

## CREATING A RESPECTED BRAND: HOW REGULATORY AGENCIES SIGNAL QUALITY

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### INTRODUCTION

One determinant of a government agency's effectiveness is its reputation, or "brand." Much like a commercial enterprise, an agency develops a brand that signals quality to various observers. A good reputation can help the agency recruit skilled personnel, gain deference from courts, build credibility with business managers, and build popular support that can yield larger budgets and enhancements to its powers. An agency with a strong brand stands a greater chance of being effective than one with a weak brand.

This Essay considers how branding can affect the performance of the Federal Trade Commission ("FTC") and other agencies responsible for economic regulation. It analyzes how investments in building a good brand enable the regulatory agency to signal quality to various observers—insiders such as agency staff and outsiders such as businesses, consumer groups, courts, and legislators. Part I of this Essay defines the concept of a brand for public agencies. Part II then discusses why an agency's brand can be important to its effectiveness and identifies what types of agency activities either enhance or degrade an agency's brand.

The examination of agency branding has several purposes. One aim is to improve our understanding of how public agencies build a reputation, and to study the role of reputation in determining effectiveness. A closely related goal is to give public officials a better understanding of how they should approach the task of deciding what their agencies must do to prosper.

A further aim is to underscore the impact of institutional design and managerial incentives on agency performance and to illuminate how design choices and incentive schemes influence the development of a well-respected, coherent agency brand. Various design choices—for example, whether to give the competition agency a single function or a multi-purpose substantive mandate, whether to govern the agency by a single executive or

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by a board, whether to integrate the tasks of prosecution and adjudication in a single body or to unbundle them among distinct entities—affect the capacity of the agency to enhance the quality of its brand. Incentives that give incumbent leaders reason to make investments in long-term agency capacity and quality have the same effects.

## I. BRANDS AND PUBLIC INSTITUTIONS

Public institutions, such as competition or consumer protection agencies, build reputations or “brands” that the agency’s own employees and external observers associate with the agency.<sup>1</sup> Brands perform two functions for the public agency. The first function is informational.<sup>2</sup> A good brand conveys a good sense of what an agency does. It communicates, at least in a general way, the scope of the agency’s responsibilities and the aims that motivate the agency in the exercise of its powers.

A brand also signals institutional quality. For an agency such as the FTC, the foundations for a good brand are sound substantive programs (e.g., cases, regulations, reports), sound procedures (e.g., meaningful disclosure of information, rigorous testing of evidence, regular assessment of outcomes), strong capabilities (e.g., deep expertise in economics and law), and a healthy culture (e.g., thoughtfulness, integrity, courage, and a commitment to continuous improvement).<sup>3</sup> For several reasons, explained below, a strong brand is a valuable asset for a regulatory agency.

### A. *Deference from Judges*

Courts form views about the quality of public agencies—especially if the same court reviews a number of agency decisions over time and develops a general sense of how well the agency functions.<sup>4</sup> An agency with a good reputation is more likely to gain the benefit of doubt from a reviewing

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<sup>1</sup> This Essay uses the terms “brand” and “reputation” as synonyms. The Essay refers to the process by which a public agency builds a reputation as “branding.” For a major treatment of how government agencies create reputations, and of how an agency’s reputation affects its performance, see DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928* (2001).

<sup>2</sup> See David A. Hyman & William E. Kovacic, *Competition Agencies with Complex Policy Portfolios: Divide or Conquer?*, CONCURRENTS N° 1-2013, at 9, 16 (exploring this function).

<sup>3</sup> See WILLIAM E. KOVACIC, *THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY* (2009) (examining these ingredients of branding for the FTC).

<sup>4</sup> Erica Teichert, *Breyer Gives Antitrust Agencies Top Marks for EU Ties*, LAW 360 (Apr. 3, 2014, 7:31 PM), <http://www.law360.com/articles/524851/print?section=appellate>.

tribunal than an agency with a weak reputation.<sup>5</sup> Where judges exercise the discretion inherent in statutory interpretation, they are likely to account for, at least to some degree, the agency's reputation for doing strong substantive work and using sound methods to make policy.<sup>6</sup>

#### B. *Deference from Legislators*

A good brand can help the agency persuade legislators to approve generous budgets and to provide desired expansions of the agency's authority. Respect from legislators (and other budgetary gatekeepers) can yield needed increases in resources. Perceived improvements in the FTC's performance in the first half of the 1970s inspired Congress to boost the Commission's budget and powers dramatically.<sup>7</sup>

#### C. *Deference from Other Public Regulators*

A good brand can enhance the power of advocacy before other government bodies—such as national ministries and local public authorities—that make regulatory decisions that affect the quality of competition. An agency with a reputation for extensive expertise is more likely to be seen as a valuable source of guidance than an agency believed to have little idea of what it is doing. This consideration is especially important to the FTC in seeking to fulfill the competition advocacy function embodied in the agency's original charter and applied extensively during the Commission's history.<sup>8</sup>

#### D. *Respect from and Credibility with Non-Government Groups*

A competition agency's effectiveness depends partly on the reputation it develops among various groups beyond the courts, legislatures, minis-

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<sup>5</sup> See *id.* (reporting on comments by Justice Stephen Breyer on how courts form views of the quality of government agencies, and how courts have greater confidence in some government agencies than in others).

<sup>6</sup> I cannot offer rigorous proof for this proposition. In years of discussions with federal appellate judges about how they review decisions of regulatory agencies, it is evident that judges form views about the relative quality of the regulators that appear before them. It is reasonable to assume that these views consciously or unconsciously affect how judges respond to agency requests that the court defer to their expertise.

<sup>7</sup> See William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 640-42 (1982) (describing increases in FTC authority and budget in first half of 1970s).

