

## THE FTC AT 100: A MODEST PROPOSAL FOR CHANGE

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### INTRODUCTION

The Federal Trade Commission (“FTC”) commemorates its Centennial Anniversary this year. This presents an opportunity to celebrate the agency’s successes but also to reflect on needed substantive and procedural changes to the FTC’s framework. Commissioner Joshua Wright initiated this reflection with a paper proposing substantive limitations on the exercise of the FTC’s unfair methods of competition jurisdiction.<sup>1</sup> This prompted a counterproposal by Commissioner Maureen Ohlhausen,<sup>2</sup> reactions by Chairwoman Edith Ramirez<sup>3</sup> and Commissioner Julie Brill,<sup>4</sup> and subsequent debate.<sup>5</sup> Undoubtedly, other substantive proposals will follow. Process issues, which are often ignored, merit attention, too.

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<sup>1</sup> See Statement of Commissioner Joshua D. Wright, Fed. Trade Comm’n, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (June 19, 2013), [http://www.ftc.gov/sites/default/files/documents/public\\_statements/statement-commissioner-joshua-d.wright/130619umcpolicystatement.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-joshua-d.wright/130619umcpolicystatement.pdf); see also Joshua D. Wright, Comm’r, Fed. Trade Comm’n, Section 5 Recast: Defining the Federal Trade Commission’s Unfair Methods of Competition Authority, Remarks at the Executive Committee Meeting of the New York State Bar Association’s Antitrust Section (June 19, 2013), [http://www.ftc.gov/sites/default/files/documents/public\\_statements/section-5-recast-defining-federal-trade-commissions-unfair-methods-competition-authority/130619section5recast.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/section-5-recast-defining-federal-trade-commissions-unfair-methods-competition-authority/130619section5recast.pdf).

<sup>2</sup> Maureen Ohlhausen, Comm’r, Fed. Trade Comm’n, Section 5: Principles of Navigation, Remarks at the U.S. Chamber of Commerce 1 (July 25, 2013).

<sup>3</sup> See Sarah Sandok Rabinovici, *Has the Time Come for a Meaningful FTC Section 5 Standard?*, LAW 360 (Aug. 8, 2013, 12:54 PM), <http://www.law360.com/articles/463370/has-the-time-come-for-a-meaningful-ftc-section-5-standard> (subscription required) (“In sharp contrast to the proposal by Commissioner Wright, Chairwoman Ramirez believes that case-by-case development is the appropriate way to develop Section 5 jurisprudence.”).

<sup>4</sup> TECHNOLOGY POLICY INSTITUTE, *Aspen Forum 2013: A Conversation with the Commissioners*, YOUTUBE (Aug. 20, 2013), [http://youtu.be/9V\\_YEu1FIAE](http://youtu.be/9V_YEu1FIAE); see also Matthew Newman, *Guidance on FTC Powers over Unfair Competition Must Be Unanimous FTC Commissioner Says*, MLEX (Sept. 14, 2013 8:46 AM) available at <http://www.mlex.com/US/Content.aspx?ID=444451> (subscription required).

<sup>5</sup> See Thom Lambert, *TOTM Blog Symposium Thursday, Aug. 1: Regulating the Regulators—Guidance for the FTC’s Section 5 Unfair Methods of Competition Authority*, TRUTH ON THE MARKET

While the issue of dual jurisdiction<sup>6</sup> is a tempting target,<sup>7</sup> change is very unlikely anytime soon. That said, changes probably exist that, if implemented, would improve the functioning of dual jurisdiction.<sup>8</sup> However, this Article turns elsewhere.

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(July 26, 2013), <http://truthonthemarket.com/2013/07/26/totm-blog-symposium-thursday-aug-1-regulating-the-regulators-guidance-for-the-ftcs-section-5-unfair-methods-of-competition-authority/>; see also comments of Daniel Crane, Harry First, A. Douglas Melamed, Sharis Pozen and Anne Six, Joe Sims, Steven Salop, and Maurice Stucke in 9 CPI INT'L (2013) available at <https://www.competitionpolicyinternational.com/sep-13/> (subscription required).

<sup>6</sup> In this context, "dual jurisdiction" is the concurrent jurisdiction of the FTC and the Department of Justice to enforce U.S. antitrust law.

<sup>7</sup> "Why does the U.S. have two antitrust enforcement agencies?" This is a question that is posed by one or more students in almost every competition law course, in almost every lecture on U.S. competition law to a foreign audience, and sometimes in discussions among U.S. competition law practitioners. See, e.g., Colloquy, *60 Minutes with Terry Calvani Acting Chairman, Federal Trade Commission*, 55 ANTITRUST L.J. 275, 277-78 (1986). Given the budgetary crisis and the public costs associated with maintaining both enforcement mandates, one would think that an examination of the issue by Congress would have taken place sometime ago. (This ignores the costs that are borne by private parties and ultimately by consumers associated with dual jurisdiction.) When Terry Calvani was acting chairman, he attempted to interest both the Office of Management & Budget and the Department of Justice in a project to explore the costs and benefits of dual jurisdiction. Perhaps other federal consumer protection mandates could be transferred to the FTC while that agency's competition law jurisdiction could be ceded to the Department of Justice? Wiser heads persuaded Chairman Calvani that the idea was naive. Judge Douglas Ginsburg, then assistant attorney general for antitrust, patiently explained that were antitrust jurisdiction vested exclusively in the Antitrust Division, the Commerce, Science & Transportation Committee of the Senate and the Energy & Commerce Committee of the House would probably lose an object of oversight since the Judiciary Committees of both houses have oversight responsibility over the Department of Justice. Members of FTC oversight committees would never cede their jurisdiction over antitrust and all that entails, e.g., campaign contributions. See Terry Calvani, *A Proposal for Radical Change*, 34 ANTITRUST L. BULL. 185, 187-89 (1989) [hereinafter Calvani, *1989 Proposal*]. Many have proposed the abolition of dual jurisdiction. See, e.g., MARK J. GREEN ET AL., *THE CLOSED ENTERPRISE SYSTEM: RALPH NADER'S STUDY GROUP REPORT ON ANTITRUST ENFORCEMENT* 433-34 (1972). For an excellent discussion of the dual jurisdiction issue, see Ernest Gellhorn, *Regulatory Reform and the Federal Trade Commission's Antitrust Jurisdiction*, 49 TENN. L. REV. 471, 496-502 (1982) (presenting well-reasoned argument for abolishing dual jurisdiction); see also Ernest Gellhorn, *Two's a Crowd: The FTC's Redundant Antitrust Powers*, REG., Nov.-Dec. 1981, at 32, 33; NAT'L COMM'N FOR THE REVIEW OF ANTITRUST LAWS & PROCEDURES, *REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL* 365-77 (1979) [hereinafter 1979 PRESIDENTIAL ANTITRUST REPORT] (for the testimony of Ernest Gellhorn, Marcus Mattson, Glen E. Weston, and Edward E. Vaill before the 1978 presidential commission to study the antitrust laws). The Commission ultimately concluded that such issues were beyond its remit. For a more recent exposition of these issues, see William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 MICH. L. REV. 1019, 1022 (2012).

<sup>8</sup> Clearance fights between the two agencies seeking to review the same transaction is a perennial problem. A firm understanding between the agencies under which they allocate industries would be helpful. We recognize that this was attempted several years ago and that it met serious congressional opposition as oversight committees feared the loss of certain industries. See Memorandum from the Staff of the U.S. Antitrust Modernization Comm. for the FTC Comm'rs (July 20, 2006), available at <http://govinfo.library.unt.edu/amc/pdf/meetings/CrimRemSupplMemo060720circ.pdf> (for a brief description of the issue and a proposed remedy). Nonetheless, the gravity of the problem merits another

It is also notable that there is an increasing amount of literature on the institutional design of competition law enforcement agencies.<sup>9</sup> This Article's focus is narrower: namely, the interplay between the FTC's prosecutorial and adjudicative functions.

