



Federal Trade Commission

Thoughts on the FTC's Relationship (Constitutional and Otherwise) to the Legislative, Executive, and Judicial Branches

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Good afternoon. I have been asked to speak this afternoon on the Federal Trade Commission's role vis-à-vis the three branches of government. The FTC is accountable to all three branches. Commissioners are appointed (and can be reappointed) by the President. Commissioners are confirmed by the Senate and the Commission engages in rulemaking on issues assigned to us by Congress, which also controls our funding. And the Commission sits as a trial and appellate tribunal, with our decisions subject to review by the federal trial and appellate courts. All of this responsibility not only makes my job challenging and exciting, but it has several legal and practical implications which I will discuss with you today.

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisors, Amanda Reeves and Darren Tucker, for their invaluable assistance preparing this paper.

First, I will discuss the two Constitutional issues raised by the FTC's structure as an administrative agency: challenges that the FTC's decision-making framework violates due process and claims that the FTC violates the separation of powers doctrine. Second, I will discuss the extent to which the FTC, as an expert agency, receives deference from the federal district and appellate courts. Third, I will discuss reforms that the FTC has made and should make to directly address many of the criticisms you will hear me highlight this afternoon. I will end with some concluding thoughts.

I.

When Congress (at President Woodrow Wilson's urging) established the FTC in 1914, it intended for the FTC to serve the dual roles of prosecutor and judge with respect to the antitrust and consumer protection matters entrusted to it.¹ That view of the FTC as part prosecutor and part judge is codified in Section 5 of the FTC Act. Section 5 empowers the FTC to issue a complaint when it has "reason to believe" that an unfair method of competition or an unfair or deceptive act or practice has occurred.² Then, after

¹ As Representative Covington, who authored the original bill to create the FTC, declared in 1914:

The function of the Federal Trade Commission will be to determine whether an existing method of competition is unfair, and if it finds it to be unfair, to order discontinuance of its use. In doing this, it will exercise power of a judicial nature....It would seem clear that the determination of the question whether a method of competition is unfair is not a determination purely of fact, but necessarily involves the determination of a question of law. The Federal Trade Commission will, it is true, have to pass upon many complicated issues of fact, but the ultimate question for decision will be whether the facts found constitute a violation of law against unfair competition. In deciding that ultimate question the Commission will exercise power of a judicial nature..."

Congressional Record, Sept. 10, 1914, 14931-33.

² 15 U.S.C. § 45.

a hearing, Section 5 further empowers the FTC to make “findings as to the facts” and to issue a “cease and desist” order against any such violation.³

Following the FTC’s creation, parties complained that the FTC and other similarly constructed administrative agencies could not, consistent with due process, simultaneously serve as prosecutor (by issuing a complaint), and an independent-minded tribunal (by considering the validity of the challenged conduct).⁴ And, initially at least, there was a kernel of truth to those attacks:⁵ when the FTC was first formed, hearing officers were typically subordinate employees of the agency who could be hired and fired based on their decisions and there was no internal separation required between the Commission and the hearing process.⁶

In 1946, Congress responded by enacting the Administrative Procedure Act. As the Supreme Court has since observed, a “fundamental . . . purpose [of the APA was] to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge The safeguards it did set up were intended to ameliorate the evils from the commingling of functions.”⁷ To that end, the APA required that independent administrative law judges (who are no longer subject to agency control)

³ *Id.*

⁴ *See, e.g., Ramspeck v. Federal Trial Exma’s Conference*, 345 U.S. 128, 131 (1953) (observing that “many complaints were voiced against the actions of the hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations”); *Brinkley v. Hassig*, 83 F.2d 351, 356 (10th Cir. 1936) (noting that “[t]he spectacle of an administrative tribunal acting as both prosecutor and judge has been the subject of much comment, and efforts to do away with such practice have been studied for years”).

⁵ Administrative Conference of the United States, *Federal Administrative Law Judge Hearings* 10 (1980).

⁶ *Id.*

⁷ *Wong Yang Sung v. McGRath*, 339 U.S. 33, 41, 46 (1950).

conduct the initial hearings and that the Commission would then handle appeals and prohibited agency employees who participate in the investigative or prosecutorial functions from playing a role in the decision-making process.⁸ Once the Commission issues a decision, the FTC Act authorizes the respondent to appeal an unfavorable result to the relevant federal circuit court of appeals.⁹

In the APA's wake, the Supreme Court has repeatedly rejected claims that the lodging of legislative, prosecutorial, and judicial functions in one agency supplies the basis for a constitutional due process violation. In 1948, the Court held in *FTC v. Cement Institute* that the mere fact that the Commission members had previously testified before Congress about the legality of a party's pricing scheme did not disqualify the Commissioners from providing a fair tribunal in a subsequent investigation of that same party.¹⁰ Likewise, in its 1975 decision in *Winthrow v. Larkin*, the Court rejected a claim that a state agency's power to investigate and adjudicate the same matter was a due process violation.¹¹ The Court observed that, "[t]he initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues do not result in a procedural due process violation."¹²

⁸ 5 U.S.C. § 554(d).

⁹ 15 U.S.C. § 45(c).

¹⁰ *FTC v. Cement Institute*, 333 U.S. 683 (1948).

