
CPI Antitrust Chronicle

May 2014 (1)

The Unrealized Congressional Vision for the FTC and Its Historic Performance as a Law Enforcement Agency

Daniel A. Crane
University of Michigan

The Unrealized Congressional Vision for the FTC and Its Historic Performance as a Law Enforcement Agency

Daniel A. Crane¹

I. INTRODUCTION

The subject of the FTC's history in its first century and its potential for modernization are broad topics, and I will not be able to do them justice given constraints of time and space.² I hope, however, that reflection on the unrealized Congressional vision for the FTC and its historic performance as a law enforcement agency will set the stage for consideration of reforms that may be appropriate to consider on the Commission's 100th birthday.

Let me say, finally by way of introduction, that my expertise as a scholar and practitioner primarily concerns the FTC's competition and antitrust portfolio, not its consumer protection portfolio. Hence, my thoughts are primarily about the FTC's original and continuing mandate to promote competition.

II. CONGRESS' UNREALIZED VISION FOR THE FTC

A. History and Congressional Vision

Like all agencies, the FTC was a product of its times, in this case the Progressive Era. The backdrop to the passage of the FTC and Clayton Acts in 1914 can be summarized briefly as follows. During the Gilded Age of the late nineteenth century, a series of events including the second industrial revolution, the liberalization of state corporate law, and the growth in scale of business organizations led to popular demand for federal legislation to control the power of the "trusts." Congress responded in 1890 with the Sherman Act, which remains to this day our foundational antitrust law.

However, during its first two decades, the Sherman Act was not used as effectively as Progressives of the early twentieth century would have liked. The law was turned more often against labor combinations than capital and was perceived as being too weak. Also, the Progressives were frustrated with a model of antitrust enforcement that depended on the Justice Department bringing lawsuits before federal judges. The Progressives believed that a specialized commission with broad investigatory and remedial powers would be preferable to the litigation model of antitrust enforcement.

The debates over the appropriate model of antitrust enforcement crystallized in the 1912 Presidential election between Theodore Roosevelt, William Howard Taft, and Woodrow Wilson. Roosevelt argued vigorously for the creation of a new federal agency with broad supervisory power over corporations. Roosevelt wanted to replace the prosecutorial and judicial model of

¹ Associate Dean for Faculty and Research and Frederick Paul Furth, Sr., Professor of Law, University of Michigan.

² My perspectives are more fully set out in my book THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT (Oxford University Press 2011).

antitrust with an expert commission model. Taft, by contrast, pointed to recent prosecutorial successes by his administration against U.S. Steel, American Sugar, General Electric, the meat packers, and the transcontinental railways in arguing in favor of a continuation of the prosecutorial and judicial model. Wilson came in somewhere between Taft and Roosevelt, arguing in favor of the creation of a new commission, but one that would still be accountable to the courts.

Following Wilson's victory, Congress turned first to banking reform, passing the Federal Reserve Act of 1913, and then to antitrust reform, passing the FTC and Clayton Acts of 1914. The design of the FTC reflected the Progressive Era belief in regulation by technocratic experts insulated from direct political pressures. In its 1935 decision in *Humphrey's Executor*,³ a decision that legitimized the constitutionality of independent regulatory agencies, the Supreme Court described the technocratic features that made the FTC a distinctive type of governmental organization.

According to the Court, the FTC is "a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without leave or hindrance of any other official or any department of the government."⁴ "The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality."⁵ "It is charged with the enforcement of no policy except the policy of the law."⁶ "Its duties are neither political nor executive, but predominantly quasi judicial and quasi legislative."⁷ "Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'"⁸

This independent agency, technocratic conception of the FTC contrasted with the prevailing common law model of antitrust enforcement by prosecutors before judges. The question thus arose of what should be the relationship between the FTC and the Justice Department, to which the Sherman Act had delegated the primary responsibility for enforcing the antitrust laws. Here, the FTC Act's legislative history evidences a Congressional intent that "[f]ar from being regarded as a rival of the Justice Department . . . the [FTC] was envisioned as an aid to them."⁹

The FTC Act contains several mechanisms for collaborative antitrust enforcement between the two agencies, in particular on questions of remedy. Section 6(c) of the Act calls for the Commission to monitor compliance with antitrust decrees obtained by the Justice Department.¹⁰ Section 6(e) allows the attorney general to request that the FTC "make recommendations for the readjustment of the business of any corporation alleged to be violating the Antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law."¹¹ Section 7 of the Act allows

³ *Humphrey's Ex'r v. U.S.*, 295 U.S. 602 (1935).

