Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Axon Enterprise, Inc., Plaintiff, v. Federal Trade Commission, et al, Defendants.	No. 2:20-cv-00014-PHX-DWL

DECLARATION OF PAMELA B. PETERSEN

I, Pamela B. Petersen, declare as follows:

1. I am a competent adult and have personal knowledge of the following facts.

2. I am the Director of Litigation and National Appellate Counsel for Axon Enterprise, Inc. ("Axon"), a Delaware corporation, with its principle place of business in Scottsdale, Arizona. I have represented Axon, formerly TASER International, Inc., as outside counsel beginning in 2005 and joined its in-house litigation team in 2012. I have 33 years of litigation and appellate experience in Arizona, including as a former Chief Assistant U.S. Attorney for the District of Arizona.

3. I am counsel of record in the matter of *Axon Enterprise, Inc. v. Federal Trade Commission, et al.*, Case No. 2:20-cv-00014-PHX-DWL, filed in the U.S. District Court for the District of Arizona on January 3, 2020.

4. I am personally familiar with the FTC investigation commenced on June 14, 2018, into Axon's May 3, 2018 acquisition of Vievu LLC from Safariland LLC.

During the course of the FTC's more than 18-month investigation, Axon cooperated in producing more than 262,000 documents, answering extensive written interrogatories, and producing multiple executives for investigational depositions. During this time, at no point did the FTC request or suggest that Axon "hold separate" the Vievu business or assets, or avoid transitioning Vievu's customers to Axon's products and technology platform.

5. Axon has spent in excess of $1.6 million responding to the FTC's investigational demands, including attorney and expert fees, ESI production and related hosting and third-party vendor fees and expenses. This amount would have been substantially higher but for the active participation of Axon's in-house litigation team.

6. Attached hereto as Ex. A is a true and correct copy of a speech by former FTC Commissioner Joshua D. Wright, *Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority* (2015), also available on the FTC's website.

7. Attached hereto as Ex. B is a true and correct copy of a law review article by law professor and former SEC Deputy General Counsel Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. Mich. J. L. Ref. 103 (2018).

8. Attached hereto as Ex. C are true and correct excerpts from the Report of the Antitrust Modernization Commission, Deborah A. Garza, Chair (2007).

9. Attached hereto as Ex. D is a true and correct copy of an Op.-Ed. by U.S. Sen. Mike Lee, *Just One Agency Should Enforce Antitrust Law*, Wash. Examiner (Jun. 17, 2019).

10. Attached hereto as Ex. E is a true and correct copy of the brief of the Solicitor General, without appendix, filed in the U.S. Supreme Court in *Selia Law LLC v. Consumer Financial Protection Bureau,* No. 19-7 (Dec. 9, 2019).

11. Attached hereto as Ex. F are true and correct copies (highlighting added for ease of reference) of an FTC Order in the matter of CoreLogic, Inc., Docket No. C-4458, naming only two Commissioners and the corresponding Federal Register entry, Vol. 83, No. 56 at 12580 (Mar. 22, 2018) reflecting the recusal of one of them.

12. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

EXECUTED this 9th day of January, 2020 at Scottsdale, Arizona.

Pam Petersen

Pamela B. Petersen

Exhibit A

Federal Trade Commission

Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority

Remarks of Joshua D. Wright[*]
Commissioner, Federal Trade Commission

at the

Symposium on Section 5 of the Federal Trade Commission Act

The Willard InterContinental
Washington, D.C.

February 26, 2015

Good afternoon. Thank you for the kind introduction and warm welcome. I am delighted to be here today. I would like to thank Baker Hostetler, and especially Carl Hittinger, for organizing this terrific symposium and for the generous invitation to share my views with you this afternoon. Events such as this one are no small task to organize and they serve an incredibly important role in the development of antitrust and consumer protection law because they offer a vital platform for the honest exchange of ideas among practitioners, consumer advocates, agency officials, members

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[*] The views stated here are my own and do not necessarily reflect the views of the Commission or any other Commissioner. I am grateful to my attorney advisor, Jan M. Rybnicek, for his invaluable assistance in preparing this speech.

of the judiciary, and Congress. Given the caliber of the panelists at today's event, I have no doubt that we will all walk away having learned something new about Section 5.

I have made no secret of the fact that I believe there is no more important challenge facing the Commission today than finally articulating the appropriate scope and role of the agency's "unfair methods of competition" authority under Section 5. The historical record reveals a remarkable and unfortunate gap between the theoretical promise of Section 5 as articulated by Congress over a century ago and its application in practice by the Commission. Congress intended Section 5 to play a key role in the Commission's competition mission by allowing the agency to leverage its institutional advantages to develop evidenced-based competition policy. However, the record suggests that the Commission's use of Section 5 has done very little to influence antitrust doctrine or to inform judicial thinking since the agency's inception. In order to fulfill Section 5's promise, and finally provide meaning and purpose to the agency's signature competition statute, it is clear that the Commission must first provide a framework for how it intends to use its "unfair methods of competition" authority.

That is why, soon after joining the Commission, I publicly distributed a proposed policy statement outlining my views as to how the Commission should use its Section 5 authority. My hope was that doing so would start—or at least restart—a conversation on the topic and help the Commission identify areas of consensus upon which we as an agency could build. I view the release of my proposed policy statement as an unequivocal success in this regard. In the two years since issuing my policy statement, I have been pleased by the many thoughtful contributions to the marketplace of ideas discussing the scope and role of Section 5. Academics and practitioners have responded to the Section 5 debate with dozens of articles and hundreds of pages of analysis. Current and former Commissioners also have shared their views. Conferences have been held, replies have been written, criticisms leveled, blogs posted, and speeches made—there was even a Section 5 hashtag on Twitter for a few days. The point is, a substantial record has been compiled. These contributions have helped bring several key policy questions into focus and, in my view, positioned the agency to undertake the long overdue task of issuing a policy statement that both strengthens the Commission's ability to target anticompetitive conduct and provides meaningful guidance to the business community about the contours of Section 5.

I would like begin today by briefly taking stock of the Section 5 debate. I would like to summarize the case for formal agency guidance defining the boundaries of Section 5 and dispel a couple of myths about the disadvantages to drawing some meaningful parameters around the Commission's "unfair methods of competition" authority. Beyond taking stock of the current debate, I also would like to share with you what I think is the next logical step in rehabilitating Section 5 and making it a productive member of the competition community as the Commission embarks upon its second century of protecting competition and consumers. Lastly, I would like to discuss some of my concerns about what is likely to happen to the FTC's Section 5 authority if the Commission fails to provide guidance. I intend to leave time for questions at the end of my remarks, so please do not be shy when that time comes.

Before I get too far along in my comments, however, I am obligated to provide a short disclaimer familiar to most of you, and that is that the views I express today are my own and not necessarily those of the Commission or any of the other Commissioners. With that bit of business out of the way, let's jump right in.

I. THE CASE FOR FORMAL GUIDANCE DEFINING THE SCOPE OF THE FTC'S "UNFAIR METHODS OF COMPETITION" AUTHORITY

I have shared my views on why the Commission should issue formal guidance defining the parameters of the agency's "unfair methods of competition" authority in countless forums since coming to the Commission.[1] Rather than using my time today to restate each of those arguments in detail again, I would like to quickly touch upon what I view as the most salient points before moving on to what I propose the agency should do as a first step to rehabilitating Section 5 so that it can contribute effectively to the Commission's competition mission as Congress intended.

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[1] *See, e.g.*, Joshua D. Wright, *Recalibrating Section 5: A Response to the CPI Symposium*, 11 CPI ANTITRUST CHRON., Nov. 2013, *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/recalibrating-section-5-response-cpi-symposium/1311section5.pdf; 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 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.

There are at least two principal reasons the Commission's "unfair methods of competition" authority has not lived up to its Congressional promise, both of which would be solved by formal guidance explaining how the agency intends to implement Section 5 as part of its competition mission. The first reason arises from a combination of (1) the agency's administrative process advantages and (2) the vague and ambiguous nature of the agency's "unfair methods of competition" authority. Together these two characteristics pose a unique barrier to the application of Section 5 in a manner that consistently benefits rather than harms consumers.

The vague and ambiguous nature of Section 5 is well known. Proposed definitions for what constitutes an "unfair method of competition" have varied substantially over time and belief that the modern FTC has now somehow moved beyond this inherent product of its institutional design are no more than wishful thinking. Indeed, for at least the past twenty years, commissioners from both parties have acknowledged that a principled standard for the application of Section 5 would be a welcome improvement. The lack of institutional commitment to a stable definition of what constitutes an "unfair method of competition" leads to two sources of problematic variation in the agency's interpretation of Section 5. One is that the agency's interpretation of the statute in different cases need not be consistent even when the individual Commissioners remain constant. Another is that as the members of the Commission change over time, so does the agency's Section 5 enforcement policy, leading to wide variations in how the Commission prosecutes "unfair methods of competition" over time. In short, the scope of the Commission's Section 5 authority today is as broad or as narrow as a majority of commissioners believes it is.

This uncertainty surrounding the scope of Section 5 is exacerbated by the administrative procedures available to the Commission. Consider the following empirical observation. The FTC has voted out a number of complaints in administrative adjudication that have been tried by administrative law judges in the past nearly twenty years. In each of those cases, after the administrative decision is appealed to the Commission, the Commission has ruled in favor of FTC staff and found liability. In other words, in 100 percent of cases where the administrative law judge ruled in favor of the FTC staff, the Commission affirmed liability; and in 100 percent of the cases in which the administrative law judge ruled found no liability, the Commission reversed.[2] This is a strong sign of an unhealthy and biased institutional process. By way of contrast, when the antitrust decisions of federal district court judges are appealed to the federal courts of appeal, plaintiffs do not come anywhere close to a 100 percent success rate—indeed, the win rate is much closer to 50 percent. Even bank robbery prosecutions have less predictable outcomes than administrative adjudication at the FTC. One interpretation of these historical data is that the process at the FTC

[2] *See, e.g.*, David Balto, *Can the FTC be a Fair Umpire?*, THE HILL (Aug. 14, 2013), http://thehill.com/blogs/congress-blog/economy-a-budget/316889-can-the-ftc-be-a-fair-umpire; Doug Melamed, Comments to Fed. Trade Comm'n Workshop Concerning Section 5 of the FTC Act (Oct. 14, 2008), *available at* http://ftc.gov/os/comments/section5workshop/537633-00004.pdf

stacks the deck against the parties. Another is that the FTC has an uncanny knack for picking cases; a knack unseen heretofore within any legal institution. I will allow discerning readers to choose the most likely of these interpretations—but suffice it to say the "case selection" theory requires one to also grapple with the fact that Commission decisions, when appealed, are reversed at a rate four times greater than antitrust opinions by generalist federal judges.[3]

Significantly, the combination of institutional and procedural advantages with the vague nature of the Commission's Section 5 authority gives the agency the ability, in some cases, to elicit a settlement even though the conduct in question very likely may not be anticompetitive. This is because firms typically will prefer to settle a Section 5 claim rather than to go through lengthy and costly litigation in which they are both shooting at a moving target and have the chips stacked against them. Such settlements also perpetuate the uncertainty that exists as a result of the ambiguity associated with the agency's "unfair methods of competition" authority by encouraging a process by which the contours of Section 5 are drawn through settlements without any meaningful adversarial proceeding or substantive analysis of the Commission's authority.

The second principal reason Section 5 has failed to contribute effectively to the Commission's competition mission is because of the absence of even a minimal level of certainty for businesses. A stable definition of what constitutes an "unfair method of

[3] *See* Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, J. ANTITRUST ENFORCEMENT 1, 16 (2012).

competition" would provide businesses with important guidance about what conduct is lawful and what conduct is unlawful under Section 5. The benefit of added business certainty is less important than ensuring Section 5 enforcement actions—including consents—actually reach and deter anticompetitive conduct rather than chill procompetitive conduct. However, guidance to the business community surely is important. Indeed, the FTC has issued nearly 50 sets of guidelines on a variety of topics, many of them much less important than Section 5, to help businesses understand how the Commission applies the law and to allow practitioners to better advise their clients on how to comply with their legal obligations. Without a stable definition of what constitutes an "unfair method of competition," businesses must make difficult decisions about whether the conduct they wish to engage in will trigger an investigation or worse. Such uncertainty inevitably results in the chilling of some legitimate business conduct that would otherwise have enhanced consumer welfare but for the firm's fear that the Commission might intervene and the attendant consequences of that intervention. Those fears would be of little consequence if the agency's authority was defined and businesses could plan their affairs to steer clear of its boundaries.

Some commentators have asserted that formal agency guidance would too severely restrict the Commission's enforcement mission.[4] They warn that defining the

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[4] *See, e.g.*, Sharis A. Pozen & Anne K. Six, *Section 5 Guidelines: Fixing a Problem that Doesn't Exist?*, 9 CPI ANTITRUST CHRON., Sept. 2013, *available at* https://www.competitionpolicyinternational.com/section-5-guidelines-fixing-a-problem-that-doesn-t-exist/; Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Unfair Methods and the Competitive Process: Enforcement Principles for the Federal Trade Commission's Next

boundaries of the Commission's "unfair methods of competition" authority would achieve stability and clarity only at the expense of creating an enforcement regime that fails to adequately protection competition. These commentators instead urge reliance upon the same case-by-case approach that has garnered success in the context of the traditional antitrust law. Under this view, the scope of the Commission's authority to prosecute unfair methods of competition is best determined by reading the leading cases to identify which enforcement principles the Commission applies when determining whether to prosecute a particular business practice under Section 5.

Although the desire to strike the correct balance between flexibility and certainty is well intended, the so-called common law approach to defining Section 5 is a recipe for unprincipled and inconsistent enforcement and an invitation for an outside institution—the courts or Congress in particular—to define Section 5 for the FTC. The approach of reading a stack of Section 5 consents elicited from parties bargaining in the shadow of the administrative process advantages for the FTC just discussed to decipher its meaning ultimately offers no certainty and results in a boundless standard under which the Commission may prosecute any conduct as an unfair method of competition.

As I have recently written, this is because reliance upon the common law method for developing "unfair methods of competition" law mistakenly assumes that the

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Century, Keynote Address at the George Mason Law Review and Law & Economics Center Antitrust Symposium: The FTC: 100 Years of Antitrust and Competition Policy (Feb 13, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/314631/140213section5.pdf.

common law virtues that have proved beneficial to the development of the traditional antitrust laws apply equally in the context of Section 5.[5] They do not. Fundamental differences between the inputs and outputs of traditional litigation and the inputs and outputs of Section 5 enforcement prevent the common law process from generating meaningful guidance for what constitutes an "unfair method of competition." But you do not have to take my word for it. Indeed, the Commission has employed the so-called case-by-case approach for a century and, to date, Section 5 has not meaningfully contributed to competition policy. In addition to failing to produce any direct and positive influence on antitrust law during that time period, Section 5 cannot point to a single standalone "unfair methods of competition" victory affirmed by a federal appeals court in the modern antitrust era. One hundred years is ample time for a robust natural experiment to evaluate the virtues of the Commissions' case-by-case approach to Section 5. The results are in. The common law method has proven incapable of generating meaningful guidance as to what constitutes an "unfair method of competition." To expect better results from the same approach is unwise.

Moreover, as I have already mentioned, the Commission has provided guidance in a number of areas of competition and consumer protection law—many of them far less important than the scope of Section 5—without compromising its enforcement agenda. Consider an obvious example in the arena of competition law, the Horizontal

[5] *See generally* Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 GEO. MASON L. REV. 1287 (2014).

Merger Guidelines, which explain how the antitrust agencies analyze the likely competitive effects of a merger. Those guidelines have proven to be one of the most significant contributions to antitrust law and policy and have greatly benefited the antitrust agencies, the federal courts, and the business community.

Similarly, in response to Congressional criticism about how the FTC was implementing its consumer protection authority under Section 5, and amidst serious threats of shut down the agency, the Commission issued policy statements explaining how it analyzes whether conduct was unfair or deceptive.[6] Today the Commission's deception and unfairness policy statements are widely regarded as a major success *and* serve as a key basis for the Commission to more confidently litigate disputes when its authority is challenged. The FTC should be proud of the fact that it has not reflexively refused to place limits on its own discretion when appropriate. Historically, even if at times under some pressure from Congress, the FTC has embraced limits on discretion both in the name of sound policy and to strengthen the foundation of questionable legal authority. Guidance regarding what precisely constitutes an "unfair method of competition" under Section 5 would similarly improve significantly the FTC's competition mission and shore up an obvious weakness in its authority.

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[6] *See* FTC Policy Statement on Unfairness (1980), appended to Final Order, Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984), *available at* http://ftc.gov/bcp/policystmt/ad-unfair.htm; FTC Policy Statement on Deception (1983), appended to Final Order, Cliffdale Assocs., Inc. 103 F.T.C. 110, 174 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm.

II. THE TIME IS RIPE FOR THE FTC TO VOTE ON THE SCOPE OF THE AGENCY'S "UNFAIR METHODS OF COMPETITION" AUTHORITY

Having summarized the case for formal "unfair methods of competition" guidance, let me turn now turn to the current state of play and what I believe the Commission should do next. The last two years have witnessed what amounts to a healthy and fruitful public comment period on the appropriate scope and role of the Commission's "unfair methods of competition" authority. During that time, members of the antitrust bar, academics, consumer advocates, and business stakeholders have together participated in dozens of panel discussions on Section 5 and penned countless articles debating various proposals. Members of Congress, too, have sent letters to the Commission urging us to act and have even raised the scope of Section 5 as an issue during Congressional hearings.[7] Commentators have had no shortage of opportunities to weigh in with their views on what the Commission should do with respect to Section 5, as well as to consider and respond to the views offered by others. And this of course only represents the most recent round of commentary, which necessarily builds on decades of scholarship and debate—much of it offered by experts at today's symposium—as well as a formal workshop on the scope of Section 5 organized by Chairman Leibowitz in 2008. I do not know of any topic in competition policy that has

[7] *See* Letter from Members of the House and Senate Judiciary Comms. to FTC Chairwoman Edith Ramirez (Oct. 23, 2013), *available at* http://judiciary.house.gov/_files/news/2013/Signed%20Letter%20to%20FTC.pdf; *Hearing on "The FTC at 100: Where Do We Go From Here?", Before the Subcomm. on Commerce, Manufacturing, and Trade of the H. Comm. on Energy and Commerce*, 113th Cong. 1 (Dec. 3, 2013).

been deliberated more thoroughly before a policy decision has been made than the scope and role of the Commission's "unfair methods of competition" authority.

Significantly, each of my colleagues at the Commission has also voiced, to varying extents, her opinion about the appropriate scope and role of Section 5.[8] This is a welcome addition to the conversation and one that I do not believe any previous Commission has enjoyed. Importantly, the gap between each Commissioners' views, and indeed the views of an overwhelming majority of commentators generally, appears to be relatively narrow and essentially limited only to the question of how efficiencies should be treated when deciding whether to pursue an enforcement action under Section 5. This is an important milestone and one that I think this Commission should seize upon. I am optimistic that this Commission can finally do what other Commissions have been unable to do: issue agency guidance defining what constitutes an "unfair method of competition" under Section 5. Indeed, as I will elaborate upon in a moment, I believe any of the three primary definitions of an "unfair method of competition" that have been articulated by myself or my colleagues is better than the status quo. As such, if there is consensus within the Commission on any of these three alternative definitions, the Commission ought to vote to adopt that definition for what

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[8] Interview with Commissioner Terrell McSweeny, MONOPOLY MATTERS (ABA Section of Antitrust Law, Unilateral Conduct Comm.), Fall 2014, at 3, 4; Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Section 5: Principles of Navigation, Remarks before the U.S. Chamber of Commerce (July 25, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/section-5-principles-navigation/130725section5speech.pdf; Ramirez, *supra* note 4; Julie Brill, Comm'r, Fed. Trade Comm'n, Remarks at the Technology Policy Institute Aspen Forum (Aug. 20, 2013), *available at* http://youtu.be/9V_YEu1FIAE.

constitutes an "unfair methods of competition." And, after 100 years without any meaningful guidance on Section 5 and with Congress watching, it ought to do so now.