<sup>8</sup> See James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1109 (2005) (discussing the significance of the FTC's advocacy function).

tries, and other government policy making institutions. A good brand builds credibility with the general public, advocacy groups, universities, the media, professional societies, trade associations, and individual businesses.<sup>9</sup> Among other effects, the agency's reputation within these groups can influence legislators' views about whether the agency deserves greater resources and more authority, or whether various aspects of an agency's work warrant closer congressional oversight.<sup>10</sup>

The FTC's experience from the late 1970s through the early 1980s illustrates the importance of branding to an agency's effectiveness. In the late 1960s, two influential studies of the FTC concluded that the agency had performed poorly for most of its history.<sup>11</sup> One blue-ribbon committee recommended that Congress should dismantle the FTC and allocate its functions to other government bodies if the agency did not undertake immediate, drastic reforms.<sup>12</sup> Congress endorsed this view, and the FTC responded with an ambitious program of competition and consumer protection initiatives.<sup>13</sup>

Two problems accompanied the FTC's new agenda. First, the agency did not account for the political consequences of challenging a large and powerful collection of firms and entire commercial sectors through a mix of ambitious antitrust and consumer protection initiatives. The Commission's programs galvanized strong, bipartisan political opposition that would threaten its very existence by the end of the 1970s and into the early 1980s.<sup>14</sup> Second, the agency experienced a severe mismatch between its program commitments and its capacity to deliver. Many high-profile initia-

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<sup>9</sup> Media coverage of an agency plays a central role in shaping the views of all of these groups about the agency's value. No competition agency head has understood this more clearly, or developed a more effective campaign, than Allan Fels during his tenure as chairman of the Australian Competition and Consumer Commission. See FRED BRENCHLEY, *ALLAN FELLS: A PORTRAIT OF POWER* 1-4, 137-61 (2003).

<sup>10</sup> Part of the education of a regulatory agency leader is to learn which groups influence individual legislators. During my year as the FTC's chair, I had an early morning routine of reading various media publications that I knew matched the philosophies of legislators with significant FTC oversight duties. In many cases, a news story or an editorial published in a specific news outlet soon echoed in letters or press releases issued by legislators. It became possible to anticipate, with considerable accuracy, how news reporting would feed back into legislative demands for FTC action.

<sup>11</sup> EDWARD F. COX ET AL., "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION 37-39 (1969); AM. BAR ASS'N, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 1 (1969) [hereinafter ABA REPORT].

<sup>12</sup> ABA REPORT, *supra* note 11, at 3 ("Notwithstanding the great potential of the FTC in the field of antitrust and consumer protection, if change does not occur, there will be no substantial purpose to be served by its continued existence; the essential work to be done must then be carried on by other governmental institutions.")

<sup>13</sup> Kovacic, *supra* note 7, at 630-51 (discussing congressional acceptance of the ABA Report's assessment and FTC reforms in the first half of 1970s).

<sup>14</sup> *Id.* at 664-67 (recounting congressional backlash to FTC antitrust and consumer protection programs).

tives suffered because the agency could not mobilize the top-quality talent to implement them successfully.<sup>15</sup>

Well before Ronald Reagan became president in January 1981, the FTC's brand had disintegrated in the eyes of various significant external observers. In March 1978, the *Washington Post*—a key barometer of liberal political sensibilities—scorned the FTC for proposing to restrict television advertising directed toward children.<sup>16</sup> A *Post* editorial called the proposal “a preposterous intervention that would turn the agency into a great national nanny.”<sup>17</sup>

The ridicule from a left-of-center publication ordinarily disposed to favor, rather than oppose, regulatory intervention meant that it was open season on the FTC.<sup>18</sup> In 1979, during legislative debates about measures to curb the FTC's powers, one prominent member of the House of Representatives called the agency “a king-sized cancer on our economy. . . . [A] rogue agency gone insane.”<sup>19</sup> On the day before the 1980 presidential election, Vice President Walter Mondale attacked the FTC for pursuing a case that sought to break up the four leading U.S. cereal producers into smaller firms.<sup>20</sup> Mondale informed a political rally in Battle Creek, Michigan (Kellogg's headquarters) that “it is inconceivable to me and to many independent experts that divestiture would be pursued. Neither President Carter nor I would support such an action.”<sup>21</sup> Mondale added that, if reelected, he and Carter “certainly would” support legislation to bar the FTC from obtaining a divestiture remedy.<sup>22</sup> In a number of instances, the courts also made statements that suggested a low regard for the agency's substantive analysis or its way of doing business.<sup>23</sup>

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<sup>15</sup> See William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 *GEO. MASON L. REV.* 903, 922-23 (2009) (discussing the mismatch between the FTC's antitrust commitments and its capabilities in the 1970s).

<sup>16</sup> *The FTC as National Nanny*, *WASH. POST*, Mar. 1, 1978, at A22.

<sup>17</sup> *Id.*

<sup>18</sup> MICHAEL PERTSCHUK, *REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 69-71* (1982) (describing the damaging effect of the *Washington Post* editorial and its belittling tone).

<sup>19</sup> 125 *CONG. REC.* 32,465-66 (1979) (remarks of Rep. William Frenzel).

<sup>20</sup> *In re Kellogg Co.*, [1970-1973 Transfer Binder] *Trade Reg. Rep. (CCH)* ¶ 19,898 No. 8883 (Apr. 26, 1972), *complaint dismissed*, 99 *F.T.C.* 8 (1982).

<sup>21</sup> Merrill Brown, *Candidates Hit FTC Cereal Action*, *WASH. POST*, Nov. 4, 1980, at D7 (quoting Vice President Walter Mondale) (internal quotation marks omitted).

<sup>22</sup> *Id.* (internal quotation marks omitted).

<sup>23</sup> See *Am. Med. Ass'n v. FTC*, 638 *F.2d* 443, 454 (2d Cir. 1980) (Mansfield, J., dissenting) (“[T]he Commission insisted on pressing for its pound of flesh. In my view the FTC is engaged in the futile business of beating a dead horse.”).

## II. FORCES THAT DETERMINE THE QUALITY OF A COMPETITION AGENCY'S BRAND

Various entities inside and outside a competition agency define the agency's brand. The discussion below identifies the internal and external forces that shape public agency brands. Section A of this Part examines how the assignment of functions to an agency affects branding. Section B considers the importance of how an agency states its goals and explains its activities. Section C reviews the effect of activity levels and program quality.

### A. *Coherent Assignment of Functions*

The clarity of an agency's brand depends partly on the nature of the agency's responsibilities. Many jurisdictions with competition laws assign the competition agency functions beyond competition policy.<sup>24</sup> In addition to competition law, these multi-purpose agencies enforce consumer protection laws,<sup>25</sup> oversee various features of the public procurement process,<sup>26</sup> and set access prices for regulated sectors such as energy and telecommunications.<sup>27</sup>

As an agency's policy portfolio expands and its responsibilities become more diverse, it is likely to encounter a greater level of difficulty in defining its purpose and building its brand.<sup>28</sup> This difficulty is diminished if, at least conceptually, the multiple policy duties are complements.<sup>29</sup> A mix of competition and consumer protection, in general terms, satisfies this condition by bringing supply side policy concerns (increasing the number and quality of choices available to consumers) and demand side policy concerns (ensuring that consumers can make well-informed choices between alternatives, without distortions created by fraud or misrepresentation) under the same regulatory house.<sup>30</sup>

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<sup>24</sup> This observation is based on a reading of data on the world's 125 competition agencies compiled by the Competition Law Center ("CLC") of the George Washington University Law School. See *Worldwide Competition Database*, COMPETITION LAW CTR., THE GEORGE WASHINGTON UNIV., <http://www.gwclc.com/World-competition-database.html> (last visited Nov. 24, 2014).

