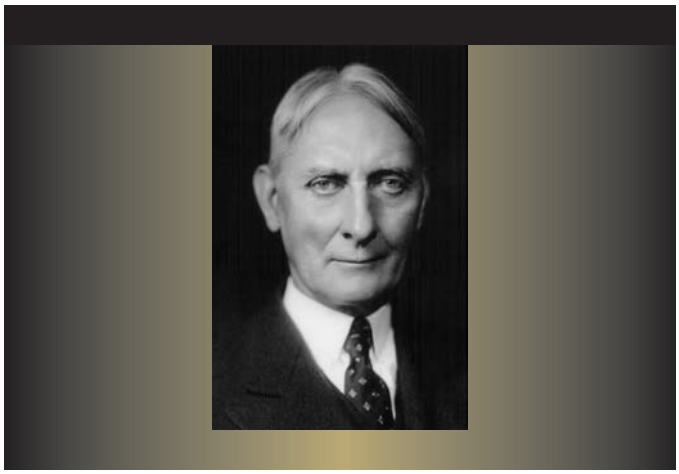
Antitrust, Vol. 26, No. 1, Fall 2011.



TRUSTBUSTERS

George Rublee and the Origins of the Federal Trade Commission

BY WILLIAM KOLASKY

FOLLOWING HIS INAUGURATION ON MARCH 4, 1913, Woodrow Wilson embarked on one of the most ambitious legislative programs in the nation's history. After successfully completing the first two legs of his program—tariff and banking reform—in his first year in office, Wilson was ready to turn in 1914 to the third leg, antitrust.

In his First Annual Address to Congress in December 1913, Wilson called for new legislation to supplement and clarify the Sherman Act in order "to prevent private monopoly more effectually than it has yet been prevented," but said that the subject was so complicated it required a separate address in the next session of Congress.[1] Over the Christmas holidays, Wilson sketched out his Address on Trusts and Monopolies, which he delivered to a joint session of Congress on January 20. As with his earlier speeches on this topic, Wilson painted with broad strokes and offered few specifics. Proclaiming that "[t]he antagonism between business and government is over," Wilson outlined a two-part program. First, he called for a "more explicit legislative definition of the policy and meaning of the existing antitrust law." "Surely," Wilson declared, "we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade" so that "[t]hese practices . . . can be explicitly . . . forbidden by statute in such terms as will practically eliminate uncertainty." Second, he called for the creation of "an interstate trade commission" to respond to the desire of "the business men of the country" for "the advice, the definite guidance and information which can be supplied by an administrative body."[2]

This article examines how Wilson was able to secure the enactment of two major pieces of legislation—the Clayton Act and the Federal Trade Commission Act—to implement this two-part program of antitrust reform. In particular, it focuses on the role played by George Rublee, a little-known lawyer who can be credited with the inclusion in the FTC Act of Section 5, which gives the FTC authority to define and prohibit "unfair methods of competition."

William Kolasky is a partner in the Washington, DC office of the firm WilmerHale, and is on the editorial board of Antitrust *magazine.* *He thanks Matthew Robinson, a summer associate at the firm in 2011, for his assistance in researching and editing this article. The photograph of Mr. Rublee was provided courtesy of the firm he helped found, Covington & Burling.*

"Who Is George Rublee?"[3]

George Rublee may have been the original golden boy. A gangly 6′4″ tall, with pale blond hair and piercing blue eyes, Rublee stood out in any crowd. Rublee, the son of a newspaper editor in Wisconsin who had spent his first eight years in Europe while his father served as U.S. minister to Switzerland, he was the first graduate of the Groton School, in 1886, where he excelled both in sports and academics. He captained "The Nine," as the baseball team was then known, and "made a good name for Groton" when he earned top honors on his entrance examinations at Harvard.[4] As Dean Acheson, a 1911 Groton graduate who joined the law firm Rublee helped found—Covington, Burling & Rublee—recalled in his memoirs of his early years, "For me George Rublee began as a tradition—his name carved in lonely eminence on an oaken panel . . . appearing again in the gymnasium as the captain of every team, and in the folklore of the place as the winner of prizes, the setter of standards."[5]

After graduating with honors from Harvard College, Rublee attended Harvard Law School, where he became close friends with his future partner, Edward B. ("Ned") Burling, as well as the future judges Learned and Augustus Hand. Even with such competition, Rublee stood out, compiling so strong an academic record that Dean James Ames invited him to return to teach international law at the school immediately after his graduation, subject to the school arranging funding for the new program, which unfortunately it was not able to do. With a strong recommendation from Dean Ames, Rublee found a position at Lord, Day & Lord, a leading New York law firm, where he began work in September 1895. Rublee, however, quickly became disenchanted with the tedium of the legal work he was given to do, and so in December he accepted an offer from Dean Ames to return to the law school to teach in the spring semester.