With this in mind, next week I intend to put each of the three principal definitions for how to define an "unfair method of competition" up for a vote by the Commission. The precise language of the three proposed definitions are attached as an appendix to this speech, which will be available on the Commission's website later today. The three proposed definitions reflect the three definitions of an "unfair method of competition" contemplated by current Commissioners, including myself. Each proposal includes at its core the element that an "unfair method of competition" under Section 5 requires evidence that the conduct in question "harms or is likely to harm competition significantly" as that term is understood under the traditional federal antitrust laws. Harm to competition is a concept that is readily understandable and that has been deeply embedded into antitrust jurisprudence since the early part of the last century. Each of my colleagues has acknowledged that Section 5 should only be used to prosecute conduct that actually is anticompetitive. This is a significant and welcome area of consensus in light of past commissioners' efforts to use Section 5 to remedy a variety of social and environmental ills unrelated to competition.[9] This element

[9] *See* Michael Pertschuk, Chairman, Fed. Trade Comm'n, Remarks before the Annual Meeting of the Section of Antitrust and Economic Regulation, Association of American Law Schools (Dec. 27, 1977) (asserting that Section 5 can be used to remedy "social and environmental harms" such as "resource depletion, energy waste, environmental contamination, worker alienation, [and] the psychological and social consequences of producer-stimulated demands").

prevents the Commission from reverting to considering non-economic factors, such as whether the practice harms small business or whether it violates public morals, when deciding whether to prosecute conduct as an "unfair method of competition." Significantly, however, this element also allows the Commission to challenge conduct that, for one reason or another, might not fit within established Sherman Act or Clayton Act precedent, and thus might find resistance initially in the federal courts. In doing so, it allows the Commission to leverage its institutional advantages to develop evidenced-based competition policy that can then shape antitrust doctrine in the federal courts.

The second element of each definition that I will offer for a vote is that Section 5 cannot be used to challenge conduct where there is well-forged case law under the traditional federal antitrust laws. The federal judiciary has provided little lasting guidance on the appropriate scope of Section 5. But, as one court has explained, and many current and former commissioners have acknowledged, this requirement ensures that the Commission will not use Section 5 to shop for favorable law to attack conduct governed by the more rigorous requirements of Section 2 of the Sherman Act.[10] Prosecuting the same or similar conduct under disparate standards blurs the lines between lawful and unlawful commercial behavior and invites the Commission to evade advances in antitrust law designed to protect consumers from false positives and

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[10] *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980) (stating that where there is "well forged" case law governing the challenged conduct, the Commission cannot prosecute the conduct under Section 5 because doing so might "blur the distinction between guilty and innocent commercial behavior").

false negatives. Whether well-forged case law exists in any particular case will of course remain within the Commission's discretion, but the requirement nevertheless adds an important measure of stability regarding the agency's "unfair methods of competition" authority.

The area in which each of the three proposed definitions differs is in how efficiencies are treated under Section 5. This is the area in which my colleagues have expressed slightly different preferences. My preferred approach is that Section 5 only be used where there are no cognizable efficiencies present. In my view, where the parties can show cognizable efficiencies the agency is better off challenging the conduct under the traditional antitrust rules that are better designed for balancing. I do not believe the Commission's track record in administrative adjudication—in terms of both substance and process—justifies the view that it has a comparative advantage in cases requiring balancing. I will give my colleagues an opportunity to vote on this proposal, but I will not be surprised if a majority of them view this approach as too restrictive.

The second option incorporates into the definition of "unfair methods of competition" a test my colleague Commissioner Ohlhausen has thoughtfully advocated for as an element of her own policy statement, which requires that any antitrust harm be disproportionate to any cognizable efficiencies.[11]

[11] *See* Ohlhausen, *supra* note 8, at 10.

The third option requires the Commission to show that the harms are not outweighed by the cognizable efficiencies before bringing an "unfair methods of competition" claim under Section 5. This approach has been pointed to by Chairwoman Ramirez as the appropriate framework to apply for "unfair methods of competition" cases and essentially employs the modern day "rule of reason" when deciding whether conduct violates Section 5.[12] The basic view underlying this definition of an unfair method of competition is that the institutional differences between administrative adjudication and federal court do not require any adjustment to the rule of reason framework. While I do not believe a rule of reason approach is the best available choice, in my view, any of the three potential options I have discussed would be superior to the status quo. Each would create a stable definition for what constitutes and unfair method of competition and tether that definition to modern economics. Accordingly, to be clear, I intend to vote in support of each of these proposals in hopes that one gains the support of a majority of the Commission.

While I am truly hopeful at least one definition of "unfair methods of competition" attracts three votes, I am also acutely aware that optimism in light of a record of a century without guidelines is indulged at my own risk. So what happens next? There are a few possibilities. One possibility is that the Commission defines an

[12] *See* Ramirez, *supra* note 4, at 8 ("Our most recent Section 5 cases show that the Commission will condemn conduct only where, as with invitations to collude, the likely competitive harm outweighs the cognizable efficiencies.").

"unfair method of competition" next week. Indeed, my hope is that my colleagues will recognize the important consensus that exists on the scope and role of Section 5 and take a modest step in articulating the agency's enforcement policy with respect to Section 5 by adopting one of these three proposed definitions.

A second possibility is that a majority of my colleagues choose to vote "no" on each of these proposals. That possibility does not require much in the way of additional explanation. While a "no" vote by the full Commission would be non-public, close observers of the agency will surely take note of the lack of any press release or announcement that the agency at long last has produced Section 5 guidelines.

A third possibility, worse still in my view, is that a majority of Commissioners simply may choose not to vote at all. Under Commission rules, the full Commission need not vote unless and until a majority has formed. Thus, it is possible that my motion finds itself languishing in agency procedural purgatory, because Commissioners are not required to vote. I believe either of these last two possibilities would be a lost opportunity for the FTC and would send the wrong message about the Commission's desire for Section 5 to live up to its Congressional promise.

III. IF THE COMMISSION FAILS TO ARTICULATE THE SCOPE OF SECTION 5, CONGRESS MAY DEFINE IT FOR THE AGENCY

Not only is the question of what constitutes an "unfair method of competition" particularly ripe for agency action in light of the considerable thought that has been devoted to the issue in recent years, but I also believe that there exists a significant risk—maybe now more so than at anytime in FTC history—that if the Commission fails to take action to define the scope of the Section 5 soon, Congress may choose to define the statute for the Commission. Indeed, in recent years numerous members of Congress have grown interested in the scope of the Commission "unfair methods of competition" authority and have voiced concerns regarding the absence of any clear standard to which the business community can turn in order to better understand the agency's enforcement policy. Members of both the Senate and House Judiciary Committees have sent Chairwoman Ramirez a letter urging the Commission to finally provide guidance that would make Section 5 enforcement transparent, fair, predictable, and reasonably stable over time. Other members of Congress have raised questions about the vague and ambiguous nature of Section 5 during recent Congressional hearings. I do not believe this interest should be taken lightly, and continued resistance on the part of the Commission to define the parameters of Section 5 could spur legislative action.

If Congress were to define Section 5, it without question would result in a more restrictive definition of what constitutes an "unfair method of competition" than anything the Commission would implement. Indeed, the simplest and most obvious solution Congress might adopt, and one that would have the added benefit for many of harmonizing the powers of the FTC and the Department of Justice's Antitrust Division, would be to define an "unfair method of competition" under Section 5 as a violation of the Sherman Act or Clayton Act. A slightly broader, and just as simple solution for

Congress would be to define an unfair method as either a violation of the Sherman Act or Clayton Act or an invitation to collude. A third possibility, and one that attacks the Section 5 problem not from a standpoint of substance but rather of procedure, would be for Congress to remove the Commission's administrative advantages altogether and allow the federal courts to supervise the Commission's use of Section 5 and define the boundaries of what constitutes an "unfair method of competition" when necessary. Although at one point this might have seemed like an unlikely option, recent legislative proposals stripping the agency of its administrative powers in the context of merger challenges in order to align the preliminary injunction standards between the FTC and the Department of Justice suggest that this might not be so farfetched of a possibility.[13]

In short, if the FTC continues to refuse to define what constitutes an "unfair method of competition," it should not be surprised when and if Congress becomes intensely interested in introducing legislation to finally solve a problem created more than a century ago. A solution to the Section 5 problem is inevitable. It is my sincere hope that this Commission seizes the opportunity it has before it now to solve the Section 5 problem on its own terms rather than leaving the solution to Congress.

Thank you for your time. I am happy to take any questions.

[13] *See* Brent Kendall, *A Challenge to the FTC Methods*, WALL STREET JOURNAL (Nov. 15, 2014), http://www.wsj.com/articles/a-challenge-to-ftc-methods-1416184116; *Hearing on the SMARTER Act of 2014 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 2 (Apr. 3, 2014); Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Judging Antitrust, Remarks at the Global Antitrust Institute Invitational Moot Court Competition (Feb. 21, 2015), *available at* http://www.ftc.gov/system/files/documents/public_statements/626231/150221judgingantitrust-1.pdf (expressing support for the passage of the SMARTER Act).

APPENDIX

Option 1 – Efficiencies Screen

An "unfair method of competition" is an act or practice (1) that harms or is likely to harm competition significantly, (2) that lacks cognizable efficiencies, and (3) for which there is not well-forged case law under the traditional antitrust laws that might cause the distinction between lawful and unlawful commercial behavior to become blurred.

Option 2 – Disproportionality Test

An "unfair method of competition" is an act or practice (1) that harms or is likely to harm competition significantly, (2) where the harms are disproportionate to the cognizable efficiencies, and (3) for which there is not well-forged case law under the traditional antitrust laws that might cause the distinction between lawful and unlawful commercial behavior to become blurred.

Option 3 – Rule of Reason

An "unfair method of competition" is an act or practice (1) that harms or is likely to harm competition significantly, (2) where the harms are not outweighed by the cognizable efficiencies, and (3) for which there is not well-forged case law under the traditional antitrust laws that might cause the distinction between lawful and unlawful commercial behavior to become blurred.

Exhibit B

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Andrew N. Vollmer
University of Virginia School of Law

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ACCUSERS AS ADJUDICATORS IN AGENCY ENFORCEMENT PROCEEDINGS

Andrew N. Vollmer*

ABSTRACT

Largely because of the Supreme Court's 1975 decision in Withrow v. Larkin*, the accepted view for decades has been that a federal administrative agency does not violate the Due Process Clause by combining the functions of investigating, charging, and then resolving allegations that a person violated the law. Many federal agencies have this structure, such as the Securities and Exchange Commission (SEC) and the Federal Trade Commission.*

In 2016, the Supreme Court decided Williams v. Pennsylvania*, a judicial disqualification case that, without addressing administrative agencies, nonetheless raises a substantial question about one aspect of the combination of functions at agencies. The Court held that due process prevented a judge from sitting in a case in which he had participated as district attorney years earlier. The operative principle for the decision was that "the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case."*

This Article concludes that the reasoning of Williams *should supersede* Withrow *on the need to disqualify a specific commissioner or agency head from participating in a particular adjudication if the agency official played a meaningful role, such as voting to approve enforcement charges, in the process leading to the agency's initiation of proceedings against the defendant. Voting to approve enforcement charges would be a meaningful role. The due process cases do not permit a compromise on the high standards of impartiality demanded of a final agency decision maker in an adjudication to determine whether a private party committed a violation of law.*

That reading of Williams *threatens to unsettle standard practices at various agencies, but a closer look at the procedures of the SEC shows that it would be able to accommodate the rule in* Williams *yet retain the combination of charging and adjudicating at the Commission level. Because of turnover of Commissioners and quorum rules, the SEC could continue to have the agency leaders bring enforcement cases and review nearly all administrative law judge decisions while disqualifying individual Commissioners under* Williams *when necessary.*

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* Professor of Law, General Faculty, and Director of the John W. Glynn, Jr. Law & Business Program, University of Virginia School of Law; former Deputy General Counsel of the Securities and Exchange Commission; and former partner in the securities enforcement practice of Wilmer Cutler Pickering Hale and Dorr LLP.

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INTRODUCTION

The standard practice at the Securities and Exchange Commission (SEC or Commission) is for the Commissioners both to charge a person with a violation of law and then sit as judges to decide whether the defendant committed the violation.[1] Often, one or more SEC Commissioners at the time of the initial charge are still Commissioners later when the Commission reviews an initial decision from an administrative law judge in the same case. When that occurs, the Commissioners who participated in the decision to initiate an enforcement proceeding also participate in the agency's final decision on disposition of the charge. Other federal agencies,

1. *See infra* text accompanying notes 169–76; Russell G. Ryan, *The SEC as Prosecutor and Judge*, WALL ST. J. (Aug. 4, 2014, 7:36 PM), http://www.wsj.com/articles/russell-g-ryan-the-sec-as-prosecutor-and-judge-1407195362.

such as the Federal Trade Commission and the Federal Communications Commission, follow similar procedures.[2]

This combination of roles and powers might surprise some, but constitutional and administrative law has long accepted that the leaders of a federal agency may investigate and charge a person with a violation of law and then later act in a judicial capacity in the same case. The primary sources of that understanding are a section of the Administrative Procedure Act[3] and *Withrow v. Larkin.* In that 1975 decision, the Supreme Court held that a state medical examining board would not violate the Due Process Clause of the Constitution by investigating and charging potential misconduct by a doctor and then determining that the doctor should be temporarily suspended because of the misconduct.[4] Lower federal courts later extended the rule of *Withrow* to federal administrative agencies.[5]

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2. *See infra* text accompanying notes 164–68.

3. 5 U.S.C. § 554(d) (2012) provides that an "employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review [of an initial decision], except as witness or counsel in public proceedings." The restriction does not apply "to the agency or a member or members of the body comprising the agency." *Id.*

4. Withrow v. Larkin, 421 U.S. 35 (1975).

5. *See, e.g.*, NEC Corp. v. United States, 151 F.3d 1361, 1371–73 (Fed. Cir. 1998) (using *Withrow* to deny a due process challenge to the role of the Department of Commerce in an anti-dumping determination and noting that "the blend of investigative and adjudicative functions sometimes found in modern administrative agencies requires that a pragmatic approach be taken to what qualifies as an 'impartial' decision maker"); Keating v. OTS, 45 F.3d 322 (9th Cir. 1995) (rejecting the contention that the first director of OTS exercised an impermissible combination of investigatory, prosecutorial, and adjudicatory functions at least in part because the second OTS director issued a final decision); *In re* Seidman, 37 F.3d 911 (3d Cir. 1994) (using *Withrow* to reject a due process challenge to the combination of investigation, prosecution, and adjudication functions in the OTS director); Simpson v. OTS, 29 F.3d 1418 (9th Cir. 1994) (using *Withrow* and the minimal involvement of the OTS director in the commencement and prosecution of the case to reject a due process challenge based on the combination of prosecution and adjudication); Blinder, Robinson & Co. v. SEC, 837 F.2d 1099 (D.C. Cir. 1988) (using *Withrow*, 5 U.S.C. § 554, and the core value of flexibility in modern administrative process to reject a due process challenge to an SEC administrative proceeding); NLRB v. Aaron Bros. Corp., 563 F.2d 409, 413 (9th Cir. 1977) (using *Withrow* and 5 U.S.C. § 554 to reject a due process challenge when the Regional Director of the NLRB "exercised both investigative and adjudicative responsibilities in connection with the issuance and resolution of [an] unfair labor practice complaint"); *see also* Kennecott Copper Corp. v. FTC, 467 F.2d 67, 79 (10th Cir. 1972) ("[T]he Federal Trade Commission combines the functions of investigator, prosecutor and judge and . . . Congress designed it in that manner. Thus Kennecott's complaint goes to the nature of the law itself. As to this, the courts have uniformly held that this feature does not make out an infringement of the due process clause of the Fifth Amendment."); FTC v. Cinderella Career & Finishing Sch., 404 F.2d 1308, 1315 (D.C. Cir. 1968) (using precedent and 5 U.S.C. § 554 to conclude that Congress had approved the combination of an agency's power to act in an accusatory capacity and to determine the merits of the charges, concluding that a combination of investigative and judicial functions within an agency did not violate due process, and rejecting the

Notwithstanding its application by the courts, *Withrow* is one of the Supreme Court decisions at the heart of a long-running debate about the extent to which the Constitution permits or forbids a federal administrative agency from exercising legislative functions, judicial functions, or a combination of them in one agency with executive duties. The debate provokes arguments about the separation of powers, separation of functions, checks and balances, due process, pragmatism and efficiency. It spans a range of theories from the formalist view of separated powers to a functionalist approach supporting workable government.[6]

The debate now has new material to digest. In 2016, the Supreme Court decided *Williams v. Pennsylvania*,[7] which put the established understanding of *Withrow* in doubt, at least in part. *Williams* held that the Due Process Clause required a state supreme court justice to disqualify himself from reviewing a collateral challenge to a defendant's conviction and death sentence because, years earlier, the judge had participated in the criminal prosecution of the defendant as district attorney. The operative principle for the decision was that "the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case."[8]

The reasoning of *Williams* naturally raises the question whether it applies to federal administrative agencies, such as the SEC, whose heads both charge and adjudicate. Does *Williams* create a new due process imperative that federal agencies must meet, or was there something about the law or facts in *Williams* that prevents the outcome from extending to agencies and qualifying *Withrow*?

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argument that an agency's issuance of a press release about the charges in a complaint created an unacceptable appearance of prejudgment because agency members were then "under a very real pressure to vindicate themselves and justify the charges").

6. *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759 (1981); Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. 1023 (2016); Rebecca Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1839 (2011); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Adrian Vermeule, *Contra* Nemo Iudex in Sua Causa*: The Limits of Impartiality*, 122 YALE L. J. 384 (2012); *see also* Martin H. Redish & Kristin McCall, *Due Process, Free Expression, and the Administrative State*, Nw U. Pritzker Sch. L. Pub. L. & Legal Theory Series No. 18-03 (2018), https://ssrn.com/abstract=3122697.

7. Williams v. Pennsylvania, 136 S. Ct. 1899 (2016).

8. *Id.* at 1905.

Perhaps *Williams* did not implicate *Withrow* at all. *Williams* was different from *Withrow* in several obvious ways: *Williams* involved a judge, a criminal case for the death penalty, and collateral relief in state court. *Withrow* was a proceeding by an administrative agency to suspend a medical license, and the Court has often acknowledged that the demands of the Due Process Clause vary with the circumstances.

This Article will discuss whether *Williams* affects our understanding of *Withrow* and the established position that a federal agency may charge and adjudicate the same case. It concludes that *Williams* should supersede *Withrow* and require the disqualification of a specific commissioner or agency head from participation in an adjudication if the agency official played a meaningful role in the process leading to the agency's initiation of proceedings against the defendant. The Article will discuss whether voting to approve enforcement charges qualifies as a meaningful role. The due process cases on disqualification do not permit a compromise on the high standards of impartiality demanded of a final agency decision maker in an adjudication to determine whether a private party committed a violation of law.

Applying *Williams* to federal agencies does not necessarily mean a complete renunciation of *Withrow* or of the combination of charging and adjudicating functions within a single agency. *Williams* dealt with the specific circumstances of an individual accuser turned adjudicator. It was not about whether an entire agency carries an inherent bias from the combination of functions or whether the Constitution's structure of separated powers prevents Congress from authorizing a single agency to charge a violation of law and then adjudicate the charge.

Part I of this Article will review and comment on the two key Supreme Court decisions, *Withrow* and *Williams*. Reconciling the reasoning of the two decisions is difficult, but the two cases illustrate the difference between a narrow claim that an individual decision maker should be disqualified because specific circumstances create a strong risk of bias or partiality and the broader argument that the Due Process Clause or the Constitution's separation of powers does not permit an enforcement agency to adjudicate claims it brought. The discussion in this Article is limited to the narrower, individual due process claim and does not address whether the combination of enforcement and adjudication in one agency violates the Constitution.