¹¹ *Winthrow v. Larkin*, 421 U.S. 35 (1975)

¹² *Id.* at 1470. The federal appellate courts have likewise repeatedly recognized that, by functioning in a quasi-prosecutorial, quasi-judicial dual role, the FTC does not violate litigants' procedural due process. *See, e.g., Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968) (holding that the Commission did not violate a party's due process rights by issuing a press release that was critical of the party's conduct following the issuance of a complaint, noting that "[i]t is well settled that a

These reforms and decisions, however, have not insulated the FTC from procedural due process attacks.¹³ Twice in the last 18 months, in fact, parties have argued that the FTC's procedures violated their due process rights. In *Inova/Prince William*, the Commission investigated and ultimately decided to challenge a merger between the only two hospitals in the relevant geographic market.¹⁴ The Commission appointed me to serve as the ALJ and oversee the trial¹⁵ and I recused myself from the Commission's decision to vote out a complaint. Notwithstanding my recusal, the parties claimed that my appointment violated their due process rights and requested that I recuse

combination of investigative and judicial functions within an agency does not violate due process"); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 79 (10th Cir. 1972) (rejecting Kennecott's argument that the Commission could not give it a fair hearing because of the Commission's extensive prior contacts with Congress on the subject matter at issue in the appeal and explaining that Congress designed the FTC to combine the functions of investigator, prosecutor, and judge and that "the courts have uniformly held that this feature does not make out an infringement of the due process clause of the Fifth Amendment").

¹³ Indeed, as the American Bar Association's Antitrust Section Special Committee to Study the Role of the FTC (of which I was a member) observed in 1989, "[t]he debate about the merits of the FTC's dual roles as prosecutor and adjudicator has raged for years." Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission 118 (1989).

¹⁴ Complaint, *In the Matter of Inova Health Sys. Found.* (Aug. 5, 2008) available at <http://www.ftc.gov/os/adjpro/d9326/080509admincomplaint.pdf>.

¹⁵ See Press Release: FTC Designates Commissioner J. Thomas Rosch as ALJ in Case challenging Inova Health System Foundation's Acquisition of Prince William Health System, Inc. (May 9, 2008) available at <http://www.ftc.gov/opa/2008/05/inovafyi.shtm>; Order Designating Administrative Law Judge (May 9, 2008) available at <http://www.ftc.gov/os/adjpro/d932610805090order.pdf>. Agency rules allowed the FTC to do so. 16 C.F.R. § 3.42(a).

myself from participating as ALJ.¹⁶ The parties abandoned the merger before the Commission ruled on the motion.¹⁷

A similar series of events occurred last year in the Whole Foods litigation. There, the Commission again appointed me to serve as the ALJ. Whole Foods moved to disqualify any member of the Commission from serving as an ALJ on the grounds that the Commission's statements made in conjunction with the preliminary injunction proceedings showed that the Commission had prejudged the matter.¹⁸ The Commission rejected Whole Foods' argument finding, first, that the public statements did not suggest prejudgment or that the Commission lacked impartiality and, second, that, a finding that the Commission had prejudged the matter would make it impossible for the Commission to ever vigorously litigate a preliminary injunction.¹⁹ Whole Foods responded by suing

¹⁶ Respondents' Motion to Recuse Commissioner J. Thomas Rosch as Administrative Law Judge ("Respondents' Motion to Recuse") (May 23, 2008) *available at* <http://www.ftc.gov/os/adjpro/d9326/080523respmorecuseroschasalj.pdf>.

¹⁷ Press Release, Inova Health System, Inova Health System, Statement from Inova Health System and Prince William Health System About the Proposed Merger (June 6, 2008), *available at* <http://www.inova.org/news/2008/inovapwhsmergerstatement.jsp>. Prior to the parties' abandonment, I had certified the parties' motion and attached a statement that explained why I believed the parties' motion lacked merit. Order Certifying Respondents' Motion to Recuse the Commission and Accompanying Statement by J. Thomas Rosch (May 29, 2008) *available at* <http://ftc.gov/os/adjpro/d9326/080529ordercert.pdf>.

¹⁸ Respondents' Motion to Recuse Commissioner J. Thomas Rosch as Administrative Law Judge ("Respondents' Motion to Recuse") (Aug. 22, 2008) *available at* <http://www.ftc.gov/os/adjpro/d9324/080822respmoqualifycomm.pdf>.

¹⁹ Order Denying Respondents' Motion to Disqualify the Commission (Sept. 5, 2008), *available at* <http://www.ftc.gov/os/adjpro/d9324/080905order.pdf>. Tellingly, Whole Foods did not move to disqualify the entire Commission from hearing an appeal on these same grounds – a fact that, in the Commission's view, severely undercut the merits of its "prejudgment" claim. Notwithstanding the Commission's finding, the Commission subsequently named a new ALJ to oversee the trial proceedings after the scheduling order was in place. Order Designating Administrative Law Judge (Oct. 20, 2008), *available at* <http://www.ftc.gov/os/adjpro/d9324/081020order.pdf>.

the FTC in federal court, claiming that the FTC's prejudgment of the case along with its trial schedule (which, it claimed "rushed" Whole Foods to trial in five months) violated its due process rights.²⁰ Whole Foods eventually dismissed its due process claim when it became clear that it was going to settle the case. Whether the due process claims in *Inova* and *Whole Foods* are a sign of things to come remains to be seen.

Apart from the due process issues, a separate constitutional issue raised by the FTC's structure is whether the FTC (and the administrative state more generally) violate the U.S. Constitution's separation of powers. The Constitution's framers divided power such that Article I vests legislative powers in the Congress,²¹ Article II vests executive powers in the President,²² and Article III, vests judicial power in the Supreme Court and the inferior courts.²³ While that seems like a straightforward enough division of power, the Constitution's checks and balances framework – and Congress's attempt to mimic that framework by creating a web of additional inter-branch checks and balances each time it creates a new "independent" governmental entity – raise a host of questions.²⁴

²⁰ Complaint for Declaratory and Injunctive Relief, *Whole Foods Market, Inc. v. FTC*, No. 1:08-cv-02121 (D.D.C. Dec. 8, 2008), *available at* <http://legaltimes.typepad.com/files/whole-foods-complaint.pdf>.

²¹ U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

²² U.S. CONST., art. II § 1 ("The executive Power shall be vested in a President of the United States of America.").