The organization of the FTC where the prosecutorial and adjudicative decisions are made by the same people within the agency merits consideration. The subject was perhaps last considered in the 1980s, when the constitutionality of the agency's prosecutorial role was at issue.<sup>10</sup> Essentially, some argued that the right to prosecute for violations of U.S. law is an executive function by virtue of the constitutional mandate that the president must "take Care that the Laws be faithfully executed."<sup>11</sup> The argument was that independent counsel, commissioners of "independent" agencies, and a significant number of other officials cannot be members of the executive branch of government because they do not serve at the pleasure of the president.<sup>12</sup> In *In re Sealed Case*,<sup>13</sup> where plaintiffs challenged the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978,<sup>14</sup> the D.C. Circuit Court of Appeals found the independent counsel provisions unconstitutional.<sup>15</sup> The decision can be read to suggest that the "take Care" clause vests the enforcement of federal law exclusively in the

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try. Your authors have received Second Requests because clearance came so late in the Initial Waiting Period. While today one can simply pull the Hart-Scott-Rodino filing and refile it, clearance fights ought not to delay transactions. Another area of possible reform would be to harmonize the standards that the agencies must meet to secure a preliminary injunction enjoining the consummation of a merger. For a discussion of this issue, see Raymond Z. Ling, Note, *Unscrambling the Organic Eggs: The Growing Divergence Between the DOJ and the FTC in Merger Review After Whole Foods*, 75 BROOK. L. REV. 935, 944-45 (2010); cf. Justin J. Hakala, The Case for Different Preliminary Injunction Standards in Merger Clearances 1-2 (Jan. 15, 2009) (unpublished student note, Wayne State University Law School), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1328586](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328586) (arguing that the division of merger review between the FTC and Department of Justice, as determined by the industry, undermines the decentralized purpose of dual agency enforcement).

<sup>9</sup> See, e.g., DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT (2011); Eleanor M. Fox, *Antitrust and Institutions: Design and Change*, 41 LOY. U. CHI. L.J. 473 (2010); David A. Hyman & William E. Kovacic, *Institutional Design, Agency Life Cycle, and the Goals of Competition Law*, 81 FORDHAM L. REV. 2163 (2013); see also Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, 1 J. ANTITRUST ENFORCEMENT 82 (2013).

<sup>10</sup> In the early 1980s the Office of Legal Counsel within the Department of Justice developed an argument that only executive officers could enforce the laws of the United States. For a discussion of the literature on these issues, see Calvani, *1989 Proposal*, supra note 7, at 191 n.22; cf. Edwin Meese, III, U.S. Att'y Gen., *Towards Increased Government Accountability*, Address Before the Federal Bar Association Annual Banquet (Sept. 13, 1985), in 32 FED. B. NEWS & J. 406, 406-08 (1985) (providing an exposition of this review).

<sup>11</sup> U.S. CONST. art. II, § 3; Calvani, *1989 Proposal*, supra note 7, at 193.

<sup>12</sup> Calvani, *1989 Proposal*, supra note 7, at 193.

<sup>13</sup> 838 F.2d 476 (D.C. Cir. 1988), rev'd sub nom, *Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>14</sup> Pub. L. No. 95-521, 92 Stat. 1824 (1978).

<sup>15</sup> *In re Sealed Case*, 838 F.2d at 478.

executive, namely, persons appointed by and serving at the pleasure of the president.

The issue further ripened when litigants began to challenge prosecutions made by independent agencies, including the FTC.<sup>16</sup> In one such case, the D.C. Circuit affirmed the dismissal of an appellant's challenge to the constitutionality of the FTC's prosecution role.<sup>17</sup> Nevertheless, the issue would soon be presented to the Supreme Court, on appeal from *In re Sealed Case*, in *Morrison v. Olson*.<sup>18</sup> At that time, Terry Calvani and other legal scholars explored ways in which the possible constitutional infirmity could be cured. To resolve the potential infirmity with respect to the FTC, Chairman Calvani proposed that the FTC's prosecutorial function should be separated from its adjudicative functions: the commissioners would retain the adjudicative function, but the prosecutorial function would be vested in another who would be appointed by and serve at the pleasure of the president.<sup>19</sup> The problem was ultimately rendered moot when the Supreme Court reversed the D.C. Circuit decision and upheld the independent counsel provisions of the Ethics in Government Act.<sup>20</sup> It is time to revisit the issue.<sup>21</sup>

Part I considers the objections raised in relation to the European Commission's dual prosecutorial/adjudicatory role. It also discusses the conclusions of two prominent critics who analyzed the issue of dual prosecutorial and adjudicative functions. Part II investigates whether the analogous process at the FTC is unfair or gives rise to the perception of unfairness. Part III sets forth a modest proposal to reorganize the FTC to separate the prosecutorial and adjudicatory functions by vesting the prosecutorial functions in a director of enforcement, appointed by and serving at the pleasure of the president, and vesting the adjudicatory functions in the commissioners.

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<sup>16</sup> See, e.g., *Ticor Title Ins. Co. v. FTC*, 625 F. Supp. 747, 752 (D.D.C. 1986), *aff'd*, 814 F.2d 731 (D.C. Cir. 1987); see Calvani, *1989 Proposal*, *supra* note 7, at 198-202 (discussing these cases). Essentially these cases were a frontal assault on *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which held that the limitations on the president's ability to remove commissioners of the FTC were constitutional.

<sup>17</sup> *Ticor Title Ins. Co.*, 814 F.2d at 732.

<sup>18</sup> 487 U.S. 654 (1988).

<sup>19</sup> See Calvani, *1989 Proposal*, *supra* note 7, at 206.

<sup>20</sup> *Morrison*, 487 U.S. at 659-60.

<sup>21</sup> Criticism of the agency's dual role as prosecutor and judge is not new. The issue was first presented in Edgar E. Barton, *The Federal Trade Commission and the Need for Procedural Impartiality*, 64 COLUM. L. REV. 390, 390-91 (1964).

## I. CRITICISM OF THE DUAL PROSECUTORIAL AND ADJUDICATIVE FUNCTION: A EUROPEAN PERSPECTIVE

In the interlude between *Morrison* and this writing, there has been much criticism of the prosecutorial and adjudicative roles vested in the European Commission (“EC”). While scholars have criticized the EC’s dual role, at least it can be said that the administrative structure was born and bred in the civil law tradition of continental Europe. (The common law jurisdictions of the United Kingdom [more properly England and Wales] and Ireland were latecomers to what is now the European Union.) Many with a history of inquisitorial adjudication may find the blending of functions to be natural. That said, it is interesting to consider the objections to the EC’s process and the application to the functions of the FTC. The EC’s placement of both prosecutorial and adjudicative functions together has been the subject of critical discussion for many years. The conclusions of two prominent critics warrant review.

### A. *The Perception of Unfairness*

Distinguished practitioner Frank Montag, one of the first to question the structure, wrote that “[d]ue to the different roles in an infringement proceeding attributed to the same Commission officials by the Treaty and Regulation 17, the fundamental principle of *in dubio pro reo* is seriously undermined.”<sup>22</sup> Importantly, Mr. Montag added that this problem “leads to a low rate of acceptance of the Commission’s decisions and a correspondingly high rate of court actions.”<sup>23</sup> He concluded that “[f]rom the point of view of public policy and good government, this is unsatisfactory.”<sup>24</sup> Mr. Montag considered several remedies but ultimately concluded that the prosecutorial and adjudicative functions must be placed into two separate and distinct organs.<sup>25</sup> Final decisions on liability should move from the EC to the European Court of Justice.<sup>26</sup> Not only would the fundamental rights of the accused be protected, but “[i]t is to be expected that undertakings would accept a decision made by an independent court much more easily than a decision made by a Commission which acts as prosecutor, judge and jury at the same time.”<sup>27</sup> Thus, Mr. Montag’s recommendation is predicated on both an abridgement of a fundamental right and a perception of unfairness.

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<sup>22</sup> Frank Montag, *The Case for a Radical Reform of the Infringement Procedure Under Regulation 17*, 8 EUR. COMPETITION L. REV. 428, 433 (1996).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 436.