Part II then considers whether *Williams* applies to federal administrative agencies. This Part considers possible ways to distinguish the two decisions but concludes that *Williams* reflects an evolving concern with the likelihood of partiality that grows out of service as an advocate. The principles in *Williams* and other due process cases on the need for impartial decision makers apply to administrative agencies, at least when an agency such as the SEC commences an enforcement claim through an internal administrative process that culminates in final agency review by the most senior agency officials. This discussion also reports data from several studies that support the Supreme Court's concern that an accuser lacks the necessary neutrality to determine the merits of an initial charging decision.

Part II concludes by examining the needs of the modern administrative state and the pragmatic considerations favoring the combination of charging and adjudicating functions in an agency. It asserts that practical considerations should and can give way to the application of *Williams*. It also explains that some agencies, such as the SEC, would be able to accommodate the rule in *Williams* and continue to have agency leaders bring enforcement cases and review nearly all decisions of administrative law judges (ALJs).

Finally, Part III assumes that *Williams* extends to federal agencies. It addresses the ways in which the *Williams* rule would apply to the SEC and the adjustments the SEC could make to its procedures to comply. If the rule in *Williams* applies to federal agencies, it would apply to the SEC whose Commissioners act as both accuser and adjudicator. Then, this Part considers the way *Williams* would have affected three specific SEC administrative proceedings. Because of turnover on the Commission and the SEC's quorum rules, applying *Williams* would rarely disable the agency from issuing a final adjudication on the merits of an administrative proceeding.

The procedures administrative agencies use is a large topic, and this Article does not set out to discuss the full range of potential issues. Three factors limit the scope of this discussion.

First, the Article addresses only those situations in which the agency head or the individuals constituting the leadership of the agency participate in both a decision to initiate an enforcement claim against a third party and then participate in an adjudication proceeding to determine liability or the appropriate sanction. At the SEC, agency leadership means the Commissioners, who are appointed by the President and confirmed by the Senate.[9] This Article does not address the position of agency personnel or adjudicators subordinate to the top officials of an agency. For example, at the SEC and many agencies, an ALJ renders an initial decision in an administrative enforcement proceeding, and the Commissioners may review that initial decision.[10] This Article does not address lower level employees because section 554(d) of the Administrative Procedure Act prohibits agency personnel who perform investigating or prosecuting functions in a case from participating in or advising on an adjudication decision in the same case or a factually related case, but the prohibition does not apply to the agency or agency heads.[11]

Second, this Article addresses government enforcement cases brought as administrative proceedings. These are situations in which a government agency charges a specific person with a violation of law because of particular past conduct, litigates the case within the agency, and renders a decision on whether a violation occurred and what sanction or relief to impose. SEC administrative enforcement cases can lead to severe forms of coercive sanctions and resemble criminal prosecutions in many ways. Many agency enforcement cases brought as administrative proceedings, such as the ones at the SEC, involve a hearing on the record and are adjudications under the APA;[12] they are not license hearings, rulemakings, or rulings on government benefits.

Third, the reasoning and analysis in this Article apply only to federal agencies with two characteristics: (1) those that use administrative proceedings to resolve meaningful enforcement allegations and (2) those whose top-level officials vote to initiate enforcement proceedings and make the final agency determination on a potential violation. The SEC is a leading example of such an agency, and the details of its operations are used to illustrate the implications of applying *Williams* to an agency's procedures. Other

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9. 15 U.S.C. § 78d(a) (2012); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 510–13 (2010).

10. Other works devote attention to the position of administrative law judges, administrative judges, or agency staff. *See* Asimow, *supra* note 6 (addressing primarily the separation of staff from decision making); Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643 (2016); Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797 (2013); Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act*, ADMIN. CONFERENCE U.S. (Nov. 10, 2016), https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-final-report_0.pdf.

11. 5 U.S.C. § 554(d); *see* discussion *supra* note 3.

12. *See* 5 U.S.C. §§ 551(7), 554(a) (2012); 15 U.S.C. §§ 77u, 78u-2(a), 78u-3(a), 78v (2012).

agencies appear to have a similar structure and to operate in a similar manner. Part III of this Article describes some of the relevant procedures of several other agencies, including the Federal Communications Commission and the Commodity Futures Trading Commission, but the particular processes of those agencies would need to be considered to reach a fully informed conclusion about whether and how *Williams* would apply.

I. THE SUPREME COURT DECISIONS IN *WITHROW* AND *WILLIAMS*

This first Part describes *Withrow* and *Williams*. This review prompts several observations that bear on the later, essential question of whether the holding in *Williams* should apply to federal administrative agencies.

A. Withrow v. Larkin

In *Withrow v. Larkin*, a doctor challenged the procedures used by the Wisconsin Medical Examining Board to enforce state statutes against various types of professional misconduct.[13] The doctor's objection was that the Board had the authority to investigate possible prohibited acts, issue charges, and then reach a conclusion on reprimanding him or temporarily suspending his medical license.[14]

The Board held an investigative hearing to determine if the doctor had engaged in prohibited acts in the course of his work. It then proposed to hold a "contested hearing" on charges resulting from the investigation and decide whether to suspend the doctor's license temporarily.[15] The doctor sought relief from a federal district court, which stopped the Board from imposing a temporary suspension because the Board was not "an independent, neutral and detached decision maker."[16] The district court concluded that a Board decision to suspend the doctor's medical license "at its own contested hearing on charges evolving from its own investiga-

13. 421 U.S. 35 (1975).
14. *Id.* at 41.
15. *Id.* at 40–41; Larkin v. Withrow, 368 F. Supp. 796, 797 (E.D. Wis. 1973); Brief for Appellee at 14, Withrow v. Larkin, 421 U.S. 35 (1975) (No. 73-1573), 1974 WL 186368, at *14 ("The issues involved in the contested hearing were identical to the issues which had been investigated by the Board.").
16. *Withrow*, 368 F. Supp. at 797; *Withrow*, 421 U.S. at 41–42.

tion would constitute a denial to him of his rights to procedural due process."[17]

After the district court enjoined the temporary suspension proceedings, the Board held another investigative session and then issued findings of fact, conclusions of law, and a decision that the doctor had engaged in specified misconduct. The Board also determined that it had probable cause for an action to revoke the doctor's medical license and filed its decision with the local district attorney to initiate appropriate revocation or criminal proceedings.[18] Permanent license revocation or a criminal conviction needed a court action prosecuted by the district attorney.

The Board appealed the district court's judgment to the Supreme Court, and the Court rejected the due process argument in a unanimous opinion by Justice White. The Court began by acknowledging that administrative adjudications must be fair and must have an unbiased decision maker.[19] The Court identified previous situations "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."[20] The earlier situations occurred when an adjudicator had a pecuniary interest in the outcome[21] and when the adjudicator had been the target of personal abuse or criticism from a party.[22]

The combination in an administrative agency of the authority to investigate, commence proceedings, and adjudicate was different. Unlike the situations previously identified, the Court did not believe it created an unconstitutional risk of bias.

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers

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17. *Withrow*, 368 F. Supp. at 797; *Withrow*, 421 U.S. at 42.
18. *Withrow*, 421 U.S. at 41–42.
19. *Id.* at 46–47.
20. *Id.* at 47.
21. The Court cited *Gibson v. Berryhill*, 411 U.S. 564 (1973), and *Tumey v. Ohio*, 273 U.S. 510 (1927), among other cases. *Withrow*, 421 U.S. at 47 n.14.
22. The Court cited *Taylor v. Hayes*, 418 U.S. 488 (1974), and *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), among other cases. *Withrow*, 421 U.S. at 47 n.15.

> on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.[23]

The Court conceded that the argument against allowing the combination of functions had merit. "The issue is substantial,"[24] but, when the question concerned the operations of administrative agencies, legislators needed freedom to choose from complete separation of functions or virtually none at all. The "growth, variety, and complexity of the administrative processes have made any one solution highly unlikely."[25] At the federal level, Congress had passed section 554(d) of the Administrative Procedure Act, which explicitly permitted the members of a federal agency to investigate or prosecute and participate or advise in adjudication.[26]

The doctor relied on the Supreme Court's 1955 decision in *Murchison*,[27] where the Court held that the Due Process Clause prohibited a state court judge acting as a one-person grand jury from hearing witnesses, charging witnesses with perjury or contempt, and then trying the charges against the witnesses. The Court responded by saying that *Murchison* did not stand for a broad rule against the combination of functions at an administrative agency, did not question the APA or an earlier Court decision permitting agency members from having some knowledge of facts relevant to an adjudication,[28] and involved different procedures. It concluded the Board in *Withrow* used procedures that did not contain an unacceptable risk of bias.

The Court appeared to demand proof that members of the Board held an actual personal bias or prejudice against the doctor or had prejudged the outcome of the doctor's case based on the information from the investigation.[29] The mere exposure to evi-

23. *Withrow*, 421 U.S. at 47.

24. *Id.* at 51.

25. *Id.* at 51–52.

26. *Id.* at 52. The Court also relied on the approval of the combination of functions by the leading commentator on the administrative process at the time, Kenneth Culp Davis. The Court cited the Davis treatise several times. *Id.* at 52 nn.17–18, 57 n.24 (citing 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE (1958 & Supp. 1970)).

27. *Withrow*, 421 U.S. at 53; *In re* Murchison, 349 U.S. 133 (1955).

28. *Withrow*, 421 U.S. at 53 (discussing FTC v. Cement Inst., 333 U.S. 683 (1948)).

29. *Id.* at 54–55 ("When the Board instituted its investigative procedures, it stated only that it would investigate . . . . Later, . . . it would determine if violations had been committed . . . . Without doubt, the Board then anticipated . . . an adjudication of the issue; but there was no more evidence of bias . . . than inhered in the very fact that the Board had investigated and would now adjudicate.").

dence presented in a non-adversary investigation was not sufficient to impugn the fairness of the Board members at a later adversary hearing. The Board members and other administrators should be assumed to be conscientious and intellectually disciplined.[30]

The Court then rejected the argument that the Board's filing of probable cause conclusions with the district attorney demonstrated prejudice and prejudgment. Different stages of a proceeding, such as initial charges and ultimate adjudication, have different bases and purposes and could legitimately lead to different results from "a more complete view of the evidence afforded by an adversary hearing."[31] The risk of bias or prejudgment in deciding whether a violation occurred after having filed a complaint "has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position."[32]

In summary, *Withrow* was a rousing defense of the administrative state and Congress's ability to authorize an agency to investigate, charge, and resolve allegations of misconduct. The Court elevated legal formalities over the psychological tendencies and human weaknesses of individuals, praised the honesty and intellectual discipline of agency adjudicators, and diminished due process precedents.

B. Williams v. Pennsylvania

In *Williams v. Pennsylvania*,[33] the Supreme Court held that the Due Process Clause of the Constitution forbids a person from being both an accuser and adjudicator in the same case. The case concerned a local district attorney who approved a decision to seek the death penalty against a criminal defendant and then, many years later, participated as a judge in a court decision that refused to grant the defendant post-conviction relief.

Pennsylvania charged the defendant with a 1984 murder. The trial prosecutor wrote a memorandum to her supervisors requesting permission to seek the death penalty. The district attorney

30. *Id.* at 55.
31. *Id.* at 57–58.
32. *Id.* at 57.
33. Williams v. Pennsylvania, 136 S. Ct. 1899 (2016).

wrote a note at the bottom of the memorandum approving the request. The defendant was convicted and sentenced to death in 1986.[34] The district attorney did not participate in the litigation other than to approve the request to seek the death penalty.[35]

For over twenty-five years, the defendant challenged his conviction and sentence. In 2012, he filed a petition for post-conviction relief claiming newly discovered evidence. The state trial court found misconduct by the trial prosecutor and ordered a new sentencing hearing. The case went to the Supreme Court of Pennsylvania where the district attorney who had approved seeking the death penalty was now chief justice. The defendant asked the chief justice to disqualify himself. He refused and voted with the other five members of the state supreme court to reinstate the death penalty.[36]

The U.S. Supreme Court, in a five-to-three decision written by Justice Kennedy, held that the Due Process Clause required the disqualification of the state chief justice. A judge must be free of bias. That determination required an objective standard: Would an average judge likely be neutral or have an unconstitutional potential for bias from a financial or other interest in the outcome of a case.[37]

The *Murchison* precedent, which *Withrow* had distinguished, played an important role in *Williams*.[38] In *Williams,* the Court said *Murchison* "determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case."[39]

The *Williams* majority, using language from *Withrow* and *Murchison*, gave weight to an advocate's psychological investment and personal knowledge:

> When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome. There is, furthermore, a risk that the judge

34. Brief for Petitioner at 7, Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) (No. 15-5040), 2015 WL 10356400.

35. Brief for Respondent at 17, Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) (No. 15-5040), 2016 WL 355062.

36. *Williams*, 136 S. Ct. at 1904–05.

37. *Id.* at 1905–06.

38. *Id.* at 1905–07; *In re* Murchison, 349 U.S. 133 (1955).

39. *Williams*, 136 S. Ct. at 1905.

> "would be so psychologically wedded" to his or her previous position as a prosecutor that the judge "would consciously or unconsciously avoid the appearance of having erred or changed position." In addition, the judge's "own personal knowledge and impression" of the case, acquired through his or her role in the prosecution, may carry far more weight with the judge than the parties' arguments to the court.[40]

The Court cited no empirical research or studies to bolster these conclusions, although supporting data exists, as discussed below.[41]

The *Williams* Court recognized that the state chief justice was just one of several prosecutors who worked on the case, played only a limited role, and ended his involvement decades earlier. Nonetheless, "the constitutional principles" were fully applicable when "a judge had a direct, personal role in the defendant's prosecution."[42] What mattered was whether the adjudicator participated in a "critical" or "major adversary decision."[43] "A prosecutor may bear responsibility for any number of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call."[44] Brief, administrative or ministerial acts do not qualify.[45] When a serious risk exists that a person would be influenced by a motive, even inadvertent, to validate prior involvement, the person has a "duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences that his or her own earlier, critical decision may have set in motion."[46] An individual is not able to set aside personal interest in an outcome when he or she has served as an advocate in the very case being adjudicated.[47]

The Court concluded that the chief justice's authorization to seek the death penalty amounted to significant and personal involvement in a critical trial decision and gave rise to an unacceptable risk of actual bias. His participation in the proceedings as a justice on the state supreme court violated due process.[48]

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40. *Id.* at 1906 (citations omitted).
41. *See infra* Part II.C.
42. *Williams*, 136 S. Ct. at 1906.
43. *Id.*
44. *Id.* at 1907.
45. *See id.*
46. *Id.*
47. *Id.* at 1906.
48. *Id.* at 1908–09.

The violation was not harmless error even though six state supreme court justices decided the case and the chief justice's vote was not decisive.[49] The existence of harm did not depend on whether the chief justice influenced the other justices during the decision-making process or whether the disqualified judge's vote was necessary to the disposition of the case. The decision of a body with several members reflects a collective process of exchanging ideas and arguments with each person playing a part in shaping the ultimate disposition. "Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself."[50]

Chief Justice Roberts, together with Justice Alito, dissented and would not have found a due process violation because the state chief justice did not have any previous knowledge of the facts contested in the specific issue that the state supreme court reviewed and had not made any previous decision on that issue.[51] Justice Thomas also dissented because the post-conviction proceedings were different from the original criminal case, the state chief justice did not participate as a prosecutor in the post-conviction proceeding, and the Due Process Clause required disqualification only when a judge had a direct and substantial pecuniary interest or had served as a lawyer in the same case.[52]

C. *Comments on* Withrow *and* Williams

Through the lens of *Williams*, a large part of *Withrow* appears to be wounded. The reasoning in the two opinions is hard to reconcile, as four aspects of the opinions illustrate. The fifth comment below observes that comparing *Withrow* and *Williams* accentuates the difference between a due process disqualification of an individual decision maker for partiality in particular circumstances and a broader separation of powers or due process challenge to an agency's combined authority to investigate, commence proceedings, and adjudicate.

First, *Withrow* and *Williams* had similar basic fact patterns and stated the same legal standards for disqualification but reached entirely different outcomes. *Withrow* said that due process required

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49. *Id.* at 1909.
50. *Id.*
51. *Id.* at 1910–11 (Roberts, C.J., dissenting).
52. *Id.* at 1920 (Thomas, J., dissenting).

disqualification when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."[53] *Williams* began with the same general due process principle and quoted *Withrow*.[54]

Withrow professed to make "a realistic appraisal of psychological tendencies and human weakness" but concluded that the sequence of functions of investigating, charging, and deciding did not create an intolerably high risk "that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position."[55] *Williams* considered the human tendency to be psychologically wedded to a position and reached the opposite conclusion. Serving as a judge after having been an advocate in the same case created an unacceptable "risk that the judge 'would be so psychologically wedded' to his or her previous position as a prosecutor that the judge 'would consciously or unconsciously avoid the appearance of having erred or changed position.'"[56] The *Williams* opinion cited concepts and language from *Withrow,* but reached different conclusions.

The *Williams* majority did not follow other parts of *Withrow*'s reasoning. It did not refer to or rebut *Withrow*'s "presumption of honesty and integrity in those serving as adjudicators" or *Withrow*'s assumption that adjudicators would act with conscience, intellectual discipline, and fairness.[57] In fact, one of the most interesting things about the use of *Withrow* as a precedent is that the Supreme Court has adopted the standard of impartiality from *Withrow* in other cases but has jettisoned key reasons for allowing a person both to charge and adjudicate.[58]

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53. Withrow v. Larkin, 421 U.S. 35, 47 (1975).

54. *Williams*, 136 S. Ct. at 1903 (citing Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872 (2009) (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975))).

55. *Withrow*, 421 U.S. at 47, 57.

56. *Williams*, 136 S. Ct. at 1906 (quoting *Withrow*, 421 U.S. at 57).

57. *Withrow,* 421 U.S. at 47, 55. The *Withrow* Court showed its faith in the board members at several points. It referred to the fairness of the members, *id.* at 55, and to their objectivity in adjudicating after making a charging decision. The board could decide not to suspend the doctor without implicitly admitting error because the decision would probably "reflect the benefit of a more complete view of the evidence afforded by an adversary hearing." *Id.* at 57–58.

58. *See, e.g.*, *Williams*, 136 S. Ct. at 1903; *Caperton*, 556 U.S. at 872. The dissents in *Caperton* and *Williams* quoted the *Withrow* presumption of honesty and integrity in adjudicators. *Caperton*, 556 U.S. at 891 (Roberts, C.J., dissenting); *Williams*, 136 S. Ct. at 1910 (Roberts, C.J., dissenting).

Second, both opinions featured discussions of *Murchison*,[59] but they derived considerably different lessons. In *Murchison*, a state judge heard testimony about potential crimes, charged witnesses with perjury or contempt, and then tried and convicted them. It was important precedent in both *Withrow* and *Williams* because *Murchison* required disqualification for a decision maker's earlier participation in a case rather than for the traditional reason of the adjudicator's financial interest. *Withrow* emphasized the part of *Murchison* that found that the judge likely relied on his own personal knowledge and impression of what the witnesses said in the grand jury room, an impression that could not be tested by adequate cross-examination. *Murchison* did not "stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications."[60]

Withrow referred to *FTC v. Cement Institute*[61] and other examples of a decision maker exposed to the same facts for different purposes.[62] It stated that *Murchison* did not purport to question *Cement Institute*[63] and concluded that "mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing."[64]

To the *Williams* Court, *Murchison* laid down a broader rule. The Court had overturned the convictions in *Murchison* because "the judge's dual position as accuser and decisionmaker in the contempt trials violated due process: 'Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.'"[65] The *Williams* Court also drew on *Murchison*'s concern with exposure to factual information, as discussed below, but the

59. *Caperton* also included an extended discussion of *In re* Murchison, 349 U.S. 133 (1955). 556 U.S. at 880–81.
60. *Withrow*, 421 U.S. at 53.
61. FTC v. Cement Inst., 333 U.S. 683 (1948).
62. *Withrow*, 421 U.S. at 47–49.
63. *Id.* at 53.
64. *Id.* at 55. A year after *Withrow*, the Supreme Court used similar reasoning to reject a due process challenge to a school board decision to fire striking teachers when the board was the bargaining agent for the school district and engaged in negotiations with representatives of the striking teachers. The Court said that mere familiarity with the facts of a case gained by an agency in performance of its statutory role does not disqualify a decision maker. Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 493–94 (1976).
65. Williams v. Pennsylvania, 136 S. Ct. 1899, 1906 (2016) (alteration in original) (quoting *In re* Murchison, 349 U.S. 133, 137 (1955)).

chief lesson the Court drew from *Murchison* was an objection to an adjudicator's participation in the accusatory process.

