Case Western Reserve Law Review

Volume 52 | Issue 1

2001

Robert Pitofsky: Public Servant and Scholar

Timothy J. Muris

ROBERT PITOFSKY: PUBLIC SERVANT AND SCHOLAR

Timothy J. Muris[†]

INTRODUCTION

Robert Pitofsky is one of the key Founding Fathers of the modern Federal Trade Commission ("FTC"). He was present at its creation, as principal author of the 1969 ABA Report on the Commission.[1] In that pivotal role, he crafted a vision for a revitalized agency that remains as relevant today as it was 30 years ago. The core of that vision is the recognition that consumer welfare is the agency's reason for being. Even more remarkably, over the next three decades, Bob, in his role as Director of the Bureau of Consumer Protection, Commissioner, and Chairman as well as scholar, worked to make that vision a reality. In that period of time, others have interpreted Bob's original vision in different ways, but it was altogether fitting that the composer himself return to show how the music should be played.

Bob and I are of like mind, but have not always agreed. Agreement, however, is not the best basis to evaluate a scholar or a Chairman. A more objective measure is whether he had a coherent, principled vision for the agency and was able to implement it. By this measure, Bob has been a resounding success. Today's Federal Trade Commission is the agency that Pitofsky and his ABA colleagues envisioned some 30 years ago, and he can take enormous credit for this accomplishment.

I. ABA REPORT: BLUEPRINT FOR THE FUTURE

Pitofsky's role in FTC history began in 1969 when he was Counsel to the ABA Commission to Study the FTC. The FTC then was at the most critical juncture of its history. The Nader Report had just

---

[†] Chairman, Federal Trade Commission. I wish to thank Teresa Schwartz, William Kovacic, Lee Peeler, and Lesley Fair for their assistance. The views expressed in this article are my own and do not necessarily reflect the views of the Commission or other Commissioners.

[1] COMM'N TO STUDY THE FED. TRADE COMM'N, ABA, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969) [hereinafter ABA REPORT].

been issued, lambasting the agency and characterizing its overall performance as "shockingly poor."[2] The ABA also found serious weaknesses throughout the FTC—poor leadership, lack of direction, aimless enforcement, and squandered resources. The fundamental question was whether the agency should be abolished or reformed.

The ABA Commission chose reform, but with a significant caveat: if the agency did not change fundamentally, and soon, it should be abolished. "Further temporizing is indefensible. Notwithstanding the great potential for the FTC in the field of antitrust and consumer protection, if change does not occur there will be no substantial purpose to be served by its continued existence . . . ."[3]

The *ABA Report* did much more than find fault; it offered solutions. It provided a blueprint for reform for both consumer protection and antitrust. For consumer protection, the *Report* prescribed vigorous law enforcement and a national role in developing consumer protection policy. More specifically, it recommended that the agency focus enforcement on serious consumer problems, especially fraud. The recommendations included:

Mount a more effective campaign against deceptive advertising;
Strengthen its remedies and reduce delays;
Provide industry guidance and incentives for compliance and self-regulation;
Undertake studies, issue reports, and make legislative recommendations directed at pressing consumer issues;
Work with state and local consumer protection agencies; and
Make consumer education part of the agency's mission.[4]

For competition, the *Report* prescribed that the Commission use its unique history and institutional advantages—those not available to the Department of Justice's Antitrust Division—to advance competition policy and enforcement. More specifically, the Report recommended that the agency:

Use the "full panoply" of its institutional tools to make competition policy—doing research, publishing studies, bringing cases, and making use of the intersection of competition policy and consumer protection authority;

---

[2] *See* EDWARD F. COX ET AL., THE CONSUMER AND THE FEDERAL TRADE COMMISSION 137 (1969) (critiquing the FTC and providing suggestions for institutional reform).

[3] ABA REPORT, *supra* note 1, at 3.

[4] *See id.* at 1-3.

Formulate national competition policy by using the administrative process to adjudicate cases; and
Make policy involving "unsettled" areas of the law.[5]

II. FROM SCHOLAR TO PUBLIC SERVANT

Shortly after the *ABA Report*, Bob Pitofsky became Director of the Bureau of Consumer Protection ("BCP"). Creating a blueprint for fundamental change was one thing, implementing it another. From my government career and my brief experience as a law school dean, I know that making plans is relatively easy, but putting them into practice is the ultimate measure of success. Yet, Bob Pitofsky proved successful at both.