While Rublee enjoyed teaching, he decided at the end of the semester to return to Milwaukee to be with his dying father. After his father's death in October 1896, Rublee moved to Chicago where he and his law school friend Ned Burling formed the part-

nership Rublee and Burling. When clients failed to appear, the two young lawyers dissolved their partnership in the late spring of 1897, after which Rublee practiced briefly with another Chicago firm and thought seriously about giving up the law.

Rublee's legal career was rejuvenated when he received an offer to join the practice of Victor Morawetz in New York, arranged through a master at Groton seeking to help the school's first graduate. Morawetz was a leading lawyer in the new field of corporation law who counted J.P. Morgan among his principal clients. Morgan was just undertaking the reorganization of the steel industry through the formation of U.S. Steel, and Morawetz expected to be "smothered in work" for which he needed an assistant. Rublee initially found his work with Morawetz fascinating because it was "kind of a puzzle," but within a couple of years he again became bored with the tedium of law practice.[6] In the interim, Rublee married well, and with his wife's money and Morawetz's guidance he invested well enough to build up the capital needed for more interesting pursuits.

Once the U.S. Steel merger was completed in 1901, Rublee and his wife moved to Europe where they "gave themselves over completely to the leisurely life of European high society," and Rublee became the Crown Prince of Sweden's favorite tennis partner.[7] Returning to the United States in 1904, Rublee rejoined Morawetz's law practice in New York City. Because Morawetz shut down his practice in the summer, Rublee and his wife were able to summer in Cornish, New Hampshire, which at the time was a "center for artists and literary men" that some referred to as an "American Athens."[8] Rublee and his wife fell in love with the bucolic New Hampshire lifestyle, and in 1906 they purchased a large country "cottage" there. Rublee was soon inviting friends, including Learned Hand and Ned Burling, to join him in Cornish, and over time Cornish became a favorite getaway not just for artists and writers, but also for a growing number of progressive-minded lawyers and journalists.

Again becoming bored with his law practice, Rublee began to plunge into various progressive causes. One of the first was the Pinchot-Ballinger affair, which brought him into close contact with a Boston lawyer by the name of Louis Brandeis, who was the lead lawyer for Gifford Pinchot and his allies in their dispute with William Howard Taft's Secretary of the Interior, Richard Ballinger.[9] Like so many other progressives, Rublee and Brandeis split over whom to support in the 1912 election: Rublee supported Theodore Roosevelt and his new Progressive Party, while Brandeis—a lifelong Republican—shifted his allegiance to the Democratic candidate, Woodrow Wilson. Just as Brandeis helped Wilson craft the antitrust plank for his New Freedom program in that election, so, too, did Rublee help develop the Progressive Party's antitrust plank. Working with his Cornish friends Learned Hand and Herbert Croly, Rublee drafted a plank that questioned the effectiveness of the Sherman Act because it "only operates after the event and by means of litigation."[10] They called for the creation of a trade commission to provide more "constructive regulation, in order to free legitimate business from confusion and uncertainty as to the limits of lawful cooperation and combination." Although their plank was cut from the new party's final platform, it reflected Roosevelt's long-held views, which he outlined again in his acceptance speech at the party's convention.[11]

Following Wilson's victory, Rublee returned briefly to law practice in New York, while letting friends know that he would like to become more involved in public policy. His opportunity came in September 1913, when Brandeis—who was overwhelmed with other commitments—responded to an offer from Rublee to do "unpaid public work."[12] Brandeis asked Rublee for help in completing a series of articles he had committed to write for *Harper's Weekly* attacking the trusts and outlining a legislative program for "regulating competition" to prevent their formation. Accepting eagerly, Rublee traveled to Boston and spent the next two weeks working with Brandeis on the articles before moving to Washington to work on the legislation itself. Rublee helped Brandeis prepare his testimony before both the House Committee on Interstate Commerce and the House Committee on the Judiciary in February 1914, outlining in more detail his ideas on how to regulate competition. Following his testimony, Brandeis met informally with the members of both committees who were working on the proposed legislation. Expressing himself satisfied with the language of the draft bills that emerged from these discussions, Brandeis then returned to Boston, leaving Rublee to watch over their progress.[13]

The Clayton and Covington Bills

The House Committee on the Judiciary, chaired by Henry Clayton of Alabama, took the lead on the first of Wilson's two objectives: legislation to define more clearly what conduct violated the antitrust laws. The Clayton bill, as it came to be known, was introduced on April 14, and reported out of committee on May 6, with only minor amendments.[14] As reported, the bill had five substantive provisions, which included prohibitions of certain forms of price discrimination, exclusive dealing and tying, as well as of certain acquisitions of voting securities and certain interlocking directorates. Each provision contained criminal penalties for violations.

