XI. GOVERNMENT ENFORCEMENT

A. Overview

At the forefront of antitrust enforcement in the United States are the two federal antitrust agencies: the Federal Trade Commission and the U.S. Department of Justice. At the FTC, the Bureau of Competition (often "BC" or "the Bureau" in antitrust-speak) handles most antitrust enforcement work, with support from the Bureau of Economics, while DOJ's antitrust enforcement is housed in the Antitrust Division (often "ATR" or "the Division"). These two agencies bring many of the nation's most complex and important antitrust cases, handle the vast majority of the nation's merger and conduct government-enforcement workload, and play a critical role in developing antitrust policy and doctrine. In addition to the federal enforcers, the 50 states—along with the District of Columbia, Guam, and Puerto Rico—play an important role in combating antitrust violations.

This chapter takes a look at these government enforcers and some aspects of their operation and relationships. Sections B and C introduce the nation's two federal antitrust enforcers in turn. Section D explores the unusual fact that we have two antitrust enforcers rather than one, and considers some of the implications (and the resulting litigation). Section E completes our examination of the federal institutions with a look at the Hart-Scott-Rodino ("HSR") Act, which structures the merger review process that represents the majority of each agency's civil workload. In Section F, we will briefly meet the state Attorneys General, an important additional source of antitrust enforcement authority in the United States. Finally, in Section G, we will turn to antitrust remedies in the context of government enforcement, as we examine the injunctive relief that constitutes the usual remedy in government antitrust cases. In the next chapter we will complete our survey of remedies when we consider damages: although the Justice Department and the states can sue for damages under the Sherman Act, on behalf of the federal government and state citizens respectively, damages are primarily important in connection with private litigation. (We will touch briefly on government damages and private injunctions in Chapter XII.)

B. The Federal Trade Commission

The Federal Trade Commission was created by the Federal Trade Commission Act of 1914 ("FTC Act"). The FTC was created to augment the federal government's powers of economic regulation and to supplement the Department of Justice's existing antitrust jurisdiction.[967]

→ For most of modern antitrust history, pursuant to relevant language in the FTC Act that purportedly restricted the President's power to fire Commissioners, the FTC has acted as an "independent" and bipartisan administrative agency, with "majority" and "minority" Commissioners working under a Chair selected by the President from among the Commissioners (and thus, in practice, of the President's own party). But in 2026 the Supreme Court held that the restrictions unconstitutionally interfered with executive power and were invalid. At the time of writing (Summer 2026), the FTC is neither independent nor bipartisan, and its future is uncertain.

1. Structure and Organization

The FTC is overseen by a Commission of up to five Commissioners serving staggered seven-year terms, of whom the FTC Act prescribes that no more than three may come from one political party, and each of whom is

[967] *See, e.g.*, Eli Nachmany, *The Original FTC*, 77 Ala. L. Rev. 1 (2025); Marc Winerman & William E. Kovacic, *The William Humphrey and Abram Myers Years: The FTC from 1925 to 1929*, 77 Antitrust L.J. 701 (2011); Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921–1925*, 77 Antitrust L.J. 145 (2010); Gerald Berk, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900–1932 (2009); Marc Winerman, *The Origins of the Federal Trade Commission: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L.J. 1 (2003); ABA, REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, *reprinted at* 59 Antitrust L.J. 43 (1989); James C. Lang, *The Legislative History of the Federal Trade Commission Act*, 13 Washburn L.J. 6 (1974); Richard A. Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47 (1969); ABA, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969); George Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 Proc. Academy of Pol. Sci. in the City of N.Y. 114 (1926).

nominated by the President and confirmed by the Senate.[968] One Commissioner is designated by the President to serve as Chair of the agency. Congress provided in the FTC Act that the President may remove a Commissioner only for cause: specifically, for "inefficiency, neglect of duty, or malfeasance in office." The Supreme Court held that that restriction was constitutional in *Humphrey's Executor* in 1935, but recanted that view 91 years later in *Trump v. Slaughter*.

CASENOTE: Humphrey's Executor v. United States

295 U.S. 602 (1935)

For ninety years, *Humphrey's Executor* underpinned the FTC's status as an "independent" administrative agency rather than a straightforward arm of the executive like the Justice Department. Its core holding was that the FTC Act's limits on the President's ability to fire a Commissioner did not infringe Article II of the U.S. Constitution.

The facts of *Humphrey's* were straightforward. After completing one term as a Commissioner, William E. Humphrey was in December 1931 nominated by President Hoover, and later confirmed by the Senate, to a second term that would expire on September 25, 1938. But in 1933 President Hoover was succeeded by President Roosevelt, who shortly thereafter purported to fire Commissioner Humphrey. The new President explained in correspondence that "I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission." But Humphrey refused to go quietly, pointing out that the FTC Act limited the President's power to fire Commissioners to cases of "inefficiency, neglect of duty, or malfeasance in office." Humphrey died in February 1934, but his executor claimed lost wages from the United States.

In response, the Government argued that the FTC Act was unconstitutional to the extent that it limited the President's power to fire an FTC Commissioner. The Government cited Myers v. United States, 272 U.S. 52 (1926), for the proposition that Article II of the Constitution empowers the President to remove executive officers. In *Myers*, the Supreme Court had considered a statute that provided that postmasters could not be removed by the President without the advice and consent of the Senate. The *Myers* Court had held that that purported limitation was unlawful and invalid. Article II of the Constitution, wrote Chief Justice Taft for the Court, "grants to the President the executive power of the government—*i.e.*, the general administrative control of those executing the laws, including the power of appointment *and removal* of executive officers." (Emphasis added.) Indeed, "to hold otherwise," the *Myers* Court concluded, "would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed." The *Myers* Court feared the consequences of entrenching executive officers who by "their inefficient service[,] . . . lack of loyalty[,] . . . or . . . different views of policy might make [the President's] taking care that the laws be faithfully executed most difficult or impossible."

But, even though *Myers* had been decided just nine years before, the *Humphrey's* Court distinguished *Myers* on the ground that an FTC Commissioner was *not* an executive officer. Writing for the Court, Justice Sutherland concluded that, as an "administrative body," the FTC's purpose was "to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive." Congress specifically intended the FTC to be "free from executive control." Its investigational and reporting functions were quasi-legislative, and its functions as a master in chancery were quasi-judicial. It followed that the limitations on the President's firing power were constitutional, Humphrey had been unlawfully fired, his estate was entitled to back pay, and the FTC was, to a meaningful extent, lawfully "independent" of the President.

For 90 years, *Humphrey's Executor* stood for the proposition that Congress could, at least to some extent, insulate leaders of certain "independent" federal agencies from Presidential removal, and thus limit executive control over those agencies. But the decision was long criticized by judges, scholars, and lawmakers who saw such insulation as

[968] 15 U.S.C. § 41.

inconsistent with Article II of the Constitution, the demands of democracy, or both.[969] The question was called again on March 18, 2025, when President Trump fired the two Democratic FTC Commissioners: Rebecca Kelly Slaughter and Alvaro Bedoya. Bedoya resigned; Slaughter litigated her removal up to the Supreme Court. In a widely-anticipated decision, the Court upheld the firing and overruled *Humphrey's*.

→ At the time of writing (Summer 2026), the implications for the FTC are not yet clear. Today the FTC has a Chair and a non-Chair Commissioner, both Republicans; three Commission seats remain vacant. Will Presidents ever again appoint Commissioners from outside their own political parties? Permit Commissioners to vote their own views? Allow concurring or dissenting statements? Or even want two executive antitrust enforcement agencies?

Trump v. Slaughter

609 U.S. ___ (2026), No. 25-332 (June 29, 2026)

Chief Justice Roberts.

[1] . . . [I]n March [2025], President Trump fired the two . . . Democratic [FTC] Commissioners, Rebecca Slaughter and Alvaro Bedoya. He did not assert that they were inefficient, neglected their duties, or committed malfeasance in office, as the statute required. He instead told them that their continued service on the FTC was inconsistent with his Administration's priorities and that they were removed from office pursuant to his authority under Article II of the Constitution.

[2] Slaughter promptly filed suit . . . seeking declaratory and injunctive relief to restore her to office. [. . .]

[3] The Constitution vests "the executive Power" in a "President of the United States of America" and instructs that he "take Care that the Laws be faithfully executed." Art. II, §§ 1, 3. [. . .]

[4] In opting for one President . . . the Framers did not opt for the President to work alone. They knew . . . that it would be "impossible" for just "one man to perform all the great business of the State." 30 WRITINGS OF GEORGE WASHINGTON 334 (J. Fitzpatrick ed. 1939). So they anticipated that Congress would "institute the great Departments" and allow the President to "appoint officers therein, to assist him in discharging the duties of his trust." *Id.* [. . .]

[5] Because these officers were subject to the President's superintendence, they had to be removable by him at will. . . . Jefferson wrote as early as 1780 that "the power of appointing and removing executive officers is inherent in the Executive," as "he who appoints may remove." 4 PAPERS OF THOMAS JEFFERSON 281 (1951). [. . .]

[6] [When the First Congress was legislating to create the first executive departments, a group of legislators led by Madison] successfully convinced the House of Representatives to delete a clause in [a] draft bill that said that the Secretary of Foreign Affairs was "to be removable by the President," for such language would have the appearance of conferring the power upon [the President] when in fact it was his all along. What [the relevant legislators] favored instead—and what they got—was a new clause that assumed the power of removal to be in the President, so as to establish a legislative construction of the Constitution. The bill as amended passed the House, and then the Senate, a feat that was repeated first with laws establishing the Department of War and then again with the Treasury. These statutes thus implicitly endorsed the view that the President had a constitutional power to remove executive officers.

[7] Congress's confirmation of the President's power quickly took hold—and even gained fame as "the Decision of 1789." "After very long debates," Madison wrote to Jefferson, Congress had endorsed the view that "the Executive function of removal" was "vested in the President," a decision "most consonant to the text of the Constitution" and "to the requisite responsibility and harmony in the Executive Department." Even those who

[969] *See*, *e.g.*, Seila Law LLC v. CFPB, 591 U.S. 197, 251 (2020) (Thomas, J., concurring in part and dissenting in part) ("Continued reliance on *Humphrey's Executor* to justify the existence of independent agencies creates a serious, ongoing threat to our Government's design."); Daniel A. Crane, *Debunking* Humphrey's Executor, 83 Geo. Wash. L. Rev. 1835 (2015); Sen. Mike Lee, *Take Care Act* (June 7, 2019), https://www.lee.senate.gov/2019/6/take-care-act-floor-remarks.

opposed Congress's decision recognized that the decision had been made. . . . [E]ven those far removed from the debates saw the issue as settled, including Chief Justice Marshall, Chancellor Kent, and Justice Story.

[8] Early Presidents of all persuasions, too, hewed to the Decision of 1789. Washington saw it as his indispensable duty to remove officers who failed to live up to his expectations. His Cabinet agreed, taking the stance that the ability to remove from office was an essential attribute of [e]xecutive [p]ower. The first President Adams said the same. So did Jefferson. So did Madison. So did Monroe, along with the second President Adams.

[9] And so did Jackson—much to Congress's dismay. Unlike his predecessors, who (except for Jefferson) utilized their removal power sparingly, Jackson fired hundreds of subordinates for personal and partisan reasons. But even Jackson's most vehement critics acknowledged that he had the power to do as he pleased. [. . .]

[10] In [Myers v. United States, 272 U. S. 52 (1926)], Chief Justice Taft . . . reaffirmed the President's power to fire his subordinates at will. That power arose, he wrote for the Court, from the Constitution's text, history, and structure, just as the First Congress had held in 1789. [. . .]

[11] [In Humphrey's Executor v. United States, 295 U.S. 602 (1935)] Justice Sutherland, writing for the Court, started by reaffirming that the President possesses "the exclusive and illimitable power" to remove "all purely executive officers," just as *Myers* held. He then pivoted. There are some presidentially appointed officials, he explained, who may perform "executive functions" but exercise "no part of the executive power." And for those officials, "the decision in the *Myers* case cannot be accepted as controlling."

[12] The Court held that William Humphrey was one such official. That was because the FTC's duties were very limited—they were neither political nor executive, but predominantly quasi-judicial and quasi-legislative. When courts requested the FTC's help as a master in chancery to recommend appropriate remedies in antitrust litigation, for instance, it acted solely as a judicial aid. When Congress requested the FTC's help to make investigations and reports on certain topics, it acted solely as a legislative aid. And when it brought (and adjudicated) charges against corporations it suspected of using "unfair methods of competition" in commerce, it acted in part quasi-legislatively and in part quasi-judicially. Because these quasi functions did not require the use of executive power, Justice Sutherland reasoned, Humphrey needed to answer only to Congress and the courts. . . .

[13] From the start, *Humphrey's* was tethered to a highly circumscribed and almost fictional view of the FTC's role. *Humphrey's* by its terms applied only to agencies that occupy "no place in the executive department," are "independent of executive authority," and exercise "no part of the executive power." [. . .]

[14] Soon enough, we recognized that *Humphrey's* flunked even its own test. "It is hard to dispute that the powers of the FTC," even "at the time of *Humphrey's Executor*," we explained in 1988 [in Morrison v. Olson, 487 U.S. 654, 689 n.28 (1988)], "would at the present time be considered 'executive,' at least to some degree." . . .

[15] Fast forward another few decades, and *Humphrey's* premises had been further undermined. In two cases, Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010), and Seila Law LLC v. CFPB, 591 U.S. 197 (2020) . . . we reiterated *Myers*'s rule that the President exercises general administrative control of those executing the laws and thus must be able to remove those for whom he can not continue to be responsible. . . . [I]n both cases, we refused to extend *Humphrey's* to a new situation—in *Free Enterprise Fund*, two layers of for-cause removal within an agency, and in *Seila Law*, for-cause removal protection for the sole head of an agency. . . .

[16] *Humphrey's* framework, in short, has not withstood the test of time. While *Humphrey's* was surely right to focus on the character of the office at issue, and surely right to say that purely executive powers must be controlled by the President, we long ago abandoned the notion that there are some powers that are only *partly* executive. . . .

[17] At this point, all that is left of *Humphrey's* is its observation that an agency that exercises no part of the executive power need not fall within the rule of Presidential removal. If Congress wishes to establish independent agencies to assist it with its functions, it may do so. But it may not foist those agencies upon the President, and thus deprive him of the executive power vested in him by the Constitution—something *Humphrey's* itself never purported to permit.

[18] If anything more *is* left of *Humphrey's*, we overrule it. Humphrey's has for decades been a result in search of a rationale. . . . *[S]tare decisis* is not an inexorable command, and is at its weakest in constitutional cases, where only we may readily fix our own mistakes. Our precedents about precedent teach that a number of factors are relevant. Here, every factor—the quality of the decision's reasoning, its consistency with our other cases, the workability of its rule, and the interests of those who have relied on it—counsels in favor of letting *Humphrey's* go.

[19] *Humphrey's* has been difficult to make sense of from the start. Only by blind feats of definition could the Court transform powers that are quintessentially executive—investigative and prosecutorial alike—into nonexecutive "quasi-legislative" and "quasi-judicial" functions. . . . When an agency "executes" a congressional mandate against private parties, it exercises executive power—no ifs, ands, or quasis about it.

[20] For that reason, *Humphrey's* is now far out of step with our cases, which have all but limited it to its facts. We long ago retreated from *Humphrey's*. We applied it only once, in 1958, to a solely adjudicatory body that dealt with a limited category of claims for compensation from those imprisoned or interned in the Second World War. . . . Since then, we have undermined *Humphrey's* premises at every turn. . . .

[21] Little surprise, then, that no one knows how to apply *Humphrey's* in practice. Does it protect all multimember agencies? Or only those that are balanced along partisan lines? Those that wield some executive power, but not a lot? Or only those that do not wield the President's "conclusive and preclusive" powers? Or perhaps it is only those that are materially indistinguishable from the 1935 FTC? With its indeterminacy and unpredictability, *Humphrey's* has undermined the very rule of law values that *stare decisis* exists to secure.

[22] All that is left is reliance, upon which Slaughter (and the dissent) rely. Slaughter argues that Congress has relied upon *Humphrey's* to create agencies that are insulated from presidential control. That is precisely the problem. Despite what *Humphrey's* may say, independent agencies are not "independent" in the sense that they are free of the President and thus responsive only to the people of the United States. Independent agencies are insulated from the President, not from politics. . . . Placing the power to administer laws in officers who enjoy freedom from Presidential oversight (and protection) . . . does not deliver us to a promised land of technocratic governance—it often results only in an increased subservience to congressional direction. Congress may well have relied on *Humphrey's* in taking more power for itself, but that is hardly one of the legitimate reliance interests that our precedents contemplate. [. . .]

[23] [T]his is not a close case. The FTC's for-cause removal provision violates the separation of powers. In its present form, the FTC enforces and administers some 80 statutes, which cover almost every facet of our Nation's economy. The tasks it undertakes are the very essence of execution of the law—precisely the President's constitutional role.

[24] First, the FTC has the power to promulgate substantive rules that carry the force of law. In the consumer-protection realm, for instance, the FTC is tasked with giving content to the startlingly abstract idea of "acts or practices which are unfair or deceptive." . . .

[25] Second, the FTC not only investigates businesses to ensure they comply with its statutes and rules, but enforces those statutes and rules through in-house adjudications. Indeed, it may even place the onus on a private party to comply with its orders—on pain of monetary penalties—before the case reaches the courts. This power, too, is executive.

[26] And third, the FTC files civil suits on behalf of the United States in federal court. It may select its remedies freely—from injunctions, to civil penalties, to any relief necessary to redress injury to consumers, including the refund of money or return of property. As we have said many times, the discretionary power to seek judicial relief lies at the very core of executive authority. . . .

[27] The FTC unquestionably exercises executive power, and must therefore be controlled by the Chief Executive, in whom such power is vested. It follows, then, that Slaughter served as the President's subordinate at the FTC—and that the President was entitled to cut her tenure short. [. . .]

[28] [The dissent] defends a version of *Humphrey's* that does not exist. On the dissent's telling, *Humphrey's* makes this a "profoundly easy case," as *Humphrey's* squarely holds that Congress may forbid Presidential removal for an

agency of this character. . . . Nowhere does the dissent argue, however, that the FTC today exercises "no part of the executive power" or (to quote further from *Humphrey's*) that the FTC occupies "no place in the executive department" and ought to be "independent of executive authority." [. . .]

[29] . . . Slaughter . . . [argues] that we should police Congress's decisions for reasonableness. If Congress reasonably decides that the President should be able to remove some duly appointed officers only for certain causes and through certain processes, she argues, the courts should respect that decision, and require that the President discharge his obligations under the Take Care Clause by going through those processes when warranted.

[30] That supposed limiting principle is neither limiting nor much of a principle. On Slaughter's view . . . Congress could commandeer the Environmental Protection Agency, the Department of Commerce, the Department of Education, the Department of Health and Human Services, most (if not at all) of the Department of Justice, and a number of other agencies besides. Indeed, it is not clear to us why Congress would need to allow the President any say in firings. If it is so critical for an agency to have independence and to act with impartiality free from the suspicion of partisan direction, then why should the President have a role at all? . . .

[31] The answer, then as now, is that these officers exercise the *President's* power, not their own, and thus must be *responsible* to him. [. . .]

[32] To discharge the duties of his trust, the President must have the assistance of officers he can trust. Although it is up to the Senate to decide whether to confirm those with whom the President would *prefer* to work, neither Congress nor the courts may saddle him with those with whom he *cannot* work. Subordinates who exercise the President's power are subject to removal by him. Then, and only then, can they remain accountable to the President, and the President to the people. [. . .]

Justice Gorsuch, concurring.

[33] [. . .] Independent agencies today hold tremendous sway over the Nation's affairs. They regulate our businesses and our financial markets. They set the rules for the internet and airwaves. They decide how we light our homes, how we run our elections, and the manner of our employment. They determine what toys our children will play with, and how we interact with each other at work. And . . . so much more.

[34] Often, these agencies do all this with hardly any statutory guidance, based on broad grants of legislative authority. The FTC, for example, enjoys what the Court calls the "startling" power to define, outlaw, and prosecute any "acts or practices which are unfair or deceptive." The Securities and Exchange Commission ("SEC") may "make such rules and regulations as may be necessary or appropriate to implement" its mandate "to insure the maintenance of fair and honest markets." . . . The Federal Communications Commission ("FCC") has exclusive authority to grant licenses to broadcasters "based on public convenience, interest, or necessity." One could go on.

[35] Nor have these agencies hesitated to employ the powers Congress has given them. Take a few examples from just the past two years. In 2024, the SEC took on climate change. That same year, the FTC sought to ban nearly all employee noncompete agreements nationwide. And then there's late-night comedy. Last year, taking objection to a network host's on-air remarks, the Chairman of the FCC suggested there would be "additional work ahead" for the agency if broadcasting companies did not "find ways to take action." The Benny Show, Sept. 17, 2025 ("[W]e can do this the easy way or the hard way").

[36] Some independent agencies even have *de facto* authority to create new crimes. [. . .]

[37] Would Congress have gone so far down this road, delegating so much legislative and judicial power to agencies, without *Humphrey's* assurance that their leaders would enjoy protection against at-will presidential removal? . . . [V]ery possibly not. . . . Ms. Slaughter cites evidence that at no point was it proposed that an FTC ought to be set up unless it be independent. . . . [Other] commentators have offered similar assessments. [. . .]

[38] Apparently relying on the assumption that it can afford their leaders some protection against presidential removal, Congress has not just assigned executive law-enforcement power to independent agencies. It has delegated extensive lawmaking and adjudicative functions to them as well. Today's decision may not have occasion

to address those delegations directly, but it carries weighty consequences for them. Open-ended delegations of legislative power have not gone away; now they will just be exercised by agency officials who answer to the President. The power to write new regulatory crimes still exists, but now the pen ultimately rests in the President's hand. The ability to judge disputes in-house remains, but now the house is white.

[39] . . . It would be one thing if today's decision afforded the White House more control over the airwaves. Or financial markets. Or energy. But Presidents now will enjoy waxing authority over all those areas and more. A business out of favor with the party in control of the White House might be able to stave off an FCC investigation. But can it survive a subsequent FTC rule declaring unlawful one of its longstanding trade practices? What about an in-house adjudication by OSHA? Or a prosecution for a new crime the SEC announces? Not to mention what these now-coordinated powers could do to disfavored individuals who lack the resources needed to fend off such attacks. It may be true that after today there is no more "fourth branch" of government. But the fourth branch's powers still exist; they have just been reassigned to the President. [. . .]

[40] [I]t would be a grave mistake to think that [today's] step is enough on its own. . . . Congress has endowed formerly independent agencies not just with executive authority, but with enormous legislative and judicial powers as well. And now the President enjoys control over all those powers too. From here, the only sure path is to finish the journey we start today and restore legislative and judicial powers to where they belong: in Congress and the courts. We have tolerated adventurous theories long enough. It is time to return, all the way, to the Constitution.

Justice Sotomayor, with whom Justice Kagan and Justice Jackson join, dissenting.

[41] For most of this Nation's history, Congress and the President together have decided that some Government functions should operate at a distance from partisan politics. Those include the management of nuclear energy; the security of the monetary supply; and the safety of American workplaces, consumer products, and chemical hazards. In these and many other areas, the wisdom of the centuries has taught that some decisions should depend not only on who is in office . . . but also on judgment, expertise, and the public good.

[42] Since the founding, Congress has created agencies that in various ways have embodied this goal of independence. Over the last 140 years especially, the political branches have done so by establishing agencies like the [FTC]: bipartisan, multimember bodies with "for-cause" removal protections. This structure allows the agencies to address complex problems while enjoying some independence from Presidential removal and thus absolute partisan control. . . . Ever since [*Humphrey's* was decided], Congress and more than a dozen Presidents have relied on [it] to construct a workable Government, creating many other agencies in the FTC's tradition. [. . .]

[43] [T]here is no evidence that those who shaped or ratified the Constitution adopted the majority's general rule of at-will removal. Indeed, the Court has long noted that, for the most part, the Constitution is silent with respect to the power of removal from office, where the tenure is not fixed. The one exception, and only explicit removal power granted in the Constitution, is for impeachment of the President, Vice President, and all Civil Officers, a power placed in Congress's hands, not the President's. *See* Art. I, § 3, cls. 6–7; Art. II, § 4.

[44] Still, the majority begins by claiming that its theory of Presidential removal comes from Article II's vesting of "the executive Power" in the President. That assertion begs the question. Does the "executive Power," in fact, contain an illimitable removal power beyond Congress's power to "establish by Law" certain offices, as "necessary and proper" to structure the Executive Branch? Art. I, § 8, cl. 18; Art. II, § 2, cl. 2. After all, agencies like the FTC would not even exist if not for Congress's exercise of its Article I power to create them.

[45] There is little to suggest that "executive Power," as understood at the time of the founding, was as capacious as the Court today asserts. . . . Parliament often restricted the Crown's ability to remove even high-level royal officers, and States with vesting clauses like the Constitution's . . . allowed for limits on gubernatorial removal powers. [. . .]

[46] Removal also was not discussed in the Constitutional Convention, making an expansion of preratification executive power unlikely. [. . .]

[47] The majority . . . places undue weight on the notion that the power of appointing and removing executive officers is inherent in the Executive. Under the Constitution, the President does not have unlimited appointment

powers either. His power is to "nominate"; only "by and with the Advice and Consent of the Senate" may he "appoint" the "Officers of the United States." Art. II, § 2, cl. 2. What is more, the President can appoint officers only to offices "established by Law"—that is, by Congress. *Id.* Any link between appointment and removal thus undermines the existence of any inherent illimitable executive removal power. Given that the Constitution did not grant the President alone an illimitable power to appoint, it is all the less likely that it silently vested in the President an unbounded power to remove.

[48] Nor does the Take Care Clause serve as a plausible source for the expansive removal power the majority posits. The provision—"he shall take Care that the Laws be faithfully executed"—speaks of duty, not power. As recent scholarship has explained, "faithful execution" was proto-fiduciary legal language from centuries of English law that limited the discretion of executive officials and did not expand their power. At-will removal might be one good way of fulfilling those duties. There is no evidence, however, that anyone understood the Take Care Clause at or near the founding to imply a mandatory, inflexible rule of at-will removal that Congress could never modify. [. . .]

[49] The majority . . . cites nothing from the ratification debates or the Constitution's text endorsing its view of unbounded removal power. Instead, the majority rests mostly on postratification commentary and congressional inaction. . . . [B]ut the available evidence from 1789 through the end of the 19th century reflects that the political branches have long believed, and acted upon the belief, that Congress has the power to set limits on the President's removal authority and that the President was not free to flout such limits when enacted. [. . .]

[50] [T]he debates from 1789 do not support the majority's understanding of executive power. The House in 1789 did not address whether Congress could place limits on the President's power to remove; it debated whether the President could remove officers *at all* without Senate consent. [. . .]

[51] . . . [T]he First Congress itself created administrative bodies that . . . enjoyed significant independence in ways that undermine the majority's simplistic history of uniform at-will removal. . . . [I]n 1790 Congress enacted (and President Washington signed) a law creating the Sinking Fund Commission, a five-member agency responsible for stabilizing the Nation's debt. . . . [T]wo [members] could not be removed by the President—making the body at least semi-independent. . . . In 1790, Congress included the Chief Justice as a member of the Mint Board, again allowing an independent individual to carry out important Treasury functions and partake in the exercise of executive power.

[52] . . . [The First Congress] also established the Revolutionary War Debt Commission: a board of three commissioners . . . whose decisions would be final and conclusive without further review. Hamilton would later describe the Commission as made up of "distinct and Independant Officers." . . . [The relevant statute specified] that the Commissioners would continue in office until the first day of July 1792. Scholarship has recently shown . . . that at the founding, such fixed-term tenures were broadly understood to preclude removal before the end of the term. On this understanding, the Commissioners truly were, as Hamilton claimed, independent. [. . .]

[53] The majority . . . has very little support in text, history, or precedent. What it does have is a theory. As the majority sees things, the buck stops with the President, who holds all executive power and thus can be blamed or held responsible for all executive conduct. . . . The only way for that accountability to exist, according to the majority, is for [inferior executive] officers to be removable by the President at will, for any reason or no reason at all.

[54] Responsiveness and responsibility are certainly valuable, but they are not the only values countenanced by our Constitution. Others are the continuity and stability of Government, and the impartiality and fair administration of justice. . . . Today, the majority places accountability to the President above all else. [. . .]

[55] [T]he majority all but ignores . . . the tremendous reliance interests engendered by *Humphrey's*. *Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance upon a previous decision. . . . For the better part of the last century, *Humphrey's* has guided Congress in constructing the modern system of Government, including dozens of independent agencies that remain central to protecting the Nation's economy, health, safety, and more. At times, Congress has done so in express reliance upon the rule stated in *Humphrey's*. [. . .]

[56] The result [of the majority's decision] is a President who emerges with far greater power than ever before. It is a power, however, that neither the People, nor Congress, nor the Constitution bestowed upon him. In granting the President this unbridled authority, the Court upends its precedent, misconstrues our history, and sheds any pretense of judicial modesty. I respectfully dissent.

* * *

The heart of the FTC is its three Bureaus: the Bureau of Competition, the Bureau of Consumer Protection, and the Bureau of Economics. They are complemented by Offices which report to the Chair, dealing with competition and consumer-protection policy, international affairs, and congressional relations, among others.