In three short years, with more than a little help from the staff,[6] he transformed the BCP.[7] He systematically addressed the deficiencies identified in the *ABA Report*. He formulated a plan to allocate resources, and in direct response to the *ABA Report*'s criticism that too little attention had been given to the surge in national advertising, made deception in national advertising a BCP priority.[8] Characteristically, one of the early actions of the new Bureau was to hold hearings on Advertising and the Public Interest, which resulted in a report and recommendations to the Commission. The Foreword to the report, written by Bob Pitofsky, is telling: "[t]hose who seek a sensationalized approach to serious and complicated problems of economic regulation will be disappointed. This report is solid, business-like and professional and, in my opinion, fair to the conflicting viewpoints that inevitably emerge in discussion of problems of deception in advertising."[9]

Bob launched an aggressive array of advertising investigations involving food and drugs,[10] health and safety issues,[11] energy and en-

---

[5] *See id.* at 64-65.

[6] Bob's long relationship with Jodie Bernstein, who became Chairman Pitofsky's Director of the Bureau of Consumer Protection, began when Bob, as Bureau Director, made Bernstein his assistant.

[7] In mid-1970, in response to the criticism in the ABA Report, the Commission adopted a major reorganization plan that, for the first time, consolidated all of the agency's consumer protection responsibilities into one operating bureau, the Bureau of Consumer Protection. FED. TRADE COMM'N, 1970 ANN. REP. 1.

[8] *See* FED. TRADE COMM'N, 1971 ANN. REP. 12. The Commission did so for three reasons. The first reason was the sheer volume, immediacy, and impact of national television advertising. Second, there were growing concerns about the claims being made in national advertising. Finally, the Commission believed it necessary to address the rising public frustration with alleged unfair and deceptive practices of some national TV advertisers.

[9] JOHN A. HOWARD & JAMES HULBERT, THE FED. TRADE COMM'N, ADVERTISING AND THE PUBLIC INTEREST: A STAFF REPORT TO THE FEDERAL TRADE COMMISSION (1973).

[10] *See, e.g.*, Bristol-Myers Co., 102 F.T.C. 21 (1983) (final admin. order); Sterling Drug, Inc., 102 F.T.C. 395 (1983) (final admin. order); American Home Products Corp., 98 F.T.C. 136

vironmental claims,[12] and advertising directed to children.[13] Using the FTC's persuasive power, rather than law enforcement, he also convinced television networks to eliminate their ban on comparative advertising.[14]

One cornerstone of this new focus on national advertising was development of the legal principle that advertisers needed a reasonable basis to support objective claims in advertising before the claims were made.[15] Although today the concept of ad substantiation is often taken for granted,[16] in the early 1970s, the rule that advertisers were *legally required* to have adequate substantiation (or a reasonable basis) for objective claims *before* they are made was important and controversial. Its adoption by the Commission provided the basis for both the success of the flexible, case-based approach to advertising regulation the Commission used and for increased self-regulation by the advertising industry. Indeed, when faced with an increasingly active FTC and a concerned public, the advertising industry responded by creating the National Advertising Review Board, or NARB, in 1971. One of the first principles the NARB announced was that advertisers must possess reasonable substantiation for their objective claims.[17] The NARB today remains a model of self-regulation, a vital supplement to government law enforcement efforts,

---

(1981) (final admin. order); Medi-Hair Int'l, 80 F.T.C. 627 (1972) (consent order); Ocean Spray Cranberries, Inc., 80 F.T.C. 975 (1972) (consent order); Procter & Gamble Co., 80 F.T.C. 181 (1972) (consent order); General Foods Corp., 79 F.T.C. 422 (1971) (consent order).

[11] *See, e.g.*, Warner-Lambert Co., 86 F.T.C. 1398 (1975) (admin. order); Firestone Tire & Rubber Co., 81 F.T.C. 398 (1972) (admin. order); Lorillard, 80 F.T.C. 455 (1972) (consent orders).

[12] *See, e.g.*, Sun Oil Co., 84 F.T.C. 247 (1974) (consent order); Union Carbide Corp., 84 F.T.C. 591 (1974) (consent order); Ex-Cell-O Corp., 82 F.T.C. 36 (1973) (consent order).

[13] *See, e.g.*, Mattel, Inc., 79 F.T.C. 667 (1971) (consent order). Children's advertising was also an important focus of the 1971 FTC hearings on Advertising and the Public Interest. *See* HOWARD & HULBERT, *supra* note 9, at 58.

[14] *See* FED. TRADE COMM'N, CONSUMER INFORMATION REMEDIES: POLICY REVIEW SESSION 221-233 (1979) (describing efforts initiated by Pitofsky to persuade the major television networks to end voluntary bans on comparative advertising). *See also* 16 C.F.R. § 14.15 (2001) (codifying FTC's comparative advertising policy statement, adopted in August 1979).

