 2007–2008 GAS PRICE STUDY FINAL REPORT 2 (2008) ("This investigation did not uncover any illegal conduct in Washington regarding the pricing of gasoline during the period examined, 2000–2008."); WASH. STATE ATTY. GEN. & WASH. STATE DEP'T OF CMTY., TRADE AND ECON. DEV., 2007 GAS PRICE STUDY PHASE 1: FACT FINDING (2007); State of W. Va., Office of the Atty. Gen., Press Release, Attorney General McGraw Continues to Monitor Gasoline Pricing (Jan. 13, 2004) (press release noting closing of a gas price investigation without any action being taken; also noting earlier investigation, begun in 1994, "did not find any concerted effort to fix or maintain prices to gain a monopoly position in West Virginia). In addition, the Attorney's General of Maine, Massachusetts, New Hampshire, New York and Vermont commissioned a major study of the structure of the gasoline and heating markets in those states. *See* ERS Group, REPORT OF PETROLEUM PRODUCTS MARKETS IN THE NORTHEAST: PREPARED FOR THE ATTORNEYS GENERAL OF MAINE, MASSACHUSETTS, NEW HAMPSHIRE, NEW YORK AND VERMONT (2007). In addition, the Attorney General of Wisconsin asked Mark Cooper, research director at the Consumer Federation of America, an advocacy group, to prepare a report on "the current state of the gasoline market." *See* MARK N. COOPER, THE ROLE OF SUPPLY, DEMAND, INDUSTRY BEHAVIOR AND FINANCIAL MARKETS IN THE GASOLINE PRICE SPIRAL (2006) (prepared for Wisconsin Attorney General Peggy A. Lautenschlager).

industry—especially, the price of gasoline. Throughout the twentieth century, the FTC and the Antitrust Division of the DOJ investigated the structure and competitiveness of the petroleum industry. For the last several decades, the FTC alone has investigated the industry, including investigations of various business practices and the effects of mergers and acquisitions.

Many of the Commission's most intensive investigations were initiated in response to political inquiries, most notably the enormously expensive and ultimately fruitless attempt to dismember the industry vertically in the 1970s. But since 1980, the Commission has substantially limited the influence of political considerations in its enforcement decisions, and despite the intense political interest in the price of gasoline, the FTC has made significant strides in limiting the influence of "political antitrust" on the petroleum industry. Although the agency has applied scarce resources to several substantial investigations of the industry without finding evidence of illegal conduct, and appears to apply stricter standards to its review of petroleum industry mergers (suggesting the continued influence of political considerations), on balance, we think the glass is currently more "half-full" than "half-empty" in the FTC's efforts to limit the influence of politics on its antitrust enforcement decisions. The FTC has recognized, and argued, that market forces, and not anticompetitive conduct, largely drive the price of gasoline, and that these market forces are superior to a more invasive, regulatory approach to organizing the market for petroleum products. A high point of the FTC's advocacy in support of market forces as the better way to maximize consumer welfare was the Commission's recent, successful effort to resist, as ill-founded, congressional efforts to identify "price-gouging" as an anticompetitive practice.[9] As we discuss, the Commission's later acquiescence in the development of a rule to prohibit "manipulation" was a partial retreat from this position, but the Commission did moderate the desires of the primary congressional sponsor of the manipulation legislation for a more heavy-handed, invasive review of unilateral, ordinary course business decisions by petroleum firms. The Commission's stand against the politicization of its law enforcement efforts to support politically popular legislative fixes that could have had significantly negative allocation, consumer welfare, and efficiency effects is significant, and reflected in the Commission's recent resistance to efforts by some in Congress to set the enforcement agenda in the petroleum industry.

9. *See infra* notes 156–61.

We seek both to acknowledge and to begin to explain the FTC's recent success in this industry, as this success provides a useful model for other agencies, including the DOJ's working group, which often must consider how to address political interest in their law enforcement decisions. We focus on three areas of intense political interest in which the FTC has avoided implementing what we think are extreme and unnecessary suggestions from congressional and local enforcement officials: (1) merger enforcement; (2) scrutiny of certain business practices; and (3) retail prices. Our analysis is drawn primarily from incidents over the last fifteen years. We believe the FTC has largely succeeded in recent years in limiting the influence of political antitrust for five reasons: (1) continuity across administrations in the standards used to challenge mergers and identify problematic conduct; (2) a commitment to transparency; (3) engaging its critics and a willingness to subject itself to self-criticism through the use of retrospective reviews of its enforcement decisions; (4) a robust research agenda conducted by the FTC's Bureau of Economics; and (5) an affirmative, pro-competition program, as exemplified by the FTC Office of Policy Planning's comments on state proposals that would limit or restrict competition or competitive behavior in the petroleum industry.

We illustrate each principle with particular examples. To put the FTC's actions in a historical context, Part II briefly summarizes the early history of the FTC's involvement in petroleum markets, and Part III discusses the agency's efforts—in response to congressional pressure—to restructure the petroleum industry in the 1970s. Abandoned after eight years without going to trial, this effort, recognized internally as the agency's "Vietnam," represents the high point of political antitrust. After the dismissal of the agency's Exxon complaint, the FTC took significant steps to modify and control its law enforcement efforts in the petroleum industry, beginning with its reaction to the merger wave of the 1980s and 1990s (Part IV). Part V then discusses the FTC's efforts from 2001 to 2004 to retain control of its agenda in the face of heightened congressional concerns over gas prices. Part VI discusses similar issues from 2005 to 2011.

II. THE FTC AND THE PETROLEUM INDUSTRY: REVIEW OF COMPETITIVE CONDITIONS AFTER STANDARD OIL

During its formative years, the FTC conducted several investigations about competitive conditions in the petroleum industry, especially the pricing of petroleum products. These initial studies foreshadow the grand sweep of the FTC's recent industry investigations and were often initiated due to an intense interest in the effect of the break-up of Standard Oil. The later studies reflect a continuing interest in the industry's practices.

A. THE INITIAL INVESTIGATION: REPORT OF THE PRICE OF GASOLINE IN 1915

As directed by the Senate, the Commission began its first investigation into the price of gasoline in 1916. During the later part of 1915, "numerous complaints from all parts of the country [that] came to the Commission charg[ed] that the price of gasoline was unreasonably high, and that gross discriminations in price were being practiced by refiners and others."[10]

10. FEDERAL TRADE COMM'N, REPORT ON THE PRICE OF GASOLINE IN 1915, AT 1 (1917) [hereinafter REPORT ON THE PRICE OF GASOLINE IN 1915]. *See also* FEDERAL TRADE COMM'N, A PRELIMINARY REPORT RELATIVE TO AN INVESTIGATION OF GASOLINE PRICES BY THE COMMISSION (1916), as provided to the Senate, 64th Congress, 1st Sess., Sen. Doc. No. 403 (1916).

This was not the Commission's first investigation of the petroleum industry. In 1916, the Commission issued a report on the pipeline transportation of petroleum from the mid-continent and gulf coast oil fields. FEDERAL TRADE COMM'N, PIPE-LINE TRANSPORTATION OF PETROLEUM (1916). The Commission's report "deal[t] primarily" with the pipelines "financial and operating accounts." FEDERAL TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1916 at 22 (1916). The Commission's principal conclusions were that (1) "the cost of pipe-line construction is so great that small concerns can not build lines from the Mid Continent field to the large consuming and distribution markets;" (2) "there is a large difference between the cost of pipe-line transportation and pipe-line tariffs" but rail-road rates were "still higher" and (3) "lower pipe-line rates and also smaller minimum shipments are necessary in many cases [ ] to enable small concerns to compete with large refineries affiliated with pipe-line companies." *Id*. at 22–23. According to the Commission "reasonable and equitable conditions of shipment … would tend to greater equality in the prices of Mid-Continent and Appalachian crude oil and in the prices of refined products in different markets." *Id*. at 23. "The Commission's report was only a partial response to the Senate's inquiry, and it was intended that additional reports follow." *Id*. at 22. But, by 1918, the investigation was suspended "on account of work made necessary by the war." FEDERAL TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1918, at 12 (1918). The Navy Department had asked the Commission for information on "the cost of producing fuel oil and gasoline" because the Department could not "secure satisfactory bids for supply fuel oil for the fiscal year 1917–18." *Id*. at 13. The Commission periodically furnished cost estimates to the Navy Department and the War Industries Board. *Id*.

The Commission's predecessor, the Bureau of Corporations, had begun the investigation underlying this report in 1913, pursuant to a Senate resolution for "a thorough investigation into the price of oil in Oklahoma transported by interstate pipe lines, and a comparison of such prices with the general market level in the United States, quality and transportation considered." FEDERAL TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1916, at 22 (1916). The Bureau of Corporations had also recently produced a report on conditions in the Healdton, Oklahoma oil fields, pursuant to a Senate resolution directing an "inquiry into the cause of a reduction . . . in the [purchased] price of crude oil" from the Healdton fields, by the Magnolia Petroleum Company and its related company, the Magnolia Pipe Line Co. DEP'T OF COMMERCE, BUREAU OF CORPS., CONDITIONS IN THE HEALDTON OIL FIELD 1 (1915) . Earlier reports of the Bureau of Corporations that were instrumental in the Department of Justice's prosecution of Standard Oil and the regulation of the petroleum industry, are discussed in Arthur M. Johnson, *Theodore Roosevelt and*

According to the Commission, there were "marked changes in the price of gasoline, a fall in prices in the early part of the year being followed by an extraordinary advance," with an increase in wholesale prices of approximately 7 to 9 cents per gallon (approximately 75 percent to 85 percent), and a "decline in the quality of gasoline."[11]

The Commission's investigation found various reasons for the increase in price and for the variance in price by geographic region. There was "an unusual increase in the holdings of crude oil by various large producers and pipe-line companies" that "contributed appreciably to the increase in the price of crude and to the advance in gasoline crudes."[12] Refiners "found it necessary to pay premiums."[13] The Commission also found "an important increase [in the demand for gasoline] in 1915," with refiners reporting a 38 percent increase in sales of "gasoline and naphtha to jobbers and consumers," and evidence from reports of over 1,000 garages "scattered over every State in the Union" showing an increase of 16 percent in total sales of gasoline" as compared to 1914.[14] There was also a substantial increase—over 50 percent—in exports of gasoline products, as compared to the previous year.[15] This increase "was one factor in causing the advance in the price of gasoline."[16] The "division of the country in Standard [Oil] marketing territories" was partially responsible for the inequalities in, and different rates of increase of price, by different geographic region.[17] The Standard Oil companies' geographic boundaries (by state) were "arbitrarily bounded" and inconsistent with those that would be "fixed by industrial concerns and economies in marketing," as evidenced by the fact that none of the "independent" companies observed such limited boundaries.[18] The costs of refining product were not sufficient to explain the increase in the price of gasoline.

The Commission proposed various remedies, including: (1) efforts to limit Standard Oil's "control of the market"; (2) vertical separation of

the Bureau of Corporations, 45 MISS. VALLEY HIST. REV. 571 (1959). The most important were the Bureau's REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE TRANSPORTATION OF PETROLEUM (1906) and REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE PETROLEUM INDUSTRY (1907). For the relationship between the Bureau of Corporations and the FTC, see Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

11. *Id*. *See also* REPORT ON THE PRICE OF GASOLINE IN 1915, *supra* note 10, at 1.
12. *Id*. at 2.
13. *Id*.
14. *Id.* at 3–4.
15. *Id*. at 4.
16. *Id*.
17. *Id*. at 6.
18. *Id*. at 6–7.

pipeline ownership from "the other branches" of the petroleum industry (e.g., production and refining); (3) fixing, to some extent, the quality of product that could be labeled gasoline; and (4) continuing the statistical analysis of the industry.[19]

B. Subsequent Industry Investigations into the Production, Transportation, Distribution and Marketing of Petroleum and Petroleum Products

The FTC conducted a number of investigations of the petroleum industry in the decade after its formation. Many of these continued to focus on the effectiveness of the relief ordered in Standard Oil, sometimes explicitly, sometimes implicitly, through their description of the competitiveness of the industry. Still later investigations showed the Commission's continued interest in the industry.

In 1919, the Senate again asked the Commission to study price increases for gasoline and other petroleum products, this time on the Pacific coast. The Senate asked for a comprehensive investigation of crude oil production, refining, distribution, and marketing of petroleum products, and the profits of the companies operating on the Pacific coast. The Senate also asked whether the firms were engaged in any methods of unfair competition or restraints of trade.[20] The Commission concluded, among other findings, that "all branches of the petroleum industry of the Pacific Coast . . . were dominated by a few large interests,"[21] and that the small refining and marketing companies in Los Angeles had formed the Independent Petroleum Marketers Association to limit competition between them and to effectuate their agreement to maintain the prices announced by Standard Oil.[22]

In 1920, the Commission, pursuant to a House of Representatives

19. *Id*. at 16–18.

20. FEDERAL TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1920, at 30–31 (1920) [hereinafter 1920 FTC ANNUAL REPORT]; FEDERAL TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1917, at 16–17 (1917).

21. FEDERAL TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1921, at 46–47 (1921) [hereinafter 1921 FTC ANNUAL REPORT]. *See also* FEDERAL TRADE COMM'N, PACIFIC COAST PETROLEUM INDUSTRY, PART I, PRODUCTION, OWNERSHIP AND PROFITS (1921).

22. FEDERAL TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1922, at 47–48 (1922) [hereinafter 1922 FTC ANNUAL REPORT]. S*ee also* FEDERAL TRADE COMM'N, PACIFIC COAST PETROLEUM INDUSTRY, PART II, PRICES AND COMPETITIVE CONDITIONS (1921).

request, investigated and reported on the causes of petroleum product price increases between late 1919 and the first half of 1920. The Commission also considered the competitive conditions in the production, refining, and marketing of crude petroleum and refined products. The Commission concluded that supply and demand conditions, rather than illegal acts, were responsible for the price increases.[23] At approximately the same time, the Commission conducted an investigation into the Wyoming petroleum industry, and submitted a report to Congress with its findings in January 1921. Standard Oil was found to control substantially all of the production, refining, and pipeline capacity in Wyoming.[24] The Commission supplemented its 1921 report in 1923, concluding again that the local petroleum industry remained dominated by Standard Oil interests. The Commission suggested "specific additional legislation . . . which would effect the abolition of the extensive community of interest among the Standard Oil companies, which resulted from the defective requirements" of the 1911 decree.[25]

Pursuant to a Senate Resolution, in 1923 the Commission reported on foreign ownership in the petroleum industry.[26] The Report largely focused on the "organization, development, and present status of the Royal Dutch-Shell group" (including its "absorption of the Union Oil Co."),[27] and also discussed the practice of foreign governments discriminating against U.S. persons in the acquisition and development of petroleum fields in those foreign states.[28] (Congress had previously noted this discrimination; in 1920, Congress passed a mineral leasing law that forbid the acquisition of properties by nationals of foreign countries that denied reciprocity rights to Americans.)

In 1924, the Commission yet again investigated conditions in the petroleum industry, this time at the request of President Calvin Coolidge. The Governor of South Dakota had complained to the President, alleging:

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23. 1920 FTC ANNUAL REPORT, *supra* note 20, at 30–31. *See also* FEDERAL TRADE COMM'N, ADVANCE IN THE PRICE OF PETROLEUM PRODUCTS (1920), as provided to the House of Representatives, 66th Congress, 2d session, Doc. No. 801.

24. 1921 FTC ANNUAL REPORT, *supra* note 21, at 47–48. *See also* FEDERAL TRADE COMM'N, PETROLEUM INDUSTRY OF WYOMING (1921).

25. 1922 FTC ANNUAL REPORT, *supra* note 22, at 73–74. *See also* Letter from Nelson B. Gaskill, FTC Chairman, to the President of the Sen. and the Speaker of the House of Reps., on Petroleum Trade in Wyoming and Montana, 67th Cong. 2d session, Sen. Doc. No. 233.

26. FEDERAL TRADE COMM'N, PACIFIC COAST PETROLEUM INDUSTRY, PART II, PRICES AND COMPETITIVE CONDITIONS (1921).

27. *Id*. at ix.

28. *Id*. at 39–64.

(1) an accumulation of large stocks of crude petroleum at very low prices by the Standard Oil interests during the last half of 1923; (2) a corner of the crude-petroleum market by the same Standard Oil interests; (3) a large increase in refinery prices of gasoline in early 1924, as an effect of the corner; and (4) excessive profit-taking in the sale of gasoline.[29] The Commission concluded that "some particular large Standard Oil company in each great oil field" had "almost autocratic influence in dictating prices" for the purchase of crude oil and its power was, in part, "further fortified by advantageous relations [with other Standard Oil companies] in the transportation and market outlets for oil."[30] It also found that Standard Oil's "power to fix simultaneously in large measure both the prices of crude oil purchased and the prices of gasoline sold gives to any company an immense and . . . unfair advantage over its small and unintegrated competitors."[31] The Commission continued to press its previously issued recommendations: (1) separation of pipeline companies from common ownership with a company that ships product over the pipeline; (2) lower pipeline transportation rates and reduction of minimum shipment requirements; (3) legislative efforts to prohibit common stock ownership of companies dissolved by decree; (4) collection of relevant facts about the industry and commercial conditions; and (5) development of a consumer's cooperative gasoline supply organization to encourage competition from independent refiners who are unable to develop an extensive distribution organization.[32]

In October 1926, at the request of Congressman Marvin Jones on behalf of crude oil petroleum producers in the Panhandle oil field in Texas, the Commission staff opened an investigation "to ascertain the reasons for a recent reduction in the price of petroleum . . . instituted by the major purchasing companies."[33] The Commission issued its report in 1928; its investigation did not attribute the drop in prices to illegal conduct by the purchasing companies. The report identified various factors that could account for the reduction in price: (1) differences in the quality of crude oil from the Panhandle fields as compared to other fields; (2) an excess of

29. FEDERAL TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1925, at 85 (1925). *See also* FEDERAL TRADE COMM'N, REPORT ON GASOLINE PRICES IN 1924, *as provided in* a letter to President Coolidge (June 4, 1924); 66 Cong. Rec. 4941 (1925)

30. *Id*.

31. *Id*. at 86.

32. *Id*. at 85.

33. FEDERAL TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1928 at 35 (1928).

crude supply; and (3) greater expense in the transportation, storage, and refining of the Panhandle crude.[34]

In late 1927, the Commission completed another report initiated in response to a Senate Resolution on the structure of the petroleum industry, finding that "increased competitive activity has developed in the industry."[35] The Commission found significant changes in the structure of the industry. According to the Commission's investigation, two decades earlier the Standard Oil companies had about 80 percent of refined products, but by 1927 they accounted for just 45 percent of production. In addition, ownership of Standard Oil had become widely dispersed.[36]

In 1933, the Commission, in response to a Senate Resolution, prepared a short report on the "dumping of foreign gasoline . . . in the city of Detroit."[37] The Commission focused on the major petroleum firms' use of "price zones" to allow for selective discounting to meet local, lower priced competition—here, competition from gasoline blended to include cheaper foreign sources.[38] In February 1934, the Senate asked the Commission to report on "the increase in the price of gasoline during the last six months, and what the increase in price means to the users of gasoline throughout the country."[39] The Commission, in response, reported on the pricing trends for 272 cities over the seven months prior to the Senate's request (July 1, 1933 to January 31, 1934).[40] In 1936, acting at the request of the Attorney General, the Commission investigated compliance with the decree in *United States v. Standard Oil of California*.[41] The Commission reported the

34. *Id*. at 35–36. *See also* FEDERAL TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON PANHANDLE CRUDE PETROLEUM 14 (1928).

35. FEDERAL TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1928, at 32 (1928). FEDERAL TRADE COMM'N, A REPORT ON PRICES, PROFITS AND COMPETITION IN THE PETROLEUM INDUSTRY (1927), as provided to the Senate, 70th Cong., 1st. Sess., Sen. Doc. No. 61.

36. *Id*. at 30.

37. *See* Letter from the Chairman of the Federal Trade Commission, Transmitting, in Response to Senate Resolution No. 274, A Report of the Results of Its Inquiry at Detroit, Mich., Relative to the Importation of Foreign Gasoline, *reprinted in* S. Doc. No. 206, 72d Cong. 2d Sess. (1934).

38. *Id*.

39. FEDERAL TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30,1934 at 30.

40. FEDERAL TRADE COMM'N, FOREIGN OWNERSHIP IN THE PETROLEUM INDUSTRY (1923).

41. FEDERAL TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1937, at 33 (1937) (discussing investigation of compliance with consent decree, United States v. Standard Oil, Equity No. 2542-S (N.D. Cal., Sept. 15, 1930), enjoining seven major oil companies, twelve independent oil companies, and one individual from conspiring to monopolize and restrain trade and commerce in the manufacture, transportation, or sale of gasoline).

results of its inquiry in April, 1937; this report was not made public.[42] Between 1920 and 1936, the Commission participated in the industry's promulgation of fairness codes.[43] In 1944, the Commission released an analysis of "the methods and costs of distributing commodities" in the petroleum industry, as part of a larger report.[44]

The Commission's 1944 directive to its economic staff to "conduct a long-range investigation of international cartels"[45] would trigger a significant Department of Justice investigation into the petroleum industry. In 1949, the Commission, believing "the petroleum industry . . . is very highly concentrated" with reports of "American petroleum companies operating in foreign countries hav[ing] entered into restrictive agreements among themselves and with petroleum companies of other nations" directed its staff to investigate these agreements as part of the international cartel investigation.[46] The Commission report found that "outside of the United States and the Soviet Union, the seven major companies [Anglo-Iranian, Royal Dutch/Shell, Standard of New Jersey, Socony, Gulf, Texaco, and Socal] control the bulk production and marketing of oil moving in international commerce."[47] These seven companies "operate[d] through layers of jointly owned subsidiaries and affiliated companies" and, "[t]hrough this corporate complex of companies, they control not only most of the oil but also most of the world's foreign petroleum refining, cracking, transportation, and marketing facilities."[48] Through the use of "interlocking directorates" these companies "extended their spheres of potential influence over the United States oil industry" and the "high degree of concentration facilitate[d] the development and observance of international agreements regarding price and production policies." Two techniques—(1) joint ownership and (2) long-term contracts for the sale of crude oil—

42. *Id*. The Commission was itself active in alleging illegal or unfair conduct in the petroleum industry in the first quarter century of its operations. The Commission's law enforcement efforts are summarized in FEDERAL TRADE COMM'N, A SURVEY OF CONTROVERSIAL MARKETING PRACTICES IN THE PETROLEUM PRODUCTS RETAIL INDUSTRY (1939).

43. See ROBERT L. BRADLEY JR., OIL, GAS, AND GOVERNMENT: THE U.S. EXPERIENCE 1328–59 (1996); Robert T. Joseph, *John Lord O'Brian, Hoover's Antitrust Chief, Gives the FTC an Antitrust Lesson*, 25 ANTITRUST 88 (2010).