The FTC's antitrust enforcement arm is the Bureau of Competition. Led by a Director and managed by a "front office" that includes Deputy Directors and a rotating group of Counsel—experienced attorneys on detail from the Bureau's divisions—the Bureau includes among other components:

- Four merger enforcement divisions: **Mergers I**, which primarily investigates mergers involving pharmaceuticals, medical devices, defense, and tech businesses; **Mergers II**, which primarily investigates mergers involving semiconductors, chemicals, heavy industries, and computer hardware / software; **Mergers III**, which primarily investigates mergers involving oil and gas and a range of consumer and consumer-facing products and services; and **Mergers IV**, which primarily investigates mergers involving hospitals and physicians as well as retail businesses;
- Four divisions focused on conduct enforcement: the **Technology Enforcement** division, which primarily investigates practices (and some transactions) in digital markets; the **Health Care** division, which primarily investigates practices in pharmaceutical and healthcare markets; and the **Anticompetitive Practices I** and **Anticompetitive Practices II** divisions, which primarily investigate practices in other markets;
- And three other divisions with related enforcement and policy responsibilities: the **American Competition Enforcement** division (which includes competition enforcement attorneys from the FTC's regional offices outside Washington, D.C.); the **Compliance** division (which advises on matters of remedy and investigates compliance matters); and the **Premerger Notification Office** (which handles merger notifications under the HSR merger review process and conducts the initial review of all merger filings).

Crucial support for the antitrust enforcement function is provided by the Ph.D. economists in the Bureau of Economics, who work alongside attorneys on investigations and litigations. BE economists occasionally serve as testifying experts in the FTC's antitrust actions. The FTC supplements BE with extensive use of economists from private consulting firms to advise on, and testify in, antitrust matters, at considerable expense.[970]

A majority vote of the Commission is required to undertake key actions, including to issue a complaint, to authorize compulsory process (*i.e.*, civil investigative demands or subpoenas), or to withdraw or settle a case.[971] As noted above, the likelihood of "free voting," of separate concurring and (especially) dissenting statements, and indeed of bipartisan Commissions, seems likely to be heavily affected by the shift to an executive FTC. Time will tell.

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[970] The FTC's 2026 budget justification makes no mention of expert witness expenses, but previous versions explain the point. *See, e.g.*, FTC, CONGRESSIONAL BUDGET JUSTIFICATION FISCAL YEAR 2025 (Mar. 11, 2024), 11 ("Expert witnesses are a critical element of all antitrust litigations, where explaining complex market dynamics to generalist judges is essential. . . . It is commonplace for defendants in FTC litigations to outspend the Commission by a significant amount on expert support[.]").

[971] Compulsory process is increasingly authorized on a categorical "omnibus" basis, rather than for individual matters. *See, e.g.*, FTC, Press Release, Federal Trade Commission Authorizes Three New Compulsory Process Resolutions for Investigations (Aug. 26, 2022).

2. Powers and Functions

a) FTC Act Section 5

The FTC's two principal functions—competition and consumer protection—are reflected in Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits "unfair methods of competition" ("UMC") and "unfair or deceptive acts and practices" ("UDAP"). The latter language, which forms the basis for the FTC's consumer protection enforcement authority, was added by Congress in 1938 after the FTC's efforts at consumer protection were blocked by the Supreme Court for want of statutory authority.[972] The FTC also issues guidance (alone and with DOJ) and is active as an amicus in antitrust cases.

The statutory prohibition on UMC, plus the Clayton Act, forms the accepted basis for the FTC's antitrust enforcement authority. As the Supreme Court put it in 1948, the FTC's mandate to prohibit UMC reflected "a strong congressional purpose not only to continue enforcement of the Sherman Act by the Department of Justice and the Federal District Courts but also to supplement that enforcement through the administrative process of the new Trade Commission."[973] But the limits of its substantive scope are unclear. Courts and commentators generally agree that the phrase "unfair methods of competition" includes *at least* all the conduct prohibited by the antitrust laws and at least some margin more, but they disagree about how much more broadly it reaches: that is, what the set of "standalone" Section 5 violations might be.[974]

It is broadly agreed that "invitations to collude"—that is, unilateral and unaccepted proposals to enter into a nakedly anticompetitive agreement, which do not generally violate the antitrust laws—violate Section 5.[975] But the consensus more or less stops there. After a trio of adverse decisions in the 1980s,[976] and setting aside a number of settlements,[977] the FTC generally gave up the effort to litigate "standalone" Section 5 theories other than those dealing with invitations to collude. (At least: until the effort, beginning in 2022, to reboot Section 5! We will come to that shortly.)

One case in the 1980s trio was *du Pont*, in which the FTC challenged the parallel but non-collusive use of practices that facilitated oligopolistic pricing by producers of "antiknock" gasoline additives. Specifically, the FTC's complaint charged that the producers had violated Section 5 by engaging, without agreement, in parallel practices including: (1) selling at a "delivered" price that included the cost of transportation; (2) using MFN clauses (see Chapter VI!) in their contracts with buyers; (3) using contractual provisions that committed them to giving customers 30 days' notice of any price changes; and (4) giving advance notice of price increases to the press. Each of these practices had been used by Ethyl Corporation when it had been the sole supplier in the market; other firms, upon entering, had adopted them as well. Such behavior would generally not violate the Sherman Act, given the absence of either agreement or individual monopoly power: the Second Circuit held that it did not violate Section 5 of the FTC Act either. In the process, the court indicated that there are some limits on the reach

[972] *See* FTC v. Raladam Co., 283 U.S. 643, 649 (1931). For some history, *see* J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection* (May 30, 2003).

[973] FTC v. Cement Inst., 333 U.S. 683, 692 (1948).

[974] *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 242 (1972); for a wide range of perspectives, *see generally* Sandeep Vaheesan, *Lawbreaking as a Method of Competition*, 75 Am. U. L. Rev. (forthcoming 2026); Tim Wu, *Section 5 and "Unfair Methods of Competition": Protecting Competition or Increasing Uncertainty?*, Colum. Pub. L. Research Paper 14-508 (2016); Debbie Feinstein, *A Few Words About Section 5*, COMPETITION MATTERS BLOG (Mar. 13, 2015); James C. Cooper, *The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the FTC Act*, 3 J. Antitrust Enf't 87, 88 (2015); William Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 20 Minn. J. Int'l L. 274 (2010); Susan A. Creighton & Thomas G. Krattenmaker, *Appropriate Role(s) for Section 5*, Antitrust Source (Feb. 2009); ABA, REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, *reprinted at* 59 Antitrust L.J. 43 (1989); Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. Rev. 227 (1980); Eugene R. Baker & Daniel J. Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 Villanova L. Rev. 517 (1962).

[975] *See*, *e.g.*, Analysis to Aid Public Comment, In the Matter of Fortiline, LLC, File No. 151-0000 (F.T.C. Aug. 9, 2016); Analysis to Aid Public Comment, In the Matter of U-Haul Int'l, Inc., File No. 081-0157 (F.T.C. June 9, 2010).

[976] E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984); Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980); Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980).

[977] *See*, *e.g.*, Complaint, In the Matter of Negotiated Data Solutions LLC, FTC File No. 051-0094 (F.T.C. filed Sept. 23, 2008).

of the unfairness prohibition. The FTC would take this message to heart, substantially narrowing its efforts to apply Section 5 beyond the antitrust laws.

E.I. du Pont de Nemours & Co. v. FTC

729 F.2d 128 (2d Cir. 1984)

Judge Mansfield.

[1] Congress' use of the vague general term "unfair methods of competition" in § 5 without defining what is "unfair" was deliberate. The statute's legislative history reveals that, in reaction to the relatively narrow terms of the Sherman Act as limited by the Supreme Court's adoption of the Rule of Reason in Standard Oil Co. v. United States, 221 U.S. 1 (1911), Congress sought to provide broad and flexible authority to the Commission as an administrative body of presumably practical men with broad business and economic expertise in order that they might preserve business' freedom to compete from restraints. Congress' aim was to protect society against oppressive anti-competitive conduct and thus assure that the conduct prohibited by the Sherman and Clayton Acts would be supplemented as necessary and any interstices filled. Indeed, Congress, in the process of drafting § 5, gave up efforts to define specifically which methods of competition and practices are competitively harmful and abandoned a proposed laundry list of prohibited practices for the reason that there were too many practices to define and many more unforeseeable ones were yet to be created by ingenious business minds. The specific practices that might be barred were left to be defined by the Commission, applying its expertise, subject to judicial review. Congress did not, however, authorize the Commission under § 5 to bar any business practice found to have an adverse effect on competition. Instead, the Commission could proscribe only "unfair" practices or methods of competition. Review by the courts was essential to assure that the Commission would not act arbitrarily or without explication but according to definable standards that would be properly applied.

[2] During the period since the enactment of the Federal Trade Commission Act the courts have established certain principles bearing on the scope of the Commission's powers. Although the Commission may under § 5 enforce the antitrust laws, including the Sherman and Clayton Acts, it is not confined to their letter. It may bar incipient violations of those statutes, and conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit. In prosecuting violations of the spirit of the antitrust laws, the Commission has, with one or two exceptions, confined itself to attacking collusive, predatory, restrictive or deceitful conduct that substantially lessens competition.

[3] The Commission here asks us to go further and to hold that the "unfair methods of competition" provision of § 5 can be violated by non-collusive, non-predatory and independent conduct of a non-artificial nature, at least when it results in a substantial lessening of competition. We recognize that § 5 invests the Commission with broad powers designed to enable it to cope with new threats to competition as they arise. As the Supreme Court stated in FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972):

> . . . [L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.

[4] However, as the Court noted in the same case, appropriate standards must be adopted and applied to protect a respondent against abuse of power. As the Commission moves away from attacking conduct that is either a violation of the antitrust laws or collusive, coercive, predatory, restrictive or deceitful, and seeks to break new ground by enjoining otherwise legitimate practices, the closer must be our scrutiny upon judicial review. A test based solely upon restraint of competition, even if qualified by the requirement that the conduct be "analogous" to an antitrust violation, is so vague as to permit arbitrary or undue government interference with the reasonable freedom of action that has marked our country's competitive system.

[5] The term "unfair" is an elusive concept, often dependent upon the eye of the beholder. A line must therefore be drawn between conduct that is anticompetitive and legitimate conduct that has an impact on competition. Lessening of competition is not the substantial equivalent of "unfair methods" of competition. Section 5 is aimed at conduct, not at the result of such conduct, even though the latter is usually a relevant factor in determining

whether the challenged conduct is "unfair." Nor does the statute obligate a business to engage in competition; if that were the case, many acceptable pricing and market decisions would be barred. A manufacturer, for instance, would be prevented from making a concededly lawful change in its distribution system, designed to increase sales efficiency, by unilaterally reducing the number of its wholesalers, since the effect would be to diminish substantial competition at the wholesaler level. Similarly, if anticompetitive impact were the sole test, the admittedly lawful unilateral closing of a plant or refusal to expand capacity could be found to be "unfair." The holder of a valid product patent could be prevented from exercising its lawful monopoly to charge whatever the traffic would bear, even though a monopolist, as long as he has no purpose to restrain competition or to enhance or expand his monopoly, and does not act coercively, retains the right to trade with whom he wishes.

[6] When a business practice is challenged by the Commission, even though, as here, it does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character, standards for determining whether it is "unfair" within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable. Otherwise the door would be open to arbitrary or capricious administration of § 5; the FTC could, whenever it believed that an industry was not achieving its maximum competitive potential, ban certain practices in the hope that its action would increase competition. The mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws. It represents a condition, not a "method;" indeed it could be consistent with intense competition. Labelling one producer's price change in such a market as a "signal," parallel price changes as "lock-step," or prices as "supracompetitive," hardly converts its pricing into an "unfair" method of competition. To so hold would be to condemn any such price increase or moves, however independent; yet the FTC has not suggested that § 5 authorizes it to ban all price increases in an oligopolistic market. On the contrary, it states that "Section 5 should not prohibit oligopolistic pricing alone, even supracompetitive parallel prices, in the absence of specific conduct which promotes such a result." This fine distinction creates doubt as to the types of otherwise legitimate conduct that are lawful and those that are not. The doubt is increased by the Commission's concession that price uniformity is normal in a market with few sellers and homogeneous products, such as that in the antiknock compound industry.

[7] In view of this patent uncertainty the Commission owes a duty to define the conditions under which conduct claimed to facilitate price uniformity would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability. The Commission's decision in the present case does not provide any guidelines; it would require each producer not only to assess the general conduct of the antiknock business but also that of each of its competitors and the reaction of each to the other, which would be virtually impossible. Some idea of the fickleness and uncertainty of the FTC's position in the present case can be gathered from its ambivalent view towards some of the practices which it attacks. Certain otherwise-legitimate practices were declared unlawful only when used cumulatively with other practices. Others were found unfair when used by certain producers . . . but not when used by others . . . . Press announcements of price increases and contractual 30-day price increase notice requirements were held permissible but giving buyers a few days additional notice was found to be unfair even though there was no proof that the extra days made any competitive difference. Indeed, with or without the additional days' notice the initiator of a price increase was not precluded from withdrawing or modifying it within the 30-day period or from extending the 30-day notice period itself. Thus the FTC's rulings and order appear to represent uncertain guesswork rather than workable rules of law.

[8] In our view, before business conduct in an oligopolistic industry may be labelled "unfair" within the meaning of § 5 a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct. If, for instance, a seller's conduct, even absent identical behavior on the part of its competitors, is contrary to its independent self-interest, that circumstance would indicate that the business practice is "unfair" within the meaning of § 5. In short, in the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not "unfair" in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason. To suggest, as does the Commission in its opinion, that the defendant can escape violating § 5 only by showing that there are "countervailing procompetitive justifications" for the challenged business practices goes too far.

[9] In the present case the FTC concedes that the petitioners did not engage in the challenged practices by agreement or collusively. Each acted independently and unilaterally. There is no evidence of coercive or predatory conduct. If the petitioners nevertheless were unable to come forward with some independent legitimate reason for their adoption of these practices, the Commission's argument that they must be barred as "unfair" when they have the effect of facilitating conscious price parallelism and interdependence might have some merit. But the evidence is overwhelming and undisputed, as the ALJ found, that each petitioner independently adopted its practices for legitimate business reasons which we have described.

[10] The tenuousness of the Commission's finding that the challenged practices are "unfair" is illustrated by the fact that it does not tell us when the practices became unlawful: at the time of their original adoption by Ethyl when it was the sole manufacturer of antiknock compounds, when Du Pont entered the market in 1948, when PPG entered in 1961, when Nalco appeared on the scene in 1964, or at some other time. The matter is of some importance for the reason that during the period from 1948 (when Du Pont entered) to 1974 Ethyl's share of the market fell from 100% to 33%. Du Pont's share likewise fell from 50% in 1961, the time of PPG's entry, to 38% in 1974. In the meantime PPG and Nalco, using aggressive competitive measures, captured substantial shares of the market. If the challenged business practices engaged in by the four producers were "unfair" during the 1974–1979 period one would expect that they would be viewed as unfair during the 1960s. Yet the evidence is clear beyond doubt that they did not "facilitate" conscious price parallelism during that earlier period; indeed, from 1960 to 1974 the price of one ingredient of antiknock compounds, TEL (tetraethyl lead) increased only 17% while the price of the other, TML (tetramethyl lead) fell 10%, even though the overall price index rose 57% during the same period. This casts doubt upon the FTC's selection of the 1974–1979 period as indicative of the effect of the business practices at issue. It is difficult to believe that a practice deemed lawful when competitive forces were producing changes in the market became "unfair" when market conditions stabilized.

[11] The Commission contends that although the business practices at issue here might not be unfair under other market conditions, they assume that unlawful character when adopted in a concentrated or oligopolistic market in which a few producers sell a homogenous product, demand is inelastic, prices are "supracompetitive," and barriers to entry are high. It is argued that in such a milieu the practices assist the producers in independently maintaining prices at higher levels than would otherwise be the case. Perhaps this argument would be acceptable if the market were clearly as so described and a causal connection could be shown between the practices and the level of prices. Indeed the Commission majority concedes that facilitating practices will be found to violate § 5 as unfair methods of competition only if the weight of the evidence shows that competition has been substantially lessened and that it was required to establish a clear nexus between the challenged conduct and adverse competitive effects before invoking our authority in this regard. But the record does not contain substantial evidence supporting many of the Commission's conclusions or showing a causal connection between the challenged practices and market prices. Indeed, it appears to be riddled with deficiencies and inconsistencies[.] . . .

[12] In the first place, price uniformity and parallelism was much more limited than the FTC would have it. During the relevant period (1974–1979) Nalco extended price discounts on more than 80% of its sales and PPG on more than one-third of its sales, the latter increasing to 58% of its sales in 1979 as the sellers competed for fewer buyers in a diminishing market. Although there was for the most part price parallelism on the part of Du Pont and Ethyl, they effectively met the price discounts of the other two producers by providing competition in the form of extensive services which had the effect of retaining old customers or luring away new ones. Thus the total package, including free valuable services and discounts, presents a picture of a competitive market in which large, sophisticated and aggressive buyers were making demands and were satisfied with the results. To the extent that there was price uniformity, that condition is as consistent with competitive as with anticompetitive behavior.

[13] The problems faced by anyone thinking of entering the market were not "barriers" in the usual sense used by economists, such as requirements for high capital investment or advanced technological know-how. The main problem has been that market demand, due to factors uncontrolled by petitioners, is sharply declining. A dying market, which will soon dry up altogether, does not attract new entries. Absent some reasonable prospect that a price reduction would increase demand-and there is none-it is not surprising that existing producers have not engaged in as much price competition as might exist under other conditions. To suggest that industry-wide use of delivered instead of f.o.b. pricing {*Eds.: f.o.b. = "free on board," or excluding costs of transportation*} restrained price

competition in such a market ignores the de minimis part freight charges played in the price paid by customers. It also overlooks the fact that f.o.b. pricing is not necessarily more competitive than delivered pricing.

[14] In short, we do not find substantial evidence in this record as a whole that the challenged practices significantly lessened competition in the antiknock industry or that the elimination of those practices would improve competition.

* * *

In 2015, the FTC issued a brief "Statement of Enforcement Principles" relating to the meaning of the UMC prohibition, tying it to the principles of antitrust enforcement.

FTC, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act

August 13, 2015

In deciding whether to challenge an act or practice as an unfair method of competition in violation of Section 5 on a standalone basis, the Commission adheres to the following principles:

- the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;
- the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and
- the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice.

* * *

→ But in 2021, the Commission withdrew the Statement, and signaled a determination to take a fresh, and broader, look at the scope of Section 5.[978] In November 2022, a new policy statement emerged (as did a vigorous dissent![979]). At the time of writing (Summer 2026), the 2022 policy statement has not been withdrawn by the Trump Administration, and it remains the operative FTC statement on the scope of Section 5. What do you make of it?

FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act

November 10, 2022

[1] Pursuant to the FTC's analysis of the decided cases and prior enforcement actions, this policy statement describes the key principles of general applicability concerning whether conduct is an unfair method of competition. Consistent with the Supreme Court's interpretation of the FTC Act in at least twelve decisions, this

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[978] FTC, Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021).

[979] *See* Dissenting Statement of Commissioner Christine S. Wilson Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022) ("Instead of a law enforcement document, [the Statement] resembles the work of an academic or a think tank fellow who dreams of banning unpopular conduct and remaking the economy. It does not reflect the thinking of litigators who know that legal precedent cannot be ignored, case-specific facts and evidence must be analyzed, and the potential for anticompetitive effects must be assessed. It does not reflect the approach of experienced policy makers who recognize the necessity of considering the business rationales for, and benefits of, conduct so that agency action does not harm consumers and the economy. And it does not exhibit the input of those with counseling and in-house experience who understand the need to provide workable rules so that 'honest businesses' can map the boundaries of lawful conduct.").

statement makes clear that Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions. [. . .]

[2] In enacting Section 5, Congress's aim was to create a new prohibition broader than, and different from, the Sherman and Clayton Acts. Congress purposely introduced the phrase, "unfair methods of competition," in the FTC Act to distinguish the FTC's authority from the definition of "unfair competition" at common law. It also made clear that Section 5 was designed to extend beyond the reach of the antitrust laws. Concluding that a static definition would soon become outdated, Congress wanted to give the Commission flexibility to adapt to changing circumstances. [. . .]

[3] Relying on the text, structure, legislative history of Section 5, precedent, and the FTC's experience applying the law, this statement describes the most significant general principles concerning whether conduct is an unfair method of competition under Section 5 of the FTC Act.

[4] Conduct must be a "method of competition" to violate Section 5. A method of competition is conduct undertaken by an actor in the marketplace—as opposed to merely a condition of the marketplace, not of the respondent's making, such as high concentration or barriers to entry. The conduct must implicate competition, but the relationship can be indirect. For example, misuse of regulatory processes that can create or exploit impediments to competition (such as those related to licensing, patents, or standard setting) constitutes a method of competition. Conversely, violations of generally applicable laws by themselves, such as environmental or tax laws, that merely give an actor a cost advantage would be unlikely to constitute a method of competition.

[5] The method of competition must be unfair, meaning that the conduct goes beyond competition on the merits. Competition on the merits may include, for example, superior products or services, superior business acumen, truthful marketing and advertising practices, investment in research and development that leads to innovative outputs, or attracting employees and workers through the offering of better employment terms.

[6] There are two key criteria to consider when evaluating whether conduct goes beyond competition on the merits. First, the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature. It may also be otherwise restrictive or exclusionary, depending on the circumstances, as discussed below. Second, the conduct must tend to negatively affect competitive conditions. This may include, for example, conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers.

[7] These two principles are weighed according to a sliding scale. Where the indicia of unfairness are clear, less may be necessary to show a tendency to negatively affect competitive conditions. Even when conduct is not facially unfair, it may violate Section 5. In these circumstances, more information about the nature of the commercial setting may be necessary to determine whether there is a tendency to negatively affect competitive conditions. The size, power, and purpose of the respondent may be relevant, as are the current and potential future effects of the conduct.

[8] The second principle addresses the tendency of the conduct to negatively affect competitive conditions—whether by affecting consumers, workers, or other market participants. In crafting Section 5, Congress recognized that unfair methods of competition may take myriad forms and hence that different types of evidence can demonstrate a tendency to interfere with competitive conditions. Because the Section 5 analysis is purposely focused on incipient threats to competitive conditions, this inquiry does not turn to whether the conduct directly caused *actual* harm in the specific instance at issue. Instead, the second part of the principle examines whether the respondent's conduct has a tendency to generate negative consequences; for instance, raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing other market participants, or reducing the likelihood of potential or nascent competition. These consequences may arise when the conduct is examined in the aggregate along with the conduct of others engaging in the same or similar conduct, or when the conduct is examined as part of the cumulative effect of a variety of different practices by the respondent. Moreover, Section 5 does not require a separate showing of market power or market definition when the evidence indicates that such conduct tends to negatively affect competitive conditions. Given the distinctive goals of Section 5, the inquiry will not focus on the "rule of reason" inquiries more common in cases under the Sherman Act, but will instead focus

on stopping unfair methods of competition in their incipiency based on their tendency to harm competitive conditions.

[9] In the event that conduct *prima facie* constitutes an unfair method of competition, liability normally ensues under Section 5 absent additional evidence. There is limited caselaw on what, if any, justifications may be cognizable in a standalone Section 5 unfair methods of competition case, and some courts have declined to consider justifications altogether. [. . .]

[10] If parties in [Section 5] cases choose to assert a justification, the subsequent inquiry would not be a net efficiencies test or a numerical cost-benefit analysis. The unfair methods of competition framework explicitly contemplates a variety of non-quantifiable harms, and justifications and purported benefits may be unquantifiable as well. The nature of the harm is highly relevant to the inquiry; the more facially unfair and injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind. In addition, whether harmed parties share in the purported benefits of the practice may be relevant to the inquiry.

[11] Some well-established limitations on what defenses are permissible in an antitrust case apply in the Section 5 context as well. It is the party's burden to show that the asserted justification for the conduct is legally cognizable, non-pretextual, and that any restriction used to bring about the benefit is narrowly tailored to limit any adverse impact on competitive conditions. In addition, the asserted benefits must not be outside the market where the harm occurs. Finally, it is the party's burden to show that, given all the circumstances, the asserted benefits outweigh the harm and are of the kind that courts have recognized as cognizable in standalone Section 5 cases. [. . .]

[12] A non-exclusive set of examples of conduct that have been found to violate Section 5 include:

- Practices deemed to violate Sections 1 and 2 of the Sherman Act or the provisions of the Clayton Act, as amended (the antitrust laws).
- Conduct deemed to be an incipient violation of the antitrust laws. Incipient violations include conduct by respondents who have not gained full-fledged monopoly or market power, or by conduct that has the tendency to ripen into violations of the antitrust laws. Past examples of such use of Section 5 of the FTC Act include:
    - invitations to collude,
    - mergers, acquisitions, or joint ventures that have the tendency to ripen into violations of the antitrust laws,
    - a series of mergers, acquisitions, or joint ventures that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws, and
    - loyalty rebates, tying, bundling, and exclusive dealing arrangements that have the tendency to ripen into violations of the antitrust laws by virtue of industry conditions and the respondent's position within the industry.
- Conduct that violates the spirit of the antitrust laws. This includes conduct that tends to cause potential harm similar to an antitrust violation, but that may or may not be covered by the literal language of the antitrust laws or that may or may not fall into a "gap" in those laws. As such, the analysis may depart from prior precedent based on the provisions of the Sherman and Clayton Acts. Examples of such violations, to the extent not covered by the antitrust laws, include:
    - practices that facilitate tacit coordination,
    - parallel exclusionary conduct that may cause aggregate harm,
    - conduct by a respondent that is undertaken with other acts and practices that cumulatively may tend to undermine competitive conditions in the market,
    - fraudulent and inequitable practices that undermine the standard-setting process or that interfere with the Patent Office's full examination of patent applications,
    - price discrimination claims such as knowingly inducing and receiving disproportionate promotional allowances against buyers not covered by Clayton Act,

- de facto tying, bundling, exclusive dealing, or loyalty rebates that use market power in one market to entrench that power or impede competition in the same or a related market,
- a series of mergers or acquisitions that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws,
- mergers or acquisitions of a potential or nascent competitor that may tend to lessen current or future competition,
- using market power in one market to gain a competitive advantage in an adjacent market by, for example, utilizing technological incompatibilities to negatively impact competition in adjacent markets,
- conduct resulting in direct evidence of harm, or likely harm to competition, that does not rely upon market definition,
- interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act,
- commercial bribery and corporate espionage that tends to create or maintain market power,
- false or deceptive advertising or marketing which tends to create or maintain market power, or
- discriminatory refusals to deal which tend to create or maintain market power.

* * *

The FTC's authority to enforce Section 5 is subject to some jurisdictional carveouts. Most importantly, banks (including federal credit unions), common carriers (although only to the extent engaged in common-carriage activities[980]), air carriers, and entities subject to the Packers and Stockyards Act are all beyond the FTC's reach under Section 5.[981] In addition, due to a peculiarity of the definition of "corporation" in 15 U.S.C. § 44, nonprofits have long been understood to fall outside Section 5's reach, preventing the FTC from tackling practices by, for example, nonprofit hospitals.[982] (*California Dental* established that the FTC can challenge nonprofit actors organized to promote the profit of their members.[983]) These create gaps in the FTC's powers, within which the Department of Justice alone must fulfil the antitrust enforcement function. In addition to its powers under Section 5, the FTC also has authority to enforce Section 7 of the Clayton Act directly.[984]

b) FTC Act Section 6(b)

The FTC has a unique power under Section 6(b) of the FTC Act, 15 U.S.C. § 46(b), to conduct market studies by means of compulsory process and to compel businesses subject to Section 5 to respond under oath. The FTC has used this power to undertake multiple investigations in a range of markets.[985]

3. Enforcement Procedure

FTC antitrust enforcement begins with an investigation, which is almost invariably handled by a conduct or merger division in the Bureau of Competition. Such investigations typically begin with an informal or voluntary phase (in which potential targets as well as customers, trading partners, and competitors are invited to submit documents and information and/or to participate in interviews) following which the Commission may vote to authorize the use of compulsory process—that is, civil investigative demands ("CIDs") and subpoenas[986]—with

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980 *See* FTC v. AT&T Mobility LLC, 883 F.3d 848, 850 (9th Cir. 2018); FTC v. Educare Ctr. Servs., Inc., 433 F. Supp. 3d 1008, 1017 (W.D. Tex. 2020).

981 15 U.S.C. § 45.

982 15 U.S.C. § 44 (defining corporation, in relevant part, as "organized to carry on business for its own profit or that of its members").

983 California Dental Ass'n v. FTC, 526 U.S. 756, 766–67 (1999) (holding that "proximate relation to lucre must appear" but that "[n]onprofit entities organized on behalf of for-profit members have the same capacity and derivatively, at least, the same incentives as for-profit organizations to engage in unfair methods of competition or unfair and deceptive acts").

984 *See* 15 U.S.C. § 21(a).

985 *See*, *e.g.*, FTC, PATENT ASSERTION ENTITY ACTIVITY: AN FTC STUDY (Oct. 2016); FTC, Press Release, FTC Issues Orders to Nine Social Media and Video Streaming Services Seeking Data About How They Collect, Use, and Present Information (Dec. 14, 2020); FTC, Press Release, FTC to Examine Past Acquisitions by Large Technology Companies (Feb. 11, 2020).