<sup>25</sup> Examples include Australia, Canada, the Netherlands, the United Kingdom, and New Zealand.

<sup>26</sup> Examples include Bulgaria, Germany, and Russia.

<sup>27</sup> Examples include Australia and New Zealand.

<sup>28</sup> See PETER H. SCHUCK, *WHY GOVERNMENT FAILS SO OFTEN AND HOW IT CAN DO BETTER* 78-79 (2014).

<sup>29</sup> David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446 (2014).

<sup>30</sup> See Timothy J. Muris, Chairman, Fed. Trade Comm'n, *The Interface of Competition and Consumer Protection*, Remarks at the Fordham Corporate Law Institute's Twenty-Ninth Annual Conference on International Antitrust Law and Policy (Oct. 31, 2002), available at <http://www.ftc.gov/sites/default/>

Branding is more difficult if the policy duties are substitutes or entirely unrelated. For example, an agency assigned to enforce a competition law and to impose anti-dumping penalties is likely to experience recurring episodes of schizophrenia.<sup>31</sup> Other agencies can become a legislature's default destination for regulatory duties not easily located elsewhere. The FTC, for example, enforces over seventy statutes that encompass a broad range of competition, consumer protection, and data protection mandates.<sup>32</sup> Some of these measures run far afield from what might be regarded as the core of the FTC's mandate.<sup>33</sup>

### B. *Coherent Statement of Aims and Activities*

Each of an agency's public statements—by means of a decision in a case, a report, a guideline, a speech, or testimony before a government body—is an occasion to shape its brand. The clarity and quality of the brand depend on the agency's ability to spell out its priorities and link individual initiatives to the attainment of its stated aims.<sup>34</sup> Each public statement, from presentations by high officials to the comments of the most humble case handlers, should reinforce the agency's major themes.

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files/documents/public\_statements/interface-competition-and-consumer-protection/021031fordham.pdf (discussing the complementarities between competition and consumer protection law).

<sup>31</sup> In its first years, Panama's competition system combined competition, consumer protection, and anti-dumping safeguards under the same roof. Panama later spun off the anti-dumping mandate to a separate agency. See ORGANISATION FOR ECON. CO-OPERATION & DEV., COMPETITION LAW AND POLICY IN PANAMA: A PEER REVIEW 12-14 (2010) (describing adjustment in responsibilities of Panama's competition authority).

<sup>32</sup> See *Statutes Enforced or Administered by the Commission*, FED. TRADE COMM'N, <http://www.ftc.gov/enforcement/statutes> (last visited Nov. 24, 2014) (providing a complete list of the FTC's statutory responsibilities).

<sup>33</sup> One notable outlier is the Mohammad Ali Boxing Reform Act, which gives the FTC a role in overseeing bodies that sanction professional boxing matches. See 15 U.S.C. §§ 6301-6313 (2012).

<sup>34</sup> These steps are vital means for an agency to be accountable for its policy choices and to make its decisions observable to outsiders. See Alex Chisholm, Chief Exec., U.K. Competition & Mkts. Auth., Aspirations and Expectations for the Competition and Markets Authority, Speech Before the Ashurst General Counsel Conference (Nov. 14, 2013), available at <https://www.gov.uk/government/speeches/aspirations-and-expectations-for-the-competition-and-markets-authority>. Exemplars of competition agency statements that serve these purposes include *2014-2015 ACM Agenda*, AUTH. FOR CONSUMERS & MKTS., <https://www.acm.nl/download/documenten/acm/2014-2015-acm-agenda-en.pdf> (last visited Nov. 24, 2014) (discussing policy agenda of the Netherlands Authority for Consumers & Markets); Press Release, Competition & Mkts. Auth., Competition and Markets Authority Publishes Guidance on Approach to New Powers (Jan. 10, 2014), <https://www.gov.uk/government/news/competition-and-markets-authority-publishes-guidance-on-approach-to-new-powers> (discussing policy guidance for the United Kingdom's newly established Competition and Markets Authority); N.Z. COMMERCE COMM'N, STATEMENT OF INTENT: OUR PLAN FOR 2014-2018 (2014) (discussing statement of policy goals by New Zealand Commerce Commission).

In part, achieving coherence in public expressions involves the solution of familiar problems of coordination, communication, and monitoring that arise in many interactions between principals and their agents.<sup>35</sup> The principal must select a suitable agent, spell out her preferences clearly, give useful instructions to the agent, and then monitor fulfillment of the assignment. These tasks grow in difficulty as the size of the institution under the principal's supervision expands and becomes more complex.

Agency design can determine whether this basic task becomes more or less difficult. Suppose that, instead of a single executive hierarchy, the principal consists of a college of decision makers. This describes the baseline state of the world for competition systems.<sup>36</sup> Achieving coherence in external messaging can be more difficult with a board than with a single-person executive. Branding in the multi-member board setting is a matter of team production, as the overall impression conveyed to outsiders by the board depends on the commitment of individual members to build and reinforce a coherent brand. In some cases, the board's members may share a strong sense of common cause and align their messages to state priorities clearly and coherently and to emphasize agreed-upon themes in all public statements.

For various reasons, this result is not inevitable. Divergent preferences among board members may be so accentuated as to frustrate the attainment of consensus.<sup>37</sup> Non-chair board members may chafe at their subordinate status, relative to the chair, and may use speeches or other statements to stake out positions that will attract attention at the cost of agency coherence.<sup>38</sup> The interaction of board members is probably best understood as a repeated game in which possibilities for retribution and tit-for-tat retaliation discourage extreme deviations. Yet these sanctioning mechanisms may fail to discourage sharp variations, especially when an individual member derives substantial utility from playing a visible role as a maverick.

This has important implications for the selection of board members. Ideally, in addition to superior technical skills, board nominees each pos-

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<sup>35</sup> See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989) (presenting one of the most useful modern treatments of these issues).

<sup>36</sup> Well over half of the world's competition agencies are multimember commissions. See *Worldwide Competition Database*, *supra* note 24.

<sup>37</sup> This is particularly true where the statutory criteria for appointment include a political diversification requirement. In the United States, for example, no more than three of the FTC's five board members can belong to the same political party. 15 U.S.C. § 41 (2012).