The House Committee on Commerce took the lead on the second of Wilson's two objectives: creating a trade commission to provide guidance to business on compliance with the antitrust laws. Since their collaboration during the 1912 election, Wilson and Brandeis had contemplated that the new trade commission would be a sunshine agency, with power to investigate and expose anticompetitive conduct, and to provide businesses guidance as to what conduct was lawful and what was not, but with no authority to enforce the antitrust laws. The bill that emerged from the House Committee on Commerce on January 22, 1914, the so-called Covington bill—named after Representative James Covington of Maryland, who would later become the third founding partner of Covington, Burling & Rublee—reflected these principles.[15] The Covington bill proposed to create an Interstate Trade Commission and transfer to it the existing powers of the Bureau of Corporations, which Roosevelt had earlier created. As Wilson had contemplated in his Address on Monopolies and Trusts, the Commission would have had no enforcement authority, but would only be authorized to conduct investigations into

"unfair competition or practices in commerce" and to publish reports with recommendations "for readjustments of business" or "for legislation in relation to the regulation of commerce."

The Genesis of Section 5[16]

After Brandeis left Washington, Rublee became concerned as he "listened to the testimony and hearings and thought about the matter."[17] As he explained in an editorial he wrote anonymously for his friend Norman Hapgood's *Harper's Weekly*, Rublee believed that "[w]hether competition is fair or unfair depends in a peculiar degree upon the circumstances of the particular case."[18] He concluded, therefore, that it would be impossible through legislation to define the many ways in which a large company might engage in unfair competition without at the same time straitjacketing other, smaller businesses that might use the very same methods to compete against those larger firms. Reminiscing decades later, Rublee recalled that as he studied the cases that had been decided under the Sherman Act, he was struck that in several, the final decrees had "prohibited sometimes seven or eight methods of unfair competition . . . and then added a last phrase reading 'and all other unfair methods of competition.'"[19] This led him to conclude "that the best way to solve the problem of improving the anti-trust laws would be to prohibit unfair methods of competition and to leave it to whomever was administering the law to determine whether a method in a particular case was unfair and harmful or not."[20]

Rublee took his idea to another one of his New Hampshire friends, Congressman Raymond Stevens, who sat on the House Commerce Committee. Stevens agreed to introduce a bill embodying Rublee's new conception of the Commission and to seek to have it substituted in the committee for the Covington bill. Stevens's bill, drafted by Rublee, renamed the proposed agency the "Federal Trade Commission," and added a new Section 5 prohibiting "unfair and oppressive competition" and giving the Commission the power to issues orders restraining "unfair methods of competition."[21] Unwilling to change its approach—which both Wilson and Brandeis had supported—the committee quickly rejected Stevens's substitute bill and reported out Covington's original bill. Stevens issued a short separate Minority Report, pressing Rublee's argument that unless the new Commission was given "some power to regulate competition it would seem hardly worth while to abolish the Bureau of Corporations."[22] Stevens then attempted to have his version substituted for the Covington bill on the House floor, again without success.

Rublee himself sought support for Stevens's bill from the members of Wilson's cabinet whom he knew. Again, he ran into a wall. Attorney General James McReynolds told him that "everything has been decided" and advised Rublee to "give this up."[23] Rublee also tried to approach Wilson personally through their mutual friend Norman Hapgood, the editor of *Harper's Weekly*, who supported Rublee's new concept for the Commission. At Rublee's urging, Hapgood sent Wilson a letter in late April asking him to meet with Rublee. Hapgood explained that because Brandeis had been "so tied up with his railroad work," "[t]he most important part of the really hard work done recently by the little group [Brandeis] represents has been carried out by George Rublee . . . [who has] one of the best minds for this kind of thinking that I ever knew."[24] Hapgood closed by writing that, "I cannot help feeling that in spite of the complication of burdens on you, a half hour with Mr. Rublee would not seem to you wasted."

Wilson did not respond immediately, but as opposition to the Clayton bill's effort to catalog unfair methods of competition grew, Wilson agreed in late May to meet with Rublee. Realizing that Wilson would likely not act without consulting Brandeis, Rublee asked Brandeis to join him for the meeting, even though he feared that Brandeis "wouldn't go or would oppose" his plan because it was so different from the two-pronged approach Brandeis had helped design during the 1912 campaign.[25] When Rublee explained his new concept, Brandeis surprised him by not rejecting it out of hand, instead telling Rublee only that he would reserve the right to argue against it before Wilson.