986 The Commission must have "reason to believe" the recipient is in possession, custody, or control of relevant information before issuing a CID. *See* 15 U.S.C. § 57b-1(c). *See also* 15 U.S.C. § 49 (subpoena power).

which compliance is mandatory.[987] Some investigations are governed by so-called "omnibus resolutions," providing pre-authorization for the use of compulsory process in certain categories of cases.[988]

➞ The FTC has an unusual choice of venues in which to pursue enforcement litigation. It may file administrative litigation, pursuant to Part 3 of the FTC Rules of Practice, to obtain a cease and desist order.[989] This typically involves an initial trial before an FTC Administrative Law Judge, with plenary review by the Commission.[990] A respondent may appeal from a decision of the Commission to any federal circuit court of appeals.[991] On appeal, factual findings are reviewed to determine whether they are supported by substantial evidence, while—at least historically—conclusions of law are reviewed *de novo* with some deference to the FTC's view of whether a particular practice is "unfair" under Section 5.[992] It is not yet clear whether such deference can survive the Supreme Court's emerging opposition to the idea that agencies should receive deference from courts in matters of statutory interpretation.[993] At the time of writing (Summer 2026), order violations are punishable by civil penalties of up to $53,088 per violation.[994]

Administrative litigation presents the slightly odd prospect of the Commission first voting to bring a case, and then sitting in an adjudicative capacity to decide the case that it has, itself, authorized. In order to separate the functions of prosecutor and adjudicator, once the Commission votes to file a complaint in Part 3, a firewall (the "Part 3 wall") is raised between the litigating staff ("complaint counsel") and members of the Commission, including the Chair.[995] But criticism persists.[996] Indeed, as we shall see below, this feature has been a target of litigation.

Under certain circumstances the FTC may sue in federal district court under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). Doing so offers the FTC some advantages. For one thing, because the remedy in a Part 3 case is limited to a cease and desist order, the FTC cannot use administrative litigation to obtain interim relief, such as a preliminary injunction to block a merger. In those cases, the FTC may seek a preliminary injunction in district court *and* simultaneously move forward with administrative litigation to obtain a permanent order.[997] In addition, litigating in federal court avoids some of the constitutional and other challenges that Part 3 litigation increasingly invites. But—crucially—Section 13(b) is not a blank check to bring any antitrust suit in federal court: it sets some important limitations on when the FTC can go to court, and what it can get when it does.[998] Here is the statute.

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987 *See generally* 16 C.F.R. Part 2 (nonadjudicative procedures).

988 *See, e.g.*, FTC, Resolution Directing Use of Compulsory Process Regarding Acts or Practices Affecting Healthcare Markets, FTC File No. P210100 (July 1, 2021)

989 *See* 15 U.S.C. § 45(b) (cease and desist order); 16 C.F.R. Part 3.

990 *See* 16 C.F.R. § 3.52 (review of recommended decision by Commission).

991 15 U.S.C. § 45(c) (allowing appellate review in "any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business").

992 15 U.S.C. §§ 21(c), 45(c) (appeal court review of factual findings limited to determining whether such findings are supported by "evidence" or "substantial evidence"); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1986) (under the substantial evidence test, "the court must accept the Commission's findings of fact if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); *id.* at 454 ("The legal issues presented—that is, the identification of governing legal standards and their application to the facts found—are, by contrast, 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 is to be condemned as 'unfair.'"); Impax Lab'ys, Inc. v. FTC, 994 F.3d 484, 491–92 (5th Cir. 2021) (discussing standard).

993 Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 400 (2024) ("It . . . makes no sense to speak of a 'permissible' interpretation that is not the one the court . . . concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.").

994 15 U.S.C. § 45(*l*). Penalties are normally adjusted annually for inflation. *See* FTC, Press Release, FTC Publishes Inflation-Adjusted Civil Penalty Amounts for 2025 (Feb. 11, 2025). But there was no adjustment in 2026. *See* Russell T. Vought, OMB Memorandum M-26-11 re: "Cancellation of Penalty Inflation Adjustments for 2026 . . . " (Apr. 17, 2026).

995 *See* 16 C.F.R. § 4.7 (limits on ex parte communications with the Commission when a matter is in Part 3 adjudication); *see also* 5 U.S.C. § 554(d) (APA requirement of separation between investigational and adjudicative functions).

996 *See generally* Keith Klovers, *Three Options for Reforming Part 3 Administrative Litigation at the Federal Trade Commission*, 85 Antitrust L.J. 409 (2023) (noting criticisms and proposing reforms).

997 *See, e.g.*, FTC v. Thomas Jefferson Univ., 505 F. Supp. 3d 522, 527 (E.D. Pa. 2020) ("The Federal Trade Commission and Pennsylvania Office of Attorney General, collectively the Government, seek to preliminarily enjoin a proposed merger between Thomas Jefferson University and the Albert Einstein Healthcare Network pending an administrative determination of whether the combination violates Section 7 of the Clayton Act.").

998 For one perspective on the role of 13(b) over time, *see* Stephen Calkins, *Civil Monetary Remedies Available to Federal Antitrust Enforcers*, 40 U.S.F. L. Rev. 567 (2006).

15 U.S.C. § 53(b)

(b)Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe—

> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—
>
>> the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: Provided, however, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

* * *

The peculiar language of Section 13(b) sets up at least three possible limitations on the FTC's powers as a district-court litigant: first, the "is violating, or is about to violate" language might mean that the FTC is unable to go to district court to seek a remedy for past antitrust violations; second, the brief reference to "a permanent injunction" might mean that certain forms of equitable relief—such as disgorgement of profits or restitution of ill-gotten gains—are unavailable; and, third, that the "in a proper case" language might mean that injunctive relief is available in only a subset of litigated matters. All three of these issues were litigated in recent years: the FTC lost on two of the three fronts, with significant implications for its powers, though Section 13(b)'s limits have not been finally resolved.

FTC v. Shire ViroPharma, Inc.

917 F.3d 147 (3d Cir. 2019)

Chief Judge Smith.

[1] Section 13(b) requires that the FTC have reason to believe a wrongdoer "is violating" or "is about to violate" the law. We conclude that this language is unambiguous; it prohibits existing or impending conduct. Simply put, Section 13(b) does not permit the FTC to bring a claim based on long-past conduct without some evidence that the defendant "is" committing or "is about to" commit another violation.

[2] The plain language of Section 13(b) is reinforced by its history. Generally, where the text of a statute is unambiguous, the statute should be enforced as written and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language. When Congress added Section 13(b), the provision was expected to be used for obtaining injunctions against illegal conduct pending completion of FTC administrative hearings. *See* S. Rep. No. 93-151, at 30 (1973) ("The purpose of [Section 13(b)] is to permit the

[FTC] to bring an immediate halt to unfair or deceptive acts or practices when [at] the present time such practices might continue for several years until agency action is completed."). The provision was not designed to address hypothetical conduct or the mere suspicion that such conduct may yet occur. Nor was it meant to duplicate Section 5, which already prohibits past conduct.

[3] The FTC's arguments to the contrary are unconvincing. The FTC contends that relief under Section 13(b) is appropriate when it shows a reasonable likelihood that past violations will recur. In other words, when a defendant has already violated the law but the illegal conduct has ceased, injunctive relief should be granted if there exists some cognizable danger of recurrent violation.

[4] The FTC borrows its "likelihood of recurrence" standard from the common law standard for an award of injunctive relief. A party can generally obtain injunctive relief for past conduct that is likely to recur; the wrongdoer cannot avoid an injunction by voluntarily ceasing its illegal conduct. Although injunctive relief can survive discontinuance of the illegal conduct, the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.

[5] The FTC insists that other courts have consistently applied the likelihood of recurrence standard in Section 13(b) cases. This is true, and unsurprising, given that Section 13(b) explicitly authorizes the FTC to obtain injunctions. But none of the cases cited by the FTC considers the issue presented here—the meaning of Section 13(b)'s threshold requirement that a party "is" violating or "is about to" violate the law. [. . .]

[6] [T]he FTC trots out the old adage that a remedial statute like the FTC Act should be construed broadly. Because Section 13(b)'s "is" or "is about to" requirement allegedly conflicts with the remedial purpose of the FTC Act, the FTC says we should disregard the plain meaning of that language. Of course, none of the authority the FTC cites stands for the broad proposition that we can ignore clear statutory language if it does not promote a remedial interpretation.

[7] The FTC points to a parade of horribles that it predicts will result if we uphold the District Court's decision. *See*, *e.g.*, [FTC Brief] 35 ("Limiting the FTC's Section 13(b) authority to cases of ongoing or imminent violation would make it easy for wrongdoers to evade Congress' purposes in creating the regime. As soon as a potential defendant got wind that the FTC was investigating its activities, it could simply stop those activities and render itself immune from suit in federal court unless the FTC could allege and prove an imminent re-violation."). But there is no reason to believe that our decision today unnecessarily restricts the FTC's ability to address wrongdoing. Section 5 authorizes administrative proceedings based on past violations. And, of course, if the FTC believes that a wrongdoer is "about to violate" the law during the pendency of an administrative proceeding, it could then come to court and obtain an injunction under Section 13(b).

[8] The FTC's understandable preference for litigating under Section 13(b), rather than in an administrative proceeding, does not justify its expansion of the statutory language. If the FTC wants to recover for a past violation—where an entity "has been" violating the law—it must use Section 5(b). If the FTC instead chooses to use Section 13(b), it must plead that a violation of the law "is" occurring or "is about to" occur. Here, the FTC wants to use the most advantageous aspects of each statutory provision—to punish Shire for a past violation using the less onerous enforcement mechanism. But the FTC's attempt to squeeze Shire's conduct into the "about to violate" category distorts Section 13(b) beyond its intended purpose. Section 13(b) cannot accommodate the FTC's interpretation—that "about to violate" means only that a violation could recur at some future point.

[9] In short, we reject the FTC's contention that Section 13(b)'s "is violating" or "is about to violate" language can be satisfied by showing a violation in the distant past and a vague and generalized likelihood of recurrent conduct. Instead, "is" or "is about to violate" means what it says—the FTC must make a showing that a defendant is violating or is about to violate the law.

* * *

➞ The limits that the Third Circuit emphasized in *Shire ViroPharma* turned out to have sharp edges. The following extract draws on a case you may remember from Chapters III and VII: the FTC's challenge to the acquisitions by Facebook (now Meta) of Instagram and WhatsApp. The relevant timeline was as follows: in 2012, Meta bought Instagram; in 2014, Meta bought WhatsApp; in 2020, the FTC filed suit to challenge the acquisitions (among other conduct); in 2025, the matter proceeded to a bench trial. The fact that, in the meantime, YouTube and TikTok together had eroded Meta's monopoly power—an analysis reproduced in Chapter VII above—was fatal to the FTC's power to litigate under Section 13(b). At the time of writing (Summer 2026) an appeal is pending.

FTC v. Meta Platforms, Inc.

811 F. Supp. 3d 67 (D.D.C. 2025)

Chief Judge Boasberg.

[1] In this action, the FTC has argued that Facebook, Instagram, Snapchat, and minor player MeWe compete only with one another in a market that the agency calls "personal social networking" ("PSN"). It claims that Meta holds a monopoly in this market and, faced with challenges to its dominance, preserved its monopoly not by outcompeting its upstart rivals Instagram and WhatsApp, but by buying them. This, the agency has maintained, constitutes maintaining monopoly power through means other than competition on the merits, which would violate Section 2 of the Sherman Act. [. . .]

[2] Before turning to the methods of proof, one . . . preliminary remains: <u>when</u> must the FTC show that Meta had monopoly power? Throughout this case, the Court has held that the agency must prove that Meta is violating the law <u>now</u>. In its post-trial brief, the FTC nonetheless tries another angle, arguing that if Meta broke the law in the past and this violation is still harming competition, then the agency may seek an injunction to redress the lingering harm.

[3] That might be a sensible statutory scheme, but it is not the one that Congress passed. The FTC's authority to seek injunctions comes from Section 13(b) of the FTC Act: "Whenever the Commission has reason to believe that any . . . corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission"—including the antitrust laws—then "the Commission . . . may bring suit in a district court of the United States to enjoin any such act or practice." As courts have emphasized, Section 13(b) serves a forward-facing role: enjoining ongoing and imminent future violations. The FTC can therefore seek to enjoin only conduct that currently violates the law or imminently will.

[4] To win the permanent injunction that it seeks here, the FTC must prove a current or imminent legal violation. While Section 13(b) is always forward facing, the burden it sets for the agency rises as a case progresses. To have a cause of action, the FTC needs only "reason to believe" that a defendant is currently breaking the law or is about to. To secure a preliminary injunction, it must make a "proper showing." And to win a permanent injunction, the relevant standard here, the FTC must provide "proper proof"—that is, proof that the act or practice that it seeks to enjoin is an ongoing or imminent violation of the law.

[5] What does that mean for this case? Recall that Meta is violating Section 2 only if it (1) has monopoly power and (2) is maintaining that power through anticompetitive conduct. As both elements must be met, the FTC must prove that Meta has monopoly power <u>now</u>. [. . .]

{*Eds.: you may remember the court's analyses of market definition and monopoly power from Chapters III and VII respectively. The court held that, given competitive changes in recent years, today TikTok—and to at least some extent YouTube—exert significant competitive pressure on Meta, such that it no longer enjoys monopoly power.*}

[6] The Court ultimately finds that YouTube and TikTok belong in the product market, and [in light of competitive changes in recent years] they prevent Meta from holding a monopoly [at the time of trial in 2025]. Even if YouTube is out, including TikTok alone defeats the FTC's case.

[7] Like Heraclitus's river, the rapids of social media rush along so fast that the Court has never even stepped into the same case twice. It considered motions to dismiss in 2021 and 2022, motions for summary judgment in 2024, and a full merits trial this year. Each time it examined Meta's apps, they had changed. The competitors had, too. The Court's two Opinions on motions to dismiss did not even mention the word "TikTok." Today, that app holds center stage as Meta's fiercest rival.

[8] . . . Whether or not Meta enjoyed monopoly power in the past . . . the agency must show that it continues to hold such power now. The Court's verdict today determines that the FTC has not done so.

CASENOTE: FTC v. Surescripts, LLC, and The Idea of a "Proper Case"

424 F. Supp. 3d 92 (D.D.C. 2020)

When the FTC sued the e-prescribing platform Surescripts for using loyalty discounts to induce exclusivity, it did so in federal court, pursuant to Section 13(b) of the FTC Act. As noted above, that provision states that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."

In moving to dismiss the FTC's complaint, Surescripts argued that the language "in proper cases" should meaningfully limit Section 13(b). In particular, it argued, injunctive relief should be available only in "routine, straightforward" cases. And the FTC's challenge to its loyalty discounts, Surescripts argued, was not routine: "it involves complex and novel issues of antitrust law, such as how to understand the two-sided e-prescription markets" in light of *AmEx*. Surescripts pointed to some legislative history suggesting that Congress may have intended the FTC to seek permanent injunctions in district court in routine cases in which it was not attempting to develop or extend the law. In response, the FTC argued that Surescripts was overreading the language. A "proper" case, the FTC argued, is "any case in which a permanent injunction would be 'appropriate,' i.e., any case in which a law enforced by the FTC has been violated and equitable remedies are needed to make harmed consumers whole." {*Eds.: note that after* AMG Capital, *discussed below, the FTC can no longer obtain equitable monetary relief in an action under Section 13(b) of the FTC Act to "make harmed consumers whole."*}

The district court agreed with the FTC. It was true, the court allowed, that a "proper case" could not mean "any case." The phrase "proper case" could be understood as an effort to distinguish between cases that were proper for a permanent, rather than preliminary, injunction—or as a reference to cases that did not rely on the FTC's "scientific expertise." But, leaving the boundaries of the zone for another day, it was enough that this case was an effort to enforce existing law, not to define new legal standards: "The FTC grounds its legal argument here in Circuit precedent, and does not seek to rely on its agency expertise to develop the law. Under such circumstances, the Court concludes that the complaint adequately alleges a 'proper case.'"

Surescripts thus gave the FTC a win on the "proper case" question, but it did not foreclose future efforts by defendants to make some hay out of this enigmatic—and thinly-litigated—turn of phrase in Section 13(b).

AMG Capital Management, LLC v. FTC

593 U.S. 67 (2021)

Justice Breyer.

[1] [S]everal considerations, taken together, convince us that § 13(b)'s "permanent injunction" language does not authorize the Commission directly to obtain court-ordered monetary relief. For one thing, the language refers only to injunctions. It says, "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). An "injunction" is not the same as an award of equitable monetary relief. We have, however, sometimes interpreted similar language as authorizing judges to order equitable monetary relief.

[2] But if this language alone is not enough, there is more. The language and structure of § 13(b), taken as a whole, indicate that the words "permanent injunction" have a limited purpose—a purpose that does not extend to the grant of monetary relief. Those words are buried in a lengthy provision that focuses upon purely injunctive, not monetary, relief. {*Eds.: the Court here quoted Section 13(b), reproduced above.*}

[3] Taken as a whole, the provision focuses upon relief that is prospective, not retrospective. Consider the words "is violating" and "is about to violate" (not "has violated") setting forth when the Commission may request injunctive relief. Consider too the words "pending the issuance of a complaint," "until such complaint is dismissed," "temporary restraining order," "preliminary injunction," and so forth in the first half of the section.

These words reflect that the provision addresses a specific problem, namely, that of stopping seemingly unfair practices from taking place while the Commission determines their lawfulness. And the appearance of the words "permanent injunction" (as a proviso) suggests that those words are directly related to a previously issued preliminary injunction. They might also be read, for example, as granting authority for the Commission to go one step beyond the provisional and ("in proper cases") dispense with administrative proceedings to seek what the words literally say (namely, an injunction). But to read those words as allowing what they do not say, namely, as allowing the Commission to dispense with administrative proceedings to obtain monetary relief as well, is to read the words as going well beyond the provision's subject matter. In light of the historical importance of administrative proceedings, that reading would allow a small statutory tail to wag a very large dog.

[4] Further, the structure of the Act beyond § 13(b) confirms this conclusion. Congress in § 5(l) and § 19 gave district courts the authority to impose limited monetary penalties and to award monetary relief in cases where the Commission has *issued cease and desist orders*, *i.e.*, where the Commission has engaged in administrative proceedings. Since in these provisions Congress explicitly provided for "other and further equitable relief," 15 U.S.C. § 45(l), and for the "refund of money or return of property," § 57b(b), it likely did not intend for § 13(b)'s more cabined "permanent injunction" language to have similarly broad scope.

[5] More than that, the latter provision (§ 19) comes with certain important limitations that are absent in § 13(b). As relevant here, § 19 applies only where the Commission begins its § 5 process within three years of the underlying violation and seeks monetary relief within one year of any resulting final cease and desist order. And it applies only where "a reasonable man would have known under the circumstances" that the conduct at issue was "dishonest or fraudulent." . . .

[6] It is highly unlikely that Congress would have enacted provisions expressly authorizing *conditioned* and *limited* monetary relief if the Act, via § 13(b), had already implicitly allowed the Commission to obtain that same monetary relief and more without satisfying those conditions and limitations. Nor is it likely that Congress, without mentioning the matter, would have granted the Commission authority so readily to circumvent its traditional § 5 administrative proceedings.

[7] At the same time, to read § 13(b) to mean what it says, as authorizing injunctive but not monetary relief, produces a coherent enforcement scheme: The Commission may obtain monetary relief by first invoking its administrative procedures and then § 19's redress provisions (which include limitations). And the Commission may use § 13(b) to obtain injunctive relief while administrative proceedings are foreseen or in progress, or when it seeks only injunctive relief. By contrast, the Commission's broad reading would allow it to use § 13(b) as a substitute for § 5 and § 19. For the reasons we have just stated, that could not have been Congress' intent. Cf. Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 468 (2001) ("Congress does not hide elephants in mouseholes").

4. Competition Rulemaking Authority

In addition to its power to sue violators of Section 5 and conduct market studies under Section 6(b), the FTC has at least some power to undertake some rulemaking.

The FTC's principal rulemaking powers are aimed at consumer protection. The most important source of such authority is the Magnuson-Moss Act, codified at 15 U.S.C. § 57a. This is reserved for consumer-protection matters,[999] and requires the FTC to follow a lengthy process (including the publication of an advance notice of proposed rulemaking, followed by a notice of proposed rulemaking, followed by informal hearings, and perhaps judicial review) before enforcing the rule.[1000] The FTC also has some narrow authorities to make particular kinds of rules, subject to the Administrative Procedure Act, created by individual federal statutes over the years.[1001]

[999] 15 U.S.C. § 57a(a).

[1000] *See generally*, *e.g.*, Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 Geo. Wash. L. Rev. 1979 (2015); Kurt Walters, *Reassessing the Mythology of Magnuson-Moss: A Call to Revive Section 18 Rulemaking at the FTC*, 16 Harv. L. & Pol'y Rev. 519 (2022).

[1001] *See*, *e.g.*, 15 U.S.C. § 68d (wool labeling).

But some have discerned a general competition rulemaking power in the FTC Act as well. In particular, the FTC has power under Section 6(g) of the FTC Act, 15 U.S.C. § 46(g), to "[f]rom time to time classify corporations and (except as provided [in the Magnuson-Moss Act]) to make rules and regulations for the purpose of carrying out the provisions of this subchapter." The "subchapter" in question—15 U.S.C. §§ 41–58—includes among other things Section 5 of the FTC Act, 15 U.S.C. § 45.

The meaning of this Section 6(g) language is deeply controversial. Some commentators suggest that this statutory language adds up to a broad rulemaking power to "carry[] out" the FTC's function to prohibit unfair methods of competition—that is, a general power to engage in substantive competition rulemaking—and they cite a 1973 D.C. Circuit opinion, *National Petroleum Refiners Association*, which dealt with a narrow rule grounded in both competition and consumer-protection authority, in support of this reading.[1002] Other commentators argue that this language is a slender reed on which to hang a broad competition rulemaking power, and disagree that *National Petroleum Refiners Association* remains a good guide to modern administrative law.[1003] To muddy the waters a little further: there appears to be exactly one example of pure UMC rulemaking in the FTC's history between 1914 and 2022. The "Tailored Clothing Rule" was promulgated in 1967 to clarify the application of the Robinson-Patman Act (which, as you may recall, prohibits certain forms of price discrimination) to promotional allowances in the tailored clothing industry: that rule was never enforced and was repealed in 1994.[1004]

The FTC recently tested the limits of its powers by launching a rulemaking effort aimed at the prohibition of labor non-compete agreements.[1005] The Chair's Statement accompanying the Notice of Proposed Rule-Making took a firm view on *National Petroleum Refiners Association*, calling it "the only case that directly addresses the FTC's Section 6(g) rulemaking authority" and representative of the "current state of the law."[1006] The FTC's rule was issued in April 2024 and promptly challenged in federal court. The U.S. District Court for the Northern District of Texas held that the FTC lacked the relevant statutory authorization and set the rule aside; the FTC subsequently abandoned its appeal and the rulemaking.[1007] The following materials tell the story: the *National Petroleum Refiners Association* case; some highlights from recent Supreme Court law; and the noncompete decision itself.

National Petroleum Refiners Association v. FTC

482 F.2d 672 (D.C. Cir. 1973)

Judge Skelly Wright.

[1] [A]t issue in the District Court was the [FTC's] rule declaring that failure to post octane rating numbers on gasoline pumps at service stations was an unfair method of competition and an unfair or deceptive act or practice. {*Eds.: the court explained in a footnote that a violation would involve a "fail[ure] to disclose clearly and conspicuously in a permanent manner on the pumps the minimum octane number or numbers of the motor gasoline being dispensed."*} The plaintiffs in the District Court, appellees here, are two trade associations and 34 gasoline refining companies. . . . [T]he District Court disposed of the case solely on the question of the Commission's statutory authority to issue such rules. That is the only question presented for our consideration on appeal. [. . .]

[2] [T]he [FTC] Act includes a provision which specifically provides for rule-making by the Commission to implement its adjudicatory functions under Section 5 of the Act. Section 6(g) of the Act, 15 U.S.C. § 46(g), states

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1002 *See*, *e.g.*, Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357 (2020).

1003 *See*, *e.g.*, Maureen K. Ohlhausen & Ben Rossen, *Dead End Road: National Petroleum Refiners Association and FTC "Unfair Methods of Competition" Rulemaking*, in Daniel A. Crane (ed.), RULEMAKING AUTHORITY OF THE FEDERAL TRADE COMMISSION (2022) ("[T]here is little question that [*National Petroleum Refiners Association*] reads today like an anachronism.").

1004 *See* 59 Fed. Reg. 8,527, 8,528 (Feb. 23, 1994) (Federal Register notice recounting nature of rule, history, and reason for rescission, and noting that "it does not appear that the agency has ever relied on the Rule in a law enforcement matter, or that any litigant has ever made use of it in a reported private action").

1005 FTC, Press Release, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023).

1006 Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding the Notice of Proposed Rulemaking to Restrict Employers' Use of Noncompete Clauses, FTC File No. P201200 (Jan. 5, 2023) 4 n.12.

1007 FTC, Press Release, Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule (Sept. 5, 2025).

that the Commission may "[f]rom time to time . . . classify corporations and . . . make rules and regulations for the purpose of carrying out the provisions of [relevant sections] of this title."

[3] According to appellees, however, this rule-making power is limited to specifying the details of the Commission's nonadjudicatory, investigative and informative functions spelled out in the other provisions of Section 6 and should not be read to encompass substantive rulemaking in implementation of Section 5 adjudications. We disagree for the simple reason that Section 6(g) clearly states that the Commission "may" make rules and regulations for the purpose of carrying out the provisions of Section 5 and it has been so applied. For example, the Commission has issued rules specifying in greater detail than the statute the mode of Commission procedure under Section 5 in matters involving service of process, requirements as to the filing of answers, and other litigation details necessarily involved in the Commission's work of prosecuting its complaints under Section 5. Such rulemaking . . . has been upheld. [. . .]

[4] [I]t is at least arguable that [previous] cases go no farther than to justify utilizing Section 6(g) to promulgate procedural, as opposed to substantive, rules for administration of the Section 5 adjudication and enforcement powers. But we see no reason to import such a restriction on the "rules and regulations" permitted by Section 6(g). On the contrary, as we shall see, judicial precedents concerning rule-making by other agencies and the background and purpose of the Federal Trade Commission Act lead us liberally to construe the term "rules and regulations." The substantive rule here unquestionably implements the statutory plan. Section 5 adjudications—trial type proceedings—will still be necessary to obtain cease and desist orders against offenders, but Section 5 enforcement through adjudication will be expedited, simplified, and thus "carried out" by use of this substantive rule. And the overt language of both Section 5 and Section 6, read together, supports its use in Section 5 proceedings.

[5] Our belief that "rules and regulations" in Section 6(g) should be construed to permit the Commission to promulgate binding substantive rules as well as rules of procedure is reinforced by the construction courts have given similar provisions in the authorizing statutes of other administrative agencies. There is, of course, no doubt that the approved practices of agencies with similar statutory provisions is a relevant factor in arriving at a sound interpretation of the Federal Trade Commission's power here. [. . .]

[6] The need to interpret liberally broad grants of rule-making authority like the one we construe here has been emphasized time and again by the Supreme Court. [. . .]

[7] [W]hile we believe the historical evidence is indecisive of the question before us, we are convinced that the broad, undisputed policies which clearly motivated the framers of the Federal Trade Commission Act of 1914 would indeed be furthered by our view as to the proper scope of the Commission's rule-making authority. The multiplicity of differing plans proposed for a trade commission prior to 1914 and during the intensive debates in 1914 immediately preceding enactment of the Trade Commission Act demonstrates, of course, that proponents of the agency were hardly agreed on exactly what powers the agency should assume. But the variety of plans and the proponents of the agency all unquestionably shared deep objections to the existing structure of judicial monopolization of cases involving unfair, anticompetitive business practices. Those who believed from the start in a commission with independent enforcement powers, as the Commission was finally given in the 1914 legislation, and those who believed the Commission should have lesser powers, agreed that entrusting enforcement of congressional policy to prevent undue incursions on competition exclusively to the courts was a serious mistake. The courts were said to lack sufficient expertise in matters of economic complexity, their decisions were said to be wanting in the clarity planners of complicated business transactions and innovations required, and finally and most importantly, the courts lacked both the resources and the skill to proceed with speed and expedition in the trial and disposition of complicated cases involving economic questions. This concern over judicial delay, inefficiency and uncertainty was echoed time and again throughout the 1914 debates over the form a commission would take.

[8] In determining the legislative intent, our duty is to favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where, as here, that interpretation is consistent with the plain language of the statute. In the absence of an unmistakable directive, we cannot construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate. . . . [The Supreme] Court has

repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred. This view was reiterated just a few weeks ago by Mr. Chief Justice Burger, writing for the Court:

> Where the empowering provision of a statute states simply that the agency may make such rules and regulations as may be necessary to carry out the provisions of this Act, we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is reasonably related to the purposes of the enabling legislation.

Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973). In short, where a statute is said to be susceptible of more than one meaning, we must not only consult its language; we must also relate the interpretation we provide to the felt and openly articulated concerns motivating the law's framers. In this way we may be sure we are construing the statute rather than constructing a new one. [. . .]

[9] There is little disagreement that the Commission will be able to proceed more expeditiously, give greater certainty to businesses subject to the Act, and deploy its internal resources more efficiently with a mixed system of rule-making and adjudication than with adjudication alone. With the issues in Section 5 proceedings reduced by the existence of a rule delineating what is a violation of the statute or what presumptions the Commission proposes to rely upon, proceedings will be speeded up. For example, in an adjudication proceeding based on a violation of the octane rating rule at issue here, the central question to be decided will be whether or not pumps owned by a given refiner are properly marked. . . . Furthermore, rules, as contrasted with the holdings reached by case-by-case adjudication, are more specific as to their scope, and industry compliance is more likely simply because each company is on clearer notice whether or not specific rules apply to it. [. . .]

[10] Despite the import of Section 6(g)'s plain language, the overwhelming judicial support given to expansive agency readings of statutory rule-making authorizations that are not flatly inconsistent with other statutory provisions, and the incontestable relationship between the broad policies behind the 1914 Act and the utility of substantive rule-making power, appellees argue that substantive rule-making represents a sufficiently important innovation in Commission practice for us to balk at authorizing its use on the basis of an arguably ambiguous statute in the absence of very firm indications of affirmative and specific legislative intent. Indeed, courts have assumed such a stance toward novel assertions of agency powers. . . .