The *Williams* Court had the better reading of *Murchison*. The first reason *Murchison* gave for faulting trial by the judge-grand jury was the judge's role in the accusatory process:

> It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. . . . A single "judge-grand jury" is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal.[66]

The *Williams* Court then expanded the part of *Murchison* that relied on the judge's personal knowledge of the events to be tried rather than the evidence presented at the contempt trial. The *Murchison* concern had been narrow and limited to what took place before the judge in the secret grand jury sessions. For the *Murchison* Court, the judge was to be impartial and weigh only the evidence presented at the contempt trial but would not be able to disregard the events at the grand jury stage and would not be subject to cross-examination on those impressions. *Williams* enlarged this concern about access to facts and opined that a judge's personal knowledge and impression of a case acquired through participation in a prosecution could carry more weight with the judge than the parties' arguments to the court.[67] This was an expansion of the point in *Murchison* because *Williams* reasoned that a prosecutor would ascribe undue weight to all information learned while working on a case. The broader concern in *Williams* about information acquired while working on a case as a prosecutor contrasts with the statement in *Withrow* that "exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of [adjudicators] at a later adversary hearing."[68]

Third, the two opinions differed in assessing the significance of a decision maker's actions before the adjudication stage. *Withrow*

66. *Murchison*, 349 U.S. at 137.
67. *Williams*, 136 S. Ct. at 1906.
68. *Withrow*, 421 U.S. at 55.

gave credence to the different legal standards applicable to different stages of a matter and the ability of a decision maker to remain analytically pure in applying those standards. "When the Board instituted its investigative procedures, it stated only that it would investigate whether proscribed conduct had occurred. Later in noticing the adversary hearing, it asserted only that it would determine if violations had been committed which would warrant suspension of appellee's license."[69] In another part of the opinion, the Court observed that judges usually participate in different stages of a proceeding, such as approving an arrest warrant and later presiding over the criminal trial or resolving a preliminary injunction application and later presiding over permanent injunction proceedings.[70] The Court remarked that, "just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute."[71]

The problem with all of the Court's analogies in *Withrow* was that none of them included a judge in the role of advocate or prosecutor with a will to win. In each example, the judge acted as a referee who tested whether one party, as advocate, satisfied a legal standard used in an early part of a case and then applied a different legal standard to the evidence and legal arguments of the parties at a later stage of the case. The judge was not an accuser, movant, or proponent for an outcome.[72] A later part of this Article discusses whether a member of a charging administrative agency takes on the mantle of an accuser and advocate.[73]

Williams on the other hand worried more about the reality of human behavior when an adjudicator, as an advocate, had played an important role in a "critical" or "major adversary decision."[74] Significant, personal involvement in any critical prosecutorial decision was not eradicable and was sufficient to call for the protec-

69. *Id.* at 54.
70. *Id.* at 56–57.
71. *Id.* at 57.
72. The Federal Circuit relied on this difference in finding that no due process problem existed with the same panel of the Patent Trials and Appeals Board first deciding to institute *inter partes* review and then later deciding the merits of the *inter partes* review. Ethicon Endo-Surgery, Inc. v. Covidien LP, 812 F.3d 1023, 1029–30 (Fed. Cir. 2016).
73. *See infra* Part III.B.
74. Williams v. Pennsylvania, 136 S. Ct. 1899, 1906 (2016).

tions of the Due Process Clause against a decision maker's bias and prejudgment. The Court explained:

> Even if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process.[75]

The *Williams* Court took a broad view of major adversary decisions: "A prosecutor may bear responsibility for any number of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call."[76] Brief administrative or ministerial acts do not qualify.[77]

Williams did not draw nice differences between legal standards or stages of a proceeding, although it could have. Using the reasoning of *Withrow*, the *Williams* Court could have argued that the state chief justice's actions as district attorney did not amount to adopting the view that the defendant had committed an offense worthy of the death penalty. Instead, it could have determined that the district attorney did nothing more than conclude that the state, in the particular circumstances and based on the information at the time, had sufficient grounds and evidence to seek to persuade the final decision maker, the jury, to impose the death penalty. The *Williams* Court also could have relied on the difference between a decision to seek the death penalty at the original trial and the standards for granting post-conviction relief. It did not rely on these differences.

The *Withrow* decision does not hold up under the *Williams* standard. The Board in *Withrow* had significant personal involvement in key prosecutorial decisions. It conducted an investigation and then proposed to hold a contested hearing to determine whether to suspend the doctor's medical license. The Board later confirmed its commitment to the view that the doctor engaged in misconduct when it issued a decision that it had probable cause for an action to revoke the doctor's medical license and filed its decision with the local district attorney. The Board decided whether to

75. *Id.* at 1907.
76. *Id.*
77. *Id.*

bring charges and what charges to bring. Before transferring responsibility to the district attorney, the Board was the proponent and movant against the doctor. It was not a referee intermediating between two other adversarial parties.

A fourth comparison between *Withrow* and *Williams* involves the relevance of a decision-making body with several members. *Withrow* did not comment on the number of members of the Board because it was not relevant. The doctor's complaint applied to the Board as a whole and did not turn on any distinction between one member and another. All we know from *Withrow* is that the Board had more than one member.[78] As far as we can tell, every member of the Board participated in every stage of the proceeding against the doctor. By contrast, the issue of a group decision maker was present in *Williams* because the state chief justice was the only member of the court who had participated earlier in the case and his vote in the state supreme court had not been decisive. As described above,[79] the Court held that an unconstitutional failure to recuse is a structural error even if the judge in question did not cast a deciding vote. The chief justice's participation in the state supreme court decision was an error that affected the "whole adjudicatory framework below."[80]

Fifth, *Williams* and *Withrow* together highlight the difference between a due process disqualification of an individual decision maker for partiality or bias on particular facts and a broader separation of powers or due process challenge to the combination of functions within a single administrative agency. That is an important distinction to keep in mind.

The larger separation of powers or due process question was not at stake in *Williams*. *Williams* was about the propriety of one decision maker's participation in one particular case because the individual had participated in the prosecution of the same case before becoming a judge. *Williams* did not say that no district attorney could become a judge. Other due process cases on partiality or bias were also aimed at a single individual and the specific circumstances of that individual's participation in a case or in a recurring

78. The Court referred to the "practicing physicians" on the Board and the "individual members" of the Board. Withrow v. Larkin, 421 U.S. 35, 37–38 (1975). Section 15.405(7) of the 1973 Wisconsin statutory code provided for eight members at the time of the doctor's hearings in mid-1973. *See* 1973 Assembly Bill 300, ch. 90, § 18, 1973 Wis. Sess. Laws 200.

79. *See supra* text accompanying notes 42–50.

80. *Williams*, 136 S. Ct. at 1910.

category of cases. *Caperton*, *Murchison*, and *Mayberry v. Pennsylvania*[81] are examples.

A separation of functions challenge to an agency's structure would argue that the design of the Constitution, which separated executive, judicial, and legislative powers, prohibited an Executive Branch agency from exercising both executive and judicial functions and therefore prohibited an agency from charging and adjudicating. That would be a constitutional challenge to the powers Congress conferred on the agency rather than a fact-specific claim that an agency decision maker had a financial interest in an outcome or prejudice against a party. A structural due process argument of bias would rest on some of the reasons for separating executive and judicial functions. A defendant could argue that an agency head had a bias in favor of his or her own agency and was partial to upholding charges brought by the agency even if the agency head did not participate in the charging decision. The Supreme Court saw a due process defect in a similar situation, when a village mayor sat as a judge in traffic cases and the village received a portion of the fine income from the mayor's court even though the mayor did not personally receive a share of the fines.[82]

Withrow blended consideration of individualized due process arguments and separation of functions issues. The doctor in *Withrow* asserted a due process claim, and the Supreme Court treated the case as a due process case, but the reasoning of the opinion mixed due process issues such as impartiality, bias, and prejudice with a defense of the combination of functions in agencies. The Court discussed bias cases and decisions considering an agency's exposure to facts that later were the subject of an adjudication but concluded that those cases did not "stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications."[83] A pragmatic factor was that legislatures needed to be able to combine functions within a single agency because of the complexity of the structure of government.

Lower courts and commentators have generally treated *Withrow* as authority to reject separation of powers and due process attacks on the combination of functions in federal agencies. For example,

81. Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971) (holding that a defendant in criminal contempt proceedings should be tried by "a judge other than the one reviled by the contemnor").

82. Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972).

83. *Withrow*, 421 U.S.at 53.

the District of Columbia Circuit reviewed an SEC enforcement case in which the defendant attacked the SEC's combination of charging and prosecution powers with the power to adjudicate and impose sanctions. The court cited *Withrow* as settling the question: The defendant "failed to heed *Withrow*'s message that a due process challenge directed broadly to combinations of purposes or functions in the modern administrative state 'assumes too much.'"[84] A leading casebook also viewed *Withrow* as protecting administrative agencies from separation of functions challenges: "No one doubts . . . that a broad-based separation-of-powers challenge to the modern combination of functions in federal agencies would meet the same fate as the broad-based due process challenge in *Withrow*."[85]

The Supreme Court has not decided whether the combination of charging and adjudicating authority within a federal agency contravenes separation of powers requirements, probably because *Withrow* is viewed as resolving it, but separation of powers concerns with agencies occasionally surface at the Court.[86] Rumblings from various justices signal that they might be ready to consider whether particular combinations of functions at administrative agencies exceed separation of powers limitations.[87]

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84. Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1104-07 (D.C. Cir. 1988). Another example was *Ethicon Endo-Surgery, Inc. v. Covidien LP*, which involved a due process challenge to the use of one panel of the Patent Trials and Appeals Board to institute a type of review of claims and then make final decisions. 812 F.3d 1023, 1029–31 (Fed. Cir. 2016). The court did not accept the due process contention largely because of *Withrow*. *Id.* at 1029 ("The leading case involving due process and the combination of functions is the Supreme Court's decision in *Withrow*.").

85. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 298 (7th ed. 2016); *see also* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 762 (7th ed. 2011) (In *Withrow*, "the Supreme Court made clear that at the agency-head level the combination of adjudicative and investigative functions does not in itself violate due process.").

86. *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., 138 S. Ct. 1365 (2018) (holding that the *inter partes* review process at the Patent and Trademark Office does not violate Article III of the Constitution); Stern v. Marshall, 564 U.S. 462, 503 (2011) (holding that bankruptcy court exercised judicial power reserved to Article III courts and stating that the Court could not "compromise the integrity of the system of separated powers" even if the compromise would be minor).

87. *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1237–38 (2015) (Alito, J., concurring) (discussing separation of powers issues raised by Amtrak statute); *id.* at 1240–42, 1246, 1250–52 (Thomas, J., concurring) (discussing the same); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210 (2015), (Alito, J., concurring in part and in the judgment) (expressing concern about the power of administrative agencies when issuing interpretations of regulations and concern about transfer of judicial power to an executive agency); *id.* at 1215–20 (Thomas, J., concurring in the judgment) (expressing similar concerns); Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); City of Arlington v. FCC, 133 S. Ct. 1863, 1877–79 (2013) (Roberts, C.J., dissenting) (discussing agencies and the separation of powers and stating "the danger posed by the growing power of the admin-

II. *WILLIAMS* APPLIES TO FEDERAL AGENCY ENFORCEMENT ADJUDICATIONS

Williams and *Withrow* addressed similar concerns, started their opinions with similar legal standards, but then reached different outcomes. As the foregoing comments explained, the reasoning of *Williams* repudiated substantial segments of *Withrow*. Would the *Williams* Court have decided *Withrow* differently, or does a principled, legal distinction exist between the *Williams* decision and administrative agency adjudications? Does *Williams* likely apply to administrative agencies? Does it require agency heads who participate in accusatory functions, such as commencing proceedings asserting violations of law, to disqualify themselves when the case returns to them for final adjudications on the merits?

The factual contexts of *Withrow* and *Williams* were different, and an important body of law cautions that due process for a court is different from due process for an administrative agency. This Part considers the possible ways to distinguish the two decisions. It concludes that *Williams* reflects an evolving concern with the likelihood of partiality that grows out of service as an advocate, that the principles in *Williams* and other due process cases that address the need for impartial decision makers apply to administrative agencies, and that pragmatic considerations favoring the combination of charging and adjudicating functions in an agency should and can give way to the application of *Williams*. This Part also reviews empirical research that supports the Supreme Court's concerns in *Williams*.

A. *Factual Differences Between* Withrow *and* Williams

First, consider some of the obvious factual differences between *Withrow* and *Williams*: *Williams* was about a judge in a criminal case addressing the death penalty and collateral relief in state court. *Withrow* was a proceeding by a state administrative agency to sus-

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istrative state cannot be dismissed"); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (discussing Supreme Court decisions that "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design").

pend a medical license.[88] These differences are not sufficient to lessen the legal weight *Williams* should carry in the agency process.

The reasoning of *Williams* did not depend on any of these factual distinctions. The rationale of the decision was sweeping and was not limited to judges, criminal cases, or death penalty cases. The Court could have reasoned that death penalty cases are different and require special procedural protections. The defendant had made that argument,[89] but the Court did not adopt it. A decision to seek the death penalty is consequential and was certainly a critical decision in the defendant's case,[90] but the Court cited many other litigation decisions as significant. The Court expanded the category of accusatory acts that would disqualify an advocate turned decision maker to include "what charges to bring, whether to extend a plea bargain, and which witnesses to call."[91] Helping to decide what charges to bring or which witnesses to call is a part of civil cases and non-capital criminal cases.

The Court could have stated that criminal cases call for more restrictive judicial disqualification standards than civil or administrative cases, but the Court did not draw that distinction. To the contrary, it extracted and applied "constitutional principles" from its "due process precedents" and reasoned that "the principles on which these precedents rest dictate the rule that must control" when a judge had prior involvement in a case as a prosecutor.[92] The main principle from its precedents extended well beyond criminal cases, judges, and prosecutors: "Of particular relevance to the instant case, the Court has determined that an unconstitution-

88. The state-federal distinction has not been significant for purposes of determining the procedures that must be used in agency adjudications. Carroll v. Greenwich Ins. Co. of N.Y., 199 U.S. 401, 410 (1905) ("While we need not affirm that in no instance could a distinction be taken, ordinarily if an Act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth."). The Court has interpreted the procedural due process clauses of the Fifth and Fourteenth Amendments to provide similar protections in administrative adjudications, subject to exceptions, such as the debate about the incorporation of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment or the application of the Due Process Clause to certain issues in state criminal cases (but not to questions about the impartiality of a judge). *See, e.g.*, Medina v. California, 505 U.S. 437, 442–46 (1992); Duncan v. Louisiana, 391 U.S. 145 (1968). *See also* PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW 545–46 (12th ed. 2018); LAWSON, *supra* note 85, at 845.

89. Brief for Petitioner at 20–21, 25, 30, Williams v. Pennsylvania, 136 S. Ct. 1899 (2016), (No. 15-5040), 2015 WL 10356400.

90. *Williams*, 136 S. Ct. at 1907 ("[W]hether to ask a jury to end the defendant's life is one of the most serious discretionary decisions a prosecutor can be called upon to make.").

91. *Id.*

92. *Id.* at 1905–06.

al potential for bias exists when the same person serves as both accuser and adjudicator in a case."[93]

The impartiality principle applied to the larger, less specific categories of accusers and adjudicators. The *Williams* Court often referred to the role of a judge, jurist, or prosecutor,[94] because those were the facts of the case, but also broadened the analysis to "advocate," "accuser and decisionmaker," "fair adjudication," and "accusatory process."[95]

The *Williams* rationale cannot be limited to criminal cases or judicial disqualification cases. Although criminal sanctions are severe, many agency law enforcement proceedings are nearly as severe as criminal cases, as discussed below.[96] Moreover, the function of an agency decision maker in an enforcement adjudication is the same as a judge's function in a civil or criminal case. No principled ground exists for distinguishing agency enforcement proceedings from criminal or judicial proceedings on the issue of impartiality. The concern is with bias, the partiality of the decision maker, and the potential effect on the accuracy, legitimacy, and fairness of a judicial-like decision. The need for neutrality and the appearance of neutrality reaches many different types of proceedings:

> An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.[97]

Second, the rule in *Williams* might not apply to administrative agencies because the Court did not suggest that possibility. *Williams* was not a case about the combination of functions by the head of an administrative agency. The briefs of the parties did not identify the possibility of applying a principle of impartiality to heads of administrative agencies,[98] and none of the majority or dissenting

93. *Id.* at 1905.
94. *Id.* (referring in the holding to a judge and prosecutor); *id.* at 1906–10.
95. *Id.* at 1906, 1909.
96. *See infra* text accompanying notes 126–35.
97. *Williams*, 136 S. Ct. at 1909.
98. The brief for the defendant Williams cited cases involving the SEC, Federal Trade Commission (FTC), and the National Labor Relations Board (NLRB) on the question of the effect of the bias of one member of a tribunal with several members. Brief for Petitioner at 42, *Williams*, 136 S. Ct. 1899 (2016) (No. 15-5040), 2015 WL 10356400.

opinions remarked about the possibility of extending the result in *Williams* to agencies. The Court did not address the effect on federal agencies or attempt to reconcile its principle with *Withrow* as a longstanding precedent on the combination of executive and judicial roles at an agency. Surely, the Court would have said something if it meant to overturn forty years of settled practice at federal agencies.

These arguments have force but in the end are not sufficient to protect administrative agency members acting as adjudicators from the due process standard of impartiality developed in *Williams*. Much of the language in *Williams* naturally was directed at a prosecutor who became a judge, because that was the situation in the case, but the reasoning of the majority opinion was not confined to judicial disqualifications or criminal cases and was expressed as a constitutional due process principle. As discussed at greater length in a moment, the Supreme Court has applied the same due process standard of impartiality to adjudicators in executive agencies as it has to judges and criminal cases, with the exception of *Withrow*. The impartiality rule in *Williams* also is likely to extend to administrative agency adjudications.

Finally, the *Williams* Court was certainly aware of the chance that its conclusion would be read to apply to administrative agencies. *Withrow* is the standard authority for the proposition that an administrative agency may investigate, charge, and adjudicate; the majority opinion in *Williams* cited *Withrow* three times, and the Chief Justice's dissent cited *Withrow* once.[99] None of the writers cautioned that the *Williams* outcome did not apply to agencies.

B. *Due Process, Administrative Agencies, and Impartiality in Agency Adjudications*

This section of the Article considers the different strands of due process authorities. One important line of Supreme Court decisions supports the view that administrative agencies are different from courts for purposes of the Due Process Clause, and those cases might be used to reason that *Williams* does not apply to administrative agencies. The more relevant due process authorities are the decisions on the impartiality of an adjudicator, and those cases do

99. *Williams*, 136 S. Ct. at 1903, 1906, 1909 (Kennedy, J.); *id.* at 1910 (Roberts, C.J., dissenting).

not distinguish between court and agency decision makers or administrative enforcement and criminal prosecutions.