²³ U.S. CONST., art. III § 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

²⁴ Did the framers intend for a "flexible understanding of separation of powers" such that power was not overly concentrated in any one branch? Or did the framers intend for each branch to have exclusive powers with limited interference from the will of another? *Compare Mistretta v. United States*, 488 U.S. 361, 381 (1989) (citing Federalist No. 51 for the proposition that the Framers adopted a "flexible understanding of separation of

The administrative agencies, in particular, present a separation of powers conundrum because they pose the question of whether, when Congress establishes an independent agency or commission in one branch with power that belongs to another, does it unconstitutionally vest legislative, executive, or judicial power in that entity?

The Supreme Court first confronted this question in 1935 in *Humphrey's Executor v. United States* when it considered whether Congress could constitutionally limit the President's power to remove Commissioners under the Federal Trade Commission Act.²⁵ President Hoover had nominated William Humphrey to succeed himself as a member of the Commission and he was confirmed by the Senate for a seven-year term that was to expire on September 25, 1938.²⁶ In 1933, however, President Franklin Roosevelt wrote Humphrey and asked him to resign because "the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection."²⁷ Commissioner Humphrey refused to resign and President Roosevelt sent him a letter terminating him from further service – a fact that Commissioner Humphrey ignored by continuing to

powers" and that Madison thought the "greatest security against tyranny" rested "in a carefully crafted system of checked and balanced power within each Branch") *with id.* at 426 (Scalia, J., dissenting) ("Today's decision follows the regrettable tendency of our recent separation-of-powers jurisprudence to treat the Constitution as though it were no more than a generalized prescription that the functions of the branches should not be commingled too much – how much is too much to be determined, case-by-case by this Court. The Constitution is not that.").

²⁵ 295 U.S. 602 (1935).

²⁶ *Id.* at 618.

²⁷ *Id.*

serve out his term.²⁸ Humphrey died while in office and his estate sued the United States to recover his salary from the time of his termination until his death.

In a decision that is generally considered to provide the constitutional foundation for the administrative state – as well as, perhaps, retribution for the President’s aggressive New Deal policies²⁹ – the Court held that Congress did not violate the separation of powers when it established the Federal Trade Commission and limited the president’s removal power except for good cause. In so holding, the Court distinguished between administrative officials who performed “purely executive” functions (such as postmasters) and those officials who performed “quasi-legislative” and “quasi-judicial” functions (such as Federal Trade Commissioners). The Court held that, as to the former, the President had absolute removal power, but that, as to the latter, Congress could constitutionally limit the President’s power.

Since *Humphrey’s Executor*, the Supreme Court has repeatedly held the administrative framework does not violate the Constitution so long as the President nominates and the Senate confirms the principal officers, with the caveat that Congress

²⁸ *Id.* at 619.

²⁹ See *Morrison v. Olson*, 487 U.S. 654, 724 (1988) (Scalia, J., dissenting) (noting that *Humphrey’s Executor* “was considered by many at the time the product of an activist, anti-New Deal Court bent on reducing the power of President Franklin Roosevelt”). Indeed, Justice Jackson, who had been Roosevelt’s Attorney General, later remarked:

I really think the decision that made Roosevelt madder at the Court than any other decision was that damn little case of *Humphrey’s Executor v. United States*. The President thought they went out of their way to spite him personally and they were giving him a different kind of deal than they were giving Taft.

Synar v. United States, 626 F. Supp. 1374, 1398 n.27 (D.D.C. 1986) (per curiam) (quoting E. Gerhart, *America’s Advocate: Robert H. Jackson* 99 (1958)).

may constitutionally limit the President to a good-cause removal power.³⁰ I will briefly touch on two of the most recent decisions.

First, in *Morrison v. Olson*, the Supreme Court rejected in a 7-1 decision a separation of powers challenge to the Ethics in Government Act which authorized the appointment of an Independent Counsel to investigate (and, if necessary) prosecute high-ranking government officials for violations of federal criminal laws.³¹ As in *Humphrey's Executor*, the Act allowed for the Independent Counsel's removal only by the Executive Branch and only for good cause.³² Ted Olson, who eventually became the Solicitor General under President George W. Bush and was the target of an independent counsel investigation, challenged the Act on the grounds that (1) unlike the FTC, the independent counsel was not merely "quasi-executive" but served in a "purely executive" role,³³ and (2) the Act more generally impermissibly interfered with the role of the Executive Branch. The Court was unmoved on both grounds. "The real question," the Court

³⁰ Indeed, to date, the only cases in which the Supreme Court has held the structure of an administrative agency unconstitutional involved attempts by Congress to insert itself directly into the appointment process or to directly control an agency's decisions through a veto-like power. Richard H. Pildes, *Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act* 33 (NYU Law and Economics Research Paper No. 08-51, Aug. 31, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1281083 (citing *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (direct congressional participation in agency decision-making); *Bowsher v. Synar*, 478 U.S. 714 (1986) (direct congressional involvement in removal process); *INS v. Chadha*, 462 U.S. 919 (1983) (direct congressional veto over agency decisions); *Buckley v. Valeo*, 424 U.S. 1, 1 (1976) (direct congressional participation in appointment process); *Myers v. United States*, 272 U.S. 52 (1926) (direct Senate participation in removal)).

³¹ 487 U.S. 654 (1988). Justice Scalia dissented and Justice Kennedy did not participate in the decision.

³² *Id.* at 686 (citing 28 U.S.C. § 596(a)(1) (providing that an independent counsel may be removed from office "only by the personnel action of the Attorney General, and only for good cause").