44. FEDERAL TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON DISTRIBUTION METHODS AND COSTS, PART IV, PETROLEUM PRODUCTS, AUTOMOBILES, RUBBER TIRES AND TUBES, ELECTRICAL HOUSEHOLD APPLIANCES, AND AGRICULTURAL IMPLEMENTS 1 (1944).

45. FEDERAL TRADE COMM'N, THE INTERNATIONAL PETROLEUM CARTEL 1 (1952).

46. *Id*. at 1–2.

47. FEDERAL TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1952, at 19 (1952).

48. *Id*.

allowed the companies to obtain control over foreign reserves.[49] According to the Commission:

> In the Middle East, the interests of seven international oil companies have been woven together by joint ownerships of subsidiary companies, each holding interests in one or more of these joint enterprises. In Venezuela, three international oil companies own the bulk of that nation's oil reserves and production and are closely bound together through long-term contracts for the sale of crude oil. Closely allied to these agreements, which in effect bind the three companies together in a partnership, are other agreements designed to impose restrictive controls on the production of two of these companies. Production and marketing of petroleum have been controlled by four international oil agreements, dated from 1928 to 1934.[50]

The Commission's report did not make any recommendations. Nevertheless, the facts detailed in the report were sufficient for the Department of Justice to open a criminal investigation and to threaten criminal prosecution of the various companies.[51]

In December 1964, the Commission announced an industry-wide investigation of competitive problems in the marketing of gasoline, in response to "a large number of inquiries, complaints and petitions from various groups in the gasoline industry, from members of Congress, and

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49. *Id*.

50. *Id*. *See also United States v. Standard Oil Company, Revised Summary of Fact Memorandum of January 24, 1956*, *reprinted in* U. S. Senate, Subcommittee on Multinational Corporations of the Committee on Foreign Relations, Multinational Corporations and United States Foreign Policy, Part 8, 93d Cong., 2d Sess. 30 (1974).

51. *See* REPORT BY THE DEPARTMENT OF JUSTICE ON THE GRAND JURY INVESTIGATION OF THE INTERNATIONAL OIL CARTEL, *reprinted in* U.S. SENATE, SUBCOMMITTEE ON MULTINATIONAL CORPORATIONS OF THE COMMITTEE ON FOREIGN RELATIONS, *Multinational Corporations and United States Foreign Policy*, Part 8, 93d Cong., 2d Sess. 12 (1974). The Department of Justice's intention to proceed with a criminal prosecution met with significant intra-governmental resistance. *See* REPORT BY THE DEPARTMENTS OF STATE, DEFENSE, AND THE INTERIOR ON SECURITY AND INTERNATIONAL ISSUES ARISING FROM THE CURRENT SITUATION IN PETROLEUM, *reprinted in* U.S. Senate, Subcommittee on Multinational Corporations of the Committee on Foreign Relations, Multinational Corporations and United States Foreign Policy, Part 8, 93d Cong., 2d Sess. 3 (1974); REPORT BY THE DEPARTMENTS OF STATE AND DEFENSE ON FOREIGN PETROLEUM POLICY, *supra*, at 9. Upon the direction of President Truman, the Department suspended its criminal investigation in 1953. The Department did file a civil suit against the five American members of the cartel in 1953. In 1968, after obtaining some settlements, the government abandoned the prosecution. *See* WYATT WELLS, ANTITRUST & THE FORMATION OF THE POSTWAR WORLD 196–200 (2002). The failure of an earlier, large-scale DOJ investigation and challenge to the structure of the petroleum industry—the "Mother Hubbard" case—is discussed in William E. Kovacic, Standard Oil Co. v. United States *and Its Influence on the Conception of Competition Policy*, COMPETITION L.J. (forthcoming 2012).

from members of the consuming public."[52] When this industry-wide investigation was announced, the Commission was investigating and litigating a number of matters involving unfair distribution practices—largely, alleged violations of the Robinson-Patman Act, and related efforts by refiners to control or influence pricing at the retail level. The Commissions focus was on "gasoline price wars."[53] These price wars—described as "severe price competition . . . in many markets"[54]—were allegedly problematic because, in the long term, they might lead to the exit of independent distributors and marketers. The Commission identified a number of practices—including (1) zone pricing (the establishment of limited geographic areas in which the refiner would support lower prices to meet or under-price independent retail competitors) and (2) dual distribution and marketing (where refiners' downstream assets compete with independent distributors and marketers) as practices that gave it concern but that were not clearly, or solely, anticompetitive. Most importantly, the Commission's report evidenced a general concern about the ability of vertically integrated firms (those with operations that included refining and marketing of petroleum products, and sometimes exploration for crude oil) to eliminate competition from independent firms, in an effort to establish, or maintain, the "soft competition of a functioning oligopoly" of the remaining integrated refiners.[55] Although not clearly anticipated in

52. FEDERAL TRADE COMM'N, REPORT ON ANTICOMPETITIVE PRACTICES IN THE MARKETING OF GASOLINE (1967), *reprinted in part in* dissenting statement of Commissioner MacIntyre. This investigation and subsequent report brought to fruition the Commission's earlier expressed views that "a proper solution of the various problems [of perhaps illegal marketing practices] . . . cannot be made until a thorough and complete investigation has been made." FEDERAL TRADE COMM'N, A SURVEY OF CONTROVERSIAL MARKETING PRACTICES IN THE PETROLEUM PRODUCTS RETAIL INDUSTRY 32 (1939). In 1956, the Commission was encouraged by Senator Hubert Humphrey to conduct such a study. *See* A STUDY OF PETROLEUM MARKETING PRACTICES IN NEW JERSEY: HEARING BEFORE A SUBCOMM. OF THE SECTION COMM. ON SMALL BUS., 84th Cong., 1st & 2d Sess., Part 3, 446–47 (1956) (Senate's Select Committee on Small Businesses hearings on the "vexing problem" of "frequent . . . gasoline price wars in New Jersey" in 1955).

53. These matters are discussed in various FTC Annual Reports in the late 1950s and early to mid 1960s. *See, e.g.*, FEDERAL TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1965, at 24–25 (1965); FEDERAL TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1964, at 23 (1964) (noting fifteen investigations underway and seven docketed cases); FEDERAL TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1961, at 4 (1961). Open matters were all dismissed, and open investigations closed, as part of the Commission's release of the 1967 Report. FEDERAL TRADE COMM'N, REPORT ON ANTICOMPETITIVE PRACTICES IN THE MARKETING OF GASOLINE 66 (1967).

54. *Id.* at 13.

55. *Id*. at 37. The Commission noted its "particular concern" for the "welfare" of the "small businessman, an individual entrepreneur" and "interference with his right to compete as he chooses . . . are matters calling for public intervention." *Id*. at 40.

the report, this view underlay the Commission's effort to restructure the petroleum industry in the coming decade.

III. THE FTC'S EFFORT TO RESTRUCTURE THE PETROLEUM INDUSTRY

Congressional interest in "de-concentrating" industries reached a peak in the late 1960s and early 1970s.[56] In addition, the Report of the 1969 American Bar Association Commission to Study the Federal Trade Commission[57] spurred "leading legislators [to] insist[] that the FTC forsake caution and embrace boldness" in its enforcement efforts.[58] Partly in response to both these pressures, in 1969, and continuing through 1980, the FTC (and the DOJ) embarked on a massive effort to restructure multiple industries.[59] During that eleven-year period, the antitrust agencies sought to restructure the computer,[60] photocopier,[61] telecommunications,[62] tire,[63]

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56. See William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1136–41 (1989).

57. AM. BAR ASS'N COMM'N TO STUDY THE FTC, REPORT OF THE COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969). This report was highly critical of the agency's recent historical performance and case selection, identifying a focus on "trivial" matters and suggested that the FTC limit its enforcement of the Robinson-Patman Act—which enforcement was driving the Commission's involvement in gasoline price wars—to "instances in which injury to competition is clear." *Id*. at 1, 67–68.

58. William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869, 875 (1988); William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 631–34 (1982).

59. Former FTC Chairman William E. Kovacic argues that this effort was driven in part by criticism that the federal antitrust agencies had dealt "timidly with concentrated industries" and that the agencies adopted the recommendations of the Neal Commission that the "Congress and the enforcement agencies adopt a new norm that promoted enforcement to attack abusive conduct by dominant firms and . . . to deconcentrate major sectors of the economy." *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 450 (2003) [hereinafter Kovacic, *Modern Evolution*]. The Neal Report was commissioned by President Lyndon Johnson, who requested that distinguished lawyers and economists report on the state of competition in the United States, and recommend any needed reforms of the antitrust laws. *See* PHIL C. NEAL, TASK FORCE REPORT ON ANTI-TRUST POLICY (1968), *published in* 115 CONG. REC. 11, 13890 (1969). The Report proposed significant reform, most importantly a "Concentrated Industries Act" to give the Attorney General authority to search out and challenge oligopolies and to order divestitures, so that no firm would have a market share in excess of 12 percent. The Nixon Administration created another Commission, chaired by George Stigler, that disagreed with the recommendations of the Neal Report. The Stigler Report was published at 115 CONG. REC. 12, 15933–42, shortly after public release of the Neal Report (June 16, 1969).

60. *See* United States v. IBM Corp., [1961–1970 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,069 (S.D.N.Y. Jan. 17, 1969) (complaint alleging monopolization and attempted monopolization).

61. *See In re* Xerox Corp., 86 F.T.C. 364, 367–68 (1975) (complaint alleging monopolization, attempted monopolization, and the maintenance of a highly concentrated market structure).

62. *See* United States v. AT&T Co., [1970–1979 Transfer Binder] Trade Reg. Rep. (CCH)

breakfast cereal,[64] and petroleum industries.[65] While some of these efforts resulted in "victories," few commentators believe that these efforts were productive.[66] Alleged competitive problems in the petroleum industry remained a focus of the Congress. In July 1970, the Senate Judiciary Committee's subcommittee on Antitrust and Monopoly held hearings on marketing practices in the gasoline industry.[67] Subcommittee Chairman Philip Hart characterized the testimony before the subcommittee as reflecting disappointment with the FTC's "lack of action" and an industry "rampant" with "various trade-restraining practices."[68] Senator Hart asked the FTC to determine whether the testimony presented before the subcommittee "indicates violations of law" and asked whether the Commission had taken any action "on gasoline pricing practices since issuing its report in 1967."[69] FTC Chairman Miles Kirkpatrick, in response, noted that the Commission had "already instituted a preliminary investigation into complaints of coercive" behavior by the majors towards their dealers and independents.[70] Chairman Kirkpatrick noted that the Commission, based on testimony at the hearings and other information collected, had authorized its staff to undertake an investigation of the competitive effects of zone-pricing.[71] In July 1971, the Subcommittee held a second set of hearings. Senator Hart noted that, in response to the testimony of the earlier hearings, "the Federal Trade Commission, at our request, began an investigation of alleged anticompetitive practices in the

¶ 45,074 (D.D.C. Nov. 20, 1974) (complaint alleging monopolization, attempted monopolization, and conspiracy to monopolize).

63. *See* United States v. Goodyear Tire and Rubber Co., & United States v. Firestone Tire & Rubber Co., [1970–1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,073 (N.D. Ohio Aug. 9, 1973) (complaint alleging attempted monopolization).

64. *See In re* Kellogg Co., 99 F.T.C. 8, 11–16 (1982) (complaint alleging maintenance of a highly concentrated, noncompetitive market structure, and shared monopolization).

65. *See In re* Exxon Corp., 98 F.T.C. 453, 456–59 (1981) (complaint alleging agreement to monopolize and maintenance of a noncompetitive market structure).

66. *See*, e.g. Timothy J. Muris, Chairman, Federal Trade Comm'n, Prepared Remarks Before American Bar Association Antitrust Section Fall Forum, How History Informs Practice—Understanding the Development of Modern U.S. Competition Policy (Nov. 19, 2003), *available at* http://www.ftc.gov/speeches/muris/murisfallaba.pdf; Kovacic, *Modern Evolution*, *supra* note 59, at 451–52 (noting that "[t]he dominant legacy of the federal campaign . . . is failure" and the creation of "doubts about the institutional capacity of the agencies to handle these types of cases successfully").

67. *Marketing Practices in the Gasoline Industry, Hearings before the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary*, 91st Cong. 2d Sess. (1970).

68. Letter from Philip A. Hart, Chairman, Antitrust and Monopoly Subcomm. to Hon. A. Everette MacIntyre, Acting Chairman, Federal Trade Comm'n, Aug. 14, 1970.

69. *Id*.

70. Letter from Miles W. Kirkpatrick, Chairman, Federal Trade Comm'n, to Hon. Philip A. Hart (Dec. 23, 1970).

71. *Id*.

industry.[72] The purpose of this second round of hearings was to determine "whether the structure of the industry may be causing or contributing to its ills."[73] The Committee had heard in the earlier hearings that one solution to the problems would be to "divorce oil companies from the ownership of retail outlets"; this hearing was intended to collect testimony on the benefits of "divorcing . . . the retailer and the oil companies."[74]

In December 1971, the Commission authorized a formal investigation focusing on these concerns. The Commission investigation would review:

> the acts and practices of firms engaged in the production or refining of crude oil or the distribution of petroleum products to determine the effects of vertical integration and joint ownership and operating agreements on the structure, conduct and performance of the petroleum industry, and whether such firms are engaged in unfair methods of competition or unfair acts or practices which are in violation of Section 5 of the Federal Trade Commission Act.[75]

After what appeared to be little action in the investigation, on May 31, 1973, Senator Henry M. Jackson requested that the Commission "prepare a report within thirty days regarding the relationship between the structure of the petroleum industry and related industries and the current and prospective shortages of petroleum products."[76] On July 6, 1973, the Commission delivered to Senator Jackson a "Preliminary Federal Trade Commission Staff Report on Its Investigation of the Petroleum Industry."[77] The Commission requested that the report not be made public, as it was "an internal staff memorandum" and release would be "inconsistent with [the Commission's] duty to proceed judiciously in determining what, if any, action should be taken on the basis of the staff investigation."[78] Nevertheless, on July 13, the Senate Committee on Interior and Insular Affairs published the 1973 Staff Report.[79]

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72. *Marketing Practices in the Gasoline Industry, Hearings before the S. Subcomm. on Antitrust and Monopoly of the Committee on the Judiciary*, 92d Cong. 1st Sess. 518 (1971).

73. *Id*.

74. *Id*.

75. Federal Trade Comm'n, Resolution Directing Use of Compulsory Process in NonPublic Investigation, FTC File No. 721 0047 (Dec. 21, 1971).

76. *Investigation of the Petroleum Industry, Permanent Subcomm. on Investigations of the Senate Comm on Gov't Operations*, 93d Cong., 1st Sess. 7 (1973) [hereinafter *Investigation of the Petroleum Industry*].

77. *Id*. at 9.

78. *Id*. at 11.

79. *See Investigation of the Petroleum Industry*, *supra* note 76. The Treasury Department offered a detailed critique of the FTC's preliminary staff report six weeks after its release. DEP'T OF THE TREASURY, STAFF ANALYSIS OF OFFICE OF THE ENERGY ADVISOR DEPARTMENT OF THE TREASURY ON

Five days later, the Commission issued a complaint alleging that the eight major oil companies—Exxon Corporation, Texaco Inc., Gulf Oil Corporation, Mobil Oil Corporation, Standard Oil Company of California, Standard Oil Company (Indiana), Shell Oil Corporation, and Atlantic Richfield Company—had "maintained and reinforced a non-competitive market structure" in the market for "the refining of crude oil into petroleum products."[80] The Commission's complaint alleged that the oil companies pursued common actions to:

> (i) abuse and exploit the ownership and control of the means of gathering and transporting crude oil to refineries;
>
> (ii) restrict or engage in exclusionary transfers of ownership of crude oil among themselves and with other petroleum companies;
>
> (iii) adhere to a system of posted prices leading to the maintenance of an artificial level for the price of crude oil;
>
> (iv) enter into numerous processing arrangements with independent refiners to expand control over refining capacity, and to limit the availability of refined petroleum products to independent marketers, and potential entrants into marketing;
>
> (v) accommodate each other in the production, supply, and transport of crude oil to the exclusion or detriment of independent refiners and potential entrants into refining;
>
> (vi) use their vertical integration to keep profits for the production of crude oil artificially high and profits at the refining level artificially low, to raise entry barriers to refining;
>
> (vii) abuse and exploit the ownership and control of the means of transporting refined petroleum products from refineries;
>
> (viii) accommodate each other in the transportation and marketing of refined petroleum products to the exclusion of independent marketers and potential entrants into marketing;
>
> (ix) refuse to sell gasoline and other refined petroleum products to independent marketers;
>
> (x) participate in restrictive and exclusionary exchanges of gasoline and other refined petroleum products among themselves and with other petroleum companies; and,

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THE FEDERAL TRADE COMMISSION'S JULY 2, 1973 PRELIMINARY FEDERAL TRADE COMMISSION STAFF REPORT ON ITS INVESTIGATION OF THE PETROLEUM INDUSTRY (1973), *as reprinted in* U.S. SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, PRELIMINARY FEDERAL TRADE COMMISSION STAFF REPORT ON ITS INVESTIGATION OF THE PETROLEUM INDUSTRY, S. DOC. NO. 93-15 (1st Sess. 1973).

80. *In re* Exxon Corp., 98 F.T.C. 453, 456 (1981).

> (xi) engage in common marketing practices to avoid price competition in the marketing of refined petroleum products.[81]

According to the Commission's complaint, these acts and practices had multiple anticompetitive effects, including: (1) establishing and maintaining artificially high prices at each level of the petroleum industry; (2) raising, strengthening, and increasing barriers to entry into the refining of petroleum products; (3) distorting the normal supply response to demand conditions; (4) forcing independent marketers to close retail outlets and curtail retail operations because of an inability to obtain refined product; and (5) forcing American consumers to pay substantially higher prices for petroleum and petroleum products than they would have to pay in a competitively structured market, all of which allowed the respondent oil companies to "obtain[] profits and returns on investments substantially in excess of those that they would have obtained in a competitively structured market."[82] To relieve the anticompetitive conditions it alleged, the Commission primarily sought the vertical disintegration of the industry.

Proponents subsequently explained the Commission's reason for bringing the Exxon case:

> The history of the Federal Trade Commission's activity in the petroleum industry has been characterized by a case-by-case attack on specific anticompetitive marketing practices. This approach has, in general, been of limited success in controlling wasteful marketing practices, dealer coercion, and the lack of competition in the petroleum industry. . . . But the practice-by-practice approach to antitrust attack, which sought to correct specific anticompetitive conduct at the marketing level, did not adequately address the industry's vertically integrated structure or its multi-level behavior. The major oil companies operate on four levels—crude production, refining, transportation, and marketing. To fashion a remedy for one level without considering the performance of a company, or the industry, at the other levels, ignores the market power associated with vertical integration and limited competition.[83]

The move from the case-by-case approach to the industry-wide attack proved disastrous for the FTC, as the litigation became unmanageable.[84] At

81. *Id*. at 457–58.

82. *Id*. at 458.

83. Wesley J. Liebeler, *Bureau of Competition: Antitrust Enforcement Activities*, *in* THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR 86 n.47 (Kenneth W. Clarkson & Timothy J. Muris eds., 1981) (quoting Walter Adams, *Vertical Divesture of the Petroleum Majors: An Affirmative Case*, 30 VAND. L. REV. 1115 (1977)).

84. FTC staff attorneys and economists investigate allegations of anticompetitive conduct. The staff and bureau management present their recommendation to the Commission, and the Commission

its peak, the investigation consumed approximately 30 percent of the Commission's resources devoted to antitrust enforcement.[85] It was not until October 31, 1980—more than seven years after the Commission issued its complaint—that FTC complaint counsel filed their "First Statement of Issues, Factual Contentions and Proof."[86] In April 1981, the Commission issued an order requesting that the parties—FTC complaint counsel and counsel for the Respondents—provide a proposed schedule setting forth dates for the conclusion of all additional discovery, the filing of all pretrial motions, the filing of all pretrial briefs, and the commencement and conclusion of trail.[87] In response, FTC complaint counsel stated its "best case" contemplated that trial would start in three years, and admitted that it was "unlikely that continuation of the *Exxon* case can accomplish a timely and meaningful resolution of the violations" described in its First Statement and recommended that the matter be dismissed.[88] On September 16, 1981—eight years and three months after the complaint was first filed and with the trial still at least three years away—the Commission dismissed its complaint, finding that additional proceedings were "not in the public interest."[89]

IV. THE FTC AND THE TWO PETROLEUM INDUSTRY MERGER WAVES, 1981–2000

A. THE REAGAN ADMINISTRATION AND THE FIRST MERGER WAVE, 1981–1988

The Commission's dismissal of the *Exxon* case during the first year of the Reagan Administration did not lead to an end of investigations and analysis of the industry. Congressional interest in petroleum firm mergers remained high during the late 1970s and the early 1980s. In January 1982, the United States Senate Committee on the Judiciary (with the support of the House Commerce and Judiciary Committees) requested that the Commission conduct a thorough investigation of the impact of mergers and

may authorize the staff to file a complaint, challenging the respondent's conduct. Litigation is before an administrative law judge, with the Commissioners removed from the prosecution of the case, but with authority to review the decisions of the administrative law judge. The staff of the FTC's Bureau of Competition acts as complaint counsel in FTC administrative litigation.

85. *See* Liebeler, *supra* note 83, at 86.

86. Final Order, *In re* Exxon Corp., 98 F.T.C. 453, 459 (1981) (No. 8934).

87. *See id*.

88. *Id*. (internal quotations omitted).

89. *Id*. There were no appointees of President Ronald Reagan on the Commission at this time.

acquisitions involving the petroleum industry, as a "great help to Congress . . . in the exercise of its oversight and legislative responsibilities."[90] The Commission's study, completed in September 1982, concluded that the recent industry consolidation did not adversely affect prices and availability of petroleum products, and that the acquisition activity had not substantially diverted resources from the exploration and production of crude oil.[91] Thus, the Commission opposed a ban on oil company mergers.[92]

Notwithstanding the deregulatory emphasis of the Reagan administration, during President Reagan's eight-year tenure, the FTC challenged seven significant petroleum firm mergers: (1) Mobil/Marathon (1981); (2) Gulf/Cities Service (1982); (3) Texaco/Getty (1984); (4) Chevron/Gulf (1984); (5) Conoco/Asmera (1986); (6) PRI/Shell (1987); and (7) Sun/Atlantic (1988).[93]

In addition to its merger enforcement efforts during the Reagan administration, the Commission also investigated the pricing of crude oil sold on the West Coast, but did not identify any anticompetitive practices as contributing to changes in the price of crude oil. Staff of the Commission's Bureau of Economics (the "Bureau") produced reports on the wealth-decreasing effects of imposing tariffs on petroleum imports[94] and on petroleum product price regulation.[95] Consistent with the Reagan Administration's efforts to deregulate the oil and gas industry and pursuant to a commitment to Congress, the Antitrust Division published a study to identify interstate oil pipelines that should remain under federal regulation.[96] The Department's Oil Pipeline Deregulation Report recommended the elimination of federal regulation of all existing crude oil

90. Letter from Senator Bob Packwood et al. to James C. Miller III, Chairman, Federal Trade Comm'n (Jan. 15, 1982), *reprinted in* FEDERAL TRADE COMM'N, MERGERS IN THE PETROLEUM INDUSTRY B-1 (1982) [hereinafter 1982 OIL MERGER REPORT], *available at* http://www.ftc.gov/o5/2004/08/040813 mergersinpetrol82.pdf.