The meeting with Wilson took place on the South Lawn of the White House on a warm late May afternoon and lasted well beyond its allotted half-hour. Rublee and Brandeis were joined by Congressman Stevens and New Hampshire Senator Henry Hollis. After an opening statement by Stevens, Rublee outlined his proposal to Wilson. He argued that the Clayton bill was flawed because "it was impossible to define these unfair practices" in a way acceptable to the courts. It would be better, he argued, simply to prohibit unfair methods of competition and create a strong trade commission that would determine whether a violation had occurred in order to "nip restraint of trade in the bud."[26] As Rublee later recalled, he sensed he was "making an impression on the President," who "listened very attentively and asked some questions." Rublee added that when he had finished, Brandeis, to Rublee's "great surprise . . . entered the fray with great enthusiasm and backed me up strongly." By the end of the meeting, Rublee thought "it was clear to all of us that the President had accepted the idea." As they left the White House, Brandeis told Rublee it was "the most remarkable interview that I have ever been present at."[27]

The president decided, however, that it was too late to so radically change the two bills before they were voted on in the House and that trying to do so might give the opposition "a footing to launch a counteroffensive that could scuttle the entire antitrust effort."[28] Wilson called Rublee, Brandeis, Stevens, and Hollis back to the White House on June 10 to tell them that he intended instead to have Rublee's provisions incorporated into a new Section 5 of the Covington bill in the Senate and then to rely on Senator Francis Newlands, chair of the Senate Interstate Commerce Committee, to have the Senate version adopted by the conference.

The Senate Debates

Senator Newlands introduced a Senate substitute for the Covington bill just four days later, on June 14.[29] The substitute adopted Rublee's new name for the commission, the Federal Trade Commission, increased the number of members from three to five, which Rublee had proposed, and added Rublee's new Section 5, which provided that "unfair competition in commerce

is hereby declared unlawful," and empowered the Commission "to prevent corporations from using unfair methods of competition in commerce."[30] Procedurally, the new Section 5 authorized the FTC, "[w]henever the commission shall have reason to believe that any corporation . . . is using any unfair method of competition," to issue a written order directing the company to appear for a hearing within thirty days to show cause why an order restraining it from using such method of competition should not issue. If upon such hearing, the Commission found that the method of competition violated the act, it could issue a restraining order, but could not enforce that order through penalties or otherwise without first going to court to get an injunction.

As Wilson had expected, Rublee's new Section 5 immediately attracted fire from both supporters and opponents of the proposed Commission. Senator Charles Thomas, on the opening day of the debate, denounced the indefiniteness of "unfair competition," declaring that the proposed law would give the FTC "the absolute power . . . of arbitrarily determining whether any act submitted to it is or is not unfair competition."[31] Other senators objected to the bill's use of "unfair competition" and "unfair methods of competition" interchangeably, arguing that "unfair competition" had a well-established and narrow meaning in the law limited to the passing off of one's goods as those of a competitor, whereas the term "unfair methods of competition" had no established meaning whatever.[32] James Reed of Missouri, one of the leading opponents of the bill, argued therefore that the bill would leave the FTC "without any guide of law . . . to determine what is fair and what is unfair," thereby unconstitutionally delegating to the Commission the powers of Congress to legislate.[33]

For nearly two months, the bill's supporters, led by Democratic Senator Newlands and Republican Senator Albert Cummins, parried every attack. Senator Hollis, who had helped Rublee convince Wilson to add Section 5 to the Commission bill, responded directly to the argument that the terms lacked legal significance.[34] In a speech Rublee almost certainly helped write for him, Hollis reviewed a long series of federal and state cases to show that courts, in enforcing both federal and state antitrust laws, regularly used the terms "unfair competition" and "unfair methods of competition" interchangeably to refer to anticompetitive practices the defendants had used either to gain a monopoly or to restrain trade.[35]

Most prominent among these was Chief Justice Edward Douglas White's opinion in Standard Oil, where White listed among the anticompetitive practices used by Standard Oil to gain and maintain its monopoly "unfair methods of competition, such as local price cutting at the points where necessary to suppress competition."[36] Hollis also pointed to other decrees in antitrust cases under the Sherman Act that included a broad prohibition on "unfair competition" or "unfair methods of competition." Seeking to distill from these cases a general principle that the proposed Commission could apply in distinguishing unfair competition from fair competition, Senator Hollis used terms that still resonate today: "Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper."[37]