³³ *Id.* at 690.

observed, “is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.”³⁴ Because the “imposition of a ‘good cause’ standard for removal by itself” did not “unduly trammel[] on executive authority,” and because the statute did not vest Executive Branch power in the Judicial or Legislative Branches, the Court rejected Olson’s separation of powers challenge.³⁵

In the second case, *Mistretta v. United States*, the Court further extended *Humphrey’s Executor* and *Morrison* to uphold the constitutionality of the United States Sentencing Commission in an 8-1 decision.³⁶ In contrast to the Independent Counsel, which Congress lodged in the Executive Branch, Congress created the Sentencing Commission as an independent Commission within the Judicial Branch. Congress mandated that the Commission would have seven members (including a minimum of three federal judges) appointed by the President and gave the Commission authority to promulgate binding guidelines that established sentencing ranges for categories of federal offenses. A defendant sentenced under the Commission’s guidelines challenged the Commission’s constitutionality, claiming, among other things, that Congress (1) violated the separation of powers doctrine by combining the functions of rulemaking (a legislative function) and sentencing judgment (a judicial function), and (2) undermined the judicial branch’s independence by making the Commissioners removable by the President. The Supreme Court was again unmoved. The Court rejected the claim that Congress had given away legislative power reasoning that, before the Sentencing Commission’s

³⁴ *Id.* at 691.

³⁵ *Id.* at 691, 695-96.

³⁶ *Mistretta*, 488 U.S. 361.

creation, the courts had rulemaking power within the areas of its expertise and, in any event, the courts had always possessed wide discretion to engage in sentencing.³⁷ And it rejected the argument that the President’s appointment and limited removal power eroded the Judicial Branch’s authority, reasoning that these powers did not give the President undue sway over the Judicial Branch.³⁸

Justice Scalia, whom you heard from this morning, has long criticized this line of decisions on the grounds that *Humphrey’s Executor* authorized the creation of a “headless fourth branch” of government by recognizing “independent” agencies that are, in his words, “*within* the Executive Branch (and thus authorized to exercise executive powers) independent of the [President’s] control”³⁹ As I read Justice Scalia’s opinions, his principal critique seems very straightforward: in his view, the Constitution divides power among the three branches and any entity that exercises executive, legislative, or judicial power must be fully accountable to the head or heads of the relevant branch. Simply put, assuming the FTC and the independent counsel serve (at least part, if not entirely) Executive Branch functions, if the President has to wait for an FTC Commissioner or independent counsel to act so egregiously so as to warrant removal for “good cause,” the President is not really in charge of the Executive Branch functions; Congress (by implementing the good cause standard) or, worse, the politically

³⁷ *Id.* at 389.

³⁸ *Id.* at 409.

³⁹ *Id.* at 424 (Scalia, J., dissenting); *Synar*, 626 F. Supp. at 1398 (“It has in any event always been difficult to reconcile *Humphrey’s Executor*’s ‘headless fourth branch’ with a constitutional text and tradition establishing three branches of government”).

unaccountable independent agency or counsel, is in charge.⁴⁰ That reassignment or sharing of power, in Justice Scalia’s view, is flatly contrary to the separation-of-powers framework.

Justice Scalia has thus far remained in the minority when it comes to separation-of-powers issues. However, since the leading separation of powers decisions are now nearly 20 years old, the majority of the justices have not decided a major separation of powers case. That will change this fall when the Court considers an appeal challenging the legality of the Public Company Accounting Oversight Board (“PCAOB” [pronounced “peek-a-boo”]).⁴¹ Under the Sarbanes-Oxley Act, the PCAOB’s members are appointed by the SEC Commissioners and are only removable by those Commissioners for good cause. The appeal raises two issues. First, whether Congress impermissibly intruded on the Executive Branch’s authority under Article II by empowering decision-makers at this “agency within an agency” to engage in executive power who are twice-removed from the President. Second, whether the PCAOB runs afoul of the Constitution’s Appointments Clause because it allows the SEC to appoint the PCAOB members who are (arguably) either “principal officers” (who must be appointed by the President) or “inferior officers” (who must be appointed by Heads of a Department). In a 2-1 decision,

⁴⁰ See also *Mistretta*, 488 U.S. at 425 (criticizing the majority for approving of “agencies ‘within the Judicial Branch (whatever that means), exercising governmental powers that are neither courts nor controlled by courts, nor even controlled by judges”).

⁴¹ *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 129 S. Ct. 2378, No. 08-961 (May 18, 2009) (order granting petition for certiorari). Congress created PCAOB in the Sarbanes-Oxley Act of 2002, following several major financial and accounting scandals. The PCAOB registers public accounting firms, establishes auditing and ethics standards, conducts inspections and investigations of registered firms, and imposes sanctions as needed.

with Judge Kavanaugh (whom you will hear from next) writing a lengthy dissent, the D.C. Circuit rejected these arguments and upheld the PCAOB’s constitutionality.⁴²

The PCAOB case is particularly interesting because it will be our first glimpse at Chief Justice Roberts and Justice Alito’s thinking on these issues, both of whom spent time early in their legal careers advocating on the President’s behalf – Chief Justice Roberts as Associate Counsel to President Reagan and Justice Alito as Deputy Assistant Attorney General under President Reagan – and both of whom have suggested that they may agree with Justice Scalia. In 1986, then-Associate White House Counsel Roberts opined that “[w]ith respect to independent agencies . . . the time may be ripe to reconsider the existence of such entities, and take action to bring them back within the Executive Branch.”⁴³ And in 1989, as the United States Attorney for New Jersey, Alito described Justice Scalia’s dissent in *Morrison* as “brilliant, but very lonely.”⁴⁴

To be sure, I have no reason to believe that the Court will use the PCAOB case to revisit the holding of *Humphrey’s Executor* – namely, that Congress may establish independent agencies within the Executive Branch, so long as the President maintains removal power over those principal officers who exercise executive powers. Justice Scalia himself has never suggested that he would revisit that holding and, in any event, as Judge Kavanaugh made clear in his dissent,⁴⁵ the PCAOB case is distinguishable because

⁴² *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008). The D.C. Circuit subsequently voted 5-4 to deny en banc review.

⁴³ CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY, 256-57 (Back Bay Books 2008) (2007).

⁴⁴ “After the Independent Counsel Decision: Is Separation of Powers Dead? Introduction by Samuel A. Alito, Jr.,” 26 Am. Crim. L. Rev. 1667 (1988).