[11] . . . [But the] rule here does not bypass the Commission's statute-based cease-and-desist proceedings. It merely supplements them. Moreover, in light of the concern evident in the legislative history that the Commission give attention to the special circumstances of individual businesses in proceeding against them, the Commission should administer any rules it might promulgate in much the same way that courts have ordinarily required other agencies to administer rules that operate to modify a regulated party's rights to a full hearing. That is, some opportunity must be given for a defendant in a Section 5 proceeding to demonstrate that the special circumstances of his case warrant waiving the rule's applicability, as where the rationale of the rule does not appear to apply to his own situation or a compelling case of hardship can be made out. [. . .]

[12] Any fears that the agency could successfully use rule-making power as a means of oppressive or unreasonable regulation seem exaggerated in view of courts' general practice in reviewing rules to scrutinize their statement of basis and purpose to see whether the major issues of policy pro and con raised in the submissions to the agency were given sufficient consideration. The Commission is hardly free to write its own law of consumer protection and antitrust since the statutory standard which the rules may define with greater particularity is a legal standard. Although the Commission's conclusions as to the standard's reach are ordinarily shown deference, the standard must get its final meaning from judicial construction.

[13] . . . [O]ur task in determining the meaning of this legislation is the usual one of starting from the areas where the legislative intent is readily discernible, and projecting to fair and reasonable corollaries of that intent for the specific issue before us. It is as clear as it is unlimited: "The Commission shall also have power . . . to make rules and regulations for the purpose of carrying out the provisions of Section 5." Ambiguous legislative history cannot change the express legislative intent. The Commission is using rule-making to carry out what the Congress agreed was among its central purposes: expedited administrative enforcement of the national policy against monopolies and unfair business practices. Under the circumstances, since Section 6(g) plainly authorizes rule-making and

nothing in the statute or in its legislative history precludes its use for this purpose, the action of the Commission must be upheld.

[14] Our conclusion as to the scope of Section 6(g) is not disturbed by the fact that the agency itself did not assert the power to promulgate substantive rules until 1962 and indeed indicated intermittently before that time that it lacked such power. As the Supreme Court put it in United States v. Morton Salt Co., 338 U.S. 632 (1950), a case which involved what was thought to be a novel assertion of the FTC's statutory authority:

> The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescripted by an unchallenged exercise. We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns. We find no basis for holding that any power ever granted to the Trade Commission has been forfeited by [nonuse]. [. . .]

[15] A more troubling obstacle to the Commission's position here is the argument that Congress was made fully aware of [a] formerly restrictive view of the Commission's power and passed a series of laws granting limited substantive rule-making authority to the Commission in discrete areas allegedly on the premise that the 1914 [legislative] debate withheld such authority. Where there has been evidence of congressional knowledge of and acquiescence in a long-standing agency construction of its own powers, courts have occasionally concluded that the agency construction had received a *de facto* ratification by Congress.

[16] But *de facto* ratification through acquiescence in an administrative construction is not lightly attributed. The argument before us is not that Congress, by a combination of its knowledge of the agency construction and its inaction . . . could be said to have accepted the construction. Even in these cases it can be argued quite plausibly that imputing ratification in this fashion fails to take into account significant practical aspects of the legislative process: those legislators actually aware of the construction in question may not have been so concerned as to raise it to the attention of most members, and even in the event some legislators were deeply troubled by the construction, the press of other business was such as to keep the question on the "back burner." Here the situation is different. The view that the Commission lacked substantive rule-making power has been clearly brought to the attention of Congress and, rather than simply failing to act on the question, Congress, in expanding the agency's powers in several discrete areas of marketing regulation, affirmatively enacted limited grants of substantive rule-making authority in the Wool Products Act of 1939, the Fur Products Labeling Act of 1951, the Flammable Fabrics Act of 1953 as amended in 1967, the Textile Fiber Products Identification Act of 1958, and the Fair Packaging and Labeling Act of 1967. Thus it is argued that Congress would not have granted the agency such powers unless it had felt that otherwise the agency lacked rule-making authority.

[17] Conceding the greater force of this argument than one premised on congressional inaction, we believe it must not be accepted blindly. In such circumstances, it is equally possible that Congress granted the power out of uncertainty, understandable caution, and a desire to avoid litigation. While this argument, like any theory requiring us to draw inferences from congressional action or inaction, may be speculative, we believe it cannot be ignored here. For there is ample evidence that, while some of the limited rule-making legislation may well have been influenced by the belief that the 1914 Act did not grant the Commission substantive rule-making power, at least during the passage of the Packaging and Labeling Act of 1967, this assumption was not accepted and was thought by many congressmen to be an open question, despite the protestations of the Commission's chairman that the agency was powerless under the 1914 Act. . . . [I]mputing congressional ratification to a disputed administrative construction of its powers is, in the words of the Supreme Court, shaky business. Where there is solid reason, as there plainly is here, to believe that Congress, in fact, has not wholeheartedly accepted the agency's viewpoint and instead enacted legislation out of caution and to eliminate the kind of disputes that invariably attend statutory ambiguity, we believe that relying on the *de facto* ratification argument is unwise. In such circumstances, we must perform our customary task of coming to an independent judgment as to the statute's meaning, confident that if Congress believes that its creature, the Commission, thus exercises too much power, it will repeal the grant.

[18] We hold that under the terms of its governing statute, 15 U.S.C. § 41 et seq., and under Section 6(g), 15 U.S.C. § 46(g), in particular, the Federal Trade Commission is authorized to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent.

The Supreme Court and Administrative Agency Power

Alabama Ass'n of Realtors v. Dept. of Health and Human Servs., 594 U.S. 758 (2021); West Virginia v. EPA, 597 U.S. 697 (2022); Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024)

The approach outlined in *National Petroleum Refiners Association* is significantly out of step with modern judicial practice. The Supreme Court's decisions in *Alabama Association of Realtors*, *West Virginia*, and *Loper Bright* exemplify current skepticism in the federal judiciary about broad (and particularly novel) assertions of agency power—even when statutory text can be read, on its face, to confer considerable power.

In *Alabama Association of Realtors*, the Centers for Disease Control and Prevention ("CDC") had enacted an eviction moratorium in reliance on a broad delegated rulemaking power. The statutory power—§ 361(a) of the Public Health Service Act—empowered the Surgeon General, with the approval of the Secretary of Health and Human Services, to: "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession." The next sentence continued: "For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary."

The Supreme Court struck down the eviction moratorium for want of authority.[1008] First, the Court pointed out, the second sentence of § 361(a) "informs" the first, by illustrating the kinds of measures that might be necessary to respond to disease within the meaning of the provision. An eviction moratorium "relates to interstate infection far more indirectly" than do the various activities in the second, making it a "stretch" to imagine that the first sentence contained such a power.

But even if the text were more ambiguous, the Court held, "the sheer scope of the CDC's claimed authority under § 361(a) would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance. That is exactly the kind of power that the CDC claims here. At least 80% of the country, including between 6 and 17 million tenants at risk of eviction, falls within the moratorium." In addition, the eviction moratorium intruded into "an area that is the particular domain of state law: the landlord-tenant relationship. Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."

More generally, reading § 361(a) to give the CDC the power to block evictions "would give the CDC a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside the CDC's reach, and the Government has identified no limit in § 361(a) beyond the requirement that the CDC deem a measure necessary. Could the CDC, for example, mandate free grocery delivery to the homes of the sick or vulnerable? Require manufacturers to provide free computers to enable people to work from home? Order telecommunications companies to provide free high-speed Internet service to facilitate remote work?" Such an "unprecedented" reading of § 361(a) would dramatically break with the historical use and understanding of the provision. Indeed, "[s]ince [its] enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium."

The following year, in 2022, the Court decided West Virginia v. EPA, holding among other things that "something more than a merely plausible textual basis for . . . agency action is necessary" to justify assertions of power in ways that would amount to an "extraordinary grant of regulatory authority" or work a "radical or fundamental change" in a statutory scheme. The Court would henceforth presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies": in such "major question" cases, "clear congressional authorization for the power [the agency] claims" would be required. In that case, the Court applied the major-

[1008] *See also* West Virginia v. EPA, 597 U.S. 697, 721–24 (2022) (holding that for "major" policy decisions, "something more than a merely plausible textual basis for the agency action is necessary," and "[t]he agency instead must point to 'clear congressional authorization' for the power it claims").

questions doctrine to conclude that the EPA lacked power, under the Clean Air Act, to cap CO_2 emissions pursuant to a "generation shifting" plan designed to spur a transition to cleaner energy sources.

And in 2024, the Court decided Loper Bright Enterprises v. Raimondo. That case had its origin in a challenge to a rule promulgated by the National Marine Fisheries Service ("NMFS") requiring that certain fishing vessels must carry a Government-certified observer on certain trips. A number of family fishing businesses challenged the rule on the ground that it exceeded the rulemaking power given to the NMFS in the relevant statute. The lower federal courts considered the claim through the lens of "*Chevron* deference": an administrative law rule articulated in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), that required some deference by courts to permissible agency interpretations of certain statutory ambiguities. But the Court emphatically repudiated *Chevron*. Writing for the Court, Chief Justice Roberts declared that "*Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do." Courts were always required to select the *best* interpretation of a statute: "[i]n the business of statutory interpretation, if [an interpretation] is not the best, it is not permissible." He added that "abdication in favor of the agency" was perhaps "least appropriate" in cases in which a statutory ambiguity was "about the scope of an agency's own power." The Court overruled *Chevron*, and remanded for the lower courts to interpret the statute without deference.

These cases exemplify a much less charitable approach to agency discretion, even when statutory language is ambiguous. Do they imply the end of *National Petroleum Refiners Association*?

CASENOTE: Ryan, LLC v. FTC

746 F. Supp. 3d 369 (N.D. Tex. 2024)

On April 23, 2024, as noted above, the FTC adopted a final rule that purported to prohibit many labor non-compete agreements and conditions. On the same day, Ryan LLC—a tax services firm—sued for injunctive and declaratory relief, arguing that the rule exceeded the FTC's statutory powers, violated the Constitution, and was arbitrary and capricious under the Administrative Procedure Act.

In August of that year, the U.S. District Court for the Northern District of Texas held that the non-compete rule exceeded the FTC's statutory authority and was arbitrary and capricious. With respect to the statutory question, the court held that Section 6(g) of the FTC Act was nothing more than a "housekeeping statute" that permitted procedural, not substantive, rulemaking. This, the court held, was clear in light of (among other things): (1) the lack of penalties in the FTC Act for violating Section 6(g) rules; (2) the textual priority of the non-substantive phrase "classify[ing] corporations" ahead of the key language in Section 6(g); (3) the fact that Section 6(g) appears "seventh in a list of twelve almost entirely investigative powers"; (4) the fact that the FTC itself disclaimed substantive rulemaking power for the first 48 years of its existence; and (5) the existence of Congressional amendments in the 1960s that would have been superfluous if the FTC had already enjoyed substantive rulemaking power.

And with respect to the arbitrary-and-capricious standard, the court held that the record on which the agency purported to rely did not support the rule. The FTC had considered "a handful of studies that examined the economic effects of various state policies," none of which approached the "categorical" ban that the FTC adopted. The "lack of evidence as to why [the FTC] chose to impose such a sweeping prohibition—that prohibits entering or enforcing virtually all non-competes—instead of targeting specific, harmful non-competes, renders the Rule arbitrary and capricious." The FTC had compounded the error by failing to analyze less extreme alternatives.

As a result, the court declared the rule unlawful and set it aside. Just over a year later, the FTC abandoned its appeal of the decision in *Ryan*, and acceded to the vacatur of the non-compete rule.[1009]

[1009] The FTC has pursued case-specific enforcement efforts, however. *See*, *e.g.*, FTC, Press Release, FTC Takes Action Against Noncompete Agreements, Securing Protections for Workers (Apr. 15, 2026).

NOTES

1) How, if at all, do you think *Trump v. Slaughter* will change the working of the FTC? Does the majority's logic imply the invalidity of the rule that no more than three Commissioners can be of the same political party?
2) When Congress created the FTC, why do you think it left DOJ with power to enforce the antitrust laws after doing so? Do you think the logic of that choice survives after *Trump v. Slaughter*?
3) What practices should constitute "unfair methods of competition" that are not violations of the antitrust laws?
4) In what respects is the 2022 Section 5 policy statement different from the 2015 one? In what respects is it different from the rules imposed by the antitrust statutes?
5) The market-study power allows the FTC to require compulsory production of documents and information from companies.
    a. What three market studies would you undertake and why? Specify the recipients, the nature of the specifications in the studies, and the payoff of the study for antitrust enforcement and policy.
    b. The market study power is limited in practice by the OMB requirement for burdensome additional process (under the Paperwork Reduction Act) for studies with more than nine respondents. What effect do you think this has in practice? Is it a good rule?[1010]
6) Does it add value to have antitrust and consumer protection (from "unfair" and "deceptive" acts and practices) under the same roof at the FTC?
7) Imagine that the FTC was given plenary rulemaking power by Congress to enact rules to prevent unfair methods of competition, defined as violations of the antitrust laws. (In other words, assume a broad rulemaking power but a narrow definition of UMC under Section 5.) What rules would you write and why?
8) When should the FTC litigate in Part 3 rather than in district court? Should Part 3 exist at all?
9) If Congress wanted to give the FTC *some* power to enact substantive competition rules, what would you suggest?
10) What are the best arguments that *National Petroleum Refiners Association* is, and is not, good law?

C. The Department of Justice

The Department of Justice was the nation's first antitrust enforcer, and is the only federal criminal antitrust authority.

1. Structure and Organization

The Antitrust Division of the Department of Justice is led by an Assistant Attorney General ("AAG") for the Antitrust Division, and managed by a front office that also includes Deputy Assistant Attorneys General and a number of Counsel. The AAG reports to the Attorney General and serves at the pleasure of the President. The Division consists (among other things) of the following sub-components:

- A Civil Enforcement Program including the following: an Anti-Monopoly and Collusion Enforcement Section; a Defense, Industrials, and Aerospace Section; a Financial Services, Fintech, and Banking Section; a Healthcare and Consumer Products Section; a Media, Entertainment, and Communications Section; a San Francisco Office; a Technology and Digital Platforms Section; and a Transportation, Energy, and Agriculture Section;
- A Criminal Enforcement Program including Offices in Chicago, New York, and San Francisco, as well as a Washington Criminal Section;
- a Procurement Collusion Strike Force to tackle bid-rigging and other crimes affecting government procurement;
- an Expert Analysis Group; and

[1010] *See*, *e.g.*, FTC, PATENT ASSERTION ENTITY ACTIVITY: AN FTC STUDY (Oct. 2016) 37 (noting that the FTC began the process of obtaining authorization in September 2013, eventually receiving approval in August 2014). *See generally*, *e.g.*, *Methodologies for Conducting Market Studies—Note by the United States*, OECD Working Paper DAF/COMP/WP3/WD(2017)19 (May 26, 2017) (detailing FTC's approach to market studies under 6(b), including the OMB requirements).

- various other offices handling executive, policy, appellate, international, and other matters.

The Division works closely with other components of the Department of Justice, including the Office of the Solicitor General, which leads and coordinates work on Supreme Court matters and advises on some appeals.[1011]

2. Powers and Functions

Just like the FTC, the DOJ's civil investigations commonly begin with an informal or voluntary phase, featuring interviews and productions of documents and information, which may progress to the issue of compulsory process—CIDs—with the approval of the Assistant Attorney General.[1012] The Division Manual normally sets out guidance on DOJ's conduct of civil antitrust investigations; at the time of writing (Summer 2026) it is under revision.[1013]

DOJ enforces the Sherman Act and the Clayton Act directly. Pursuant to 15 U.S.C. § 25, DOJ may file suit in district court "to prevent and restrain" antitrust violations. DOJ may also sue under the antitrust laws to recover treble damages for injuries suffered by the United States (*e.g.*, when the federal government is itself an injured customer or supplier).[1014] As a result, DOJ avoids the complexities and controversies raised by the FTC's unique structure, and need not struggle with the peculiarities of Section 13(b) of the FTC Act. Like the FTC, DOJ issues guidance to consumers and businesses, and files amicus briefs and statements of interest in antitrust cases.

The Expediting Act

From 1903 to 1974, a statute called the Expediting Act provided for direct appeal from a district court to the Supreme Court—bypassing the courts of appeal—in civil antitrust cases brought by DOJ. The statute aimed to empower the Court to build a coherent national antitrust jurisprudence.[1015] But it came with real costs. In *Brown Shoe*, for example, Justice Clark complained that the Act "deprives the parties of an intermediate appeal and this Court of the benefit of consideration by a Court of Appeals,"[1016] while Justice Harlan grumbled that there was "much to be said in favor of relieving this Court of the often arduous task of searching through voluminous trial testimony for any exhibits to determine whether a single district judge's findings of fact are supportable."[1017] In 1974, Congress amended the Act, allowing direct appeal only if the district court certifies that "immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice."[1018] President Ford's signing statement noted that the change would "halt the practice of clogging the Supreme Court docket by taking all antitrust appeals directly to that tribunal, thus denying it the wisdom and advice of the U.S. Circuit Courts of Appeals."[1019] Perhaps coincidentally, the Court's last substantive decision on the merits of a Section 7 merger case was in 1975.[1020]

In some cases, DOJ is the sole federal antitrust enforcer able to take action, including because FTC jurisdiction is subject to certain carveouts, as noted above.[1021] In addition to its standard enforcement remit, DOJ often plays a role in certain sectoral-regulation activities—such as the Surface Transportation Board's review of certain railroad mergers and the Department of Transportation's review of applications for antitrust immunity for certain

[1011] The FTC generally has independent litigating authority (*i.e.*, independent of DOJ), including some limited independence to litigate in the Supreme Court. *See* 15 U.S.C. § 56.

[1012] 15 U.S.C. § 1312.

[1013] *See* https://www.justice.gov/atr/division-manual.

[1014] 15 U.S.C. § 15a.

[1015] Robert C. Bonges, *The Antitrust Expediting Act—A Critical Reappraisal*, 63 Mich. L. Rev. 1240, 1242 (1965); W. Wallace Kirkpatrick, *Antitrust to the Supreme Court: The Expediting Act*, 37 Geo. Wash. L. Rev. 746, 748 (1969).

[1016] Brown Shoe Co. v. United States, 370 U.S. 294, 355 (1962) (Clark, J., concurring).

[1017] *Id.* at 364 (Harlan, J., concurring in part and dissenting in part).

[1018] 15 U.S.C. § 29(b).

[1019] Statement by the President re: S.782 Antitrust Procedures and Penalties Act (Dec. 21, 1974), https://www.fordlibrarymuseum.gov/library/document/0055/1668810.pdf.

[1020] United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86 (1975).

[1021] *See supra* notes 981–982 and accompanying text.

agreements relating to international air transportation—although these fall beyond the scope of this chapter and this book.[1022]

DOJ faces some unique constraints as a civil enforcer. Unlike the FTC (which simply makes proposed consent orders available for public comment before they are finally entered by the Commission), DOJ is subject to the Tunney Act, which provides for federal court review of DOJ consent decrees to determine that the settlement is in the public interest.[1023] As part of that process, DOJ files with the court a "Competitive Impact Statement" explaining why the proposed remedy resolves the relevant concerns, and the court reviews the settlement and evidence of suitability. The Tunney Act was enacted as a response to Congressional concern regarding the Nixon Administration's interference with a DOJ investigation of ITT.[1024]

Tunney Act review has sometimes led to changes in relief. Most famously, following the district court's Tunney Act review of the blockbuster consent decree breaking up AT&T in 1982, Judge Greene required additional provisions to be added to address his concerns.[1025] But there is room for some disagreement about the scope of review and the extent to which DOJ should enjoy deference.[1026] The next extract, taken from one such statement, states DOJ's view of the purpose and scope of Tunney Act review; the note that follows it sets out the perspective from two courts.

Competitive Impact Statement, United States v. Intuit Inc.

No. 1:20-cv-3441 (D.D.C. filed Dec. 10, 2020)

[1] The Clayton Act, as amended by the [Antitrust Procedures and Penalties Act], requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to broad discretion to settle with the defendant within the reaches of the public interest.

[2] . . . [U]nder the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not make de novo determination of facts and issues. Instead, the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The

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1022 *See*, *e.g.*, 49 U.S.C. § 11325(b)(1) (right of Attorney General to intervene in certain proceedings before the Surface Transportation Board); 49 U.S.C. § 41309(c)(1) (Attorney General notice and opportunity to comment on relevant applications with the Department of Transportation).

1023 15 U.S.C. § 16.

1024 *See* George Lardner Jr., *On Tape, Nixon Outlines 1971 "Deal" to Settle Antitrust Case Against ITT*, WASHINGTON POST (Jan. 4, 1997).

1025 United States v. AT&T Co., 552 F. Supp. 131 (D.D.C. 1982). *See also* Memorandum Order, United States v. Comcast Corp., No. 1:11-cv-106 (D.D.C. filed Sept. 1, 2011) (ordering additional relief pursuant to consent decree in light of hearing).

1026 For a thoughtful overview of the issues, *see*, *e.g.*, Alexandra P. Clark, *Leaving Judicial Review with the Judiciary: The Misplaced Role of Agency Deference in Tunney Act Public Interest Review*, 78 Wash. & Lee L. Rev. 925 (2022). *See also*, *e.g.*, Darren Bush, *The Death of the Tunney Act at the Hands of an Activist D.C. Circuit*, 63 Antitrust Bull. 113 (2018).

court should bear in mind the flexibility of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest. More demanding requirements would have enormous practical consequences for the government's ability to negotiate future settlements, contrary to congressional intent. The Tunney Act was not intended to create a disincentive to the use of the consent decree.

[3] The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. The ultimate question is whether the remedies obtained by the Final Judgment are so inconsonant with the allegations charged as to fall outside of the reaches of the public interest.

[4] Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to construct its own hypothetical case and then evaluate the decree against that case. Because the court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place, it follows that the court is only authorized to review the decree itself, and not to effectively redraft the complaint to inquire into other matters that the United States did not pursue.

CASENOTE: Tunney Act in Action: *CVS / Aetna* and *HPE / Juniper*

United States v. CVS Health Corp., 407 F. Supp. 3d 45 (D.D.C. 2019); United States v. Hewlett Packard Enterprise Co., No. 25-CV-00951, 2025 WL 3454834 (N.D. Cal. Dec. 1, 2025)

The administration of the Tunney Act is usually a fairly routine affair. But from time to time this obscure statute is the focus of intense attention when a DOJ antitrust settlement proves controversial, as these two cases demonstrate.

CVS / Aetna. The full reach of the Tunney Act was demonstrated in 2019 when Judge Leon of the U.S. District Court for the District of Columbia undertook an extensive review—effectively, a mini-trial—of the proposed resolution of the CVS / Aetna merger. His opinion contains an extended discussion of the role and nature of Tunney Act review, and offers an interesting complement to DOJ's perspective above.

The court began by underscoring the importance of the Tunney Act: "Industry players, consumer groups, and state regulatory bodies have all raised concerns about CVS's acquisition of Aetna. The merger combines two healthcare giants. Its effects, for better or worse, will be felt by millions of consumers. As I explained to the parties near the outset of this case, with so much at stake, the congressionally mandated public interest inquiry must be thorough. Indeed, if the Tunney Act is to mean anything, it surely must mean that no court should rubberstamp a consent decree approving the merger of one of the largest companies in the United States and the nation's third-largest health-insurance company, simply because the Government requests it!"

The court then outlined the government's obligations during the Tunney Act process: (1) the government must "publish its proposed final judgment and a competitive impact statement in the Federal Register at least sixty days before the effective date of the proposed judgment"; (2) during this 60-day period, the government "must receive and consider written comments about its proposed judgment"; (3) once the period ends, it must "publish a response to those comments in the Federal Register and file the same response with the Court," and "publish the proposed final judgment and competitive impact statement in a newspaper of general circulation in the district where the case is pending and to furnish the competitive impact statement to members of the public upon request."

In addition to these steps, the court explained, the Tunney Act requires the court to "determine that the entry of such judgment is in the public interest." In this case, the court was far from satisfied with the government's written responses to the comments received. The response was "rife with conclusory assertions that merely reiterate the Government's confidence in its proposed remedy, but shed little light on the reasons for that confidence. Indeed, the Government's perfunctory response to the public comments was particularly disappointing in light of the volume and quality of the comments to which it was responding!"

As a result, the court decided to take an unusual step. "Rather than risk an uninformed public interest determination that relied too heavily on responses like these from the Government, I decided to hold hearings on the Motion to Enter the Proposed Final Judgment. The hearings were designed to assist the Court in evaluating the public record. The parties and the amici were given the opportunity to propose up to three witnesses who could be called to testify. The Court alone would decide which of those witnesses it believed would be most helpful to its analysis and how much time would be allotted to each witness. In the end, the amici were allowed to call a combined total of three witnesses who were permitted to testify for a total of four hours. CVS and the Government were allowed the same combined total of witnesses and the same combined total number of hours of testimony. To reinforce my repeated emphasis that the hearings were not a trial, cross-examination was not permitted. Only the Court was allowed to ask follow-up questions during the direct examination of each witness."

The court's public-interest determination would be guided by the language of the Tunney Act, 15 U.S.C. § 16(e)(1), which required the court to consider: "(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint." In exercising this function, Judge Leon allowed, a court cannot "force the government to make a claim. The Government, alone, chooses which causes of action to allege in its complaint." But he emphasized that this would not mean the court would be blinkered: "[W]hile the Government is certainly entitled to great deference—if not a presumption of accuracy—when it contends that a proposed final judgment is in the public interest, evidence by third parties that persuasively demonstrates actual or likely harm to the public interest will overcome that presumption and the proposed final judgment will be denied."

In light of the hearing, the court concluded that the government's position had been vindicated. The variety of concerns raised by amici had "shed a healthy light on this merger," but had not "persuasively demonstrate[ed] that the concerns currently exist or are likely to develop." Indeed, "the markets at issue are not only very competitive today, but are likely to remain so post-merger." Accordingly, there was no basis for rebuttal of the presumption in favor of the government's position, and the government's motion to enter the final judgment would be granted.

HPE / Juniper. Several years later, Judge Pitts of the U.S. District Court for the Northern District of California fielded an unusual request from a coalition of state Attorneys General to intervene in a Tunney Act proceeding. DOJ had undertaken a merger review of a wireless-technology deal—the acquisition by Hewlett Packard Enterprise of Juniper Networks, another market participant—and had negotiated a settlement that included a divestiture and a requirement to license some source code.

As the court noted, "[d]uring the public comment period, news outlets reported that HPE had hired two individuals close to the President to lobby on its behalf," prompting a coalition of states to seek participation rights in the Tunney Act process. "The states want to conduct discovery," the court noted, "regarding the United States's pretrial materials as well as communications and information exchanged . . . during settlement discussions."

→ The court permitted the intervention and allowed some targeted discovery, noting that the states had a claim sharing common questions with DOJ's main litigation, including whether the deal violated Section 7 and whether the proposed settlement was an adequate remedy. Rejecting DOJ's objection that the Tunney Act process should be streamlined, the court concluded that, "[t]o the extent the text of the Act suggests anything, it suggests that the Congress . . . was far more interested in ensuring a full adjudication of the merits of any proposed consent decree than in streamlining the required approval proceedings and minimizing burdens on the parties." The court held a hearing in March 2026. At the time of writing (Summer 2026), no decision has yet issued.

Unlike the FTC, DOJ has a criminal antitrust jurisdiction. This enforcement function is part of the Justice Department's overall (*i.e.*, non-antitrust) criminal enforcement program. The criminal program represents a significant share of DOJ's resource allocation and enforcement activity: in fiscal year 2024, for example, DOJ initiated 70 criminal grand jury investigations and filed 20 criminal cases, compared to 89 new civil investigations and 8 filed civil complaints.[1027] In criminal cases, the Sherman Act provides for imprisonment for up to ten years and/or criminal fines of up to $1 million for individuals and $100 million for corporations. A separate federal statute (18 U.S.C. § 3571) provides for criminal fines for up to twice the amount of gain or loss resulting from the offense, which may be an even larger amount.

In recent decades, criminal antitrust enforcement had been aimed only at conduct that is *per se* illegal under Section 1 of the Sherman Act: as we saw in Chapters IV and V, this includes price-fixing, market division, and bid-rigging. But the Division has recently signaled an expansion of its criminal enforcement program on at least two fronts.

First, the Division has in recent years undertaken criminal enforcement efforts relating to wage-fixing. The pathbreaking effort here was the prosecution of Neeraj Jindal and John Rogers for fixing wages of physical therapists. As we saw in Chapter V, the defendants argued that the fact that they were fixing purchase prices for labor rather than sale prices for other products or services meant that criminal scrutiny was inappropriate, including because they were denied fair notice that their conduct could be criminally prosecuted. The court disagreed and held that price-fixing and wage-fixing should be treated alike under Section 1, including in criminal cases. The *Jindal* defendants were subsequently acquitted of wage-fixing by a jury.[1028] But in 2025 DOJ secured a wage-fixing conviction when Eduardo Lopez was found guilty of conduct that included fixing the wages of home healthcare nurses, and sentenced to 40 months of imprisonment, criminal fines, forfeiture, and criminal restitution.[1029]

Second, the Justice Department has in recent years launched a limited effort to revive the long-paused criminal prosecution of monopolization cases. As one official explained it in 2022:

> Section 2 is a criminal statute that's been on the books for over 130 years. It has been a felony for more than 40 years, which Congress reaffirmed in 2004 when it increased the felony penalties. Yet, since the late 1970s, the Antitrust Division effectively ignored Section 2 when it came to criminal enforcement. Going forward, the division will no longer ignore Section 2. A long history of Section 2 prosecutions and accompanying case law show us the way forward. If the facts and the law, and a careful analysis of department policies guiding our use of prosecutorial discretion, warrant a criminal Section 2 charge, the division will not hesitate to enforce the law.[1030]

As we saw in Chapter VII, the law of monopolization is complex and can be hard to predict: as a result, many commentators expressed surprise that the Justice Department would take its criminal enforcement program in this direction. Among other things, courts have rejected constitutional fair-notice challenges to criminal enforcement under Section 1 because prosecution is limited to a reasonably clear set of *per se* offenses.[1031] However, criminal prosecutions are certainly not unknown to the history of Section 2.[1032]

[1027] U.S. Department of Justice, *Antitrust Division Workload Statistics FY 2015–2024*, https://www.justice.gov/atr/media/1385421/.