[15] *See* Pfizer, Inc., 81 F.T.C. 23 (1972) (admin. order). In 1970, the Commission issued a complaint challenging as unsubstantiated claims that an over-the-counter sunburn remedy could actually anesthetize nerves in sensitive sunburned skin. Although the Commission ultimately dismissed the complaint, it unambiguously affirmed the principle that Section 5 requires companies to have adequate substantiation for their advertising claims, noting "[t]he significance of this particular case lies . . . not so much in the entry of a cease and desist order . . . but in the resolution of the general issue of whether the failure to possess a reasonable basis for affirmative product claims [violates Section 5]." *Id.* at 73-74. Those words turned out to be prescient.

[16] *See, e.g.*, Thompson Medical Co., 104 F.T.C. 648 (1984) (final admin. order).

[17] *See, e.g.*, Stanley E. Cohen, *Who'll Demand Ad Proof Is Lively Question, But Someone Clearly Will*, ADVERTISING AGE, June 21, 1971, at 70 (discussing the need for advertising substantiation).

and one of the many accomplishments for which Bob Pitofsky can genuinely be proud.

Implementation of the substantiation doctrine, of course, has at times been controversial. Part of its original intent—to place materials on the record for the public to analyze—has long been abandoned. The combination of a lack of a precise methodology for determining the content of implied claims along with extraordinary substantiation requirements became a major problem in advertising cases of the mid- and late 1970s, after Pitofsky departed as Bureau Director. The Commission's deception and substantiation statements of the 1980s[18] —still followed today—helped place appropriate parameters on the doctrine, including its grounding in the Commission's deception authority.[19]

In the end, the results of these Commission efforts, begun in the early 1970s, were well-established "rules of the road" for national advertising. What then seemed novel and controversial is now well accepted and almost commonplace. And, as described in the next section, each effort not only provided significant consumer protection, but was directed toward ensuring a better functioning marketplace.

III. CONTINUING ENGAGEMENT AS SCHOLAR

Before returning to the FTC in 1978 as Commissioner Pitofsky, Professor Pitofsky wrote his ground-breaking 1977 article, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, which supplied much of the intellectual framework for today's market-oriented advertising program at the FTC.[20] In *Beyond Nader*, he wrote: "[p]rotection of consumers against advertising fraud should not be a broad, theoretical effort to achieve Truth, but rather a practical enterprise to ensure the existence of reliable data which in turn will facilitate an efficient and reliable competitive market process."[21]

---

[18] *See* Letter from James C. Miller III, Chairman F.T.C., to Hon. John D. Dingell, Chairman, Committee on Energy and Commerce (Oct. 14, 1983), *reprinted in* Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984) [hereinafter Deception Policy Statement] (clarifying the manner in which the Commission planned on enforcing its deception mandate); FED. TRADE COMM'N, FTC POLICY STATEMENT REGARDING ADVERTISING SUBSTANTIATION, *reprinted in* Thompson Medical Co., 104 F.T.C. 648, 839 (1984) [hereinafter Substantiation Policy Statement] (articulating the Commission's advertising substantiation policy).

[19] *See* Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 681-83 (1977) (asserting that costs of prior substantiation requirement should be weighed against benefits to consumers; for example, "an across-the-board substantiation requirement seems justified" for health and safety claims, but not so for claims involving minor economic injury).

[20] *Id.*

[21] *Id.* at 671.

When market failure disrupts the free flow of accurate information to consumers, however, "government regulation of the advertising process is warranted."[22]

Pitofsky's balanced, market-based approach to the regulation of advertising is the foundation for many of today's well-settled principles of deception law, including the Commission's 1983 Deception Policy Statement. In decrying the tendency of past Commissions to become "entangled in nit-picking, literalistic disputes" motivated by competitor complaints from entrenched rivals[23]—not consumer interests—he focused the agency on cases involving injury to consumers. He also paved the way for the principle that absent evidence that ads targeted a particularly vulnerable group, the Commission should evaluate claims from the point of view of "average" or "ordinary" consumers.[24] Further, while recognizing that courts had left issues of ad interpretation to the Commission's expertise, his was among the first voices to urge the FTC to exercise that expertise with prudence.[25] That he himself exercised great care in interpreting ad claims is a point no staff member who has ever presented an advertising case to Bob Pitofsky would dispute.