⁴⁵ 537 F.3d at 697-98 (describing case as raising a “constitutional issue of first impression” and characterizing it as different from *Humphrey’s Executor*).

it presents the altogether different question of whether an agency within an agency is constitutionally permissible. It will nevertheless be interesting to see where the justices come out in this latest chapter in the separation-of-powers debate.

II.

Next I would like to switch gears and discuss the relationship between the FTC and the Judicial Branch and, more specifically, the role that the U.S. federal courts play in reviewing FTC decisions. In the United States, the federal courts can review an FTC decision through two avenues. First, to obtain a preliminary or permanent injunction to, for example, block an impending merger, the FTC must sue the parties in the federal district courts in a Section 13(b) proceedings.⁴⁶ Either side may appeal the district court's decision to the appropriate federal appellate court. Second and independently, after an administrative hearing on the merits and an appeal to the Commission, the respondent may appeal an unfavorable Commission's ruling to any federal appellate where the act occurred or where the company does business or resides.⁴⁷ I think it is safe to say that the amount of "deference" that the courts give to the FTC as an "expert agency" has been, to put it mildly, a moving target at best.

⁴⁶ See 15 U.S.C. § 53(b) (authorizing the FTC to seek preliminary and permanent injunctions to remedy "any provision of law enforced by the Federal Trade Commission" and further providing that (1) whenever the Commission has "reason to believe" that any party "is violating, or is about to violate" a provision of law enforced by the Commission, the Commission may ask the district court to enjoin the allegedly unlawful conduct, pending completion of an FTC administrative proceeding to determine whether the conduct is unlawful, and (2) "in proper cases," the Commission may seek, and the court may grant, a permanent injunction).

⁴⁷ 15 U.S.C. § 45(c) (appeals may be filed "in any circuit where the method of competition or act or practice in question was used or where such person . . . resides or carries on business").

Deference in Preliminary Injunction Proceedings. In the preliminary injunction context, the courts have vacillated over the years in the quantum of proof that they have required the FTC to show to carry its burden. Section 13(b) of the FTC Act allows a district court to grant preliminary relief “[u]pon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.”⁴⁸ Yet, for much of the past decade, federal district courts in Section 13(b) proceedings required the Commission to meet the same higher standard that applied to private litigants. In doing so, the courts disregarded Congress’s intent for the FTC to be able to readily obtain preliminary injunctions so that it could conduct a more comprehensive plenary trial of the merger itself.

In 2004, for example, the Commission challenged a proposed acquisition by Arch Coal of two coal mines in the Southern Powder River Basin (“SPRB”), a coal-rich region in Wyoming that would have combined two of the four leading producers of SPRB coal and substantially increased concentration in an already concentrated market. The Commission had developed evidence that the transaction would combine the two firms that held the principal sources of excess capacity in the SPRB, that the SPRB coal market was susceptible to coordination by producers, that the acquiring coal company had actually attempted to lead coordinated SPRB output reductions in the past, and that dozens of utility customers anticipated higher prices as a result of the transaction. On the applicable public interest standard, it is hard to imagine how the FTC would not be entitled to an injunction.

⁴⁸ 15 U.S.C. § 53(b).

Yet, after conducting what could only be described as a full-blown two-week plenary trial complete with more than 20 witnesses and almost a thousand pages of pre- and post-hearing briefing, the district court denied the Commission's request for a preliminary injunction and permitted the merger to go forward.⁴⁹ The court exhaustively analyzed buyer preferences for different types of coal to determine the relevant market, examined in detail the financial conduction of the seller, assessed the likelihood of coordination based on an in-depth review of the SPRB coal industry, and even made findings as to whether coordination had actually occurred in the past. The court gave no hint of deference toward the FTC's expertise in analyzing these issues.

Much the same occurred a few years later in the FTC's challenge to Western Refining's proposed \$1.4 billion acquisition of rival energy company Giant Industries. Western and Giant were two of only a handful of competitors in the bulk supply of light petroleum products, including gasoline, in northern New Mexico, and Giant (a "maverick") had recently developed the ability to increase its production. The acquisition thus promised to eliminate a source of aggressive new competition.

Again, however, after a one-week hearing the district court denied the FTC's motion for a preliminary injunction and permitted the acquisition to proceed.⁵⁰ The court found that the FTC's econometric analysis of the transaction was fundamentally flawed, and that the FTC's legal theory reflected a poor understanding of the nature of the

⁴⁹ *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004). The Commission filed a motion for an injunction pending appeal in the U.S. Court of Appeals, which denied the motion.

⁵⁰ *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶ 75,725, 2007 WL 1793441 (D.N.M. May 29, 2007). The Commission filed a motion for an injunction pending appeal in the U.S. Court of Appeals, which denied the motion.

petroleum business. This was quite a surprise, given the FTC's unparalleled expertise in petroleum industry competition and merger econometrics.

Finally, I would be remiss if I did not mention our challenge to Whole Foods' \$670 million acquisition of its chief rival, Wild Oats. Whole Foods was and is the largest premium natural and organic supermarket chain in the United States. Wild Oats was its closest competitor. The FTC had developed compelling evidence that premium natural and organic supermarkets, such as Whole Foods and Wild Oats, were differentiated from conventional retail supermarkets. In several dozen local markets across the country, the transaction would reduce the number of these premium natural and organic supermarkets from 3 to 2 or 2 to 1. Buttressing the case were numerous party documents demonstrating that the transaction's purpose was to eliminate a competitor.

The district court again denied the FTC's preliminary judgment request.⁵¹ Although the *Whole Foods* hearing lasted only two days, the trial record was nevertheless substantial, consisting of 35 deposition transcripts, 17 declarations, expert reports from five experts, and over 1,500 exhibits. The court disregarded the FTC's documentary evidence almost entirely, resulting in a battle of the experts. The court rejected the testimony of the FTC's economic expert and adopted the testimony of Whole Foods' expert. As in *Western Refining*, the district court gave no deference to the FTC's expertise in merger analysis and the particular industry at issue.