<sup>38</sup> In my experience as a member of the FTC's board and from discussions with officials in dozens of competition agencies over the past twenty years, I have noticed how frequently internal strife stemming from acute policy disagreements, personality clashes, jealousy, and spite have undermined the effectiveness of multi-member boards. The consequences of these human impulses for collective decision making should surprise no one. What is surprising is how rarely these phenomena are taken into account in considering how collegial governance mechanisms function and why they sometimes perform poorly.

sess personal sensibilities that facilitate effective collegial interaction and decision making. Moreover, the board's chair should have demonstrated the ability to form consensus and to dispense credit freely to others. These attributes are difficult to screen for in the appointments process, where it is often a struggle enough to obtain appointees with consistently high technical skills.<sup>39</sup> It may be that a system should forego some level of technical skill in favor of a person's capacity to work agreeably in a college. An individual with merely adequate (not superior) accomplishments in competition law who also has good personal sensibilities might be a better board member than a person who has exceptional experience and knowledge in competition policy but whose preferred style in dealing with colleagues is akin to hand-to-hand combat.

Other institutional design characteristics can impede the attainment of coherence in expression that improves the brand. Most competition agencies are stand-alone entities,<sup>40</sup> but others, such as the Directorate for Competition of the European Commission ("DG Comp") and the Antitrust Division of the Department of Justice ("DOJ"), are subdivisions of larger complex institutions. A competition agency's branding efforts can suffer when it resides within a larger institution whose stature lags behind the competition agency's reputation—a circumstance similar to that of a first-rate academic department located within a second-rate university. The weaker reputation of the larger enterprise can spill over onto the brand of a superior subdivision, such as a competition agency.

The internal structure of the competition agency also can complicate coherent branding. Some competition systems establish high levels of separation between case-handling units and the agency's political leadership. In Germany's Federal Cartel Office ("FCO"), for example, the case-handling chambers enjoy great autonomy vis-à-vis the FCO's president.<sup>41</sup> The FCO's president has no voice in the initiation or conclusion of the agency's cases. Thus, in a fundamental sense, the FCO president does not set priorities or define the agency's objectives. The president can offer suggestions or make recommendations to the chambers, but cannot dictate what they will do. When speaking on behalf of the FCO, the president can provide a synthesis of past and current activities and interpret what these measures mean for future policy making. The president also can offer predictions about future

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<sup>39</sup> See William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*, 74 ST. JOHN'S L. REV. 361, 365-66 (2000).

<sup>40</sup> This statement is based on a review of the competition agency benchmarking data compiled in the George Washington CLC database. See *Worldwide Competition Database*, *supra* note 24.

<sup>41</sup> I am grateful to Andreas Mundt and Barbara Schulze for many useful conversations about the organization and operations of the FCO.

work (based on past decisions by the FCO's case handling chambers), but the president cannot directly dictate the course of policy for the institution.<sup>42</sup>

### C. *Work Product Volume and Quality*

A competition agency determines its brand mainly through the volume and quality of its work product. Presented below are ways in which an agency's work product influences its brand.

#### 1. Activity Levels Frequently Serve as Proxies for Quality

For the most part, groups external to the agency tend to equate higher levels of activity with higher quality.<sup>43</sup> An agency that does more things typically is seen to be a better agency than an agency that does fewer things. This principle can be derived from reading the proceedings of international organizations such as the Organisation for Economic Co-operation and Development ("OECD") and the United Nations Conference on Trade and Development ("UNCTAD"),<sup>44</sup> the ratings of publications such as the *Global Competition Review*,<sup>45</sup> and academic and popular commentary on what competition agencies do.

The most highly valued form of activity consists of cases, and the initiation of law enforcement proceedings involving high-profile enterprises tends to receive a higher weighting.<sup>46</sup> By contrast, the filing of reports and the performance of various functions grouped under the category of "advoc-

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<sup>42</sup> The FCO president exercises what might be termed indirect forms of influence over the chambers. The FCO president selects the heads of the chambers and can use this appointment authority to choose individuals who seem to share the president's views about what the agency should do. These appointments, however, come with the equivalent of tenure for the selected officials. Once the appointments are made, the FCO president loses influence over the chamber decision makers.

<sup>43</sup> Kovacic, *supra* note 15, at 908.

<sup>44</sup> OECD and UNCTAD both perform "peer reviews" of competition agencies. See Hugh M. Hollman & William E. Kovacic, *The International Competition Network: Its Past, Current and Future Role*, 20 MINN. J. INT'L L. 274, 291-93 (2011) (discussing OECD and UNCTAD peer reviews). A common metric used in these exercises to determine the effectiveness of a competition agency is whether it has been "active," i.e., is the agency bringing a substantial number of cases, and is the number increasing over time? See, e.g., ORGANISATION FOR ECON. CO-OPERATION & DEV., COMPETITION LAW AND POLICY IN CHILE 37-40 (2010) (reviewing enforcement statistics); UNITED NATIONS CONFERENCE ON TRADE AND DEV., VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY: A TRIPARTITE REPORT ON THE UNITED REPUBLIC OF TANZANIA-ZAMBIA-ZIMBABWE 11-13 (2012) (reviewing enforcement statistics).

<sup>45</sup> The Global Competition Review publishes an annual ranking of the world's leading competition agencies. See GLOBAL COMPETITION REVIEW, RATING ENFORCEMENT 2014 (2014).

<sup>46</sup> Kovacic, *supra* note 15, at 908.

cacy” receive less attention and count for less.<sup>47</sup> It is important not only to bring a certain level of cases, but to win a sufficient number of them (although not all) to indicate that the agency can succeed in court. A small number of highly visible litigation victories can accomplish this result.

A corollary to this principle is that higher levels of fines or sanctions often are taken as signs of higher quality. An agency whose law enforcement activities yield a larger amount of monetary recoveries is likely to be deemed to be more effective than an agency with smaller recoveries.

## 2. Minimum Activity Levels May Be Essential to Perceived Effectiveness

An agency whose activity rate falls below some level runs a risk of appearing ineffective. External observers will depict its program as deficient. This is true regardless of whether the socially optimal decision in a specific case would be to stand aside, or whether a program of little or no enforcement for certain types of offenses might improve economic performance.

By this norm, decisions not to prosecute tend to receive little or no credit. To withstand criticism of individual decisions not to prosecute, an agency must accumulate a minimum level of reputational capital in the form of previous decisions to intervene. Past prosecutions give the agency capital it can spend in future matters when agency leadership concludes that a case is not warranted. For new leadership, it is ideal to have some early matters in which the agency can take action and thus establish its willingness to act and be tough when necessary.

