BUREAUCRACY AND POLITICS IN FTC MERGER CHALLENGES*

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I. Introduction

Since Stigler's article on the economic theory of regulation,[1] public interest views of regulation increasingly have yielded to self-interest explanations. That is, well-organized private groups purchase regulatory favors in the political marketplace, benefiting both themselves and politician-sellers at the expense of less well-organized groups. However, one form of government regulation, antitrust, has largely escaped characteri-

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We have reluctantly agreed to recite the following, written by the FTC's Office of General Counsel:

This paper was prepared using nonpublic information from Federal Trade Commission internal files. Access to this information was available to Messrs. Higgins and Coate because they were employees of the Commission, and it was made available to Mr. McChesney because he was a consultant to the FTC Bureau of Economics. The Commission's Bureau of Economics has major disagreements with the methodology, analysis, inferences, and conclusions contained in this paper, and neither the Commission nor any of its members has authorized or endorsed its creation or publication. The FTC General Counsel determined that precluding publication would not be in the public interest and authorized its publication under secs. 5.12 and 5.21 of the FTC Rules of Practice, 16 C.F.R. secs. 5.12 and 5.21.

[1] George J. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. 3 (1971).

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zation as a political, interest-group bargain. "Antitrust is one of the few remaining areas in which it is commonly assumed that government operates in the public interest."[2] Stigler himself believes antitrust a rare instance of benevolent regulation.[3] Some have tested this claim by examining the cases brought by antitrust authorities but found little evidence that public interest (social welfare) considerations drive antitrust enforcement. However, the alternative hypothesis, that antitrust is a politically driven, private-interest sort of regulation, has also been tested and found to be largely unsupported.

This article joins the debate by examining decisions of the Federal Trade Commission (FTC) to challenge horizontal mergers, using non-public data from that agency's files. The FTC does not purport to base its enforcement of merger law on the public interest variables identified by previous authors; rather, the commission's merger enforcement policy focuses on variables specified in the Department of Justice's merger guidelines. All other things equal, the guidelines predictably would play a role in agency determinations to challenge a merger, a hypothesis tested here using the internal FTC data.

Our data also elucidate the separate roles played by FTC lawyers and economists in influencing FTC decisions to challenge mergers. Several studies of the FTC have advanced—but never tested—hypotheses about these two groups within the agency. Lawyers supposedly have greater incentives to initiate cases than do economists, but both lawyers and economists are said to affect agency decisions whether to file a complaint. Those and related hypotheses are also tested here.

Finally, we model antitrust enforcement by the FTC as also influenced, ceteris paribus, by pressure from Congress. This pressure reflects demands from management and labor of companies at risk from reorganization through mergers and takeovers. Although mergers and takeovers are socially beneficial overall, the configuration of winners and losers confronts a politician with asymmetric benefits and costs. Individual share-

[2] William F. Shughart II & Robert D. Tollison, The Positive Economics of Antitrust Policy: A Survey Article, 5 Int'l Rev. of Law & Econ. 39, 53 (1985).

[3] Stigler calls the Sherman Act "a public interest law . . . in the same sense in which I think having private property, enforcement of contract, and suppression of crime are public-interest phenomena . . . I like the Sherman Act." Thomas Hazlett, Interview with George Stigler, Reason, Jan. 1984, at 46. See also George J. Stigler, The Economic Effects of the Antitrust Laws, 9 J. Law & Econ. 225 (1966). For similarly benign views of the intent (though not effect) of antitrust law, see Robert Bork, The Antitrust Paradox 50–71 (1978). For further discussion of the tenacity of the public interest view of antitrust, see Robert E. McCormick, The Strategic Use of Regulation: A Review of the Literature, in The Political Economy of Regulation: Private Interests in the Regulatory Process 26 (Robert A. Rogowsky & Bruce Yandle eds. 1984).

holders who gain are weakly organized and scattered throughout the country; institutional shareholders are too numerous and well diversified to have strong incentives to organize. Management and labor that may lose their jobs or be transferred are better organized and more concentrated in a particular politician's district. An antitrust regime can be useful to a politician in the same way that antitakeover legislation is, avoiding the risk that resources and votes will exit a politician's jurisdiction following completion of a merger.

Section II briefly reviews previous attempts to explain antitrust, then presents an alternative model of bureaucratically and politically directed antitrust enforcement. The FTC is modeled as responsive to (i) the merger guidelines, (ii) internal agreement or disagreement between its own lawyers and economists, and (iii) pressure from politicians seeking to block mergers. Section III tests the model by examining FTC decisions whether to challenge a proposed merger between 1982 and 1986. The model is shown to explain considerably more of antitrust enforcement than has been possible heretofore. High values for the variables identified in the merger guidelines almost guarantee a merger challenge. In addition, congressional pressure on the FTC to block mergers is found to increase significantly the likelihood that the commission will do so.

II. Determinants of Antitrust Enforcement

A. *Previous Inquiries*

Statistical examination of antitrust enforcement began with Posner.[4] Building on Posner's data, Long, Schramm, and Tollison (L-S-T) developed a cross-industry model of welfare loss potentially caused by antitrust infractions and examined whether the Justice Department brought more cases in industries where amounts of potential welfare loss were greater.[5] They found that welfare loss "played a minor role in explaining antitrust activity. . . . Much of the explanation of antitrust activity clearly lies outside our model."[6]

Subsequent work to explain antitrust enforcement in social welfare (public interest) terms has aimed at improving the L-S-T model. Siegfried, for example, ran the L-S-T tests using more disaggregated data and a

[4] Richard A. Posner, A Statistical Study of Antitrust Enforcement, 13 J. Law & Econ. 365 (1970).