Pitofsky's 1977 article also argued that there were some types of deception cases that the Commission should avoid either because of their detrimental effect on vigorous competition or because they involved cheap, safe products with which consumers were familiar. "[W]here consumers are fully capable, through common sense or simple observation, of protecting their interests against advertising exaggerations or distortions, there would be no reason for the law to intervene."[26] Particularly noteworthy was Bob's critique of the FTC's deceptive pricing cases.[27] Here, his antitrust and consumer protection analysis united. He noted that the agency's focus on the literal truth of the pricing claims without regard to any reasonable interpretation of the ads resulted in law enforcement that was both anticompetitive and anti-consumer, i.e., cases that discouraged discounting. De-emphasis of such cases was a major triumph of his vision.

Without his intellectual framework, advertising regulation could have taken a distinctly different turn from the balanced approach of

---

[22] *Id.* at 669.

[23] *Id.* at 674.

[24] Deccption Policy Statement, *supra* note 18, at 177-78 (applying a "reasonable consumer test" in determining liability for deceptive advertising). *Beyond Nader* noted the "astonishing lengths" that the Commission had gone to protect the credulous from inconsequential inaccuracies in advertising, efforts that diverted resources away from more important consumer protection issues. *See* Pitofsky, *supra* note 19, at 676 n.58.

[25] *See* Pitofsky, *supra* note 19, at 679.

[26] *Id.* at 671.

[27] *See id.* at 687-89.

recent years. Both consumers and competition have benefited from Pitofsky's championing of market-based solutions. It should be clear that I have always regarded Robert Pitofsky's views as one of the intellectual foundations of the FTC's 1983 Deception Policy Statement. Unfortunately, during the controversy that surrounded that statement, his role was, perhaps, under appreciated.

This praise of Bob's work in the 1970s is not meant to ignore that by 1980, the FTC had gone seriously astray. The most important problem on the consumer protection side, the rise of rulemaking designed to make the FTC our nation's second most powerful legislature, followed Bob's tenure as BCP Director. When Bob returned, he was instrumental in helping rein in the worst excesses, specifically the FTC's virtually unlimited claims under its "unfairness" jurisdiction following the Supreme Court's 1972 *FTC v. Sperry & Hutchinson Co.* decision.[28] In fact, as a Commissioner in the late seventies, Bob was one of the early voices calling for a more principled statement of how the Commission would use its unfairness authority and an advocate for the 1980 Unfairness Policy Statement.[29] The principles developed in that statement themselves became the basis for legislative codification of the Commission's unfairness authority in 1994, which ended the long deadlock between the House and Senate over FTC reauthorization.[30] Cautious use of unfairness was a hallmark of the Pitofsky Commission in the 1990s.

IV. FAST-FORWARD TO THE LAST SIX YEARS

As Chairman, building on his decades of experience, Pitofsky engineered a full flowering of the FTC's consumer protection mission. This time around, his blueprint was the 1989 ABA Report on the Commission.[31] Steve Calkins, who became General Counsel at the FTC under Bob, was counsel to the ABA committee, and much of his effort involved negotiating what might modestly be called a Pitof-

---

[28] 405 U.S. 233 (1972) (holding that in order to protect consumers as well as competitors, the FTC may determine that challenged practices constitute unfair methods of competition or unfair or deceptive acts or practices even though the practice violates neither the letter or spirit of the antitrust laws). *See also* Substantiation Policy Statement, *supra* note 18.

[29] *See* Letter from FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation (Dec. 17, 1980), *reprinted in* Int'l Harvester Co., 104 F.T.C. 1070, 1071 (1984) (delineating a "concrete framework for future application of the Commission's unfairness authority"). *See also* Letter from FTC to Hon. Robert Packwood and Hon. Robert Kasten (Mar. 5, 1982), *reprinted in* H.R. REP. NO. 156, pt. 1, at 27, 32 (1983) (also explaining the FTC's unfairness authority).

[30] *See* 15 U.S.C. § 45(n) (1994).

[31] American Bar Association, *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43 (1989).

sky/Muris view of the FTC. Happily, our agreements were far more significant than our disputes. Indeed, on consumer protection, differences were largely inconsequential. We agreed that the Commission needed to assert national leadership more aggressively; focus on significant cases, particularly fraud; work closely with the states; and provide clearer guidance to industry.