[1028] *See* U.S. Dept. of Justice, Press Release, Former Health Care Staffing Executive Convicted of Obstructing FTC Investigation into Wage-Fixing Allegations (Apr. 14, 2022).

[1029] *See* U.S. Dept. of Justice, Press Release, White-Collar Executive Incarcerated for Fixing Nurse Wages and Fraud (Nov. 21, 2025); U.S. Dept. of Justice, Press Release, Jury Convicts Home Health Agency Executive of Fixing Wages and Fraudulently Concealing Criminal Investigation (Apr. 14, 2025).

[1030] Richard A. Powers, U.S. Dept. of Justice, *Effective Antitrust Enforcement: The Future Is Now* (remarks of June 3, 2022); *see also* Jonathan Kanter, U.S. Dept. of Justice, *Remarks at 2022 Spring Enforcers Summit* (Apr. 4, 2022) ("We will aggressively pursue enforcement of the criminal antitrust laws to protect [those] harmed by unlawful collusion and monopolization.").

[1031] *See, e.g.*, Bouie v. City of Columbia, 378 U.S. 347, 350 (1964); United States v. Miller, 771 F.2d 1219, 1225 (9th Cir. 1985) ("The sufficiency of fair notice of the acts proscribed by a statute must be examined in the context of the conduct with which a defendant is charged. . . . A defendant cannot challenge a statute on the ground that it may not give fair notice that conduct other than that with which he is charged is forbidden. . . . The indictment charges Miller with price-fixing. Because price-fixing has repeatedly been held to be per se illegal under the Sherman Act . . . Miller could not have had any reasonable doubt that his conduct violated section one."); United States v. Cinemette Corp. of Am., 687 F. Supp. 976, 979 (W.D. Pa. 1988) ("In light of the decision in *Professional Engineers* . . . and the substantial case law holding that restrictions upon competitive bidding constitute price-fixing, a per se violation of the Sherman Act, the Court finds little merit in defendants' claims that they were not given fair notice that split agreements could constitute violations of § 1.").

[1032] *See supra* note 531 (collecting scholarship and some early cases).

→ To date (*i.e.*, through Summer 2026) the criminal monopolization revival has been very limited and has focused in substance on conduct involving agreements or invitations to form them. Thus, in October 2022, DOJ obtained a guilty plea to criminal attempted monopolization in a case involving "highway crack-sealing services." As the press release explained, "Nathan Nephi Zito attempted to monopolize the markets for highway crack-sealing services in Montana and Wyoming by proposing that his company and its competitor allocate regional markets. . . . Zito approached a competitor about a 'strategic partnership' and proposed that the competitor stop competing with Zito's company for highway crack-sealing projects administered by Montana and Wyoming. In return, Zito's company would stop competing with the competitor for projects administered by South Dakota and Nebraska. Zito offered to pay his competitor $100,000 as additional compensation for lost business in Montana and Wyoming."[1033] And in March 2025, a number of defendants pleaded guilty to participating in an extended and violent conspiracy to monopolize the transmigrante forwarding agency market in the Los Indios area of Texas.[1034]

The DOJ Cartel Leniency Program

One of the most significant challenges in fighting cartels is finding them. Cartel agreements are seldom publicized by their participants, and it can be difficult to spot collusion in the marketplace. In order to aid the detection and prosecution of price-fixing cartels and similar practices (like bid-rigging schemes), DOJ has developed a successful leniency program to obtain information and cooperation from a surprising place: the participants themselves.[1035]

The core of the program is simple. DOJ grants immunity from criminal prosecution, and (pursuant to the Antitrust Criminal Penalty Enhancement and Reform Act) significant protection from civil damages exposure,[1036] to the first qualifying participant in an individual cartel to come forward, disclose the cartel to DOJ, and cooperate fully with the Department's investigation and prosecution efforts, while also making best efforts to provide restitution to victims.[1037] Subsequent applicants for a particular cartel do not qualify for the protection of the leniency scheme, although they may obtain some benefits—in the form of Division support for a sentencing reduction—if they are first to self-report a *second* cartel while cooperating in the investigation into the first. Priority order is determined by a "marker" system that ensures that the first entity to contact DOJ and request leniency will be the protected applicant if it satisfies the substantive criteria for leniency.

[1033] U.S. Dept. of Justice, Press Release, Executive Pleads Guilty to Criminal Attempted Monopolization (Oct. 31, 2022).

[1034] *See* U.S. Dept. of Justice, Press Release, Eight Individuals Plead Guilty to Wide-Ranging Scheme to Monopolize Transmigrante Forwarding Industry, Fix Prices, Extort Competitors, and Launder Money (Mar. 11, 2025).

[1035] *See generally* U.S. Dept. of Justice Antitrust Division Manual § 7-3.300 ("Antitrust Division Leniency Policy and Procedures"), https://www.justice.gov/atr/page/file/1490246/download; *see also* Antitrust Division Leniency FAQs, https://www.justice.gov/atr/page/file/1490311/download.

[1036] Specifically, pursuant to the Antitrust Criminal Penalty Enhancement and Reform Act, a sufficiently cooperative defendant can obtain limitation of liability to single damages for conduct individually attributable to the applicant, rather than treble damages for the conduct of the conspiracy as a whole. 15 U.S.C. § 7a-1(a).

[1037] "Type A" leniency may be granted to an applicant if: "1. At the time the applicant reports the illegal activity, the Antitrust Division has not received information about the illegal activity from any other source; 2. The applicant, upon its discovery of the illegal activity, promptly reports it to the Antitrust Division; 3. The applicant reports its participation in the illegal activity with candor and completeness and makes a confession of wrongdoing that is truly a corporate act, as opposed to isolated confessions of directors, officers, and employees; 4. The applicant provides timely, truthful, continuing, and complete cooperation to the Antitrust Division throughout its investigation; 5. The applicant uses best efforts to make restitution to injured parties, to remediate the harm caused by the illegal activity, and to improve its compliance program to mitigate the risk of engaging in future illegal activity; and 6. The applicant did not coerce another party to participate in the illegal activity and clearly was not the leader or originator of that activity." Type B leniency may be granted to an organization that does not qualify for Type A leniency if: "1. At the time the applicant reports the illegal activity, the Antitrust Division does not yet have evidence against the applicant that, in the Antitrust Division's sole discretion, is likely to result in a sustainable conviction against the applicant; 2. The applicant, upon its discovery of the illegal activity, promptly reports it to the Antitrust Division; 3. The applicant reports its participation in the illegal activity with candor and completeness and makes a confession of wrongdoing that is truly a corporate act, as opposed to isolated confessions of directors, officers, and employees; 4. The applicant provides timely, truthful, continuing, and complete cooperation that advances the Antitrust Division's investigation; 5. The applicant uses best efforts to make restitution to injured parties, to remediate the harm caused by the illegal activity, and to improve its compliance program to mitigate the risk of engaging in future illegal activity; 6. The applicant did not coerce another party to participate in the illegal activity and clearly was not the leader or originator of that activity; and 7. The applicant is the first to qualify for leniency for the illegal activity reported and the Antitrust Division determines that granting leniency to the applicant would not be unfair to others." U.S. Dept. of Justice Antitrust Division Manual § 7-3.300 ("Antitrust Division Leniency Policy and Procedures"), https://www.justice.gov/atr/page/file/1490246/download.

The prospect of leniency for the first applicant—leaving the applicant's competitors to face investigation, prosecution, penalties, and greater damages exposure—is intended to have a destabilizing effect on cartels. It creates strong incentives for cartel participants to inform the authorities and cooperate against their competitors: thus undermining what may already be a fragile relationship among the cartelists.

NOTES

1) This chapter mostly focuses on formal legal powers. But enforcement realities depend at least as much on policy priorities (of an Administration and of individual enforcers), resource and funding constraints, litigation risk assessments, and the distribution of matters that come to the agencies' attention (*e.g.*, an agency usually can't just "decide to bring a good vertical merger case"). Should the agencies make some of these things public: for example, by publishing a "resource allocation and enforcement priorities" document each year?
2) Should DOJ expand its criminal antitrust program beyond *per se* violations of the antitrust laws? To what?
3) The cartel leniency program is widely regarded as successful. (How could we measure that?) Should we introduce something similar for non-criminal antitrust violations? What might it look like? How could it work?
4) Should the Antitrust Division be apolitical, responsive to the White House, both, or neither? Explain your view.
5) As *CVS / Aetna* demonstrates, the Tunney Act can be used to run something like a mini-trial in which the nominal "parties" are aligned and the judge is testing their joint position. Is this desirable? What concerns or challenges might arise in this context?
6) How much deference, if any, should DOJ enjoy under the Tunney Act? If the idea is to supervise DOJ's decision-making, to what extent—and in what respects—can DOJ sensibly enjoy a margin of deference?
7) Suppose that a judge in a Tunney Act proceeding concludes that a good (*i.e.*, substantively adequate) settlement had been reached through a bad (*i.e.*, non-merits-driven) process of some kind. What should the judge do?
8) As noted above, the Expediting Act was amended in 1974 to substantially narrow the fast track to the Supreme Court; the last substantive Supreme Court decision on the merits of a Section 7 merger case was in 1975.[1038] Do you think these are related? Should we return to the earlier version of the Expediting Act?
9) The charged conduct in the Zito criminal monopolization case appears to have amounted to an invitation to collude: a practice that had been hitherto regarded as a matter warranting only civil enforcement under Section 5 of the FTC Act.[1039] Why do you think DOJ chose to pursue a criminal enforcement path?

D. The Two-Agency Model

In general, the two federal antitrust agencies have typically enjoyed a close and cooperative relationship. The agencies work together to avoid duplicative investigations through the "clearance" process, a somewhat informal system of allocating proposed investigations to one agency or another based, first, on statutory power (antitrust investigations in some industries, like airlines, are allocated to DOJ by statute); second, on comparative expertise and experience (a critical consideration in practice: for example, the FTC has unparalleled experience in handling hospital and physician-practice mergers, while the DOJ has unrivalled expertise in certain agricultural markets); and, finally, on relative workload at the time the matter arises. Most of the time, this process works well enough to avoid generating significant headaches or delays for either the agencies or for parties who appear before them.

But the overlapping jurisdiction of the antitrust agencies is, at least, not an obvious way to structure an antitrust enforcement system. The existence of two agencies, with different structures, internal processes, and leadership may strike an observer as odd, and it certainly raises some questions. The Court's 2026 decision in *Trump v. Slaughter* may well have some implications for the answers, even if those implications are not yet clear.

Historically, there have been some striking complementarities between the Department of Justice, on the one hand (which can be highly responsive to democratic changes in the White House), and the Federal Trade Commission

[1038] United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86 (1975).
[1039] *See supra* note 975 and accompanying text.

(which—given the staggered seven-year terms of the members of its historically-bipartisan Commission—has a history of continuing policy and enforcement programs across multiple Administrations[1040]). In addition, each agency has enjoyed unique advantages that the other does not: for example, the Department of Justice has the power to conduct criminal prosecutions, and faces no threat of "deadlock" due to recusals or vacancies; while the Federal Trade Commission has some unique tools—including the market study power in Section 6(b), the ability to serve as a specialized antitrust adjudicator in administrative litigation, and very significant policy resources—that are well adapted to bringing specialized expertise to bear on complex civil matters. In addition, the FTC's simultaneous role as a consumer protection regulator (including its role as the nation's leading privacy enforcer) creates scope for competition concerns to be addressed in a manner that is sensitive to consumer protection ones, and vice versa. The two-agency model is also, of course, exactly what Congress intended in enacting the FTC Act.

But the arrangement has also often been criticized. Sometimes "clearance battles" take precious time, complicating the start of a merger or conduct investigation. More troublingly, critics have pointed to the risk—and occasionally the reality—that the agencies will take different positions, either in specific cases or as a matter of policy. The worst example in recent memory is probably the *Qualcomm* litigation, in which the Department of Justice intervened in an FTC antitrust enforcement action, before the Ninth Circuit, on the side of the defendant and against the FTC(!).[1041] (In 2023, the U.S. Government Accountability Office published a study of the jurisdictional overlap between the agencies, concluding that interagency conflicts are mercifully rare.[1042]) *Qualcomm* illustrates a broader point: the agencies have divided in recent years on enforcement policy relating to the interaction between antitrust and intellectual property, with the FTC more consistently favoring aggressive antitrust enforcement in this area, while DOJ under some Administrations has sometimes favored greater deference to the perceived demands of IP policy.[1043]

Aside from the risk of direct conflict, the two-agency model raises the risk that the FTC and DOJ might both investigate the same practice or transaction. The Supreme Court has expressly held that such parallel proceedings are legally unobjectionable, in light of the broader reach of Section 5 of the FTC Act,[1044] but such an outcome might—at a minimum—raise sharp questions about whether federal enforcement resources were being prudently deployed.

Finally, critics have also charged that there is procedural unfairness in the fact that businesses are subject to the jurisdiction of two agencies, with different leadership and policy preferences, and that antitrust matters are allocated between those agencies through a largely informal, nonpublic, and non-transparent "clearance" process. Divergences in substantive law or policy—for example, the FTC's unilateral withdrawal from the Vertical Merger Guidelines in 2021, with DOJ declining to follow suit, creating an odd difference in approach until the agencies jointly issued the 2023 Merger Guidelines—have of course fueled this criticism.[1045]

→ This old debate has acquired some new urgency with the 2026 decision in *Trump v. Slaughter* that ended the FTC's era of "independence," and perhaps also the tradition of bipartisan Commissions if future Presidents decline to nominate minority Commissioners. *Slaughter* will likely focus new attention on the future of the two-agency antitrust model, while changing its benefits and costs. On the one hand, for example, the post-2026 FTC may no longer offer the complementary perspective of an independent and bipartisan enforcer: to that extent, the two-agency arrangement may now be less valuable than it was. On the other hand, the risk of conflict between an executive FTC and an executive DOJ—with respect to either specific matters or broader policies—now seems

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[1040] For example, in recent decades the FTC has pursued long, cross-Administration, bipartisan campaigns to roll back the scope of state-action immunity, invigorate hospital merger enforcement, and enforce the antitrust laws on the IP/antitrust frontier.

[1041] *See*, *e.g.*, Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, FTC v. Qualcomm Inc., No. 19-16122 (9th Cir. Aug. 30, 2019) (supporting Qualcomm in its litigation with the FTC); Brief for the United States as Amicus Curiae, FTC v. Schering-Plough Corp., No. 05-723 (May 2006) (opposing the FTC's petition for certiorari in its first pharmaceutical patent "reverse payment" case and criticizing the FTC's approach).

[1042] GAO, ANTITRUST: DOJ AND FTC JURISDICTIONS OVERLAP, BUT CONFLICTS ARE INFREQUENT, GAO-23-105790 (Jan. 2023).

[1043] *See*, *e.g.*, Anita Alanko, *New Madison Approach to Antitrust Law and IP Law*, 28 Cath. U. J. L. & Tech 219, 238–41 (2020) (noting divergence).

[1044] FTC v. Cement Inst., 333 U.S. 683, 694 (1948).

[1045] *See* U.S. Dept. of Justice, Press Release, Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021).

more muted, with the White House well placed to resolve any conflicts: and, to that extent, the two-agency arrangement may now be less costly than it was. Only time will tell, as the implications of *Trump v. Slaughter* gradually become clear.

To date, the highest profile challenge to the two-agency model was filed in 2020 by Axon Enterprise, a manufacturer of police body cameras that acquired its competitor Vievu, triggering an FTC administrative challenge to unwind the merger. Axon responded by filing a complaint for declaratory judgment in federal district court in Arizona, mounting a facial challenge to the dual-enforcement system, as well as the constitutional soundness of the FTC itself. The ensuing litigation prompted the Supreme Court to rule unanimously that federal courts may hear constitutional challenges to the FTC's structure even while administrative proceedings are pending.[1046] Following that decision, the FTC abandoned its challenge.[1047] Remember that what follows is a litigant's complaint, not a judicial opinion. Which of Axon's complaints are most, and least persuasive? Does the decision in *Trump v. Slaughter* affect its force?

Complaint, Axon Enterprise, Inc. v. FTC

No. 2:20-cv-14 (D. Ariz. filed Jan. 3, 2020)

1. Plaintiff Axon Enterprise, Inc. ("Axon") brings this case to challenge the unconstitutional structure and processes employed by Defendant, the Federal Trade Commission ("FTC" or "Commission"), to prohibit lawful mergers and extract unwarranted settlements. The FTC exists as a Constitutional anomaly. In one hand, it wields a mighty sword—the power to not only prosecute cases, but to judge them too; in the other, a massive shield—near-total protection from political accountability, with the Commissioners who direct its actions subject to neither democratic election nor at-will removal by the President. For decades, the agency has leveraged that power against American companies indiscriminately—including, most recently, Axon. No longer. [. . .]

30. Because the DOJ and FTC have dual jurisdiction to review mergers, the agencies have created a "clearance" process to decide which agency will investigate a merger. Over the years, the agencies have reached a series of informal, non-public understandings as to how they will divvy up merger investigations. Clearance is an opaque, black-box process. The agencies maintain complete control over the structure and implementation of the clearance process and have total discretion to decide which agency will undertake a particular merger investigation. Merging parties have no insight or input into which agency will investigate their merger. Moreover, clearance rules and procedures are not mandated by statute, subject to Congressional scrutiny, or promulgated through notice-and-comment rulemaking.

31. Which agency reviews a consummated transaction is critical. The DOJ's only means of unwinding a consummated merger is to sue in federal court. The FTC, on the other hand, has the option to sue in federal court under Section 13(b) of the Act, or to commence an internal administrative hearing before either a single Commissioner or an ALJ on the FTC's payroll.

32. The FTC's internal administrative hearing provides none of the substantive or procedural protections enjoyed by litigants in federal district court. These proceedings are, instead, fraught with Due Process and Equal Protection deficiencies.

- Federal district court judges are Article III impartial fact-finders who owe no allegiances to the DOJ. In contrast, any FTC Commissioner (including one who voted to sue the defendant) is permitted to preside over the administrative hearing; and, at best, an ALJ appointed by the FTC and on the FTC's payroll will preside.
- Federal court proceedings are governed by the Federal Rules of Evidence and Federal Rules of Civil Procedure. Neither apply in FTC administrative proceedings.

[1046] Axon Enterprise, Inc. v. FTC, 598 U.S. 175 (2023).

[1047] Order Returning Matter to Adjudication and Dismissing Complaint, In the Matter of Axon Enterprise, Inc., FTC Dkt. No. 9389 (F.T.C. Oct. 6, 2023) ("[W]e have come to the difficult conclusion that the public interest requires that this litigation no longer be continued.").

- The DOJ must satisfy a more rigorous standard of finding that a merger or acquisition "substantially lessens competition," whereas the FTC can satisfy a less onerous "unfair competition" standard in the administrative context.
- Litigants in federal court can appeal adverse decisions to impartial circuit court judges. Decisions rendered in FTC administrative proceedings must first be appealed to the same FTC Commissioners who voted to sue the defendant at the outset.
- The DOJ cannot change the findings made by the district court when appealing a decision to the circuit court. However, the FTC Commissioners, on appeal, can ignore and completely change the merits decision rendered in the administrative proceedings *before* the defendant appeals to the circuit court.
- Different appellate standards of review also apply depending on where the case originated. The district court's factual findings in a DOJ case are reviewed for "clear error," whereas "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive."

33. Given the inherently biased and unfair nature of administrative hearings at the FTC and the limited review of its factual findings on appeal, it is no surprise that the agency believes itself to be virtually untouchable in its internal arena. [. . .]

36. Worse still, the FTC lacks any political check on how it exercises its unfair procedures against the companies that happen to fall within its bailiwick. Although Article II "vested" all "executive Power" in the President, Art. II, § 1, cl. 1, and charged the President alone with "tak[ing] Care that the Laws be faithfully executed," Art. II, § 3, the FTC enforces the antitrust laws outside of Presidential control. [. . .]

40. FTC Commissioners, however, are shielded from at-will Presidential removal—and hence from the key mechanism of democratic accountability—in violation of Article II. The FTC is headed by five Commissioners, nominated by the President and confirmed by the Senate, each serving a 7-year term. But once appointed, the Commissioners are not subject to removal by the President absent a finding of "inefficiency, neglect of duty, or malfeasance in office." This means FTC Commissioners are not politically accountable for their actions. So long as the Commissioners stop short of "malfeasance," the President can do nothing but stand by and watch, no matter how much he disagrees with them. Moreover, because the FTC-appointed ALJ can also only be removed for "good cause" in accordance with statutory procedures, an impermissible "dual-layer of protection" even further restricts Executive control.

41. This means that crucial law enforcement actions, sometimes with massive consequences for the American economy (and here, for public safety), are currently taken by individuals not elected by the People, and not controlled by the President. That runs directly contrary to Article II and the democratic principles underlying the Constitution. [. . .]

COUNT I (Violation of Axon's Fifth Amendment Rights) [. . .]

58. The imminent administrative proceeding, in which the FTC will act as prosecutor, judge, and jury, violates Axon's Due Process rights, including but not limited to depriving Axon of the ability to make its case before a neutral arbiter.

59. By arbitrarily subjecting Axon to unfair procedures before an administrative body, rather than to a fair trial before a neutral judge appointed in accordance with Article III of the Constitution with the procedural protections of a federal court, the FTC has violated Axon's Equal Protection rights. [. . .]

COUNT II (The FTC's Structure Violates Article II) [. . .]

62. The FTC's actions separately violate Axon's Constitutional rights because the agency's structure, on its face, is unconstitutional under Article II. In particular, Article II requires that Executive officials exercising law-enforcement power be removable at will by the President. Although the FTC clearly exercises law-enforcement power—including but not limited to Axon's case—its Commissioners are shielded from at-will removal. Moreover, ALJs appointed by the FTC, who also can only be removed for cause, create an impermissible dual-layer of insulation. Because the agency's structure violates Article II, any actions taken against Axon under its present structure are invalid.

COUNT III (Declaratory Judgment that Axon's Acquisition Did Not Violate Antitrust Laws) [. . .]

64. Axon's acquisition of Vievu did not violate Clayton Act § 7 or any other antitrust law. The acquisition was not likely to substantially lessen competition and in fact has not done so.

NOTES

1) How would you allocate authority between the agencies? Does *Trump v. Slaughter* affect your answer?
2) Is it important that antitrust enforcement is: (a) responsive to political change; or (b) bipartisan? Why? Would your answers be any different for any other law enforcement function?
3) The clearance process for allocating investigations between the agencies is nonpublic and effectively unreviewable. Is this a problem? Is it more of a problem than the fact that many other investigative decisions, including the choice of which division or personnel will lead a case, are also nonpublic and unreviewable?
4) Suppose that you are the head of the Antitrust Division (or FTC Chair), and that the FTC (or the Division) files a complaint with which you disagree. Specifically, you think the enforcement action represents bad and harmful policy. What should you do?
5) Does the FTC's 2022 Section 5 statement affect the strength of Axon's constitutional objections?

E. Merger Review and the Hart-Scott-Rodino ("HSR") Act

Merger enforcement is a flagship component of the work of the antitrust agencies: indeed, merger review is sometimes described as the agencies' primary function. To get a sense of the relative volume of merger review compared to civil conduct investigations in recent years, take a look at this chart:

U.S. Department of Justice Antitrust Division Workload Statistics FY 2015–2024

New Civil Investigations Reported (note: investigations may be counted more than once)	2024	2023	2022	2021	2020	2019	2018	2017	2016	2015
Sherman § 1: Restraint of Trade (civil only)	21	16	31	10	16	18	18	6	17	16
Sherman § 2: Monopolization	16	5	13	7	7	9	3	3	5	13
Clayton § 7: Mergers	79	47	73	75	58	73	67	57	67	68
Others	7	12	25	4	5	7	3	4	6	4

Compiled from information available at: https://www.justice.gov/atr/media/1385421/dl?inline

The merger review function at both agencies is governed by the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, which sets out the statutory framework for premerger notification in the United States and establishes a timeline under which most merger review is conducted. The Premerger Notification Office ("PNO") of the FTC administers the HSR system on behalf of both agencies. The HSR statute is supplemented by implementing regulations,[1048] and by informal interpretations issued by PNO.[1049]

HSR was enacted in 1976 to create a system in which a planned merger or acquisition of a certain size must be notified to the antitrust agencies *before* consummation (*i.e.*, before the buyer actually becomes the owner of the target). The central purpose of the Act is to impose a "waiting period" to give the agencies a chance to review the deal, during which time the parties may not consummate the transaction.[1050]

[1048] 16 C.F.R. Parts 801–03.

[1049] *See* https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations.

[1050] For thoughtful discussion of the HSR system, its history, and its purposes, *see* Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Fiscal Year 2020 Hart-Scott Rodino Annual Report to Congress (Nov. 8, 2021); Noah Phillips, *The Repeal of Hart-Scott-Rodino*, Global Comp. Rev. (Oct. 6, 2021); William J. Baer, *Reflections on 20 Years of Merger Enforcement under the Hart-Scott-Rodino Act*, 65 Antitrust L.J. 825 (1997); Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 Antitrust L.J. 865 (1997);

⟶ Under the Act, only certain mergers are "reportable" or subject to the notification obligation. The requirements are somewhat intricate, adjusted every year for inflation, and subject to some exceptions and special rules,[1051] but in very broad terms (and with effect from February 17, 2026):

- transactions valued up to $133.9 million are not reportable;
- transactions valued at more than $535.5 million are reportable;
- transactions valued at between $133.9 million and $535.5 million are reportable *if*:
    - one party has assets or annual sales of at least $26.8 million *and*
    - the other party has assets or annual sales of at least $267.8 million.[1052]

Under the Act, if a transaction is reportable, merger review begins with a "merger notification": a form, a fee, and a set of materials containing basic information about the proposed transaction.[1053] An "initial waiting period" then follows—in most cases, 30 days after the notification[1054]—in which the agencies have an opportunity to decide whether further investigation is appropriate, to determine which agency will be cleared to conduct that investigation, and (at least to some extent) conduct an initial review of the transaction. This may involve requesting and receiving some documents and information from the parties and/or from other market participants.

⟶ In February 2025, the agencies introduced a new and more detailed HSR form. But the new form, and the rule requiring it, were vacated and set aside on the ground that the new form's costs were not justified by its benefits, as the HSR Act required, and on the ground that the FTC had acted arbitrarily and capriciously in promulgating the rule.[1055] "The FTC lacks any evidence," the court held, "that the [new form] would detect illegal mergers more effectively than the prior [one]. And it failed to show that the claimed benefit of saving [agency] time and resources reasonably outweighs the [new form's] significant costs."[1056] At the time of writing (Summer 2026), the FTC has indicated that it is considering a new HSR rulemaking that would result in a new revised notification form.[1057]

During the initial waiting period, the HSR Act forbids the parties from closing the deal. For the purposes of the antitrust laws, the merging parties are still considered separate entities during this time: coordination on commercial or competitive matters may, accordingly, constitute an antitrust violation. (Improper coordination with the other side of a deal that has not been consummated is often known as "jumping the gun" or a "gun-jumping violation."[1058]) The agencies may (but need not) grant early termination of the waiting period if they conclude there are no competitive concerns and further delay is unwarranted.[1059]

At the close of the initial waiting period, the agency must decide whether to do nothing and simply let the waiting period expire (thus leaving the parties free to close their deal), or whether instead to issue a "Second Request."

William J. Kolasky, Jr. & James W. Lowe, *The Merger Review Process at the Federal Trade Commission: Administrative Efficiency and the Rule of Law*, 49 Admin. L. Rev. 889 (1997); James W. Mullenix, *The Premerger Notification Program at The Federal Trade Commission*, 57 Antitrust L.J. 125, 130-31 (1988); Irving Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 Colum. L. Rev. 679, 681-82 (1977).

1051 *See*, *e.g.*, 15 U.S.C. § 18a(c) (listing various categories of exempt transactions); 16 C.F.R. Part 802 (exemption rules).

1052 *See generally* 16 C.F.R. Part 801 (coverage rules). The FTC publishes the inflation-adjusted thresholds each year. The simplified framing in the text glosses over, among other things, different treatment depending on whether the acquired party is engaged in manufacturing. *See* 15 U.S.C. § 18a(a)(2)(B).

1053 *See* 16 C.F.R. Part 803, Appendix A (HSR Form); Appendix B (instructions for completing the form).

1054 *See* 15 U.S.C. § 18a(b)(1)(B) (30-day default and 15-day period for cash tender offers); 11 U.S.C. § 363(b)(2) (abbreviated waiting period for certain filings in connection with a bankruptcy proceeding); FTC Premerger Notification Office Informal Interpretation 1307002 (July 19, 2013) (interpreting same).