91. *Id*. at 296.

92. *Id*. at 298.

93. *FTC Merger Enforcement Actions in the Petroleum Industry Since 1981*, FEDERAL TRADE COMM'N, http://www.ftc.gov/ftc/oilgas/charts/merger_enforce_actions.htm (last visited Apr. 4, 2012) [hereinafter *FTC Merger Enforcement Actions in the Petroleum Industry Since 1981*].

94. *See* KEITH B. ANDERSON & MICHAEL R. METZGER, A CRITICAL EVALUATION OF PETROLEUM IMPORT TARIFFS (1987).

95. *See* FEDERAL TRADE COMM'N, PETROLEUM PRODUCT PRICE REGULATIONS, OUTPUT, EFFICIENCY AND COMPETITIVE EFFECTS (1981). In the 1970s, the FTC's economists had prepared an analysis of price and allocation controls implemented to alleviate shortages of petroleum and petroleum products. *See* FEDERAL TRADE COMM'N, BUREAU OF ECONOMICS STAFF REPORT ON THE EFFECTS OF FEDERAL PRICE AND ALLOCATION REGULATIONS ON THE PETROLEUM INDUSTRY (1976).

96. U.S. DEP'T OF JUSTICE, OIL PIPELINE DEREGULATION (1986).

pipelines, and a substantial number of petroleum product pipelines.[97] It also recommended that new pipelines not be regulated.[98]

B. THE CLINTON ADMINISTRATION AND THE SECOND MERGER WAVE, 1997–2001

Large petroleum firm mergers fell dramatically between 1989 and 1996[99] and there were no FTC challenges to mergers in the industry.[100] Mergers increased in the second term of the Clinton Administration[101] and between 1997 and 2001, the FTC obtained relief in several large petroleum firm mergers. The agency also conducted two significant, regional investigations regarding the price of gasoline. We summarize these matters below, noting that the number and size of the mergers and the FTC's failure to identify and challenge pricing and supply practices led to significant criticism of the agency. By 2001, a hostile climate existed toward the agency's efforts to identify and address supposed misconduct by petroleum firms. By then, congressional interest in the effects of structural change and industry practices had returned to a level not seen since the 1970's effort to dismantle the petroleum industry.

In the first of the major mergers, in 1997 Shell and Texaco proposed combining their refining and marketing operations in the Midwest and the western United States. The new companies—two joint ventures that would operate in roughly the eastern and western halves of the United States—would control nearly 15 percent of the nation's gasoline sales.[102] Despite the large national footprint of the merging parties, the FTC ordered relief only in limited product and geographic markets: (1) the refining of gasoline and jet fuel in the Puget Sound area of Washington State and the Pacific Northwest; (2) the refining of California Air Resources Board ("CARB") gasoline in California, and the marketing of CARB gasoline in San Diego;

97. *Id*. at 61.

98. *Id*. at 143.

99. FEDERAL TRADE COMM'N, BUREAU OF ECONOMICS, THE PETROLEUM INDUSTRY: MERGERS, STRUCTURAL CHANGE, AND ANTITRUST ENFORCEMENT (2004).

100. In 1989, the FTC revised the 1982 Merger Report, and analyzed large petroleum firm mergers that occurred between 1982 and 1984. *See* JAY S. CRESWELL, JR., SCOTT M. HARVEY & LOUIS SILVIA, FEDERAL TRADE COMM'N, MERGERS IN THE U.S. PETROLEUM INDUSTRY 1971–1984: AN UPDATED COMPARATIVE ANALYSIS (1989), *available at* http://www.ftc.gov/be/ecourpt/232168.pdf. The FTC also investigated the factors affecting gasoline prices in Spring 1989, but did not identify anticompetitive conduct.

101. DANIEL YERGIN, THE QUEST: ENERGY, SECURITY, AND THE REMAKING OF THE MODERN WORLD 86–87 (2011). Industry experts, and the merging firms, attributed the merger wave to the collapse in the price of crude oil. *See*, *e.g.*, *id*. at 89–105.

102. Agis Sapulkis, *Shell, Texaco to Merge Some U.S. Refining*, N.Y. TIMES, Mar. 19, 1997.

(3) the terminaling and marketing of gasoline and diesel fuel in Hawaii; and, (4) the refining and transportation of refined light products to the inland Southeast.[103] As in the merger investigations of the 1980s, the FTC paid close attention to the effects of the transaction in the western states, given their isolation from the Gulf market (the most liquid market in the United States).[104] The FTC prevented the two companies from combining their two major refineries in the Pacific Northwest, and required the divestiture of gas stations and wholesale terminals in California prior to clearing the transaction.[105] The Commission, foreshadowing its willingness to apply seemingly higher burdens to large petroleum firm mergers, required relief in markets that were only "moderately concentrated."[106] Explaining this more stringent standard, then FTC Bureau of Competition Director William Baer noted that

> [a] relatively small number of branded marketers in a local gasoline market may have the ability to raise price oligopolistically, without fear that the price increase will be eroded by a small fringe of independent marketers or by new entry. That appeared to be the case in San Diego, California, where branded marketers were able to maintain higher prices even in a market defined as 'moderately concentrated.'"[107]

The FTC also required significant relief in clearing British Petroleum's ("BP's") proposed merger with Amoco. This 1998 merger was, for a brief period, the largest industrial merger in American history.

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103. Shell was required to divest its refinery in Anacortes, Washington; a Hawaiian terminal; and retail gasoline stations in Hawaii and California, as well as an interest in either the Plantation or Colonial Pipeline. *See In re* Shell Oil Co., 125 F.T.C. 769, 771–73 (1998), *available at* http://www.ftc.gov/os/ 1998/04/9710026.do.htm.

104. Complaint, *In re* Shell Oil Co., 125 F.T.C. 769 (1998) (No. C-3803), *available at* http://www.ftc.gov/os/1998/04/9710026.cmp.htm.

105. *See In re Shell Oil Co.*, 125 F.T.C. at 771–73.

106. The antitrust agencies measure concentration in an industry by reference to the Herfindahl-Hirschman Index ("HHI"). The HHI is calculated by summing the squares of the individual market shares of all the participants in the relevant market. The HHI can range from 0 to 10,000, with 10,000 representing a monopoly firm with 100 perecnt market share, and 0 suggesting an atomistic market with an infinite number of firms. At the time of the FTC's review of the mergers discussed here, the agency considered markets with a post-merger HHI in the range of 1000 to 1800 to be "moderately concentrated." *See* FEDERAL TRADE COMM'N, 1992 DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION HORIZONTAL MERGER GUIDELINES, *available at* http://www.ftc.gov/bc/docs/horizmer.shtm. The 1992 Guidelines have been superseded by new guidelines. *See* U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 1 n.1 (2010) [hereinafter 2010 MERGER GUIDELINES], *available at* http://ftc.gov/ os/2010/08/100819hmg.pdf. The 2010 Guidelines define moderately concentrated markets as markets with an HHI of 1500 to 2500. *Id*. at 19.

107. *Statement of the Federal Trade Commission Before the H. Comm. on Commerce, Subcomm. on Energy and Power*, 106th Cong. (1999) (statement by William J. Baer, Director, Bureau of Competition).

Although the two companies had relatively few competitive overlaps, the FTC required divestitures in substantially all geographic markets where the two companies competed in the wholesaling or terminaling of gasoline.[108] Again, the FTC sought relief in retail markets that were only "moderately concentrated."[109]

In 1999, the FTC reviewed the proposed merger of BP Amoco and ARCO. At the time, the merging parties were the number one and number two competitors for the production, delivery, and sale of Alaska North Slope ("ANS") crude.[110] The FTC concluded that BP was already exercising market power in the production and sale of ANS crude, and that the merger would only exacerbate the situation by allowing BP to eliminate its top competitor.[111] After the FTC moved to block the transaction, the merging parties agreed that they would divest all of ARCO's Alaska assets to another ANS crude supplier.[112] The relief "reduc[ed] BP's incentive to elevate the price of ANS crude . . . [and] retain[ed] an independent competitive force with the incentive to find and deliver additional ANS crude oil."[113]

In reviewing the proposed merger of Exxon and Mobil that same year, the FTC investigated "every oil market—'from the well to the pump.'"[114] The Commission cleared the transaction, subject to what was, and remains, the largest divestiture package ever obtained as a condition to merger clearance: the sale of (1) 2,431 Exxon and Mobil gas stations in the

108. *In re BP Co., Amoco Corp. & BP Amoco*, No. C-3868 (F.T.C. 1999), *available at* http://www.ftc.gov/os/1999/04/981-0345.c3868%20british%20petroleum.do.htm. BP was required to divest nine light petroleum terminals and retail outlets in eight geographic areas (totaling 134 gasoline stations), and to allow branded sellers in thirty markets (representing more than 1,600 gas stations) to switch their gasoline stations to other brands. *Id*. In fact, very few gasoline stations switched brands; this failure would drive the FTC to require divestiture, rather than mere switching opportunities, in later transactions.

109. *Id*. (statement of Commissioner Orson Swindle, concurring in part and dissenting in part). *See also* Complaint, *In re BP Co., Amoco Corp. and BP Amoco*, No. C-3868 (F.T.C. 1999), *available at* http://www.ftc.gov/os/1999/04/981-0345.%20c3868%20british%20petroleum%20cmp.htm.

110. Complaint at 2, *FTC v. BP Amoco*, File No. 991-0192 (Feb. 4, 2000) (No. C-3938), *available at* http://www.ftc.gov/os/2000/02/bpcomplaint.pdf.

111. *See id*.

112. *In re BP Amoco and Atlantic Richfield Co*., No. C-3938 (F.T.C. 2010), *available at* http://www.ftc.gov/os/2000/08/bparco.do.pdf.

113. *FTC Merger Enforcement in the Gasoline Industry, Before the Comm. on Commerce, Sci. and Transp., Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism*, 107th Cong. (2001) (prepared statement of the FTC), *available at* http://www.ftc.gov/os/2001/04/mergers010424.htm.

114. Federal Trade Comm'n, Exxon/Mobil Agree to Largest FTC Divestiture Ever in Order to Settle FTC Antitrust Charges; Settlement Requires Extensive Restructuring and Prevents Merger of Significant Competing U.S. Assets (Nov. 30, 1999), http://www.ftc.gov/opa/1999/11/exxonmobil.shtm.

Northeast and Mid-Atlantic; (2) an Exxon refinery in California; and (3) numerous associated terminals, a pipeline, and other assets.[115] The divestiture package "eliminated *all* of the overlaps in areas in which the Commission had evidence of competitive concerns."[116] Despite its size, the divestiture package represented only a small part of Exxon/Mobil's worldwide assets.[117]

C. Congressional Interest in the Clinton Administration's Review of Large Petroleum Firm Mergers

Congressional inquiry into the potential effects of these initial "second wave" mergers was, at first, limited. For example, the Senate Judiciary's subcommittee on Antitrust, Business Rights and Competition held a hearing on the BP/Amoco merger, but only two Senators, Mike DeWine (Ohio) and Herb Kohl (Wisconsin) attended. Senator DeWine (chairman of the subcommittee) wondered about the deal's "broader ramifications for competition" and raised local concerns—the merging companies had made clear that BP's Ohio headquarters would close, resulting in at least some job losses in Ohio.[118] Senator Kohl (ranking minority member) wondered whether BP was "trying to reassemble the empire of Standard Oil" but that "[didn't] seem likely."[119] Witnesses were asked to discuss whether there were likely to be other deals of the size and scope of BP/Amoco. Unsurprisingly, the company witnesses, Steven Percy (Chairman and Chief Executive Officer of BP America, Inc.) and George Spindler (Senior Vice President, Law and Corporate Affairs, Amoco Corporation), felt their deal was unusual.[120] Philip Verleger, an experienced commentator and consultant, argued that similar combinations, perhaps of second tier firms, were likely, as they could lead to significant cost savings.[121] Both Senators DeWine and Kohl seemed willing to leave the antitrust analysis to the

115. *See In re Exxon Corp. and Mobil Corp.*, No C-3907 (F.T.C. 1999), *available at* http://www.ftc.gov/os/2001/01/exxondo.pdf . *See also* Complaint, In re Exxon Corp. and Mobil Corp., No C-3907 (F.T.C. 1999), *available at* http://www.ftc.gov/os/1999/11/exxonmobilcmp.pdf.

116. *FTC Merger Enforcement in the Gasoline Industry, Before the Comm. on Commerce, Sci. and Transp. Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism*, 107th Cong. (2001) (prepared statement of Chairman Robert Pitofsky of the FTC).

117. *See id*.

118. *See The BP/Amoco Merger: A Competition Review: Hearing Before the S. Subcomm. on Antitrust, Bus. Rights, and Competition of the S. Comm. on the Judiciary*, 105th Cong. 1–2 (1998) ("Examining the state of competition within the petroleum industry, focusing on the competitive implications of the proposed merger between BP America and the Amoco Corporation.").

119. *Id*. at 3.

120. *Id*. at 35.

121. *Id*. at 34–35

FTC,[122] although they did ask the witnesses to opine on how the FTC would define relevant markets, and what steps would protect competition that the merger might otherwise harm.[123]

Although congressional interest in the Exxon/Mobil merger was stronger, it had not yet jelled into concerns about the FTC's willingness and ability to identify and challenge problematic mergers, nor its commitment to protect consumers from the potential for higher gasoline prices.[124] Members at a House of Representatives hearing on the proposed merger did not challenge the FTC's resolution of the BP/Amoco deal, except to note the fears of station owners that the FTC's required divestiture of retail assets required the dealers to switch to offering a branded product with which they had limited or no previous experience.[125] While members questioned the potential effects of the Exxon/Mobil merger on competition at all levels of the production and distribution chain, they expressed no concern that the FTC would fail to identify and address anticompetitive impacts. Nevertheless, the transaction and hearing identified one area that would bedevil the FTC for the next few years: "zone pricing."[126] Echoing concerns raised by dealer spokesmen, subcommittee members asked whether the transaction would increase the use of zone pricing and questioned whether "zone pricing" was simply price-fixing and a tool to limit competition (and thus raise price) between company-owned and leased stations.[127] Members continued to ask whether the FTC's likely relief—the divestiture of service stations—would unfairly impact the two companies' independent dealer network.[128]

122. *See id*. at 31–32 ("I assume that the FTC is likely to review the competitive situation . . . .") (statement of Senator Mike DeWine, Chairman, S. Comm. on Antitrust, Bus. Rights, and Competition).

123. *Id*. at 29–32.

124. *See The Exxon-Mobil Merger: Hearings Before the Subcomm. on Energy and Power of the H. Comm. on Commerce*, 106th Cong. 54–60 (1999) (discussing antitrust aspects of the Exxon-Mobil merger).

125. *See id*. at 58–60, 93–94.

126. *Id*. at 96–99. Zone pricing is a practice whereby refiners set uniform wholesale prices and supply branded gasoline directly to both their company-operated and leased stations (and to some independent, open-dealer stations) within a small but distinct geographic area called a price zone. Zone-pricing was not a new practice; it was discussed in earlier Commission studies.

127. *Id*. at 66, 86–87, 96–99.

128. Tom Reidy, testifying on behalf of the Service Station Dealers of America and Allied Trades, requested that its members who lease their stations from one of the merging parties be allowed to purchase the property and related assets if the FTC required divestiture of their station, rather than require divestiture of all, or a significant subset of stations, to a single buyer. *Id*. at 86–87. Charles Shotmeyer, testifying on behalf of the Fuel Merchants Association of New Jersey, noted that dealers and distributors faced substantial harm if, as part of a divestiture, they were forced to switch brands. Previous brand specific investments would be lost. *Id*. at 90.

D. THE CLINTON ADMINISTRATION'S TWO INVESTIGATIONS OF PRICE AND SUPPLY PRACTICES

Besides investigating large petroleum firm mergers, the Clinton FTC opened two significant pricing and practices investigations.

1. Midwest Gasoline Price Increase Investigation

The FTC conducted a major investigation of the Spring 2000 gasoline price increases in the Midwest. Gasoline prices had increased dramatically throughout the United States, with the Midwest states experiencing the most significant and fastest price increases.[129] Acting pursuant to a congressional request, the FTC investigated whether anticompetitive conduct caused the price spike.[130] In a March 2001 report,[131] the Commission found no evidence of coordinated anticompetitive conduct.

> The Commission's investigation found no direct evidence of collusion, and insufficient evidence of parallel conduct and "plus factors" to support an inference of collusion. Much of the evidence collected is inconsistent with coordinated action, and instead suggests different unilateral reactions to the price spike among the various market participants. . . . While the industry does engage in substantial firm-to-firm contact and exchanges of information, which may constitute "plus factors" under some circumstances, such information exchanges are customary in this industry and appear to help the market function efficiently. Companies with an excess of a particular petroleum product at one location may trade for the same product at another location, for

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129. The FTC identified the prices increases, price disparities, and eventual price declines, in its Final Report:

> In the spring of 2000, gasoline prices began increasing nationwide. From May 30 to June 12, 2000, the national average retail price of [Phase II reformulated gasoline ("RFG II")] increased from $1.61 to $1.67 per gallon, before declining to $1.61 on July 17, 2000. In Chicago, however, the price increase was significantly greater. The average RFG II price in Chicago rose from $1.85 per gallon on May 30 to $2.13 on June 20, before falling to $1.57 on July 24, 2000. From May 30 to June 20 in Milwaukee, the average RFG price increased from $1.74 to $2.02, but by July 24 had fallen to $1.48.

FEDERAL TRADE COMM'N, MIDWEST GASOLINE PRICE INVESTIGATION (2001) (citations omitted), *available at* http://www.ftc.gov/os/2001/03/mwgasrpt.htm.

130. *Id*. ("The large price run-up in the Midwest prompted a bipartisan group from Congress to request that the Federal Trade Commission open an investigation to determine whether an antitrust violation had caused or contributed to the price spike.").

131. *See id*.

> another type of petroleum product at the same location, or for another petroleum product at another location. These exchange agreements are motivated by factors peculiar to the industry: refineries are large-scale organizations that produce myriad products; crude oil comes in different grades that may be more suitable for some refineries than others; demand for different products varies seasonally, cyclically, and for other reasons; and the physical movement of the product is slow. A certain amount of contact and exchange of information between companies is necessary to work out the terms of the agreements. Companies also frequently buy and sell particular products at various locations for the same reasons they enter into exchange agreements. While these contacts provide opportunities for collusion, the Commission's investigation found no evidence that these contacts spilled over into illicit agreements.[132]

The Commission instead pointed to "a mixture of [unilateral] structural and operating decisions" to not invest in certain equipment necessary to support the conversion to environmentally cleaner gasoline, unexpected delays in refinery turnaround and maintenance requirements, pipeline disruptions, errors by refiners in forecasting industry supply, and "decisions by some firms to limit supply as they pursued profit-maximizing strategies" as explanations for the dramatic price spike.[133] The FTC noted that the price spike was "shortlived" and that "[o]nce prices began to climb, some firms increased their supply of [reformulated gasoline] to the Midwest market."[134]

Notwithstanding the FTC's conclusions suggesting no anticompetitive behavior, the FTC's press release highlighted, as a factor causing the price spike, the decisions of a few companies to limit supply to the Midwest after prices increased in an attempt to maintain higher margins and the higher short-term price increase.[135] FTC Commissioners Orson Swindle and Thomas Leary identified this focus as both misleading and neither legally actionable nor economically problematic.[136] Nevertheless, the press release

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132. *Id*.

133. *Id*.

134. *Id*. The causes of the Midwest gasoline price spike are also discussed in Jeremy Bulow, et al., *U.S. Midwest Gasoline Pricing and the Spring 2000 Price Spike*, 24 ENERGY J. 121 (2003). Jeremy Bulow was the Director of the FTC's Bureau of Economics during the investigation.

135. Press Release, Federal Trade Comm'n, FTC Issues Report on Midwest Gasoline Price Investigation (Mar. 30, 2011), http://www.ftc.gov/opa/2001/03/midwest.shtm.

136. According to Commissioner Swindle:

> Some companies made more RFG II and shipped it to the area; some made less RFG II but increased production of conventional gasoline; and still other firms waited to see if the price spike would continue before they produced and shipped RFG II into the region from more distant refineries. These firms reacted rationally to market conditions as they

would damage the Commission's ability to maintain control over its enforcement agenda, as its congressional critics began focusing on the inability or unwillingness of the Commission to challenge single firm conduct that allegedly raised gasoline prices. Characterizing unilateral conduct by nondominant firms, especially conduct that had short-term price effects, as beyond the reach of the antitrust laws raised concerns in parts of Congress, and, as discussed below, led to a concerted effort to press the FTC to identify and impose rules that would limit the ability of a single firm to affect price through market manipulation.[137]

2. West Coast Gasoline Pricing Investigation

Acting at the request of California Senator Barbara Boxer and the U.S. Attorney for the Southern District of California, in 1998 the FTC initiated a major investigation into the pricing of gasoline on the West Coast.[138] Historically, refined petroleum products, including gasoline, have been priced higher on the West Coast than elsewhere in the United States, in part because of stricter environmental regulations and because the area is

> understood them. Some of these tactics were profitable for the participants; some turned out not to have been. . . . The bottom line is that the problems in the Midwest were caused not by antitrust violations—of which there is no evidence—but by a combination of the EPA requirement and unforeseen market circumstances.

Statement of Orson Swindle, Comm'r, Federal Trade Comm'n, on the Final Report on the Midwest Gasoline Price Investigation, No. 0010174 (2001), *available at* http://www.ftc.gov/os/2001/03/mwgasrptswindle.htm.