Let me repeat what I said during my confirmation hearing:

> [t]wenty years ago we shifted the Federal Trade Commission's emphasis away from cumbersome rulemaking designed to transform entire industries toward aggressive law enforcement of the basic rules that we already have—rules against fraud, deception, and breach of contract. Our vision was that the Federal Trade Commission would forge a bipartisan consensus on how to protect consumers and would work with other federal and state agencies to provide maximum benefits for consumers from the Federal Trade Commission's limited resources. Today, through the hard work of hundreds of people over the past 20 years and superb leadership of the Commission—most recently by Bob Pitofsky and Jodie Bernstein—that dream has become reality.[32]

As Bob Pitofsky himself has often said, much of the praise for beginning the skillful implementation of the recommendations in the 1989 ABA Report rightfully belongs to Janet Steiger, who chaired the FTC from 1989 to 1995. Building on her work, Bob swiftly enlarged the Commission's activity beyond traditional media to establish the FTC as watchdog over fraud and deception in what has become a global electronic marketplace. While the new medium was still in its infancy, the Commission moved quickly to establish an intellectual framework for applying well-settled consumer protection principles online. It held a series of hearings on Consumer Protection in the High-Tech Global Marketplace, which it used to craft a blueprint for Commission action. With the overall goal of protecting consumers without imposing unnecessary burdens on this emerging marketplace, the plan called for aggressive law enforcement, especially against fraud; consumer and industry education; and the development of policies in areas raising new consumer protection concerns, including privacy.

The results have been impressive. The online law enforcement program has:

---

[32] *See* Timothy J. Muris, Statement Before the Committee on Commerce, Science and Transportation, United States Senate, *at* http://commerce.senate.gov/hearings/0516may.pdf (May 16, 2001).

produced more than 200 cases challenging deceptive practices; transformed the way the agency does business by pioneering the use of the Internet as a law enforcement tool; training state, local, and international consumer protection officials in online investigative methods; and creating a global database to coordinate law enforcement efforts; and has instituted "surf days" to locate patently deceptive promotions and organized "sweeps" on a global scale to shut down fraudulent operators.

In addition to law enforcement, during Chairman Pitofsky's tenure, the FTC moved aggressively to provide clear guidance to industry that the same consumer protection standards apply online as apply in the "brick-and-mortar" world. Through publications such as *Advertising and Marketing on the Internet: The Rules of the Road*[33] and *Dot.Com Disclosures*,[34] the FTC made its standards transparent. In response to requests from advertisers for more informal guidance, the Commission sponsored workshops such as *E-tail Details*, a one-day seminar on consumer protection basics for cyber-retailers, and *Disclosure Exposure*, a national conference on disclosures in advertising sponsored with the National Advertising Division of the Better Business Bureau. I believe that the Commission's public workshops in recent years have been immensely helpful to consumers and industry, and I intend for the Commission to continue them.

In addition to applying well-settled consumer protection principles to the Internet, the Commission fostered dialogue among the industry, the public, and the government about developing areas of consumer concern, including online privacy. During Chairman Pitofsky's tenure, the FTC held nine public workshops on privacy issues, worked with industry to encourage self-regulatory efforts, conducted two major surveys of websites' privacy practices, and issued a series of *Reports to Congress*.

The approach the Commission has taken toward e-commerce is a prominent example of the innovative leadership of the Pitofsky era, but it is not the only one. Programs were created to address newly emerging areas such as identity theft, predatory lending, and cross-border fraud. In addition, the Commission undertook an extensive regulatory review program that resulted in the repeal or revision of

---

[33] BUREAU OF CONSUMER PROTECTION, FED. TRADE COMM'N, ADVERTISING AND MARKETING ON THE INTERNET: THE RULES OF THE ROAD, *at* http://www.ftc.gov/bcp/conline/pubs/buspubs/ruleroad.pdf (2000).

[34] BUREAU OF CONSUMER PROTECTION, FED. TRADE COMM'N, DOT.COM DISCLOSURES: INFORMATION ABOUT ONLINE ADVERTISING, *at* http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.pdf (n.d.)

dozens of its rules and guides, thereby reducing unnecessary burdens on businesses. Across the board, the consumer protection program was strengthened by stepping up the fight against fraud; increasing cooperation with state law enforcers; focusing Commission resources on the practices that pose risks to consumer health and safety, such as deceptive health claims; and making consumer and business education an integral part of law enforcement.

The Pitofsky Commission used Section 13(b) of the FTC Act to bring more than 450 cases in federal court to fight bogus business opportunities, investment scams, and other patently deceptive promotions. Through these efforts, the Commission has obtained hundreds of millions of dollars in redress for defrauded consumers, won orders banning the most serious offenders from certain businesses, and stepped up civil and criminal enforcement against recidivists and scofflaws.

Not included in these impressive numbers are the hundreds of additional cases brought since 1995 by state attorneys general as part of more than 50 FTC co-sponsored "sweeps"—coordinated law enforcement actions in which multiple cases are filed simultaneously all across the country against companies and individuals engaged in a particular type of fraud.[35] Concentrating federal and state resources in this way to bring dozens of law enforcement actions at one time not only sends an emphatic warning to others engaged in the same questionable promotions, but also dramatically raises consumer awareness of that particular type of fraud.