Senator Hollis' defense of Section 5's use of the terms "unfair competition" and "unfair methods of competition" gave opponents of the FTC another argument—namely, that if the Sherman Act already outlawed unfair methods of competition, why was Section 5 necessary at all? Again, with Rublee's help, Hollis had a ready answer. Hollis responded that the Sherman Act "does not become effective until a monopoly is full grown, in full panoply, so that you can prove to the court that i[t] is a monopoly and is in restraint of trade."[38] Moreover, "the Department of Justice, with its manifold other activities, has not in the past brought suit under the Sherman Act, and probably will not do so, except in cases of great magnitude involving what appear to be very clear violations." By contrast, Section 5 "is aimed to nip those practices in the bud" in order to protect competitors from unfair methods of competition before a monopoly has been achieved or is dangerously close to being achieved.[39]

Apparently persuaded by these arguments, the Senate passed its version of H.R. 15613 on August 5 by a vote of 53–16, with no further material changes to Section 5. The bill then went to conference where the House, "with some encouragement from Wilson, acquiesced in the critical addition of Section 5."[40] In conference, only two significant changes were made. The first was largely cosmetic, using the term "unfair methods of competition" to describe both the conduct that violated the law and the conduct the Commission was empowered to prohibit.[41] The second was more substantive, clarifying the standard for judicial review by requiring deference only to FTC findings of fact, but not to Commission conclusions of law.[42] This allowed the Supreme Court, eight years later in *FTC v. Gratz*,[43] to hold that the courts, not the Commission, had the ultimate authority under the Act to decide what was or was not an unfair method of competition. After brief debate, the conference bill passed the Senate 43–5 and the House without a record vote, becoming law on September 26.

The Fate of the Clayton Act

Having succeeded in winning President Wilson's support for giving the FTC authority to prohibit unfair methods of competition, Rublee believed he also had the President's blessing to lobby against the inclusion of the provisions of the Clayton Act that singled out particular methods of unfair competition, such as price discrimination, exclusive dealing, and tying, and subjected violators to criminal penalties. Rublee ghost-wrote an editorial for the August 8 issue of *Harper's Weekly* accusing the Senate Judiciary Committee of making a "bad blunder" by retaining those prohibitions in the Clayton bill, as reported by the Committee.[44] He argued that "[i]n so far as the defined methods are unfair, they are effectively prohibited by Section 5 of the Trade Commission Bill," so "[n]othing is gained by prohibiting them specifically in the Clayton Bill." Doing so, rather, could cause mischief because "[w]hat is harmful under certain circumstances may be beneficial under different ones."

Rublee's lobbying seemed at first to be succeeding. On August 17, the chair of the Senate Judiciary Committee, Senator Charles

Culberson of Texas, moved successfully to strike Section 2 of the bill prohibiting price discrimination "for the reason that the general subject embraced in that section can be dealt with by the Federal trade commission,"[45] just as Rublee had urged. In addition, the Senate deleted all criminal penalties for violations of the Act, instead giving the FTC authority to enforce the substantive provisions of the Act. In conference, however, the House insisted on reinserting these prohibitions, but acquiesced to the Senate's removal of criminal penalties.[46] The Senate and House both approved the Conference Committee's revised bill, and President Wilson signed the Clayton Act into law on October 15. By then, however, the FTC Act had passed, and Congressman Clayton had left Congress for the federal bench. The Clayton Act had thus become something of an orphan. Distracted by the outbreak of war in Europe in August and his wife's death the same month, Wilson did not even hold a public signing ceremony.[47]

The Commission's Early Years: A Disappointing Start

The FTC's original sponsors, including George Rublee and Louis Brandeis, along with most historians who have studied its early history, agree that the Commission got off to a disappointing start, from which it took decades to recover.[48]

Brandeis was Wilson's first choice for his new Federal Trade Commission, but Brandeis declined, perhaps because he was holding out for something better. Not able to have Brandeis, Wilson sought to appoint his lieutenant, George Rublee, as one of his first commissioners. Unfortunately, Rublee's nomination ran afoul of New Hampshire politics. Following his success in helping to secure passage of the FTC Act, Rublee had returned to New Hampshire in September 1914 to help manage the Senate campaign of his friend Raymond Stevens, the Democratic congressman who had introduced his FTC bill, to unseat the Republican incumbent, Jacob Gallinger. As part of this effort, Rublee delivered a series of speeches attacking Gallinger's "extremely conservative record."[49] Stevens lost in a landslide, and Rublee had made a powerful enemy. When Wilson nominated Rublee for a seat on the FTC, Gallinger quickly declared that he found Rublee "personally offensive" because he had orchestrated "a campaign of vilification" against Gallinger in order to elect Stevens. Despite Wilson's strong support, Rublee's nomination was defeated by a vote of 42–36. Characteristically, Wilson refused to back down. He gave Rublee a recess appointment in March 1915, just days before the Commission opened its doors. Wilson then re-nominated Rublee for a full term early in 1916, but Gallinger again invoked senatorial courtesy to block his appointment. This time, Wilson used Rublee's case to trigger a nationwide debate over the use of senatorial courtesy to block nominations generally. While Democratic-leaning newspapers across the country denounced Gallinger, Rublee's nomination was again voted down.