Commissioner Leary argued that, unlike the report itself, the press release unfairly and unwisely suggested unilateral firm decisions were substantially responsible for the price spike:

> The Commission press release . . . emphasizes . . . some individual decisions relating to capacity investments and sales volumes that could have been made differently. The Release as a whole conveys the wrong impression that we believe some companies behaved inappropriately, albeit legally. . . . The increasingly complicated regulatory and business environment in which these companies operate makes it inevitable that forecasting mistakes will be made, and it would ill-behoove a government agency to criticize business decisions on the basis of hindsight. Moreover, in a competitive market system, companies are entirely free to make whatever individual decisions they choose to make about the configuration of their plants, their rates of production or the management of their inventory, and it would be inappropriate for us to suggest otherwise.

Statement of Thomas B. Leary, Comm'r, Federal Trade Comm'n, on the Final Report on the Midwest Gasoline Price Investigation, No. 0010174 (2001), *available at* http://www.ftc.gov/os/2001/03/mwgasrptsleary.htm.

137. *See infra* Part V.B.

138. Letter to Robert Pitofsky, Chairman, FTC, from Barbara Boxer, Sen., Cal. (Mar. 18, 1998); Letter to William Baer, Dir., Bureau of Competition, from Alan D. Bersin, U.S. Attorney, S. Dist. of Cal. (Mar. 26, 1998).

isolated from the more liquid markets of the Gulf Coast.[139] But Senator Boxer and U.S. Attorney Bersin noted the significant differences in the price of gasoline among the major cities of California—and the FTC's investigation was "[i]nitiated . . . to explain the[se] differences in the price of gasoline between Los Angeles, San Francisco, and San Diego."[140] The investigation was subsequently expanded to include Arizona, Nevada, Oregon, and Washington, because the same refineries supplied these states and California.

Of interest to the FTC were two types of conduct by refiners, "price zone[s]" and "redlining," that the agency had identified in its investigation of the Exxon-Mobil merger. Zone pricing is the setting of uniform wholesale prices to both company-operated and leased stations within a distinct geographic area.[141] Redlining is a practice whereby refiners contractually prevent their distributors from undercutting them when the refiner distributes directly to its company-operated gas stations.[142]

The investigation revealed that many of the major integrated refiners used zones to price their direct-supplied stations. Because it would make economic sense for a refiner unilaterally to use price zones to capture economic profits based on local structural differences (e.g., number of competitors, supply efficiencies, demand patterns), the mere existence of zone pricing was not a sufficient basis for an antitrust challenge to the practice. An allegation that industry-wide use of zone pricing was an illegal practice would likely have required the Commission to prove the refiners had entered into an explicit agreement to use zone pricing (and, perhaps, to set prices in overlapping zones). The Commission had not identified evidence of an explicit agreement, nor did they find that price zones were stable, either across firms or across time. A challenge to the unilateral use of zone pricing by any single firm would have required the Commission to show the firm had market power, a dubious proposition in a geographic

139. Christopher T. Taylor & Jeffrey H. Fischer, *A Review of West Coast Gasoline Pricing and the Impact of Regulations*, 10 INT'L J. ECON. BUS. 225 (2003) (identifying higher costs to produce CARB gasoline and higher opportunity costs to produce conventional gasoline, higher shipping costs, including the effects of the Jones Act, Unocal's patents on CARB gasoline blending, higher taxes, Oregon's ban on self-service gasoline, and higher land costs as likely explanations for the higher costs of gasoline on the West Coast).

140. Statement of Sheila F. Anthony, Orson Swindle & Thomas B. Leary, Comm'rs, FTC, Concerning Western States Gasoline Pricing Investigation, File No. 981-0187 (2001), http://www.ftc.gov/os/2001/05/wsgpiswindle.htm.

141. *Id*.

142. *Id*.

market of five to seven significant suppliers of gasoline.[143] Thus, the investigation focused on whether the refiners had engaged in coordinated or collusive conduct; the investigation revealed "no evidence of coordination by refiners in their use of price zones or in the zones' geographic locations or dimensions."[144]

The staff's investigation focused more substantially on redlining, a practice the refiners used to restrict the resale of wholesale branded gasoline by their distributors. Refiners sell branded gasoline to company owned or leased stores, but also to independent distributors ("jobbers") who resell to the jobber's own stations or to independent stations not served by the refiner.[145] The Commission found that "most of the Western States refiners prevented their jobbers from competing with them to supply branded gasoline to independent dealers in metropolitan areas."[146] Refiners used two forms of redlining to limit competition from jobber supplied stations: (1) territorial redlining, in which the refiner has the right to refuse a jobber's request to supply branded gasoline to an independent or jobber-owned station within a specific price zone; or (2) site-specific redlining, through the use of financial disincentives for a jobber to sell in locations directly supplied by the refiner, or to prevent jobbers from shipping low-priced gasoline to high-priced markets.[147] Like zone pricing, the industry use of redlining could be challenged as a horizontal agreement on price or output, if evidence of such an agreement could be found. Again, much like zone pricing, because redlining was in each firm's unilateral interest, evidence of an explicit agreement would likely be necessary to prove collusion. Agreements between the refiner and jobber could be challenged as vertical nonprice restraints, but, because vertical nonprice restraints would be evaluated under the rule of reason, the Commission would have had to show "actual or prospective consumer harm."[148] Absent such evidence, the Commission would have to show a refiner could raise price (or reduce output) profitably in a relevant market. It would also need to consider whether, without offering discounts to jobbers to serve rural or new areas, those areas would be served. (The redlining restrictions were an

143. BP/ARCO, Chevron, Equilon, ExxonMobil, Tesoro, Tosco, Ultramar Diamond Shamrock, and Valero supplied some or all of the relevant markets. Refining and wholesale supply markets were moderately to highly-concentrated. *See id*.

144. *Id*.

145. *See id*.

146. *Id*.

147. *Id*.

148. *Id*.

effort to limit the discounts to these lesser-served, otherwise lower-margin areas.)

The FTC's investigation "revealed no evidence of conspiracy or coordination" of these practices.[149] There was no evidence that any refiner had the "ability profitably to raise price market-wide or reduce output at the wholesale level," nor did the Commission "find a situation in which a refiner adopted redlining in a metropolitan area and increased market-wide prices."[150] Because the purpose of redlining was to maintain higher prices in certain zones, neither the Commission nor the companies could claim that the practice did not have a price effect in local geographic price zones.

Reviewed closely and suspiciously, the Commission's closing statement did not foreclose the potential that unilateral use of price zones and the use of vertical agreements to restrict supply from moving from a low price zone to a high price zone affected gasoline prices. The Commission's focus on horizontal coordinated action as a requirement for bringing an antirust action against these industry practices, at a time when the largest petroleum firms were doubling in size, looked to some like a failure to take unilateral market power concerns seriously. As the Clinton era headed to a close, congressional critics began a significant effort to address this alleged loophole by pressing the FTC aggressively to attack unilateral conduct that the critics believed increased the price of gasoline. These pressures would continue through the Bush Administration and could have forced the agency to use considerable resources to address these issues.

V. THE GEORGE W. BUSH ADMINISTRATION: FTC POLICY INITIATIVES TO MAINTAIN CONTROL OF THE AGENCY'S ENFORCEMENT AGENDA, 2001–2004

A. POLITICAL CONCERN OVER MERGERS AND THE HIGH PRICE OF GASOLINE

Leadership of the FTC changed in June 2001.[151] The new leadership arrived as gasoline prices were increasing: the monthly average price of a

149. *Id*.

150. *Id*.

151. President George W. Bush nominated Tim Muris to serve as a member of the FTC on April 26, 2001. Subsequent to his confirmation by the full Senate on May 25, 2001, President Bush designated Muris as FTC Chairman. Gerhard Peters & John T. Woolley, *George W. Bush: Nominations Sent to the Senate*, THE AMERICAN PRESIDENCY PROJECT (Apr. 26, 2001),

gallon of conventional gasoline had increased from $1.23 in January 1997 and $1.19 in May 1997 to $1.43 in January 2001 and $1.65 in May 2001.[152] The May 2001 average price was the highest nominal monthly averaged price for conventional gasoline ever reached in the United States, and was $.04 higher than that reached during June 2000, at the height of the Midwest gasoline price spike.[153] The monthly average price of a gallon of reformulated gasoline increased from $1.26 in January 1997 and $1.25 in May 1997 to $1.50 in January 2001 and $1.81 in May 2001; the May 2001 price was the highest nominal average price recorded in the United States.[154] At the same time, the FTC was reviewing three large petroleum firm mergers announced at the tail end of the Clinton administration: Chevron/Texaco (announced in October 2000), Phillips/Tosco (announced in February 2001), and Valero/UDS (announced in May 2001). Past experience suggested that it was unlikely the Commission would move to enjoin any of these three mergers, causing continued friction with the industry's growing congressional critics. (Another large-firm merger would follow in November 2001, when Conoco and Phillips announced their intention to merge the two companies.[155])

The effect of the recent large petroleum firm mergers on gasoline prices, and concern that the FTC had been insufficiently vigorous in identifying and attacking price gouging and anticompetitive practices that raised the price of gasoline were topics of Timothy Muris's pre-confirmation meeting with various Senators and at his confirmation hearing.[156] Oregon's Democratic Senator Ron Wyden asked how Muris "would . . . carry out the presidential directive [to keep a close eye to make certain that there wasn't price gouging going on],"[157] and whether Muris

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http://www.presidency.ucsb.edu/ ws/?pid=78825. The White House had previously announced the President's intention to nominate Muris to the Commission. Press Release, The White House, President Bush to Nomination Eight Individuals to Serve in His Administration (Mar. 21, 2001), http://georgewbush-whitehouse.archives. gov/news/releases/2001/03/20010321-7.html.

152. Weekly Retail Gasoline and Diesel Prices, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/dnav/pet/pet_pri_gnd_dcus_nus_m.htm (last updated Apr. 2, 2012).

153. *Id*.

154. *Id*.

155. *See* Complaint, *In re* Phillips Petroleum Co. and Conoco Inc., No. C-4058 (F.T.C. 2002), *available at* http://www.ftc.gov/os/2002/08/conocophillipscmp.pdf.

156. Just prior to the Senate's consideration of Muris's nomination, President Bush called on the FTC to monitor complaints of price gouging, asking the Commission to "make sure that no entity can legally overcharge." Kevin Diaz, *Wellstone Calls on Bush to Force an End to Oil Industry "Price Gouging,"* MINN. STAR TRIB., May 17, 2001. During Muris's courtesy calls with senators prior to confirmation, the oil industry was one of the only three topics—privacy and violence in media marketed to adolescents were the other two—raised frequently.

157. *See Nominations to the Federal Trade Commission, Department of Transportation, and*

agreed that "redlining is anticompetitive." Wyden noted his frustration with what he characterized as an insufficient response by the Commission in its West Coast gasoline pricing investigation—finding that "redlining is going on, [and] that it is anticompetitive . . . and that is the way it goes."[158] This was an area of significant interest for Wyden; in 1999 he had released a report identifying redlining and zone pricing as anticompetitive and anti-consumer practices, and had been actively encouraging the FTC and the DOJ to investigate these and other practices by the oil companies for some time. In announcing his intention to vote to confirm Muris, Wyden expressed his belief that "in the area[]" of gasoline prices "[the FTC] can do more."[159]

Wyden's comments were not simply hearing theater—just one week into Muris's term as Chairman, Senator Wyden released a report in which he claimed that he had obtained documents showing that the "major oil companies pursued efforts to curtail refinery capacity."[160] Senator Wyden noted that his investigation was "ongoing."[161] More significantly, in May of 2002, Democratic Senator Carl Levin, Chairman of the Senate's Permanent Subcommittee on Investigations, directed the Majority Staff of the Subcommittee to investigate the reasons for the spike in the price of gasoline in the Midwest, and whether the "increased concentration in the [refining] industry" had contributed to recent price spikes and price increases.[162]

These congressional critics of the petroleum industry had significant "consumer group" support. These groups alleged that the FTC and DOJ were insufficiently attentive to the anticompetitive conduct in and structure of the petroleum industry. While these groups lacked access to any non-public data and were unable to engage in rigorous analysis of the market behavior and structure they decried, they loudly proclaimed the antitrust

Department of Commerce: Hearing Before the S. Comm. on Commerce, Sci. and Transp., 107th Cong. 15 (2001) (statement of Sen. Ron Wyden, Member, S. Comm. on Commerce, Sci. and Transp.).

158. *Id*. at 16.

159. *Id*. at 17.

160. RON WYDEN, THE OIL INDUSTRY, GAS SUPPLY AND REFINERY CAPACITY: MORE THAN MEETS THE EYE 1 (2001), *available at* http://wyden.senate.gov/issues/gas_prices/pdfs/wyden_oil_report.pdf.

161. *See id*.

162. *Gas Prices: How Are They Really Set?: Hearing Before the Permanent Subcomm. of Investigations of the S. Comm. on Governmental Affairs*, 107th Cong. 326 (2002) [hereinafter *Gas Prices: How Are They Really Set?*]. The FTC was aware of this investigation at its initial stages because the Subcommittee staff sought documents and work product from the Commission.

agencies were not taking sufficient efforts to attack anticompetitive conduct in the industry.

This combination of continued large-firm mergers, rising gasoline prices, Democratic dissatisfaction with the Clinton FTC's investigation of industry practices, and a major ongoing congressional investigation raised the prospect that Congress would co-opt a significant portion of the FTC's antitrust enforcement agenda for the first time since congressional pressure led to the FTC's ill-fated and poorly considered 1970s challenge to the industry's vertically integrated structure. The political climate—the May 2001 switch of the Senate from a fifty-fifty deadlock to a Democratic majority—increased this concern.

B. THE COMMISSION'S 2001–2002 INITIATIVES TO PREVENT CEDING ITS ENFORCEMENT AGENDA TO CONGRESSIONAL CRITICS OF THE PETROLEUM INDUSTRY

Although the incoming Commission leadership promised (and delivered) significant "continuity" in antitrust enforcement,[163] it had some different priorities than the previous Commission leadership. The new leadership indicated its intention to focus aggressively on finding and challenging horizontal agreements and horizontal mergers in health care, developing, through litigation, a framework for structured "rule-of-reason" analysis, and limiting the protections for anticompetitive horizontal agreements under state or First Amendment protection (the State-Action doctrine and Noerr-Pennington doctrine).[164]

With the slowdown in the merger wave, the incoming Commission leadership would find it easier to focus resources on its agenda. However, congressional critics of the FTC's unwillingness to curtail what they saw as anticompetitive conduct could hinder this reset in Commission focus.

163. Timothy J. Muris, Chairman, FTC, Prepared Remarks Before the American Bar Association Antitrust Section Annual Meeting, Antitrust Enforcement at the Federal Trade Commission: In a Word—Continuity (Aug. 7, 2001) [hereinafter Muris, Continuity], *available at* http://www.ftc.gov/speeches/muris/murisaba.shtm.

164. *Id*.; Timothy J. Muris, Chairman, FTC, Remarks at the Milton Handler Antitrust Review, Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy (Dec. 10, 2002) [hereinafter Muris, Looking Forward], *available at* http://www.ftc.gov/speeches/muris/handler.shtm; Timothy J. Muris, Chairman, FTC, Remarks at the 7th Annual Competition in Health Care Forum, Everything Old Is New Again: Health Care and Competition in the 21st Century (Nov. 7, 2002), *available at* http://www.ftc.gov/speeches/muris/murishealthcarespeech0211.pdf. Both speeches identify the incoming administration's priorities, and initiatives begun during the summer of 2001 to reset the Commission's competition enforcement agenda.

Believing that it had not been sufficiently proactive in identifying nor successful in pre-empting congressional concerns, in the summer of 2001 the Commission began various petroleum-related policy initiatives to maintain control over its enforcement agenda. As explained in detail below, five principles guided the Commission's policy initiatives: (1) transparency of past and current enforcement efforts; (2) continuity across administrations in law enforcement standards; (3) engagement with critics and critical self-examination of past enforcement decisions; (4) a robust research program; and (5) development of a pro-competition agenda. This positive agenda used enforcement, research, and competition advocacy, combined with a determined effort to be transparent and engage the many criticisms of both the petroleum industry and the FTC's antitrust oversight of the industry to maintain control of the Commission's law enforcement agenda.[165]

Early in the Bush Administration, the Commission launched a gasoline price-monitoring program, initiated a substantial research program to review the effects of recent petroleum firm mergers and redlining and zone pricing on gasoline prices, and undertook to write two substantial industry studies—one on mergers and one on factors that affect gasoline prices.[166] The Commission also compared its past merger enforcement decisions in the petroleum industry to other industries to determine whether the Commission was applying different standards to mergers in the petroleum industry. The Commission also became much more transparent in its enforcement decisions and released information on its merger challenges by industry. It also increased the practice of providing detailed public statements on closed merger or non-merger investigations. The desire to develop and narrow the Noerr-Pennington doctrine overlapped with a previously initiated, but abandoned, investigation into the California Air Resources Board adoption of a technology standard for phase II CARB gasoline. Finally, the Commission's Office of Policy Planning was given significantly more encouragement to identify, analyze, and comment on state legislative initiatives that would limit price competition in the petroleum industry.

165. *See* Muris, Continuity, *supra* note 171 (discussing the future initiatives of the FTC).

166. *See* FEDERAL TRADE COMM'N, GASOLINE PRICE CHANGES: THE DYNAMIC OF SUPPLY, DEMAND, AND COMPETITION 127 (2005) [hereinafter FTC, GASOLINE PRICE CHANGES], *available at* http://www.frc.gov/reports/gasprices05/050705gaspricesrpt.pdf; FEDERAL TRADE COMM'N, THE PETROLEUM INDUSTRY: MERGERS, STRUCTURAL CHANGE, AND ANTITRUST ENFORCEMENT (2004), *available at* http://www.ftc.gov/os/2004/08/040813 mergersinpetrolberpt.pdf.

To kick off its increased efforts to understand the "central factors that can affect the level and volatility" of gasoline and other refined product prices,[167] the Commission held a one-day conference in August 2001 to identify additional topics for its review and consideration.[168] Participants in the conference included representatives of federal and state agencies with responsibility for energy matters and law enforcement efforts, consumer advocates, academics, and industry officials.[169] A similar two-day conference was held in May 2002.[170] The Commission also invited state law enforcement officials and academics to help shape its future law enforcement efforts by soliciting studies and information about price spikes or questionable conduct. We next discuss how these early policy initiatives helped allow the Commission to deflect later efforts by Congress to redirect the agency's enforcement decisions.

1. Gasoline Price Monitoring Initiative

Swift detection of illegal conduct is a necessary cornerstone of any law enforcement program. Considered, early analysis of the evidence of possible misconduct is necessary to avoid devoting resources to investigations that will not bear fruit, and to dissuade others—in the Commission's case, Congress—from directing or "motivating" the agency to devote scarce resources to investigating such conduct.

The FTC had devoted substantial resources to reviewing a short-run gasoline price spike in the late spring of 2000 because it had no ready answer for Congress when Congress asked for an investigation of the cause of the price spike. Congress had, in effect, hijacked considerable FTC resources to spend nine months investigating a three-week increase in the price of gasoline that was caused by unanticipated production disruptions, and where the post-spike price was lower than the pre-spike price, because of the quick supply response by firms operating within and outside of the

167. *See* Federal Trade Comm'n, Public Conference: Factors that Affect Prices of Refined Petroleum Prices (July 12, 2001), *available at* http://www.ftc.gov/os/2001/07/rpppricesfrn.htm. A transcript of the conference discussion can be accessed at http://www.ftc.gov/bc/gasconf/010802trans.pdf.

168. Press Release, Federal Trade Comm'n, FTC to Hold Public Conference/Opportunity for Comment on U.S. Gasoline Industry in Early August (July 12, 2001), http://www.ftc.gov/opa/2001/07/gasconf.shtm.

169. *See Agenda—Factors that Affect Prices of Refined Petroleum Products*, FEDERAL TRADE COMM'N, http://www.ftc.gov/bc/gasconf/agenda.shtm (last visited Apr. 4, 2012).

170. *See* Federal Trade Comm'n, Public Conference: Factors that Affect Gasoline Prices to Be Discussed at FTC Conference (May 1, 2002), *available at* http://www.ftc.gov/opa/2002/05/gasolineprices.shtm. Transcripts of the conference discussion can be accessed at http://www.ftc.gov/bc/gasconf/020508petroleumtrans.pdf and http://www.ftc.gov/bc/asconf/020509petroleumtrans.pdf.

affected area.[171] These agency resources would have been better used elsewhere.

To reduce the need to make commitments of significant investigatory resources for transient phenomena likely to be explained by market forces and unplanned supply disruptions, and to better understand gasoline price fluctuations, an early initiative of the Bush FTC was the development of a real-time gasoline price-monitoring program. Recognizing that even short-run price spikes generally build slowly, as the impact of supply disruptions take effect, the Commission sought an early-warning system to identify pricing anomalies as they started to develop, not when they peaked, so the Commission staff could begin investigating—usually informally—changes in the market that might be affecting price and supply. Such knowledge would allow the Commission to respond quickly and without committing significant efforts to congressional charges of possible petroleum firm gouging, manipulation, or withholding.

In the summer of 2001, the FTC's Bureau of Economics developed (subject to continuous fine-tuning and improvement) an economic model—that allowed the Commission's staff to identify, at the early stages, gasoline pricing anomalies that required further investigation. The model was a data based collusion screen used to detect possible anticompetitive activity.[172] Announced at the May 2002 conference, the Bureau's model uses historical gasoline prices to identify and then forecast the relationship between gasoline prices across a large number of urban areas. The model identifies instances when actual prices in a city or region deviates significantly (in the statistical sense) from their historical relationship with other regions of the

171. *See* FEDERAL TRADE COMM'N, MIDWEST GASOLINE PRICE INVESTIGATION, *supra* note 129; Jeremy Bulow, Dir,, Bureau of Econ., FTC, The Midwest Gasoline Investigation (June 25, 2007), *available at* http://www.ftc.gov/speeches/other/midwestgas.shtm (discussing "remarkably rapid" supply response by the petroleum industry); Luke Froeb & John Seesel, The Cost of Filling Up: Did the FTC Approve Too Many Energy Mergers 5 (Mar. 31, 2005) (prepared remarks of the FTC's Director of the Bureau of Economics, and Associate General Counsel for Energy), *available at* http://www.ftc.gov/speeches/froeb/050331abareport.pdf (discussing post spike pricing).