[5] William F. Long, Richard Schramm, & Robert Tollison, The Economic Determinants of Antitrust Activity, 16 J. Law & Econ. 351 (1973).

[6] *Id.* at 361–62.

larger sample.[7] However, his results were not qualitatively different from the L-S-T results, and they generally explained even less of the Antitrust Division's enforcement activities. When Siegfried altered various L-S-T assumptions, his model's explanatory power fell even further, leading him to conclude that "economic variables have little influence on the Antitrust Division."[8] Asch noted difficulties in using industry data of any sort, since antitrust cases are filed against firms, not entire industries.[9] Other than the need to focus more on micro (firm) levels of enforcement, however, Asch advanced no particular hypothesis about antitrust. Indeed, he concluded that the "appropriate interpretation" of his empirical results was "not entirely clear," even "puzzling."[10]

Thus, in attempts to predict antitrust enforcement ex ante, the "public interest hypothesis has not been supported by empirical work."[11] As an alternative, antitrust has been modeled as an interest-group process akin to other economic regulation, whereby antitrust is used to benefit well-organized private interests. A priori, the hypothesis is appealing: as attested by current judicial regulation of the telephone industry, antitrust often results in de facto regulatory regimes administered by government agencies and the courts.[12] Thus, some studies attempted to locate the

[7] John J. Siegfried, The Determinants of Antitrust Activity, 17 J. Law & Econ. 559 (1975).

[8] *Id.* at 573. Overall, Siegfried concluded that "government is more interested in questions concerning the division of the economic pie than in increasing its total size. . . . [T]here is apparently *no* consideration of economic benefits in the decision process for allocating antitrust cases." *Id.* at 563, 567 (emphasis in original).

[9] Peter Asch, The Determinants and Effects of Antitrust Activity, 17 J. Law & Econ. 575 (1975).

[10] *Id.* at 579.

[11] Bruce Yandle, Antitrust Actions and the Budgeting Process, 59 Pub. Choice 263 (1988). Studies of particular areas of enforcement likewise find that antitrust does not increase, and often reduces, economic welfare. Government price-fixing cases apparently target ineffective cartels, rather than successful ones that cause significant economic damage. Howard P. Marvel, Jeffrey M. Netter, & Anthony M. Robinson, Price Fixing and Civil Damages: An Economic Analysis, 40 Stan. L. Rev. 561 (1988). Firms successfuly charged by the government with price-fixing have had lower rates of profitability than a random sample of firms. Peter Asch & Joseph J. Seneca, Is Collusion Profitable? 58 Rev. Econ. & Stat. 1 (1976). Likewise, mergers challenged by the government are generally not anticompetitive. See, for example, B. Espen Eckbo & Peggy Wier, Antimerger Policy under the Hart-Scott-Rodino Act: A Reexamination of the Market Power Hypothesis, 28 J. Law & Econ. 119 (1985). Noteworthy also is the considerable evidence that the remedies awarded the government in successful antitrust cases seem not to have achieved stated welfare goals. For example, George A. Hay & Daniel Kelley, An Empirical Survey of Price-Fixing Conspiracies, 17 J. Law & Econ. 13 (1974); Kenneth Elzinga, The Antimerger Law: Pyrrhic Victories, 12 J. Law & Econ. 43 (1969); Robert A. Rogowsky, The Pyrrhic Victories of Section 7: A Political Economy Approach, in Public Choice and Regulation: A View from Inside the Federal Trade Commission (Robert J. Mackay, James C. Miller III, & Bruce Yandle eds. 1987).

[12] For example, Frank Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1, 35 n.72 (1984) (citations omitted): "Many antitrust suits are regulatory. The Department of Justice

private beneficiaries of antitrust, whose influence (via the political process) could explain the origin and enforcement of the antitrust statutes. Such attempts, notably those of Stigler and of Baxter, also have failed empirically.[13]

B. *A Bureaucratic-Political Model of Antitrust Enforcement*

1. Bureaucratic Factors

There are several likely reasons for the prior models' inability to explain antitrust enforcement. First, prior inquiries have ignored the criteria that the antitrust agencies themselves specify as determining their case selection. With mergers, for example, the Department of Justice and the FTC have officially adhered to written merger guidelines for the past twenty years.[14] The more recent guidelines (issued on June 14, 1982, and revised in 1984) define various factors that will increase the likelihood of an antitrust challenge to a merger, including the degree of and change in market concentration (measured by the Herfindahl-Hirschman Index [HHI]), the existence of significant barriers to entry, the likelihood of successful collusion for reasons other than barriers to entry, and the possibility that one firm may be failing. Prior models have not included the merger guidelines criteria as determining antitrust enforcement, perhaps because antitrust enforcers' measures of these variables have not generally been available.[15] Our access to internal FTC case files permits

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used antitrust suits to establish district courts as regulatory agencies over industries in which the Antitrust Division was persuaded that competition was 'unworkable,' but in which the political process had not acted. Approximately 53 antitrust decrees entered through 1979 are regulatory in character. This substantially exceeds the number of industries regulated by statute.'' See also E. Thomas Sullivan, The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition, 64 Wash. U. L. Q. 997 (1986).

[13] George J. Stigler, The Origin of the Sherman Act, 14 J. Legal Stud. 1, 8 (1985). Stigler tested the hypotheses that agrarian and small-business interests account for the origins of federal antitrust law but reported a ''failure to find strong evidence for any explanation for the passage of the Sherman Act.'' Baxter hypothesized that two groups in particular, private antitrust lawyers and smaller firms, stand to gain from greater antitrust enforcement. William F. Baxter, The Political Economy of Antitrust, in The Political Economy of Antitrust (Robert D. Tollison ed. 1980). Discriminating tests of his hypotheses were difficult to identify, and the data Baxter did present were inconclusive.