⁴ *Id.* at 625–26.

⁵ *Id.* at 624.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* (citation omitted).

⁹ *FTC v. Cement Inst.*, 333 U.S. 683, 692–93 (1948).

¹⁰ 15 U.S.C. § 46(c).

¹¹ 15 U.S.C. § 46(e).

district courts to refer Department of Justice antitrust cases to the FTC to sit as a “master of chancery” and determine the appropriate form of relief.¹²

To summarize, the original Congressional design contemplated that the FTC would have the following characteristics:

1. non-partisanship and independence from the political branches of government,
2. superior expertise,
3. primarily legislative and adjudicatory responsibilities, and
4. a cooperative partnership with the Justice Department.

For better or for worse, almost none of this vision has been realized.

B. Failure of the Congressional Vision

1. Political Independence

Congress designed the FTC to be independent from the political branches of government. The *Humphrey’s Executor* case sealed this independence by preventing the President from removing Commissioners from office for political reasons. The Commission thus enjoys a high degree of independence from the executive branch of government. However, this does not mean the Commission is politically independent as a general matter.

To the contrary, empirical evidence suggests that the Commission yields to the will of Congress, and, particularly, of the oversight committees with funding responsibility.¹³ For example, a study by Roger Faith, Donald Leavens, & Robert Tollison found that case dismissals at the FTC were non-randomly concentrated on defendants headquartered in the home districts of congressmen on committees and subcommittees with budgetary and oversight jurisdiction over the FTC.¹⁴ Bill Kovacic, who later went on to become the FTC’s chair, found that the FTC has consistently chosen policy programs that follow the expressed will of the FTC’s oversight committees in Congress.¹⁵

To say that the FTC responds to the will of Congress is not necessarily to criticize the FTC for being a “political” institution. In a democracy, having a politically accountable agency may be desirable. However, it is important to acknowledge that the Progressive Era vision for technocratic independence and a non-political character is largely illusory.

2. Superior Expertise

The Progressive Era agency model was largely based on the assumption that regulatory commissions would be run by people with superior expertise to that of ordinary law enforcement officials—in this case, that the FTC would have superior expertise on competition issues to the Justice Department. In the early years, the FTC may have had an expertise advantage over the Justice Department. In 1914, the FTC inherited the Economic Department (later transformed into the Economic Division and then the Bureau of Economics) of its predecessor—the Bureau of

¹² 15 U.S.C. § 47.

¹³ See PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION (Robert J. Mackay, James C. Miller III, & Bruce Yandle, eds. 1987).

¹⁴ Roger L. Faith, Donald R. Leavens, & Robert D. Tollison, *Antitrust Pork Barrel*, in Mackay et al., *id.* at 15–29.

¹⁵ William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective*, in Mackay, et al., *id.* at 63.

Corporations.¹⁶ The Justice Department's Antitrust Division did not hire its first economist or create an economics unit until 1936.¹⁷ Until the early 1970s, economists played a relatively small role in the division—mostly in data gathering and statistical litigation support.¹⁸ The FTC's economics unit, by contrast, enjoyed earlier influence within the agency.¹⁹

Today, however, there is little distinction between the agencies on this score. At the Antitrust Division, a deputy assistant attorney general for economics—usually a prominent academic economist—heads a staff of approximately 60 Ph.D.-level economists.²⁰ At the FTC, the Bureau of Economics features about 70 Ph.D.-level economists (although they spend about a quarter of their time on consumer protection issues).²¹ The bureau director is also usually a prominent academic economist, and it is typical to have an economist among the commissioners. Although there have been exceptions, including on the present commission, the commissioners historically have not been leading experts in their fields when appointed and have not stayed at the Commission long enough to acquire expertise.²² In terms of overall expertise, there is no substantial difference between the FTC and Antitrust Division.