<sup>27</sup> *Id.*

## B. *Inherent Bias*

In addition to the perception of unfairness highlighted by Mr. Montag's analysis, the commingling of prosecutorial and adjudicative functions could lead to inherent bias on the part of the decision maker. Ian Forrester, a distinguished European practitioner who has spoken and written widely on the issue, argues that the fusion of the decision to investigate and final decisionmaking authority is offensive.<sup>28</sup> In his article *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, Mr. Forrester undertakes an analysis of the EC's decisionmaking process and finds significant flaws, many of which are *sui generis* to the EC or otherwise irrelevant to consideration of this Article's FTC proposal.<sup>29</sup> But the bottom line is the impropriety of blending the prosecutorial and adjudicative roles. In his discussion, Mr. Forrester cites Professor Wouter Wils's identification of three types of prosecutorial bias.<sup>30</sup> First, confirmation bias, which "arises from the natural tendency" for a person to favor evidence of his or her belief that an offense has been committed.<sup>31</sup> Second, "[h]indsight bias flows from the natural desire to justify one's past efforts."<sup>32</sup> Lastly, Professor Wils identifies policy bias, which "arises from the desire of officials . . . to show a high level of enforcement activity."<sup>33</sup> Mr. Forrester goes

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<sup>28</sup> See Ian S. Forrester, *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, 34 EUR. L. REV. 817, 840 (2009).

<sup>29</sup> *Id.* at 831-40. First, Mr. Forrester is concerned that decisions are made by the college of commissioners who most often know very little, if anything, about the case and who generally defer to the commissioner holding the competition portfolio. When other members of the college do interest themselves in a matter, that interest sometimes flows from parochial interests or other political considerations. Moreover, commissioners are more often than not politicians of one stripe or another. In his words, "[t]he final decision is made by politicians." *Id.* at 831. Second, Mr. Forrester is troubled that the sanctions imposed by the Commission today in competition matters are sufficiently severe as to be criminal in nature without regard to their label as administrative. If treated as criminal, Mr. Forrester argues that the process is offensive to the European Convention on Human Rights. *Id.* at 826-28. Third, the oral hearing bears no reasonable resemblance to an adjudicative hearing where the evidence is tested and the presiding officer makes a decision predicated on the law and the facts. Rather, the hearing is more cosmetic and arguably of little import. *Id.* at 833-36.

<sup>30</sup> *Id.* at 836; see Wouter P.J. Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal & Economic Analysis*, 27 WORLD COMPETITION 202 (2004).

<sup>31</sup> Forrester, *supra* note 28, at 836. For citations to confirmation bias in the literature, see Wils, *supra* note 30, at 215 & n.38.

<sup>32</sup> Forrester, *supra* note 28, at 836 (emphasis removed); see Wils, *supra* note 30, at 215-16.

<sup>33</sup> Forrester, *supra* note 28, at 837; see Wils, *supra* note 30, at 217. To be clear, Professor Wils does not conclude that these biases characterize the work of the EC. Rather he discusses the possibility. It is probably correct to say that Professor Wils is more convinced that the perception of unfairness by the addressees of Article 81 and 82 decisions is real and merits attention. Wils, *supra* note 30, at 218. However, Professor Wils's ultimate conclusion is that the issue is a difficult one; that violations of

to great length to avoid any personal criticism of the commissioners and the staff of the agency, but simply concludes that, even with the most well-intentioned, fair-minded personnel, there is an inherent bias.<sup>34</sup> The subject has been considered by others.<sup>35</sup>

## II. THE FTC AS PROSECUTOR AND ADJUDICATOR

Although the EC process differs from that at the FTC in some meaningful ways,<sup>36</sup> the heart of the criticism is that the EC serves both as the

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Articles 81 and 82 (as distinct from the Merger Regulation) would probably benefit from separation of the two functions. *See id.* at 223-24.

<sup>34</sup> Forrester, *supra* note 28, at 843; *see also* Ian S. Forrester, *A Challenge for Europe's Judges: The Review of Fines in Competition Cases*, 36 EUR. L. REV. 185, 186-89 (2011); Ian S. Forrester, *A Bush in Need of Pruning: The Luxuriant Growth of "Light Judicial Review,"* in EUROPEAN COMPETITION LAW ANNUAL REVIEW 2009: EVALUATION OF EVIDENCE AND ITS JUDICIAL REVIEW IN COMPETITION CASES 407 (Claus-Dieter Ehlermann & Mel Marquis eds., 2011). In the articles Forrester, recognizing that more fundamental change will not be forthcoming in the short term, argues for enhanced judicial review of EC decisions by the European Community courts. *See also* Barry E. Hawk, James S. Venit & Henry L. Huser, *Recent Developments in EU Merger Control*, 15 ANTITRUST 24, 27 (2001); *cf.* Barry Hawk, James Venit & Henry Huser, Skadden Arps Comments on Commission's Green Paper on the Review of the EC Merger Regulation § 4.2 (Mar. 28, 2002), *available at* [http://ec.europa.eu/competition/consultations/2002\\_council\\_regulation/skadden.pdf](http://ec.europa.eu/competition/consultations/2002_council_regulation/skadden.pdf) ("The due process concerns raised by many observers regarding the Commission's multiple investigatory and decisionmaking roles are perhaps the greatest threat to the long-term legitimacy and efficacy of the ECMR system.").

<sup>35</sup> The subject was considered by the House of Lords Select Committee on European Communities in its 1994 report on competition law enforcement. *See* HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, 1994 REPORT ON ENFORCEMENT OF COMMUNITY COMPETITION RULES, 1993-94, H.L. 7, ¶ 11 (U.K.) (the question posed by the Select Committee was "whether it is appropriate 'for the one body to be simultaneously the detective, the prosecutor, the negotiator and the decision maker.'" (quoting another source)). The Select Committee received many submissions on both sides of the issue. Sir Jeremy Lever Q.C., the dean of the English competition bar, argued that the prosecutorial and adjudicative roles should be separated. *Id.* ¶ 13. Nonetheless, the Select Committee concluded that separation was not the right way forward. *Id.* ¶ 103.

<sup>36</sup> The FTC model is fairer in that the initial findings of fact and conclusions of law are determined by an administrative law judge. Moreover, once a decision to initiate administrative proceedings has been made, commissioners may not be further involved in the matter unless one of the parties takes an appeal from the decision of the administrative law judge. (A notable exception to this rule is that the matter may be removed from the administrative proceeding for settlement discussions.) These administrative proceedings very much resemble common law trials before a court of law. Oral hearings at the EC are quite different. The hearing officer, who presides over the hearing, does not participate in the decisionmaking of the EC. Moreover, although one FTC commissioner will take the lead, all FTC commissioners will have read the submissions of the parties. While the decisions to initiate the proceedings and the final decision will be made by the twenty-eight commissioners, only one will likely have read the papers. Indeed the draft decision may have been written by the team that undertook the investigation. *See* CRANE, *supra* note 9, at 198-200.

prosecutor and the adjudicator.<sup>37</sup> This criticism applies with equal vigor to the FTC.

The basic objection to the model is that it is unfair for the same persons to initiate cases and then ultimately determine whether the decision to prosecute was well taken. Two related objections merit consideration: (1) the process is, in and of itself, unfair; and (2) even if it is not unfair as an empirical matter, it gives rise to the perception of unfairness.