[14] U.S. Dep't of Justice merger guidelines, May 30, 1968. The guidelines were amended in 1982 and 1984. For the text of the 1968, 1982, and 1984 guidelines, plus the FTC's statement that it would give ''considerable weight'' to Justice's 1982 guidelines, see Section of Antitrust Law, Am. Bar Ass'n, Horizontal Mergers: Law and Policy 264–336 (1986).

[15] But see Robert A. Rogowsky, The Justice Department's Merger Guidelines: A Study in the Application of the Rule, 6 Res. L. & Econ. 135 (1984). Rogowsky examined the extent to which the Antitrust Division has followed its merger guidelines, finding that from 1968 to 1981 over 20 percent of the merger cases filed by the government fell below the defined threshold of concentration. Rogowsky did not, however, specify or test a model of enforcement action.

us, however, to determine whether these factors increase the chances of FTC enforcement action.

A second reason for the weak explanatory power of previous models, especially the private-interest models, has been their failure to model the agency decision in terms of the incentives of particular agency personnel. Lawyers and economists face different incentives to bring cases. Attorneys are said to favor more litigation than do economists because court challenges increase lawyers' human capital as litigators and thus raise their subsequent returns in private practice.[16] Even in the shorter run, heading a major investigation is required for FTC lawyers to advance to higher government employment grades (which also increase salaries); no such requirement applies to economists. The influence of economists at the FTC has grown considerably, particularly as economists have been named as commissioners and (once) even as chairman of the commission.[17] Economists tend to stay longer at the agency instead of using federal experience to build capital for subsequent private employment.

Conflicting incentives will lead to disagreement between lawyers and economists about whether to bring cases, and disagreements will reduce the likelihood of merger challenges. One would hypothesize that the FTC brings more cases when both lawyers and economists agree that the magnitudes of the various factors set out in the merger guidelines have reached worrisome levels. Disagreement among agency personnel as to the desirability of a particular merger challenge, in contrast, probably will reduce the likelihood that a case will be brought.

2. Political Factors

There is another reason for the largely unsuccessful attempts at explaining antitrust enforcement from an interest-group perspective. Those efforts have generally considered only private industries possibly served by antitrust. The likely private beneficiaries from antitrust may, however,

[16] "The principal attraction of Commission service to lawyers who wish to use it as a steppingstone to private practice lies in the opportunities it affords to gain trial experience. . . . It is the experience of trying cases, the more the better, not the social payoff from the litigation, that improves the professional skills and earning prospects of FTC lawyers." Richard A. Posner, The Federal Trade Commission, 37 U. Chi. L. Rev. 47, 86 (1969). Every other study of the FTC agrees. For example, Kenneth W. Clarkson & Timothy J. Muris, Commission Performance, Incentives, and Behavior, in The Federal Trade Commission since 1970: Economic Regulation and Bureaucratic Behavior 300 (Clarkson & Muris eds. 1981). The same incentives are said to motivate antitrust lawyers at the Justice Department. For example, Suzanne Weaver, The Decision to Prosecute: Organization and Public Policy in the Antitrust Division 38–41 (1977).

[17] For example, Robert A. Katzmann, Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy 52–53 (1980).

cut across particular industries. Examination of the private winners and losers from mergers, plus the interests of politicians themselves, suggests that merger enforcement would be politically driven by the same groups favoring restriction on corporate takeovers generally.

In a merger, the wealth of shareholders in both firms increases.[18] Even the threat of a merger will benefit shareholders of potential target firms if management seeks to operate more efficiently to avoid a takeover. Small shareholders who gain ordinarily are not organized and are geographically dispersed; their small individual holdings give them little incentive to be active politically. Likewise, larger institutional shareholders are too numerous, dispersed, and well diversified to have strong incentives to organize. But with gains to shareholders often come losses to two more concentrated groups, firms' current management and labor. Jobs may be eliminated and offices may be closed or moved, as a result either of the merger or of reorganization to fend off takeover threats. This means that the merger (or threat of merger) of a firm in politicians' home districts or states confronts them (and their management and labor constituents) with concentrated expected costs, while the expected benefits are spread among shareholders nationwide. Imperiled home-district management and labor will value political help to stop the merger; failure to stop it not only will mean the district loses wealth, but politicians may lose votes as jobs are transferred.

Of course, the districts where jobs and offices ultimately are located will benefit, so other politicians may have an incentive to favor a merger. But the particular districts that benefit are more difficult to perceive (more uncertain) ex ante, so potential labor and management beneficiaries have less incentive to press for the merger. Thus, the value of the probable loss to the current district is typically greater than the value of the possible gain to another. The expected costs to losing politicians outweigh the gains to winning politicians, ceteris paribus. To politicians who stand to lose, an antitrust challenge can be beneficial in defeating the attempted merger altogether; at a minimum it will slow down completion of the merger, increasing the likelihood that the parties themselves will call off the proposed arrangement.

In effect, the antitrust system works like private and public anti-takeover devices, although the similarities have not been fully appreciated. Privately, target managements can file antitrust actions to repel hostile bidders; they can acquire assets preemptively to increase concen-

[18] See generally Michael Jensen & Richard Ruback, The Market for Corporate Control: The Scientific Evidence, 11 J. Fin. Econ. 5, 9–16 (1983), which recites the empirical evidence.

tration levels and so elicit a governmental antitrust challenge to the proposed takeover.[19] Under either strategy, antitrust is a close substitute for other private devices (for example, poison pills) to fend off bids.