The DOJ’s enforcement of antitrust prohibitions on dominant firm misconduct provides a possible illustration. The DOJ’s antitrust leadership appointed under President George W. Bush initiated no cases involving monopolization or attempted monopolization.<sup>48</sup> The DOJ’s program in this and other areas of antitrust law figured prominently in attacks made by Barack Obama against the Bush administration’s antitrust program during the 2008 presidential campaign.<sup>49</sup> This number contrasts with seven such cases begun under FTC leadership appointed by President Bush.<sup>50</sup>

As a matter of policy and strategy, the decision not to bring dominant firm misconduct cases arguably deprived the Bush DOJ of an important measure of political and reputational capital. Zero is an easy number for

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<sup>47</sup> *Id.* at 920-21.

<sup>48</sup> *Id.* at 911.

<sup>49</sup> Senator Barack Obama, Statement for the American Antitrust Institute (Sept. 27, 2007), available at [http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07\\_092720071759.pdf](http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf).

<sup>50</sup> See Kovacic, *supra* note 15, at 911.

specialist critics to attack and for wider audiences to understand.<sup>51</sup> A law enforcement body ought not to be admonished to bring cases simply for the sake of bringing cases. Yet it might have been prudent for the Bush DOJ antitrust leadership to develop even a small number of cases that would appear to coincide with the incumbent administration's antitrust philosophy.<sup>52</sup> At least in some areas of antitrust law, a minimum level of activity may be vital to preserve the credibility and reputation of the competition agency.<sup>53</sup>

### 3. Queuing: The Order of Events May Affect Prosecutorial Choices

The queue of matters that comes before an antitrust agency is partly determined exogenously and partly endogenously. Mergers provide an illustration. From the perspective of the competition agency, a major cause of merger rates is the state of the economy. In periods of growth and ascending stock values, firms are more likely to undertake mergers than when economic conditions are bleak.<sup>54</sup> The decision to merge, however, also depends on an endogenous factor. The agency's enforcement record and its statements of enforcement intentions shape the perceptions of potential merging parties and their advisors about whether to proceed.

The order in which specific matters come before the agency may affect what the agency decides to do. In the mid-1990s, under the leadership of Robert Pitofsky, the FTC achieved important litigation merger victories in transactions involving office supplies (*FTC v. Staples, Inc.*)<sup>55</sup> and pharmaceutical distribution systems (*FTC v. Cardinal Health, Inc.*)<sup>56</sup> Later in the

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<sup>51</sup> An enforcement record of no cases is unlikely to attract criticism if the type of enforcement has been largely discredited. The two U.S. antitrust agencies have brought one case to enforce the Robinson-Patman Act since 1989 and none since 2000. William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 410-15 (2003). Because academics, the bar, and the public enforcement community hold the Robinson-Patman Act in low regard, this trend has not provoked objections.

<sup>52</sup> For example, a "conservative" antitrust program to police monopolization or attempted monopolization could focus on preventing the accumulation or protection of market power through the abuse of governmental processes. For a defense of this approach by a prominent skeptic of enforcement against dominant firm exclusionary conduct, see ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 347-64 (1978).

<sup>53</sup> An analogy might be made to maritime navigation. Unless a boat attains a minimum level of speed, the manipulation of the rudder becomes ineffective as a means of turning the vessel.

<sup>54</sup> Merger activity in the United States rose significantly in the 1980s and 1990s during periods of economic growth and ascending stock market prices. Merger levels fell substantially in 1999-2000 with the collapse of the so-called dot-com bubble and from 2008-2010 with the financial crisis. See Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 124 (2002) (documenting trends in merger activity and federal enforcement).

<sup>55</sup> 970 F. Supp. 1066 (D.D.C. 1997).

<sup>56</sup> 12 F. Supp. 2d 34 (D.D.C. 1998).

decade, the FTC allowed Boeing to purchase McDonnell Douglas without restrictions<sup>57</sup> and permitted several large mergers of petroleum companies (most notably, Exxon's purchase of Mobil) with some divestitures.<sup>58</sup>

Let us consider how the FTC might have evaluated Boeing/McDonnell Douglas or Exxon/Mobil if one of these transactions had occurred earlier in Pitofsky's tenure. Would the FTC chairman, who had criticized enforcement policy under the Reagan administration as being too lax,<sup>59</sup> have allowed Boeing to purchase McDonnell Douglas if the deal had been the first major transaction to emerge in, say, 1995? One possible interpretation of FTC merger enforcement policy in the 1990s is that the successful challenges to the Staples and Cardinal Health transactions established the agency's reputation for toughness. The *Staples* and *Cardinal Health* decisions, in effect, put reputational and political capital in the bank that the FTC could spend on future decisions not to prosecute. These litigation victories enabled the agency to say, when the Boeing merger and the petroleum deals came along, that it was willing to intervene when the facts so required, but sufficiently discerning to stand down when the transaction was benign.

The queuing effect might have other consequences for an agency's enforcement choices. Consider, again, the Boeing/McDonnell Douglas example. Some commentators accused the FTC of rolling over in the face of White House and congressional pressure to permit the merger as a way of enabling Boeing to cope with the increasingly formidable commercial aircraft program of Airbus.<sup>60</sup> Moreover, the FTC's inaction in the face of a three-to-two merger seemed to clash with Pitofsky's scolding of the Reagan administration for allowing various mergers of large enterprises and the Pitofsky FTC's commitment to block deals that yielded especially high post-merger market shares.<sup>61</sup> Judged by the apparent policy preferences of the FTC's chairman, the Boeing/McDonnell Douglas deal seemed ripe for an FTC challenge.

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<sup>57</sup> Press Release, Fed. Trade Comm'n, FTC Allows Merger of the Boeing Company and McDonnell Douglas Corporation (July 1, 1997), <http://www.ftc.gov/news-events/press-releases/1997/07/ftc-allows-merger-boeing-company-and-mcdonnell-douglas>.

<sup>58</sup> See Kovacic, *supra* note 51, at 442-44 (discussing the FTC's decisions involving petroleum industry mergers during the Pitofsky chairmanship).

<sup>59</sup> *Id.* at 430-31 (recounting Pitofsky's criticisms of Reagan-era merger enforcement).

<sup>60</sup> In the months before the FTC's decision not to intervene, Vice President Al Gore visited one of Boeing's production facilities outside Seattle and told an assembly of Boeing workers that moves by the European Commission to block the acquisition of McDonnell Douglas could lead to a trade war. I suspect the awareness of this preference did not lead the FTC to stand aside, but I also understand why many observers would conclude otherwise. See William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J. 805, 840-41 (2001) (recounting this episode).