3. Legislative and Adjudicatory Character

As noted earlier, the key features that justified the independence of the FTC from the executive branch were supposedly that it was not merely another law enforcement agency, but that it instead had a legislative and adjudicatory character. However, this vision has been largely unrealized.

First, the FTC has never been an antitrust rule maker. Although the Commission has promulgated influential rules on the consumer protection side—the Cigarette Rule and the Do Not Call Registry, for example—it has published almost no antitrust rules.²³ Indeed, it has been discouraged from doing so. A 1989 ABA report on the FTC concluded, “we are not optimistic about the chances that the FTC could codify antitrust-oriented prohibitions on specific types of business conduct.”²⁴

Second, although the Commission may adjudicate matters internally, it more often chooses to litigate in court instead. During the 1990s, for example, the FTC brought slightly more injunctive actions in district court than it did administrative actions.²⁵ Thus, while the FTC enjoys the flexibility of choice, it often chooses the conventional law enforcer route—in which capacity it is essentially identical to the Antitrust Division.

¹⁶ Lawrence J. White, *Economics, Economists, and Antitrust: A Tale of Growing Influence*, NYU Law and Economics Research Paper No. 08-07, available at http://www.aeaweb.org/annual_mtg_papers/2008/2008_180.pdf.

¹⁷ R. Hewitt Pate, *Robert H. Jackson at the Antitrust Division*, 68 ALB. L. REV. 787, 791 n. 12 (2005).

¹⁸ White, *supra* n. 16 at 11.

¹⁹ *Id.*

²⁰ *Id.* at 13.

²¹ *Id.*

²² See Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L. J. 761, 768 (2005).

²³ A 1989 ABA report found only one instance of the FTC promulgating an antitrust rule. *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L. J. 43, 91 n.103 (1989).

²⁴ *Id.*

²⁵ According to a tally from the FTC's annual reports, during the 1990–1998 period, the FTC brought 31 administrative complaints and 33 district court actions.

Further, it is unclear how much real adjudication is happening in administrative proceedings at the FTC—if we assume that adjudication means a true contest over evidence before an impartial tribunal. The FTC’s enforcement staff enjoy tremendous success in adjudication at the Commission level. One study found that between 1983 and 2008 the staff won all 16 cases adjudicated by the Commission.²⁶ This does not necessarily translate into ultimate victory for the Commission, since the courts of appeal have not been shy about reversing Commission decisions. The Commission faces better prospects on appeal if it has won in a district court proceeding than if it has found liability through an administrative proceeding, which explains the Commission’s preference to litigate cases in court.

4. Cooperative Partnership with Justice Department

Finally, despite Congress’s intention that the two agencies collaborate in antitrust enforcement, the statutory provisions encouraging such collaborations have been seldom used. In a 1962 letter to the chairman of the FTC, referring a decree matter to the FTC under Section 6(c), the Attorney General stated the section had been “virtually unused since its enactment in 1914,”²⁷ and the neglect of 6(c) has continued since that time.

The antitrust agencies collaborate to the extent of figuring out how to divide responsibility and issuing joint guidelines on certain topics, but they do jointly enforce the antitrust laws on the same matters, as contemplated by Congress.

III. THE FTC AS A LAW ENFORCEMENT AGENCY

Despite the original Congressional design, on competition matters the FTC is not a legislative body, is not primarily an adjudicatory body, is not uniquely expert on antitrust matters, and does not play the collaborative role with Justice Department that Congress wrote into the FTC Act. Rather, the FTC is primarily a law enforcement agency that enforces antitrust norms created by the courts on equal terms with the Justice Department, state attorneys general, and private plaintiffs.

The question thus arises as to why maintain the FTC’s antitrust enforcement role. More specifically, why should the federal government continue to fund two separate antitrust agencies that perform essentially the same executive law enforcement function? In recent years, the trend in other countries (like Brazil, France, and Portugal, for example) has been toward consolidating antitrust enforcement in a single agency, and thus eliminating the duplication costs, jurisdictional battles, and uncertainty for the business community that can arise from multiple agencies.