#### A. *Is the Process Unfair?*

While we acknowledge that the process is not unconstitutional, is it unfair?<sup>38</sup> A good argument can be made that fundamental fairness requires that the adjudicative function be separate from the decision to open proceedings in the first instance. Highlighting the unfairness of the dual-function approach, Judge Richard Posner, sitting as a member of the ABA Commission to Study the Federal Trade Commission, observed:

It is too much to expect men of ordinary character and competence to be able to judge impartially in cases that they are responsible for having instituted in the first place. An agency that dismissed many of the complaints that it issued would stand condemned of having squandered the taxpayer's money on meritless causes.<sup>39</sup>

Former FTC Commissioner Philip Elman, an astute observer of the agency, has made the same point,<sup>40</sup> adding that measurement of the agency's success might be construed as a function of the number of orders is-

<sup>37</sup> *See id.*

<sup>38</sup> Unfairness does not imply unconstitutionality. The Supreme Court has confirmed the constitutionality of the FTC as constituted on several occasions. *See Humphrey's Executor v. United States*, 295 U.S. 602, 629-32 (1935). For a discussion of the case, see Calvani, *1989 Proposal*, *supra* note 7, at 195-98. More to our point, the Supreme Court has held that the blending of the prosecutorial and adjudicative roles is not constitutionally offensive absent a factual showing of actual bias. *Withrow v. Larkin*, 421 U.S. 35, 47-49 (1975); *FTC v. Cement Inst.*, 333 U.S. 683, 700-03 (1948); *see also* 2 ABA ANTITRUST SECTION, MONOGRAPH 5, THE FTC AS AN ANTITRUST ENFORCEMENT AGENCY: ITS STRUCTURE, POWERS AND PROCEDURES 69-70 (1981).

<sup>39</sup> REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 98 (1969). William Simon, the late distinguished antitrust practitioner, echoed these same sentiments:

I know that my client . . . will receive a fairer trial in a federal court . . . than before an administrative agency. I say this to you because when the federal judge gets down to deciding how to decide a case, he doesn't have to say to himself: 'Did I make a mistake in bringing this case in the first place, because I filed the case?' That is what a Commissioner has to say at the Federal Trade Commission . . . And, the Commissioner has to ask himself: 'Can I afford to dismiss a case, where I brought the case and I have spent \$30 million of the taxpayer's [sic] money?' . . . I say to you that inherent in the system is something inherently unfair.

1979 PRESIDENTIAL ANTITRUST REPORT, *supra* note 7, at 368.

<sup>40</sup> *See* Philip Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777, 810 (1971) [hereinafter Elman, *Administrative Reform*]; *see also* Philip Elman, *A Modest Proposal for Radical Reform*, 56 A.B.A. J. 1045, 1048 (1970) [hereinafter Elman, *A Modest Proposal*].



sued.<sup>41</sup> More fundamentally, he states, “the blending of prosecutorial and adjudicative powers in a single tribunal imposes intolerable strains on fairness.”<sup>42</sup> The problem is exacerbated in Commissioner Elman’s view when the complaint contains a novel theory. “To put it bluntly, once such a complaint is issued, one should ask for long odds before betting against issuance of a final order,” adding that the “result . . . is likely to be a foregone conclusion.”<sup>43</sup> While this makes good sense, it is more difficult to demonstrate empirically.<sup>44</sup>

Anecdotal evidence suggests bias. For example, in the *Cereals Shared Monopoly Case*,<sup>45</sup> former FTC Chairman Michael Pertschuk stated that “[w]inning the cereal case would be an enormous help” to the agency.<sup>46</sup> Even some circuit courts of appeals have recognized the FTC’s apparent bias. In *Schering-Plough Corp. v. FTC*,<sup>47</sup> the Eleventh Circuit vacated a cease-and-desist order issued by the FTC for the alleged violation of section 1 of the Sherman Act.<sup>48</sup> After a lengthy administrative trial involving a substantial volume of evidence and a number of witnesses, the administrative law judge (“ALJ”) found no violation.<sup>49</sup> The FTC subsequently reversed the ALJ decision.<sup>50</sup> On appeal, the Eleventh Circuit took issue with the FTC’s rejection of the appellants’ affirmative defense that its conduct was pro-competitive, stating, “It would seem as though the Commission clearly made its decision before it considered any contrary conclusion.”<sup>51</sup> Aside from anecdotal evidence, however, little has been done to test the hypothesis of bias at the FTC. Economic scholars Malcolm Coate and Andrew Kleit

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<sup>41</sup> Elman, *Administrative Reform*, *supra* note 40, at 810.

<sup>42</sup> Elman, *A Modest Proposal*, *supra* note 40, at 1048.

<sup>43</sup> *Id.*

<sup>44</sup> In fact, then-Professor Richard Posner attempted to test several aspects of Commissioner Elman’s thesis via a comparison between the FTC’s practices and those of the National Labor Relations Board. Richard A. Posner, *The Behavior of Administrative Agencies*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 250, 257 (Gary S. Becker & William M. Landes eds., 1974) (concluding that, although the results suggested no bias exists, the results were “hardly definitive”). A counterargument is that the FTC uses a different standard in determining when to initiate civil prosecution than it uses in finding liability. But query whether the so-called reason-to-believe standard is really any different from the balance-of-probability standard. A second defense proffered is that generally the FTC that votes to sue is a different FTC that hears appeals from administrative tribunals due to the length of time that FTC administrative litigation takes. Thus it is not unfair because FTC proceedings take such a very long time!

<sup>45</sup> *In re Kellogg Co.*, 81 F.T.C. 1031 (1972).

<sup>46</sup> Edward Everett Vaill, *The Federal Trade Commission: Should It Continue as Both Prosecutor and Judge in Antitrust Proceedings?*, 10 SW. U. L. REV. 763, 765 (1978) (quoting another source) (internal quotation marks omitted).

<sup>47</sup> 402 F.3d 1056 (11th Cir. 2005).

<sup>48</sup> *Id.* at 1058.

<sup>49</sup> *Id.* at 1061-62.

<sup>50</sup> *Id.* at 1062.

<sup>51</sup> *Id.* at 1065.

examined the issue of bias in their 1998 study, *Does It Matter that the Prosecutor Is Also the Judge?*<sup>52</sup> They reviewed some seventy mergers decided by the FTC between 1950 and 1988, examining *inter alia* the hypothesis that the “more commissioners voting on a formal decision who were also part of the original decision to prosecute that matter, the more likely it is that the FTC will find in favor of its own case.”<sup>53</sup> Mr. Coate and Mr. Kleit find a positive, though not dispositive, relationship<sup>54</sup> and conclude that “it appears to matter if Commissioners act as both prosecutors and judges.”<sup>55</sup>

In comments presented by former Deputy Assistant Attorney General of the Department of Justice’s Antitrust Division A. Douglas Melamed at a 2008 FTC workshop, Mr. Melamed explained that “despite [their] best efforts . . . there is substantial reason to believe that Commissioners inherently and unavoidably lack the independence that we expect from adjudicative fact-finders.”<sup>56</sup> Mr. Melamed presented evidence that over the twenty-six-year period from 1983 to 2008, FTC staff won sixteen Sherman Act cases and lost none. In four of those cases, the ALJ ruled in favor of the respondents, staff appealed to the FTC, and the FTC reversed the ALJ’s decision.<sup>57</sup> Mr. Melamed described this record as “astonishing,” explaining that “[t]he Commission’s undefeated streak cannot be explained by flawless case selection” for several reasons.<sup>58</sup> First, it is beyond the limits of human nature for the FTC to engage in flawless case selection.<sup>59</sup> Second, if the FTC could do so, respondents would never litigate because they would always lose.<sup>60</sup> Third, the fact that courts of appeal have reversed FTC decisions—including a number of the sixteen cases that were examined—demonstrates that the FTC cannot be flawless in its case selection.<sup>61</sup> Although Mr. Melamed did not conduct a detailed examination of the sixteen cases to deter-

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<sup>52</sup> Malcolm B. Coate & Andrew N. Kleit, *Does It Matter that the Prosecutor Is Also the Judge? The Administrative Complaint Process at the Federal Trade Commission*, 19 *MANAGE. DECIS. ECON.* 1, 1 (1998).

<sup>53</sup> *Id.* at 2; see also Malcolm B. Coate & Andrew N. Kleit, *The Political Economy of Federal Trade Commission Administrative Decision Making in Merger Enforcement* 7 (Fed. Trade Comm’n, Working Paper No. 210, 1995), available at <http://www.ftc.gov/sites/default/files/documents/reports/political-economy-federal-trade-commission-administrative-decision-making-merger-enforcement/wp210.pdf> (put differently, “Commissioners who voted to prosecute a particular matter will be, on average, reluctant to admit, by finding for the parties in that matter, that the decision to prosecute could have been a mistake”).

<sup>54</sup> Coate & Kleit, *supra* note 52, at 6.