Well-known cases, such as *Goldberg v. Kelly*[100] and *Mathews v. Eldridge*,[101] considered whether an evidentiary hearing was required before or after an agency deprived a person of some type of liberty or property interest and whether the hearing needed to approximate a judicial trial.[102] The Court stressed that due process was not a technical conception with a fixed content unrelated to time, place, and circumstance and, instead, was flexible and dependent on the demands of the particular situation.[103] It developed the now famous and frequently invoked three-factor balancing test.[104] "Under the *Mathews* balancing test, a court evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake."[105] In many situations, the test does not call for all the protections of court litigation.[106]

The due process precedents more relevant to the question of an agency head who participates in authorizing an enforcement proceeding and later participates in resolving the merits of the claim are those addressing the neutrality and impartiality of the decision maker in an adjudication. *Williams*, *Withrow*, *Murchison*, and other decisions fall into this subcategory.

The remainder of this section demonstrates that the due process cases on impartiality apply equally to administrative agency adjudicators and judges and favor application of *Williams* to agency enforcement proceedings. The differences between courts and agencies, as well as the differences among civil, criminal, and administrative proceedings, have not mattered when considering the standards for the neutrality or impartiality of the decision maker, and the demands of the modern administrative state have

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100. 397 U.S. 254 (1970).
101. 424 U.S. 319 (1976).
102. *Id.* at 333–34.
103. *Id.* at 334.
104. *Id.* at 335. The Court applies the test in a variety of situations, especially to determine the process due in administrative cases. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 528–29 (2004); PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW 580–629 (12th ed. 2018).
105. Nelson v. Colorado, 137 S. Ct. 1249, 1255 (2017).
106. *See, e.g.*, *Mathews*, 424 U.S. at 348 ("The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness . . . . [D]ifferences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.'") (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940)).

not diluted those standards. This uniform application reflects the high level of due process protection accorded to the impartiality of adjudicatory decision makers. That high value deserves to be protected in agency enforcement cases because agency adjudicators perform the same function as a judge and the stakes for the defendant can be very high.

The Supreme Court has applied its decisions on the impartiality of judges and agency officials interchangeably. It has cited judicial disqualification decisions in cases about agency officials and vice versa. The legal standard did not vary depending on whether the decision maker was a judge or an agency official, and the reasoning was not moderated with balancing factors or cost-benefit tests. In *Schweiker v. McClure*, the Court considered the impartiality of Medicare hearing officers appointed by private insurance carriers and cited *Murchison*, a decision about judges, as one of the cases establishing the relevant standards.[107] In *Gibson v. Berryhill*, which concerned an administrative board of optometrists, the Court noted the "prevailing view that '[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.'"[108]

The Court also has applied impartiality principles from administrative situations to judicial disqualification cases. *Williams* itself is an example. It was a judicial disqualification case, but it extracted key principles for its analysis from *Withrow* and discussed *Tumey v. Ohio*, which was a case about an executive official acting in a judicial capacity.[109] *Caperton*, another judicial disqualification case, cited *Withrow* for the constitutional standard for recusal (recusal is necessary when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable") and reviewed the main due process cases requiring recusal, including several that involved executive officials: *Tumey*, *Gibson*, and *Ward v. Village of Monroeville*,[110] another case about a mayor's court.[111]

Marshall v. Jerrico, Inc.[112] explained that the cases on neutrality and impartiality apply to a person serving in an adjudicatory role, whether in a court or an agency, and do not apply to agency offi-

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107. Schweiker v. McClure, 456 U.S. 188, 196 (1982).
108. Gibson v. Berryhill, 411 U.S. 564, 578–79 (1973) (quoting KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT [sic] § 12.04, at 250 (1972) (concerning bias by prejudgment and pecuniary interest)).
109. Tumey v. Ohio, 273 U.S. 510 (1927).
110. 409 U.S. 57 (1972).
111. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876–79 (2009).
112. 446 U.S. 238 (1980).

cials not acting in a judicial role. The case was a due process challenge to an administrator's actions within an area of the Department of Labor that determined certain violations and assessed penalties. Penalty payments were paid to the administrator's area of the Department, creating, in the view of the challenging party, an impermissible risk that the administrator would be biased to make more and larger penalty assessments.[113] The Court discussed the due process requirement of neutrality from *Tumey* and *Ward*, observing that it had "employed the same principle in a variety of settings, demonstrating the powerful and independent constitutional interest in fair adjudicative procedure" and citing a mix of judge, justice of the peace, and agency cases.[114] In the end, the Court decided that the impartiality rules did not apply because the administrator was not acting in a judicial capacity. "The rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity."[115]

Similar examination of Supreme Court precedents demonstrates the Court applies the impartiality principles uniformly to criminal, civil, and administrative cases. The Court has not developed a special, stricter impartiality rule for criminal cases. The Court's 2009 *Caperton* decision is illustrative. *Caperton* concerned judicial disqualification in a civil tort case for compensatory and punitive damages, but the Court invoked due process impartiality principles from several criminal cases, including *Murchison*, *Tumey*, *Ward*, and *Mayberry*.[116] The Court applied all or some of those same criminal precedents in cases about the impartiality of administrative actors, such as *Marshall* and *Gibson*. The reasoning of *Williams* is therefore apt to extend to administrative enforcement adjudications even though *Williams* was a criminal case.

Applying the standards of judicial neutrality to an agency official engaged in a judicial function is consistent with the high level of due process importance assigned to the impartiality of an adjudicator, whether in an agency or a federal court. Without evident disagreement or qualification, legal authorities view an impartial decision maker as a fundamental attribute of due process. In *Goldberg v. Kelly*, the Court found that the government must provide some procedural protections before terminating a person's welfare ben-

113. *Id.* at 241.
114. *Id.* at 242–43, 243 n.2.
115. *Id.* at 248.
116. Caperton, 556 U.S. at 872, 876–78, 880–81.

efits.[117] A pre-termination hearing did not need to take the form of a judicial or quasi-judicial trial, but it had to provide "minimum procedural safeguards" and meet "rudimentary due process."[118] The Court concluded its list of necessary procedures with this: "And, of course, an impartial decision maker is essential."[119] An impartial decision maker was a minimum procedural safeguard of rudimentary due process.

Commentators agree. One treatise writer said: "Due process requires a neutral, or unbiased, adjudicatory decisionmaker. Scholars and judges consistently characterize provision of a neutral decisionmaker as one of the three or four core requirements of a system of fair adjudicatory decisionmaking."[120] Another scholar concluded that an agency decision maker "should not be biased for or against any party. An impartial decisionmaker is an essential element of an evidentiary hearing. Impartiality is required both by the APA and by due process."[121] In a widely cited article, Judge Henry Friendly put "an unbiased tribunal" at the top of his list of the elements of a fair hearing.[122]

Even *Withrow* accepted the need for a fair tribunal in an administrative adjudication, although the result did not fulfill the promise of the principle. *Withrow* conceded (that was the word the Court used) that a basic requirement of due process was a fair trial in a fair tribunal and then immediately said: "This applies to administrative agencies which adjudicate as well as to courts."[123]

Certainly the purpose of requiring an impartial decision maker is the same in both courts and administrative proceedings. The judge and the agency adjudicator perform the same function in the type of administrative law enforcement proceeding addressed here. They take or review evidence about specific historical facts involving a particular person, receive arguments about the proper legal standard of behavior, apply the law to the facts to determine whether the person committed a violation of law, and then impose a sanction or relief for a violation. The reason to have a neutral

117. Goldberg v. Kelly, 397 U.S. 254 (1970).
118. *Id.* at 265–67.
119. *Id.* at 271 (citing *In re* Murchison, 349 U.S. 133 (1955)).
120. 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.8 (5th ed. 2010).
121. Asimow, *Evidentiary Hearings*, *supra* note 10, at 23 (footnotes omitted).
122. Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1279 (1975); *see also* Redish & McCall, *supra* note 6, at 2, 8, 12, 19 ("Of all the procedural requirements dictated by the demands of fair procedure, far and away the most important is the requirement of an independent, neutral adjudicator.").
123. Withrow v. Larkin, 421 U.S. 35, 46–47 (1975).

decision maker is to maximize the chance of a result on the merits of the relevant facts and law and to minimize the chance that external influences distort an objective determination of the facts and application of the law.[124] A famous passage in *Tumey* described the impartiality standard this way:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.[125]

The same demands for accuracy and legitimacy in the eyes of the defendant and the public are present whether a judge or an agency head decides that a defendant did or did not break the law.

A further consideration in assessing whether to apply the standards of judicial neutrality to an agency adjudicator, at least in government enforcement cases, is that just as much or more is at stake in an administrative enforcement proceeding as a case in federal court and nearly as much is at stake as in a criminal case. Different agencies have different powers, but many agency enforcement cas-

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124. The Court gave these reasons for the neutrality requirement:

> This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. . . . The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (citations omitted); *see also* Williams v. Pennsylvania, 136 S. Ct. 1899, 1907, 1909 (2016) ("Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself."); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 883 (2009) ("If the judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult to dispel that there is a real possibility of undermining neutrality, the judge may think it necessary to consider withdrawing from the case."); Mathews v. Eldridge, 424 U.S. 319, 344 (1976) ("[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases.").

125. Tumey v. Ohio, 273 U.S. 510, 532 (1927).

es resemble criminal prosecutions. SEC enforcement cases do, and they do so whether they are brought as administrative proceedings or district court actions. Violations carry moral opprobrium and social stigma[126] and can result in a wide array of severe sanctions and forms of relief. In an administrative proceeding, the SEC may levy a fine,[127] order disgorgement of large amounts of money plus prejudgment interest,[128] issue a cease and desist order,[129] and prohibit a person from being an officer or director of a publicly reporting company.[130] The SEC may suspend or revoke the registration of a regulated person such as a broker-dealer or investment adviser.[131] It may deny a lawyer or accountant the ability to practice and represent clients before the SEC.[132] The main forms of relief in an SEC enforcement case in federal court are the same, with the exception of the SEC's power over regulated persons and professionals practicing before the SEC.[133] A defendant in an SEC enforcement case does not face jail or the death penalty, but otherwise faces serious consequences. The SEC has the power and uses that power to ruin reputations, livelihoods, and businesses.[134] The

126. *See* Gabelli v. SEC, 568 U.S. 442, 451–52 (2013) (stating that monetary penalties in SEC enforcement cases are intended to punish and label defendants as wrongdoers); SEC v. Bartek, 484 F. App'x 949, 957 (5th Cir. 2012) (injunction and director and officer bar "would have a stigmatizing effect and long-lasting repercussions"); *Securities Law Enforcement in the Current Financial Crisis Before the U.S. H.R. Comm. on Fin. Servs.*, 111th Cong. (2009) (testimony by Elisse B. Walter, Comm'r, SEC), https://www.sec.gov/news/testimony/2009/ts032009ebw.htm (bar on appearing or practicing before the SEC "carries a serious reputational stigma"); Thomas O. Gorman, *The SEC, Insider Trading and Prosecutorial Obligations*, SEC ACTIONS (Apr. 23, 2017), http://www.secactions.com/the-sec-insider-trading-and-prosecutorial-obligations/ ("Charging someone with violations of the law carries a stigma which last [sic] long after the case is dismissed; prosecuting that case through trial only increases that harm, grinding the stain and injury into the reputational fabric of the person prosecuted.").

127. 15 U.S.C. § 78u-2(a) (2012).

128. 15 U.S.C. §§ 78u-2(e), 78u-3(e) (2012); 17 C.F.R. § 201.600(a) (2018).

129. 15 U.S.C. § 78u-3(a) (2012).

130. 15 U.S.C. § 78u-3(f) (2012).

131. 15 U.S.C. §§ 78o(b)(4), (b)(6), 80b-3(e)–(f). License revocation proceedings ranked high on Judge Friendly's list of most serious government actions against a person. *See* Friendly, *supra* note 122, at 1297.

132. *See* 15 U.S.C. § 78d-3 (2012); 17 C.F.R. § 201.102(e) (2018).

133. In federal court, the SEC may seek and the court may order an injunction, a civil monetary penalty, disgorgement with pre-judgment interest, and other equitable relief. *See* 15 U.S.C. § 78u(d)(1)–(3), (5) (2012). In *Kokesh v. SEC*, the Court did not express an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings. 137 S. Ct. 1635, 1642 n.3 (2017).

134. KIRKPATRICK & LOCKHART LLP, THE SECURITIES ENFORCEMENT MANUAL 5, 135 (1997) (noting that "the publicity that frequently accompanies enforcement actions can be devastating to those who depend on investor confidence for their business" and an administrative order "may have a business or career-ending impact on firms or persons in the securities business").

severity of the results of government enforcement cases brought as administrative proceedings rebuts the idea that, because less is at stake in administrative cases than in criminal cases, the due process protections may be relaxed.[135]

The Supreme Court's decisions on the due process requirement of impartiality apply equally to judicial or administrative decision makers and to criminal and agency enforcement proceedings. The standard is a high one, and, aside from *Withrow*, has not been watered down with considerations of costs, burdens, or the need for procedural flexibility in agency cases. An agency head deciding the merits of an enforcement case performs the same function as a judge, and a defendant has much at stake in an administrative enforcement case. The grounds for relaxing the standard of impartiality for an agency adjudicator in an enforcement case are extremely weak. The next section of the Article reviews research showing that the *Williams* Court was correct to be concerned about the likelihood that an accuser maintains a bias against the accused.

C. *Data Supporting Bias in Accusers*

Several sources support the *Williams* Court view that a charging official likely develops a will to win or a stake in sustaining the charges. Three are empirical studies, and one reports the personal experience of an SEC Commissioner. None is definitive, but they are consistent with the position that an accuser lacks the necessary neutrality to determine the merits of the initial charging decision.

The first set of data reports results of SEC adjudications that reviewed ALJ decisions in cases where the Commission charged one or more violations of the securities laws. The Commission reviewed ALJ decisions covering sixty-four defendants in administrative enforcement proceedings that the Commission began in fiscal years 2007 through 2015. For sixty of the sixty-four defendants, over ninety-three percent, the Commission found one or more violations and ordered a sanction. The Commissioners dismissed all charges against four of the sixty-four defendants. For seven of the sixty defendants found liable, nearly twelve percent, the ALJ had dismissed all charges, but the Commission disagreed with the ALJ

135. Contrary to this last statement, one commentator reasoned that the combination of prosecution and adjudication in one agency does not need to comply with the stringent requirements of the criminal model because an agency does not have the power to order incarceration. *See* 2 PIERCE, *supra* note 120, § 9.9, at 884.

and found violations.[136] Thus, when the SEC judged cases in which it had brought charges, it won against over ninety-three percent of defendants. In contested cases in federal court, the SEC's success rate was much worse; it prevailed eighty percent of the time.[137] Achieving a more favorable outcome for the SEC in thirteen percent of cases appears to be meaningful in a system in which the SEC staff conducts lengthy one-sided investigations and the Commissioners have complete discretion in charging decisions.

A different research project looked at potential bias at the Federal Trade Commission (FTC) in merger challenges decided between 1956 and 1992.[138] The charging process at the FTC is similar to the one at the SEC. The Commissioners vote on administrative complaints, send the matter to an ALJ for an initial decision, and then review ALJ decisions. An "FTC commissioner can act as both the prosecutor and the judge on a particular case."[139] The authors found that FTC "commissioners are more likely to vote for administrative complaints if they were members of the commission that chose to prosecute those cases. Thus, it appears to matter if commissioners act as both prosecutors and judges."[140] The "ability of commissioners to act as both prosecutor and judge in a particular matter can significantly increase the likelihood of a merger order."[141] An analysis of the combination of prosecution and adjudication functions at the FTC and NLRB by Richard Posner published in 1972 differed, concluding that the results, "although hardly definitive," suggested that the combination did not bias an agency's adjudication.[142]

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136. An SEC fiscal year runs from October 1 through September 30; for example, fiscal year 2015 ended on September 30, 2015.

I am grateful to Urska Velikonja for these details from data she compiled. For a description of her data on SEC enforcement cases, see Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315 (2017).

The figures in the text about Commission review of ALJ initial decisions cover cases in which the Commission issued an opinion by June 30, 2017. The enforcement cases were primary enforcement actions, not follow-on proceedings, as Professor Velikonja defines them. A primary enforcement action is one to establish a violation of the securities laws and obtain relief. A follow-on case is an administrative proceeding for additional regulatory or disciplinary relief based on success in a preceding primary action. *Id.* at 338–39.

137. *Id.* at 349, 352 (explaining inclusion of some voluntary dismissals).

138. 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 MANAGERIAL & DECISION ECON. 1, 3 (1998).

139. *Id.* at 2.

140. *Id.* at 7.

141. *Id.* at 9.

142. Richard A. Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305, 343 (1972); *see* BREYER, *supra* note 85, at 764–65.

A third study concerned lawyers rather than agencies and considered whether lawyers tend to view the merits of their clients' cases too favorably. This research is relevant to agency adjudications because the head of an agency, when deciding that the agency should charge a person with a violation of law, is in a position resembling a lawyer agreeing to represent a client in litigation. Furthermore, in many cases, the agency head is a lawyer.[143] This particular study sought to avoid flaws in earlier research on lawyer optimism bias by questioning law students about the merits of the position they took in moot court competitions.[144] One of the two questions used to assess a person's perceived confidence in the merits of a legal position was: "If you were the judge, how likely would you be to rule in favor" of your opponent?[145] The data from the study showed that "students overwhelmingly perceive that the legal merits favor the side that they were randomly assigned to represent"[146] and that "[p]articipation in advocacy is causally associated with increased confidence in the merits of the side that the lawyer is advocating."[147]

The final source of support for the bias of agency heads who charge and judge comes from the reflections of a former SEC Commissioner.[148] A few months after he finished six years in office, the former Commissioner recounted the "tri-functional" responsibilities of the SEC—to formulate general policies of regulation, to prosecute violations, and to pass on the rights and liabilities of individuals accused of violations[149]—and concluded that the commissioners of such an agency needed to act with the "cold neutrality of an impartial judge" when they acted in a judicial capacity.[150] Unfortunately, that was not his experience. When an SEC adjudication concerned policies of the Commission's own making, the SEC had a vested interest in reaching a particular result and protecting and

143. All the SEC Commissioners appointed since the Clinton Administration have been lawyers, except for Chairman Donaldson and Commissioners Glassman and Piwowar. For the available biographical information about each Commissioner, see *SEC Historical Summary of Chairmen and Commissioners*, SEC. EXCH. COMM'N, https://www.sec.gov/about/sechistoricalsummary.htm (last visited Aug. 30, 2018).

144. Zev J. Eigen & Yair Listokin, *Do Lawyers Really Believe Their Own Hype and Should They? A Natural Experiment*, 41 J. LEGAL STUD. 239 (2012).

145. *Id.* at 249.

146. *Id.* at 239.

147. *Id.* at 263–64.

148. Edward H. Fleischman, *Toward Neutral Principles: The SEC's Discharge of Its Tri-Functional Administrative Responsibilities*, 42 CATH. U. L. REV. 251 (1993).

149. *Id.* at 252.

150. *Id.* at 260 (quoting Bernard Schwartz, *Administrative Justice and its Place in the Legal Order*, 30 N.Y.U. L. REV. 1390, 1409 (1955)).

advancing the particular policies. The other functions of the Commission detracted from the impartiality of the judicial work. "[I]t is fairness and the appearance of fairness that are left behind when the SEC bends its adjudicatory responsibilities to the services of its policymaking function."[151]

D. *Impartiality, Separation of Functions, and the Practical Needs of the Administrative State*

This Article has shown that the due process standard of impartiality has a high value and applies equally to agency adjudicators and judges, who perform the same functions and have the ability to impose similar sanctions when deciding enforcement cases. It has also reviewed empirical support for the Supreme Court's concerns about an accuser's bias. Those factors weigh in favor of applying the strictures in *Williams* to administrative adjudications.

An additional topic to examine is the practical consideration whether some federal agencies should allow their leaders to combine the functions of charging and adjudicating to take advantage of expertise and operate efficiently within the modern administrative state. This section examines the practical concerns, argues that they do not outweigh due process values, and concludes that applying *Williams* to agency enforcement adjudications does not need to sacrifice expertise and efficiency.