Another hallmark of the Pitofsky era was the case selection policies that focused on areas that pose the greatest risk of consumer injury, most notably misleading representations about health and safety. For example, through Operation Cure.All, a multi-stage international law enforcement sweep targeting products promising to treat cancer, AIDS, and other serious conditions, the FTC sent a strong message that deceptive health claims will not be tolerated.[36]

---

[35] *See, e.g., Marketing Scams: Hearing Before the Senate Subcommittee on Commerce, Justice and State, the Judiciary, and Related Agencies*, 105th Congress, 2nd Sess. 30 (1998) (statement of Robert Pitofsky, Chairman, Federal Trade Commission) (outlining joint FTC-state sweeps against deceptive prize promotions, bogus charities, investment and business opportunity schemes, and "recovery" scams).

[36] *See, e.g.*, Press Release, FTC, Operation Cure.All Targets Internet Health Fraud (June 24, 1999), *at* http://www.ftc.gov/opa/1999/9906/04/opcureall.htm (announcing the FTC's launch of "Operation Cure.All" using law enforcement and consumer education campaign designed to combat Internet health fraud); Press Release, FTC, FTC Hits Internet Health Fraud in Continuation of Operation Cure.All (April 5, 2000), *at* www.ftc.gov/opa/2000/04/cure-all2.htm (announcing settlements with internet companies and their principal officers following FTC allegations that these companies made unsubstantiated claims regarding the effectiveness of their medical treatments).

In addition to fighting fraud in court, the Commission in recent years has recognized that one of the best defenses against deceptive practices is a well-informed consumer. During Bob's tenure, the FTC became a national leader in consumer education, publishing more than 200 titles distributed by federal, state, and local consumer protection offices and hundreds of private sector partners. Total annual distribution of consumer education materials—including electronic distribution on the Commission's award-winning websites—now numbers over ten million. The consumer protection record of the last six years under Pitofsky sets a high bar for future Commissions.

V. COMPETITION

I turn now to Bob's contributions to the Commission's competition mission. As described above, the 1969 ABA Report envisioned an important antitrust role for the FTC. That role would not consist of simply imitating the Department of Justice's Antitrust Division. Instead, the Commission would use the comparative advantages of its unique institutional traits to formulate national competition policy.[37]

To the ABA Commission, the FTC could make distinctive contributions by exploiting the "full panoply" of its institutional tools—doing research, publishing studies, bringing cases, and solving problems at the intersection of its competition policy and consumer protection authority.[38] In particular, the FTC could aid the formulation of national competition policy by focusing its resources on "difficult and complex antitrust questions."[39] The agency's special information gathering and research capabilities would suggest the appropriate path for doctrine, and the Commission could use administrative adjudication, guidelines, reports, and rules to shape policy.

For the most part, this vision did not become reality in the 1970s. The Commission pursued a number of novel and ill-conceived antitrust initiatives. Perhaps the most visible FTC competition policy initiatives of that decade were efforts to use the novel "shared mo-

---

[37] The 1969 ABA Report called the FTC's past antitrust performance "less than satisfactory" and mainly attributed its disappointing record to the agency's failure "to take advantage of the unique strengths conferred upon it by Congress." ABA REPORT, *supra* note 1, at 64. The ABA Report identified the Commission's "unique strengths" as: (1) broad investigatory powers; (2) the centralization in one agency of commissioners, administrative law judges, attorneys, and economists who collectively could develop special competence in the antitrust field; (3) the ability to decide questions without necessarily relying on case-by-case precedent; and (4) the power to issue studies to the Executive Branch, the Congress, and the public on antitrust issues. *Id.* at 64-65.

[38] *See* ABA REPORT, *supra* note 1, at 65.

[39] *Id.* at 64.

nopoly" theory to deconcentrate the country's breakfast cereal[40] and petroleum industries.[41] These initiatives failed, and have no enduring support. Bob had no direct responsibility for them, and has long since disclaimed any support for their intellectual foundations. More positively, the 1970s also marked the start of the Commission's highly-regarded program to enforce antitrust in the professions.[42] The FTC's efforts to address the "difficult and complex" competition issues in the provision of health care and other professional services fulfilled the vision of the 1969 ABA Report.

The 1980s were crucial for establishing the modern antitrust mainstream. Although this is not the occasion to revisit that decade, landmarks such as the retooling of the merger guidelines, a renewed emphasis on horizontal restraints, and focus on efficiency in analyzing joint ventures such as GM-Toyota—each step bitterly opposed at the time—have become accepted parts of the bipartisan antitrust agenda of recent years.