<sup>55</sup> *Id.* at 7.

<sup>56</sup> A. DOUGLAS MELAMED, COMMENTS SUBMITTED TO THE FEDERAL TRADE COMMISSION, WORKSHOP CONCERNING SECTION 5 OF THE FTC ACT 17 (2008), available at [http://www.ftc.gov/sites/default/files/documents/public\\_comments/section-5-workshop-537633-00004/537633-00004.pdf](http://www.ftc.gov/sites/default/files/documents/public_comments/section-5-workshop-537633-00004/537633-00004.pdf).

<sup>57</sup> *Id.* at 14.

<sup>58</sup> *Id.* at 14-15.

<sup>59</sup> *Id.* at 15.

<sup>60</sup> *Id.*

<sup>61</sup> See *id.*

mine whether bias was the reason for the FTC's winning streak, he suggested it is plausible that "the Commission's astonishing record might include more subtle and unavoidable attributes of administrative adjudication," such as the fact that the FTC often chooses cases that would advance the FTC's policies and therefore would have a stake in their outcome.<sup>62</sup>

Similarly to Mr. Melamed, Practitioner David Balto examined the litigation record of the FTC during the past eighteen years.<sup>63</sup> His discovery indicates that the FTC has found a law violation in each and every administrative case for that period.<sup>64</sup> For twenty years, the FTC has never found for the respondent and has reversed all ALJ decisions finding for the respondent.<sup>65</sup> Mr. Balto observed that "[the] FTC[']s 'winning streak' is simply unprecedented."<sup>66</sup> He concluded, "the FTC's almost two decade history of *always* ruling in its own favor creates a strong impression of unfairness."<sup>67</sup> Furthermore, in a speech given by Mr. Balto relating to the FTC's role as prosecutor and adjudicator, he explained that, based on this evidence, "there appears to be a lack of impartiality by the Commission that really undermines the credibility of the process, and I think that makes it more difficult for the FTC to effectively litigate tough cases and get the court of appeals to support [its] decisions going forward."<sup>68</sup>

A similar study was also undertaken by Nicole Durkin.<sup>69</sup> She examined every competition law litigated decision from 1950 to 2011.<sup>70</sup> The "Study uses the rate at which the Commission dismisses its complaints on the merits as an indicator of the Commission's willingness to reconsider its earlier decisions" and thus a measure of fairness.<sup>71</sup> The results of her study are reflected in the following table<sup>72</sup>:

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<sup>62</sup> MELAMED, *supra* note 56, at 16.

<sup>63</sup> David A. Balto, *The FTC at a Crossroads: Can It Be Both Prosecutor and Judge?*, LEGAL BACKGROUNDER (Wash. Legal Found.), April 23, 2013, at 1.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 3.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* It should be noted that Mr. Balto does not state that the process is unfair. Rather, the "perception of prejudice . . . severely undermined their decisions." *Id.* at 4.

<sup>68</sup> WashLglFndt, *FTC's Administrative Litigation Process: Should the Commission Be Both Prosecutor and Judge?*, YOUTUBE (Mar. 11, 2014), <http://youtu.be/a9zvyDr4a-Y>, at 9:24.

<sup>69</sup> See Nicole Durkin, Essay, *Rates of Dismissal in FTC Competition Cases from 1950-2011 and Integration of Decision Functions*, 81 GEO. WASH. L. REV. 1684, 1686 (2013).

<sup>70</sup> The data set did not include consent orders. It also contained only the first decision of the Commission and did not include subsequent decisions in the same matter, e.g., decisions on remand from an appellate court. *Id.* at 1686, 1693-94.

<sup>71</sup> *Id.* at 1694 (only decisions on the merits are included).

<sup>72</sup> *Id.* at 1699.

Decade	No. of Cases Decided <sup>73</sup>	No. of Cases Dismissed on the Merits	% of Cases Dismissed on the Merits
1950-59	195 (160)	41 (32)	21% (20%)
1960-69	265 (188)	38 (28)	14% (15%)
1970-79	67 (63)	12 (8)	18% (13%)
1980-89	52 (48)	19	38% (40%)
1990-99	22 (17)	4	18% (24%)
2000-11	20	0	0%
	621 (496)	115 (92) <sup>74</sup>	19% (19%)

These data tell a less dramatic story than the Balto study. Nonetheless, Ms. Durkin concluded that “[t]he dismissal rates thus cannot be relied upon in concluding that FTC adjudication is free from bias resulting from the Commission’s dual functions.”<sup>75</sup> But she recognized that these data themselves do not prove bias.<sup>76</sup> Rather, they could simply demonstrate that the commissioners’ case selection is superb and focuses on particularly strong cases.

The evidence on the issue of whether the FTC simply made correct decisions in issuing its complaints, which are later ratified with final decisions, is called into question when one examines the record of the FTC on appeal. If the commissioners are “that good,” one would expect their reversal rate in the courts of appeals to provide support for that proposition. Mr. Balto considered the possible explanation that the FTC is exceedingly judicious in its selection of cases.<sup>77</sup> He found, however, that the FTC’s record in the courts of appeals suggests otherwise. Indeed, he has noted that 20 percent of the cases in the twenty-year period in which the FTC alone ruled in favor of were reversed on appeal.<sup>78</sup> This is in comparison to the 7 percent of antitrust cases that were reversed on appeal from district courts.<sup>79</sup>

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<sup>73</sup> The parenthetical numbers in this and the columns to the right are the number of cases not including related cases where the FTC brought identical or very similar actions against additional defendants. *Id.* at 1697-99.

<sup>74</sup> The numbers in this table are reproduced as they appear in the original source. However, the sums for this column should be 114 and (91).

<sup>75</sup> *Id.* at 1699.

<sup>76</sup> Durkin, *supra* note 69, at 1699-1700.

<sup>77</sup> See Balto, *supra* note 63, at 3.

<sup>78</sup> WashLglFndt, *supra* note 68, at 6:53.

<sup>79</sup> *Id.* at 7:04.

Another study further undermines the argument that the FTC has the ability to successfully select winning cases.<sup>80</sup> Commissioner Wright and Angela Diveley collected every reported decision in which an ALJ published a substantive antitrust decision between 1976 and 2010, and every reported decision in which an Article III district court judge published a ruling on the merits of an antitrust claim between 1977 and 2007.<sup>81</sup> They found that FTC decisions were 14 percent more likely to be appealed than federal district court decisions.<sup>82</sup> These results indicate that a larger proportion of litigants in FTC cases were likely to disagree strongly with the FTC than litigants in district court cases were to disagree strongly with district court judges. A comparison of cases in which only the plaintiffs won in district court shows that appeal was more likely in 27 percent of FTC cases than in Article III cases.<sup>83</sup> Thus, where the FTC decided a case in favor of itself, respondents were even more likely to appeal the decision than defendants who lost in district court. Moreover, FTC opinions that were appealed by losing respondents were reversed 20 percent of the time compared to a 5-percent reversal rate for such opinions appealed from district courts.<sup>84</sup> Commissioner Wright and Ms. Diveley also found that the differences in appeal and reversal rates were not attributable to systematic differences in case selection by plaintiffs, such as a predisposition to select winning cases.<sup>85</sup>

Additionally, Ms. Durkin examined whether the dismissal rate varies depending on whether the case is a “straddle” case brought during one presidential administration and dismissed under another.<sup>86</sup> She concluded that the FTC more often dismissed straddle cases.<sup>87</sup> Thus, the FTC more often dismissed “cases that were brought under a previous administration associated with another political party—an administration that presumably took different approaches to competition law . . . than the current administration.”<sup>88</sup> Whatever the significance, the data do not provide strong evidence of political independence, and thus undermine at least the perception of fairness.

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<sup>80</sup> See Wright & Diveley, *supra* note 9, at 88-89.

<sup>81</sup> *Id.* at 90. Although the goal of Wright and Diveley’s study—to measure the quality of the FTC’s decisionmaking as compared to Article III judges in competition cases—differs from the analysis undertaken here, the results of the study are illuminating for our purposes.

<sup>82</sup> *Id.* at 94.