172. Collusion screens were not widely used prior to the Commission's use of the gasoline price monitoring program; we believe the Commission's gas price monitoring effort is the longest such effort in existence at a competition agency. Efforts to use economic and econometric models to identify anticompetitive activity are discussed in Rosa Abrantes-Metz & Patrick Bajari, *Screens for Conspiracies and Their Multiple Applications*, 24 ANTITRUST 66 (2009); some limitations of screens are identified in Rosa M. Abrantes-Metz & Luke Froeb, *Competition Agencies are Screening for Conspiracies: What are they Likely to Find*, 8 ECON. COMM. NEWSL. 10 (2008). For a published discussion of the use of a screen to analyze gasoline prices by FTC economists involved in the monitoring effort, see Rosa M. Abrantes-Metz et. al., *A Variance Screen for Collusion*, 24 INT'L J. INDUS. ORG. 467 (2006) (analyzing the variance of retail gasoline prices in Louisville, Kentucky for pockets of low price variation as an indicator of collusion).

country—principally the Gulf Coast, the most liquid of the U.S.'s petroleum markets.[173]

The Bureau's economists scrutinized price movements in twenty wholesale and over 350 retail markets across the country. Then General Counsel William Kovacic explained the staff's early experience with the model to Congress in a 2004 testimony:

> If the FTC staff detects unusual price movements in an area, it researches the possible causes, including, if appropriate, consulting with the state Attorneys General, state energy agencies, and the Department of Energy's ("DOE") Energy Information Administration. The FTC staff also monitors DOE's gasoline price "hotline" complaints. If the staff concludes that the unusual price movement likely results from a "natural" cause (*i.e.*, a cause unrelated to anticompetitive conduct), it does not investigate further. The Commission's experience from its past investigations and the current monitoring initiative indicates that unusual movements in gasoline prices typically have a natural cause. FTC staff further investigates unusual price movements that do not appear to be explained by "natural" causes to determine whether anticompetitive conduct may be a cause. Cooperation with state law enforcement officials is an important element of such investigations.[174]

The program produced its intended benefits. On numerous occasions, our experience was that the Commission disarmed the agency's critics with a fact-based, accurate explanation for the likely cause of pricing anomalies. When prices spiked somewhere, the Commission usually had sufficient information to derail a congressional request for a full scale investigation. What the agency did not find, except in one instance, was information suggesting illegal coordinated or unilateral action to raise prices (the exception was a potential problem from a consummated wholesale merger, which the Commission referred to the appropriate state authorities). The Commission continues to rely on the monitoring effort, improved with experience since its initial development.

2. Aggressive Law Enforcement

Although often (incorrectly) characterized as a "regulatory agency," the FTC has only limited ability to command firms to engage in specific conduct. To limit and to address concerns about "outputs"—prices,

173. *See Market Forces, Anticompetitive Activity, and Gasoline Prices: FTC Initiatives to Protect Competitive Market: Hearing on the Status of the U.S. Refining Industry Before the H. Subcomm. on Energy and Air Quality, Comm. on Energy and Commerce*, 108th Cong. 15–16 (2004) (prepared statement of the FTC), *available at* http://www.ftc.gov/os/2004/07/04071gaspricetestimony.pdf.

174. *Id*. at 16 (citation omitted).

production, transportation, and distribution—of refined petroleum products, the incoming officials emphasized the Commission's law enforcement authority. Outside of its merger challenges—all settlements that allowed the merging parties to close their transaction after divesting assets—the Clinton FTC did not identify any conduct in the petroleum industry that violated the antitrust laws. We do not believe this result was in error—the Commission's West Coast and Midwest gasoline price investigations reached the correct result. Nevertheless, the Bush appointees were concerned that the Commission's recent inability to identify *any* anticompetitive conduct in the petroleum industry encouraged a stronger congressional involvement in the Commission's enforcement agenda than was warranted or productive. Thus, identifying and challenging anticompetitive conduct with no offsetting efficiency benefits was a priority for the Bush FTC.

This effort ended up dovetailing with the Commission's renewed interest in challenging conduct that, outside of judicially created exemptions, was anticompetitive. In July 2001, the new Commission leadership directed the staff to (1) review the legal basis for the State action and the Noerr-Pennington exemptions, and, to (2) identify unilateral or coordinated conduct that would allow the agency to shape and clarify the law in these two areas.[175] A previously closed matter—the Unocal investigation—was reopened to explore whether a challenge to the alleged conduct was an appropriate vehicle for clarifying and strengthening the misrepresentation exemption to the Noerr-Pennington doctrine.

In 1996, the Commission had opened an investigation into the conduct of the Union Oil Company of California ("Unocal").[176] Industry participants complained to the Commission that Unocal had made misrepresentations to the California Air Resources Board while the Board was engaged in a rulemaking to establish regulations and standards governing the composition of reformulated gasoline. According to the complainants, Unocal had misrepresented its intellectual property rights in technology to refine, produce, and supply low emission reformulated

175. *See* Muris, Continuity, *supra* note 163, at 4.

176. The discussion of Unocal's activities is taken from the Commission's Unocal complaint. *See* Complaint, *In re* Union Oil Co. of Cal., 2005 WL 2003365 (F.T.C. 2005) (No. 9305) [hereinafter Unocal Complaint], *available at* http://www.ftc.gov/os/adjpro/d9305/030304unocaladmincmplt.pdf. Prior to 1997, Unocal operated as a vertically integrated producer, refiner, and marketer of petroleum products. In March 1997, Unocal sold its refining, marketing, and transportation assets to Tosco. During the Commission's investigation, the company primarily engaged in oil and gas exploration and production, but also had an ownership interest in pipelines, natural gas storage facilities, and the marketing and trading of hydrocarbon commodities. *Id*. ¶ 13.

gasoline, telling CARB that its intellectual property was non-proprietary.[177] In fact, during CARB's rulemaking, Unocal was seeking, and did obtain, patent protection for this technology.[178] (Unocal also misrepresented its intellectual property rights to industry participants in the rulemaking and standard setting process.[179]) CARB subsequently incorporated Unocal's intellectual property into the standards for reformulated gasoline, and Unocal moved to enforce its patent rights against firms producing reformulated gasoline for the California market. A jury determined that gasoline produced by ARCO, Shell, Exxon, Mobil, Chevron, and Texaco infringed on Unocal's patent, and awarded Unocal a 5.75 cents per gallon royalty on gasoline produced by these firms.[180]

The Commission declined to act and closed its investigation in 1997 because the conduct was considered likely to be protected by the Noerr-Pennington exemption. The Commission's new emphasis on narrowing this exemption led in 2001 to a re-opening of the investigation and reconsideration of the legality of Unocal's conduct. In March 2003, the FTC alleged that Unocal had obtained and exercised monopoly power in the markets for (1) CARB-compliant summer-time reformulated gasoline produced and supplied for sale in California, and, (2) various technology incorporated into the process for refining, producing and supplying CARB-compliant summertime reformulated gasoline through its bad faith, deceptive, and exclusionary conduct.[181] Unocal's monopoly power was obtained through its deception of California's regulatory authorities in connection with proceedings to develop the reformulated gasoline standards that the authorities ultimately adopted.[182]

In July 2004, the Commission, sitting as a judicial tribunal reviewing Unocal's motion to dismiss, found Unocal's alleged conduct not protected by the Noerr-Pennington doctrine, and a full trial on the merits was scheduled.[183] The trial never occurred, as the next year Chevron and Unocal announced an intention to merge and the FTC allowed the transaction to proceed only on the condition that Chevron not enforce Unocal's patent rights associated with the technology incorporated into the

177. *Id*. ¶¶ 2–3.

178. *Id*. ¶¶ 3–4.

179. *Id*.

180. *Id*. ¶ 9. Unocal subsequently sought the imposition of a similar royalty on infringing gasoline produced by Valero. *Id.*

181. *Id*. ¶¶ 99–103.

182. *Id*. ¶ 1.

183. Opinion of the Commission, *In re* Union Oil Co. of Cal., 2005 WL 2003365 (F.T.C. 2005) (No. 9305), *available at* http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf.

CARB reformulated gasoline standard.[184] According to the Commission, the "agreement provides the full relief that the Commission sought in its administrative litigation with [Unocal]."[185] The Commission estimated that its challenge to Unocal's enforcement of its patent and subsequent settlement prohibiting enforcement of its intellectual property rights, as a condition to clearing the Chevron/Unocal merger, saved purchasers of California reformulated gasoline over $500 million annually.[186] The Commission's willingness to bring a monopolization case against a petroleum firm allowed it to argue it was not turning a blind eye to anticompetitive conduct in the petroleum industry.[187] This was a significant change from recent history, during which conduct investigations were largely opened at the behest of Congress, with no anticompetitive conduct found.

3. An Affirmative, Pro-Competition Agenda

Although vigorous law enforcement is necessary to protect consumers, the Commission can also enhance consumer welfare by informing decisionmakers of the likely effects of proposed policies.[188] By 2001, the Commission had a long history of such involvement,[189] but it had not been

184. Decision and Order 3–4, *In re* Union Oil Co. of Cal., 2005 WL 2003365 (F.T.C. 2005) (No. 9305), *available at* http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf.

185. Statement of the FTC, In the Matter of Union Oil Company of California at 1, Docket No. 9305 and In the Matter of Chevron Corporation and Unocal Corporation, File No. 051-0125, Docket No. C-4144 (Aug. 2, 2005), *available at* http://www.ftc.gov/os/adjpro/d9305/050802statement.pdf.

186. Unocal's expert had testified that 90 percent of the 5.75 cents per gallon royalty Unocal sought would be passed on in prices at the pump. Unocal Complaint, *supra* note 176, ¶ 10.

187. Some in Congress incorrectly viewed the Commission's challenge to Unocal's conduct as protecting refiners, and not consumers, from anticompetitive conduct—apparently not understanding that the refiners all faced a common cost that they would likely pass on in pump prices.

188. The Commission has authority under Section 6 of the FTC Act to conduct special studies and issue reports on substantial consumer protection and competition related issues affecting the U.S. economy. Federal Trade Commission Act § 6, 15 U.S.C. § 46 (2006).

189. In the fall of 1974, Lewis Engman, then–FTC Chairman, gave a speech positing that burdensome federal transportation regulations contributed to the nation's then significant macroeconomic problems. *See* Address by Lewis A. Engman, Chairman, FTC, Before the 1974 Fall Conference of the Financial Analysts Federation, Detroit, Michigan (Oct. 7, 1974). Engman discussed how the Civil Aeronautics Board raised prices by limiting the entry of new carriers and controlling the distribution of airline routes. *Id*. at 4. He noted that the Interstate Commerce Commission effectively sanctioned price fixing among trucking companies. *Id*. at 7. Engman concluded that the country's lack of sound competition policy led to higher transportation costs, which in turn hurt the U.S. economy overall. Engman's address may be considered one of the first contemporary examples of successful competition advocacy; his speech, presenting competition policy as a means of addressing the country's pressing economic problems, received substantial coverage in the popular press. *See, e.g.*, Robert Metz, *F.T.C. Chief Calls Role of Agencies Inflationary*, N.Y. TIMES, Oct. 8, 1974, at 1. The result was a new interest in deregulating the transportation sector. During the next decade, the Commission aggressively

active in commenting on gasoline related legislation or rules during the Clinton Administration. This was a significant departure from the Commission's efforts under Republican chairmen from 1981 to 1993.[190] The George W. Bush Administration appointees were determined to reinvigorate the Commission's advocacy efforts through participation in state and federal legislative, regulatory, and judicial (as amicus curiae) fora, and were especially interested in intervening when the FTC's participation could help remove protectionist regulations or laws.

While often of less interest to congressional critics of the agency, the new agency personnel understood that legislation and rules were often used to protect firms from their more efficient competitors—pure "special interest" legislation. Successful use of the legislative or administrative process to exclude more efficient competitors would have significant negative effects on consumers. The FTC's advocacy program provided economic analysis and other informed guidance to help policymakers better understand the impact of their decisions on creating, maintaining, or forestalling competitive markets.

Because some federal and state legislators had previously attacked the Commission's advocacy efforts as an inappropriate intrusion on legislative matters, the incoming Commission was selective in choosing the areas in which it would participate, focusing on matters of high priority to consumers—energy, health care, and professional services. In energy, the Commission's first comment was to the Environmental Protection Agency ("EPA"), as it studied the effects of its mandated boutique fuel requirements.[191] Previous Commission experience suggested that the

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pursued competition advocacy to promote deregulation of airlines, railroads, trucking, and intercity buses.

190. *See generally* Letter from Ronald B. Rowe, Dir. for Lit., FTC Bureau of Competition, to David Knowles, Assemblyman, Cal. Legislature (May 5, 1992); Claude C. Wild III, Dir., FTC Denver Reg'l Office, Prepared Statement Before the State, Veterans, and Military Affairs Comm. of the Colo. State Senate (Apr. 22, 1992); Letter from Claude C. Wild III, Dir., FTC Denver Reg'l Office, to Bill Morris, Sen., Kan. State Senate (Feb. 26, 1992); Letter from Claude C. Wild III, Dir., FTC Denver Reg'l Office, to David Buhler, Exec. Dir., Utah Dep't of Commerce (Jan. 29, 1992); Letter from Thomas B. Carter, Dir., FTC Dallas Reg'l Office, to W.D. Moore, Jr., Senator, Ark. State Senate (Mar. 22, 1991); Letter from Jeffrey I. Zuckerman, Dir., FTC Bureau of Competition, to Jennings G. McAbee, Chairman, Other Taxes and Revenues Subcomm., Ways and Means Comm., S.C. House of Representatives (May 12, 1989). Copies of the FTC's comments on gasoline-related legislation, including the above, are available at http://www.ftc.gov/opp/advocacy_subject.shtm#gatg.

191. STAFF OF THE GENERAL COUNSEL, BUREAUS OF COMPETITION AND ECON., AND THE MIDWEST REGION OF THE FEDERAL TRADE COMM'N, BEFORE THE ENVIRONMENTAL PROTECTION AGENCY, STUDY OF UNIQUE GASOLINE FUEL BLENDS ("BOUTIQUE FUELS"), EFFECTS ON FUEL SUPPLY AND DISTRIBUTION AND POTENTIAL IMPROVEMENTS, EPA 420-P-01-004, PUBLIC DOCKET NO. A-2001-20 (2002), *available at* http://www.ftc.gov/be/v020004.pdf.

proliferation of unique boutique fuel requirements for different areas of the country made it less likely firms could adjust quickly to local or regional supply shocks by supplying fuel from outside the local or regional area.[192] Efforts by state legislators to ban "below-cost" gasoline pricing were another target of the agency's advocacy efforts. Believing that bans on "below-cost" pricing were simply an attempt by less efficient competitors to tie up their competitors in litigation and chill their willingness to offer lower prices, the Commission consistently advocated against such bans.[193] The Commission also continued its recent post-Exxon practice of opposing state legislation that would ban refiners from owing retail gasoline stations, because it believed such laws would result in higher gasoline prices.[194]

4. Continuity in Merger Enforcement and Research into the Price Effects of Recent Mergers

192. *Id*. at 2–3.

193. *See, e.g.*, Letter from Todd J. Zywicki, Dir., FTC Office of Policy Planning et al., to Gene DeRossett, Rep., Mich. House of Reps. (June 17, 2004), *available at* http://www.ftc.gov/os/2004/06/040618staffcommentsmichiganpetrol.pdf; Letter from Susan Creighton, Dir., FTC Bureau of Competition et al., to Les Donovan, Sen., Kan. State Senate (Mar. 12, 2004), *available at* http://www.ftc.gov/be/v040009.pdf; Letter from Susan Creighton, Dir., FTC Bureau of Competition et al., to Shirley Krug, State Rep., Wis. (Oct. 15, 2003), *available at* http://www.ftc.gov/be/v030015.htm; Letter from Joseph J. Simons, Dir., FTC Bureau of Competition et al., to Eliot Spitzer, Att'y Gen., N.Y. (July 24, 2003), *available at* http://www.ftc.gov/be/nymfmpa.pdf; Letter from Joseph J. Simons, Dir., FTC Bureau of Competition et al., to Roy Cooper, Att'y Gen., N.C. (May 19, 2003), *available at* http://www.ftc.gov/os/2003/05/ncclattorneygeneralcooper.pdf; *Competition and the Effects of Price Controls in Hawaii's Gasoline Market: Before the State of Hawaii, J. Hearing H. Comm. on Energy and Envtl. Prot. et al.* (Haw. 2003) (testimony of Jerry Ellig, Deputy Dir., FTC Office of Policy Planning), *available at* http://www.ftc.gov/be/v030005.htm; Letter from Joseph J. Simons, Dir., FTC Bureau of Competition et al., to George E. Pataki, Governor, N.Y. (Aug. 8, 2002), *available at* http://www.ftc.gov/be/v020019.pdf; Letter from Joseph J. Simons, Dir., FTC Bureau of Competition to Robert F. McDonnell, Del., Commonwealth of Va. House of Dels. (Feb. 15, 2002), *available at* http://www.ftc.gov/be/V020011.htm.

194. *Competition and the Effects of Price Controls in Hawaii's Gasoline Market: Before the State of Hawaii, J. Hearing H. Comm. on Energy and Envtl. Prot. et al.* (Haw. 2003) (testimony of Jerry Ellig, Deputy Dir., FTC Office of Policy Planning), *available at* http://www.ftc.gov/be/v030005.htm; Letter from Joseph J. Simons, Dir., FTC Bureau of Competition et al., to George E. Pataki, Governor, N.Y. (Aug. 8, 2002), *available at* http://www.ftc.gov/be/v020019.pdf. The FTC commented on similar legislation introduced in the District of Columbia in 2007. Letter from Maureen K. Ohlhausen, Dir. FTC Office of Pol'y Planning et. al., to Mary M. Cheh, Chairperson, Comm. on Pub. Servs. and Consumer Affairs (June 8, 2007), *available at* http://www.ftc.gov/os/2007/06/V070011divorcement.pdf. The FTC's economists have calculated the likely price effects of prohibiting refiners from owning retail gasoline stations (divorcement) as significant. Michael G. Vita, *Regulatory Restrictions on Vertical Integration and Control: The Competitive Impact of Gasoline Divorcement Policies*, 18 J. REG. ECON. 217 (2000) (divorcement regulations raise the price of gasoline by about 2.6 cents per gallon).

The Bush FTC applied legal and factual standards consistent with the previous Commission's scrutiny of oil industry mergers to the large firm mergers reviewed in 2001 and 2002. (By the close of 2002, the large firm mergers had stopped.) To congressional critics of the industry, this was a significant problem. Although these critics had not voiced effective opposition to the Clinton era mergers, by 2001–2002, they were better prepared to question the FTC's effectiveness in identifying anticompetitive mergers because the Senate's Permanent Subcommittee on Investigations had conducted an inquiry into the cause of gasoline price changes, and, in addition to obtaining testimony from State Attorney Generals about the effects of past merger decisions, had requested a wide-ranging General Accounting Office ("GAO") study of the FTC's petroleum merger decisions. Nevertheless, the Commission's proactive research agenda allowed it to respond sufficiently to these congressional claims without materially diverting large investigatory resources unnecessarily.

C. THE CONGRESSIONAL ATTACK ON THE FTC'S MERGER ENFORCEMENT EFFORTS

The 2002 Senate Permanent Subcommittee of Investigations Report, "Gas Prices: How Are They Really Set?" identified a rise in concentration at the refinery level and retail level—in part caused by the recent mergers—as a reason for higher gasoline prices.[195] The report found that "mergers in the oil industry over the last few years . . . have increased the concentration in the refining industry" and that "[h]igh concentration exacerbates the factors that allow price spikes and [price] increases."[196] Connecticut Attorney General Richard Blumenthal (now Senator from Connecticut), testifying at a hearing that coincided with the release of the Report, argued that the existing levels of "market concentration ha[d] enabled the industry to manipulate prices, to take advantage of low supplies," and to "exploit" disruptions caused by "refinery fires" and "pipeline problems" for their own benefit.[197] Blumenthal charged that a reason for such high concentration was the "bipartisan failure. . . of the FTC" appropriately to challenge mergers.[198] As the cure for the "lack of effective enforcement," Blumenthal proposed a "moratorium on all major mergers and acquisitions" within the petroleum industry.[199] He also

195. *Gas Prices: How Are They Really Set?*, *supra* note 162, at 322.
196. *Id*. at 328, 330.
197. *Id*. at 90.
198. *Id*.
199. *Id*.

suggested that an essential requirement for approval be that the merging parties show consumer benefits from the merger.[200] Michigan Attorney General (and later Michigan Governor) Jennifer Granholm, testifying at the same hearing, "agree[d] fully with the moratorium idea" although perhaps one focused on mergers among "wholesale suppliers."[201] Attorney General Granholm was "not sure that [the FTC and DOJ have] the ability to assess in the way they ought every merger that is being proposed."[202]

Senator Levin then requested that the GAO "examine the effect of the wave of mergers that occurred in the U.S. petroleum industry in the 1990s."[203] GAO's report,[204] released in May 2004, concluded that of the eight specific mergers it examined—Ultramar Diamond Shamrock/Total, Tosco/Unocal, Marathon/Ashland, Shell/Texaco I (Equilon), Shell/Texaco II (Motiva), BP/Amoco, Exxon/Mobil, and Marathon Ashland Petroleum ("MAP")/UDS—most raised prices of conventional wholesale gasoline. Two mergers, the MAP/UDS and Exxon/Mobil mergers, were found to have raised wholesale gasoline prices in excess of 2 cents per gallon. Of the four mergers that GAO modeled for post-merger changes in the price of reformulated gasoline, two—Exxon/Mobil and Marathon/Ashland—were alleged to have increased price by about 1 cent per gallon. Of the two mergers—Tosco/Unocal and Shell/Texaco I (Equilon)—that GAO modeled for the reformulated gasoline used in California (CARB gasoline), GAO found that Tosco/Unocal had increased the price of branded product by 6 cents per gallon.[205] Several congressional members relied on the GAO results to attack the FTC's merger enforcement.[206]

200. *Id*. at 102.

201. *Id*. at 92, 94.

202. *Id*. at 94.

203. Letter from Jim Wells, Dir., Natural Res. and Env't, U.S. Gen. Accounting Office, to Carl Levin, Sen., Ranking Minority Member, Permanent Subcomm. on Investigations, Comm. on Gov't Affairs, U.S. Senate (May 17, 2004), *reprinted in* U.S. GEN. ACCOUNTING OFFICE, ENERGY MARKETS: EFFECTS OF MERGERS AND MARKET CONCENTRATION IN THE U.S. PETROLEUM INDUSTRY 1 (2004) [hereinafter GAO REPORT].

204. GAO REPORT, *supra* note 203, at 82–90.

205. *Id*. at 82–89.