The public system of antitrust enforcement also works like antitakeover statutes, which have been shown to decrease the number of successful takeovers.[20] The Hart-Scott-Rodino (H-S-R) procedure of premerger notification requires that merger partners notify federal antitrust authorities of their proposed merger, then wait for government clearance before completing any deal.[21] In essence, therefore, the H-S-R system works like the Williams Act, the principal federal statute regulating takeovers, which requires notification of the Securities and Exchange Commission (SEC) and a mandatory waiting period before tender offers can be completed.[22]

Political considerations alone will not determine agency decisions. Antitrust enforcers purport to follow the government's merger guidelines in deciding what mergers to challenge, and these also should affect bureaucratic choices. At the margin, however, political demands for enforcement will increase the bureaucratic supply of mergers challenged. There is considerable anecdotal evidence that the FTC commissioners do at times bring pressure for more cases.[23] The principal implication of the

[19] For example, Panter v. Marshal Field & Co., 646 F.2d 271 (7th Cir.), cert. denied, 102 S. Ct. 658 (1981). See Gregg A. Jarrell, The Wealth Effects of Litigation by Targets: Do Interests Diverge in a Merge? 28 J. Law & Econ. 151 (1985).

[20] Gregg A. Jarrell & Michael Bradley, The Economic Effects of Federal and State Regulations of Cash Tender Offers, 23 J. Law & Econ. 371 (1980).

[21] The Hart-Scott-Rodino Antitrust Improvements Act of 1976 is codified at 18 U.S.C. sec. 18a *et seq.*

[22] Just as legislators have proposed extending the Williams Act waiting period, they have also sought to extend H-S-R waiting periods before mergers can be completed. See, for example, H.R. 586 100th Cong. 1st Sess. (Jan. 8, 1987). That bill would require an "economic impact statement" for mergers. It would require (i) notice whether the proposed merger would result in the sale or closing of any facility or termination of its operations, (ii) an estimate of the number of jobs that would be lost, and (iii) an estimate of revenue that would be lost "by each governmental entity in the geographical jurisdiction." H.R. 586, 100th Cong., 1st Sess. sec. 4(b) (2) (1987).

[23] In May 1987, the FTC commissioners met to "decide the fate" of the Bureau of Competition director, who was accused of bringing too few cases. "Here Comes the Pendulum," FTC: Watch, May 29, 1987, at 1. "The meeting was scheduled far enough in advance that [BC Director] Zuckerman had time to visit all the Commissioners . . . and promise to get the bureau up to speed. According to knowledgeable agency officials, Zuckerman's promises to the Commissioners will require the Competition Bureau to bring on the order of thirty (30) cases in the next six months, an output which would be prodigious by recent standards." *Id.* at 2. It was subsequently reported that the budget for merger surveillance and thus the number of investigations had increased considerably. "A little direct intervention by the Commissioners," it was concluded, "goes a long way." "Mergers," FTC: Watch, June 26, 1987, at 5.

model presented here is that in bringing such pressure, the FTC commissioners respond to politicians' demand for more antitrust cases. This model of antitrust has implications for a more general debate. Many social scientists, including some economists, view administrative agencies as operating with few effective constraints imposed by legislators: this view characterizes many prior studies of the Federal Trade Commission.[24] Others argue along the lines of the present hypothesis: that the benefits to politicians of controlling bureaucratic agencies are worth the costs.[25] In the end, the issue is an empirical one.

III. Empirical Evidence

To test the bureaucratic-political model of merger enforcement, we reviewed the internal records associated with all H-S-R "second requests" concerning horizontal mergers issued by the Federal Trade Commission between June 14, 1982 (the date of the new merger guidelines) and January 1, 1987. Second requests obtain the data necessary to evaluate potentially anticompetitive transactions.[26] The sample includes seventy commission decisions.[27] In forty-three cases, the merger was allowed to

[24] For example, Katzmann, *supra* note 17; Clarkson & Muris, *supra* note 16.

[25] For general discussions and empirical tests, see Barry R. Weingast & Mark J. Moran, Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission, 91 J. Pol. Econ. 800 (1983); William F. Shughart II, Robert D. Tollison, & Brian L. Goff, Bureaucratic Structure and Congressional Control, 52 So. Econ. J. 962 (1982); Roger L. Faith, Donald R. Leavens, & Robert D. Tollison, Antitrust Pork Barrel, 25 J. Law & Econ. 329 (1982). See also William E. Kovacic, The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective, in Mackay, Miller, & Yandle eds., *supra* note 11, at 65 (FTC's antitrust enforcement "consistent with, and responsive to, congressional policy preferences"); Posner, *supra* note 16, at 82–85 (discussing ways politicians can use the FTC to benefit their constituents).

[26] For a description of the Hart-Scott-Rodino procedures, including issuance of "second requests," see, for example, Heublein, Inc. v. FTC, 539 F.Supp. 123, 124–25 (D.D.C. 1982). Following a second request, the FTC staff can dispose of a matter in several ways. The investigation may be closed, based on the staff's concurrence in a recommendation to close, which is subject to reversal by the commission. Alternatively, there may be a recommendation to the commission that a complaint be issued. In this case, the commission votes either to issue a complaint or to close the investigation.