Rublee thus was able to serve only sixteen months as a recess appointee and had no chance to be elected to chair the new Commission, which he had been so instrumental in creating. Instead, Joseph E. Davies, who had been serving as head of the Bureau of Corporations, became the Commission's first chairman. Wilson's other three nominees—Edward Hurley, Will Parry, and William Harris—were all businessmen, and none of them had any prior experience with antitrust law.

Rublee understood from the outset that the success of the Commission depended on the caliber of the men appointed to it. As a result, he was deeply discouraged by Wilson's choices for his fellow commissioners. Apart from Davies, Rublee viewed his fellow commissioners as men who had been appointed purely for political reasons, rather than for their expert knowledge of the issues they would face. Although they were "rather agreeable men," Rublee quickly concluded that the Commission "really had no chance to do its job with that kind of membership."[50]

The FTC's problems began almost as soon as it was organized. According to Rublee, Davies mishandled the agency's initial appropriations bill, leaving the Commission with such a serious shortage of funds that it could not even purchase the furniture and other supplies it needed.[51] More seriously, whereas Rublee wanted the FTC to take on important cases, the other commissioners preferred to devote what he saw as excessive time dealing with "little frauds" that were simply "squabbles between small producers that had little impact on the nation."

Rublee and his fellow commissioners were also divided over the issue of whether the FTC should give advance advice to businesses as to whether their proposed conduct was permissible under the law. Davies, with support from Hurley, was a strong advocate for providing such advice, arguing that "what men needed largely in the business world was not the menace of legal process, but some definite guidance and some information—some help."[52] Rublee, on the other hand, believed it was "perfectly clear that nothing in the law authorized the giving of such advice" and that "the Congressional debates showed that Congress was strongly opposed to such action on the part of any government agency."[53] At Rublee's insistence, the commissioners sought Brandeis's views on this question. Brandeis, who had long been on record against government agencies giving advisory opinions, supported Rublee.

Even with Brandeis's support, Rublee could not dissuade his fellow commissioners from providing informal advice to businesses as to how to comply with the new law. Hurley—who disagreed with Davies on almost everything else and who ultimately dislodged Davies as chairman—went so far as to boast at one point, "I think that the business men of the country will bear me out when I say that I try to work wholly in the interest of business."[54] At another point, Hurley announced that the FTC was "making an inquiry into the coal industry today with the hope that we can recommend to Congress some legislation that will allow them to combine and fix prices."[55] This pro-business attitude ultimately led to the Commission lending its support to trade association activities designed to reduce what their members saw as overly aggressive forms of competition, until finally, over a decade later, President Herbert Hoover's Assistant Attorney General for Antitrust, John Lord O'Brian, had to take the FTC to the woodshed for affirmatively encouraging collusive behavior in a large number of industries.[56]

Rublee's last few months on the Commission were marred by a bitter battle between Davies and Hurley for leadership. The ill-

feeling between the two men dated back to an inaugural tour of the country Davies arranged for the Commission in 1915, during which Hurley and Harris grew frustrated because Davies "always made all the speeches."[57] Rublee, who had originally supported Davies, agreed in July 1916 to provide the third vote to replace Davies with Hurley as chairman after learning that Davies had helped Gallinger persuade senators to vote against his nomination. After this, Rublee submitted his resignation from the Commission to Wilson, but Wilson resisted, announcing in September 1916 that he intended to put Rublee's name before the Senate again in the next Congress, assuming he was reelected. So as not to embarrass the president during his re-election campaign, Rublee withdrew his resignation, but then resubmitted it in January 1917, following Hurley's surprise announcement that he, too, was resigning from the Commission. In a letter to one of Wilson's advisors, Rublee explained that while he "deeply" appreciated Wilson's offer, "Hurley's resignation has weakened the commission so much that its reorganization ought not be delayed by re-opening the controversy about me."[58] Rublee went on to express his deep disappointment in the FTC's early performance: "The truth is that the Commission has not yet made a record to justify its existence and to fulfill the expectations of those who hoped it might become an agency of great benefit to the public."