1055 Chamber of Commerce of the United States of America v. FTC, 820 F. Supp. 3d 473 (E.D. Tex. 2026).

1056 *Id.* at 491.

1057 FTC, Press Release, Federal Trade Commission and Department of Justice Seek Public Comment on the Premerger Notification and Report Form (Mar. 25, 2026).

1058 A number of merging parties have fallen into this trap. *See*, *e.g.*, FTC, Press Release, Oil Companies to Pay Record FTC Gun-Jumping Fine for Antitrust Law Violation (Jan. 7, 2025) (noting the largest gun-jumping penalty ever imposed: $5.6 million); U.S. Dept. of Justice, Press Release, Justice Department Reaches Settlement with Duke Energy Corporation for Violating Premerger Notification and Waiting Period Requirements (Jan. 18, 2017); U.S. Dept. of Justice, Press Release, Justice Department Settles Lawsuit Against Computer Associates For Illegal Pre-Merger Coordination (Apr. 23, 2002). *See generally*, *e.g.*, M. Howard Morse, *Mergers and Acquisitions: Antitrust Limitations on Conduct Before Closing*, 57 Bus. Lawyer 1463 (2002).

1059 15 U.S.C. § 18a(b)(2); 16 C.F.R. § 803.11.

This is a demand pursuant to the HSR Act for additional documents and information relating to the transaction. Typically, a Second Request requires the production of a very significant amount of material, representing months of work by the company's employees and attorneys. When a Second Request is issued, the waiting period is extended until 30 days after the parties have substantially complied with it.[1060] The HSR rules allow a party to withdraw and immediately refile a notification once (a "pull and refile") without needing to pay an additional filing fee.[1061]

→ HSR violations—which might include failure to produce relevant materials, or violations of the suspensory obligation—are punishable by statutory penalties of up to $53,088 per day.[1062] (This figure is adjusted for inflation each year.) Failure to substantially comply with a notification requirement of a Second Request may also result in an order to comply, an extension of the statutory waiting period, or other equitable relief.[1063]

The following brief extract from the FTC's public Model Second Request should give you a flavor of what a Second Request looks like in practice, and the kinds of information that are included.

FTC, Model Second Request (revised January 2024)

REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY MATERIAL ISSUED TO [COMPANY]

Unless modified by agreement with the staff of the Federal Trade Commission, each Specification of this Request for Additional Information and Documentary Material (the "Request") requires a complete search of "the Company" as defined in Definition D1 of the Definitions, which appear after the following Specifications. If the Company believes that the required search or any other part of the Request can be narrowed in any way that is consistent with the Commission's need for documents and information, you are encouraged to discuss any questions and possible modifications with the Commission representatives identified in Instruction I(11) of this Request. All modifications to this Request must be agreed to in writing by a Commission representative. Submit the information requested in Specifications 1 and 10(a) of this Request promptly to facilitate discussions about any potential modifications to this Request including the scope of the Company's search or interrogatory response obligations.

SPECIFICATIONS

1. Submit:

> (a) one copy of each organization chart and personnel directory in effect since January 1, [Yr-2] for the Company as a whole and for each of the Company's facilities or divisions involved in any activity relating to any Relevant Product [Service];
>
> (b) a list of all agents and representatives of the Company, including, but not limited to, all attorneys, consultants, investment bankers, product distributors, sales agents, and other Persons retained by the Company in any capacity relating to the Proposed Transaction or any Relevant Product [Service] (excluding those retained solely in connection with environmental, tax, human resources, pensions, benefits, ERISA, or OSHA issues);
>
> (c) for each Person identified in response to Specification 1(b), the agent's or representative's title, business address, and telephone number, as well as a description of that Person's responsibilities in any capacity relating to the Proposed Transaction or any Relevant Product [Service] provided in any Relevant Area; and

[1060] *See* 15 U.S.C. § 18a(e)(1).
[1061] 16 C.F.R. § 803.12.
[1062] 15 U.S.C. § 18a(g); FTC, Press Release, FTC Publishes Inflation-Adjusted Civil Penalty Amounts for 2025 (Feb. 11, 2025). There was no adjustment in 2026. *See* Russell T. Vought, OMB Memorandum M-26-11 re: "Cancellation of Penalty Inflation Adjustments for 2026 . . . " (Apr. 17, 2026).
[1063] 15 U.S.C. § 18a(g).

(d) an Information Systems Diagram for the Company.

2. List each Relevant Product manufactured or sold [Service provided] by the Company in the Relevant Area, and for each:

(a) provide a detailed description of the product [service] [including its end uses]; and
(b) state [the brand name and] the division, subsidiary, or affiliate of the Company that manufactures or sells [provides] or has manufactured or sold [provided] the product [service].

3. For each Relevant Product [Service] listed in response to Specification 2 above, state or provide:

(a) the Company's Sales to all customers in each Relevant Area, stated separately in units and dollars;

(b) [that portion of the Company's Sales to customers in each Relevant Area, stated separately in units and dollars, that were of products manufactured in the U.S.;]

(c) [that portion of the Company's Sales to customers in each Relevant Area, stated separately in units and dollars, that were of products manufactured outside the U.S.;]

(d) that portion of the Company's Sales to customers in each Relevant Area, stated separately in units and dollars, that were of products purchased from sources outside the Company and resold by the Company rather than of products manufactured by the Company;

(e) the names and addresses of the [XX] Persons who purchased the greatest unit and dollar amounts of the Relevant Product [Service] from the Company in each Relevant Area;

(f) [a sample contract for each customer type]; and

(g) the name, address, estimated Sales, and estimated market share of the Company and each of the Company's competitors in each Relevant Area in the manufacture or sale of the Relevant Product [provision of the Relevant Service].

4. State the location of each facility that manufactures or sells [including distribution centers, etc.], or has manufactured or sold, any Relevant Product [provides or has provided any Relevant Service] in the Relevant Area for the Company, and for each such facility state: the current nameplate and practical capacity and the [annual, monthly] capacity utilization rate for production of each Relevant Product manufactured at the facility, specifying all other factors used to calculate capacity; the number of shifts normally used at the facility; and the feasibility of increasing capacity [by X% or more], including the costs and time required.

5. For each Relevant Product manufactured or sold [Service provided] in the Relevant Area, submit (a) one copy of all current selling aids and promotional materials and (b) all documents relating to advertising [and marketing] Plans and strategies.

6. Submit all documents relating to the Company's or any other Person's Plans relating to any Relevant Product [Service] [in the Relevant Area], including, but not limited to, business plans; short-term and long-range strategies and objectives; expansion or retrenchment plans; research and development efforts; presentations to management committees, executive committees, and boards of directors; and budgets and financial projections. For regularly prepared budgets and financial projections, the Company need only submit one copy of final year-end documents for prior years, and cumulative year-to-date documents for the current year.

7. Submit all documents relating to competition in the manufacture or sale of any Relevant Product [provision of any Relevant Service] in the Relevant Area, including, but not limited to, market studies, forecasts and surveys, and all other documents relating to:

(a) the Sales, market share, or competitive position of the Company or any of its competitors;

(b) the relative strength or weakness of Persons producing or selling each Relevant Product [providing each Relevant Service];

(c) supply and demand conditions;

(d) attempts to win customers from other Persons and losses of customers to other Persons, [including, but not limited to, all sales personnel call reports and win/loss reports];

(e) allegations by any Person that any Person that manufactures or sells any Relevant Product [provides any Relevant Service] is not behaving in a competitive manner, including, but not limited to, customer and competitor complaints; and threatened, pending, or completed lawsuits; and

(f) any actual or potential effect on the supply, demand, cost, or price of any Relevant Product [Service] as a result of competition from any other possible substitute product [service].

8. Submit:

(a) all documents relating to the Company's or any other Person's price lists, pricing Plans, pricing policies, pricing forecasts, pricing strategies, price structures, pricing analyses, price zones, and pricing decisions relating to any Relevant Product [Service] in the Relevant Area; and

(b) all studies, analyses, or assessments of the pricing or profitability of any Relevant Product [Service] sold or provided by the Company, [by third-party distributors/lessee dealers/etc.], or through other channels of trade in any Relevant Area.

9. Identify the Person(s) at the Company responsible for creating or monitoring price strategy, [price zones,] pricing practices, and pricing policies for the Relevant Product [Service] in the Relevant Area. Describe in detail the Company's pricing strategy, pricing practices, and pricing policies, including, but not limited to:

(a) a description regarding how, and how often, the prices for each Relevant Product [Service] in each Relevant Area are determined;

(b) whether, and how, pricing based on customer characteristics, presence of other competitors, or other factors are used by the Company in determining the prices for each Relevant Product [Service] in each Relevant Area; and

(c) [whether, and how, price zones and/or pricing based on geographic areas, the presence of local competitors, or other factors are used by the Company for each Relevant Product [Service] in each Relevant Area.]

10. Identify each electronic database used or maintained by the Company in connection with any Relevant Product [Service] at any time after January 1, [Yr-3], that contains information concerning the Company's (i) products [services] and product codes; (ii) facilities; (iii) production; (iv) shipments; (v) bids or sales proposals; (vi) sales; (vii) prices; (viii) margins; (ix) costs, including but not limited to production costs, distribution costs, standard costs, expected costs, and opportunity costs; (x) patents or other intellectual property; (xi) research or development projects; or (xii) customers. . . .

{*Eds.: the full Model Second Request has 31 specifications, 19 definitions, and 11 instructions!*}

* * *

In practice, the baseline timing (*i.e.*, substantial compliance plus 30 days) is often modified by entry into a negotiated "timing agreement" with the reviewing agency.[1064] In this agreement, the parties and the agency typically negotiate narrower production obligations for the parties than those in the Second Request as it was issued, in exchange for giving the agency a longer period of time in which to review the transaction after receiving the materials.

The HSR system has transformed merger review. It gives the agencies the opportunity to detect and investigate troubling deals before they happen, and it gives businesses some confidence that a reviewed deal is unlikely to be

[1064] *See* FTC Model Timing Agreement (Feb. 27, 2019), https://www.ftc.gov/system/files/attachments/merger-review/ftc_model_timing_agreement_2-27-19_0.pdf.

challenged after it has closed.[1065] But the HSR system does *not* provide affirmative "clearance"—in the sense of positive approval—of a deal. The agencies can challenge deals after an HSR review that did not result in an immediate complaint, even if a Second Request was issued. Indeed, the HSR Act expressly says so: "Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of [the Clayton] Act or any other provision of law."[1066] And, on rare occasions, the agencies have been willing to do so in practice.[1067] But whether and when it is good policy to challenge a merger that was HSR-reviewed but not challenged remains controversial.[1068]

A recent judicial discussion of this issue arose in the second motion-to-dismiss decision in the *Meta / Instagram / WhatsApp* litigation. Facebook (now Meta) argued that the FTC's challenge to its consummated acquisitions of Instagram and WhatsApp was inappropriate, including because both transactions were notified under the HSR system, and the Instagram deal proceeded to a Second Request. The court held that this was no barrier to the suit.

FTC v. Facebook, Inc.

581 F. Supp. 3d 34 (D.D.C. 2022)

Judge Boasberg.

[1] As required by the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, the FTC reviewed the acquisition of Instagram prior to closing to assess whether it posed anticompetitive concerns. Whereas most mergers are cleared quickly, in this instance the review took over four months. During that scrutiny, the agency took the rare step of requiring the submission by the parties of additional information or documentary material relevant to the proposed acquisition. Eventually, however, Facebook and Instagram satisfied the agency's concerns, and in August (over four months after the merger was announced), the Commission voted 5-0 to allow it to proceed without any challenge or conditions.

[2] Facebook's acquisition of WhatsApp was also subject to Hart-Scott-Rodino Act pre-merger review, but the FTC, once again, did not block it. Although the FTC again conveniently omits any mention of this review in its Complaint, the Court may take judicial notice of that public agency action.

[3] Facebook thus argues that because the FTC unconditionally cleared both acquisitions under Section 7 of the Clayton Act, which Congress enacted to address incipient threats to competition that Section 2 would not condemn, it is hypocritical for the agency to now claim that the acquisitions run afoul of Section 2. The FTC, for its part, counters that HSR filings do not result in acquisitions being approved or blessed by the FTC or DOJ, that the HSR Act merely established reporting requirements for acquisitions over a certain size, and that the prior HSR reviews are simply beside the point here.

[4] The FTC has the better argument, at least insofar as its HSR reviews at the time of the acquisitions do not bear significantly on the issue now before the Court. The HSR Act does not require the FTC to reach a formal determination as to whether the acquisition under review violates the antitrust laws. On the contrary, it merely obliges the parties to the merger to report certain information to the agency and to wait to consummate the deal until the expiration of the statutory waiting period, which the FTC may extend while it gathers additional information. Indeed, while the FTC conducted an investigation of the challenged acquisitions here and eventually voted to close the investigation, its closing letter to Facebook expressly stated, "This action is not to be construed as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take such further

[1065] For a variety of perspectives on HSR, *see* supra note 1050.

[1066] 15 U.S.C. § 18a(i)(1).

[1067] *See*, *e.g.*, Complaint, United States v. Parker-Hannifin Corp., No. 1:17-cv-01354 (D. Del. filed Sept. 26, 2017); Menesh S. Patel, *Merger Breakups*, 2020 Wis. L. Rev. 975, 990–91 (2020) (noting same).

[1068] *See*, *e.g.*, Timothy J. Muris & Jonathan E. Nuechterlein, *First Principles for Review of Long-Consummated Mergers*, 5 Criterion J. on Innovation 29 (2020).

action as the public interest may require." That letter is in keeping with the Act's explicit language making clear that the FTC can bring post-review challenges, notwithstanding the previous closing of HSR review without an antitrust-violation determination: "Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law." 15 U.S.C. § 18a(i)(1).

[5] In light of that reality, the FTC's decisions to close the investigations into Facebook's acquisitions do not provide a basis to grant the company's Motion. The Commission could have decided to close the investigations for many reasons, and it would be improper to draw a merits conclusion about the legality of the mergers on the basis of those decisions, especially at the motion-to-dismiss stage. Cf. Steves & Sons, Inc. v. JELD-WEN, Inc., 988 F.3d 690, 713–14 (4th Cir. 2021) (affirming district court's exclusion of evidence relating to Department of Justice's investigation of merger without challenging it and holding that Department's "decision not to pursue the matter isn't probative as to the merger's legality because many factors may motivate such a decision, including the Department's limited resources").

NOTES

1) How many different values does a merger review process serve? In what order do you think it is important that merger review be: (a) fast; (b) thorough; and (c) final?
2) Under what circumstances, if any, should the fact of a previous HSR review (without a challenge) weigh against an agency challenge to a consummated transaction, either (a) as a matter of law, or (b) as a matter of enforcement policy? Why? What impact, if any, should it have on a *private* challenge by an injured customer?
3) At times, some merging parties have received "close at your own risk" letters from the FTC at the end of the HSR waiting period, stating that the agency will not sue to block the deal but that the agency may investigate further and/or take enforcement action in the future. When, if ever, should the agencies send such letters?
4) What are the best arguments in favor of, and against, the Early Termination program?
5) A transaction may have a high valuation without raising competition concerns; conversely, it may have a low valuation and present a serious threat to competition. So why does the size of the parties matter for HSR reportability? Can you think of better criteria for reportability?
6) If you were designing or amending the HSR statute, what penalties or other consequences would you apply to an acquiror that has misrepresented facts, or withheld documents, in an HSR filing? *See* 15 U.S.C. § 18a(g).

F. The States

The fifty states, plus the District of Columbia and U.S. territories, are active to varying degrees in antitrust enforcement. The level and depth of state involvement varies widely. Some states include teams with experience and expertise to litigate significant antitrust matters: in particular, among others, New York, California, Colorado, Washington state, and Texas have established reputations as prominent actors in antitrust enforcement. In addition, states cooperate to investigate and pursue matters that affect more than one jurisdiction.[1069]

Under the federal antitrust laws, states may sue for injunctive relief to protect themselves as direct victims of antitrust wrongdoing, under the provision that entitles private parties to injunctive relief, or on behalf of their citizens in what is sometimes called a "parens patriae" action.[1070] States may also sue for treble damages suffered

[1069] This has been the case in some recent tech enforcement actions. *See*, *e.g.*, New York v. Facebook, Inc., No. 1:20-cv-3589 (D.D.C. filed Dec. 9, 2020); United States v. Google, No. 1:20-cv-3010 (D.D.C. filed Oct. 20, 2020); Colorado v. Google LLC, No. 1:20-cv-3715 (D.D.C. filed Dec. 17, 2020); Texas v. Google, No. 4:20-cv-957 (E.D. Tex. filed Dec. 16, 2020).

[1070] Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945) ("Georgia, suing for her own injuries, is a 'person' within the meaning of s 16 of the Clayton Act, 15 U.S.C.A. s 26; she is authorized to maintain suits to restrain violations of the anti-trust laws or to recover damages by reason thereof. But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, parens patriae, are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia. . . . There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts."); Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 261 (1972) ("Hawaii plainly qualifies as a person . . . whether it sues in its proprietary capacity or as parens patriae."). *See also* Memorandum Amicus Curiae of the United States by them or by their citizens.[1071] 15 U.S.C. § 15f directs the Attorney General of the United States to notify a State AG when the federal AG has filed an antitrust suit and has "reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws."[1072]

In addition to its powers under the federal antitrust system, every state has its own antitrust and competition laws. Although these usually resemble federal antitrust law—including equivalents of Sherman Act Sections 1 and 2, Clayton Act Section 7, and FTC Act Section 5—some states' laws exhibit important differences. Many states allow indirect purchasers—such as those who buy at an overcharge from an intermediary that buys from an antitrust wrongdoer—to sue for damages: as we shall see in Chapter XII, federal law does not.[1073] Some states are considering significant change to their antitrust statutes in ways that would create serious divergence from federal antitrust law.[1074] The Supreme Court has held that federal antitrust law does not preempt state antitrust statutes that reach more broadly,[1075] although other federal statutes have been held to do so on occasion.[1076] While the vast majority of state antitrust enforcement is civil, there is a limited amount of state criminal enforcement.[1077]

In practice, while relatively few states have the resources to undertake major antitrust litigations alone, they often serve as critical partners to the federal agencies.[1078] State Attorneys General may be the first to learn about anticompetitive practices or transactions, bringing them to the attention of the federal enforcers and working with them on investigations; and if matters proceed to litigation, states may serve as important partners in court.[1079] The support of a state Attorney General not only means that more talented litigators with local knowledge are available for an enforcement effort: it may also help to reassure a judge that the competitive concerns are shared by those with local expertise, rather than being a theoretical concern held only by distant D.C. regulators.

Stephen Calkins, Perspectives on State and Federal Antitrust Enforcement

53 Duke L.J. 673 (2003)

[1] The most accepted roles for the states are ones derived from the states' comparative advantages. Three advantages stand out: familiarity with local markets, familiarity with and representation of state and local institutions, and ability to send money to injured individuals.

[2] *Familiarity with Local Markets.* For all the talk about globalization of competition, antitrust enforcement is routinely concerned about competition in local markets. Almost half of the FTC's merger complaints make allegations involving local markets, which should not be surprising given the number of challenges to mergers in groceries, gasoline retailing, construction, natural gas transportation, and health care. Intimate knowledge about local competitive conditions is essential to effective antitrust enforcement. State attorneys general have a clear comparative advantage in understanding local markets. . . .

Regarding Microsoft Corporation's Motion for Dismissal of the Non-Settling States' Demand for Equitable Relief, United States v. Microsoft Corp., Civil Action No. 98-1233 (D.D.C. filed Apr. 15, 2002) 4–9 (discussing same and collecting authorities).

[1071] 15 U.S.C. § 15c (parens patriae damages); 15 U.S.C. § 15 (injured-person damages).

[1072] 15 U.S.C. § 15f.

[1073] *See infra* § XII.C.

[1074] *See*, *e.g.*, California Law Revision Comm'n, *Antitrust Law—Study B-750*, https://clrc.ca.gov/B750.html (package of reforms).

[1075] California v. ARC Am. Corp., 490 U.S. 93, 102 (1989) ("Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States. . . . Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies. . . . And on several prior occasions, the Court has recognized that the federal antitrust laws do not pre-empt state law.").

[1076] *See*, *e.g.*, Connell Const. Co. v. Plumbers & Steamfitters Loc. Union No. 100, 421 U.S. 616, 635 (1975).

[1077] *See*, *e.g.*, Office of the New York Attorney General, Press Release, A.G. Schneiderman Announces Bust Of Broome County Waste Management Cartel For Colluding To Rig Bids And Fix Prices (Apr. 9, 2018), https://ag.ny.gov/press-release/2018/ag-schneiderman-announces-bust-broome-county-waste-management-cartel-colluding.

[1078] For a very different perspective, *see* Richard Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 940–42 (2001) (refusing to "make a fetish of federalism" and arguing that the states should be stripped of their authority to enforce the federal antitrust laws for reasons including "the poor quality of the briefs and arguments").

[1079] *See*, *e.g.*, FTC, Press Release, FTC and Commonwealth of Pennsylvania Challenge Proposed Merger of Two Major Philadelphia-area Hospital Systems (Feb. 27, 2020); U.S. Dept. of Justice, Press Release, Justice Department Sues Monopolist Google For Violating Antitrust Laws (Oct. 20, 2020) (noting suit along with 11 State AGs).

[3] *Familiarity with Local Institutions.* State attorneys general are more likely than federal enforcers to know and be known and be trusted by state and local government officials. They are thus uniquely situated to help prevent anticompetitive harm from being inflicted on or by government agencies. Government and nonprofit entities play major roles, even in the United States' capitalist economy. . . . Although federal enforcers regularly engage in "competition advocacy," as it is called, no Washington-based voice is likely to be listened to as carefully as the voice of the state attorney general.

[4] *Compensating Individuals.* State attorneys general recover money for injured individuals in two ways. First, states implicitly represent taxpayers by recovering overcharges exacted from state purchasing operations. Beyond that, state attorneys general are the only governmental officials specifically authorized by federal statute to recover monetary relief in treble damages for natural persons injured by Sherman Act violations. The Justice Department has no such power, and the FTC finds authority for a court to award consumer redress only by implication (and very rarely invokes the authority in antitrust cases). {*Eds.: this extract was written before the Supreme Court's decision in* AMG Capital.}

* * *

The final point mentioned in this extract—the prospect that states may be able and willing to obtain consumer redress—has acquired additional importance with the FTC's loss in *AMG Capital* of its power to obtain equitable monetary relief in district court.[1080]

Of course, the federal and state enforcers do not always see eye to eye on every issue, and some friction is a hallmark of any polycentric system. Thus, sometimes one or more states may take a different position on antitrust enforcement from the federal agencies: for example, state AGs may litigate when the federal government declines to do so.[1081] In *Sprint / T-Mobile*, famously, the Antitrust Division negotiated a consent decree that, in the view of the Department of Justice, resolved the competitive concerns, but a group of state Attorneys General disagreed and filed suit in an (unsuccessful) effort to block the deal.[1082] In rejecting the challenge, the court treated DOJ's decision as "informative but not decisive."[1083] This episode generated some high-profile controversy about the relationship between federal and state antitrust enforcement.[1084]

Statement of Interest of the United States of America, New York v. Deutsche Telekom

No. 1:19-cv-5434 (S.D.N.Y. filed Dec. 20, 2019)

[1] The United States, through the Department of Justice's Antitrust Division and the FCC, investigated the proposed merger of T-Mobile US, Inc. ("T-Mobile") and Sprint Corporation ("Sprint"). The Antitrust Division (along with a number of state Attorneys General) and the FCC concluded that consumers would benefit from the combination of T-Mobile and Sprint accompanied by the divestitures and other relief the Antitrust Division (in its proposed Final Judgment) and the FCC (in its order) secured to protect competition and promote the public

1080 *See generally* Schonette Walker, Steve Scannell & Abigail Wood, *Bridging the Gorge: States Prevent Retention of Ill-Gotten Profits Through Disgorgement*, Comp. Pol'y Int'l (Aug. 2021).

1081 *See*, *e.g.*, California v. American Stores, 495 U.S. 271 (1990) (states permitted to sue for injunctive relief, notwithstanding FTC negotiation of a consent order).

1082 New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020).

1083 New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 224 (S.D.N.Y. 2020) ("Not only have the FCC and DOJ conditioned the transaction before the Court, the Court will accord their views some deference. Where federal regulators have carefully scrutinized the challenged merger, imposed various restrictions on it, and stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices[,] we have a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain. Indeed, the Supreme Court has looked to the views of federal regulators on multiple occasions for assistance in conducting its Section 7 analysis. As Plaintiff States note, however, the views of the FCC and DOJ cannot simply be adopted entirely at face value, as their assessment of a merger's legality may be guided by considerations that are outside the scope of Section 7. Ultimately, the Court will treat the views of the FCC and DOJ as informative but not conclusive. . . . [M]indful that the agencies are intimately familiar with this technical subject matter, as well as the competitive realities involved, the Court treats their views and actions as persuasive and helpful evidence in analyzing the competitive effect of this merger[.]") (cleaned up).

1084 *See*, *e.g.*, Michael Murray, U.S. Dept. of Justice, Antitrust Federalism (remarks of Aug. 31, 2020) (explaining DOJ perspective on deference owed to federal enforcers' decisions).

interest. This outcome benefits consumers through the combination's enhanced output—the increased availability of a higher quality mobile wireless network for consumers. Specifically, T-Mobile has committed to providing 5G coverage to 85% of the rural population within three years, and 90% of the rural population within six years. In addition, the relief the Antitrust Division and the FCC secured will maintain the competitive structure of the industry through a substantial divestiture of assets from T-Mobile to DISH Network Corporation ("DISH"), which has committed to building a nationwide network that will put its idle spectrum holdings into use by mobile wireless consumers for the first time. As a result, the relief the Antitrust Division (and a number of state Attorneys General) and the FCC secured means consumers in rural areas will gain new access to high quality 5G networks and consumers nationwide will continue to have four fully competitive options for their mobile wireless services.

[2] A group of thirteen states and the District of Columbia (the "Litigating States") seek to block the merger in its entirety. In doing so, they ask this court to undo the benefits of the relief secured by the Antitrust Division (and our fellow state Attorneys General) and the FCC. The Litigating States face a high bar in their challenge. To win a permanent injunction that would block the merger, they must convince the court their request to block the merger in its entirety is in the public interest, among other obstacles. In other words, they must convince this honorable court that it is not merely acceptable, but beneficial to the public, to deprive consumers nationwide of a higher quality T-Mobile network and DISH's commitment to build a nationwide retail mobile wireless network, and to deprive consumers in rural states, which have disproportionately chosen to support the Antitrust Division's settlement rather than join in this litigation, of new access to 5G networks. Indeed, that the Litigating States' proposed remedy will affirmatively harm consumers in rural states by denying them these benefits weighs strongly against a nationwide injunction. [. . .]

[3] . . . The proposed Final Judgment outlines a structural settlement that preserves the existence of a fourth competitor in the nationwide market for retail mobile wireless service. The settlement requires T-Mobile to divest to DISH certain retail wireless business and network assets, and supporting assets and provide to DISH all services, access, and assets necessary, to facilitate DISH building and operating its own mobile wireless services network and to enable it to compete in the marketplace. This is intended to ensure the development of a new national facilities-based mobile wireless carrier competitor to ultimately remedy the anticompetitive harms that flow from the change in the market structure that otherwise would have occurred as a result of the merger. Further, DISH will bring spectrum (that it currently has no obligation to build out in this way) into service as a mobile broadband 5G service that will serve consumers across the country.

[4] The Antitrust Division reached these conclusions in its role as the enforcer of the federal antitrust law on behalf of consumers nationwide. This required, among other things, considering the interests of differently situated consumers. Ultimately, the proposed Final Judgment fulfills the twin goals of a merger remedy. It permits the merger to proceed, enabling rural, and other, consumers to benefit from its promised efficiencies, while adopting remedies that will protect consumers in and bring new competition to urban areas that may have been at greater risk without this settlement. Currently, ten states—Arkansas, Colorado, Florida, Kansas, Louisiana, Nebraska, Ohio, Oklahoma, South Dakota, and Texas—have joined the Antitrust Division's suit seeking approval of its settlement, and three more states—Arizona, New Mexico, and Utah—have publicly supported the deal. [. . .]

[5] Just as the existence of the remedies secured by the Antitrust Division and the FCC are important factors in this court's equitable relief analysis, so too are the conclusions of both agencies that the remedies they secured are in the public's interest. Giving weight to these determinations is all the more justified here, where granting the Litigating States' request for a nationwide injunction would directly conflict with the Antitrust Division's proposed Final Judgment and the FCC's order, effectively displacing these remedies and preventing the merger's significant procompetitive efficiencies from flowing to consumers. [. . .]

[6] Both the Antitrust Division and the FCC had the ability to pursue a nationwide injunction to block the merger, but after an extensive review and analysis, instead chose to secure other relief. After studying the merger for fifteen months on the basis of its antitrust expertise and from the perspective of the nation as a whole, the Antitrust Division reached a settlement that provided substantial long-term benefits for American consumers by allowing consumers to benefit from the transaction's efficiencies while protecting them from its harms. Similarly, the FCC conducted a thorough and lengthy investigation, informed by its expertise regarding competition among providers

of various telecommunications services and its nationwide perspective, and concluded that the proposed transaction, as modified by the FCC's own set of conditions, would be in the public interest. [. . .]

[7] As Congress recognized, state government bodies do not hold the same policy concerns as federal government bodies. In representing the rights and interests of their residents, they do not consider the rights and interests of the nation as a whole. In particular, they do not possess the expansive view of federal enforcers who regularly oversee antitrust investigations and make remedy recommendations on a national scale. They have neither the authority nor the responsibility to act on behalf of the nation, and while their concerns are not invalid, they are bound by state borders. [. . .]