<sup>83</sup> *Id.* at 94-95.

<sup>84</sup> *Id.* at 96-97.

<sup>85</sup> *Id.* at 99.

<sup>86</sup> Durkin, *supra* note 69, at 1700 (internal quotation marks omitted).

<sup>87</sup> *Id.* at 1702-03.

<sup>88</sup> *Id.*

While the evidence does suggest unfairness, the case for separation of the prosecutorial and adjudicative functions does not rest on the existence of actual prejudice.<sup>89</sup> The perception of unfairness is equally important.

B. *Does the Process Give Rise to a Perception of Unfairness?*

The perception of unfairness is not a foreign concept to the FTC. Indeed, the agency has strict, well-developed rules relating to recusal or disqualification of individuals from cases due to potential conflicts of interest.<sup>90</sup> It is not uncommon for commissioners, their advisors, or staff to be recused or disqualified for this reason. Yet the rules are premised on the perception of unfairness rather than on actual unfairness. Thus, it is clear that the FTC recognizes the potential for unfair treatment of respondents, at least with respect to individuals within the agency. What is unclear is why the perception of unfairness on the part of an individual should be viewed any differently than the perception of unfairness on the part of the agency's adjudicative body.

Even if one cannot conclusively demonstrate that blending the prosecutorial and adjudicative functions is unfair, it certainly gives rise to the perception of unfairness. The American Bar Association in its 1989 report on the FTC observed, "No thoughtful observer is entirely comfortable with the FTC's . . . combining of prosecutory and adjudicatory functions. Whenever the same people who issued a complaint later decide whether it should be dismissed, concern about at least the appearance of fairness is inevitable."<sup>91</sup> Former Commissioner Elman made the same point<sup>92</sup> as have other commentators.<sup>93</sup>

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<sup>89</sup> Interestingly, the Competition Commission of the United Kingdom cleared over 50 percent of the merger references from the Office of Fair Trading ("OFT") in recent years. To the point that this supports the argument of the existence of confirmation bias, one must acknowledge that the standards of reference by the OFT are less stringent than that employed by the Competition Commission. On the other hand, the standards for initiating a prosecution and finding liability by the FTC are also different. Perhaps the OFT is more liberal in making references than the FTC is when it initiates a case?

<sup>90</sup> See 16 C.F.R. § 3.42(g) (2014).

<sup>91</sup> AM. BAR ASS'N, 1989 REPORT OF THE ABA ANTITRUST SECTION SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION 118 (1989).

<sup>92</sup> Elman, *A Modest Proposal*, *supra* note 40, at 1048 ("The problem of avoiding prejudgment, in appearance or in fact, constantly hovers over all agency activity and is troublesome to agency members in almost every kind of action it takes."); see also Barton, *supra* note 21, at 390 ("[T]he Commission will fail to enjoy the full confidence of the business community which it oversees").

<sup>93</sup> See, e.g., 1979 PRESIDENTIAL ANTITRUST REPORT, *supra* note 7, at 366 (for Ernest Gellhorn's testimony before the National Commission for the Review of Antitrust Laws & Procedures, where he observed that the blending of functions at the FTC gave rise to serious issues of prejudgment noting that the "integrity of the process . . . is terribly important" (quoting another source) (internal quotation marks omitted)); *id.* at 349-55 (for the separate views of Commissioner Hatch); *id.* at 366 (for the testimony of Edward Vaill before the same commission, where he observed, "[w]hether or not they actually are

The dual function offends a basic sense of fairness. One does not need a law degree to appreciate the issue. Noteworthy is the criticism of President Franklin D. Roosevelt on the blending of functions in some of the administrative agencies in which he stated, “There is a conflict of principle involved in their make-up and functions . . . [T]he same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness: it weakens public confidence in that fairness.”<sup>94</sup>

Public confidence in the fairness of adjudicative processes is important itself. Without wading into constitutional law, fairness is widely perceived as a part of the due process that citizens expect and deserve. But there are additional reasons for concern. If the result is foreordained, why litigate this case unless one is prepared to slug it out to get to the court of appeals? The cost of antitrust litigation is such that one is not likely to resist the FTC, and improvident settlements will follow in a good number of cases. Recognizing the existence of dual jurisdiction, Mr. Balto identifies another cause for concern: entities prosecuted by the Department of Justice have access to a court before those subject to the FTC’s jurisdiction.<sup>95</sup>

### III. A MODEST PROPOSAL FOR CHANGE

This Article proposes that the FTC be reorganized to separate the prosecutorial and adjudicatory functions. The former would be vested in a director of enforcement appointed by and serving at the pleasure of the president.<sup>96</sup> Commissioners would hear the cases brought before the agency. This model is not alien to American administrative law and independent agencies. Labor complaints are evaluated and issued by National Labor Relations Board (“NLRB”) regional directors. Administrative hearings are

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partial or impartial, there is that appearance which undermines the credibility of the agency.” (quoting another source) (internal quotation marks omitted)); *see also* Eleanor M. Fox & Michael J. Trebilcock, *The GAL Competition Project: The Global Convergence of Process Norms*, in *THE DESIGN OF COMPETITION LAW INSTITUTIONS* 1, 8 (Eleanor M. Fox & Michael J. Trebilcock eds., 2013) (concluding that the authors “personally share the view that separation of the functions is normally desirable, particularly in cases where much is at stake”); *cf. Antitrust in the European Union: Unchained Wachdog*, *ECONOMIST* (Feb. 18, 2010), <http://www.economist.com/node/15546333>.

<sup>94</sup> Vaill, *supra* note 46, at 767 n.25 (quoting S. DOC. NO. 8, at 206, 77th Cong., 1st Sess. (1941)); *see also* FTC Watch No. 58, at 6 (Oct. 20, 1978) (where the editors observed, “[t]he fact is, as we have noted over and over, the business community is coming to view the FTC not as an adversary within the commonly-accepted sense of the term, but as a kangaroo court before which only a fool would expect a fair hearing and a just result”).

<sup>95</sup> *See* Balto, *supra* note 63, at 4. In the end, Balto recommends that the FTC ensure that its adjudicative process is fair and admit error dismissing complaints where appropriate. *Id.*

<sup>96</sup> In addition to remedying the perception of unfairness, this structural change would address the related problem of giving an unelected, unappointed FTC staff significant prosecutorial powers following the creation of a “wall” between the FTC and staff after the FTC votes out an administrative complaint. For a fuller discussion of this problem, *see* MELAMED, *supra* note 56, at 11-13.

held before ALJs, and appeals from the ALJs are vested in the NLRB.<sup>97</sup> Similarly, the Securities and Exchange Commission's ("SEC's") prosecutorial functions are vested in the Division of Enforcement while administrative hearings are held before ALJs and appeals are vested in the SEC.<sup>98</sup>

A. *Separating the Prosecutorial and Administrative Functions*

This change in organization would eliminate the existence or perception of unfairness associated with the same commissioners participating in both the decision to initiate a case and in its ultimate resolution. It would also make the decision to prosecute more transparent. One person would be responsible for the agency's enforcement agenda.<sup>99</sup>

The proposal, while requiring little in the way of personnel change, alters the responsibilities of the commissioners—and, rather dramatically, those of the chair. Some might be concerned about the perceived loss of collegial responsibility for setting the agency's enforcement agenda, including priorities, initiation of investigations, and decisions to prosecute. The "college of experts" would no longer make these decisions.<sup>100</sup> Such concern is misguided because these responsibilities have rested almost exclusively with the chair since the Reorganization Plan No. 8 of 1950,<sup>101</sup> which vests management of the agency in the chair. The chair appoints the senior staff who supervise and bring cases to the FTC.<sup>102</sup> Thus, it is the chair, in consultation with his or her senior staff, who sets the enforcement agenda.<sup>103</sup> To

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<sup>97</sup> See The National Labor Relations Act, 29 U.S.C. §§ 151, 160 (2006).

<sup>98</sup> See generally Securities Exchange Act of 1934, 15 U.S.C. § 78a (2006).