<sup>61</sup> See Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195, 196 (1992).

Roughly a year later, Heinz sought to acquire Beech-Nut's baby food business, and the FTC ultimately succeeded in blocking the merger.<sup>62</sup> On its face, the merger was a three-to-two transaction that would leave Gerber (the market leader with a 70 percent share), Heinz (with roughly 28 percent), and a fringe.<sup>63</sup> Heinz argued, without success, that this was not a three-to-two merger but instead a one-to-two transaction—that the deal would enable the merged enterprise to mount an effective challenge to the well-established industry leader, Gerber, whose dominance had persisted for forty years.<sup>64</sup> There is some evidence that the Heinz/Beech-Nut efficiency and competitive effects story had merit, and Gerber's share of the North America baby food market has climbed to over 80 percent.<sup>65</sup> Maybe the FTC stopped a three-to-two merger it should have allowed (Heinz) and failed to impose conditions on a three-to-two merger that it waived through untouched (Boeing).

The FTC's decision in the baby food merger may have illustrated the queuing effect. The Heinz transaction arose a relatively short time after the Pitofsky FTC had decided not to oppose Boeing's acquisition of McDonnell Douglas. Heinz/Beech-Nut also followed the FTC's high profile decision to permit Exxon to buy Mobil—a deal valued at over \$81 billion and resolved with approximately \$2 billion of divestitures.<sup>66</sup> To allow Heinz to buy Beech-Nut (and to endorse a three-to-two deal on the basis of efficiency arguments that seldom rescue mergers in the highest atmosphere of concentration) would again have raised aggressive questioning about the Commission's merger program and Pitofsky's commitment to tough merger enforcement. If the FTC had approved Heinz/Beech-Nut, Pitofsky's legacy might have changed in unwelcomed ways. He might have been remembered more as an official with a blind spot for big three-to-two deals (Boeing and Heinz) and petroleum industry consolidation rather than the person who spearheaded the pathbreaking prosecution in *Staples*.

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<sup>62</sup> *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001). I was not a neutral observer in this case. I wrote a brief supporting the merger in the appeal to the D.C. Circuit.

<sup>63</sup> Press Release, Fed. Trade Comm'n, FTC to Challenge Merger of Beech-Nut Nutrition Corp. and H.J. Heinz Co. (July 7, 2000), <http://www.ftc.gov/news-events/press-releases/2000/07/ftc-challenge-merger-beech-nut-nutrition-corp-and-hj-heinz-co>.

<sup>64</sup> *FTC v. H.J. Heinz Co.*, 116 F. Supp. 2d 190, 192, 198 (D.D.C. 2000), *rev'd*, 246 F.3d 708 (D.C. Cir. 2001).

<sup>65</sup> See Viola Chen, *The Evolution of the Baby Food Industry, 2000-2008*, 6 J. COMPETITION L. & ECON. 423, 441 (2010).

<sup>66</sup> See John R. Wilke et al., *Exxon-Mobil Merger Gets Approval; FTC May Be Tougher on Future Deals*, WALL ST. J. (Dec. 1, 1999), <http://online.wsj.com/articles/SB943986833943182619> (subscription required) (valuing Exxon-Mobil deal at \$81.38 billion); Nancy Rivera Brooks, *FTC Approves Merger of Giants Exxon, Mobil*, L.A. TIMES (Dec. 1, 1999), <http://articles.latimes.com/1999/dec/01/business/fi-39285> (valuing required divestitures at about \$2 billion).

#### 4. The Persistence of Presumptions Favoring Intervention

This discussion does not assume that activity levels are a suitable measure of agency quality. To say that an agency is bringing lots of cases, or collecting substantial fines, does not establish that its program is improving economic performance—the genuine test of effectiveness. Activity is not a synonym for accomplishment.

If one acknowledges the hazards of simply counting cases and fines, why is activity so often taken to be an important signal for quality? One reason is that the assessment of the outcomes of enforcement decisions (to intervene or not to intervene) can pose difficult methodological challenges and can be expensive. Given the choice between bringing the next case (with its immediate credit-claiming opportunities) and performing an ex post evaluation, agency leadership might well prefer the first course of action. To the extent that ex post assessments might discredit an agency's existing presumptions about whether to intervene, the agency might prefer to assert the correctness of its policies on the basis of a priori reasoning and forego empirical testing.<sup>67</sup>

Another reason for the popularity of activity measures of effectiveness are the professional interests of numerous observers who shape opinions about the agency's performance. The livelihoods of antitrust lawyers depend significantly upon the level of public agency enforcement activity—the significance grows where private rights of action do not exist, or are feeble. Even the most ardent members of the defense bar require the fact or threat of intervention to obtain clients. The same is true for economic consultants.

To say that there is economic self-interest among these professional groups does not discredit their endeavors, or their preference for higher (rather than lower) rates of enforcement. A physician who prescribes aspirin as an alternative to bloodletting to cure a fever can be said to be advancing her own economic interests, yet her efforts to promote medical treatment generally coincide with the interests of prospective patients and society as a whole. There comes a point, however, at which a physician might prescribe a treatment regime that is excessive in the sense that it does not advance the patient's well-being but instead results in an intensity of caregiving that mainly serves to raise the physician's fees. The element of self-interest among professional advisors (economists and lawyers) in competition law resides not in their preference for certain levels of activity, but rather in the dosage they prescribe. Law firms and economic consultancies

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<sup>67</sup> See William E. Kovacic, *Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 GEO. MASON L. REV. 843, 856 (2001) (discussing the reasons for the reluctance of antitrust agencies to invest in ex post evaluations of past prosecutorial decisions).

might well be correct in suggesting that antitrust agencies should exercise their enforcement power, but they might not be trusted entirely when they suggest how much.

The same bias for action (in the form of investigations and prosecutions) can be observed in academics, especially those who also engage in professional consulting. An antitrust program with no enforcement likely would diminish the demand for courses in competition law and industrial organization economics, and it would reduce the perceived value of articles, casebooks, and treatises on competition policy. In some respects, the ideal economic or legal model is one that creates a presumption favoring intervention in some areas of competition law. The presumption toward intervention enables the academic/professional advisor to act for agencies or private firms that seek to intervene, but—just as important—it allows the academic/advisor to work on behalf of those who oppose intervention. In the latter case, the academic/advisor can say that, although he and his model are sympathetic to intervention, the facts of *this* case fail to satisfy the demanding conditions of the model. The ideal model creates opportunities for representation on behalf of plaintiffs and defendants, with the academic/advisor serving as the knowledgeable expert who can discern when intervention or forbearance is appropriate.