[8] The Litigating States' strong interest in this merger does not justify their attempt to substitute their judgment for the nationwide perspective of the United States. The United States does not intend to discourage private party plaintiffs—whether states, businesses, or individuals—from spending their time and effort assisting the federal government in antitrust enforcement. The Clayton Act was enacted not merely to provide private relief, but to serve as well the high purpose of enforcing the antitrust laws. At the same time, states cannot and should not displace the federal government's role as the nation's federal antitrust enforcer. When a group of states attempts to do so by seeking relief that quite arguably may benefit certain citizens while harming others, such a remedy is not in the public interest, and, respectfully, should not satisfy this court's test for injunctive relief.

* * *

Sprint / T-Mobile was not the last time the Justice Department would find itself at odds with a group of state Attorneys General. In December 2025, a group of 12 states plus the District of Columbia were granted leave to intervene in a Tunney Act proceeding regarding DOJ's settlement of the HPE / Juniper transaction, following some high-profile firings at the Justice Department and allegations of improper conduct.[1085] The next year, when DOJ accepted a settlement in a conduct investigation into Live Nation Entertainment,[1086] a coalition of states refused to join the settlement, tried the case without DOJ, and successfully obtained a jury verdict in April 2026.[1087]

In *Sprint / T-Mobile* above, the Division argued that its decision to accept a remedy should have some persuasive weight in subsequent litigation. In other circumstances, however, the Division has argued that *no* inference ought to be drawn from its decision not to challenge a transaction, in the adjudication of a subsequent challenge by another plaintiff. In an amicus brief filed in the *Steves and Sons v. JELD-WEN* private merger challenge, the Division denied that the defendant could rely on the Justice Department's decision not to intervene, urging the court that:

> [N]o inference should be drawn from the Division's closure of its investigations into JELD-WEN's proposed and consummated acquisition of CMI. As the United States has stated twice previously in this case in response to JELD-WEN's assertions, there are many reasons why the Antitrust Division might close an investigation or choose not to take an enforcement action. The Division's decision not to challenge a particular transaction is not confirmation that the transaction is competitively neutral or procompetitive.[1088]

Are these positions consistent? Are there reasons of principle why a decision to affirmatively accept a remedy might warrant different treatment from a decision not to take enforcement action?

NOTES

1) What are the benefits and risks of increased state-level antitrust enforcement activity? When and why should we allocate national tax dollars to support state rather than federal antitrust enforcement?
2) State antitrust laws usually follow the contours of the federal antitrust statutes, but they do not always do so. Is this a reason for concern, a cause for celebration, or both? Explain.

[1085] *See* United States v. Hewlett Packard Enter. Co., No. 25-CV-00951-PCP, 2025 WL 3454834, at *1 (N.D. Cal. Dec. 1, 2025) (granting leave to intervene); Hannah Rabinowitz & David Goldman, *Justice Department Fires Two Senior Antitrust Attorneys, Alleging Insubordination*, CNN (July 29, 2025); Roger P. Alford, *The Rule of Law Versus the Rule of Lobbyists* (remarks of Aug. 18, 2025).

[1086] Notice of Settlement, United States v. Live Nation Entertainment, Inc., No. 1:24-cv-3973 (S.D.N.Y. Mar. 9, 2026), https://www.justice.gov/atr/case/us-and-plaintiff-states-v-live-nation-entertainment-inc-and-ticketmaster-llc.

[1087] Ben Sisario, *Jury Finds Live Nation Acts as a Monopoly in a Victory for States*, N.Y. TIMES (Apr. 15, 2026).

[1088] Brief for the United States of America as Amicus Curiae in Support of Appellee Steves And Sons, Inc., Steves and Sons, Inc. v. JELD-WEN, Inc., No. 19-1397, at 15 (4th Cir. filed Aug. 23, 2019).

3) Are there circumstances under which a court should defer to a state enforcer's view rather than the contrary view of the federal agencies?
4) Are there any reasons why it might not be optimal for the states to have power to sue for *parens patriae* damages on behalf of their citizens?
5) What kinds of interstate cooperation could help improve the effectiveness of state enforcement? How?[1089]

G.Remedies I: Injunctive Relief

The primary remedy in government cases—whether brought by the FTC, DOJ, or state governments—is usually injunctive relief: that is, a court order designed to terminate and remedy the antitrust violation, after liability has been established. (Damages—the signature remedy in private cases, although sometimes available to government plaintiffs—are considered in the next chapter.) In the following extract, Doug Melamed gives a very brief tour of the most important purposes of an antitrust remedy.

A. Douglas Melamed, Afterword: The Purposes of Antitrust Remedies

76 Antitrust L.J. 359 (2009)

[1] Broadly speaking, antitrust remedies serve four different purposes:

[2] *Compensation of victims of unlawful conduct.* The most straightforward purpose is compensation of those who have been harmed by the unlawful conduct. . . .

[3] *Punishment and deterrence of unlawful conduct.* Furthering the punishment and deterrence objectives requires remedies the ex ante anticipation of which would cause economic actors to expect conduct that violates the antitrust laws to be ultimately unprofitable. . . .

[4] *Terminating and preventing the recurrence of unlawful conduct.* There is probably no dispute that a determination that the defendant has violated the antitrust laws should at the very least be cessation of the unlawful conduct and some kind of assurance that the unlawful conduct will not be resumed in the near future. . . .

[5] *Restoring competitive conditions to the market harmed by the unlawful conduct.* Questions regarding this remedial objective are in some ways the most difficult and controversial. Restorative remedies can include divestiture and mandatory injunctions. They can be problematic for three basic reasons. They could impose a disproportionate and inequitable burden on the defendant. They could wittingly or unwittingly substitute government regulation for market competition. And they could fail to achieve their purpose because of the inability of those fashioning the remedy fully to understand the markets and to foresee the future. In these ways, the cure of restorative remedies could be worse than the disease.

* * *

Antitrust injunctions may be preliminary (*i.e.*, granted on an interim basis, usually to preserve the status quo, pending some more extensive proceeding) or permanent (*i.e.*, reflecting a full and final merits adjudication). The agencies are situated a little differently with respect to their access to injunctive relief. When the FTC contemplates permanent proceedings in administrative court, preliminary relief—such as an injunction preventing the parties closing a notified transaction after the expiration of the HSR waiting period—is only available in district court, because the Commission (and its ALJs) can only award a permanent cease-and-desist order.[1090] As a result, the FTC has historically had a practice, in merger cases, of filing complaints simultaneously in administrative court (seeking permanent relief) *and* in federal district court (seeking a preliminary injunction, and perhaps a temporary restraining order preventing the parties from closing the deal during the preliminary injunction proceedings). DOJ, by contrast, has no power to litigate administratively and no limits on its ability to litigate in district court: as a

[1089] The National Association of Attorneys General is very active in facilitating antitrust cooperation. *See* https://www.naag.org/issues/antitrust/.

[1090] The remedial powers of the ALJ and Commission in administrative proceedings are limited to issuing a permanent cease-and-desist order. Interim or preliminary relief is not available. 15 U.S.C. § 45(b).

result, DOJ's practice usually involves a combined proceeding in federal district court to obtain both preliminary and permanent injunctive relief.

The agencies also face slightly different standards when seeking preliminary relief. DOJ's power to obtain an injunction is grounded in Section 15 of the Clayton Act, 15 U.S.C. § 25. The generally applicable standard typically requires the government to show "a reasonable likelihood of success on the merits" as well as a favorable "balance of equities": most courts do not separately require the government to make a separate showing of irreparable injury.[1091] By contrast, the FTC's power to seek a preliminary injunction is grounded in Section 13(b) of the FTC Act, as the district court explained in the FTC's (successful) effort to enjoin a New Jersey hospital merger:

> Pursuant to Section 13 of the FTC Act, the FTC can file suit in district court seeking a preliminary injunction to prevent a merger [or to restrain other conduct] pending an FTC administrative adjudication whenever the Commission has reason to believe that a corporation is violating, or is about to violate [the antitrust laws.] The standard for granting a preliminary injunction under the FTC Act is not the same as the standard used to grant injunctive relief under Federal Rule of Civil Procedure 65. Rather, a court should issue a preliminary injunction pursuant to Section [13(b)] "[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."
>
> Under Section 13(b), a court first considers the FTC's likelihood of success on the merits. Next, the court weighs the equities to determine whether a preliminary injunction is in the public interest. The question is whether the harm that the Defendants will suffer if the merger is delayed will, in turn, harm the public more than if the injunction is not issued. Ultimately, in deciding whether to preliminarily enjoin a merger[,] doubts are to be resolved against the transaction.
>
> The FTC must show that it has a likelihood of success of demonstrating, during the administrative proceeding, that the proposed merger [or conduct] violates [a relevant provision of law.] . . . [A]t the preliminary injunction stage, the FTC does not need to establish that the proposed [practice or transaction is unlawful]. Rather, the FTC need only show that there is a reasonable probability that the challenged [practice or] transaction will [be unlawful].[1092]

Courts have wide discretion in designing antitrust injunctive relief. The Supreme Court has stated that the touchstone is "whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct."[1093] This often includes what is known as "fencing-in" relief: that is, prohibitions on conduct that may not violate the antitrust laws in its own right, but which presents an unacceptable risk of illegality or harm given

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[1091] *See*, *e.g.*, United States v. Siemens Corp., 621 F.2d 499, 505 (2d Cir. 1980) ("The proper test for determining whether preliminary relief should be granted in a Government-initiated antitrust suit is whether the Government has shown a reasonable likelihood of success on the merits and whether the balance of equities tips in its favor. . . . [O]nce the Government demonstrates a reasonable probability that s 7 has been violated, irreparable harm to the public should be presumed.").

[1092] FTC v. Hackensack Meridian Health, Inc., No. CV 20-18140, 2021 WL 4145062, at *14 (D.N.J. Aug. 4, 2021), aff'd, 30 F.4th 160 (3d Cir. 2022). *See also*, *e.g.*, FTC v. Whole Foods Market, Inc., 548 F.3d 1028 (D.C. Cir. 2008) ("[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. Not that the court may simply rubber-stamp an injunction whenever the FTC provides some threshold evidence; it must exercise independent judgment about the questions § 53(b) commits to it. Thus, the district court must evaluate the FTC's chance of success on the basis of all the evidence before it, from the defendants as well as from the FTC. The district court should bear in mind the FTC will be entitled to a presumption against the merger on the merits, and therefore does not need detailed evidence of anticompetitive effect at this preliminary phase. Nevertheless, the merging parties are entitled to oppose a § 53(b) preliminary injunction with their own evidence, and that evidence may force the FTC to respond with a more substantial showing."); FTC v. Swedish Match, 131 F. Supp. 2d 151, 156 (D.D.C. 2000) ("The question before this Court is whether the FTC has made a showing that raises questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the Commission in the first instance and ultimately by the Court of Appeals. . . . [T]he Commission must show that there is a reasonable probability that the challenged acquisition will substantially lessen competition.") (internal quotation marks and citations omitted).

[1093] Nat'l Soc. of Prof. Engineers v. United States, 435 U.S. 679, 698 (1978). *See also* Jacob Siegel Co. v. FTC, 327 U.S. 608, 613 (1946) ("The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.").

the circumstances following the violation. And when an antitrust agency is involved, courts exhibit considerable deference to the agency's judgment in designing an effective remedy.

National Lead exemplifies these principles. In that case, the FTC had determined that sellers of lead pigments had entered into an anticompetitive conspiracy that involved the use of "zone delivered pricing": that is, flat delivered pricing within particular geographic zones. The Commission issued an order requiring the participants to refrain from any conspiracy or agreement to use zone pricing, or any other system that resulted in identical prices to customers. The Commission also prohibited the participants from *unilaterally* using any pricing mechanism that resulted in identical prices with competitors as a result of zone delivered pricing. The participants objected to this latter limitation which, they argued, was an impermissible overreach. The Supreme Court thus faced the question: could the FTC ban a noncollusive and usually lawful pricing practice as part of a remedial order, when that same conduct could not be prohibited in its own right? The Court had no difficulty in saying yes.

FTC v. National Lead Co.

352 U.S. 419 (1957)

Justice Clark.

[1] The Court has held that the Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist. In Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946), the Court named the Commission "the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." Thereafter, in FTC v. Cement Institute, 333 U.S. 683 (1948), the Court pointed out that the Congress, in passing the Act, "felt that courts needed the assistance of men trained to combat monopolistic practices in the framing of judicial decrees in antitrust litigation." In the light of this, the Court reasoned, it should not "lightly modify" the orders of the Commission. Again, in FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952), we said that "if the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity." We pointed out there that Congress had placed the primary responsibility for fashioning orders upon the Commission. These cases narrow the issue to the question: Does the remedy selected have a reasonable relation to the unlawful practices found to exist? We believe that it does. . . .

[2] . . . [T]he Commission correctly considered the circumstances under which the illegal acts occurred. Those in utter disregard of law . . . call for repression by sterner measures than where the steps could reasonably have been thought permissible. Respondents made no appeal here from some of the findings as to their guilt. Having lost the battle on the facts, they hope to win the war on the type of decree. They fight for the right to continue to use individually the very same weapon with which they carried on their unlawful enterprise. The Commission concluded that this must not be permitted. It was not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than it requires. Although the zone plan might be used for some lawful purposes, decrees often suppress a lawful device when it is used to carry out an unlawful purpose. In such instances the Court is obliged not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices.

* * *

Over the long life of the antitrust project, courts and agencies have developed a robust toolkit of remedial devices for antitrust cases. As we saw in discussing merger remedies in Chapter VIII,[1094] these can crudely be divided into "structural" and "behavioral" remedies. Structural remedies work by severing the economic connections between businesses or business units; behavioral remedies work by establishing rules for what businesses must do (*i.e.*, affirmative duties) or must not do (*i.e.*, prohibitions). Structural remedies have the advantage that, if correctly designed, they eliminate the incentive for the relevant firm to engage in harmful conduct; behavioral remedies tend to leave that incentive intact, requiring ongoing interpretation, monitoring, and enforcement to guard against

[1094] *See supra* § VIII.E (merger remedies).

violations (and leaving open the possibility that the business will engage in behaviors that undermine the remedy without literally violating its terms).

1. Structural Remedies

"Divestiture" of all or part of a merger or acquisition target. As we have already seen, the most common and important remedy in a merger case is a requirement to divest (*i.e.*, sell off) the assets that would, if acquired or retained, constitute an antitrust violation. Sometimes the divestiture amounts to a complete block on the entire proposed transaction: on other occasions, it is enough to spin off the competitively-troubling business units, such that the rest of the transaction can proceed. As you may remember, a successful divestiture must satisfy a number of tests: it must include a "package" of assets—including facilities, employees, IP, brands, information, and so on—that is commercially viable (this may mean that the package includes more than simply the assets that literally give rise to the competitive problems), and it must be to a buyer that can credibly commit to operating the package as a competitive force. A buyer that will simply strip business and sell off the component parts, or just under-invest in the business and let it decline, may not represent much of a solution to the competitive problem.

Look back at Chapter VIII for more information about divestiture remedies in a merger case.

"Breakup." Sometimes a synonym for "divestiture," the concept of "breakup" as an antitrust remedy tends to connote something beyond just blocking all or part of a proposed or consummated acquisition. In particular, the term tends to be used in an informal sense to mean a divestiture as a remedy for something other than an acquisition of the relevant business units: for example, the "breakup" of a company in response to a conduct violation such as monopolization. The breakup of AT&T pursuant to the famous 1982 consent decree remains the most prominent example of such a remedy in modern antitrust history.[1095]

Breakup of this kind remains very rare in conduct (*i.e.*, nonmerger) cases.[1096] It was originally ordered by the district court in *Microsoft*, only for this instruction to be vacated by the D.C. Circuit, and the parties to subsequently reach a settlement that left Microsoft intact.[1097] Nonetheless, while commenting on the possibility of divestiture in light of the district court's decision, the D.C. Circuit provided some helpful—and somewhat pointed—guidance on the role of the breakup remedy and the conditions under which it would be appropriate. What follows is, first, the district court's judgment on remedy—requiring that Microsoft's operating system business be separated from its applications business—followed by the D.C. Circuit's decision on appeal, vacating the breakup order and remanding the case.

Note: as you may remember from Chapter VII, the district court judge, Judge Thomas Penfield Jackson, had engaged in misconduct during the trial that gave rise to an appearance of impropriety and bias against Microsoft (although the circuit court concluded that there was no actual bias).

United States v. Microsoft Corp.

97 F. Supp. 2d 59 (D.D.C. 2000)

Judge Jackson.

[1] These cases are before the Court for disposition of the sole matter presently remaining for decision by the trial court, namely, entry of appropriate relief for the violations of the Sherman Act, §§ 1 and 2, and various state laws committed by the defendant Microsoft Corporation as found by Court in accordance with its Findings of Fact and

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1095 *See* United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982) (accepting consent decree pursuant to the Tunney Act); Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications under Judge Greene*, 50 Hastings L.J. 1395 (1999); Christopher S. Yoo, *The Enduring Lessons of the Breakup of AT&T: A Twenty-Five Year Retrospective*, 61 Fed. Commc'ns. L.J. 1 (2008). *See also* Robert W. Crandall, *The AT&T Divestiture: Was It Necessary? Was It A Success?* Presentation to DOJ (Mar. 28, 2007), https://www.justice.gov/sites/default/files/atr/legacy/2007/04/10/222440.pdf.

1096 *See generally*, *e.g.*, Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 Antitrust L.J. 11, 14–16 (2009); Robert Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 Or. L. Rev. 109 (2001); Neil W. Averitt, *Structural Remedies in Competition Cases under the Federal Trade Commission Act*, 40 Ohio St. L.J. 779 (1979).

1097 Stipulation & Revised Proposed Final Judgment, United States v. Microsoft Corp., No. 98-1232 (Nov. 6, 2001).

Conclusions of Law. Final judgment will be entered contemporaneously herewith. No further proceedings will be required.

[2] The Court has been presented by plaintiffs with a proposed form of final judgment that would mandate both conduct modification and structural reorganization by the defendant when fully implemented. Microsoft has responded with a motion for summary rejection of structural reorganization and a request for months of additional time to oppose the relief sought in all other respects. Microsoft claims, in effect, to have been surprised by the "draconian" and "unprecedented" remedy the plaintiffs recommend. What it proposes is yet another round of discovery, to be followed by a second trial—in essence an *ex post* and *de facto* bifurcation of the case already considered and rejected by the Court.

[3] Microsoft's profession of surprise is not credible. From the inception of this case Microsoft knew, from well-established Supreme Court precedents dating from the beginning of the last century, that a mandated divestiture was a possibility, if not a probability, in the event of an adverse result at trial. . . . Its failure to anticipate and to prepare to meet such an eventuality gives no reason to afford it an opportunity to do so now.

[4] These cases have been before the Court, and have occupied much of its attention, for the past two years, not counting the antecedent proceedings. Following a full trial Microsoft has been found guilty of antitrust violations, notwithstanding its protests to this day that it has committed none. The Court is convinced for several reasons that a final—and appealable—judgment should be entered quickly. It has also reluctantly come to the conclusion, for the same reasons, that a structural remedy has become imperative: Microsoft as it is presently organized and led is unwilling to accept the notion that it broke the law or accede to an order amending its conduct.

[5] First, despite the Court's Findings of Fact and Conclusions of Law, Microsoft does not yet concede that any of its business practices violated the Sherman Act. Microsoft officials have recently been quoted publicly to the effect that the company has "done nothing wrong" and that it will be vindicated on appeal. The Court is well aware that there is a substantial body of public opinion, some of it rational, that holds to a similar view. It is time to put that assertion to the test. If true, then an appellate tribunal should be given early opportunity to confirm it as promptly as possible, and to abort any remedial measures before they have become irreversible as a practical matter.

[6] Second, there is credible evidence in the record to suggest that Microsoft, convinced of its innocence, continues to do business as it has in the past, and may yet do to other markets what it has already done in the PC operating system and browser markets. Microsoft has shown no disposition to voluntarily alter its business protocol in any significant respect. Indeed, it has announced its intention to appeal even the imposition of the modest conduct remedies it has itself proposed as an alternative to the non-structural remedies sought by the plaintiffs.

[7] Third, Microsoft has proved untrustworthy in the past. In earlier proceedings in which a preliminary injunction was entered, Microsoft's purported compliance with that injunction while it was on appeal was illusory and its explanation disingenuous. If it responds in similar fashion to an injunctive remedy in this case, the earlier the need for enforcement measures becomes apparent the more effective they are likely to be.

[8] Finally, the Court believes that extended proceedings on the form a remedy should take are unlikely to give any significantly greater assurance that it will be able to identify what might be generally regarded as an optimum remedy. As has been the case with regard to Microsoft's culpability, opinion as to an appropriate remedy is sharply divided. There is little chance that those divergent opinions will be reconciled by anything short of actual experience. . . . In its experience the Court has found testimonial predictions of future events generally less reliable even than testimony as to historical fact, and cross-examination to be of little use in enhancing or detracting from their accuracy.

[9] In addition to its substantive objections, the proposed final judgment is also criticized by Microsoft as being vague and ambiguous. Plaintiffs respond that, to the extent it may be lacking in detail, it is purposely so to allow Microsoft itself to propose such detail as will be least disruptive of its business, failing which plaintiffs will ask the Court to supply it as the need appears.

[10] Plaintiffs won the case, and for that reason alone have some entitlement to a remedy of their choice. Moreover, plaintiffs' proposed final judgment is the collective work product of senior antitrust law enforcement officials of the United States Department of Justice and the Attorneys General of 19 states, in conjunction with multiple consultants. These officials are by reason of office obliged and expected to consider—and to act in—the public interest; Microsoft is not. The proposed final judgment is represented to the Court as incorporating provisions employed successfully in the past, and it appears to the Court to address all the principal objectives of relief in such cases, namely, to terminate the unlawful conduct, to prevent its repetition in the future, and to revive competition in the relevant markets. Microsoft's alternative decree is plainly inadequate in all three respects.

[11] The final judgment proposed by plaintiffs is perhaps more radical than might have resulted had mediation been successful and terminated in a consent decree. It is less so than that advocated by four disinterested amici curiae. It is designed, moreover, to take force in stages, so that the effects can be gauged while the appeal progresses and before it has been fully implemented. And, of course, the Court will retain jurisdiction following appeal, and can modify the judgment as necessary in accordance with instructions from an appellate court or to accommodate conditions changed with the passage of time. [. . .]

[12] Upon the record at trial and all prior and subsequent proceedings herein, it is this 7th day of June, 2000, hereby:

ORDERED, ADJUDGED, AND DECREED as follows:

1. Divestiture

> a. Not later than four months after entry of this Final Judgment, Microsoft shall submit to the Court and the Plaintiffs a proposed plan of divestiture. . . .
>
> b. Following approval of a final plan of divestiture by the Court (the "Plan") . . . Microsoft shall implement such Plan.
>
> c. The Plan shall provide for the completion . . . of the following steps:
>
> > i. The separation of the Operating Systems Business from the Applications Business, and the transfer of the assets of one of them (the "Separated Business") to a separate entity along with (a) all personnel, systems, and other tangible and intangible assets (including Intellectual Property) used to develop, produce, distribute, market, promote, sell, license and support the products and services of the Separated Business, and (b) such other assets as are necessary to operate the Separated Business as an independent and economically viable entity.
> >
> > ii. Intellectual Property that is used both in a product developed, distributed, or sold by the Applications Business and in a product developed, distributed, or sold by the Operating Systems Business as of April 27, 2000, shall be assigned to the Applications Business, and the Operating Systems Business shall be granted a perpetual, royalty-free license to license and distribute such Intellectual Property in its products[.] [. . .]
>
> d. Until Implementation of the Plan, Microsoft shall:
>
> > i. preserve, maintain, and operate the Operating Systems Business and the Applications Business as ongoing, economically viable businesses, with management, sales, products, and operations of each business held as separate, distinct and apart from one another as they were on April 27, 2000, except to provide the accounting, management, and information services or other necessary support functions provided by Microsoft prior to the entry of this Final Judgment; [. . .]
> >
> > iii. take no action that undermines, frustrates, interferes with, or makes more difficult the divestiture required by this Final Judgment without the prior approval of the Court[.] [. . .]

2. Provisions Implementing Divestiture

a. After Implementation of the Plan, and throughout the term of this Final Judgment, neither the Operating Systems Business nor the Applications Business, nor any member of their respective Boards of Directors, shall acquire any securities or assets of the other Business; no Covered Shareholder holding securities of either the Operating Systems Business or the Applications Business shall acquire any securities or assets of or shall be an officer, director, or employee of the other Business; and no person who is an officer, director, or employee of the Operating Systems Business or the Applications Business shall be an officer, director, or employee of the other Business.

b. After Implementation of the Plan and throughout the term of this Final Judgment, the Operating Systems Business and the Applications Business shall be prohibited from:

> i. merging or otherwise recombining, or entering into any joint venture with one another;
>
> ii. entering into any Agreement with one another under which one of the Businesses develops, sells, licenses for sale or distribution, or distributes products or services (other than the technologies referred to in the following sentence) developed, sold, licensed, or distributed by the other Business;
>
> iii. providing to the other any APIs, Technical Information, Communications Interfaces, or technical information that is not simultaneously published, disclosed, or made readily available to [trading partners]; and
>
> iv. licensing, selling or otherwise providing to the other Business any product or service on terms more favorable than those available to any similarly situated third party.

United States v. Microsoft Corp.

253 F.3d 34 (D.C. Cir. 2001) (en banc)

Per curiam.

[1] As a general matter, a district court is afforded broad discretion to enter that relief it calculates will best remedy the conduct it has found to be unlawful. This is no less true in antitrust cases. And divestiture is a common form of relief in successful antitrust prosecutions: it is indeed the most important of antitrust remedies.

[2] On remand, the District Court must reconsider whether the use of the structural remedy of divestiture is appropriate with respect to Microsoft, which argues that it is a unitary company. By and large, cases upon which plaintiffs rely in arguing for the split of Microsoft have involved the dissolution of entities formed by mergers and acquisitions. On the contrary, the Supreme Court has clarified that divestiture has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and that complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws.

[3] One apparent reason why courts have not ordered the dissolution of unitary companies is logistical difficulty. As the court explained in United States v. Alcoa, 91 F. Supp. 333, 416 (S.D.N.Y. 1950), a "corporation, designed to operate effectively as a single entity, cannot readily be dismembered of parts of its various operations without a marked loss of efficiency." A corporation that has expanded by acquiring its competitors often has preexisting internal lines of division along which it may more easily be split than a corporation that has expanded from natural growth. Although time and corporate modifications and developments may eventually fade those lines, at least the identifiable entities preexisted to create a template for such division as the court might later decree. With reference to those corporations that are not acquired by merger and acquisition, Judge Wyzanski accurately opined in *United Shoe*:

> United conducts all machine manufacture at one plant in Beverly, with one set of jigs and tools, one foundry, one laboratory for machinery problems, one managerial staff, and one labor force. It takes no Solomon to see that this organism cannot be cut into three equal and viable parts.

United States v. United Shoe Machine Corp., 110 F. Supp. 295, 348 (D.Mass. 1953).

[4] Depending upon the evidence, the District Court may find in a remedies proceeding that it would be no easier to split Microsoft in two than United Shoe in three. Microsoft's Offer of Proof in response to the court's denial of an evidentiary hearing included proffered testimony from its President and CEO Steve Ballmer that the company "is, and always has been, a unified company without free-standing business units. Microsoft is not the result of mergers or acquisitions." Microsoft further offered evidence that it is "not organized along product lines," but rather is housed in a single corporate headquarters and that it has only one sales and marketing organization which is responsible for selling all of the company's products, one basic research organization, one product support organization, one operations department, one information technology department, one facilities department, one purchasing department, one human resources department, one finance department, one legal department and one public relations department. If indeed Microsoft is a unitary company, division might very well require Microsoft to reproduce each of these departments in each new entity rather than simply allocate the differing departments among them.

[5] In devising an appropriate remedy, the District Court also should consider whether plaintiffs have established a sufficient causal connection between Microsoft's anticompetitive conduct and its dominant position in the OS market. Mere existence of an exclusionary act does not itself justify full feasible relief against the monopolist to create maximum competition. Rather, structural relief, which is designed to eliminate the monopoly altogether requires a clearer indication of a significant causal connection between the conduct and creation or maintenance of the market power. Absent such causation, the antitrust defendant's unlawful behavior should be remedied by an injunction against continuation of that conduct.

[6] [In this case,] we have found a causal connection between Microsoft's exclusionary conduct and its continuing position in the operating systems market only through inference. Indeed, the District Court expressly did not adopt the position that Microsoft would have lost its position in the OS market but for its anticompetitive behavior. If the court on remand is unconvinced of the causal connection between Microsoft's exclusionary conduct and the company's position in the OS market, it may well conclude that divestiture is not an appropriate remedy.

[7] While we do not undertake to dictate to the District Court the precise form that relief should take on remand, we note again that it should be tailored to fit the wrong creating the occasion for the remedy.

* * *

In recent years, breakups are back on the menu of policy discussion. Tim Wu, for example, has argued that "[t]here is an unfortunate tendency within enforcement agencies to portray breakup and dissolutions as off the table or only for extremely rare cases. There is no legal reason for that presumption[.]"[1098] The next couple of extracts give two different perspectives on the breakup option.

Noah J. Phillips, FTC, We Need to Talk: Toward a Serious Conversation About Breakups

Remarks of Apr. 30, 2019

[1] Using antitrust to break up companies was never common practice in U.S. history, even in the law's early days. Of the single-firm monopolization cases brought by the government, fewer than 20% resulted in substantial divestiture, whether the sample runs from 1890 through 1939 or is extended through 1999. Focusing only on non-merger cases, the percentage drops below 10%. The most famous antitrust breakups are *Standard Oil* in 1911 and *AT&T* in 1984. The contrasts between the two are instructive, but neither experience should whet our appetite for breaking up companies without a good basis and the right conditions.