Authorities give practical reasons for combining functions within a single agency. Agencies are essential tools in modern government, and agency heads have an informed and experienced understanding of the statutes, rules, and policies in their areas that give them a comparative advantage when evaluating the types of conduct that should be subject to an enforcement charge and that should be found to be a violation. Vesting final decision-making power in agency heads allows them to retain control over the policy direction of the agency, promote consistency in legal interpretations and adjudicatory results, and monitor the functioning of the regulatory area.[152]

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151. *Id.* at 261.

152. *See* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. (forthcoming 2019) (manuscript at 3, 34–37), https://ssrn.com/abstract=3129560; George Robert Johnson, Jr., *The Split Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987).

The *Withrow* Court reasoned that prohibiting an agency from charging and deciding "would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity."[153] The growth, variety, and complexity of administrative processes gave legislators latitude to determine when different administrative functions should be performed by the same persons.[154] "The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle."[155] *Withrow* was loath to constrain Congress's discretion to tailor the design of an administrative agency for the needs of modern government.

Commentators attributed *Withrow* and other Supreme Court decisions on the combination of functions in an agency to similar pragmatic factors rather than legal ones. One said the main ground for the decisions "has been that the combination of functions is necessary to secure expert administrative decisionmaking in a complex society." Impartiality comes at too great a price given the tradeoff with informed expertise in the administrative state.[156] Another writer cited the inefficiency, burden, and expense of requiring a separation of functions: Congress's decision to allow an agency head to investigate, charge, and adjudicate "represents a tradeoff between the goal of minimizing the risk of potential conflicts of interest attributable to an agency head's multiple roles and the goal of creating an efficient decisionmaking structure. The Supreme Court has consistently acquiesced in the balance Congress struck in the APA."[157]

The response to these pragmatic considerations has several parts. First, the practical factors supporting the need for combined functions in an agency are aimed more at mollifying separation of powers and institutional due process concerns than at denying an impartial decision maker to a defendant in an agency enforcement case. The expertise, efficiency, and cost arguments in favor of combining functions within a single agency relate more to the

153. Withrow v. Larkin, 421 U.S. 35, 49–50 (1975) (internal quotation marks omitted) (quoting Richardson v. Perales, 402 U. S. 389, 410 (1971)).
154. *Id.* at 51.
155. *Id.* at 52.
156. Vermeule, *supra* note 6, at 405.
157. 2 PIERCE, *supra* note 120, at 889; *see also* Asimow, *supra* note 6, at 787–88 ("Clearly combinations arising because a legislature gives investigating, negotiating, prosecuting, and adjudicating tasks to a single agency, so that agency heads are ultimately responsible for all functions, do not violate due process. A contrary holding would violate the principle of necessity and sow uncertainty and disruption in all levels of government.").

overall institution and the expertise and efficiency gains of permitting different staff areas to work together than to advantages that occur from allowing the senior people in an agency to charge violations and then make final agency decisions on those charges. The staff who regulate a particular market and write rules for it are valuable advisers to the staff who investigate potential misconduct and recommend enforcement cases, and the experiences of the enforcement staff aid the regulatory areas. For example, when the SEC proposed new regulations to govern broker-dealer recommendations about securities to retail customers, the proposal drew heavily from the history of enforcement cases against broker-dealers.[158] Some expertise, policy, and consistency benefits accrue from consolidating rulemaking, enforcement, and adjudication responsibilities in the top persons in an agency, but the bulk of the advantage is found in the overall operation of the agency. To the extent the benefits occur at the agency-head level, they should not be enough to defeat a due process objection based on *Williams* for the additional reasons discussed below; whether the practical benefits from the combination of functions within a single agency would be enough to defeat a separation of powers challenge is not clear and, in any event, is beyond the scope of this article.

Second, applying the due process rule of *Williams* to a federal agency would not impose a blanket prohibition on agency heads from both charging and adjudicating. The rule from *Williams* would operate on individual agency heads in a particular set of circumstances—when they participated in a significant charging decision—and not as a constitutional barrier prohibiting the combination of functions within an agency. This distinction was discussed above.[159] The main legacy of *Withrow* could continue. Agency heads could continue to vote to bring an enforcement case and then later vote on its final disposition as long as the same individual did not do both. *Withrow* would need to be read compatibly with *Williams*, but it would not need to be entirely overruled.

Third, interests in administrative expertise and efficiency should not outweigh the due process values in a neutral and impartial decision maker. The due process requirement for a fair and impartial decision maker has constitutional status, and it serves, to a large

158. Regulation Best Interest, 83 Fed. Reg. 21,574, 21,576–77 nn. 9–18 (proposed May 9, 2018) (to be codified at 17 C.F.R. pt. 240).

159. *See supra* text accompanying notes 80–83.

extent, to protect the individual from the powers of government.[160] The need to use agencies to operate modern government is an interest with weight, but the combination of functions in a single agency does not have explicit constitutional recognition, and, as already discussed, an impartial adjudicator is at the top of the due process hierarchy.[161] As described below, an agency can likely develop reasonable alternative approaches that would allow it to provide a neutral decision maker to a person accused of a violation of law and preserve most of the benefits of the combined functions of charging and adjudicating.

Fourth, *Williams* only has bite at the agency-head level and not at lower echelons. Section 554(d) of the APA already prohibits the combination of prosecution and adjudication in all parts of a federal agency except for "a member or members of the body comprising the agency." Consequently, the effect of *Williams* is limited to the top officials at an agency, such as the SEC's Commissioners. Except for final action by agency heads to decide a contested administrative enforcement case, an agency could continue to function as it does now with no changes in staffing or procedures at levels beneath its leaders.

Fifth, if *Williams* applied, agencies would have several ways they could continue to combine enforcement and adjudication functions. As discussed below,[162] applying the *Williams* rule at the SEC would not create unmanageable problems. The length of time from the commencement of a case to the time the Commission reaches a decision in a review of an ALJ decision is several years, and changes in the composition of the Commission would mean an untainted quorum would usually be available.[163] If a quorum was not available, the agency could wait until a quorum was available or accept an ALJ's initial decision as final.

Therefore, for the series of reasons discussed above, *Williams* should apply to administrative agencies. First, a neutral or impartial adjudicator is highly valued in the due process hierarchy. It is

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160. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 331 (1986) ("[T]he Due Process Clause . . . 'was intended to secure the individual from the arbitrary exercise of the powers of government . . . .'") (quoting Hurtado v. California, 110 U.S. 516, 527 (1884))).

161. *See supra* text accompanying notes 117–23 .

162. *See infra* Part III.C–D .

163. *See infra* text accompanying notes 190–93; *see also* Asimow, *supra* note 6, at 785–88 ("[A] court might conclude that a single commissioner of a multimember agency who has previously functioned as an adversary . . . can be disqualified without undue cost and disruption . . . . [T]he costs of disqualifying a single member of a multi-member agency . . . would generally . . . be minor.").

one of the three or four core requirements of a fair adjudicatory system. Second, since *Withrow*, the Supreme Court has applied its due process principles of impartiality without distinguishing between judicial and agency adjudicators or administrative and criminal cases. The decisions on the impartiality of judges apply with full force to agency officials acting in a judicial capacity. The due process standard of impartiality and neutrality for an adjudicator has not been lower for an agency decision maker than for a judge. Third, the purpose of the neutrality requirement applies to the function of an agency adjudicator in enforcement cases. Fourth, research supports the fear that an accuser builds a lasting will to win against an accused. Fifth, the alarm that a federal agency could not operate efficiently if due process disqualified an agency head from sitting as an adjudicator when he or she participated in launching the enforcement case is overstated and, in any event, does not supersede the importance of preserving impartiality in adjudications decided by agency heads. These reasons strongly suggest that *Williams* applies to federal agency adjudications and prohibits individuals who head agencies from participating in a decision to charge a violation of law and then in a final agency conclusion on the charge.

III. THE APPLICATION OF *WILLIAMS* TO SEC ADMINISTRATIVE ENFORCEMENT CASES

If the rule in *Williams* applies to federal agencies, it would apply to the procedures that the SEC follows. At the SEC, Commissioners act as both accuser and adjudicator. In this Part, we look at the SEC's procedures, the reasons those procedures would violate the rule in *Williams*, and the way *Williams* would have affected three proceedings. Because of turnover at the SEC and the SEC's quorum rules, applying *Williams* would rarely disable the agency from issuing a final adjudication on the merits of an administrative proceeding.

A. *The Role of SEC Commissioners in Initiating and Resolving Administrative Enforcement Proceedings*

This section reviews the procedures the SEC follows in enforcement cases. SEC Commissioners both charge a person with a violation of law and then sit as judges to decide whether the defendant committed the violation. Other agencies also involve commissioners or top officials in both the commencement and resolution of enforcement cases. Examples of such agencies are the Federal Trade Commission,[164] the Federal Communications Commission,[165] the Commodity Futures Trading Commission,[166] the Federal Energy Regulatory Commission,[167] and the Consumer Financial Protection Bureau.[168]

A majority of SEC Commissioners must vote to authorize an enforcement case.[169] The staff of the Division of Enforcement conducts investigations and makes charging recommendations in a detailed action memorandum that reviews significant portions of the information from the record of the investigation. The Commissioners jointly discuss and then vote on the staff's recommendations at a closed Commission meeting.[170] A majority of Commis-

164. LAWSON, *supra* note 85, at 290–91 (describing the enforcement process at FTC).

165. A person is liable for a forfeiture penalty if the FCC determines the person committed a violation of certain communications laws. 47 U.S.C. § 503(b)(1) (2012). The Commission must issue a notice of apparent liability in writing to impose a forfeiture penalty on a person. *Id.* § 503(b)(4)(A). The Commission then has the power to determine the forfeiture penalty in an adjudication. *Id.* § 503(b)(2)(E), 503(b)(3)(A). A staff member has delegated authority to issue the notice of apparent liability and to determine the penalty amount when the amount does not exceed certain levels. 47 C.F.R. § 0.311(a)(4) (2018).

166. *See* Dan M. Berkovitz, *The Resurrection of CFTC Administrative Enforcement Proceedings: Efficient Justice or a Biased Forum?*, 35 FUTURES & DERIVATIVES L. REP. 2, 3–6 (2015), https://www.wilmerhale.com/-/media/ed79ca97e7f74c8ca2d205044e081332.pdf; Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45, 71–72 (2016).

167. FED. ENERGY REG. COMM'N, REVISED POLICY STATEMENT ON ENFORCEMENT, 123 FERC ¶ 61,156 at ¶¶ 35–41, Pt. III.B.3. (2008), https://www.ferc.gov/whats-new/comm-meet/2008/051508/M-1.pdf.

168. *See* 12 U.S.C. § 5563(b)(1)(A), (D); PHH Corp. v. CFPB, 881 F.3d 75, 137–38, 154 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting); *id.* at 165, 171 (Kavanaugh, J., dissenting); CFPB, ENFORCEMENT POLICIES AND PROCEDURES MANUAL, 2-6, 2-8, https://www.venable.com/files/upload/CFPB_Enforcement_Policies_and_Procedures_Manual.pdf (last visited Oct. 17, 2018).

169. The main securities acts require the Commission to initiate an enforcement case. The Exchange Act says that "the Commission" may issue a notice instituting an administrative proceeding for a cease-and-desist order and that "the Commission . . . may in its discretion bring an action in the proper district court." 15 U.S.C. §§ 78u(d)(1), 78u-3(a)–(b); *see also id.* §§ 77h-1(a)–(b), 77t(b), 80a-9(f), 80a-41(d), 80b-3(k)(1), 80b-9(d). The Commission has the authority to delegate its statutory power to commence an enforcement case, *id.* at § 78d-1(a), but has not exercised that power. *Cf.* 17 C.F.R. § 200.30-4 (indicating delegations that *have* been made to the Director of Division of Enforcement); *cf.* SEC DIVISION OF ENFORCEMENT, ENFORCEMENT MANUAL 2.5.1–2.5.2 (Oct. 28, 2016), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf (referencing requirement of Commission approval to bring suit).

170. For a description of the submission of an action memorandum to the Commissioners for approval to bring an enforcement case and of Commission deliberations on proposed enforcement cases at a closed meeting, see SEC DIVISION OF ENFORCEMENT, ENFORCEMENT MANUAL 2.5 (Nov. 28, 2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf; Christopher Cox, Chairman, Sec. Exch. Comm'n, Opening Re-

sioners must agree on the important decision to sue, the charges to be asserted, and the forms of relief to be sought. For example, the Commissioners make the final choices about whether to assert a fraud claim and whether to seek a financial penalty or an order to prohibit a person from being an officer or director of a public company. Discussion among the Commissioners can lead to tougher or more lenient claims or requested relief.[171]

The Commission also decides whether to bring the case in federal district court or in the internal SEC administrative process.[172] An administrative case goes first to an administrative law judge for an initial decision on whether a violation occurred and whether sanctions are appropriate. The ALJ conducts pre-trial and trial proceedings with adversarial parties that brief and argue legal issues, take discovery, present witnesses, and introduce evidence. The ALJ holds an on-the-record, trial-type hearing,[173] compiles a record, and then releases a long written decision with findings of fact and conclusions of law.[174]

ALJ decisions are then subject to review by the full Commission, which has complete authority to affirm, reverse, modify, or remand the ALJ's decision or make findings or conclusions based on the record.[175] In these adjudications, the Commission acts as a court. The Commissioners receive legal briefs from the parties, hear oral argument,[176] jointly deliberate about the case at a closed meeting, and issue a written opinion that reviews evidence of the conduct of the defendant, applies the law to determine whether a violation occurred, and imposes sanctions. A majority of participating Commissioners determines the disposition of the merits of the case.[177]

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marks to the Practising Law Institute's SEC Speaks Series (Feb. 9, 2007), https://www.sec.gov/news/speech/2007/spch020907cc.htm.

171. *Cf.* Luis A. Aguilar, *Dissenting Statement In the Matter of Lynn R. Blodgett and Kevin R. Kyser, CPA, Respondents* (Aug. 28, 2014) (criticizing the case for failing to include fraud charges or a bar on appearing before the SEC as an accountant), www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370542787855.

172. *See* 17 C.F.R. § 202.5(b) (2018).

173. *See id.* §§ 201.300–201.360 (2018). The SEC's Rules of Practice govern administrative proceedings. *Id.* §§ 201.100–201.900.

174. 17 C.F.R. §§ 201.350-60 (2018).

175. *See* 5 U.S.C. § 557(b) (2012); 17 C.F.R. § 201.411(a) (2018); *see also* Raymond J. Lucia Cos. v. SEC, 832 F.3d 277 (D.C. Cir. 2016), *pet. for review denied by equally divided en banc court*, 868 F.3d 1021 (D.C. Cir. 2017), *rev'd*, 138 S. Ct. 2044 (2018); Bandimere v. SEC, 844 F.3d 1168 (10th Cir. 2016).

176. *See* 17 C.F.R. §§ 201.450–201.451 (2018).

177. 17 C.F.R. § 201.411(f) (2018).

B. *SEC Commissioners as Accusers*

The next question is whether this SEC process has features that create an unconstitutional potential for bias faulted in the Supreme Court's *Williams* decision. The better conclusion is that it does. Commissioners have a direct, personal role in critical decisions of initiating enforcement cases by the agency they head. They are accusers who have a desire to prevail, and they later act as judges to decide whether the defendant committed the charged misconduct.

The decisions that SEC Commissioners make when they vote to approve the specific charges and the specific requested relief against a defendant fit within the category of critical or major adversary decisions defined in *Williams*. The examples in *Williams* were decisions about which charges to bring or witnesses to call.[178] A Commissioner votes to authorize a case, the specific charges, the proposed sanctions, and the forum. These are among the most consequential decisions a law enforcement agency can make. After an initial ALJ decision, a Commissioner resolves all liability and sanctions issues from the ALJ opinion raised by the defendant or the Division of Enforcement. According to *Williams*, a person with responsibility for a major adversary decision is likely to continue to be influenced by a motive to validate that decision.

An SEC Commissioner might seek to avoid this criticism by claiming that he or she applies one legal standard when deciding whether to charge a person (such as sufficient evidence to raise a substantial question or probable cause to believe that the defendant committed the violation) and a stricter legal standard when voting as an adjudicator on final liability issues (such as preponderance of the evidence on each aspect of the violation).[179] The Commissioner could say that the Commission is a neutral umpire between the advocacy of the Enforcement staff and the arguments of the defendant and that it therefore acts in the nature of a judge or magistrate when deciding to bring a case. The argument would be that the application of a higher legal standard for purposes of determining final liability removes any taint of advocacy from participation at the charging stage. Recall that *Withrow* took different

178. *See supra* text accompanying notes 44–45, 76–77.
179. *See* Steadman v. SEC, 450 U.S. 91 (1981) (holding that the standard of proof in an SEC enforcement adjudication, including one for fraud, is preponderance of the evidence).

legal standards into account, while *Williams* did not mention that factor.[180]

The possible use of different legal standards at different phases of an SEC case is not a persuasive basis for insulating an SEC Commissioner from *Williams*. The question, according to *Williams*, is not whether an accuser uses a different legal standard from the one used to judge[181] but whether a person becomes an accuser, advocate, or adversary with an unacceptable risk of being psychologically wedded to the position that the defendant engaged in misconduct. *Williams* could have drawn lines based on different legal tests or standards but did not.[182] To the *Williams* Court, a person did not need much involvement in the earlier stages of an enforcement proceeding to qualify the person as an accuser or advocate. Selecting charges or witnesses was sufficient. Ancillary involvement decades earlier was sufficient. The test set a low threshold, and, as just discussed, the role of an SEC Commissioner easily meets it.

Even if a Commissioner employed one legal standard for a vote to charge and a different legal standard to hold a defendant liable, a vote to authorize an enforcement case makes the Commissioner an accuser. The Commissioners are the leaders of the Agency that will be named as the complaining party. The Enforcement staff does not bring a case; the Agency does, and the Agency may not do so unless a majority of the Commissioners votes to commence the case. This kind of role carried weight in *Williams*. The Court cited the need for the express authorization of the district attorney, who later became a state supreme court justice, before Pennsylvania could pursue the death penalty against Williams.[183]

180. *See supra* text accompanying notes 69–77.

181. The statutory authority for SEC administrative cease-and-desist proceedings specifies no standard for commencing a case or resolving it. The provision states that the Commission may enter a cease-and-desist order if it "finds" that a person is violating, has violated, or is about to violate any of the federal securities laws. 15 U.S.C. §§ 77h-1(a), 78u-3(a) (2012). An SEC Commissioner is free to apply no standard or a personally selected standard when commencing an enforcement case. Presumably, most Commissioners would employ a lower legal standard to charge a violation than to determine ultimate liability. An appropriate charging standard is that the Commissioners should not authorize a proceeding unless they believe that (1) a reasonable person would conclude that the SEC is more likely than not to prevail on the facts and the law and (2) that a proceeding would serve broad and legitimate enforcement goals of deterrence or prevention. *See* Andrew N. Vollmer, *Four Ways To Improve SEC Enforcement*, 43 SEC. REG. L.J. 333, 341–42 (2015).

182. *See supra* text accompanying notes 77–78.

183. Williams v. Pennsylvania, 136 S. Ct. 1899, 1907 (2016).

The language in *Williams* describes an accuser as an advocate and adversary with a desire to prevail.[184] SEC Commissioners know that charging a person with a violation of law is a serious matter and do not want to be wrong. A vote to charge would not be responsible if a Commissioner did not conclude that the defendant should be the subject of an enforcement proceeding and that the agency should win. The Commissioners know that the SEC's enforcement record matters for deterrence, compliance in the securities markets, the SEC's reputation, and success in obtaining congressional appropriations.[185] Losing too many enforcement cases would harm the mission of the Agency the Commissioners are responsible for leading.