Legislators also might prefer activity that results in intervention, or the threat of intervention, by the competition agency. This is especially true in a system in which affected commercial interests are a major source of electoral resources (e.g., campaign contributions, the mobilization of voters) that legislators require to gain and hold office. The possibility of agency intervention creates two categories of parties that can provide such resources—firms that desire intervention and firms that oppose it. If the agency intervenes, a legislator whose constituents benefit from the action can claim credit for the agency's action. At the same time, a legislator whose constituents and business patrons oppose intervention can seek to apply his influence to forestall or to modulate the agency's action. For both groups (legislators who desire agency intervention and those who oppose it), a decision-making presumption that favors agency activity serves their electoral interests.

A propensity to intervene also is compatible with the preferences of media organizations that cover antitrust enforcement agencies. A journalist assigned to an antitrust beat presumably prefers to write about action rather than inaction. A publication that specializes in covering antitrust enforcement is unlikely to attract a strong subscriber base and advertisers if there is no enforcement to cover. The prosecution of cases—most important, matters involving well-known enterprises—produces visible, ongoing events that demand reporting. Agencies that do not bring cases do not generate news coverage events that media organizations value highly. Journalists are more likely to write favorable accounts of agencies that “create news” and to criticize, as “dormant” or “moribund,” agencies that do not.

#### D. *Quality Control Processes*

An agency can enhance its brand by creating and applying institutional processes that press the agency toward improving the quality of its work. In modern discussions about agency effectiveness, these quality control mechanisms often are analyzed under the rubric of “procedural fairness” or “procedural due process.”<sup>68</sup>

Procedural fairness or due process can be seen as having two dimensions. The first ingredient is the establishment of mechanisms that test evidence rigorously and thereby increase the agency’s capacity to diagnose behavior correctly and to impose appropriate cures for apparent competitive ills.<sup>69</sup> Among other results, a regime of rigorous evidentiary testing overcomes the confirmation bias that can arise when an agency formulates an initial hypothesis about likely competitive effects and then refuses to abandon the hypothesis in the face of theories or evidence that dictate reconsideration.

The second dimension of due process or fairness is to create the appearance of truth seeking as well as to accomplish this result in fact.<sup>70</sup> At a conceptual level, the appearance of fairness is achieved through the reliance (visible to agency outsiders) on mechanisms that test evidence rigorously and operate as safeguards against confirmation bias. Providing clarity about enforcement intentions and allowing affected parties the opportunity to contest agency theories and portrayals of fact are key means to these ends.

The pursuit of procedural fairness, for the sake of sound substantive analysis and the appearance of fairness, has important implications for agency design. This is especially true for the decision to bundle or unbundle major decision-making tasks—the decision to investigate, the decision to prosecute, the determination of guilt or innocence, and the imposition of sanctions.<sup>71</sup> As a general matter, the more that a system moves toward complete integration of these functions in a single body, the more it is likely to confront greater difficulty in testing evidence rigorously and being seen as a fair decision maker.

This is the challenge facing agencies such as the FTC and the European Commission. Each institution has chosen different mechanisms to in-

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<sup>68</sup> See, e.g., ORGANISATION FOR ECON. CO-OPERATION & DEV., PROCEDURAL FAIRNESS AND TRANSPARENCY: KEY POINTS 2012 (2012), available at <http://www.oecd.org/competition/mergers/50235955.pdf> (summarizing the OECD’s three presentations on procedural fairness and transparency held during 2010 and 2011).

<sup>69</sup> See *id.* at 6.

<sup>70</sup> See *id.*

<sup>71</sup> See William E. Kovacic & David A. Hyman, *Competition Agency Design: What’s On The Menu?*, 8 EUR. COMPETITION J. 527, 534-36 (2012) (addressing the decision to integrate or unbundle decision-making tasks).

crease confidence in its process and to signal system quality to outsiders.<sup>72</sup> In competition matters, the FTC board receives recommendations from three distinct entities in nearly each matter it addresses—Competition, Economics, and General Counsel. Administrative adjudication takes place before an administrative law judge with substantial independence (and protection from dismissal by an unhappy board), testimony is taken under oath, and witnesses are subject to cross-examination. Nonetheless, the same body that decides to prosecute a case (the Board) also is the final body for appeals within the Commission on questions of liability and remedy. In a rough sense, the same entity that decided to bring the case gets to decide if its initial intuition about whether the respondent infringed the law was correct.

The famous trilogy of the European Commission merger setbacks before the Court of First Instance (now the General Court) in 2002 stimulated major procedural reforms within the Commission.<sup>73</sup> DG Comp revamped its internal procedures to test evidence more rigorously and to give the outward appearance of using sound process.<sup>74</sup> It created the position of Chief Economist and established internal adversary panels to challenge positions staked out by case handling teams.<sup>75</sup> DG Comp has been engaged in a continuing search for refinements for its hearing process for the same purpose.<sup>76</sup>

An important audience for an agency's establishment of quality control mechanisms is the judiciary. Competition systems usually subject decisions of the competition agency to judicial review. Regardless of the nominal standard of review, the intensity of judicial oversight probably depends upon the court's perception of the quality of the agency's procedures. The stronger the agency's internal safeguards, the stronger its prospects of convincing courts to give the deference which the statute says the agency is entitled to receive. As the stakes in a case increase, a reviewing court may well exercise still greater scrutiny. Courts that are willing to defer when the fine at issue is one million dollars may be more demanding of the agency when the sum in question increases to one billion.

Another important form of quality control is the willingness to engage in ex post assessment of past enforcement decisions to intervene or not to intervene. A commitment to submit the agency's work to ex post review can have two beneficial effects for the quality of agency policy making. Retrospective studies can help correct flaws and identify superior methods

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<sup>72</sup> See William E. Kovacic et al., *Merger Control Procedures and Institutions: A Comparison of EU and U.S. Practice*, 59 ANTITRUST BULL. 55 (2014) (examining the EU and FTC mechanisms in the context of merger control).

<sup>73</sup> *Id.* at 65-67.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See *id.* at 63-65.

of analysis going forward, and they can increase confidence that the agency is determined to improve the quality of its programs and make necessary adjustments.<sup>77</sup>

#### E. *Engagement with External Bodies*

Agencies can strengthen their brands through the interaction with external bodies. Means to this end include speeches, the issuance of guidelines, and the convening of events at which the agency elicits the views of outsiders about what it has done and what it should do in the future. Each public pronouncement—a speech, a case, a report, or a guideline—is an opportunity to establish and reinforce a brand. As suggested above, doing this effectively requires an agency to identify what it wishes its brand to be, to clearly state its priorities, and to develop a common understanding within the agency about how to deliver its message. It is impossible to be “on message” without identifying what the messages ought to be.