I think it is fair to say that the district court loss in *Whole Foods* represented the low point in the FTC's recent merger enforcement efforts. Since then, however, there has been a noticeable change. The key turning point was the FTC's decision to appeal the

⁵¹ *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007), *rev'd*, 548 F.3d 1028 (D.C. Cir. 2008).

Whole Foods decision and the resulting decision from the D.C. Court of Appeals to reverse the district court.⁵²

The D.C. Circuit's *Whole Foods* decision clarified that the FTC is not required to satisfy a traditional preliminary injunction standard and reaffirmed the FTC's role as an expert agency. A majority of the *Whole Foods* appellate panel held that, in Section 13(b) cases, the public interest lies in having antitrust cases tried before the Commission, not in the federal district courts. As Judge Brown noted, "a district court must not require the FTC to prove the merits, because in a § 53(b) preliminary injunction proceeding, a court 'is not authorized to determine whether the antitrust laws . . . are about to be violated.' That responsibility lies with the FTC."⁵³ Judge Brown went on to say that "the FTC will be entitled to a presumption against the merger on the merits, and therefore does not need detailed evidence of anticompetitive effect" to obtain a preliminary injunction.⁵⁴

At about the same time as the *Whole Foods* appeal was taking place, the FTC challenged a merger of Inova Health System and Prince William Health System, two hospital systems in Northern Virginia. At a pre-trial conference, the district court judge ruled that live witness were not necessary, instead deciding to rule on the FTC's preliminary injunction motion based on the papers.⁵⁵ The judge described the hospitals' request for an evidentiary hearing as "an invitation for me to get involved in trying this

⁵² *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008).

⁵³ *Id.* at 1035 (quoting *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976)).

⁵⁴ *Id.* (citation omitted).

⁵⁵ Transcript of May 30 Hearing at 12, *FTC v. Inova Health Sys. Found.*, No. 1:08-cv-460 (E.D. Va. May 30, 2008)

case. That is an invitation that I'm going to decline."⁵⁶ A week later, the hospitals abandoned their merger.

The FTC's most recent 13(b) preliminary injunction action began in November of 2008 when the FTC challenged the proposed merger between CCC Information Services and Mitchell International, two of the three leading providers of certain software and databases used to process automobile insurance claims. The district court granted the FTC's request for a preliminary injunction pending the FTC's administrative review, relying on the articulation of the 13(b) standard in the *Whole Foods* circuit court decision.⁵⁷ In so holding, the court recognized the primary role of the FTC in determining the transaction's legality, even when the respondents put forth a compelling rebuttal case. The court stated:

The Defendants' arguments may ultimately win the day when a more robust collection of data is lain before the FTC. On this preliminary record, however, the Court must conclude that the FTC has raised questions that are so "serious, substantial, difficult and doubtful" that they are "fair ground for thorough investigation, study, deliberation and determination by the FTC."⁵⁸

The *CCC* case confirms that *Whole Foods* established a new standard for FTC preliminary injunctions – at least for the D.C. Circuit. It is also clear, based on the express language in both the *Whole Foods* and *CCC* opinions, that this new standard will allow the FTC to more readily obtain a preliminary injunction from a federal district court. We are unlikely to see decisions like *Arch Coal* again in the D.C. District Court, where the FTC brings most of its merger enforcement actions and which is required to

⁵⁶ *Id.*

⁵⁷ *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009)

⁵⁸ *Id.* at 67 (quoting *Heinz*, 246, F.3d at 714-15); *see also id.* at 30 (stating that the FTC is entitled to an injunction because the evidence is "complicated and uncertain").

apply the law of the D.C. Circuit. Of course, there are 11 other regional circuit courts for which *Whole Foods* is not binding authority, but I expect that these courts will adopt the D.C. Circuit’s 13(b) standard as the opportunity arises.

Appellate Court Deference to Commission Decisions on the Merits. The federal courts can also review Commission decisions on mergers, consummated mergers, or anticompetitive practices through an appeal by the respondent following a Commission decision on the merits. By statute, the appellate courts’ review of the FTC’s factual findings is quite narrow. Under the FTC Act, the Commission’s factual findings “if supported by evidence, shall be conclusive.”⁵⁹ In *Indiana Federation of Dentists*, the Supreme Court held that this deferential standard is coextensive with the APA’s requirement that a court defer to an agency’s factual findings so long as they are supported by “substantial evidence.”⁶⁰

The appellate courts, however, have not always been on in the same page in their interpretation of this standard. Why is that? In my view, the appellate courts’ deference to the Commission’s fact finding is, rightly or wrongly, bound up with their determination of whether the Commission correctly analyzed the question of law. In *Indiana Federation of Dentists*, the Supreme Court held that legal issues are “for the courts to resolve, although even in considering such issues the courts are to give some deference to the Commission’s informed judgment that a particular commercial practice

⁵⁹ 15 U.S.C. § 45(c).

⁶⁰ 5 U.S.C. § 706(2)(E); *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 454 (1986) (holding that the standard of review under § 5(c) is “essentially identical” to the substantial evidence test); *see also Colonial Stores v. FTC*, 450 F.2d 733, 739-40 (5th Cir. 1971) (“The findings must stand unless they were wrong and they cannot be wrong – that is, reversibly wrong – if substantial evidence supports them.”).

is to be condemned as ‘unfair.’”⁶¹ But, it seems very clear to me that when a Court wants to reject the Commission’s conclusions as a matter of law, it reviews the Commission’s analysis de novo and gives the Commission’s factual findings little deference.