In 2007, the bipartisan, congressionally appointed Antitrust Modernization Commission released an evaluative report on the entire gambit of modern antitrust law. Among other things, the twelve members of the Commission considered whether dual federal enforcement should continue. Three of the twelve—including two former heads of the Antitrust Division—voted to recommend abolishing the FTC’s antitrust enforcement authority and vesting responsibility for

²⁶ A. Douglas Melamed, *The Wisdom of Using the “Unfair Methods of Competition” Prong of Section 5*, COMPETITION POL’Y INT’L (Nov. 2008). The study Melamed cites found that the respondents won 4 of the 16 cases before the Administrative Law Judge, but then lost those cases before the Commission.

²⁷ U.S. v. Int’l Nickel Co. of Can., 203 F.Supp. 739 (S.D.N.Y. 1962).

all antitrust enforcement with the Justice Department.²⁸ But the majority recommended retaining the dual-enforcement structure.

The reasons for retaining dual enforcement are largely conservative and prudential. Although the FTC may not be functioning as the agency that Congress designed it to be, it is by and large an effective law enforcement agency today. One cannot be sure what would happen if antitrust enforcement were consolidated in a single agency, and since there is no pressing problem with federal antitrust enforcement, its basic structure should be retained. To put it colloquially, if it ain't broke, don't fix it.

The one hundredth anniversary of the FTC is an opportune time for reflecting on whether this conservative and prudential wisdom is sound, or whether it is simply the path of least resistance. However, since there appears to be little political appetite for a wholesale reexamination of the institutional structure of antitrust enforcement, I will close by suggesting four relatively modest measures that could be implemented to better integrate the modern functioning of the FTC and Antitrust Division in light of the FTC's law enforcement role. The first could be accomplished without Congressional intervention. The next three would likely require new legislation.

IV. FOUR MODEST RECOMMENDATIONS FOR MODERNIZATION

A. *Promulgating Guidelines for Section 5 Enforcement*

In recent years, the scope of the FTC's power to enjoin "unfair methods of competition" under Section 5 of the FTC Act has been one of the most frequently discussed and controversial topics with respect to the FTC's competition mission. The Supreme Court has held that Section 5 reaches all conduct prohibited by the Sherman Act and goes even further to allow the FTC to reach conduct not yet illegal under the Sherman Act but nonetheless posing a threat to competition.²⁹ Despite this recognition of the FTC's prophylactic authority under Section 5, there are few, if any, litigated cases in the last several decades in which the FTC has successfully invoked Section 5 as to conduct not covered by the Sherman Act.

Several Commissioners and many antitrust practitioners have recently raised the need for the Commission to issue guidelines concerning the scope of Section 5. In my view, the Commission should issue such guidelines, although not necessarily for the reasons suggested by others. Some commentators have suggested that the Commission should issue guidelines in order to provide greater notice and predictability for the business community. Although such guidance might be provided on particular types of competitive practices (such as patent settlements or participation in standard-setting organizations), I am skeptical that the kinds of broad guidelines under consideration would help businesses better to plan their activities.

Rather, the value of such guidelines would obtain primarily from enhancing judicial review of Commission decisions. Although guidelines issued by the Commission may not be legally binding, they can provide a set of principles that can be invoked initially before the

²⁸ Antitrust Modernization Commission, Report and Recommendations II.A at 129 (footnote).

²⁹ *FTC v. Brown Shoe Co.*, 348 U.S. 316, 322 (1966).

Commission and ultimately in court to limit the Commission's discretion.³⁰ Given that the FTC acts principally as a law enforcement agency rather than as a legislative or judicial body, it is important that it be constrained by principles announced in advance that can be fairly contested in litigation and ultimately resolved by the courts.

B. Aligning the Preliminary Injunction Standard in Merger Cases

Under Section 13(b) of the FTC Act, the FTC receives greater deference than the Justice Department when seeking to block a merger in district court in order thereafter to initiate administrative proceedings. Courts have interpreted Section 13(b) as creating a presumption that the Commission will be accorded a preliminary injunction so long as it raises "serious, substantial, difficult, and doubtful" issues about the merger.³¹ By contrast, in order to secure a preliminary injunction against an anticompetitive merger, the Justice Department must meet the traditional preliminary injunction standard, including proving a substantial likelihood of success on the merits and irreparable harm.