Rublee's dismal judgment of the FTC's early performance was widely shared by others, including Brandeis, who had supported its creation. Brandeis summed up their judgment most succinctly when he declared in an interview that "it was a stupid administration."[59] More recent scholars have shared this negative assessment of the Commission's initial record. The leftist historian, Gabriel Kolko, in his 1963 classic study, *The Triumph of Conservatism: A Reinterpretation of American History, 1900–1916*, argues that the FTC saw itself too much as the friend of business, and that this led it to sanction what amounted to cartel activity in many industries.[60] The far more conservative Harvard Business School professor Thomas McCraw agrees with Kolko's assessment in his Pulitzer Prize-winning history, *Prophets of Regulation*, observing that the Commission's performance during its "first generation of existence," showed that it "was not to be taken seriously."[61]

Rublee's Later Career

Dean Acheson, looking back on Rublee's career after his death in 1961, describes it as a "symphony . . . with alternating themes, one of contented languor, touched with melancholy, the other a passionate, almost demoniacal seizure which carried him to heights of brilliant and tireless effort, ending in the tragedy of frustration and failure, followed again by the melancholy languor."[62] This certainly describes the three years of Rublee's life, from 1914 to 1917, that he devoted to the creation of the FTC. It also describes, more tragically, his last foray into public service when, as director of the Intergovernmental Committee on Political Refugees Coming from Germany, Rublee came tantalizingly close to winning freedom for Jewish refugees from Nazi Germany, only to see his hopes dashed by the advent of World War II.[63] Acheson concludes that Rublee, after a brilliant start in which success may have come too easily, never quite realized his full potential. For many decades, until its renaissance in the last quarter century, the same, unfortunately, could be said of the agency he helped create. ■

---

1 State of the Union Address: President Woodrow Wilson, Dec. 2, 1913, *reprinted at* 51 Cong. Rec. 75 (1913).

2 Address by President Woodrow Wilson Before a Joint Session of Congress on Additional Legislation for the Control of Trusts and Monopolies, Jan. 20, 1914, *reprinted at* 51 Cong. Rec. 1962–64, 1978–79 (1914), and *reprinted in* The Legislative History of the Federal Antitrust Laws and Related Statutes 3746–49 (Earl W. Kintner ed., 1982).

3 Marc Eric McClure, Earnest Endeavors: The Life and Public Works of George Rublee 49 (2003). This biographical sketch of George Rublee's early career is drawn largely from McClure's excellent biography, supplemented with other sources.

4 *Id.* at 14–15.

5 Dean Acheson, Morning and Noon 128 (1965).

6 McClure, *supra* note 3, at 30.

7 *Id.* at 39.

8 *Id.* at 40.

9 The affair arose from allegations that Taft's Secretary of the Interior, Richard Ballinger, had improperly fired a mid-level civil servant in the Department, Louis Glavis, after Glavis complained that Ballinger had illegally cleared claims that his former business associates had made for coalfields in Alaska. At the invitation of the progressive journalist Norman Hapgood, whom he knew from Cornish, Rublee attended a strategy meeting at Gifford Pinchot's home in Washington in January 1910. Brandeis was there because he had agreed to represent Glavis against Ballinger, but felt stretched because he had to commute from Boston to Washington to meet the demands of his law practice. Rublee, who had no such other commitments, was able to stay in Washington and "soon became LDB's right-hand man" on the case. *See* Melvin I. Urofsky, Louis D. Brandeis: A Life 254–76 (2009).

10 McClure, *supra* note 3, at 78–79.

11 *See* William Kolasky, *The Election of 1912: A Pivotal Moment in Antitrust History,* Antitrust, Summer 2011, at 82.

12 Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L.J. 1, 64 n.382 (2003) (citing 3 Letters of Louis Brandeis 183 (Melvin I. Urofsky & David W. Levy eds., 1972)).

13 *See* Thomas K. McCraw, Prophets of Regulation 122–23 (1984).

14 *See* H.R. Rep. No. 63–627 (1914); *see also* Kintner, *supra* note 2, at 1002–03.

15 H.R. 15613, 63d Cong. 2d Sess. (1914).

16 This account of the genesis of Section 5 is based in large part on Rublee's own accounts of his role, as reflected both in an article for Proceedings of the Academy of Political Science in 1926, George Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 Proceedings of the Academy of Political Science 666 (1926), and in his reminiscences, as reported in McClure, *supra* note 3, at 89–93. Rublee's description of his central role in the genesis of Section 5 has been largely accepted by others who have studied this period. *See, e.g.*, McCraw, *supra* note 13, at 122–26; Urofsky, *supra* note 9, at 393; John Milton Cooper, Jr., Woodrow Wilson: A Biography 232 (2009); *but cf.* Winerman, *supra* note 12, at 62–68.

17 McClure, *supra* note 3, at 89 (quoting George Rublee, *The Reminiscences of George Rublee* 105 (1972) (transcribing interviews conducted in 1950–1951)).

18 *Editorial, The Judiciary Committee's Blunder*, 59 Harper's Wkly. 121, Aug. 8, 1914.