In *Schering-Plough*, for example, the Eleventh Circuit rejected the Commission’s finding that a reverse payment settlement was anticompetitive. In so holding, the court took creative license with the substantial evidence standard citing a Tenth Circuit case that preceded *Indiana Federation of Dentists* for the proposition that the “we may . . . examine the FTC’s findings more closely where they differ from those of the ALJ.”⁶² The Eleventh Circuit cited a pair of cases that preceded *Indiana Federation of Dentists* for the proposition that “[s]ubstantial evidence requires a review of the *entire* record at trial, and that most certainly includes the ALJ’s credibility determinations and the overwhelming evidence that contradicts the Commission’s conclusion.”⁶³

Likewise, in *Rambus*, the D.C. Circuit reversed the Commission’s finding that computer chip manufacturer Rambus violated Section 5 of the FTC Act when it made misrepresentations to a private standard-setting organization.⁶⁴ Tellingly, in my view, the D.C. Circuit reached a conclusion on the question on appeal before – almost as an afterthought – so much as mentioning the deference that should be accorded to the Commission’s factual findings.⁶⁵ Not surprisingly, the D.C. Circuit found those findings were based on “rather weak evidence.”⁶⁶

⁶¹ *Indiana Fed’n of Dentists*, 476 U.S. at 454.

⁶² *Schering*, 402 F.3d at 1062.

⁶³ *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1070 (11th Cir. 2005).

⁶⁴ *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008)

⁶⁵ *Id.* at 456. The Court stated “we hold, therefore, that the Commission failed to demonstrate that Rambus’s conduct was exclusionary, and thus to establish its claim that

In contrast, in the *Toys 'R Us* litigation, for example, the Seventh Circuit affirmed the FTC. In so holding, the Seventh Circuit observed that “[o]ur only function is to determine whether the Commission’s analysis of the probable effects of these acquisitions . . . is so implausible, so feebly supported by the record, that it flunks even the deferential test of substantial evidence.”⁶⁷ Likewise, in *Polygram Holding*, the D.C. Circuit affirmed the Commission’s finding that PolyGram Holding violated Section 5 of the FTC Act by entering into a series of agreements that prohibited discounts and advertising.⁶⁸ In its discussion of the legal standard it cited the *Indiana Federation of Dentists* test⁶⁹ and the substantial evidence standard, which it later concluded that the Commission had met.⁷⁰

III.

Last, I’d like to discuss some reforms that the Commission has made (or should make) in the context of our investigatory and judicial processes to minimize skepticism about the agency. In April, the Commission adopted several amendments to our Rules of Practice designed to improve the Part 3 adjudicatory process.⁷¹ The Commission also recently implemented a task force to consider reforms to the Commission’s Part 2

Rambus unlawfully monopolized the relevant markets.” *Id.* Only after making that finding did the Court then separately analyze the deference owed to the Commission’s fact finding.

⁶⁶ *Id.* at 469.

⁶⁷ *Toys 'R Us v. FTC*, 221 F.3d 928, 934-35 (7th Cir. 2000).

⁶⁸ *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

⁶⁹ *Id.* at 33.

⁷⁰ *Id.* at 38.

⁷¹ On October 7, 2008, the FTC published a Notice of Proposed Rulemaking detailing proposed rule revisions and inviting public comment. *See* 73 Fed. Reg. 58832. On January 13, 2009, the FTC published interim final rules, which governed all proceedings commenced after that day. *See* 74 Fed. Reg. 1804. On May 1, 2009, the Commission published final rules, adopting the interim rules subject to a few revisions. *See* 74 Fed. Reg. 20205. The final rules govern all proceedings initiated on or after May 1, 2009. *See id.*

investigation process. I am hopeful that these reforms will silence some of the critics that I have mentioned today and, perhaps, help the Commission's decisions earn the deference that they should receive.

The first set of reforms relates to timing. Whole Foods' complaint that our procedures provided them with too speedy of a trial notwithstanding, the most frequent complaint that I have heard over the years is that our investigation and adjudicatory processes take way too long. In merger cases, parties frequently argue that drawn out proceedings will cause them to abandon transactions before the antitrust merits can be adjudicated. I call this a "pocket veto" because, as I explained in conjunction with our failure to conclude our investigation in the *Endocare/Galil* matter, when we sit on an investigation for too long, it has the practical effect of killing the deal.⁷² Along the same lines, I believe that the protracted nature of our Part 3 adjudicatory proceedings has contributed to the reluctance of some federal courts to grant preliminary injunctive relief in merger cases brought under Section 13(b) of the FTC Act. Moreover, protracted Part 3

⁷² In *Endocare/Galil*, Endocare abandoned its merger with Galil Medical as a result of a Commission investigation. See *Endocare, Inc. Current Report (Form 8-K) (June 8, 2009)* (stating that Endocare "terminated the Galil Merger Agreement as a result of the failure by the United States Federal Trade Commission to close its investigation into whether the Galil Merger violated certain U.S. antitrust laws, which caused certain conditions to closing of the Galil Merger to become incapable of fulfillment"); Statement of Commissioner J. Thomas Rosch on the Abandonment of the Endocare, Inc./Galil Medical, Ltd. Merger (June 9, 2009), *available at* <http://www.ftc.gov/os/closings/staff/090609galilendocarestmtrosch.pdf>. This merger involved two small companies involved in developing innovative therapies for prostate and renal cancer. The parties had agreed not to close the transaction so long as the Commission's investigation remained open. Yet, over six months later, the investigation was still pending, and the parties could not hold the deal together any longer. These events were especially troubling because the Commission never had an opportunity to consider whether there was "reason to believe" that the transaction was illegal or that challenging it would be in the public interest. In this regard, staff's lengthy investigation functioned as a "pocket veto" of the transaction.

proceedings do not necessarily result in decisions that are more just or fair, and instead may result in substantially increased litigation costs for the Commission and respondents whose transactions or practices are challenged.⁷³

In the Part 3 adjudicatory context, the most significant changes we recently implemented accelerate the hearing and impose tighter deadlines on the ALJ and the Commission to issue their decisions. We now require, for example, that a hearing be held five months from the date of the complaint in cases in which the Commission is also seeking preliminary injunctive relief in federal court, and eight months in all other cases.⁷⁴ We have also required that an ALJ issue an initial decision issue within 70 days of the post-trial briefs that the Commission's decision issue within 100 days of the initial decision for cases in which the agency seeks preliminary relief under Section 13(b) of the FTC Act,⁷⁵ and within six months of the initial decision in all other cases.⁷⁶

⁷³ Indeed, some federal courts have demonstrated that these matters can be handled quickly. For example, in *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004), a complex merger trial in 2004, Judge Walker issued his opinion approximately seven months after the complaint was filed. The disparity between that timeframe and the administrative litigation timeframe (which was much longer) existed despite the fact that federal district court dockets are much more substantial than the dockets handled by the Commission and its ALJs.