Economics has a crucial role in informing the FTC's judgment about how best to carry out its mission. Modern discussion about developments in industrial organization economics often focuses on putting economic ideas into allegedly neat "Chicago" and "Post-Chicago" compartments. This is a sterile exercise. Regarding antitrust, we must have solid economic analysis that is firmly grounded in facts and real world institutions. These traits characterize what might simply be called good economics, rather than economics of any "school." Although I have not always agreed with cases brought by the Pitofsky FTC, Commission departures from relying on good economics were exceptions, not the norm.

Although there are disagreements about cases at the margin, there is widespread agreement that the purpose of antitrust is to protect consumers, that economic analysis should guide case selection, and that horizontal cases, both mergers and agreements among competitors, are the mainstays of antitrust. Moreover, today there is bipartisan recognition that antitrust law is a way of helping to organize our economy. A freely functioning market, subject to the rules of antitrust, provides maximum benefits to consumers.

---

[40] *See* Kellogg Co., FTC No. 8883 (Apr. 26, 1972), *complaint dismissed,* 99 F.T.C. 280 (1982).

[41] *See* Exxon Corp., FTC No. 8934 (July 18, 1973), *complaint dismissed,* 98 F.T.C. 453 (1981).

[42] The FTC's most notable accomplishment of this period was its successful challenge to various restrictions on advertising by physicians imposed by the American Medical Association. *See e.g.,* Am. Med. Ass'n, 94 F.T.C. 701 (1979) (final admin. order), *aff'd and modified,* Am. Med. Ass'n, 638 F.2d 443 (2nd Cir. 1980), *aff'd by an equally divided Court,* 455 U.S. 676 (1982).

In returning to the Commission as Chairman in the 1990s, Bob Pitofsky was especially well-suited to design an agenda for executing the ABA Report's vision of the FTC's competition policy mission. Pitofsky brought to the task an extraordinary reservoir of personal intellectual capital concerning antitrust competition policy and antitrust enforcement in the United States. I already have mentioned Bob's previous experience as an FTC Bureau Director and as a Commissioner. He was also one of our leading antitrust scholars, having authored important works on such matters as distribution practices,[43] efficiencies,[44] joint ventures,[45] mergers,[46] and the goals of the antitrust laws.[47] He already had transmitted much of this learning to the competition policy community in one of the country's most influential antitrust casebooks[48] and in his participation in special, blue-ribbon panels dealing with difficult antitrust questions, such as the consolidation of the defense industry.[49]

In several key areas, the Pitofsky FTC looked beyond litigation alone and expanded reliance on the "full panoply" of competition policy tools at its disposal, thus following the ABA panel's view that the maintenance of two antitrust agencies required complementary roles. From the beginning of his chairmanship, Bob restored the agency's role in using fact-finding hearings and workshops to identify the appropriate path of future policies and to formulate a law enforcement and advocacy agenda. The agency's hearings on globalization and innovation, collaboration among competitors, and B2B ventures provided valuable examples of how the FTC could use its distinctive ca-

---

[43] *See, e.g.*, Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per Se *Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1487 (1983) (arguing that minimum vertical price-fixing agreements lead to higher and uniform resale prices).

[44] *See, e.g.*, Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195 (1992) (arguing for more restrictive enforcement against vertical and horizontal mergers and narrowly-focused enforcement against conglomerate mergers).

[45] *See, e.g.*, Robert Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 HARV. L. REV. 1007 (1969) (noting that antitrust doctrine has not successfully checked the rising tide of anti-competitive joint ventures).

[46] *See, e.g.*, Robert Pitofsky, *New Definitions of the Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805 (1990) (suggesting an alternative approach to market definition).

[47] *See, e.g.*, Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA L. REV. 1051 (1979) (arguing for inclusion of specific, non-economic goals in antitrust analysis).

[48] *See* MILTON HANDLER ET AL., TRADE REGULATION: CASES AND MATERIALS (4th ed. 1997).

[49] *See* DEF. SCI. BD., REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON ANTITRUST ASPECTS OF THE DEFENSE INDUSTRY CONSOLIDATION (1994) (chaired by Robert Pitofsky).

pabilities to communicate with and to the business community and develop a consensus about the future course of policy.[50]

The menu of competition policy activities during the Pitofsky era in the 1990s also included studies and guidelines. The FTC's hearings helped shape guidelines that the Commission and the Justice Department issued on competitor collaboration and efficiencies.[51] The Commission devoted special attention to studying the effects of past remedies in merger cases and prepared a report that has fostered valuable debate inside the FTC and within the larger antitrust community about the appropriate design of remedies.[52] The Pitofsky Commission used the FTC's historically important research and reporting capabilities to shape policy. Future Commissions will no doubt continue to use these unique FTC capabilities.