19 McClure, *supra* note 3, at 89–90 (quoting Rublee, *supra* note 17, at 105–06).

[20] *Id.*

[21] *Id.* at 91.

[22] H.R. REP. NO. 63-533, pt. 2 (1914), *reprinted* in Kintner, *supra* note 2, at 3763–64.

[23] MCCLURE, *supra* note 3, at 91–92.

[24] *Id.*

[25] *Id.* at 92.

[26] *Id.*

[27] *Id.* at 93.

[28] *Id.* at 94–95.

[29] S. 4160, 63d Cong. 2d Sess. (1914). For an excellent contemporary account of the legislative history of Section 5, *see* Gilbert Holland Montague, *Unfair Methods of Competition,* 25 YALE L.J. 20 (1915).

[30] *Id.*

[31] 51 CONG. REC. 11,103 (1914), *reprinted in* Kintner, *supra* note 2, at 3947.

[32] *See, e.g., id.* at 11,299 (statement of Sen. William Borah) (narrow definition of "unfair competition"), *reprinted in* Kintner, *supra* note 2, at 4020; *id.* at 13,056 (statement of Sen. John K. Shields) (arguing that "unfair methods of competition" had no established legal meaning), *reprinted in* Kintner, *supra* note 2, at 4486.

[33] *Id.* at 11,114, *reprinted in* Kintner, *supra* note 2, at 3972.

[34] Some of the research into prior court decisions using the terms "unfair competition" or "unfair methods of competition" for Senator Hollis's speech was apparently commissioned by Joseph E. Davies, who was then the Commissioner of Corporations in the Department of Commerce, Bureau of Corporations, and who later served as the first chair of the Federal Trade Commission. This research was later amplified and published in an 832-page volume entitled U.S. BUREAU OF CORPORATIONS, TRUST LAWS AND UNFAIR COMPETITION (1916). *See* R.M.W., *Reviews of Statistical and Economic Books*, 80 J. ROYAL STATISTICAL SOC'Y 105 (1917).

[35] 51 CONG. REC. 12, 142–209 (1914), *reprinted in* Kintner, *supra* note 2, at 4131–4153.

[36] 221 U.S. 1, 43 (1911).

[37] 51 CONG. REC. 12,146 (1914), *reprinted in* Kintner, *supra* note 2, at 4141.

[38] *Id.*

[39] *Id.* at 4142. Rublee's ghost-written editorial for *Harper's Weekly* makes this even clearer. In it, he points out that in suits under the Sherman Act, "the Attorney General usually alleges the use of unfair competitive practices" and concludes that the Sherman Act "is adequate for the abolition of monopoly, but is not invoked until the monopoly is full grown." *Editorial*, *supra* note 18.

[40] Winerman, *supra* note 12, at 90.

[41] *See* H.R. REP. NO. 1142, at 18 (1914) (Conf. Rep.).

[42] *Id.* at 19.

[43] 253 U.S. 421 (1920).

[44] *Editorial*, *supra* note 18.

[45] Kintner, *supra* note 2, at 1010.

[46] *Id.* at 1013–16.

[47] COOPER, *supra* note 16, at 231.

[48] *See* Rublee, *supra* note 16, at 672 (noting that the FTC "has perhaps not been able to do the particular job for which it was established as well as it otherwise might have."); UROFSKY, *supra* note 9, at 398 (noting that Brandeis "deplored the poor quality of some of Wilson's appointees to . . . the Federal Trade Commission"); *see also* MCCRAW, *supra* note 13 at 152 ("[T]he Federal Trade Commission was not to be taken seriously" during its first generation of existence). For a somewhat more positive assessment of the Commission's early years, see Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921–1925*, 77 ANTITRUST L.J. 145 (2010), and GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION (2009).

[49] *See* MCCLURE, *supra* note 3, at 107.

[50] *Id.* at 112.

[51] *Id.*

[52] GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM 272 (1963).

[53] Rublee, *supra* note 16, at 667.

[54] KOLKO, *supra* note 52, at 275.

[55] *Id.* at 276.

[56] *See* Robert Joseph, *John Lord O'Brian, Hoover's Antitrust Chief, Gives the FTC an Antitrust Lesson*, ANTITRUST, Fall, 2010, at 88, 89–92.

[57] MCCLURE, *supra* note 3, at 119.

[58] *Id.* at 124.

[59] MCCRAW, *supra* note 13, at 126 (citing interview by Ray Stannard Baker with Louis D. Brandeis (Mar. 23, 1929)).

[60] KOLKO, *supra* note 52, at 270–78.

[61] MCCRAW, *supra* note 13, at 152.

[62] ACHESON, *supra* note 5, at 127–28.

[63] *See* MCCLURE, *supra* note 3, at 228–71.