Solicitude to the FTC's position as an independent agency with "quasi-adjudicatory" powers might make sense if the FTC had a fundamentally different role than the Justice Department in merger cases, but it does not. Both agencies act functionally as law enforcement agencies executing legal rules created by Congress and the courts. Whether a merger case ends up before the Justice Department or FTC has nothing to do with the complexity of the case or whether it has features making it particularly suitable for administrative or executive handling. It turns on whether the Justice Department or FTC happens to be the usual custodian of the relevant industry. For example, if the relevant industry is computer software the Justice Department takes charge but if it is computer hardware the FTC takes charge. There is no logical reason that the FTC should have an easier time getting a preliminary injunction in a hardware case than the Justice Department does in a software case.

Given that preliminary injunctions are often dispositive in merger challenges, this difference in the preliminary injunction standard means that the FTC has an arbitrary advantage in blocking mergers in the industries over which it holds sway. Congress could remedy this anomaly by passing legislation establishing a single preliminary injunction standard for both the FTC and Justice Department.

C. Allowing Formal Division of Authority

As noted earlier, the idea that the agencies will play a cooperative role in investigating and prosecuting antitrust cases has not materialized. Instead, the agencies informally allocate enforcement based on their experience with particular industries. It is often not obvious in advance which agency will end up taking a particular case. Particularly in the merger context, where the Hart-Scott-Rodino Act's premerger notification clock is running, delay in identifying which agency will be responsible for reviewing a merger can be costly.

³⁰ For example, courts frequently rely on the Horizontal Merger Guidelines in assessing FTC and Justice Department merger challenges. See Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771 (2006).

³¹ *FTC v. Whole Foods, Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008) (citation omitted).

In 2002, the FTC and Justice Department entered into a formal Memorandum of Agreement allocating merger enforcement by industrial segment.³² Thus, for example, the FTC was to investigate computer hardware, energy, health care, retail stores, pharmaceuticals, and professional services, and the Antitrust Division was to investigate agriculture, computer software, financial services, media and entertainment, telecommunications, and travel. Unfortunately, the agencies ultimately had to withdraw their agreement under pressure from Congress.³³ An opportunity for greater clarity and transparency in the allocation of authority between the two agencies was lost.

Although the agencies do not require statutory authority to allocate their workload informally, given that Congressional pressure was responsible for the collapse of their 2002 agreement, some Congressional involvement in encouraging the agencies to undertake such an effort again is desirable.

D. Preventing Appellate Forum Shopping by Defendants

Under the current appellate review statute, which dates back to the Commission's founding in 1914, a losing defendant may appeal the Commission's order "within any circuit where the method of competition or act or practice in question was used or where such person, partnership, or corporation resides or carries on business."³⁴ What this unique appellate review statute means, in effect, is that a large corporate defendant doing business throughout the United States can choose any of the twelve federal courts of appeal (not including the specialized Court of Appeals for the Federal Circuit) in which to lodge its appeal. This means that large corporate defendants always have the advantage of litigating in the shadow of the most sympathetic appellate court in the nation and can shape their defenses accordingly.

The appellate forum shopping that this creates is particularly problematic in light of the fact that the Supreme Court has been relatively uninterested in antitrust cases, in general, and FTC cases, in particular, in the last four decades. During the 1960s, the FTC sought certiorari on substantive antitrust issues fifteen times, and the Supreme Court granted certiorari in eleven of those cases. Since the 1960s, the FTC has filed thirteen certiorari petitions in antitrust cases and has been granted Supreme Court review only six times.

Given current odds, the FTC knows that it is likely that the appellate court selected by the defendant will have the final say in the case. This problem could be addressed by a statutory reform requiring the defendant to lodge its appeal in a particular court—for example the U.S. Court of Appeals for the D.C. Circuit or in jurisdiction of the defendant's principal place of business.

³² See Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (March 5, 2002), available at <http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf>.

³³ Lauren Kearney Peay, *Note, The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 VAND. L. REV. 1307, 1333-38 (2007).

³⁴ 15 U.S.C. § 45(c).