206. *See, e.g.*, *Driving Down the Cost of Filling Up, Hearing Before the H. Subcomm. on Energy Policy, Natural Res., and Regulatory Affairs, of the H. Comm. on Gov't Reform*, 108th Cong. 180 (2004) (statement of John Tierney, Rep.) ("I think it just stands to reason that the GAO's conclusions are right on the money . . . "); *Consolidation in the Energy Industry: Raising Prices at the Pump?: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 3 (2006) (statement of Herb Kohl, Sen.) ("The Government is not doing nearly enough to protect consumers. Mergers and acquisitions in the oil industry . . . have left a dangerous level of consolidation in their wake. GAO has found that this has led to higher gas prices, so we need to ask . . . whether our antitrust laws are sufficient to handle this level of consolidation?"). A later GAO report provided no support for enhanced merger enforcement efforts, and, in conjunction with the FTC's criticism, discussed below, has substantially undercut the relevance

D. THE FTC'S REBUTTAL TO ITS CONGRESSIONAL CRITICS

The Bush FTC strongly disputed claims that it and the Clinton Administration had failed to challenge mergers that were potentially anticompetitive. The Commission argued that: (1) it had sought substantial relief in almost all of the large firm mergers that occurred during the 1997 to 2002 period, and it continued to investigate mergers, and obtain relief, at substantially lower concentration thresholds than in any other industry; (2) its own retrospectives did not show that mergers had raised the price of gasoline; and (3) the congressional and GAO criticisms of the effect of large petroleum firm mergers on gasoline prices were substantially flawed.[207]

1. The FTC Obtained Substantial Relief in Major Petroleum Firm Mergers, and Its Approach to Merger Analysis Was Transparent and Consistent Across Administrations

The agency collected and released data showing the agency applied stricter standards in its merger review of large petroleum firm mergers. Data on all of the FTC's horizontal merger investigations and enforcement actions from 1996 to 2003 revealed that, for mergers involving petroleum products, the FTC had obtained relief in both moderately and highly concentrated markets, as defined in the Merger Guidelines.[208] The data showed the FTC sought relief in petroleum mergers at concentration levels substantially below the level where relief was sought in other industries. It also showed that in no other industry did the FTC seek relief where the HHI concentration is below 2000. Subsequent updates to the data show the same thing—FTC merger enforcement, across administrations, is toughest

of the GAO's 2004 report. U.S. GOV'T ACCOUNTABILITY OFFICE, ENERGY MARKETS: ESTIMATES OF THE EFFECTS OF MERGERS AND MARKET CONCENTRATION ON WHOLESALE GASOLINE PRICES (2009), http://www.gao.gov/new.items/d09659.pdf.

207. *The Status of U.S. Refining Industry, Hearing Before the H. Subcomm. on Energy and Air Quality, H. Comm. on Energy and Commerce*, 108th Cong. 42–56 (2004), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-108hhrg95456/pdf/CHRG-108hhrg95456.pdf.

208. *See* FEDERAL TRADE COMM'N, HORIZONTAL MERGER ENFORCEMENT DATA FISCAL YEARS 1996–2003 tbl.3.3 (2004) [hereinafter FTC, HORIZONTAL MERGER DATA 1996–2003] (indicating that it was only in petroleum markets that the Commission challenged transactions at HHI concentration levels less than 2000), *available at* http://www.ftc.gov/os/2004/08/040831horizmergersdata96-03.pdf. The Merger Guidelines were updated in August 2010; these revised guidelines adopted substantially higher thresholds of identifying moderately and highly concentrated markets. *See* 2010 MERGER GUIDELINES, *supra* note 106. The 2010 Guidelines define moderately concentrated markets as markets with an HHI of 1500 to 2500. *See supra* note 106.

on petroleum firm mergers, and in no industry other than the petroleum industry does the Commission seek relief in moderately concentrated markets.[209]

The agency also released a summary report showing the scope of relief required in large petroleum firm mergers.[210] Initially released in congressional testimony, the report is now updated as mergers are challenged.[211]

2. The FTC Initiated Its Own Merger Retrospective Analyses

While a review of the Commission's merger enforcement efforts during the Clinton and Bush administration shows that the Commission used stricter, more aggressive standards in its review of large petroleum firm mergers, this fact does not explicitly prove that these oil mergers did not have anticompetitive effects. As part of the Commission's self-examination efforts, the Bureau of Economics staff reviewed the price effects of petroleum mergers not challenged. To date, the Commission's economic staff has published five retrospectives reviewing seven merger or acquisition transactions; none suggest the Commission mistakenly cleared a merger that resulted in higher gasoline prices to consumers. Two of these retrospectives were published prior to the agency's rebuttal of the GAO report on mergers in the petroleum industry.

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209. *See* FEDERAL TRADE COMM'N, HORIZONTAL MERGER ENFORCEMENT DATA FISCAL YEARS 1996–2007 tbl.3.3 (2008) [hereinafter FTC, HORIZONTAL MERGER DATA 1996–2007], *available at* http://www.ftc.gov/os/2008/12/081201hsrmergerdata.pdf. Although it did not stress these facts in its public advocacy, viability of the divestiture package and efforts to speed enforcement review of large petroleum firms (by the parties) are other reasons the Commission obtains relief at lower than usual concentration levels in the in the oil industry. Because there are a large number of retail markets to investigate, the Commission's investigation may take substantial time; merging parties often agree to divest assets in such markets to avoid delay in closing their transaction. Moreover, the Commission's effort to maintain competition in relevant markets may require the divestiture of assets outside markets of concern to allow a purchaser to operate the assets competitively. *See* Timothy J. Muris, Chairman, FTC, Statement Concerning FTC Merger Enforcement in the Oil Industry (June 2, 2004), *available at* http://www.ftc.gov/speeches/muris/040602response.shtm. In oil mergers of more manageable size—where there are substantially fewer retail markets to review—Commission enforcement is at the HHI levels of other industries. *See* FEDERAL TRADE COMM'N, BUREAU OF ECONOMICS, THE PETROLEUM INDUSTRY: MERGERS, STRUCTURAL CHANGE, AND ANTITRUST ENFORCEMENT 28 n.33 (2004), *available at* http://www.ftc.gov/os/2004/ 08/040813mergersinpetrolberpt.pdf.

210. *See Market Forces, Anticompetitive Activity, and Gasoline Prices: FTC Initiatives to Protect Competitive Market, Before the H. Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs*, 108th Cong. 36–45 fig.2 (2004) (prepared statement of the FTC), *available at* http://www.ftc.gov/os/2004/07/040707gaspricetestimony.pdf.

211. *FTC Merger Enforcement Actions in the Petroleum Industry Since 1981*, Federal Trade Comm'n, *available at* http://www.ftc.gov/ftc/oilgas/charts/merger_enforce_actions.pdf.

In reviewing the Marathon/Ashland joint venture, the FTC Bureau of Economics found a positive, significant increase in wholesale prices for reformulated gasoline about fifteen months after the joint venture was consummated.[212] The Bureau's analysis concluded, however, that a change in fuel formulation requirements—not the transaction—was responsible for the observed price increase.[213] The Bureau of Economics also found no increase in wholesale prices for conventional gasoline, and no increase in the retail prices of conventional or reformulated gasoline.[214] FTC economists further studied the effects of Marathon Ashland's acquisition of the Michigan assets of Ultramar Diamond Shamrock;[215] again, the staff found no evidence that the acquisition led to higher prices.[216] The FTC economists most recently reviewed the effects of two mergers in the Northeast that the agency allowed to close without seeking relief: Sunoco's acquisition of El Paso's Eagle Point refinery and Valero's acquisition of Premcor's Delaware refinery.[217] The FTC's economists found that the transactions were largely competitively neutral; while there was some evidence of an increase in the wholesale price of unbranded gasoline, this result was not robust.[218] In other instances, prices in the merger areas appeared to have fallen relative to prices elsewhere.[219] The FTC economists also found no anticompetitive effect from ARCO's acquisition of certain Thrifty retail gasoline stations[220] and no price effect from either Tosco's purchase of Unocal's Rodeo refinery in April 1997 nor UDS's purchase of Tosco's Avon refinery in August 2000.[221]

212. Christopher T. Taylor & Daniel S. Hosken, *The Economic Effects of the Marathon–Ashland Joint Venture: The Importance of Industry Supply Shocks and Vertical Market Structure* 3–4 (FTC Bureau of Economics, Working Paper No. 270, May 7, 2004), *available at* http://www.ftc.gov/be/workpapers/ wp270.pdf.

213. *Id*. at 27–30.

214. *Id*. at 30–31.

215. John Simpson & Chris Taylor, *Michigan Gasoline Pricing and the Marathon-Ashland and Ultramar Diamond Shamrock Transaction* (FTC Bureau of Economics, Working Paper No. 278, July 2005), *available at* http://www.ftc.gov/be/workpapers/wp278.pdf.

216. *Id*. at 15.

217. Louis Silvia & Chris Taylor, *Petroleum Mergers in the Northeast United State*s 2 (FTC Bureau of Economics, Working Paper No. 300, Apr. 2010), http://www.ftc.gov/be/workpapers/ wp300.pdf.

218. *Id*. at 32.

219. *Id*. at 24.

220. Chris Taylor, Nicholas Kreisl & Paul R. Zimmerman, *Vertical Relationships and Competition in Retail Gasoline Markets: Comment* 2 (FTC Bureau of Economics, Working Paper No. 291, Sept. 2007), *available at* http://www.ftc.gov/be/workpapers/wp291.pdf.

221. *See* Dan Hosken, Louis Silvia & Chris Taylor, *Does Concentration Matter? Measurement of Petroleum Merger Price Effects*, 101 AM. ECON. REV. 45, 48–49 (2011).

3. The FTC Considered and Rejected GAO's Conclusions, Finding them "Fundamentally Flawed"

The FTC identified four major flaws in the GAO's report:

> (1) it failed to measure concentration in any properly defined geographic market; (2) it did not address the effects of concentration or mergers on *retail* pump prices; (3) it did not control for the numerous factors—other than mergers and changes in ownership—that cause gasoline prices to increase or decrease; and (4) it failed to test its model and assumptions for robustness—that is, the authors failed to determine whether small changes in its models changed the results.[222]

FTC Chairman Muris identified significant criticisms of the GAO's report immediately upon the Report's release:

> In 30 years as an antitrust enforcer, academic, and consultant on antitrust issues, I have rarely seen a report so fundamentally flawed as the GAO study of several oil mergers that the Federal Trade Commission investigated under my predecessor, Robert Pitofsky. As the Commission unanimously said in its August 2003 letter to the GAO, this report has major methodological mistakes that make its quantitative analyses wholly unreliable; relies on critical factual assumptions that are both unstated and unjustified; and presents conclusions that lack any quantitative foundation. As a result, the report does not meet GAO's own high standards of "accountability, integrity, and reliability" that one expects from its reports and publications.223

222. These flaws are discussed in FEDERAL TRADE COMM'N, TIMOTHY J. MURIS & RICHARD G. PARKER, U.S. CHAMBER OF COMMERCE, A DOZEN FACTS YOU SHOULD KNOW ABOUT ANTITRUST AND THE OIL INDUSTRY 70–75 (2007) (discussing in detail the four methodological flaws in the GAO's analyses) and materials cited herein at notes 227–30. The Commission first commented on the flaws in GAO's report in August 2003. *See* Letter from Timothy J. Muris, Chairman, Federal Trade Commission, to James E. Wells, Dir., Natural Res. and Env't, U.S. General Accounting Office (Aug. 25, 2003) [hereinafter Letter from Muris to Wells], *available at* http://www.ftc.gov/opa/2004/05/040527petrolactionsFTCresponse.pdf. Earlier staff commentary on the limitations of GAO's economic modeling are included with Chairman Muris's letter. *See* Bureau of Economics, Discussion of Deficiencies in Chapter 5 of the GAO Report "Effects of Mergers and Market Concentration in the U.S. Petroleum Industry in the 1990s" (Aug. 25, 2003); Bureau of Economics, Comments on the GAO Methodology for "Econometric Analysis of Effects of Market Concentration and Mergers on U.S. Wholesale Gasoline Prices in the 1990's" (Dec. 20, 2002). A GAO analysis of the effects of the Texaco/Getty merger and Chevron's purchase of Gulf Oil was subject to similar criticisms. U.S. GEN. ACCOUNTING OFFICE, ENERGY PRICES: GASOLINE PRICE INCREASES IN EARLY 1985 INTERRUPTED PREVIOUS TREND (1986); JOHN GEWEKE, EMPIRICAL EVIDENCE ON THE COMPETITIVE EFFECTS OF MERGERS IN THE GASOLINE INDUSTRY 2–6 (July 16, 2003) (analyzing nine studies on the empirical evidence of price effects of horizontal mergers, including GAO's analysis of the Texaco/Getty and Chevron/Gulf mergers from the early 1980s, and vertical integration), available as enclosure three to Letter from Muris to Wells, *supra*.

223. Press Release, Federal Trade Comm'n, Statement of Federal Trade Commission Chairman

The Commission also provided a substantial commentary on the Report's limitations to Congress.[224] The FTC took two additional steps: (1) it invited the GAO and a group of respected industrial organization economists to discuss the GAO's report in an open forum;[225] and (2) it replicated and subjected the GAO report to robustness testing, finding the results sensitive to the addition of other explanatory variables.[226] This work revealed that the GAO's report did not withstand close scrutiny. The Commission made its analysis public, to allow for review by any interested parties.

The FTC's efforts likely influenced the GAO. In a later report, GAO, at the request of Congress's Joint Economic Committee, examined seven mergers that occurred between 2000 and 2007.[227] GAO found that the

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Timothy J. Muris on the GAO Study on 1990s Oil Mergers and Concentration Released Today (May 27, 2004), http://www.ftc.gov/opa/2004/05/gaostatement.shtm.

224. *Market Forces, Anticompetitive Activity, and Gasoline Prices: FTC Initiatives to Protect Competitive Market: Hearing on the Status of the U.S. Refining Industry Before the H. Subcomm. on Energy and Air Quality, Comm. on Energy and Commerce*, 108th Cong. app. (2004) (prepared statement of the FTC); APPENDIX, STAFF ANALYSIS OF GENERAL ACCOUNTING OFFICE REPORT (2004), *available at* http://www.ftc.gov/os/2004/07/040715gaspricetestimony.pdf

225. *See* Federal Trade Comm'n, Estimating the Price Effects of Mergers and Concentration in the Petroleum Industry: An Evaluation of Recent Learning, Transcript (Jan. 14, 2005), *available at* http://www.ftc.gov/ftc/workshops/oilmergers/50114foilmerger trans.pdf (transcript of panel discussions hosted by the FTC on methodological issues involved in estimating the price effects of petroleum industry mergers and concentration changes within the context of the 2004 GAO Report). Dr. Scott Thompson of the Antitrust Division, a panelist at the conference, noted "a distressing variety in the measured outcomes even when you take [them] at face value" and suggested the results did not provide guidance for reviewing the next gasoline merger. *Id.* at 179–80. As Froeb and Seesel recognized, the GAO report:

> provided 28 estimates of the effects of 8 mergers on wholesale prices of branded and unbranded gasoline of three types (conventional, reformulated, and CARB). In 16 of those 28 cases, GAO found a positive and statistically significant price effect, ranging from 0.4 to 6.9 cents per gallon. In 7 cases, the report found a negative and statistically significant price effect that ranged from - 0.4 to -1.8 cents per gallon. In the 5 other cases, the GAO Report found no statistically significant effect.

Froeb & Seesel, *supra* note 171,

226. FTC STAFF TECHNICAL REPORT, ROBUSTNESS OF THE RESULTS IN GAO'S 2004 REPORT CONCERNING PRICE EFFECTS OF MERGERS AND CONCENTRATION CHANGES IN THE PETROLEUM INDUSTRY (Dec. 21, 2004), *available at* http://www.ftc.gov/ftc/workshops/oilmergers/ftcstafftechnical report122104.pdf.

227. U.S. GOV'T ACCOUNTABILITY OFFICE, ENERGY MARKETS: ESTIMATES OF THE EFFECTS OF MERGERS AND MARKET CONCENTRATION ON WHOLESALE GASOLINE PRICES (2009) [hereinafter 2009 GAO REPORT], http://www.gao.gov/new.items/d09659.pdf. In 2008, GAO recommended the FTC conduct more retrospective analyses of past mergers. For a discussion of merger retrospectives, see U.S. GOV'T ACCOUNTABILITY OFFICE, ENERGY MARKETS: ANALYSIS OF MORE PAST MERGERS COULD ENHANCE FEDERAL TRADE COMMISSION'S EFFORTS TO MAINTAIN COMPETITION IN THE PETROLEUM INDUSTRY (2008); A REPORT BY FEDERAL TRADE COMM'S CHAIRMAN WILLIAM E. KOVACIC, THE

mergers of Valero Energy with Ultramar Diamond Shamrock and Valero Energy with Premcor were associated with estimated average price increases of about one cent per gallon each; GAO also found that the merger of Phillips Petroleum with Conoco, was associated with an estimated average decrease in wholesale gasoline prices (across cities affected by the merger) of nearly 2 cents per gallon.[228] GAO could not find statistically significant results on the price of gasoline for the other four mergers. GAO concluded that "[a]dditional analysis would be needed to explain the price effects."[229] This GAO report received much less attention from politicians, perhaps because its findings do not support more aggressive merger enforcement. The FTC's criticism of the earlier report apparently led the GAO to be more cautious in its later report, and have helped limit the political and practical influence of GAO's earlier report.[230]

4. Researching the Effects of Zone Pricing and Redlining

i. Commission Concerns and Congressional Challenges

As discussed earlier, the Commission's investigation of the Exxon-Mobil merger identified two practices—zone pricing and redlining—that some congressmembers and State Attorneys General would subsequently argue raised the price of retail gasoline. While every driver knows that the price of gasoline, even of the same brand, can vary substantially within limited geographic areas, little research existed to determine how and whether the distribution practices of the integrated petroleum firms affect price and consumer welfare.

In its review of the Exxon/Mobil merger, the Commission identified "zone pricing" as an impediment to new entry or price competition.[231] The Commission found that the dealer tank wagon price (sale of wholesale

FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY 149–52 (2009).

228. 2009 GAO REPORT, *supra* note 227, at 9 tbl.1 (presenting a summary of the mergers analyzed and estimated effect on wholesale gasoline prices).

229. U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHLIGHTS OF GAO-09-659 (2009), http://www.gao.gov/assets/300/290911.pdf. The FTC staff's retrospective analysis of the Valero/Premcor merger is discussed in Louis Silvia & Chris Taylor, *Petroleum Mergers in the Northeast United State*s 2 (FTC Bureau of Economics, Working Paper No. 300, Apr. 2010), http://www.ftc.gov/be/workpapers/ wp300.pdf.

230. The authors spoke with GAO during GAO's design of its second report.

231. Federal Trade Comm'n, Analysis of Proposed Consent Order to Aid Public Comment, *In re* Exxon Corp. and Mobil Corp. 5–8 (Nov. 30, 1999), *available at* http://www.ftc.gov/os/1999/11/ exxonmobilana.pdf. Additional research by the staff indicated that zone pricing did not always deter significant entry. See Letter from William E. Kovacic, Comm'r, FTC, to Sen. Arlen Spector 4–5 (Mar. 8, 2006), *reprinted in S. Hrg 109-939, Consolidation in the Energy Industry: Raising Prices at the Pump?, Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 2d Sess. 50–51 (2006).

gasoline to open dealers and lessee dealers) was determined on a location by location basis, and it "take[s] account of the competitive conditions faced by particular stations or groups of stations" in the geographic "zone."[232] Dealer-tank wagon prices were set by "monitoring the retail prices" of competitors and adjusted "to take advantage of higher prices in some neighborhoods, without having to raise price throughout a metropolitan area as a whole."[233] According to the Commission, "[c]ompetitors set their prices on the basis of their competitors' prices, rather than on the basis of their own costs," which is an "earmark of oligopolistic market behavior."[234] Thus, firms "have some ability to raise their prices profitably."[235] While the Commission appeared to recognize the use of zone pricing as a unilateral practice, it suggested that in markets with a small number of competitors, this "interdependent pricing" could lead to higher prices and believed pricing in these markets might be considered as coordinated.[236]

The Commission appeared to retreat from its concerns about zone pricing in the Western States Gasoline Price Investigation. The Commission did not find any evidence of coordination by refiners in their use of price zones or in the zones' geographic locations or dimensions. There did appear to be some dispute—not clearly articulated in their public statements—between the five Commissioners about whether the practice of "redlining" should be challenged as an anticompetitive vertical restraint. (While zone pricing has vertical effects it is not clearly a vertical agreement, as the refiners unilaterally determine the price at which they supply wholesale gasoline to their distributors.) As Commissioner Thompson identified in his concurring statement to close the investigation:

> Site-specific redlining is a disconcerting pricing practice that creates de facto territorial restrictions on jobbers. This type of restriction can limit the ability of independent jobbers to supply wholesale gasoline to those areas that demand it most, for example, California's highest priced wholesale and retail markets. Such artificial restraints can forestall

232. *Id*. at 5–6.

233. *Id*. at 6.

234. *Id*. This sounds nefarious, but it is not, as most markets - those involving products with some differentiation - should exhibit this behavior. Where products are differentiated—and gasoline is a differentiated product (e.g., differences in brand, quality characteristics, service, location of service stations)—firms' pricing function includes the prices charged by (or output of) competitors. *See, e.g.*, DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 202–05 (4th ed. 2005); WALTER NICHOLSON, MICROECONOMIC THEORY BASIC PRINCIPLES AND EXTENSIONS 652–57 (6th ed. 1994).

235. *Id*.

236. *Id*. at 6–7.

> natural market forces from lowering the high prices in these local markets.[237]

But, Commissioner Thompson did not believe the staff's investigation had identified sufficient evidence to prove that redlining raised the price of gasoline, and voted to close the Commission's investigation.[238] The closing statement of the other three voting Commissioners also highlighted the difficulty of challenging a distribution practice that, when adopted by each refiner unilaterally, would require a showing of actual or prospective consumer harm.[239] Their suggestion—like Commissioner Thompson's—that "the investigation did not uncover any evidence of conduct . . . that would, on balance, result in likely consumer harm sufficient to establish an antitrust violation"[240] had the perverse effect of focusing interested Senators on perceived deficiencies in the antitrust laws—a requirement of horizontal conspiracy among refiners or a requirement that the Commission show actual harm to competition—that they believed limited the Commission's ability to attack redlining as anticompetitive.

The Commission's discussion of the possible negative effects of zone pricing and redlining in the Exxon/Mobil Analysis to Aid Public Comment[241] suggested to some legislators and State Attorneys General that such conduct was anticompetitive and thus *should* violate the antitrust laws, even if new legislation were required to reach this practice. Senator Wyden, characterizing the Commission's investigation as finding that "redlining was used to discourage competition and raise prices while providing no benefit to the consumer," and identifying zone pricing as allowing oil companies to "price[] . . . as high as the market would bear," called for changes to the FTC Act and for statutory changes to the Sherman and Clayton Act that would bar certain unilateral conduct in highly concentrated markets.[242] Wyden proposed that "in addition to collusion, the

237. See Federal Trade Comm'n, Concurring Statement of Commissioner Mozelle W. Thompson, Western States Gasoline Pricing, File No. 981-0187 (May 7, 2001), *available at* http://www.ftc.gov/os/2001/05/wsgpithompson.htm.