[27] The seventy cases were drawn from the total of 109 H-S-R second requests issued between June 14, 1982, and January 1, 1987. Investigations were dropped from the sample if the merger was vertical (ten cases); the attempted merger was abandoned when the second request was issued, so the FTC's case file lacked information on the relevant variables (eight cases); the transaction was a joint venture, rather than a merger (four cases); the merger received early approval, presumably because the merger raised no serious competitive issues, so the FTC's case file contained insufficient information to be included in the sample (nine cases); the cases had been closed before sufficient information had been included in the files (three cases); or the HHI fell below the lower bound (1000) stated in the guidelines for a challenge (five cases).

proceed without interference; in the other twenty-seven cases (including those in which the merger was allowed to proceed only following some agreement with the FTC, such as a negotiated divestiture) the commission issued a complaint. Of the twenty-seven complaints issued, the FTC has not lost a case.[28]

A. *Explanatory Variables*

1. Merger Guidelines Variables

The five FTC commissioners vote whether to challenge a merger on the basis of information in formal staff memoranda, which usually are submitted separately by the lawyers of the Bureau of Competition (BC) and the economists of the Bureau of Economics (BE). The files for the seventy proposed mergers prepared for the commission's decisions reveal what each staff believes to characterize the relevant legal and economic considerations about each proposed merger. To distinguish the relative influence of lawyers' and economists' views on the decision to challenge, we identified the separate views of BC and BE as to the principal criteria included in the merger guidelines.[29]

For each merger, we first noted lawyers' and economists' calculations of the HHI in the relevant industry and the change in the index from the proposed merger. The calculations were translated into two binary variables. The first, for BC, equals one for those mergers where the lawyers argued that the industry HHI exceeded 1800 (making the industry "highly concentrated" under the guidelines) and that the merger would cause at least a fifty-point HHI increase (and so would be deemed "a matter of significant competitive concern" under the guidelines). The second variable, for BE, equals one for cases where the economists argued the HHI was below 1800 or the increase would be less than fifty points. (For mergers involving diversified firms, and so different HHI's for different markets, the highest HHI was used.) Thus, a particular case could have both variables equal to one only if the two bureaus disagreed. Disagreements occur, often when the economists and lawyers define the relevant

[28] Of the twenty-seven complaints issued, twenty-six cases were completed at the time of this writing; in the last one, an administrative ruling in favor of the FTC was still on appeal. As noted, the twenty-seven complaints include cases where the merger was allowed to proceed only subject to some agreement with the commission (such as a divestiture) since complaints must be filed in such cases.

[29] In cases when the director of the Bureau of Competition disagreed with his staff and sided with the Bureau of Economics, the staff position was used here as BC's position on the merger.

market differently.[30] (As would be predicted, this usually happened because lawyers argued for narrower markets than did economists.)

For other variables identified as relevant in the merger guidelines, a similar procedure was followed. For barriers to entry, binary variables for the BC and BE determinations were included. The BC barrier-to-entry variable was coded one when the lawyers claimed significant entry could not occur for at least two years, the period specified in the merger guidelines. The BE barrier variable was assigned the value one when BE found that entry would easily occur within two years. Positive values for both variables again signal disagreement. Ease of collusion was handled the same way, with a dichotomous variable for each bureau. A value of one for the BC variable indicated that the lawyers thought collusion relatively easy, while a one for BE meant the economists thought the opposite. (Zeros for the barrier-to-entry or collusion variables in some cases indicate that the bureau simply did not address the issue.) Finally, where the failing-firm doctrine was cited by BC as applicable, a failing-firm variable was coded one. Ordinarily, the commission views application of the doctrine as a purely legal issue.

2. Political Variables

To measure the effect of politics on each proposed merger, we used two variables. The first provides a proxy for political effect by measuring the amount of news coverage given the merger. Bigger mergers generate greater news coverage. The larger the merger, the more likely it is to result in job losses, plant closings or relocations, revenue losses to local jurisdictions, and thus the likelier it will be to encounter political resistance. Our measure of news coverage, as an indirect measure of the political pressure stemming from a proposed merger, is the count of the number of articles that mentioned the merger in the *Wall Street Journal* prior to the FTC's decision. Predictably, the commission will respond to pressure brought by better-organized labor and management groups, meaning it will challenge mergers generating more publicity.

Restricting the citations variable to articles before the FTC's merger decision reduces concerns over any problem of simultaneity between the number of articles and the decision whether to challenge the merger; the decision would increase the number of citations afterward. To be sure simultaneity was avoided, the equation was also estimated with the natural logarithm of the total merger bid price substituted for the citation

[30] For the seventy cases in the sample, the two bureaus disagreed about the definition of the relevant market sixteen times.

count. Bid price would perform like citations, capturing the potential loss of wealth and jobs in the districts affected and so the expected cost to politicians of letting the merger proceed. Higher bid prices therefore would increase the probability of the FTC's voting to challenge the merger. However, because the FTC vote would not affect the bid price, there is no simultaneity problem.

Political pressure is included more directly in the model by a twelve-month moving average, centered on the FTC's second request date, of the number of times commissioners or senior (politically appointed) FTC staff were called before congressional committees to testify on their antitrust enforcement records. Calling commissioners and staff to defend their antitrust records is a technique that politicians use frequently to increase amounts of antitrust enforcement. The FTC commissioners and staff prepare "case counts" to show that they are active in investigating cases and filing an acceptable number of complaints. Politicians berate commission witnesses when they deem the number of cases brought too low.[31] Individual congressmen and senators even advocate particular enforcement actions.[32] The debate in 1984 over amending the Export Administration Act to ban oil company mergers for five years shows the link between merger enforcement and political interest in local industries. The debate principally concerned job losses in the jurisdictions affected.[33] The budget process also reflects congressional desires for more antitrust cases. Antitrust agency budgets are allocated according to the enforcement zeal shown; passage of the Hart-Scott-Rodino Act in 1976 in particular caused a significant increase in antitrust budgets.[34]

[31] See, for example, Katzmann, *supra* note 17, at 146, discussing FTC testimony before its appropriations subcommittee: "[One] yardstick that the subcommittee uses in judging how well the commission is performing has to do with case-load statistics."

[32] *Id.* at 147–60.