<sup>99</sup> FTC commissioners report to no one. Unelected, they cannot be turned out at the ballot box. On the other hand, persons appointed by and serving at the pleasure of the president ultimately report to the country's chief executive, and the ballot box provides some measure of accountability. See Theodore Olson, *Founders Wouldn't Endorse America's Plural Presidency*, LEGAL TIMES, Apr. 27, 1987, at 11 (quoting President Franklin D. Roosevelt: "[t]he plain fact is that the present organization and equipment of the Executive Branch of the Government defeat the constitutional intent that there be a single responsible chief executive to coordinate and manage the departments in accordance with the laws enacted by the Congress.").

<sup>100</sup> Of course, there is the question of whether the FTC has historically been composed of experts. See William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915, 930-46 (1997). And investigators have questioned whether FTC decisions are of superior quality to those of U.S. federal judges. See also Wright & Diveley, *supra* note 9, at 92-103.

<sup>101</sup> 5 U.S.C. app. Reorganization Plan No. 8 of 1950 § 1 (2006) [hereinafter Reorganization Plan 8].

<sup>102</sup> While it is true that the FTC must approve some senior staff appointments, we are not aware of any designation that failed to secure FTC approval.

<sup>103</sup> Reorganization Plan 8 § 3. Reorganization Plan 8 provided the president with the power to appoint and remove the chairman from among the sitting commissioners. *Id.* Previously, the chairman had been elected by the Commission; by tradition, the job rotated on a yearly basis. The chairman then became responsible for the executive and administrative functions of the agency.



be sure, the “care and feeding” of the commissioners by the chair is not unimportant. A strong and effective chair will convince his or her colleagues that they are all part of a united endeavor and will occasionally accept their counsel. But the reality is that the power resides in the Office of the Chair. Chairman Calvani previously wrote,

[A]s any former Commissioner will attest, it is well nigh impossible for a majority of the Commission to impose any enforcement agenda on the agency except with the active consent of the Chairman. This is not to say that from time to time the agency will not bring an action in which the Chairman does not concur.<sup>104</sup>

In other words, the power of a commissioner is relatively slight. The only real power of a commissioner is a negative one: blocking an enforcement initiative.<sup>105</sup>

It is very difficult for a majority of the FTC to open investigations and bring cases without the active support of the senior staff who oversee the work of the staff.<sup>106</sup> Thus, the movement of responsibility from the chair to a director of enforcement is not that significant. It simply moves responsibility from one person to another. The FTC would then become exclusively an adjudicative panel—a specialized court if you will.<sup>107</sup>

#### B. *Similar Approaches in Foreign Jurisdictions*

This altered administrative structure would not be unique, and its implementation would not require “reinventing the wheel.” Other jurisdictions employ specialized competition law tribunals. Canada, South Africa, and the United Kingdom provide models.<sup>108</sup> The Canadian tribunal was created by Act of Parliament in 1986.<sup>109</sup> It is independent of government and purely

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<sup>104</sup> Calvani, *1989 Proposal*, *supra* note 7, at 190.

<sup>105</sup> *See id.* at 190-91.

<sup>106</sup> Attempts to do so will likely encounter a most reluctant staff. One might hear “we have investigated the facts, and there is no case.” Or, “of course, we will bring a case if that is the will of the FTC, but it is a sure loser.” Such reactions likely will be self-fulfilling prophecies.

<sup>107</sup> Professors Eleanor Fox and Michael Trebilock in their edited volume *THE DESIGN OF COMPETITION LAW INSTITUTIONS*, identify “three basic models: the bifurcated judicial model (the competition authority goes to court for enforcement), the bifurcated agency/tribunal model (the agency goes to a specialized tribunal for enforcement), and the integrated agency model (a commission within the agency makes the first-level adjudication).” Fox & Trebilock, *supra* note 93, at 5. Using this paradigm, they place enforcement by the U.S. Department of Justice in the first model, Canada, South Africa and Chile in the second model, and the European Union, Japan, China and the U.S. FTC in the last model. Some jurisdictions like India and New Zealand combine elements of each. *See id.*

<sup>108</sup> *See id.*

<sup>109</sup> Josephine A.L. Palumbo, *Striking the Right Balance Between Fairness, Efficiency and Expediency: The Competition Tribunal Revisits Its Governing Rules of Practice and Procedure*, 32 *ADVOC. Q.* 437, 438 (2006-07). Interestingly, the early Canadian legislation combined the prosecutorial and adjudi-

adjudicatory hearing cases brought by the Canadian Competition Bureau.<sup>110</sup> It is composed of both judicial and lay members who serve for seven-year terms and may be reappointed. Today, four members are from the federal judiciary, one of whom sits as the chairman, and six are lay members who possess knowledge in economics, industry, commerce, or public affairs.<sup>111</sup> The lay members serve part time; the judicial members are also part time and otherwise continue to sit on the federal bench when not sitting on the tribunal. The tribunal sits in panels of three or five with a judicial member presiding. Appeals are vested in the Federal Court of Appeal.<sup>112</sup>

The Competition Tribunal of South Africa is composed of ten members who are appointed by the president on recommendation of the minister for trade & industry.<sup>113</sup> Two members, including the chairperson, are executive members and serve full time; eight, including the vice-chairperson, are non-executive members and serve part time.<sup>114</sup> Unlike Canada, the South African tribunal has no judicial members—it is composed of individuals drawn from many disciplines, including accountancy, law, and econom-

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ative functions. For example, early merger review was vested in ad hoc specially appointed commissioners who reviewed the transaction with power to impose sanctions for violations of its findings. For a history of the evolution of Canadian law in this regard, see BRIAN A. FACEY & CASSANDRA BROWN, *COMPETITION AND ANTITRUST LAWS IN CANADA: MERGERS, JOINT VENTURES AND COMPETITOR COLLABORATION* 1-23 (2013). *Cf.* *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 166 (Can.) (Canadian Supreme Court holding that statutory authorization to conduct searches and seizures vested in the director, with the consent of a member of the Restrictive Trade Practices Commission, violated the Canadian Charter of Rights and Freedoms). “A member of the R.T.P.C. passing on the appropriateness of a proposed search under the *Combines Investigation Act* is caught by the maxim *nemo iudex in sua causa*.” *Id.* at 164. Doubtless the *Hunter* case influenced Parliament’s creation of the Tribunal.

<sup>110</sup> See Competition Tribunal Act, R.S.C. ch. 19 (2d Supp. 1985). Canada criminalizes cartel conduct. Such cases are referred by the Competition Bureau to the federal director of public prosecutions and tried before the provincial criminal courts. See Competition Act, R.S.C. ch. C-34 (1985).

<sup>111</sup> The judicial members are appointed by the governor in council on recommendation of the minister of justice; the law members are appointed by the governor in council on recommendation of the minister for industry. The chairman is appointed by the governor in council. See Competition Tribunal Act, R.S.C. ch. 19 (2d Supp. 1985).

<sup>112</sup> Appeals may be taken on questions of law and on questions of fact or mixed questions of fact and law on leave of court. Fox & Trebilcock, *supra* note 93, at 15. The Tribunal has not been without controversy, principally associated with the paucity of matters on its docket. See, e.g., Neil Campbell, Hudson N. Janisch & Michael J. Trebilcock, *Rethinking the Role of the Competition Tribunal*, 76 CAN. B. REV. 297, 315, 329 (1997) (examining the failure of parties to invoke the jurisdiction of the Tribunal and propose changes to make it a more hospitable forum. They attribute the paucity of cases to the “judicialization” of the Tribunal’s process and the attendant willingness of the Court of Appeal to treat the Tribunal as a regular court of first instance without according it deference that ought, in the authors’ views, be accorded a tribunal with specialized expertise. They conclude with proposals to remedy the perceived defects).

<sup>113</sup> Fox & Trebilcock, *supra* note 93, at 42-43.