238. *Id*.

239. *See* Federal Trade Comm'n, Sheila F. Anthony, Orson Swindle & Thomas B. Leary, Comm'rs, Statement Concerning Western States Gasoline Pricing Investigation, File No. 981-0187 (May 7, 2001), *available at* http://www.ftc.gov/os/2001/05/wsgpiswindle.htm. Chairman Robert Pitofsky did not participate in the final vote on this matter.

240. *Id*.

241. Federal Trade Comm'n, Analysis of Proposed Consent Order to Aid Public Comment, *In re* Exxon Corp. and Mobil Corp. 5–8 (Nov. 30, 1999), *available at* http://www.ftc.gov/os/1999/11/exxonmobilana.pdf.

242. *Gas Prices: How Are They Really Set?*, *supra* note 162, at 85–86 (testimony of Sen. Ron

statute be broadened to bar anti-competitive practices by a single company where the market is concentrated, where you have four or fewer players controlling a significant majority of the market."[243] This standard would prevent "a company tr[ying] to squeeze an independent jobber out of a market by telling branded stores what gas they can or can't buy."[244] Wyden also called for the FTC to set up "consumer watch zones in . . . concentrated markets." "In these consumer watch zones, when oil companies employ anti-competitive practices like redlining [and] zone pricing . . . the burden of proof should shift onto them to prove that those practices are not harming consumers."[245] Connecticut Attorney General Blumenthal recommended that Congress "ban . . . zone pricing" and to amend the Robinson-Patman Act and Petroleum Marketing Practices Act to prohibit price discrimination based on location of stations.[246] California's Senior Assistant Attorney General for Antitrust suggested that zone pricing was responsible for the "rockets and feathers pricing pattern"—retail gasoline pricing that was quickly responsive to increases in the price of crude oil, but sticky in the face of crude oil price decreases.[247]

Wyden).

243. *Id*. at 86.

244. *Id*.

245. *Id*.

246. *Id*. at 91 (testimony of Richard Blumenthal, Att'y Gen. of Conn.).

247. *Id*. at 96 (testimony of Tom Greene, Senior Att'y Gen. for Antitrust of Cal.). The economic literature examining this perceived asymmetric response of downstream gasoline prices (either at the wholesale or retail level) to changes in upstream prices (either at the crude oil or wholesale gasoline level) produces mixed results, and may be a function of the econometric model chosen, data, how daily or weekly data are aggregated for the analysis, and whether the price is for branded or unbranded gasoline. For a summary of this economic literature, see JOHN GEWEKE, ISSUES IN THE ROCKETS AND FEATHERS GASOLINE PRICE LITERATURE: REPORT TO THE FEDERAL TRADE COMMISSION (2004), *available at* http://www.ftc.gov/bc/gasconf/comments2/gewecke2.pdf (skeptical that the economic literature is supportive of a claim of asymmetric response). *See also* Matthew Chesnes, *Asymmetric Pass-Through in U.S. Gasoline Prices* (Bureau of Economics Working Paper No. 302, June 2010), *available at* http://www.ftc.gov/be/workpapers/wp302.pdf (finding an asymmetric response, although the extent of the asymmetry differs across various factors). The FTC's economists have also studied more general perceptions of cycling behavior in retail gasoline prices—large, quick increases followed by smaller and slower price declines—and found that consumers benefit. Paul Zimmerman, John M. Yun & Christopher Taylor, *Edgeworth Price Cycles in Gasoline: Evidence from the U.S.* (Bureau of Economics Working Paper No. 303, May 2011), *available at* http://www.ftc.gov/be/workpapers/wp303.pdf (finding instances of cycling behavior, making consumers better off on average, as cycling lowers average prices by one cent per gallon, and that such instances of cycling behavior are consistent with a form of retail price wars). Additional work by the FTC's economists suggest that existing theories used to explain retail gasoline pricing are deficient, and that the retail gasoline market is very dynamic, with substantial heterogeneity in pricing behavior, significant changes in retail margins and markups, and with retail stations relative pricing position (against competitors) not static. Daniel Hoskin, Robert McMillan & Christopher Taylor, *Retail Gasoline Pricing: What Do We Know?* (Bureau of Economics Working Paper No. 290, Feb. 2008), *available at* http://www.ftc.gov/be/

ii. FTC Research Shows Consumer Benefits of Zone Pricing and Redlining

The Clinton FTC was more concerned about the potential for certain distribution practices and vertical agreements to be anticompetitive[248] than the Bush FTC, but there was little empirical or theoretical basis for the concern that zone pricing and redlining would necessarily lead to higher prices. In fact, the economists who testified at Senator Levin's "gas price" hearings suggested a prohibition on these practices would likely lead to higher prices, not lower prices.[249]

Concerned that bad economics and limited factual understanding of how distribution markets worked drove the policy proposals of Senators Wyden and Levin, the Commission's economists undertook additional research and conducted experimental analyses to determine the potential effects of zone pricing and other vertical restrictions. This additional research suggested that zone pricing and related vertical restrictions are, under likely conditions, pro-competitive or efficiency enhancing.[250] Neither economic principles nor empirical evidence provides a basis for a presumption that these practices raise retail gasoline prices.[251] Redlining allows refiners to make sure that jobbers serve rural locations instead of diverting the gas they buy to locations in more accessible areas.[252] The Commission, in contrast to the arguments of certain congressional leaders and state officials, concluded that "zone pricing may provide branded refiners the flexibility to meet localized competition, thus resulting in lower prices than might otherwise occur."[253] The large petroleum firms' recent

workpapers/wp290.pdf.

248. For a summary of the legal and economic analysis of vertical restrictions, see James Cooper, et al., *Vertical Restrictions and Antitrust Policy: What About the Evidence*, 1 COMPETITION POL'Y INT'L 45 (2005).

249. *Id*. at 112–18 (testimony of Justine S. Hastings, Assistant Prof. of Econ. at Dartmouth College, Hanover, N.H., and R. Preston McAfee, Prof. of Econ. at Univ. of Tex., Austin).

250. *See* David Meyer & Jeffrey Fisher, *The Economics of Price Zones and Territorial Restrictions in Gasoline Marketing* 33–34 (FTC Bureau of Economics, Working Paper No. 271, Mar. 2004), *available at* http://www.ftc.gov/be/workpapers/wp271.pdf.

251. *Id*.

252. *Id*.

253. FTC, GASOLINE PRICE CHANGES, *supra* note 3, at 127. *See also* Cary A. Deck & Bart J. Wilson, *Experimental Gasoline Markets* (FTC Bureau of Economics Working Paper No. 263, Aug. 2003), *available at* http://www.ftc.gov/be/workpapers/ wp263.pdf. Deck and Wilson conducted an experimental economics study of zone pricing in a laboratory environment with two types of geographic retail areas—isolated areas served by a single station and an area served by a cluster of four stations. They found that when zone pricing was banned, consumers in the clustered area paid higher prices than when zone pricing was permitted, and that consumers in isolated areas paid the same prices whether or not zone pricing was allowed.

exit from the ownership of downstream retail assets has tempered the interest in the effects of these practices.[254]

E. INVESTIGATION OF UNILATERAL OUTPUT DECISIONS

Between 2001 and 2004, the Commission generally resisted opening investigations into unilateral conduct by petroleum firms because it believed any such unilateral activity was not likely prohibited by the antitrust laws. But it was not completely successful. Because of Congress's continuing interest in the price of gasoline and the likelihood of a confirmation fight for Chairman Muris's potential successor, in March 2004 the Commission began a significant investigation into Shell Oil Products US ("Shell") decision to close its Bakersfield refinery. The California Attorney General's office and senators from states supplied by California refineries had pressed the Commission to open an investigation in Shell's decision to shut, rather than sell, its Bakersfield refinery.[255]

The investigation was "thorough and exhaustive":

> Commission attorneys, economists, and other staff spent considerable time on this investigation. The staff obtained confidential information—in the form of documents, investigational hearings, and interviews, from representatives of Shell and other refiners of gasoline that meets standards promulgated by the California Air Resources Board—regarding refinery output plans, crude supply options, and communications regarding the supply of refined products to California. The staff also interviewed and obtained sensitive trade secret and business information from crude oil producers related to negotiations and communications with Shell regarding crude supply affecting the

254. *See* FTC, GASOLINE PRICE CHANGES, *supra* note 3, at 124–25. For additional analysis of the effect of vertical integration in the petroleum industry, see Nathan E. Wilson, *Local Market Structure and Strategic Organizational Form Choices: Evidence from Gasoline Stations* (Bureau of Economics Working Paper No. 311, Mar. 2012), *available at* http://www.ftc.gov/be/workpapers/wp311.pdf; Nathan E. Wilson, *The Impact of Vertical Contracting Behavior: Evidence from Gasoline Stations* (Bureau of Economics Working Paper No. 310, Jan. 2012), *available at* http://www.ftc.gov/be/workpapers/wp310.pdf (vertical separation is associated with higher gasoline prices).

255. The strongest concerns were raised by the California Attorney General's Office, and Senators Barbara Boxer (Ca.) and Ron Wyden (Or.). Nelson Antosh, *Refinery Closing Questioned/FTC Examines Shell's shutdown of California Plant*, HOUS. CHRON., July 8, 2004; Press Release of U.S. Senator Barbara Boxer, Boxer Pleased FTC Investigating Closure of Shell Oil Bakersfield Refinery (July 8, 2004), *available at* http://boxer.senate.gov/en/press/releases/070804.cfm; Press Release of U.S. Senator Barbara Boxer, Boxer to Meet with Bush FTC Chairman Nominee (May 14, 2004), *available at* http://boxer.senate.gov/en/press/releases/051404a.cfms (describing March 2004 meeting with Chairman Muris about gasoline prices in California). Senators Boxer and Wyden actively opposed Deborah Majoras's selection, by President Bush, to replace Chairman Muris. Caroline Mayer, *Nominee to Head FTC Plans Hard Look at Gasoline Prices*, WASH. POST, June 3, 2004, at E5.

> Bakersfield refinery operations. In order to assess the bona fides of Shell's offer to sell the refinery, the staff interviewed companies that expressed interest in acquiring it. Finally, the staff analyzed a substantial volume of sensitive financial information from Shell relating to the operation of the Bakersfield refinery and reviewed information from California government agencies relating to past and projected crude production levels.[256]

On May 25, 2005, the Commission announced it had closed the investigation, "unanimously conclud[ing] that there [was] no basis under the antitrust laws for challenging the closing of the refinery" and that there was "strong evidentiary corroboration of Shell's stated reasons for closing the refinery."[257]

VI. 2005 TO 2011: CONGRESSIONAL PRESSURE CONTINUES AS PRICES CLIMB

The dramatic, short term price effects of Hurricanes Katrina and Rita in the fall of 2005 and the continued, steady increase in the price of gasoline and record high oil company profits encouraged continued congressional efforts to direct the FTC's law enforcement agenda during President Bush's second term and President Obama's first. For the most part, the Commission successfully resisted this pressure for ill-advised challenges to petroleum firm conduct. Nevertheless, the agency's manipulation rule is a potentially dangerous departure from this success.

A. THE 2005 MANIPULATION AND PRICE GOUGING INVESTIGATION

In 2005, pursuant to a statutory directive[258]—not a congressional member's request—the Commission undertook a massive study of the petroleum industry's production and distribution infrastructure and output

256. Statement of the Federal Trade Commission Concerning Shell Oil Company 1, FTC File No. 041-0087, *available at* http://www.ftc.gov/os/caselist/0410087/050525stmnt0410087.pdf.

257. *Id*. at 2. Shell did not close the refinery; it was purchased by a subsidiary of Flying J. Inc. *Id*. at 1. The refinery has experienced continuing financial distress. *See* John Cox, *Refinery May Face Uphill Climb to Resuming Operations*, BAKERSFIELD CALIFORNIAN, Jan. 17, 2012, *available at* http://www.bakersfield.com/news/business/economy/x2117244421/Refinery-may-face-uphill-climb-to-resuming-operations; *Flying J to Sell Bakersfield Refinery to Alon Energy USA*, FLEET OWNER, Feb. 16, 2010, *available at* http://fleetowner.com/fuel_economy/archive/flyingj-bakersfield-refinery-0216.

258. Section 1809 of the Energy Policy Act of 2005 required the Commission to "conduct an investigation to determine if the price of gasoline is being artificially manipulated by reducing refinery capacity or by any other form of market manipulation or price gouging practices." Energy Policy Act of 2005, Pub. L. No. 109-58, § 1809, 119 Stat. 594, 1125–26 [hereinafter Energy Policy Act].

decisions. The Commission investigated, among other concerns, whether

> refiners underinvested in new refinery capacity to keep supply tight relative to demand and thereby drive up prices, whether firms manipulated spot prices to adversely affect the flow of imports into certain parts of the United States, and whether control of certain infrastructure assets permitted manipulation of the prices of futures contracts.[259]

The FTC concluded that "the evidence collected in this investigation indicated that firms behaved competitively" in operating their refinery assets and there was no evidence suggesting that "expansion decisions resulted from refineries, either unilaterally or in concert, attempting to acquire or exercise market power."[260] The FTC found no evidence that "oil companies reduced inventory in order to manipulate prices or exacerbate the effects of price spikes due to supply disruptions."[261] Further, there was "no evidence that companies export product from the United States in order to raise domestic prices" and no "suggest[ion] that pipeline companies made rate or expansion decisions to manipulate gasoline prices.[262] Nor did the evidence "reveal a situation that might allow one firm (or a small collusive group) to manipulate gasoline futures prices"[263] and "the evidence did not support a theory that firms used published bulk spot prices to manipulate prices."[264]

The Commission similarly undertook a congressionally mandated investigation into reports of price gouging and price manipulation after the destruction and supply disruptions caused by Hurricanes Katrina and Rita.[265] The FTC found some evidence of price gouging, *as defined by the statute*, but concluded that almost all such instances could be explained by market forces and suggested the statutory definition of price gouging was insufficient to identify conduct that did not reflect purely market forces.[266]

259. FTC, INVESTIGATION OF GASOLINE PRICE MANIPULATION AND POST-KATRINA GASOLINE INCREASES ii (2006) [hereinafter FTC HURRICANE REPORT], *available at* http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf.

260. *Id*. at vi–vii.

261. *Id*. at viii.

262. *Id*. at vii.

263. *Id*. at viii.

264. *Id*.

265. Section 632 of the Commission's appropriations legislation for fiscal 2006, Congress directed the Commission to investigate nationwide gasoline prices and possible price gouging in the aftermath of Hurricane Katrina. Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, § 632, 119 Stat. 2290, 2344–45 (2005).

266. FTC HURRICANE REPORT, *supra* note 259, at viii–x.

The political climate towards the petroleum industry was highly negatively charged during the FTC's investigation, and, to its credit, the Commission withstood strong political pressures to identify anticompetitive conduct. In fact, the Commission's findings suggest Congress' request led to a significant diversion of resources—the inquiry found no anticompetitive practices. The industry operated aggressively, without any intent to manipulate prices, in order to address the significant supply disruptions the Hurricanes caused.

B. PRICE GOUGING LEGISLATION

Because of the Commission's recent research efforts, Congress was less able to allege credibly that merger enforcement efforts had led to higher prices, or that specific practices—such as zone pricing and redlining—were anticompetitive. Nevertheless, because high prices remained a concern, some members of Congress began to focus on "price-gouging" legislation as a means to address perceived anticompetitive problems.[267] In June 2005, a bill was introduced to prohibit the retail sale of gasoline in excess of an index price, multiplied by "twice the rate of inflation" and "as adjusted according to [a] regional price structure index" to be developed.[268] Multiple bills regarding pricing practices were introduced as the effects of supply disruptions caused first by Hurricane Katrina and then Hurricane Rita rippled through the petroleum distribution system. During that fall, congressional members introduced bills in support of a regulation to prohibit companies from raising wholesale gasoline prices more than once every twenty-four hours;[269] to make unlawful, during an emergency, sales of gasoline at a price 10 percent or more than the average price of gasoline within the previous thirty days, if the price increase was not related to additional costs related to the emergency or consistent with national or international trends;[270] to prohibit, for 180 days after a major disaster, the sale of gasoline at an "unconscionably excessive price"[271] or where the seller is taking "unfair advantage of [emergency]

267. *See, e.g.*, Federal Energy Price Protection Act of 2006, H.R. 5253, 109th Cong. § 2 (2006).

268. *See Gross Overcharging Undermines Gasoline Economics Act, H.R. 2944*, 109th Cong. § 4 (2005).

269. Gas Price Relief and Oil Conservation Act of 2005, H.R. 3646, 109th Cong. 1st Sess. (Sept. 2, 2005).

270. Gasoline Price Gouging Act of 2005, H.R. 3782, 109th Cong. 1st Sess. (Sept. 14, 2005).

271. Price Gouging Act of 2005, S. 1744, 109th Cong., 1st Sess. (Sept. 21, 2005)

circumstances to increase prices unreasonably;[272] or to prohibit "price gouging" pursuant to a rule to be developed by the FTC.[273]

The Commission resisted these entreaties to expand its law enforcement jurisdiction, stating such efforts would be "unusual" in an economy where "producers are generally free to determine their own prices and buyers are free to adjust their purchases."[274] According to the Commission, "price gouging laws that have the effect of controlling prices likely will do consumers more harm than good."[275] The Commission recognized that

> Prices play a critical role in our economy: they signal producers to increase or decrease supply, and they also signal consumers to increase or decrease demand. In a period of shortage—particularly with a product, like gasoline, that can be sold in many markets around the world—higher prices create incentives for suppliers to send more product into the market, while also creating incentives for consumers to use less of the product. For instance, sharp increases in the price of gasoline can help curtail the panic buying and "topping off" practices that cause retailers to run out of gasoline. In addition, higher gasoline prices in the United States have resulted in the shipment of substantial additional supplies of European gasoline to the United States. If price gouging laws distort these natural market signals, markets may not function well and consumers will be worse off. *Thus, under these circumstances, sound economic principles and jurisprudence suggest a seller's independent decision to increase price is— and should be—outside the purview of the law.*[276]

The Commission told Congress that it "remain[ed] persuaded that federal price gouging legislation would unnecessarily hurt consumers."[277] FTC Chairman Deborah Majoras testified that "the omission of a federal price gouging law . . . reflects a sound policy that [Congress] should not be

272. Federa1 Response to Energy Emergencies Act of 2005, H.R. 3936, 109th Cong., 1st Sess. (Sept. 28, 2005)

273. Gasoline Affordability and Security Act, S. 1868, 109th Cong. 1st Sess. (October 7, 2005).

274. *Market Forces, Competitive Dynamics and Gasoline Prices: FTC Initiatives to Protect Competitive Markets, Before the S. Comm. on Commerce, Sci. and Trans., and the S. Comm. on Energy and Natural Res.*, 108th Cong. 5 (2005) (prepared statement of the FTC), *available at* http://www.ftc.gov/os/testimony/051109gaspricestest3.pdf.

275. *Id*. at 7.

276. *Id*. at 7 (emphasis added).

277. *Id*. at 9.

quick to reverse"[278] and that she worried a law "would make things worse for consumers in the long run."[279]

The Commission continued to resist later, similar efforts by Congress to expand the FTC's law enforcement jurisdiction to include a prohibition on price gouging, arguing that such a prohibition would incorporate into the distribution system the negative element of price regulation—a distortion of market participants' response to price signals—without any offsetting benefit.[280]

The FTC's successful effort to resist congressional efforts to expand its enforcement jurisdiction into pricing practices should be applauded; very few agencies fight to avoid enhanced authority. The Commission recognized that such authority could not, in fact, be used wisely. In addition to recognizing the negative effects on consumer welfare, the Commission clearly recognized that the enhanced authority could only further divert scarce resources to efforts unlikely to help consumers. Although not stated explicitly by the Commission, there was a clear sense that the authority to pursue instances of price-gouging, however defined, would inevitably result in localized, trivial cases.[281]

278. Comments of FTC Chairman Deborah Majoras, Transcript of Hearing Before the S. Comm. on Energy and Natural Res., 108th Cong. 2d. Sess. (2005), 2005 WL 2995637, at *117.

279. *Id*. at 126. For an additional discussion of the effects of price gouging legislation, see David W. Meyer, *The Virtues of "Price Gouging,"* http://www.ftc.gov/be/meyergouging.pdf (last visited May 22, 2012); COUNCIL OF ECON. ADVISORS, A WHITE PAPER ON THE ECONOMIC CONSEQUENCES OF GASOLINE PRICE GOUGING LEGISLATION (June 20, 2007), *available at* http://georgewbush-whitehouse.archives.gov/cea/Price_Gouging_WP_062007.html.

280. *See Petroleum Industry Consolidation, Before the Joint Econ. Comm.*, 110th Cong. 23 (2007) (prepared statement of Dr. Michael A. Salinger, Dir., FTC, Bureau of Economics), *available at* http://www.ftc.gov/os/testimony/070523PetroleumIndustryConsolidation.pdf; *FTC Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases Hearing, Before the S. Comm. on Commerce, Sci. and Transp.*, 109th Cong. 18–20 (2006) (prepared statement of the FTC), *available at* http://www.ftc.gov/os/testimony/0510243CommissionTestimonyConcerningGasolinePrices05232006Senate.pdf.

281. Recent gasoline price-gouging cases pursued by state attorney generals support this conclusion. *See, e.g.*, Florida Attorney General's Office Press Release: McCollum, Bronson Announce Groundbreaking Settlement in Morgan Stanley Price Gouging Investigation (July 13, 2009), *available at* http://myfloridalegal.com/852562220065EE67.nsf/0/7FA0F480C13DC586852575F200696B4B?Open&Highlight=0,transmontaigne (restitution of $650,000); Florida Attorney General's Office Press Release: Attorney General Settles Hurricane Price Gouging Case Against Gasoline Retailer (Feb. 10, 2009), *available at* http://www.myfloridalegal.com/newsrel.nsf/newsreleases/8BA9A9887133EDDB852575590048D7DF (restitution of approximately $42,000, for sales over a nine-day period); Florida Attorney General's Office Press Release: Quincy Station Gives $2,000 to Red Cross to Settle Price Gouging Allegations (Oct. 3, 2008) (increased profits of approximately $1,500 during a three day period); Illinois Attorney General's Office Press Release: Madigan: 18 Gas Stations to Settle, Make Payments to Charity in Wake of Gas Price Investigation (Jan. 13. 2006), *available at* http://www.ag.state.il.us/pressroom/2006_01/20060113b.html (payment of $1,000 by each station to

In late 2007, Congress gave the Commission authority to prohibit price manipulation in wholesale gasoline markets.[282] The Commission's manipulation authority is discussed below.