[33] Yandle summarizes congressional concerns:

> The plan for the amendment had been triggered by the 1984 merger attempt of Texaco and Getty Oil Company, which would have been the largest merger in the nation's history. In the unfolding discussion, the senators first expressed grave concern about the inevitable monopoly power . . . [and then about] specific details associated with the FTC's antitrust review of the Texaco-Getty merger and the effects of the merger on plant operations in their states. For example, Senator Lautenberg raised as an issue Texaco's Eagle Point refinery in [West Deptford], New Jersey, indicating that 500 jobs and $1.8 million in local tax revenues were at risk. Senator Dole commented on the potential closing of a refinery in [El] Dorado, Kansas, where 1,000 jobs were at stake. He then indicated that he would "be meeting with officials of Texaco and others who may be able to shed more light on this."

Yandle, *supra* note 11, at 272.

[34] *Id.* at 271 (table 3).

B. The Regression Model

We defined a binary dependent variable, VOTE, equal to one when the commission voted a complaint in a case (including cases of divestiture or other negotiated changes in the merging parties' original agreement) and zero when it allowed the merger to proceed as the parties originally agreed. Given the binary dependent variable, we used the Probit model,

$$\mathrm{PROB}[\mathrm{VOTE} = 1] = F[aX],$$

where F is the normal distribution function and aX is a linear combination of the explanatory variables. Table 1 lists the independent variables, their means and standard deviations, and their predicted signs in the regression model.[35]

The parameter estimates for each explanatory variable are presented in Table 2. All variables have the predicted signs. The coefficients of all but the failing-firm variable are significant at the 10 percent level; most are significant at the 5 percent level. Overall, the model easily passes the chi-square likelihood ratio test, indicating that the explanatory variables significantly influence the probability of a complaint. We note in particular that the pseudo-R^2 computed from the likelihood statistic suggests that the model explains about half the variance in the dependent variable,[36] much more than previous studies of antitrust enforcement have been able to explain.

[35] The variable for congressional appearances, the effect of which is tested here, includes only hearings in which antitrust (rather than the FTC's consumer protection functions) was the subject. The means and standard deviations of BEBARLO and BECOLLO are identical, but this is coincidence. BECOLLO measures BE's assessment of the ease of collusion for reasons other than barriers to entry; the evaluation of entry barriers is captured by BEBARLO. The Pearson coefficient of correlation between the two variables (.11) is insignificant. Indeed, the correlations between the different merger guidelines variables for each bureau are generally insignificant. For the Bureau of Competition, the correlation coefficients are:

	BCHERFHI	BCBARHI
BCHERFHI		
BCBARHI	.02	
BCCOLHI	.18	.28

The coefficients for the Bureau of Economics are:

	BEHERFLO	BEBARLO
BEHERFLO		
BEBARLO	.04	
BECOLHI	−.02	.11

Thus the data indicate that the individual variables identified by the merger guidelines are evaluated on their own separate merits.

[36] R. Carter Hill, George G. Judge, William E. Griffith, Helmut Lutkepohl, & Tsoung-Chao Lee, The Theory and Practice of Econometrics 767 (1985).

TABLE 1

SUMMARY AND PREDICTED SIGN OF REGRESSION MODEL INDEPENDENT VARIABLES

Name	Definition	Mean	Standard Deviation	Predicted Sign
BCHERFHI	One if BC claims HHI > 1800 and change > 50, zero otherwise.	.714	.455	+
BEHERFLO	One if BE claims that HHI < 1800 or change < 50, zero otherwise.	.429	.498	−
BCBARHI	One if BC claims barriers to entry high, zero otherwise.	.814	.392	+
BEBARLO	One if BE claims barriers to entry low, zero otherwise.	.343	.478	−
BCCOLHI	One if BC claims industry conducive to collusion, zero otherwise.	.443	.500	+
BECOLLO	One if BE claims industry not conducive to collusion, zero otherwise.	.343	.478	−
FAILFIRM	One if BC claims failing-firm doctrine applicable, zero otherwise.	.057	.234	−
CITES	Number of articles mentioning merger in *Wall Street Journal* before FTC decision	2.57	4.84	+
HEARINGS	Twelve-month moving average of FTC or political staff testimony before Congress.	5.83	3.61	+

1. Political Influences

The coefficient estimates for the two variables measuring political pressure, CITES and HEARINGS, lead us to conclude that the commission does respond to political considerations, ceteris paribus. A chi-square test shows that the two variables are jointly significant at the 1 percent level. Using the point estimates of the regression coefficients and evaluating the derivative of the normal distribution function at the mean values of the independent variables, we can calculate the marginal effects of the political variables on the probability that the commission will vote to seek a complaint. The marginal *Wall Street Journal* story raises the probability of a challenge 4.7 percentage points, and one additional congressional hearing raises the probability of a merger challenge by 4.2 percentage points. Thus, commission decisions are significantly influenced by political concerns. Reestimating the equation with the log of the total merger bid price substituted for CITES yields results qualitatively the same as those in Table 2; all coefficients retain the same signs, and all that are

TABLE 2

PROBIT REGRESSION PARAMETERS

Variable	Coefficient
BCHERFHI	1.11**
	(1.53)
BEHERFLO	−.962**
	(−1.65)
BCBARHI	1.84*
	(1.85)
BEBARLO	−.880**
	(−1.58)
BCCOLHI	1.65*
	(3.16)
BECOLLO	−.880*
	(−1.83)
FAILFIRM	−4.33
	(−.01)
CITES	.169*
	(1.82)
HEARINGS	.151*
	(1.71)
Constant	−4.01*
	(−2.47)
Likelihood ratio test	46.3*
Pseudo-R^2	.497

NOTE.—t-statistics are in parentheses.
* Significant at the .05 level.
** Significant at the .10 level.

statistically significant remain so except the HHI variables, whose significance falls to just below 10 percent.[37]