The Standard Oil Breakup (1911)

[2] You might be surprised to learn that the breakup of Standard Oil, the infamous Rockefeller oil trust, formally ended earlier this month [*i.e.*, April 2019], when the Department of Justice ("DOJ") moved a court to end the 1911 decree, from 108 years ago.

[1098] Tim Wu, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018) 132–33.

[3] The government sued Standard Oil under Sections 1 and 2 of the Sherman Act. The complaint alleged that the Standard Oil Company of New Jersey, some 70 subsidiary corporations and partnerships, and seven individuals conspired to restrain trade in petroleum, refined oil, and other petroleum products, and attempted to and did monopolize those lines of commerce. The lower court held the defendants liable under Sections 1 and 2, and ordered the dissolution of Standard Oil. The Supreme Court affirmed the breakup ruling.

[4] [But *Standard Oil*] was not so much a case about anticompetitive conduct—the breakup remedy was really aimed at the combination it sought to undo. [. . .]

[5] [W]hile the Supreme Court affirmed Standard Oil's antitrust liability based on the combinations creating the trust and the trust's exclusionary conduct, the illegality of the trust's 1882 formation and subsequent reorganization was essential to the breakup order. [. .]

The AT&T Breakup (1984)

[6] The next breakup on which I want to focus is AT&T, in 1984, perhaps the other most significant use of Section 2 to split up a large American company.

[7] The DOJ filed its complaint against AT&T in 1974, alleging that the company, Western Electric, and Bell Telephone Laboratories had violated Section 2. The government claimed an unlawful combination and conspiracy between the defendants, the Bell Operating Companies (the "Baby Bells"), and others, which allegedly allowed AT&T to maintain control over the two other defendants and the Baby Bells, to limit competition from other telecomm providers, and to maintain a monopolistic manufacturing and purchasing relationship between Western Electric and the Bell System. The discovery process lasted seven years, with trial beginning in January 1981. Many months later, but still one month before the very long trial was scheduled to end, the parties agreed on settlement terms that were approved by the court, with modifications, in August of that year.

[8] The final decree was complex and multifaceted; so I will focus on the provisions relating to the divestiture of the Baby Bells and their impact on long-distance services. The purpose of the breakup was to boost competition in this market, not competition between the Baby Bells, which were to become regional monopolies. The government's theory was that owning the Baby Bells allowed AT&T to foreclose competition in long-distance services and telecomm equipment, by denying long-distance competitors the necessary local interconnections to the Baby Bells. So, in addition to splitting them up, the decree also required the Baby Bells to make their switching facilities equally accessible to long-distance providers.

[9] Judge Posner called the breakup of AT&T arguably the most successful structural remedy in U.S. antitrust history. He was speaking in relative terms, and I think he's probably right. There is strong evidence and broad consensus that the telecommunications industry's competitiveness increased following the 1984 breakup. [. . .]

[10] . . . Unlike *Standard Oil* . . . AT&T's high pre-divestiture share of the long-distance market had been stable, and fell significantly after the breakup, as competitors entered or expanded. That suggests the divestiture achieved gains that market forces and regulatory measures had failed to deliver, though the organization of the Baby Bells and the regulatory structure of the telecommunications industry played significant roles. [. . .]

[11] [A]gencies and courts are not, like politicians and pundits, champing at the bit to break up companies. While the law contemplates doing so—and doing so sometimes is warranted—enforcement experience and economic research show us that the treatment may be worse than the disease and, in some cases, simply not doable.

High Uncertainty

[12] Seeking a breakup remedy in an antitrust case requires a judgment that the resulting market structure will leave competition and consumers better off. Consider that for a moment: breaking up a company is, quite directly, the government using the force of law to substitute its vision of how an industry can and should be structured, for how the market has actually worked. That alone should make one pause and appreciate the gravity of the proposal. Antitrust enforcers are not industrial planners. As Judge Easterbrook wrote, we should not "fall prey to the nirvana fallacy, the belief that if a cost or flaw in existing affairs can be identified, it must follow that some other state of affairs (the 'remedy') is better."

[13] When we seek a divestiture in a merger case, we know how competition looks. The remedy seeks to preserve competition as it is (or recently was), not an untested state of affairs that we regulators might believe superior. Although some uncertainty remains in merger cases, it is far less than the uncertainty of breakups in non-merger cases. In a non-merger case, if we wish to restructure a market, why do we presume our vision for how that market ought to work will, in fact, work, much less actually work better? These are tough questions. And antitrust requires that they be answered only by one agency and one (or a few) judges.

[14] My argument here rests on the small-c conservative principle that, the greater the proposed interference with the status quo of a complex system like a market, the less confident we should be of the desired outcome, both that it will be the outcome and, if so, that it will be desirable. This principle acknowledges the nirvana fallacy and counters with a sober assessment of our limited ability to control complexity and guard against unintended consequences.

Rory Van Loo, In Defense of Breakups: Administering a "Radical" Remedy

105 Cornell L. Rev. 1955 (2020)

[1] Antitrust debates [about the breakup remedy] fail to consider the insights generated by routine private sector breakups. One-third of mergers and acquisitions (M&A)—more appropriately termed reorganizations—are divestitures. These divestitures include some of the largest deals of the last decade, including Fox's sale of its 20th Century Fox production arm for $71 billion to Disney, eBay's spinoff of PayPal, and Hewlett-Packard's decision to split itself down the middle to create two of the one hundred largest U.S. companies. Despite meaningful differences, the prevalence of these deals alone is informative because what antitrust observers have come to view as drastic is commonplace in the business world.

[2] Moreover, scholars in other fields—notably strategic management, finance, and organizational behavior—have studied voluntary private sector breakups extensively. They have shown how these voluntary divestitures add value and how better process design can improve their implementation. Of course, it is important to recognize that even if antitrust breakups are costly and lower the firm's value, they may be economically beneficial by deterring executives from pursuing anticompetitive deals. But by remaining disconnected from the extensive business scholarship on divestitures, the antitrust literature has exaggerated breakups' costs and governmental incompetence in administering them.

[3] Regulatory scholarship can also improve the antitrust conceptualization of breakups. Antitrust scholars focus far more on ex post enforcement actions and legal cases, whereas scholars in environmental law and other regulatory fields extensively analyze the monitoring of firms and design of regulatory processes. In particular, the literature in those other fields is in dialogue with a prominent strand of research, associated with administrative law, arguing for collaborative governance.

[4] Approaching breakup administration less as an adversarial law enforcement procedure and more as collaborative governance could streamline the process, which would speak to one of the biggest critiques of breakups: delay. Also, collaborative governance aims to leverage business sector expertise to compensate for administrative agency sophistication shortfalls and information asymmetries. Most concretely, this would mean not only leveraging the monopoly's resources, but also involving independent third-party M&A consultants. Thus, by drawing on the collaborative governance literature it becomes possible to see beyond the limitations that breakups faced decades ago and adopt a more realistic assessment of how they would work today.

[5] The implications of a more informed view of breakup administrability are far-reaching. A misguided view of breakups may help explain what many observers see as decades of weak antitrust enforcement, leading to charges that the deck is stacked in favor of large powerful firms. Executives know that if they execute an anticompetitive merger by quickly integrating the companies, antitrust enforcers or courts will fear breaking up the resulting company. Ironically, unfounded fears of doing harm through breakups may lead to either harmful inaction or weaker remedies that are more likely to prove wasteful. If widespread and unfounded resistance to administering breakups has contributed substantially to the presence of monopolies, it has imposed considerable costs on society.

[6] Once breakups are understood as a normal part of business affairs, and as capable of being co-administered with the private sector, courts and enforcers can deploy them more readily as an antitrust remedy. . . . At the very least, the intuitive resistance to breakups needs to end. Unless and until greater evidence is produced that breakups harm society, judges should be less hesitant to approve breakups, enforcers less tentative to pursue them, and policymakers less resistant to write laws that deploy them.

2. Behavioral Remedies

As we saw in the context of merger remedies, the toolkit of behavioral remedies is broad: we will meet just a handful of examples here.

Prohibitions on specific practices or contract terms. The most fundamental form of behavioral relief is an obligation to terminate the challenged practices, and to refrain from similar behavior in future. For example, in resolving allegations that the Alabama Board of Dental Examiners had unlawfully imposed an anticompetitive obligation on teeth-aligning providers to purchase the services of a licensed dentist, the remedial order required the Board to cut it out—to refrain from imposing that obligation, or a similar one, during the term of the order:

Decision & Order, In the Matter of Board of Dental Examiners of Alabama

FTC Docket No. C-4757 (Dec. 20, 2021)

IT IS . . . ORDERED that Respondent, in connection with its activities in or affecting commerce . . . shall cease and desist from, directly or indirectly:

> A. Requiring any Non-Dentist Provider affiliated with any Clear Aligner Platform to have on-site supervision by a Dentist when performing Intraoral Scanning; and
>
> B. Prohibiting, restricting, impeding, or discouraging any (i) Clear Aligner Platform or (ii) Dentist or Non-Dentist Provider affiliated with any Clear Aligner Platform from providing or facilitating the provision of Clear Aligner Therapy through remote treatment;
>
> *Provided, however,* nothing in this Order shall prohibit Respondent from filing, or causing to be filed, a court action against a Non-Dentist Provider, Dentist, or Clear Aligner Platform for an alleged violation of the Alabama Dental Practice Act;
>
> *For the avoidance of doubt,* and other than as set out above . . . , this Order shall not be construed as preventing Respondent from pursuing any administrative remedies against a Dentist or Non-Dentist Provider pursuant to and in accordance with [Alabama law].

* * *

Nondiscrimination. Where there is concern that a business subject to an antitrust remedy may suppress or exclude competition by foreclosing competitors' access to relevant inputs or distribution channels, a remedial order may require the business to make such inputs available on nondiscriminatory terms.

In the following extract, the FTC required Victrex, a supplier of polyetheretherketone (mercifully abbreviated to "PEEK") that had engaged in the unlawful use of exclusivity commitments, to refrain from discriminating against customers that dealt with a competing PEEK supplier.

Decision & Order, In the Matter of Victrex PLC

FTC Docket No. C-4586 (July 13, 2016)

IT IS . . . ORDERED that [. . .]

> B. Respondents shall cease and desist from discriminating against, penalizing, or otherwise retaliating against any Customer for the reason, in whole or in part, that the Customer engages in, or intends to engage in, the research, development, testing, manufacture, production, distribution, purchase, marketing, promotion, or sale of any Customer Product using a Competing PEEK, or otherwise refuses

to enter into or continue any condition, agreement, contract, understanding, or other requirement that imposes Exclusivity. Examples of practices prohibited under this Paragraph include but are not limited to the following, when the result, in whole or in part, of prohibited discrimination or retaliation for use of Competing PEEK or refusal to accede to Exclusivity:

1. Terminating, suspending, delaying, or threatening or proposing thereto, sales of Respondents' PEEK to the Customer, either generally or with respect to particular forms or grades of PEEK;

2. Denying, or threatening or proposing to deny, the Customer access to Respondents' FDA Master File;

3. Auditing the Customer's purchases or sales of Competing PEEK;

4. Withdrawing or modifying, or threatening or proposing thereto, favorable Sales Terms or Product Support to the Customer;

5. Providing, or threatening or proposing thereto, less favorable Sales Terms or Product Support to the Customer;

6. Withholding from the Customer any form or grade of Respondents' PEEK;

7. Refusing to deal with the Customer on terms and conditions generally available to other Customers; and

8. Notwithstanding the existence or non-existence of any severability or other provisions in Respondents' agreement(s) or contract(s) with any Customer(s), terminating, suspending, or requiring renegotiation of any term of any agreement or contract for the purchase and sale of Respondents' PEEK, as a result of the Exclusivity terms or other terms inconsistent with this Order being waived, invalid, illegal, or unenforceable.

For the avoidance of doubt, it shall not constitute, in and of itself, a violation of this Order for Respondents to engage in the conduct described in Paragraph II.B(1–7) above, when such conduct results from independent and verifiable business reasons unrelated to a Customer's use of Competing PEEK or refusal to accede to Exclusivity.

* * *

Compelled dealing (supply / interoperation / licensing). Under certain circumstances, a remedial order may require that a business make some kind of supply, infrastructure, interoperability, intellectual property, or other assets or facilities available to others. Such an order may go further and require that such access be on particular terms: for example, nondiscriminatory terms, for no more than a "fair and reasonable" rate or price, or on other terms and conditions that a court or agency may consider appropriate.

One example of this kind of thing was the FTC's negotiated remedy in the *Google / MMI* case, entered to resolve concerns that Google might use a package of acquired patent rights in a manner harmful to competition and in violation of previous commitments that those patents would be licensed on FRAND (*i.e.*, fair, reasonable, and non-discriminatory) terms. The consent decree in that case obliged Google to negotiate in good faith toward a license with potential licensees.

Decision & Order, In the Matter of Motorola Mobility LLC

FTC Docket No. C-4410 (July 23, 2013)

IT IS . . . ORDERED that:

A. Respondents shall, within sixty (60) days of receiving a written request by a Potential Licensee for a license to Respondents' [relevant patents] ("Requested License"), provide a written response and begin negotiation with such Potential Licensee for the Requested License. Respondents' written response pursuant to this paragraph shall be in good faith compliance with their FRAND Commitments and all other provisions of this Order.

B. Respondents shall not sell or assign any FRAND Patent to any Third Party unless such Third Party agrees: (i) to become a successor to Respondents' FRAND Commitments to the extent the FRAND Patent is subject to such FRAND Commitments, (ii) not to seek Covered Injunctive Relief on the basis of Infringement of the FRAND Patent except to the extent Respondents would be permitted to seek such Covered Injunctive Relief by the terms of this Order, and (iii) to condition further assignment of the FRAND Patent on the assignee agreeing to the terms of this subparagraph[.]

* * *

Prior approval / notification. In some cases, it may be appropriate to impose an obligation to provide advance notice, or even seek affirmative permission, before engaging in certain conduct. For example, in the Victrex case mentioned above, the FTC required Victrex to agree to give 60 days' notice before terminating a customer. The remedial language aimed to protect Victrex's right to terminate a customer in appropriate circumstances, while preserving the FTC's ability to monitor the company's conduct in exercising this right.

Decision & Order, In the Matter of Victrex PLC

FTC Docket No. C-4586 (July 13, 2016)

Notwithstanding any other provision of this Order, if:

1. Respondents timely deliver the Order and [relevant exhibits] to a Customer with an applicable Legacy Contract as required by [the Order]; and

2. the Customer has not indicated that it will comply with the terms of [the Order] by counter-signing and delivering [the relevant exhibit] to Respondents,

it shall not constitute a violation of this Order for Respondents to (i) enforce existing Exclusivity terms in a Legacy Contract, but only as applied to [certain products], or (ii) enforce terms under a Legacy Contract . . . .

Provided, however, that as to any Customer that has counter-signed and delivered [the relevant exhibit to this Order] to Respondents, Respondents shall submit to the Commission written notice of any communication from any Respondent to the Customer that the Customer has breached the terms set forth in Exhibit C. Respondents shall submit any such notice to the Commission at least sixty (60) days prior to exercising any right of termination resulting from the alleged breach, during which time the Customer shall be given the opportunity to cure the alleged breach.

* * *

Equitable monetary relief. In principle, an antitrust remedy might require that a wrongdoer hand over the profits of the illegal conduct, or otherwise make redress or restitution to injured parties.[1099] The leading example remains the FTC's consent order in the *Cephalon* matter, which contemplated total relief in excess of $1 billion.[1100] At the time of writing, however, following the decision in *AMG Capital*, the FTC has no authority to obtain equitable monetary relief in federal court under Section 13(b) of the FTC Act; however, equivalent redress might play a role in a negotiated settlement, and past DOJ antitrust settlements have required disgorgement.[1101]

[1099] Unlike damages, equitable monetary relief is generally measured by reference to the amount of an unjust gain, not an unjust injury. *See generally* Einer R. Elhauge, *Disgorgement as an Antitrust Remedy*, 76 Antitrust L.J. 79 (2009).

[1100] Stipulated Order for Permanent Injunction and Equitable Monetary Relief, FTC v. Cephalon, Inc., No. 2:08-CV-2141 (E.D. Pa. June 17, 2015) ("The Cephalon Parties shall pay One Billion and Two Hundred Million Dollars . . . as equitable monetary relief, which shall be used for a settlement fund . . . in accordance with the terms of this Order, including the Settlement Fund Disbursement Agreement, attached hereto as Exhibit A.").

[1101] U.S. Dept. of Justice, Press Release, Justice Department Requires Morgan Stanley to Disgorge $4.8 Million in Profits from Anticompetitive Agreement (Sept. 30, 2011); U.S. Dept. of Justice, Press Release, Justice Department Reaches $5 Million Settlement with Flakeboard, Arauco, Inversiones Angelini and Sierrapine for Illegal Premerger Coordination (Nov. 7, 2014). *See also* Schonette Walker, Steve Scannell & Abigail Wood, *Bridging the Gorge: States Prevent Retention of Ill-Gotten Profits Through Disgorgement*, Comp. Pol'y Int'l (Aug. 2021) (states' powers to obtain EMR).

Other "fencing-in" relief. Remedial orders may also include a wide variety of provisions designed to "fence in" the risk of further violations, including by prohibiting conduct that would not itself be illegal or harmful.[1102]

Ian Conner, FTC, Fixer Upper: Using the FTC's Remedial Toolbox to Restore Competition

Remarks of Feb. 8, 2020

[1] Our remedial orders can (and do) do more than just repeat the antitrust laws by prohibiting conduct that is already unlawful and otherwise leaving the respondent free to go about its business. Commission remedial orders commonly include prohibitions that go beyond the complained of behavior and seek to, in the words of the Supreme Court, effectively to close all roads to the prohibited goal. This is obviously both necessary and appropriate because those caught violating the antitrust laws must expect some fencing in.

[2] Fencing-in relief is exemplified by our 2016 order in *Victrex*. In that case, the Commission alleged that Victrex, Inc., monopolized sales of a high-performance polymer by committing medical device companies to deal exclusively with Victrex. The Commission's order not only banned explicitly exclusive contracts, but also banned contract terms that would have an equivalent effect, such as market-share discounts or retroactive volume discounts that could result in de facto exclusivity. Even though Victrex had not used such pricing policies in the past, and even though such agreements are not automatically unlawful under the Sherman Act, the Commission's order simply took them off the table, to ensure that Victrex would stay away from conduct that would have an equivalent effect to its original violation of the law. [. . .]

[3] Other provisions in an order may require the respondent to mitigate the impact of its previous unlawful conduct in some way. For instance, the Commission may require respondents to notify customers who might have been affected by the illegal conduct, for example by giving them the option to terminate an existing contract without facing an action for breach by the respondent. In the *Victrex* order, for example, the Commission required respondents to notify all customers with existing contracts that required exclusivity and give them the opportunity to change the terms of their contracts. The Commission may also require notice to individuals who need to know that the Respondent's conduct will or may change in the future because of the order. The Commission can also prohibit the inclusion of certain similar terms in future agreements.

* * *

The potential scope of fencing-in relief is very broad. In 2022, for example, Judge Cote of the U.S. District Court for the Southern District of New York relied on both federal and state antitrust law to impose an unusual antitrust remedy in a particularly flagrant monopolization case. In that case, infamous "Pharma Bro" Martin Shkreli had entered into a comprehensive scheme to monopolize markets for the drug Daraprim by making it very difficult for generic manufacturers to get samples of the drug for testing, harming toxoplasmosis patients across the country by slowing generic entry. His ultimate reward (among other remedies): a lifetime ban from the industry.

FTC v. Shkreli

581 F. Supp. 3d 579 (S.D.N.Y. 2022)

Judge Cote.

[1] In 2015, [Vyera's founder and CEO] Martin Shkreli raised the price of the life-saving pharmaceutical Daraprim by 4,000% and initiated a scheme to block the entry of generic drug competition so that he could reap the profits from Daraprim sales for as long as possible. Through his tight control of the distribution of Daraprim, Shkreli prevented generic drug companies from getting access to the quantity of Daraprim they needed to conduct testing demanded by the Food and Drug Administration ("FDA"). Through exclusive supply agreements, Shkreli also blocked off access to the two most important manufacturers of the active pharmaceutical ingredient ("API")

[1102] *See, e.g.*, United States v. Paramount Pictures, 334 U.S. 131, 148 (1948) ("[E]quity has the power to uproot all parts of an illegal scheme—the valid as well as the invalid—in order to rid the trade or commerce of all taint of the conspiracy.").

for Daraprim. Through these strategies, Shkreli delayed the entry of generic competition for at least eighteen months. Shkreli and his companies profited over $64 million from this scheme. [. . .]

[2] From day one, Shkreli focused [Vyera] on acquiring sole-source drugs that were the gold standard treatment option for life-threatening diseases with a small patient population and inferior alternative treatments, with the intent to raise their prices, block generic competition, and reap extraordinary profits. [. . .]

[3] At Shkreli's direction, Vyera's sales and business development teams evaluated market opportunities for Vyera to acquire sole-source drugs. By the Spring of 2015, Vyera focused on Daraprim as a prime candidate. . . . Daraprim was . . . approved by the FDA in 1958 for the treatment of toxoplasmosis[.] . . .

[4] Toxoplasmosis is a parasitic infection that can cause severe disease and death. . . . An opportunistic infection, toxoplasmosis principally impacts immunosuppressed and immunocompromised individuals such as patients who are HIV positive or recipients of organ transplants. Toxoplasmosis can cause disease in many parts of the body, but the most common manifestations are infections of the brain . . . , eye . . . , and in utero. [. . .]

[5] Before Vyera acquired Daraprim, it commissioned a physician survey to determine whether doctors would continue to prescribe Daraprim following a price hike. . . . [D]octors indicated that they considered the drug to be the backbone of therapy for toxoplasmosis and were at a loss to think of an appropriate alternative. . . .

[6] . . . In a transaction that closed on August 7, 2015, Vyera paid Impax [Laboratories, Inc.,] $55 million [for the U.S. licensing rights to Daraprim], more than eleven times Daraprim's 2014 net revenues.

[7] . . . Within days of Vyera's purchase of Daraprim and at Shkreli's direction, Vyera raised the [list price] from $17.60 to $750 per tablet effective August 11, 2015. [. . .]

[8] From 2016 through 2019, Vyera made between $55 and $74 million in annual gross profits from its sales of Daraprim. Daraprim revenues in the years between 2010 to 2014 had amounted at most to $10 million a year. Vyera's estimated gross profit margin from Daraprim, calculated by subtracting Vyera's reported production costs, ranged between 89% and 98% in 2016 through 2019. [. . .]

[9] Even before finalizing its acquisition of the rights to the drug, Shkreli made it a priority to close the Daraprim distribution channels. In June 2015, Shkreli directed [the head of] Vyera's sales team to move Daraprim from retail distribution into a closed distribution system "as swiftly as possible." [. . .]

[10] Between 2015 and 2020, Vyera's [d]istributors were restricted to selling only to authorized customers . . . . The authorized customers . . . did not include generic drug companies or their agents. No [d]istributor was permitted to sell Daraprim to a generic drug manufacturer or their agent without Vyera's express approval. There is no evidence that Vyera ever gave such approval. [. . .]

[11] Vyera also controlled the distribution of Daraprim by imposing limits on the number of Daraprim bottles that a single customer could purchase at a time. . . . Vyera's Director of Patient Access openly admitted that the quantity limits imposed in 2015 were introduced to make it harder for generic drug companies to acquire "large quantities" of Daraprim "in order to copy the drug and compete with it." He was quoted in a news article published on October 5, 2015, stating that if a generic drug maker tried to order Daraprim,

> Most likely I would block that purchase. . . . We spent a lot of money for this drug. We would like to do our best to avoid generic competition. It's inevitable. They seem to figure out a way [to make generics], no matter what. But I'm certainly not going to make it easier for them. [. . .]

[12] Vyera monitored its Distributors' daily and weekly sales reports to prevent the diversion of Daraprim to generic drug companies for [bioequivalence testing, used to evaluate relevant differences between a branded drug and a generic in development]. It promptly followed up on any sales it considered unusual to stop any leakage. [. . .]

[13] Besides blocking access to the Daraprim that generic drug manufacturers needed to conduct [bioequivalence] testing, Shkreli also worked to block their access to pyrimethamine, the [active pharmaceutical ingredient ("API")] in Daraprim. He was well aware that the sooner a generic company could find an established API manufacturer

the sooner it could launch a generic version of Daraprim. Vyera locked up the supply of pyrimethamine to U.S.-based generic drug companies through exclusive supply agreements[.] [. . .]

[14] Vyera's multifaceted campaign to delay the entry of generic [competitors] succeeded in substantially delaying the entry of at least [two]. [. . .]

[15] The Plaintiffs [the FTC and a number of state AGs] seek a lifetime ban against Shkreli participating in the pharmaceutical industry. Banning an individual from an entire industry and limiting his future capacity to make a living in that field is a serious remedy and must be done with care and only if equity demands. Shkreli's egregious, deliberate, repetitive, long-running, and ultimately dangerous illegal conduct warrants imposition of an injunction of this scope.

[16] The Plaintiffs presented a wealth of evidence that Shkreli conducted a comprehensive scheme that violated the antitrust laws of the United States and the competition laws of the seven States. The FTC and the States are empowered by federal and State law to seek comprehensive equitable relief. The Plaintiffs have demonstrated that a lifetime ban against Shkreli's future participation in the pharmaceutical industry will protect the public from suffering a repetition of the unlawful schemes proven in this case.

[17] Without a lifetime ban, there is a real danger that Shkreli will engage in anticompetitive conduct within the pharmaceutical industry again. Shkreli established two companies, Retrophin and Vyera, with the same anticompetitive business model: Acquiring sole-source drugs for rare diseases so that he could profit from a monopolist scheme on the backs of a dependent population of pharmaceutical distributors, healthcare providers, and the patients who needed the drugs. The Daraprim scheme was particularly heartless and coercive. Daraprim must be administered within hours to those suffering from active toxoplasma encephalitis.

[18] Moreover, in the face of public opprobrium, Shkreli doubled down. He refused to change course and proclaimed that he should have raised Daraprim's price higher.

[19] The context in which Shkreli conducted his schemes cannot be ignored. He cynically took advantage of the requirements of a federal regulatory scheme designed to protect the health of a nation by ensuring that its population has access to drugs that are not only effective but also safe. He recklessly disregarded the health of a particularly vulnerable population, those with compromised immune systems. His scheme burdened those patients, their loved ones, and their healthcare providers.

[20] A lifetime ban would not deprive Shkreli of the opportunity to practice a profession or to exercise a lawful skill for which he trained. In his trial testimony Shkreli does not even express a clear desire to return to the pharmaceutical industry. He reports that he is considering pursuing opportunities within and outside the pharmaceutical industry upon his release from prison.

[21] The risk of a recurrence here is real. Shkreli has not expressed remorse or any awareness that his actions violated the law. While he takes full responsibility in his direct testimony for the increase of Daraprim's price from $17.50 to $750 per pill, he denies responsibility for virtually anything else. He argues in his testimony that he is not responsible for Vyera's anticompetitive contracts because he did not negotiate or sign the exclusive supply agreements or the restrictive distribution agreements. He has also denied that what happened here was egregious, arguing that the Plaintiffs have not proven that any patient died due to the price he set for Daraprim. He chose to not even attend the trial.

[22] Shkreli presents several legal arguments against a lifetime industry ban. He contends that it amounts to a penalty beyond the proper scope of a court's power in equity. He argues that an industry ban is uncommon and reserved only for the most egregious cases and for cases of fraud. He argues that a ban of this scope is not narrowly tailored to match the challenged conduct. . . . [T]hese arguments are unavailing. This is an egregious case; death is not the only relevant metric. If a court sitting in equity is powerless to impose a lifetime industry ban to protect the public against a repetition of the conduct proven at this trial, then the public could rightfully ask whether its wellbeing has been adequately weighed.

[23] Shkreli appears to suggest that any injunction could be limited to banning him from acquiring commercial assets or engaging in the day-to-day affairs of commercializing medicine. There is no reason to believe that a

narrowly crafted injunction will succeed in providing adequate protection against a repetition of illegal conduct. Shkreli has demonstrated that he can and will adapt to restrictions. With help at times from a contraband phone, Shkreli managed to control his company even from federal prison.

[24] Shkreli's anticompetitive conduct at the expense of the public health was flagrant and reckless. He is unrepentant. Barring him from the opportunity to repeat that conduct is nothing if not in the interest of justice. "If not now, when?" Mishnah, Pirkei Avot 1:14.

NOTES

1) Why do enforcers often prefer structural remedies? When should behavioral remedies be preferred?
2) In what ways do merger and conduct remedies differ? In what respects are they similar?
3) When and how, if at all, can agencies feasibly enforce nondiscrimination obligations?
4) Should the agencies be able to negotiate a remedial obligation: (a) to terminate and refrain from lawful conduct that may be harmful to competition but would not violate the antitrust laws? (b) to terminate and refrain from lawful conduct that would not harm competition but may be undesirable for other reasons? (c) to terminate individual executives' employment?
5) What do you think makes a good divestiture buyer? How can the agencies feasibly (and swiftly) screen for those qualities? What kind of process would you design for this purpose?
6) What should happen if a divested business unit fails to flourish and exits the market within a year or two?
7) With the *Shkreli* extract in mind: When, if ever, should a court evaluate the moral character of a defendant's actions in order to determine the right antitrust remedy?