The notion that the Commissioners are passive observers, neutral intermediaries, or referees between the Enforcement staff and the potential defendant is not sustainable. A decision to charge is not just a comparison of information from an investigation to a legal standard. It is a policy judgment that the person deserves to be held accountable for the conduct and that the resources of the Agency should be used against this person rather than another person. In a great number of cases at the charging phase, Commissioners undoubtedly conclude that the defendant committed the violation. Whether they apply different legal standards to charge and adjudicate, SEC Commissioners, like the judge in *Murchison*, become the accuser and an advocate for the position that the defendant committed the violation.[186]

The information provided to a Commissioner at the time of voting to begin an enforcement case creates the further risk, identified in *Williams*, that the adjudicator's personal knowledge and impressions of the case could carry more weight than the parties' arguments at the final adjudication.[187] An SEC Commissioner receives a material amount of information about the staff's investigation of the facts in the action memorandum before a decision to

184. *Id.* at 1906 (referring to an "advocate," "adversary decision," "interest in the outcome," and desire to avoid appearing to change position).

185. *See* Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 906–12, 918, 920–21 (2016).

186. *See* Redish & McCall, *supra* note 6, at 25, 27 ("[T]he commissioners' position as heads of their agency automatically places them in a partisan role inconsistent with the impartiality by which they are constitutionally bound"; as in *Murchison*, "the commissioners may be predisposed to believe the parties charged are guilty because they initially viewed the evidence through a prosecutorial or adversarial lens.").

187. *See Williams*, 136 S. Ct. at 1906.

charge. This information will not necessarily become part of the record before the Commission at the time of a final disposition.[188]

Under the Supreme Court's rationale in *Williams*, due process forbids an SEC Commissioner who votes on commencing a particular enforcement case from participating in final agency action in that case to determine a defendant's liability or an appropriate sanction. Such a vote is significant, personal involvement in the originating accusation. As the research data discussed above support,[189] a Commissioner's participation in the charging decision creates "an unacceptable risk of actual bias." It creates a serious risk that the Commissioner will be psychologically wedded to the Agency's claim and, if later called on to sit in the case as an adjudicator, would be "influenced by an improper, if inadvertent, motive to validate and preserve" a result upholding the original charged violation.[190]

C. *Limited Effect of Applying* Williams *at the SEC*

The remedy for applying *Williams* at the SEC is for a Commissioner to disqualify himself or herself from any adjudication for which the Commissioner voted on the decision to authorize, whether the vote was to commence or not to commence an enforcement proceeding. For several reasons discussed in this section, implementing that remedy would be feasible and would not paralyze the SEC's enforcement or adjudication function.

Williams would not require disqualifying every SEC Commissioner in every adjudication. It would apply only when a particular Commissioner voted on the decision to commence the enforcement case. Usually, several years pass between a decision to initiate an administrative enforcement case and Commission review of the ALJ's decision, as the examples discussed below illustrate. The practice at the SEC is not for the Commissioners to hear and decide an enforcement case immediately after issuing charges, which was the situation in *Withrow*. There can be turnover on the Commission between the time a case is commenced and the time it comes before the Commission again after an ALJ decision. Some Commissioners are likely to have left. New Commissioners face no *Williams* disqualification issue because they did not participate in

188. See 17 C.F.R. §§ 201.350, 201.460 (2018).
189. *See supra* Part II.C.
190. *Williams*, 136 S. Ct. at 1907, 1908.

authorizing the enforcement case. A Commissioner in office when a case was initiated might not have participated in that decision.[191] The disqualification would apply only to a Commissioner who voted at the time of case initiation, was still in office at the time the Commission reviewed the ALJ initial decision, and would have participated in the review of the ALJ decision absent the disqualification.

If the *Williams* rule applied and the Commission still had a quorum, a majority would determine the outcome.[192] The Commission typically can satisfy the quorum requirement even if several Commissioners must disqualify themselves.[193] A quorum can be as small as two Commissioners when disqualifications occur. If the Commission had a quorum for a final adjudication and divided evenly over the disposition, it would dismiss the proceeding instituted against the defendant.[194] As a result, if applying *Williams* re-

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191. *See* discussion *infra* Part III.D.

192. 17 C.F.R. § 201.411(f) (2018).

193. The quorum rule is complicated and depends on the number of Commissioners in office and the number of Commissioners disqualified from a particular matter. Section 200.41 of the SEC's Rules states:

> A quorum of the Commission shall consist of three members; provided, however, that if the number of Commissioners in office is less than three, a quorum shall consist of the number of members in office; and provided further that on any matter of business as to which the number of members in office, minus the number of members who either have disqualified themselves from consideration of such matter . . . or are otherwise disqualified from such consideration, is two, two members shall constitute a quorum for purposes of such matter.

194. *See, e.g.*, Ruggieri, Securities Act Release No. 10389, 2017 WL 2984863 (July 13, 2017), https://www.sec.gov/litigation/opinions/2017/33-10389.pdf; Urban, Exchange Act Release No. 66259, 2012 WL 1024025, at *2 n.5 (Jan. 26, 2012), https://www.sec.gov/litigation/admin/2012/34-66259.pdf (alteration in original):

> Commission Rule of Practice 411(f), 17 C.F.R. § 201.411(f) ("In the event a majority of participating Commissioners do not agree to a disposition on the merits, the initial decision shall be of no effect, and an order will be issued in accordance with this result."); *Steinberg*, 58 S.E.C. 670 (2005) (dismissing proceeding where the "Commission [was] evenly divided as to whether the allegations . . . [were] established").

It is not clear why the Commission wrote a regulation choosing to dismiss an enforcement case entirely rather than allowing the ALJ's initial decision to become final when a majority of Commissioners did not agree on an outcome. The statutes do not require that result, and, in fact, the APA and the Exchange Act contemplate treating an ALJ decision as final agency action in some circumstances. 5 U.S.C. § 557(b) (2012) ("When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule."); 15 U.S.C. § 78d-1(c) (same); *see also* Raymond J. Lucia Cos. v. SEC, 832 F.3d 277, 286 (D.C. Cir. 2016) ("[T]he Commission *could* have chosen to adopt regulations whereby an ALJ's initial decision would be deemed a final decision of the Commission upon the expiration of a review period, without any additional Commission action.") (emphasis in original), *aff'd by an equally divided en banc court*, 868 F.3d 1021 (D.C. Cir. 2017), *rev'd*, 138 S. Ct. 2044 (2018). The Supreme Court affirms a decision of a court of apquired some Commissioners to disqualify themselves from reviewing an ALJ's initial decision, the Commission would operate in the normal fashion as long as the Commission had a quorum. The rule from *Williams* would not prevent an agency from tapping the expertise and efficiency that some see as benefits from the combination of functions at the top level of the agency.

If the Commission did not have a quorum to review the particular case, two courses would be open. One would be to wait until the Commission was able to form a quorum to review the case. The other would be to adopt a regulation deeming an ALJ's initial decision as the final decision of the Commission. The Commission would need to amend its rules of practice to permit this second approach.[195]

The solution is not for the Commission to delegate to the staff the power to authorize administrative enforcement cases. That would not be effective because a defendant has a legal right to seek the Commission's consideration of a delegated decision and needs to persuade only a single Commissioner to call for Commission review.[196] Furthermore, delegating the decision to initiate enforcement proceedings would allow Commissioners to shirk responsibility and accountability for one of the fundamental functions for which the President nominated and the Senate confirmed them.

D. *Examples of Applying* Williams *at the SEC*

How the *Williams* rule would affect SEC administrative enforcement cases would depend on the specific circumstances of each case. This section provides three examples by applying the *Williams* rule to actual cases on which the Commission ruled. In one, the *Williams* rule would have resulted in dismissal of all charges against

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peals when, after granting review, the justices are equally divided. *See, e.g.*, United States v. Texas, 136 S. Ct. 2271 (2016).

195. According to the District of Columbia Circuit, the SEC's current regulations require that for every case decided by an ALJ, the Commission must either review the decision or issue a finality order under Rule 360(d)(2), *Lucia*, 832 F.3d at 286, a conclusion the Supreme Court's reversal did not appear to disturb, *see* Lucia v. SEC, 138 S. Ct. 2044, 2054 (2018). The Commission may not take such an action without a quorum, and it is unclear what would happen if the Commission did not have a quorum to decide the case, issue the finality order, or review a decision by the Office of the General Counsel to issue a finality order pursuant to delegated authority. 17 C.F.R. § 200.30-14(g)(1)(iii) (2018). In principle, it seems acceptable to solve this issue with a regulation deeming the ALJ decision as final when a quorum is absent. *See supra* note 194.

196. *See* 15 U.S.C. § 78d-1(b) (2012); 17 C.F.R. § 201.430 (2018).

the defendant, which also had been the ALJ's initial decision. The rule would not have affected the result in the second case and, in the third case, would have left the Commission without a quorum, at least temporarily. The examples show that the Commission would be able to retain its power to charge and to perform its adjudication function, although it would need to make some adjustment for occasions when it could not muster a quorum.[197]

In *Flannery*, the Commissioners authorized fraud charges against two defendants on September 30, 2010.[198] The five Commissioners in office in September 2010 were Chairman Schapiro and Commissioners Casey, Walter, Aguilar, and Paredes, but Commissioners Casey and Walter did not participate in the vote to bring the case.[199] The case went to an administrative law judge, who rejected all charges and found in favor of the defendants. The staff appealed to the full Commission, then comprising Chair White and Commissioners Aguilar, Gallagher, Piwowar, and Stein. At the end of 2014, three of the five Commissioners, Chair White and Commissioners Aguilar and Stein, disagreed with the ALJ and found that each defendant had committed a violation. Commissioners Gallagher and Piwowar dissented.[200] One of the Commissioners

197. More research could be done to estimate the number of adjudications that would likely be affected by applying the *Williams* rule at the SEC and other agencies. The research could consider how often Commissioners depart and new Commissioners arrive, how much time usually elapses between a charging decision and a final Commission vote on an appeal from an ALJ decision, how often Commissioners who voted on a decision to commence an enforcement case were still Commissioners at the time of an adjudication vote, and how often a quorum of Commissioners would have existed.

198. Flannery, Securities Act Release No. 9147, 2010 WL 3826277 (Sept. 30, 2010), http://www.sec.gov/litigation/admin/2010/33-9147.pdf.

199. The SEC website has information about Commissioner votes on instituting enforcement charges and other matters. *See Final Commissioner Votes (April 2006 - December 2015)*, SEC, https://www.sec.gov/foia/foia-votes.shtml (last updated Feb. 19, 2016). The copy of the order instituting proceedings in *Flannery* in this material shows that Commissioners Casey and Walter did not participate. *See Final Commissioner Votes (September 2010)*, SEC, https://www.sec.gov/foia/docs/votes/2010-09.pdf (last updated Feb. 19, 2016) (listed in hyperlink as document number 80 of 82, and showing a handwritten note on a photocopy of the original order that indicates these two commissioners did not participate). SEC records also indicate when a Commissioner disapproved of an action. *See, e.g.*, Linton, Exchange Act Release No. 67912, 104 SEC Docket 2663, 2012 WL 4320219, at *1 (Sept. 21, 2012), https://www.sec.gov/foia/docs/votes/2012-09.pdf (listed in hyperlink as document number 50 of 75, and showing a handwritten note on a photocopy of the original order that indicates two commissioners did not participate, while another participated but disapproved of the action ultimately taken by the Commission).

200. Flannery, Securities Act Release No. 9689, Exchange Act Release No. 73840, Investment Company Act Release No. 31374, 110 SEC Docket 2463, 2014 WL 7145625 (Dec. 15, 2014). Chair White and Commissioners Aguilar and Stein were in the majority. Commissioners Gallagher and Piwowar dissented without a separate opinion. *Id.* at *41. The defendants appealed to a court of appeals, which found for the defendants and vacated the SEC decision. Flannery v. SEC, 810 F.3d 1 (1st Cir. 2015).

who participated in the SEC's review of the ALJ decision, Commissioner Aguilar, had participated in authorizing the case in 2010. He was in the three-two majority of Commissioners disagreeing with the ALJ's initial decision. If he had been disqualified from the review of the ALJ initial decision, the Commission vote probably would have been two-two, making the Commission evenly divided on whether the allegations in the charging document had been established and leading the Commission to dismiss the charges.[201]

In *Lucia*, the Commission authorized charges in September 2012.[202] The Commission consisted of Chairman Schapiro and Commissioners Aguilar, Paredes, Walter, and Gallagher, although Commissioner Aguilar did not participate.[203] An ALJ issued an initial decision finding liability based on misrepresentations and imposing sanctions, including a lifetime industry bar of Raymond Lucia.[204] Both the staff and the defendants appealed to the Commission, then consisting of Chair White and Commissioners Aguilar, Stein, Gallagher, and Piwowar. With a three-two vote in 2015, the Commission found that the defendants had committed fraud violations, added a violation that the ALJ rejected, and imposed the same sanctions that the ALJ had.[205] Chair White and Commissioners Aguilar and Stein were in the majority, while Commissioners Gallagher and Piwowar dissented.[206] Only Commissioner Gallagher participated in both the charging decision and the final adjudication. If Commissioner Gallagher had been disqualified, the vote would have been three-one, and the outcome would have been the same.

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201. If a majority of the Commissioners does not agree to the disposition on the merits of an ALJ's initial decision, the Commission dismisses the proceeding instituted against the defendant. *See supra* note 194 and accompanying text.

202. Raymond J. Lucia Cos., Exchange Act Release No. 3456, Investment Company Act Release No. 67781, 104 SEC Docket 2130, 2012 WL 3838150, at *1 (Sept. 5, 2012), https://www.sec.gov/foia/docs/votes/2012-09.pdf (showing a photocopy of the original order with a handwritten note indicating that Commissioner Aguilar did not participate in the proceeding).

203. *Id.*

204. Raymond J. Lucia Cos., Exchange Act Release No. 540, 107 SEC Docket 4365, 2013 WL 6384274 (ALJ Dec. 6, 2013), modifying Raymond J. Lucia Cos., Exchange Act Release No. 495, 106 SEC Docket 3613, 2013 WL 3379719 (ALJ July 8, 2013).

205. Raymond J. Lucia Cos., Exchange Act Release No. 4190, Investment Company Act Release No. 75837, 112 SEC Docket 1754, 2015 WL 5172953 (Sept. 3, 2015). The defendants appealed to the D.C. Circuit and sought review in the Supreme Court on a constitutional question. Raymond J. Lucia Cos. v. SEC, 832 F.3d 277 (D.C. Cir. 2016), *aff'd by an equally divided en banc court*, 868 F.3d 1021 (D.C. Cir. 2017), *rev'd*, 138 S. Ct. 2044 (2018).

206. Raymond J. Lucia Cos., Exchange Act Release No. 4190, Investment Company Act Release No. 75837, 112 SEC Docket 1754, 2015 WL 5172953, at *28 (Sept. 3, 2015).

In September 2014, Chair White plus Commissioners Aguilar and Piwowar voted to charge an investment adviser with fraud and to seek financial and other sanctions in an SEC administrative proceeding. Commissioner Stein and one other Commissioner did not participate.[207] An administrative law judge tried the case and dismissed all of the charges.[208] The SEC staff appealed to the Commission. When the Commission decided the appeal in 2016, only three Commissioners were in office: Chair White and Commissioners Stein and Piwowar. The three Commissioners decided that the ALJ had been wrong and that some of the original charges should be upheld. They found violations by the investment adviser, imposed a civil money penalty, and issued a cease and desist order.[209] If the *Williams* rule had been in effect, Chair White and Commissioner Piwowar would have disqualified themselves, leaving only Commissioner Stein to vote on the case. She had not participated in the vote to initiate the proceeding. In those circumstances, one Commissioner does not make a quorum,[210] and the Commission would have had no power to act. The case would have remained pending until another Commissioner created a quorum.

The three examples show a range of possible outcomes from applying *Williams* at the SEC. The due process protection would have mattered in two of the three cases. In the first case, one Commissioner who had voted to charge also participated in the final adjudication. He again voted against the defendants. If he had been excluded, the charges against the defendants would have failed. In the second case, only one Commissioner participated in both the initiation and adjudication of the case. He voted in favor of bringing the case but then changed his mind at the adjudication stage. He rose above the potential bias, but a majority of the Commissioners still found the defendants liable. In the third case, only three Commissioners were in office at the time of the adjudication and two of them had voted to charge the defendant. They then both voted in favor of the defendant's liability. The Commis-

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207. *See* Robare Group, Ltd., Securities Act Release No. 3907, Investment Company Act Release No. 72950, 109 SEC Docket, 4294, 2014 WL 4296690, at *1 (Sept. 2, 2014), https://www.sec.gov/foia/docs/votes/2014-09.pdf (including a photocopy of the original Order Instituting Administrative Cease and Desist Proceedings, which bears a handwritten notation indicating that Commissioners Gallagher and Stein did not participate).

208. Robare Group, Ltd., Exchange Act Release No. 806, 111 SEC Docket 3765, 2015 WL 3507108 (ALJ June 4, 2015) (Initial Decision).

209. Robare Group, Ltd., Exchange Act Release No. 4566, 115 SEC Docket 2796, 2016 WL 6596009 (Nov. 7, 2016). Commissioner Piwowar, who, along with Chair White, had initially voted to charge the adviser, ultimately disagreed with imposing a penalty.

210. *See supra* note 193 and accompanying text.

sion would not have had a quorum if those two Commissioners had been disqualified. The result of Commission review by an untainted quorum is unknown.

CONCLUSION

For decades, constitutional and administrative law has depended on *Withrow v. Larkin* for the principle that the Due Process Clause does not forbid federal agencies from combining the ability to conduct investigations into potential misconduct, commence proceedings alleging violations of law, and make final agency decisions that find a violation and impose sanctions. That position might still be valid if the question is broadly whether an administrative agency, as an institution, may combine those functions without offending due process or separation of powers concepts, but *Williams v. Pennsylvania* appears to require a partial step back from that broad position. *Williams* held that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case.

The facts of *Williams* concerned a state court judge who, years earlier, had approved a decision to seek the death penalty in a criminal case, but the reasoning of the Court's decision was not so confined. The reasoning expressed constitutional doubt about the ability of an advocate to maintain the necessary neutrality to decide the merits of a case fairly and was consistent with other Court decisions requiring impartial adjudicators when the decision maker was a judge or an executive official acting in a judicial capacity. Given the importance and high value of impartiality in adjudicatory settings, the rule in *Williams* likely applies to federal administrative agencies.

If courts agree that *Williams* applies to federal agencies, an agency head, such as a commissioner, will not be able to vote to initiate an administrative enforcement proceeding and then later sit as a judge reviewing an initial ALJ decision in that case. Combining those roles is the standard procedure at many federal agencies, such as the SEC, FTC, and FCC, and it would need to change. The change, on its face, would be dramatic. It would be at odds with the common understanding established by *Withrow* and section 554(d) of the APA and with the views of those who see pragmatic value in the combination of charging and adjudicating functions. In reality, applying *Williams* to federal agencies would have a limited effect if the example of the SEC is a reliable guide. Because of the availability of new or different agency heads in most if not all cases, an agency would be able to review an ALJ's initial decision with a quorum of commissioners or agency heads who had not participated in the original decision to charge the defendant. If, for some reason, a quorum was not available within a reasonable time, an agency could allow the ALJ's decision to become the final position of the agency.

Exhibit C

Sherman Act, Section 1 (15 U.S.C. § 1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sherman Act, Section 2 (15 U.S.C. § 2) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Clayton Act, Section 7 (15 U.S.C. § 18) No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

ANTITRUST MODERNIZATION COMMISSION

ANTITRUST MODERNIZATION COMMISSION

REPORT AND RECOMMENDATIONS

APRIL 2007

Deborah A. Garza *Chair*
Jonathan R. Yarowsky *Vice-Chair*
Bobby R. Burchfield
W. Stephen Cannon
Dennis W. Carlton
Makan Delrahim
Jonathan M. Jacobson
Donald G. Kempf, Jr.
Sanford M. Litvack
John H. Shenefield
Debra A. Valentine
John L. Warden

April 2, 2007

To the President and the Congress of the United States:

Three years ago, as authorized by statute, this Commission undertook a comprehensive review of U.S. antitrust law to determine whether it should be modernized. It is our pleasure to present the results of that effort, the enclosed Report and Recommendations of the Antitrust Modernization Commission ("Report").