The political variables may understate the FTC's overall susceptibility

[37] The estimated equation (with the absolute value of t-statistics in parentheses) was the following:

$$\begin{aligned} \text{VOTE} = {} & \underset{(2.44)}{-3.96} + \underset{(1.21)}{.832}\,(\text{BCHERFHI}) - \underset{(1.27)}{.717}\,(\text{BEHERFLO}) + \underset{(1.65)}{1.39}\,(\text{BCBARHI}) \\ & - \underset{(1.71)}{.957}\,(\text{BEBARLO}) + \underset{(2.85)}{1.42}\,(\text{BCCOLHI}) - \underset{(1.92)}{.916}\,(\text{BECOLLO}) \\ & - \underset{(.01)}{4.47}\,(\text{FAILFIRM}) + \underset{(1.51)}{.234}\,(\text{PRICE}) + \underset{(1.57)}{.130}\,(\text{HEARINGS}) + u, \end{aligned}$$

with PRICE (in millions of dollars) representing the logarithm of the merger bid price. (PRICE has a mean of 4.98 and standard deviation of 1.69.)

to political considerations. The sample does not include attempts to merge that would have occurred but for parties' perception that merger would be unacceptable politically. Data availability and measurement difficulties also preclude inclusion of a full set of political variables, so some of the unexplained variation in the dependent variable may have a political basis. Moreover, if Congress influences the bureaucratic decision to challenge mergers after development of the merger guidelines, it would also influence the bureaucratic decisions reflected in the guidelines themselves. If antitrust enforcers were to announce enforcement criteria promising fewer cases than Congress found acceptable, enforcers would be made to alter the guidelines. Mindful of this possibility, officials would adjust the criteria: for example, congressional influence would cause concentration ratios triggering second requests to be set lower than would otherwise be the case. The tests here cannot capture any political influence that affected the guidelines themselves.

Finally, BC staff legal analysis may itself include responses to political pressure. That is, factual findings presented to the commission may already reflect political choices made at the subcommission level. To test this hypothesis, we modeled the BC staff recommendation as a function of the two political variables and of BE's reading of the economic variables. The political variables were individually and jointly insignificant, however.[38] Thus, commission responsiveness to political influences appears to reside at the level of the commissioners themselves, not at the staff level.

2. Bureaucratic Influence

Merger Guidelines Variables. The evidence on bureaucratically interpreted guidelines factors also supports our hypotheses. A claim by BC that the HHI, difficulty of entry, or ease of collusion is worrisome would increase the likelihood of commission action, ceteris paribus. Likewise,

[38] The estimated equation (with the absolute value of *t*-statistics in parentheses) was the following:

$$\begin{aligned} \text{BCCHOICE} = \underset{(1.56)}{.627} &- \underset{(2.72)}{1.04}\,(\text{BEHERFLO}) - \underset{(2.26)}{.831}\,(\text{BEBARLO}) - \underset{(.32)}{.113}\,(\text{BECOLLO}) \\ &- \underset{(.01)}{5.75}\,(\text{FAILFIRM}) + \underset{(.81)}{.0321}\,(\text{CITES}) + \underset{(.78)}{.0426}\,(\text{HEARINGS}) + u, \end{aligned}$$

where BCCHOICE is the choice of the Bureau of Competition to favor the FTC's challenging the merger (BCCHOICE = 1) or allowing the merger to proceed (BCCHOICE = 0). While the political variables have no significant influence on BC's choice, BE's evaluation of the concentration index (BEHERFLO) and of the possible existence of barriers of entry (BEBARLO) are highly significant predictors of BC's decision.

BE claims that the HHI, ease of entry, or difficulty of collusion do not justify challenging a merger would reduce the likelihood that the commission would vote to challenge. A chi-square test indicates that the three economic variables as interpreted by BC are jointly significant at the 1 percent level, as are the same variables as interpreted by BE.

With the political variables held constant at their means, the equation as estimated in Table 2 can be used to estimate more precisely the relative importance of the merger guidelines criteria. When BC and BE agree that the HHI, entry barriers, and likelihood of collusion are all high, there is a 97 percent probability that the FTC will challenge a merger.[39] If both bureaus agree that entry barriers and likelihood of collusion are high, but that the HHI is not high, the probability of a challenge falls to 43 percent. The HHI is apparently the least important of the three guidelines factors, however. If the bureaus agree that entry barriers are low while the two other factors are high, the probability of a challenge falls to 21 percent. If the likelihood of collusion is agreed to be low even when the other two factors are thought to be high, the probability of a challenge is only 27 percent. The role of concentration ratios in FTC thinking, at least during the period studied, appears smaller than other considerations.[40]

Table 2 also shows, however, that within the two bureaus the three merger guidelines variables may be of equal importance. Although there is no reason a priori to believe that all factors would count equally, little empirical difference appears in the size of the coefficients for the HHI, entry barriers, and ease of collusion as the FTC economists reckon them. Only the coefficient for BC evaluation of the HHI is appreciably less (1.11) than those for entry barriers (1.84) and ease of collusion (1.65), and this result is not statistically significant.

A chi-square test indicates that one cannot reject the null hypothesis that within each bureau all guidelines factors are weighted equally. The same test shows, however, that the factors are weighted differently between the two bureaus.[41] It will prove useful below to reestimate the

[39] The probability is computed by first finding the value of the linear expression estimated in Table 2 at the mean values of the political variables and then incorporating the different assumptions about the BC and BE evaluations of the merger guideline factors (HHI, entry barriers, and likelihood of collusion). The failing-firm variable, insignificant in Table 2, is assumed to be zero. Next, based on a standardized-normal distribution table, the probability corresponding to the particular value of the linear expression is recorded. The same procedure is used to derive other probabilities discussed here based on Table 2. The reader can calculate probabilities of a merger challenge for merger guideline assumptions not discussed by using the data in Table 2 and a standardized-normal table.