The ABA Report recommended that the Commission make special contributions to elaborating antitrust doctrine through administrative adjudication. During Bob's chairmanship, the Commission worked aggressively to improve the administrative process. Key reforms included the adoption of a "fast track" administrative litigation option and a commitment by the Commission itself to accelerate the preparation of opinions. These and related initiatives were evident in cases such as *Toys "R" Us, Inc. v. FTC*[53] and *In re Summit Technology, Inc.*[54] These reforms reflected awareness of a key path for future development—that the enhancement of the Commission's administrative process could significantly improve the capacity of the U.S. antitrust system to shape antitrust doctrine during rapid technological change. Of course, the unprecedented merger wave of the 1990s prevented the agency from fully articulating a non-merger agenda. Before 1970, this agenda was principally Robinson-Patman Act cases. One of Bob's major achievements, both in the ABA report and else-

---

[50] *See* BUREAU OF CONSUMER PROTECTION, FED. TRADE COMM'N, PUBLIC WORKSHOP ON CONSUMER PRIVACY ON THE GLOBAL INFORMATION INFRASTRUCTURE (1996); FED. TRADE COMM'N, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH GLOBAL MARKETPLACE (1996); FED. TRADE COMM'N, ENTERING THE 21ST CENTURY: COMPETITION POLICY IN THE WORLD OF B2B ELECTRONIC MARKETPLACES (2000).

[51] *See* DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (rev. ed. 1997); FED. TRADE COMM'N & DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000). Although I have criticized parts of this effort, particularly the agencies' handling of this issue in court cases, the guidelines themselves were a substantial improvement over previous versions. *See* Timothy J. Muris, *The Government and Merger Efficiencies: Still Hostile After All These Years*, 7 GEO. MASON L. REV. 729, 731-733 (1999) (describing the newer merger guidelines as beneficial and reflective of a more enlightened government policy on mergers).

[52] *See* BUREAU OF COMPETITION, FED. TRADE COMM'N, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS (1999).

[53] 221 F.3d 928 (7th Cir. 2000).

[54] FTC Dkt. No. 9286 (Mar. 5, 1999) (decision and order), *at* http://www.ftc.gov/os/1999/9903/d09286summit.do.htm.

where,[55] was as a leader in documenting the anti-consumer nature of many of the FTC's Robinson-Patman cases.

As Chairman, Bob continued one of the FTC's major post-1970 efforts to develop a non-merger agenda by continuing aggressive enforcement against anti-competitive practices in the professions. He also did much more. The FTC's allocation of law enforcement resources during Bob's chairmanship demonstrated a commitment, as the ABA 1969 Report had proposed, to focus the Commission's attention on "difficult and complex" areas of antitrust law. The agenda of prominent examples include tough questions involving merger policy,[56] single-firm exclusionary conduct,[57] and remedies.[58]

No field of law better demonstrates the Pitofsky Commission's willingness to engage difficult and complex matters than the relationship between antitrust doctrine and intellectual property.[59] In these and other areas, the Commission confronted special challenges posed by innovation competition, e-commerce, globalization, and rapid technological change. Although I have disagreed with some of the Pitofsky Commission's initiatives here,[60] we agree that the potential for anticompetitive abuse of intellectual property is an increasingly important area. While recognizing the necessity of protecting valid intellectual property rights, future Commissions will no doubt remain active.

CONCLUSION

My deep appreciation for Robert Pitofsky's achievements should be clear. I only hope that I can approach the mark that he has set for us all.

---

[55] *See* ABA REPORT, *supra* note 1, at 67. *See, e.g.*, Boise Cascade Corp., 107 F.T.C. 76, 79-85 (1986) (dissenting statement of Commissioner Robert Pitofsky on issuance of the complaint).

[56] *See, e.g.*, FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997).

[57] *See e.g.*, Intel Corp., FTC Dkt. No. 9288, 1999 F.T.C. Lexis 145, at *1 (Aug. 3, 1999) (decision and order).

[58] *See e.g,* FTC v. Mylan Labs. Inc., No. 1:98CV03114 (TFH) (D.D.C. Feb. 9, 2001) (order and stipulated permanent injunction), *at* http://www.ftc.gov/os/2000/11/mylanordanstip.htm.

[59] *See* Robert Pitofsky, Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy, Address Before the Berkeley Center for Law and Technology at the University of California, Berkeley (March 2, 2001), *at* www.ftc.gov/speeches/pitofsky/ipf301.htm.

[60] *See* Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 ANTITRUST L.J. 693, 694 (2000) (criticizing a trend in FTC cases suggesting that the government need not show proof of anticompetitive effect in monopolization cases).