An agency should envision itself as being in a constant conversation with important external bodies. The judiciary, again, provides a good example. Agencies “speak” to the courts in many ways—most obviously in the filing of formal papers but less obviously in the publication of reports, the preparation of guidelines, and the delivery of speeches. An agency that seeks deference from the courts should want to convey the view to judges that it is a thinking person’s institution: its work standards are demanding, its commitment to good policy results is unyielding, and its procedures strive to test evidence rigorously and overcome confirmation bias. In the eyes of judges who see an agency on a recurring basis, the agency trades on what amounts to a stock exchange, and its reputation ascends or declines based upon the quality of work it presents to the judges. An agency with a good reputation enters the courtroom with a halo and enjoys the benefit of the doubt before it speaks a word. An agency with a poor reputation is two goals behind before the match begins.<sup>78</sup>

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<sup>77</sup> Kovacic, *supra* note 67.

<sup>78</sup> On some occasions, an agency delivers messages about its programs directly to judges. After a series of setbacks in merger cases in 2002, I observed several conferences at which DG Comp officials and judges from the CFI were speakers. DG Comp used these events to give speeches in which the Commissioner for Competition (at that time, Mario Monti) and the Director General (at that time, Philip Lowe) carefully set out plans for internal reforms. With the judges in the audience, DG Comp, in effect, said that it had received the message delivered by the adverse merger decisions and was responding with improvements. On one occasion, a DG Comp official spoke first in a keynote address and was followed in a later keynote address by a Court of First Instance (“CFI”) jurist (Bo Vesterdorf), who essentially said, we are aware of and welcome these initiatives.

#### F. *Selection of Leadership*

No one is more important to an agency's branding efforts than its top leadership. This is most evident in the role that top leadership plays as the public face of the agency in giving speeches or testifying before government bodies. The capacity of top leaders to set out a vision, to engage in debate, and to demonstrate mastery of the substantive field shapes impressions about the agency and its quality. More than any other individuals, the agency leaders are most responsible for defining the agency's ends and its strategies to attain them.

This is particularly true for newer agencies in the first decades of their development. In many instances, the performance of newer agencies has been extraordinarily sensitive to the quality of leadership, and regime changes can produce dramatic variations in performance.<sup>79</sup> Yet the branding role of top leadership is important in older agencies, as well. The image of even an older agency rises or falls if it appears that the leader is out of his depth. International audiences are particularly sensitive to the apparent skill of an agency head.<sup>80</sup>

Top leaders often are political appointees. They usually are members of one of two groups. In one group are individuals who are simply happy to have the job. They are prone to be indifferent to the agency's longer term interests, for they derive utility chiefly from the benefits associated with high office. In the other group are individuals who take the job to make useful contributions to public policy. These leaders tend to have deep expertise in their institution and a well-defined positive agenda for applying its powers.

#### G. *Norms: Aligning Individual Goals with Agency Needs*

A number of the measures that build a good brand (e.g., investments in non-litigation activities that build knowledge or increase human capital) resemble long-term capital expenditures. This may not mesh well with the incentives that guide short-term political appointees. A political appointee may focus heavily on activities that yield immediate, appropriable gains.

Case-centric performance criteria can accentuate attention to short-term individual needs rather than long-term agency requirements. A leader who desires credit-claiming events during his tenure might place a special emphasis on the initiation of new cases rather than, for example, the commencement of a study that will improve the agency's understanding of a specific sector. It may be difficult in many institutions and political systems

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<sup>79</sup> Kovacic, *supra* note 39, at 364, 368-372.

<sup>80</sup> *Id.* at 372.

to develop a norm that induces incumbent leaders to make investments whose benefits emerge over the longer term and occur mainly (or entirely) after the person who launched the investment has left office.

A propensity for short-term credit claiming also can cause a leader in the current period to denigrate the work of predecessors. The leader may engage in a self-serving form of framing, which depicts earlier periods of work as severely deficient (“It was terrible when I got here”) as a way of accentuating the accomplishments of current leadership (“My heroic efforts rescued the agency”). This behavior can be most intense at the time of a political regime change, but the simple force of personal pride and reputation polishing explains it, as well. For political or reputational reasons, an incumbent political appointee may choose to magnify her own achievements by portraying predecessors as inadequate. The behavior can continue after an individual leader has left.<sup>81</sup> Upon leaving office, the narrative then describes how the leader’s arrival saved a bad situation, but that one’s successors simply have not measured up, especially if they come from a different political party.

This form of credit-claiming behavior may serve the interests of individual leaders, current or past, but it tarnishes the agency’s brand. Who, after all, would have confidence in an institution whose behavior varies wildly with each change of leadership, especially with a political regime change? Two good, rough signs of whether an agency has a culture that promotes improvements over time in the agency’s brand are whether and how often (a) an incumbent agency leader refers favorably to the work of immediate predecessors; and (b) former officials speak well of leaders who followed them.

There is a different conception of policy making in which leaders treat public service as a relay race and not an individual event. From this perspective, success is the result of team production over a series of individual management episodes.<sup>82</sup> Each individual leader in the succession of leaders envisions herself as co-producer of a common product (the agency brand), and each seeks to ensure that, with each segment of the race, the position of the team has improved.

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<sup>81</sup> See William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST L.J. 687, 700-02 (2014) (analyzing this phenomenon).

<sup>82</sup> See Deborah Platt Majoras, Chairwoman, Fed. Trade Comm’n, Opening Remarks at the Federal Trade Commission 90th Anniversary Symposium (Sept. 22, 2004), available at [http://www.ftc.gov/sites/default/files/documents/public\\_events/ftc-90th-anniversary-symposium/040922transcript00intro.pdf](http://www.ftc.gov/sites/default/files/documents/public_events/ftc-90th-anniversary-symposium/040922transcript00intro.pdf).

## CONCLUSION

A brand is an important capital asset, for a commercial enterprise and for a public agency. To an important degree, the effectiveness of the FTC and other regulatory agencies depends on the establishment and maintenance of a brand that signals quality in the institution's process and substantive work. The design of regulatory institutions can influence their ability to create good brands. Branding also is a function of the incentives that motivate public officials, especially top agency leadership. Deeper consideration of these design and incentive features provides a useful way to think about what makes for a good regulatory agency.