<sup>114</sup> Dennis Davis & Lara Granville, *South Africa: The Competition Law System and the Country’s Norms*, in *THE DESIGN OF COMPETITION LAW INSTITUTIONS*, *supra* note 93, at 266, 271-72.

ics.<sup>115</sup> Cases are decided by panels of three, appointed by the chairperson.<sup>116</sup> Generally, the tribunal hears cases initiated by the Competition Commission; however, it does have appellate jurisdiction over those matters where the Commission has independent authority to render decisions—for example, smaller mergers.<sup>117</sup> The jurisdiction of the South African tribunal is broader than the Canadian body. While it, too, hears cases brought by the Competition Commission, it also adjudicates cases brought by private parties. Appeals are taken to a special division of the High Court, known as the Competition Appeals Court.<sup>118</sup>

### C. *FTC Adjudicative Docket*

As illustrated in the table below, the adjudicative docket of the FTC produces few adjudicated decisions each year.

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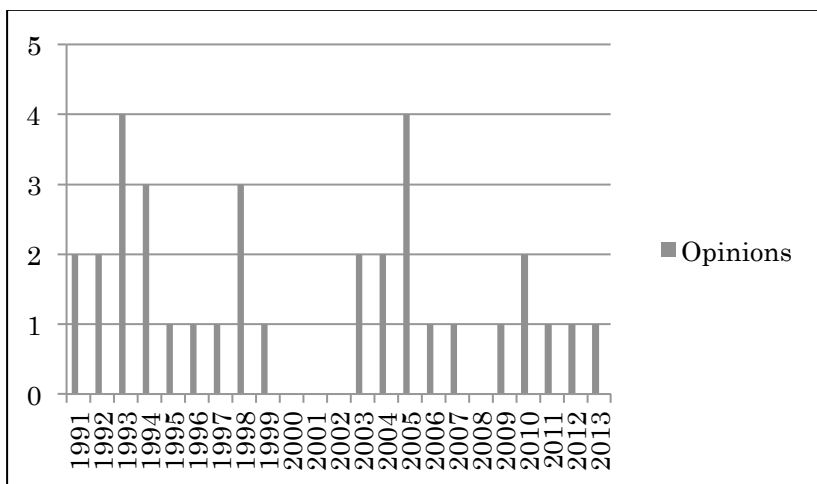
<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* Chile's institutional organization is similar. The National Economic Prosecutor's Office is the national competition enforcement authority. It is an independent agency headed by the National Economic Prosecutor who is appointed by the President. It brings its enforcement proceedings before the Competition Tribunal which is composed of four members and a president. The president must be a lawyer with the other members divided between economists and lawyers. Like South Africa, private parties may also bring cases before the Tribunal. Francisco Agüero & Santiago Montt, *Chile: The Competition Law System and the Country's Norms*, in *THE DESIGN OF COMPETITION LAW INSTITUTIONS*, *supra* note 93, at 149, 154-58.

The United Kingdom has recently reorganized its competition enforcement regime. The Office of Fair Trading investigated matters and brought cases in Her Majesty's courts or referred them to the Competition Commission. The two entities were recently merged into one agency, the Competition & Markets Authority. Previously, the OFT had decisional powers in some cases, reference ability to refer matters to the Competition Commission in others, and, with reference to the enforcement of the Enterprise Act, the authority to bring criminal cases in Her Majesty's courts of law. Thus the prior U.K. institutional organization was a hybrid combining features of the institutional enforcement paradigm of Professors Fox and Trebilcock. See Ioannis Lianos & Arianna Andreangeli, *The European Union: The Competition Law System and the Union's Norms*, in *THE DESIGN OF COMPETITION LAW INSTITUTIONS*, *supra* note 93, at 384, 404, 438. See generally Peter Freeman, *The Competition and Markets Authority: Can the Whole Be Greater Than the Sum of Its Parts?*, 1 *J. ANTITRUST ENFORCEMENT* 4, 8 (2013). The result, if ultimately enacted, continues to be a hybrid but one that combines the prosecutorial model for cases arising under the Enterprise Act and a form of the integrated agency model.

FTC ADJUDICATIVE DECISIONS<sup>119</sup>

This docket could be ably managed by a full-time chair and four part-time commissioners. This Article's proposal would also require that consent orders and order modifications be submitted to the FTC which could, if necessary, hold hearings.<sup>120</sup>

## CONCLUSION

The quality of commission decisionmaking vis-à-vis the federal courts is an important issue—particularly in light of recent evidence calling the model into question.<sup>121</sup> The responsibilities of the proposed director of enforcement closely resemble those of the assistant attorney general. The basic difference is that the FTC, rather than the federal courts, is the adjudicative tribunal. Given the recent literature, which suggests that the quality of FTC-adjudicated decisions is not better than, and is likely worse than, that of the federal courts, does this make sense? One might ask, why not “go all the way” and abolish dual jurisdiction? These are excellent questions, but as previously indicated, such a move is politically “dead on arrival.”<sup>122</sup>

<sup>119</sup> Data collected from the Office of the Secretary, United States Federal Trade Commission, Washington, D.C., June 27, 2013.

<sup>120</sup> This authority would retain the FTC as an adjudicatory body with powers similar to those of federal courts.

<sup>121</sup> See Wright & Diveley, *supra* note 9, at 103; cf. RICHARD A. POSNER, ANTITRUST LAW 280 (2d ed. 2001) (suggesting several solutions to reform antitrust regulation).

<sup>122</sup> See *supra* note 7 and accompanying text.

Is this Article's proposal a pipedream no different from a proposal to eliminate dual jurisdiction? It is sufficiently different to merit serious consideration. Most importantly, the proposal avoids ending the oversight jurisdiction by the commerce committees of both Houses of Congress.<sup>123</sup> Those same committees would continue to advise and consent on appointments to the FTC but also on the nomination of the director of enforcement.<sup>124</sup> Whatever special expertise is resident on the FTC could be employed in its adjudicative function.<sup>125</sup>

The agency would still have one principal officer, as it does now, with the director of enforcement supplanting the chair.<sup>126</sup> Thus, the agency would still have one "prestigious" position—just with a different title and somewhat different responsibilities.<sup>127</sup> The commissioners' roles would be limited to pure adjudication, no longer having to devote time to the enforcement agenda or case assessment.<sup>128</sup> Their office staffs and space would be dramatically curtailed.<sup>129</sup> One might argue that fewer quality persons will be interested in appointment to the FTC, but that is not self evident. It is certainly possible that more qualified persons might be interested in such a part-time position.

Most importantly, the proposal separates the prosecutorial from the adjudicative function without eliminating elements of congressional oversight that would be the death knell of a proposal to eliminate dual jurisdiction. Although not likely, this proposal might conceivably spark serious discussion of dual jurisdiction.

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<sup>123</sup> See *supra* note 7 and accompanying text.

<sup>124</sup> There is the potentially troublesome question of whether the president could invoke executive privilege to derail a congressional request for information from the director of enforcement. He can do so with reference to requests for information from the Department of Justice since it is an executive agency but not the FTC since it is an independent agency.

<sup>125</sup> Moreover, it is less radical than alternative proposals such as that of former Commissioner Phillip Elman who proposed that the adjudicative function be ceded to the courts—preferably in his view a specialized court—and the prosecutorial function be vested in one person and that the prosecutorial functions be vested in a single commissioner who would serve at the pleasure of both the president and Congress. See Elman, *A Modest Proposal*, *supra* note 40, at 1048-49.

<sup>126</sup> Whether this director of enforcement would inherit the EL-III level currently held by the chair or take the lower level of EL-IV currently held by the assistant attorney general for antitrust and FTC commissioners is a detail that we do not address.

<sup>127</sup> Although our focus has been on the competition mission of the agency, the same policies issues apply to the consumer protection function. This will involve less change since the FTC has since the 1980s brought a very large number of cases under Section 13(b) of the FTCA in federal court.

<sup>128</sup> It is possible, although not likely, that the FTC functioning as a specialized tribunal might develop a reputation that would enhance its adjudicatory responsibilities. Current law provides that the federal courts may refer pending antitrust cases brought by the Department of Justice to the FTC where the Commission would sit as a special master in chancery to determine an appropriate remedy. See 15 U.S.C. § 47 (2012).

<sup>129</sup> One attorney advisor and one assistant would be ample given the adjudicatory docket. Much office space could also be made available for other purposes.