[40] The differences are suggestive but not statistically significant; the confidence intervals surrounding the point estimates contain the other point estimates.

[41] To test this hypothesis, the equation was estimated with only one composite variable. The computed chi-square test statistic was 3.06.

equation shown in Table 2 on the assumption that each bureau weights the three guidelines factors the same. Two composite variables, BC and BE, were constructed to measure the sum of each bureau's dummies for the three merger guidelines factors. The reestimated model (with absolute t-values in parentheses) is

$$\begin{aligned}\text{VOTE} = &\underset{(3.21)}{-4.17} + \underset{(3.65)}{1.56}\,(\text{BC}) - \underset{(2.93)}{.85}\,(\text{BE}) - \underset{(.01)}{4.52}\,(\text{FAILFIRM}) \\ &+ \underset{(2.19)}{.158}\,(\text{CITES}) + \underset{(2.00)}{.164}\,(\text{HEARINGS}) + u,\end{aligned}$$

with the likelihood ratio test equal to 45.6 and the pseudo-R^2 equalling .489. Qualitatively, the results are identical to those in Table 2.

Lawyers versus Economists. While lawyers and economists both are influential in the decision whether to challenge a merger, lawyers' influence appears to dominate. As shown in Table 2, the absolute size of the BC coefficients for the HHI, entry barriers, and ease of collusion is greater than the BE coefficients for those variables. The reestimated model above shows that the composite BC variable is greater in absolute value than the composite BE variable. Based on the coefficients from the reestimated model, Table 3 shows more precisely the different effects of BE and BC evaluations of factors identified in the merger guidelines as anticompetitive. The table shows the probabilities that a merger will be challenged, under alternative BC and BE evaluations of the number of troublesome guidelines factors. For example, if the two bureaus agree that only one factor is a problem, the probability of a challenge is only .002; if they agree that two of the three factors are problematic, the likelihood of a challenge rises to .295; if both bureaus agree that all three factors present potential problems, the probability of a challenge is .969.

Table 3 is particularly interesting in measuring the effects of bureau disagreement. When the two groups disagree, BC apparently has a greater effect on a particular decision than BE.[42] If BC alleges that three guidelines factors are problematic when BE claims only two are worrisome, the

[42] The data here do not capture any influence that BE has on the BC factual analysis. (Casual empiricism suggests that BC has little effect on the BE analysis.) During an investigation, economists critique the BC staff analysis. These questions may persuade BC either to close the case before or shortly after a second request (in which event the case would not be in the sample) or to adjust their opinion in the final memorandum (changing disagreement to agreement on a key guidelines factor). Thus, our results may underestimate the net effect of economists at the FTC. The results reported in note 38, *supra*, indicate that BE's evaluations of guidelines factors are significant predictors of BC's decision whether to advocate challenging a merger.

TABLE 3

PROBABILITY OF FTC MERGER CHALLENGE AS A FUNCTION OF BC AND BE MERGER GUIDELINES EVALUATIONS

NUMBER OF FACTORS ALLEGED POTENTIALLY ANTICOMPETITIVE BY:

		Bureau of Competition 0	1	2	3
Bureau of Economics	0	*	*	.013	.249
	1	*	.002	.083	.568
	2	*	.018	.295	.847
	3	.003	.106	.623	.969

* Less than .001.

likelihood of a challenge is .847; in the reverse situation, however, when BE claims that three factors are problematic while BC alleges that only two factors are worrisome, the likelihood of suit is only .623. If BC claims that all factors are at worrisome levels when BE says that none are, the probability of a challenge is .249. If BE claims that all factors are problematic when BC says that none are, the probability of a challenge is only .003. In short, lawyers' evaluation of the variables identified in the merger guidelines has a greater effect than does the evaluation by economists.

IV. Conclusion

In deciding whether to challenge or allow a merger, the Federal Trade Commission relies on a number of criteria, including the various criteria specified in the Department of Justice merger guidelines. With data from the commission's own files, we show that the evaluations of agency lawyers and economists concerning the Herfindahl-Hirschman Index, ease of entry, and likelihood of collusion all perform as one would predict, and all significantly influence commission decisions.

Moreover, access to the internal data permits examination of the respective roles of attorneys and economists. A disagreement between economists and lawyers about whether to challenge a merger is not a "fair fight." Lawyers have greater influence with the commission over the decision.

Finally, we hypothesize that the process is also driven by the desires of politicians to stop mergers. Merger challenges, like antitakeover legislation, prevent the exit of resources and votes from a politician's jurisdiction and, thus, allow the politician to respond to organized labor and management interests that seek to prevent the changes caused by mergers. As we show in statistical tests, greater political pressure does cause the FTC to challenge more mergers.[43]

In the end, therefore, a constellation of identifiable interests benefits from the FTC's stopping mergers. Politicians, their organized constituents opposed to mergers, and agency attorneys are apparently among the principal beneficiaries. Overall, the merger guidelines are applied with an upward bias, resulting in a greater propensity to challenge mergers in the marginal case. Greater appreciation of the ways that antitrust works and, in particular, of the role of politics in the process should begin to dispel the notion that antitrust can be viewed as driven solely by congressional and bureaucratic concerns for competition.

[43] Inferences justified by the results here are of course limited to the period under study, 1982–86. We note, however, that antitrust in the Reagan administration has supposedly been driven more by truly economic concerns, a position apparently justified by the data. See Warren P. Preston & John M. Connor, Federal Antitrust Activity under the Reagan Administration: New Evidence (unpublished manuscript, Univ. South Carolina 1987). If, as shown here, politics plays an important role in antitrust enforcement even when economic welfare is a more dominant concern, the influence of politics must have been even greater prior to the 1982 merger guidelines.