⁷⁴ The rules also authorize the Commission to delay the hearing date or extend the length of the hearing for good cause.

⁷⁵ Briefing is to be completed within 45 days of the issuance of the initial decision, and the Commission is to issue its final decision within 45 days of the oral argument.

⁷⁶ Briefing is to be completed within 67 days of the initial decision, and the Commission is to issue its final decision within 100 days of the oral argument. There are other changes aimed at expediting the process as well, including (1) earlier deadlines for answers, the initial meet-and-confer session, and the initial scheduling conference in order to facilitate earlier commencement of discovery; (2) a requirement that the ALJ to issue a standard protective order designed to limit delays and ensure that privileged or confidential information is treated consistently in all Part 3 cases; (3) a requirement that the Commission issue decisions on all prehearing dispositive motions within 45 days.

I am hopeful that our Part 2 reforms will also result in more expeditious work on the Commission's end. Lengthy investigations, particularly when combined with "one-way" discovery conducted by the staff, can be enormously burdensome and expensive for companies. Moreover, a prolonged investigation can sometimes injure a respondent's reputation in the marketplace, even if later cleared by the agency. To that end, I have urged the Commission to consider implementing deadlines on the duration of investigations. At minimum, the Commission needs to receive reports from staff at specific intervals so that it can decide whether additional investigation is warranted. Moreover, in those cases where Commission staff believe that a protracted investigation is attributable to the parties' conduct, it can remedy that problem by, for example, refusing to grant extensions of time, enforcing compliance with compulsory process,⁷⁷ or at a minimum, staff can advise the Commission specifically what the parties are doing to stall the investigation.

The second set of reforms relates to making our processes mirror those in the federal courts wherever possible. I believe we have a perception problem in the sense that outsiders (and perhaps judges) sometimes view the FTC as one big "black box" – in other words, parties feel like they can't participate as effectively as they would like to, because there is no "playbook" so-to-speak on how to do so. In our Part 3 adjudicatory process, we have implemented several changes to make the process more familiar to the outside bar, while simultaneously placing limits on just how long processes can drag out.

Previously, the ALJ heard these motions; and (4) a limitation on hearing length to 210 hours (the equivalent of 30 trial days).

⁷⁷ Under Rule 2.13 of our Rules of Practice, the Commission General Counsel has the authority to institute an enforcement proceeding if a person has failed "to comply with, or to obey, a subpoena or civil investigative demand if the return date or any extension thereof has passed." 16 C.F.R. § 2.13

Among other things, our Part 3 rule changes seek to improve the discovery process and motion practice, such as limits on the scope of discoverable materials, procedures for the discovery of electronically stored information, deadlines for identifying expert witnesses and submitting expert reports, page limits on briefs, and protection of inadvertently produced privileged materials.

Again, I hope that we will make similar changes to Part 2, including requiring a meet-and-confer process that would require parties to provide the Commission with the same overview of their electronically-stored-information that they currently provide in private civil litigation under the 2006 amendments to the Federal Rules of Civil Procedure. More generally, as with the Federal Rules of Civil Procedure, I believe that any Part 2 reforms need to be memorialized in the Commission's Rules of Practice, rather than enforced through internal guidelines or more aggressive management. Prior well-intended internal attempts over the years to speed up the investigatory process have largely failed. Moreover, a formal rule change will be transparent to the outside bar and demonstrate that the agency is serious about expediting the investigatory process.

Finally, I think the Commission can and should implement changes to the Part 2 investigatory process that would better position the Commission to litigate cases should they proceed to the adjudicatory process. In some cases, the Commission is not adequately informed about the status of investigations. As a result, we sometimes don't hear about the status of investigations between the time compulsory process is authorized and staff prepares its recommendation. This is particularly true for smaller matters. Likewise, the Commission is often not afforded an opportunity to provide input on legal theory and strategy until very late in the process, if at all. This can sometimes mean the

parties are not asked to respond to a legal theory or concern until the eve of a Commission vote when a Commissioner is finally able to raise his/her concerns. We can take steps to prevent those occurrences.

Along the same lines, I am hopeful that the Commission will make the use of compulsory process mandatory at the beginning of every formal investigation. In some cases, Commission staff use voluntary requests for information at the outset of investigations, rather than compulsory process. Staff understandably may wish to use a less confrontational approach at the outset of an investigation and, in limited cases involving small third-parties, such voluntariness may make the most sense. But, as a general matter, I think that parties are far more likely to generate prompt and complete responses to Commission requests for information – and outcome that is in the public’s best interest – if there are sanctions attached to not doing so.

* * * * *

In closing, in my experience, the Commission is not, as Justice Scalia has suggested, a “headless fourth branch.” In addition to controlling our purse strings, Congress frequently demands that Commissioners testify on an area of concern, provide a briefing, investigate a practice, conduct a study in an area of interest, or justify a prior enforcement decision. Likewise, apart from the President’s removal process, I think the appointment – or, more correctly, reappointment – power has a much more significant effect than has previously been noted on controlling the conduct of some commissioners who wish to serve a second term. Finally, of course, our decisions on matters of law are always subject to judicial review – and the courts are not afraid to tell us when we are

wrong. This is all to say that the FTC is hardly insulated from the legislative or political process or judicial review – rather, we are subject to all three.