American Red Cross); Office of the Kentucky Attorney General Press Release: Attorney General Conway and Governor Beshear Announce Results of Price-Gouging Investigation (Jan. 22, 2009), *available at* http://migration.kentucky.gov/Newsroom/ag/pricegouginginvestigationresults.htm (settlement involving eight retail locations, $107,500 in fines); Michigan Attorney General's Office Press Release, 11 Gas Stations Enter Compliance Agreements Resulting From Gas Gouging Complaints (June 26, 2009), *available at* http://www.michigan.gov/ag/0,4534,7-164-46849_47203-217351--,00.html (compliance agreements with eleven gas stations); Office of Missouri Attorney General Press Release: Nixon Investigation into Post-Katrina Gas Pricing Leads to Legal Action Against 10 Gas Stations (Sept. 28, 2005), *available at* http://ago.mo.gov/newsreleases/2005/092805.htm (payment of $6,750 to local school fund by owners of nine retail gas stations); Office of Missouri Attorney General Press Release: Ongoing Investigation into Reports of Price Gouging in Southwest Missouri Leads to Lawsuits and Settlements (Feb. 15, 2007) (restitution of $2,886); Office of the New York Attorney General Press Release: Westchester County Gas Station Guilty of Price Gouging after Hurricane Katrina (Jan. 19, 2007), *available at* http://www.ag.ny.gov/press-release/westchester-county-gas-station-guilty-price-gouging-after-hurricane-katrina (payment of $2,000 in costs and penalties); Office of the New York Attorney General Press Release: Fifteen Gas Stations Fined in Hurricane Price Gouging Probe (Dec. 19, 2005) (fifteen stations to pay fines totaling $63,500); North Carolina Department of Justice Press Release: Gas Stations in Troy, Yadkinville To Pay For Price Gouging (Oct. 23, 2009) ($71,000 in consumer refunds, energy assistance funds and civil penalties from 14 gas stations); Office of the Attorney General Press Release: State of Tennessee, Attorney General Resolves Gasoline Pricing Enforcement Action with Major Knoxville-Area Retailer (Apr. 26, 2010), *available at* http://www.tn.gov/attorneygeneral/press/2010/story/pr10-16.pdf ($57,000 payment, including consumer refunds, for price increases at 33 retail locations); Office of the Attorney General Press Release: State of Tennessee, Attorney General Settles With 27 Stations Resolving Allegations of Hurricane Ike Price Gouging and Sues Major Knoxville-Area Retailer (Apr. 16, 2009), *available at* http://www.tn.gov/attorneygeneral/press/2009/story/pr11.pdf (restitution of $73,500); *S.C. AG: Law Helped Deter Gas Price Gouging*, CSP DAILY NEWS, July 9, 2009, *available at* http://www.cspnet.com/news/fuels/articles/sc-ag-law-helped-deter-gas-price-gouging (four settlements totaling $6,500, donated to the American Red Cross); Commonwealth of Virginia, Office of the Attorney General, Opinions of the Attorney General and Report to the Governor of Virginia viii (2009), *available at* http://www.oag.state.va.us/Opinions%20and%20Legal%20Resources/Annual_Reports/2009%20Annual%20Report.pdf (noting eight civil enforcement actions under the Post-Disaster Anti-Price Gouging Act; companies to provide restitution); Commonwealth of Virginia, Office of the Attorney General, Opinions of the Attorney General and Report to the Governor of Virginia ix (2006)\, *available at* http://www.oag.state.va.us/Opinions%20and%20Legal%20Resources/Annual_Reports/2006%20Annual%20Report_secured.pdf (noting three civil enforcement actions under the Post-Disaster Anti-Price Gouging Act). The Commission's own investigation of price gouging after Hurricane Katrina found that most of the instances of price gouging (as defined in the statute) were by "individuals [who were] relatively unsophisticated, running their business out of their glass booth." Comments of FTC Chairman Deborah Majoras, Transcript of Hearing Before the S. Commerce, Sci, and Transp., 109th Cong. 1st Sess. (2006), 2006 WL 1435247, at *64.

282. Energy Independence and Security Act of 2007, 42 U.S.C. § 17301 (2006).

C. SUBSEQUENT PRICE INVESTIGATIONS AND MERGER ENFORCEMENT

Subsequent to its congressionally mandated investigation, the Commission undertook two other industry and regional investigations into gasoline prices.[283] The first, a response to then President Bush's April 2006 directive asking "the Department of Justice to work with the FTC and the Energy Department to conduct inquiries into illegal manipulation or cheating related to [then] current gasoline prices"[284] was conducted without imposing significant burden on petroleum firms. The FTC economic staff worked with the DOJ and the DOE's Energy Information Administration to investigate national gasoline price increases that began in Spring 2006 and continued through the summer. The Commission concluded that six factors likely explained the run-up in prices: (1) seasonal effects related to the increase in summer driving; (2) increases in the price of crude oil; (3) increases in the price of ethanol; (4) declines in the production of gasoline, due to refiners' transition to ethanol from other blending components; (5) persistent refinery damage from Hurricanes Katrina and Rita; and (6) unexpected refinery maintenance. The agency concluded that no further investigation was necessary.[285]

283. In addition to these investigations, the Commission staff has investigated, in response to congressional inquiries and their identification of pricing anomalies through the gasoline price monitoring project, gasoline prices in a number of local areas, including Cape Cod, western Massachusetts, Buffalo (NY), northern Vermont, as well as additional areas not identified. *See* FEDERAL TRADE COMM'N, REPORT ON ACTIVITIES IN THE OIL AND NATURAL GAS INDUSTRIES (Jan.–June 2011) [hereinafter FTC REPORT ON ACTIVITIES IN THE OIL AND NATURAL GAS INDUSTRIES, JAN.–JUNE 2011] *available at* http://www.ftc.gov/os/2011/06/1106semiannualenergyreport.pdf; FEDERAL TRADE COMM'N, REPORT ON ACTIVITIES IN THE OIL AND NATURAL GAS INDUSTRIES (July–Dec. 2010) *available at* http://www.ftc.gov/os/2010/12/1012energyreport.pdf; FEDERAL TRADE COMM'N, REPORT ON ACTIVITIES IN THE OIL AND NATURAL GAS INDUSTRIES (Jan.–June 2009), *available at* http://www.ftc.gov/os/2009/07/P082108semiannualenergy.pdf; FEDERAL TRADE COMM'N, REPORT ON ACTIVITIES IN THE OIL AND NATURAL GAS INDUSTRIES (July–Dec. 2008) [hereinafter FTC REPORT ON ACTIVITIES IN THE OIL AND NATURAL GAS INDUSTRIES, JULY–DEC. 2008], *available at* http://www.ftc.gov/os/2008/12/P082108semiannualenergy.pdf; FEDERAL TRADE COMM'N, REPORT ON ACTIVITIES IN THE OIL AND NATURAL GAS INDUSTRIES (June 2008) [hereinafter FTC REPORT ON ACTIVITIES IN THE OIL AND NATURAL GAS INDUSTRIES, JUNE 2008], *available at* http://www.ftc.gov/os/2008/06/P082108semiannenergyreport.pdf. These reports are provided to the Congressional Appropriations Committees, in accord with the direction of Congress that the FTC "keep the Committee apprised of findings made regarding fuel prices, as well as other planned activities and investigations regarding the oil and gas industries." FTC REPORT ON ACTIVITIES IN THE OIL AND NATURAL GAS INDUSTRIES, JAN.–JUNE 2011, *supra*.

284. President George W. Bush, Remarks to the Renewable Fuels Summit (Apr. 25, 2006), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/04/25/AR2006042500762.html.

285. FEDERAL TRADE COMM'N, REPORT ON SPRING/SUMMER 2006 NATIONWIDE GASOLINE PRICE INCREASES 25 (2006), *available at* http://www.ftc.gov/reports/gasprices06/P040101Gas06increase.pdf.

In 2007, after receiving congressional inquiries about differences in the price of gasoline across the states of the Pacific Northwest, the Commission opened an "intensive investigation" of gasoline and diesel fuel pricing in that region.[286] The investigation focused on the production and supply decisions of nineteen companies operating in the Pacific Northwest, and concluded a year later with neither an enforcement action nor significant public discussion of the agency's findings.[287] This investigation was, in part, in response to congressional inquiry—rather than statutory directive—and thus was a reversion to the Commission's earlier practice of expending substantial resources at the request of individual members of Congress. Nevertheless, its conclusion was consistent with the application of existing economic and legal analysis that recognized the efficiency justifications for production and supply decisions, and the limitations of using the antitrust laws to regulate such decisions.

With limited exceptions, the Commission continued to challenge petroleum mergers, accepting divestiture commitments (and in one case, access commitments) as sufficient to address any substantive concerns.[288] In one case, *FTC v. Foster*, the Commission unsuccessfully challenged a petroleum firm merger.[289] In *Foster*, the FTC sought to enjoin the acquisition of Giant Industries by Western Refining, alleging that the deal would reduce the bulk supply of gasoline to New Mexico. The court found that the FTC made a prima facie case under the Merger Guidelines, and shifted the burden to the defendants.[290] The defendants successfully rebutted the FTC's case by showing that there were many additional actual

286. FTC REPORT ON ACTIVITIES IN THE OIL AND NATURAL GAS INDUSTRIES, JUNE 2008, *supra* note 283, at 3–4 (summary of FTC enforcement actions). One transaction—Marathon Oil Company's proposed acquisition of CITGO Petroleum's light petroleum products terminals in various Ohio cities and CITGO's interest in the Inland Pipeline—was abandoned during the Commission's investigation. *Id.* at 3.

287. Letter from Richard C. Donohue, Acting Secretary, Federal Trade Comm'n, to Bilal Sayyed, on the Pacific Northwest Gasoline and Diesel Fuel Prices Investigation (Aug. 22, 2008), *available at* http://www.ftc.gov/os/closings/080822pacificnwexxonmobilclosingletter.pdf; FTC REPORT ON ACTIVITIES IN THE OIL AND NATURAL GAS INDUSTRIES, JULY–DEC. 2008, *supra* note 283, at 3–4.

288. *See FTC Merger Enforcement Actions in the Petroleum Industry Since 1981*, *supra* note 93 (compiling data regarding markets affected, theory of anti-competitive effects, HHI concentration, and FTC enforcement action for mergers using FTC complaints, orders, and analyses); *Market Forces, Competitive Dynamics, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets, Before the H. Subcomm. on Oversight and Investigations Comm. on Energy and Commerce*, 110th Cong. 4–9 (2007) (prepared statement of the FTC), *available at* http://www.ftc.gov/os/testimony/070522FTC_%20Initiatives_to_Protect_Competitive_Petroleum_Markets.pdf.

289. FTC v. Foster, No. 07-352, 2007 WL 1793441 (D.N.M. May 29, 2007).

290. *Id.* at *27–28.

or potential competitors in the market,[291] that these competitors could easily replace lost capacity resulting from the merger, and that market factors would prevent the defendants from increasing prices unilaterally.[292] The FTC's challenge was perhaps influenced by congressional criticism of past failures to challenge mergers.

D. MARKET MANIPULATION RULE

Congress gave the Commission the authority to prohibit manipulative conduct in oil markets in Section 811 of the Energy Independence and Security Act of 2007 ("EISA").[293] Section 811 of EISA states:

> It is unlawful for any person, directly or indirectly, to use or employ, in connection with the purchase or sale of crude oil[,] gasoline or petroleum distillates at wholesale, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Federal Trade Commission may prescribe as necessary or appropriate in the public interest or for the protection of United States citizens.[294]

The Commission was not required to prescribe a rule, but merely given the authority to do so.

Unwilling to conclude that a rule was unnecessary—and thereby to resist congressional involvement in its enforcement agenda—the Commission was also unwilling to adopt a rule that might insert it into the basic business decisions—e.g., production, supply, and pricing decisions—of petroleum firms despite the apparent interest of the law's sponsor.[295] After originally considering a more aggressive rule, the Commission ultimately moved towards a fraud based model—a model that respects the information aspects of market decisions and outcomes.

The Commission's efforts in the manipulation rulemaking illustrate our belief that, with respect to rationale antitrust enforcement and the role of congressional involvement, the current glass is half full. There is a respect for market forces and a recognition that the FTC should not substitute its judgment for that of firms making production, supply and distribution decisions— but the agency appears less willing now to resist politically driven congressional requests. We summarize the Commission's

291. *Id*. at *56.
292. *Id*. at *56–58.
293. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492.
294. § 811, 121 Stat. at 1723.
295. Letter from Maria Cantwell, Sen., Wash., to Jon Leibowitz, Chairman, FTC et al. 2–3 (May 20, 2009), *available at* http://www.ftc.gov/os/comments/marketmanipulation3/541354-00018.pdf.

development of the rule to illustrate its efforts to balance these competing pressures.

In its May 2008 Advance Notice of Proposed Rulemaking, the Commission sought comment on "the manner in which it should carry out its rulemaking responsibilities under Section 811" and whether it should adopt an approach similar to, or dependent on, the approaches of the CFTC, the Federal Energy Regulatory Commission ("FERC"), or the Securities and Exchange Commission ("SEC") for identifying and sanctioning prohibited manipulation.[296] The Commission identified a possible definition of market manipulation as:

> [K]nowingly using or employing, directly or indirectly, a manipulative or deceptive device or contrivance—in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale—for the purpose or with the effect of increasing the market price thereof relative to costs.[297]

This very broad definition of market manipulation arguably would have covered any activity that had the effect of increasing market price over costs, and the industry was concerned that normal supply and distribution decisions would fall within the coverage of this definition.[298] Although industry commentators did not believe any rule was needed, it advised that a rule, if promulgated, should require that a party have engaged in a deceptive or fraudulent act, with a specific intent to affect the market price for a covered product.[299] Other commentators also suggested the Commission, if it enacted a rule, take a similar fraud based approach and adhere to its traditional policy of not second-guessing the results of the competitive process and act only when that process was disrupted.[300]

The Commission appeared to agree with the industry's views and changed its approach substantially when it issued its Notice of Proposed

296. FTC, Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of the Energy Independence and Security Act of 2007, 73 Fed. Reg. 25614, 25620 (May 7, 2008) (to be codified at 16 C.F.R. pt. 317) [hereinafter Advance Notice].

297. *Id*.

298. American Petroleum Institute and National Petrochemical and Refiners Association, Comments Before the FTC, In re Market Manipulation Rulemaking, Project No. PO82900, at 16 (June 23, 2008), *available at* http://www.ftc.gov/os/comments/market manipulation/535819-00159.pdf.

299. *Id*. at 16–18.

300. Timothy J. Muris, Foundation Professor, George Mason University, and J. Howard Beales, III, Associate Professor of Strategic Management and Public Policy, George Washington University School of Business, Comment Before the FTC, In re Market Manipulation Rulemaking, Project No. P082900, at 2, 13 (July 7, 2008), *available at* http://www.ftc.gov/os/comments/marketmanipulation /535819-00170.pdf.

Rulemaking in August 2008. Importantly, it noted its agreement with many of the Advance Notice commentators that "the market is generally the best determiner of supply and demand decisions"[301] and announced that it "tentatively determin[ed] that promulgating a rule narrowly tailored to address fraudulent practices would be appropriate to ensure the objective of EISA is carried out."[302] The Proposed Rule was focused on preventing fraudulent conduct, and modeled on the SEC's prohibition on fraud, as encapsulated in SEC Rule 10b-5:

> It shall be unlawful for any person, directly or indirectly, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale, (a) to use or employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.[303]

In April 2009, the Commission issued a Revised Proposed Rule for comment that "retain[ed] the anti-fraud concept of SEC Rule 10b-5, but . . . [was] further tailored to wholesale petroleum markets."[304] As described in the Final Rule's Statement of Basis and Purpose, the differences the Commission noted as justifying the further refinement were the greater sophistication of market participants in the wholesale petroleum market, their better ability to engage in self protection, and the differences in the regulatory structure governing participation in wholesale petroleum markets and securities markets.[305] The Revised Proposed Rule stated:

> It shall be unlawful for any person, directly or indirectly, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale, to:
>
> (a) Knowingly engage in any act, practice or course of business—including the making of any untrue statement of material fact—that operates or would operate as a fraud or deceit upon any person; or

301. FTC, Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of the Energy Independence and Security Act of 2007, 73 Fed. Reg. 48,317, 48,327 (Aug. 19, 2008) (to be codified at 16 C.F.R. pt. 317) [hereinafter Proposed Rule].

302. *Id*. at 48,320.

303. *Id*. at 48,326.

304. FTC, Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of the Energy Independence and Security Act of 2007, 74 Fed. Reg. 18,304, 18,308 (Apr. 22, 2009) [hereafter Revised Proposed Rule].

305. FTC, Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of the Energy Independence and Security Act of 2007, 74 Fed. Reg. 40,686, 40,690 (Aug. 12, 2009) (to be codified at 16 C.F.R. pt. 317) [hereinafter Statement of Basis and Purpose].

> (b) Intentionally fail to state a material fact that under the circumstances renders a statement made by such person misleading, provided that such omission distorts or is likely to distort market conditions for any such product.[306]

Finally, in August 2009, the Commission issued the Final Rule in a form not materially different from the Revised Proposed Rule. Significantly, the prohibitions in the Final Rule were very different from the definition for market manipulation in the Commission's Advance Notice of Proposed Rulemaking. The rulemaking record makes clear that the Final Rule is not intended to reach decisions regarding production, supply, or distribution of covered products in the ordinary course of business when the company has a legitimate business or economic justification for its actions. In the Discussion of the Final Rule, the Commission "emphasize[d] that it d[id] not intend to regulate or otherwise second-guess market participants' legitimate supply and operational decision-making"[307] and that the Final Rule does not reach speculative activity or the unilateral exercise of market power.[308] The FTC noted that the Final Rule "does not cover . . . legitimate conduct undertaken in the ordinary course of business"[309] and does not require firms to "disclose price, volume, other data to individual market participants, or to the market at large."[310] Nor is the Final Rule intended to "imped[e] beneficial business behavior."[311] This market-oriented approach is consistent with the Commission's historic practice of not challenging, and suggesting it is not appropriate to challenge, a firm's independent decisions involving the production, sale, or distribution of petroleum products, absent a finding of illegally obtained market power.

While the Commission's final rule reflects its respect for market forces, it is not clear why a rule was required. As Commissioner Kovacic noted in his dissent to the Commission's decision to adopt the rule, "[t]he FTC's previous inquires have determined that price fluctuations for petroleum products result principally from market forces."[312] The failure to

306. Revised Proposed Rule, 74 Fed. Reg. at 18,328.
307. Statement of Basis and Purpose, 74 Fed. Reg. at 40,695 n.111.
308. *Id*. at 40,690 n.53.
309. *Id*. at 40,693.
310. *Id*. at 40,693 n.92.
311. *Id*. at 40,693.
312. William E. Kovacic, Commissioner, Federal Trade Comm'n, Dissenting Statement, Crude Oil Price Manipulation Rule Making, Project No. P082900, at 1 (Aug. 9, 2009), *available at* http://www.ftc.gov/os/2009/08/P082900mmr_kovacic.pdf. For a discussion of the law prohibiting manipulation in the securities, commodities and electricity markets, and the development of the FTC's

grant significant weight to these past findings, and to promulgate a rule that could be interpreted broadly by future Commissions, increases the scope for a return to more politicized enforcement. Commissioner Rosch, who supported the Commission's promulgation of the rule, appears to have reached this conclusion as well. In commenting on the Obama Administration's call for a further investigation of the industry, Commissioner Rosch noted Commissioner Kovacic's warning "that the rule could and would be perverted to serve political ends" and lamented that "those of us who voted for it did not heed his warning."[313] To date, however, the agency has not challenged any conduct as a violation of its market manipulation rule.[314]

VII. CONCLUSION

We have argued that the experience of the 1970s helped lead the FTC to exercise greater caution in responding to political criticism of the oil industry. Beginning with the approval of the oil mergers in the Reagan Administration, subject to divestitures, continuing with similar treatment of the large oil mergers in the Clinton Administration, and culminating in the proactive measures of the Bush Administration, the FTC has avoided the massive personal and budgetary expenditures that characterized the 1970s effort to remake the petroleum industry, and that threatened to reoccur, albeit on a smaller scale, at the turn-of-the-century. Moreover, the FTC's response over the last thirty years has been largely consistent with modern antitrust law, although applied tightly to oil companies. The manipulation rule of 2009 is the one major FTC action in recent years whose merits can not be defended under antitrust principles. Even with that rule, however, the FTC eliminated the potential damage that its original proposal would have caused.

Our argument implies, correctly we believe, that FTC leaders have considerable discretion in the agenda they pursue. Elsewhere one of us has argued, at greater length, that such discretion indeed exists at the FTC.[315]

manipulation rule, see Theodore A. Gebhard & James F. Mongoven, *Prohibiting Fraud and Deception in Wholesale Petroleum Markets: The New Federal Trade Commission Market Manipulation Rule*, 31 ENERGY L.J. 125 (2010); Timothy J. Muris & Maryanne Kane, *The FTC and Market Manipulation in Wholesale Petroleum Markets, in* 62 THE INSTITUTE ON OIL AND GAS LAW 173 (LexisNexis ed., 2010).

313. Rosch, *supra* note 5.

314. The FTC reports its activities in the oil and gas industry to Congress on a semi-annual basis, in the Report of the Federal Trade Commission on Activities in the Oil and Natural Gas Industries.

315. *See* Timothy J. Muris, *Commission Performance, Incentives, and Behaviour*, *in* THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOUR (Timothy J. Muris & Kenneth W. Clarkson eds., 1981) (arguing that the FTC was able to pursue its own

James Q. Wilson's classic *Bureaucracy*[316] provides further explanation of the considerable discretion FTC leaders possess. Wilson differentiates agencies by whether they have significant interest groups that monitor the agency daily and attempt to exert pressure on it through Congress. The FTC lacks such interest groups. Moreover, Wilson asks whether external observers can accurately and objectively measure the economic effects of the agency's inputs and outcomes.[317] Again the FTC is not, on a consistent basis, subject to such external scrutiny.

Agencies without these external pressures will have greater discretion to pursue their own enforcement agenda. That the FTC has exercised its discretion more wisely since the 1970s is yet another example of the benefits of experience as a guide to behavior.

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interests despite congressional opposition in the late 1970s); Timothy J. Muris, *Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control*, 94 J. POL. ECON. 884 (1986) (rebutting an earlier article's assertion that Congress has considerable influence over the FTC by noting the changes in the preferences of congressional members did not predict changes in FTC behavior).

316. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 329–32 (1989).

317. *Id*. at 76–79, 158–71.