This Report is the product of a truly bipartisan effort. The members of the Commission were appointed by the President and the respective majority and minority Leadership of the House of Representatives and Senate with the goal of ensuring "fair and equitable representation of various points of view in the Commission."[1] In fact, the Commissioners represented a diversity of viewpoints, which were fully and forcefully expressed during many hours of hearings and thoughtful deliberation. As one Commissioner has said, the Commission's recommendations were "fashioned on the anvil of rigorous discussion and debate." The Commission also endeavored at every turn to obtain a diversity of views from the public. In the end, the Commission was able to reach a remarkable degree of consensus on a number of important principles and recommendations.

First, the Report is fundamentally an endorsement of free-market principles. These principles have driven the success of the U.S. economy and will continue to fuel the investment and innovation that are essential to ensuring our continued welfare. They remain as applicable today as they ever have been. Free trade, unfettered by either private or governmental restraints, promotes the most efficient allocation of resources and greatest consumer welfare.

Second, the Report judges the state of the U.S. antitrust laws as "sound." Certainly, there are ways in which antitrust enforcement can be improved. The Report identifies several. A few Commissioners have greater concerns about aspects of current enforcement, as expressed in their separate statements. On balance, however, the Commission believes that

[1] Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11054(h), 116 Stat. 1856, 1857 (2002).

U.S. antitrust enforcement has achieved an appropriate focus on (1) fostering innovation, (2) promoting competition and consumer welfare, rather than protecting competitors, and (3) aggressively punishing criminal cartel activity, while more carefully assessing other conduct that may offer substantial benefits. The laws are sufficiently flexible as written, moreover, to allow for their continued "modernization" as the world continues to change and our understanding of how markets operate continues to evolve through decisions by the courts and enforcement agencies.

Third, the Commission does not believe that new or different rules are needed to address so-called "new economy" issues. Consistent application of the principles and focus noted above will ensure that the antitrust laws remain relevant in today's environment and tomorrow's as well. The same applies to different rules for different industries. The Commission respectfully submits that such differential treatment is unnecessary, whether in the form of immunities, exemptions, or special industry-specific standards.

That does not mean the Commission sees no room for improvement. To the contrary, the Commission makes several recommendations for change. A few of these recommendations call for bold action by Congress that likely will require considerable further debate. We look forward to that debate.

The following summarizes some of the more significant changes the Commission recommends.[2]

Substantive Antitrust Standards (Mergers and Monopoly)

The Commission does not recommend legislative change to the Sherman Act or to Section 7 of the Clayton Act. There is a general consensus that, while there may be disagreement about specific enforcement decisions, the basic legal standards that govern the conduct of firms under those laws are sound.

The Commission nevertheless makes several recommendations in the area of merger enforcement. The purpose of these recommendations is to ensure that policy is appropriately sensitive to the needs of companies to innovate and compete while continuing to protect the interests of U.S. consumers. In particular, the Commission urges that substantial weight be given to evidence demonstrating a merger will achieve efficiencies, including innovation-relat-

[2] Although many recommendations garnered unanimous or nearly unanimous support, not all Commissioners fully agreed with all recommendations. Differences are identified in the text of the Report and in some instances are discussed in separate Commissioner statements. Recommendations with the support of at least seven Commissioners are reported as recommendations of the Commission. With respect to 96 percent of the recommendations, at least nine Commissioners agreed in whole or in part with the recommendations. Approximately 57 percent of the recommendations were unanimous.

ed efficiencies. The Commission also recommends that the federal enforcement agencies continue to examine the basis for, and efficacy of, merger enforcement policy. We urge the agencies to further study the economic foundations for merger enforcement policy, including the relationship between market performance and market concentration and other factors. We also recommend increased retrospective study of the effects of decisions to challenge or not challenge specific transactions. Such empirical evidence, although difficult to gather, is critical to an informed and effective merger policy.

With respect to monopoly conduct, the Commission believes U.S. courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies are generally not improper, even for a "dominant" firm and even where competitors may lose. However, there is a need for greater clarity and improvement to standards in two areas: (1) the offering of bundled discounts or rebates, and (2) unilateral refusals to deal with rivals in the same market. Clarity will be best achieved in the courts, rather than through legislation. The Commission recommends a specific standard for the courts to apply in determining whether bundled discounts or rebates violate antitrust law.

Repeal of the Robinson-Patman Act

The Commission recommends that Congress finally repeal the Robinson-Patman Act (RPA). This law, enacted in 1936, appears antithetical to core antitrust principles. Its repeal or substantial overhaul has been recommended in three prior reports, in 1955, 1969, and 1977. That is because the RPA protects competitors over competition and punishes the very price discounting and innovation in distribution methods that the antitrust laws otherwise encourage. At the same time, it is not clear that the RPA actually effectively protects the small business constituents that it was meant to benefit. Continued existence of the RPA also makes it difficult for the United States to advocate against the adoption and use of similar laws against U.S. companies operating in other jurisdictions. Small business is adequately protected from truly anticompetitive behavior by application of the Sherman Act.

Patents and Antitrust

Patent protection and the antitrust laws are generally complementary. Both are designed to promote innovation that benefits consumer welfare. In addition, a patent does not necessarily confer market power. Nevertheless, problems in the application of either patent or antitrust law can actually deter innovation and unreasonably restrain trade. Many of the Commission's recommendations relating to the Sherman Act address the antitrust side of the balance. On the patent side, the Commission urges Congress to give serious consideration to recent recommendations by the Federal Trade Commission (FTC) and National

Academy of Sciences designed to improve the quality of the patent process and patents. The Commission also recommends that the joint negotiation of license terms within standard-setting bodies ordinarily should be treated under a rule of reason standard, which considers both potential benefits of such joint negotiation to avoid "hold up" and the possibility that such joint negotiation might suppress innovation.

Improving the Enforcement Process

To be effective, any enforcement regime must be clear, fairly administered, and not unreasonably burdensome. Several of the Commission's recommendations are designed to improve current processes to better meet these goals.

Eliminate Inefficiencies Resulting from Dual Federal Enforcement. Except in the area of criminal enforcement (which is the responsibility of the Justice Department), federal antitrust law is enforced by both the Justice Department (DOJ) and the FTC. Both agencies, for example, are equally authorized to review mergers under the Hart-Scott-Rodino Act (HSR Act), which essentially requires all mergers valued at above $59.7 million to be notified to the agencies and suspended until the expiration or termination of certain waiting periods. The Commission does not believe it would be feasible or wise to eliminate the antitrust enforcement role of either agency at this time. However, we make a number of recommendations designed to eliminate inconsistencies and problems that may result from dual enforcement.

Merger Clearance. The agencies have done a good job minimizing problems that can result from dual enforcement. But there is room for improvement that can only be achieved with the help of Congress. At the time of her confirmation, the current head of the FTC was asked to agree not to pursue a global merger clearance agreement between the agencies. The Commission calls on the appropriate congressional committees to revisit that position and authorize the DOJ and the FTC to implement a new merger clearance agreement based on the principles of the 2002 clearance agreement between the agencies. It is bad government for mergers to be delayed by turf battles between the agencies. Such battles undermine confidence in government, damage agency staff morale, and potentially delay the realization of significant merger efficiencies without good reason. The Commission recommends that Congress revise the HSR Act to require the DOJ and the FTC to resolve all clearance requests under the HSR Act within a short period of time after the parties report their transaction.

The Commission also recommends changes to ensure that mergers are treated the same no matter which agency reviews them. Specifically, the Commission recommends that Congress amend Section 13(b) of the FTC Act to prohibit the FTC from pursuing administrative litigation in HSR Act merger cases. The Commission further recommends that the FTC adopt a policy that when it seeks to block a merger in federal court, it will seek both preliminary and permanent relief in a combined proceeding where possible.

Improve the HSR Act Pre-Merger Review Process. The DOJ and FTC should continue to pursue reforms to their internal review processes that will reduce unnecessary burden and delay. The Commission also makes a number of specific recommendations designed to reduce the burden of HSR merger reviews and increase the transparency of government enforcement. For example, the Commission recommends that the agencies update their Merger Guidelines to explain how they evaluate non-horizontal mergers as well as a proposed merger's potential impact on innovation competition. The Commission also recommends that the agencies issue statements explaining why they have declined to take enforcement action with respect to transactions raising potentially significant competitive concerns.

Improve Coordination Between State and Federal Enforcement. State and federal enforcement can be strong complements in achieving optimal enforcement. But the existence of fifty independent state enforcers on top of two federal agencies can, at times, also result in uncertainty, conflict, and burden. The Commission encourages state and federal enforcers to coordinate their activities to seek to avoid subjecting businesses to multiple, and potentially conflicting, proceedings. We make a number of specific recommendations in this regard. In addition, the Commission believes States should continue to focus their efforts primarily on matters involving localized conduct or competitive effects. In addition, state and federal agencies should work to harmonize their substantive enforcement standards, particularly with respect to mergers.

De-link Agency Funding and HSR Act Filing Fees. HSR Act filing fees are used to fund DOJ and FTC antitrust enforcement activity. These fees are a tax on mergers, the vast majority of which are not anticompetitive. They do not accurately reflect costs to the government of reviewing a given filing, nor do they confer a benefit on notifying parties. But they set a precedent for other countries with merger control regimes. In the past, moreover, dips in merger activity (and filing fees) have threatened to affect the level of appropriations available for critical agency activities. The Commission recommends that Congress de-link agency funding from HSR Act filing fee revenues.

Private Litigation

Uniquely in the United States, private litigation has been a key part of antitrust enforcement. Under current rules, private plaintiffs are entitled to recover three times their actual damages, plus attorneys' fees. Defendants are jointly and severally liable for alleged conspiracies. There is no right of contribution among defendants. There is also only a limited right of claim reduction when one or more defendants settle. The combined effect of these rules is that one defendant can be liable for nearly all of the damages caused by an antitrust conspiracy. Defendants thus face significant pressure to settle antitrust claims of questionable merit simply to avoid the potential for excessive liability. While the rules can maximize deterrence and encourage the resolution of claims through quick settlement, they can also overdeter conduct that may not be anticompetitive.

The Commission recommends no change to the fundamental remedial scheme of the antitrust laws: the treble damage remedy and plaintiffs' ability to recover attorneys' fees. On balance, the current scheme appears to be effective in enabling plaintiffs to pursue litigation that enhances the deterrence of unlawful behavior and compensates victims. However, the Commission recommends that Congress enact legislation that would permit non-settling defendants to obtain a more equitable reduction of the judgment against them and allow for contribution among non-settling defendants.

Indirect and Direct Purchaser Litigation. There are different rules at the federal level and among the states as to whether both direct purchasers of price-fixed goods or services and indirect purchasers may sue to recover damages. Under federal law, only direct purchasers can sue (this is commonly known as the rule of *Illinois Brick*). Defendants cannot argue that direct purchasers have "passed on" any amount of the overcharge to indirect purchasers (this is commonly known as the rule of *Hanover Shoe*). In thirty-six states and the District of Columbia, however, indirect purchasers can sue under state law providing that *Illinois Brick* does not apply to state court actions.

As a result, there is typically a morass of litigation in various state and federal courts relating to a single alleged conspiracy. Injured parties are treated differently depending on where they reside and defendants are subject to suit in multiple jurisdictions. In addition, federal *Illinois Brick/Hanover Shoe* policy provides a "windfall" to purchasers who have passed on an overcharge, while depriving any recovery at all to purchasers who actually bear the overcharge. Such a system that compensates the uninjured and denies recovery to the injured seems fundamentally unfair. The Class Action Fairness Act may ameliorate some of the administrative issues caused by conflicting federal and state rules by facilitating the removal of state actions to a single federal court for pre-trial proceedings. However, that Act applies only to pre-trial proceedings and does nothing to address the fairness issues associated with current federal policy. The Commission believes it is time to enact comprehensive legislation reforming the law in this area.

The Commission recommends that Congress overrule the Supreme Court's decisions in *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to recover for their injuries. Other aspects of the Commission's recommendation are designed to ensure that damages would not exceed the overcharges (trebled) paid by direct purchasers, that the full adjudication of such claims occurs in a single federal forum, and that current class action standards would continue to apply to the certification of direct purchasers regardless of differences in the degree to which overcharges may have been passed on to indirect purchasers.

Criminal Penalties

There is a strong consensus worldwide favoring vigorous enforcement against cartels. Cartels offer no benefit to society and invariably harm consumers. Sentencing and fines under the Sherman Act are generally determined by the courts based on guidance in the Sentencing Guidelines issued by the U.S. Sentencing Commission. The Sentencing Guidelines employ a proxy of harm from cartels based on twenty percent of the volume of commerce affected. This twenty percent proxy is based on an assumed average overcharge of ten percent, which is doubled to account for dead-weight loss to society. The Commission recommends that the Sentencing Commission evaluate whether it remains reasonable to assume an overcharge of ten percent (*i.e.*, whether it should it be higher or lower) and the difficulty of proving actual gain or loss in lieu of using a proxy. It also recommends that the Sentencing Guidelines be amended to make explicit that the twenty percent proxy may be rebutted by proof by a preponderance of evidence that the actual amount of overcharge was higher or lower where a difference is material.

International Antitrust

The United States was once the only major country actively enforcing a comprehensive set of antitrust laws. Today, more than 100 countries have adopted competition laws. On the one hand, this development has helped the United States in its fight to stamp out international cartels. It has also benefited world trade by opening up markets to competition. On the other hand, the proliferation of competition authorities has increased the risk of burden, inconsistency, and even conflict. There is some concern about the potential effect on U.S.-based companies of differences in the way that other countries treat so-called dominant firm behavior and the exploitation of rights in intellectual property.

The Commission recommends a number of steps to address these concerns. First, "as a matter of priority" the DOJ and the FTC should study and report to Congress on the possibility of developing a centralized international pre-merger notification system that would ease the burden of companies engaged in cross-border transactions. Second, the DOJ and the FTC should seek procedural and substantive convergence around the world on sound principles of competition law. Third, the United States should pursue bilateral and multilateral cooperation agreements with more of its trading partners. These agreements should explicitly recognize that conflicting antitrust enforcement can impede global trade, investment, and consumer welfare. They should also promote comity by providing for the exercise of deference where appropriate, the harmonization of remedies, consultation and cooperation, and benchmarking reviews. Fourth, the DOJ and the FTC should be provided with direct budgetary authority to provide antitrust technical assistance to other countries for the purpose of enhancing convergence and cooperation.

Cooperation from other countries can be essential to punishing international cartels that exact hundreds of millions of dollars from U.S. consumers. But the United States has had limited success in entering Antitrust Mutual Assistance Agreements (AMAAs) with other countries. Many believe this is because U.S. law appears to require that those nations agree to allow the United States to use confidential information obtained under such agreements for non-antitrust enforcement purposes. The Commission recommends that Congress amend the International Antitrust Enforcement Assistance Act to clarify that it does not require such a commitment as the cost of entering into an AMAA.

Finally, the Commission recommends that, as a general principle, purchases made outside the United States from sellers outside the United States should not give rise to a cause of action in U.S. courts. The Commission was split as to whether this principle should be codified through amendment to the Foreign Trade Antitrust Improvements Act.

Immunities and Exemptions

Free-market competition is the foundation of our economy, and the antitrust laws stand as a bulwark to protect free-market competition. Nevertheless, we have identified thirty statutory immunities from the antitrust laws. The Commission is skeptical about the value and basis for many, if not most or all, of these immunities. Many are vestiges of earlier antitrust enforcement policies that were deemed to be insufficiently sensitive to the benefits of certain types of conduct. Others are fairly characterized as special interest legislation that sacrifices general consumer welfare for the benefit of a few. Congress is currently considering the repeal of several immunities, including those covering the business of insurance and international shipping conferences. The Commission strongly encourages such review.

The Commission believes that statutory immunity from the antitrust laws should be disfavored. Immunities should rarely (if ever) be granted and then only on the basis of compelling evidence that either (1) competition cannot achieve important societal goals that trump consumer welfare, or (2) a market failure clearly requires government regulation in place of competition. The Commission recommends a framework for such a review and recommends that Congress consult with the DOJ and FTC about the likely competitive effects of existing and proposed immunities. In those rare instances in which Congress does grant an immunity, the Commission recommends (1) that the immunity be as limited in scope as possible to accomplish the intended objective, (2) that it include a sunset provision pursuant to which the immunity would terminate at the end of a specified period unless renewed, and (3) that the FTC, in consultation with the DOJ, report to Congress on the effects of the immunity before any vote on renewal.

The judicial state action doctrine immunizes private action undertaken pursuant to a clearly articulated state policy deliberately intended to displace competition. In addition, the state must provide sufficient "active supervision" to ensure that conduct is truly a manifestation of state policy rather than private interests. A recent report by the FTC staff raises concern that courts have been applying the doctrine without sufficient care to ensure that private anticompetitive conduct has actually been authorized by the state pursuant to a clear policy to displace competition. The Commission agrees that courts should adhere more closely to Supreme Court state action precedents. It recommends that the doctrine should *not* apply where the effects of conduct are not predominantly intrastate. In addition, the doctrine should equally apply to governmental entities when they act as participants in the marketplace.

Regulated Industries

During the early part of the 20th century, several industries—including electricity, natural gas, telecommunications, and transportation—were thought to be natural monopolies or at risk of "excessive competition." Since then, however, technological advancement and changed economic precepts have led to substantial deregulation. The unleashing of competition in these industries has greatly increased efficiency and provided substantial benefits to consumers. The Commission believes the trend toward deregulation should continue.

Antitrust enforcement is an important counterpart to deregulation. Where government regulation does exist, the antitrust laws should continue to apply to the maximum extent consistent with the regulatory regime. Ideally, statutes should clearly state whether, and to what extent, Congress intended to displace the antitrust laws, if at all. The courts, of course, should interpret antitrust "savings clauses" to give full effect to congressional intent that the antitrust laws continue to apply. Where there is no antitrust savings clause, the courts should imply immunity from the antitrust laws only where there is a clear repugnancy between those laws and the regulatory scheme.

The filed-rate doctrine prohibits private treble damage actions alleging that industry rates approved by a regulator resulted from unlawful collusion. Today, however, few filed rates are actually reviewed by regulators for their reasonableness. In 1986, the Supreme Court opined that a number of factors appeared to undermine the continued validity of the filed-rate doctrine,[3] but concluded that it was for Congress to make that determination. The Commission believes it is time for Congress to reevaluate the filed-rate doctrine and consider overruling it where a regulator no longer specifically reviews and approves proposed rates agreed to among an industry.

The DOJ and FTC review mergers pursuant to the HSR Act, applying the same standards across all industries. In several industries, however, the DOJ and the FTC share merger review authority with a regulatory agency that reviews the merger under a "public interest" standard. Review by two different government agencies can impose substantial and duplicative costs. It can also lead to conflict. The Commission recommends that the DOJ or the FTC should have full antitrust merger enforcement authority with respect to regulated industries. In addition, Congress should review whether separate review under a public interest standard is needed to protect particular interests that cannot be adequately protected under application of an antitrust standard.

* * *

The federal antitrust laws are more than 115 years old. Although the free-market principles on which they stand remain a rock-solid foundation, the world, our economy, and our understanding of how markets work have changed substantially. For that reason, we believe it was a wise decision to authorize this Commission to assess those laws and whether the policies developed to enforce them are serving the nation well.

The almost constitutional generality of the central provisions of the antitrust laws has provided the needed flexibility to adjust to new developments. In this sense, "antitrust modernization" has occurred continuously. But, even so, the interplay of statutes, enforcement activity, and court decisions has suggested a substantial number of areas that the Commission believes can be improved.

The issues the Commission examined are complex. Reasonable minds can, and likely will, differ on many of the Commission's findings and recommendations. But we hope this Report will prompt an important national conversation on those recommendations that will result in the adoption of many, if not all, of them.

Deborah A. Garza
Chair

Jonathan R. Yarowsky
Vice-Chair

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[3] Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 423–24 (1986).

THE ANTITRUST MODERNIZATION COMMISSION

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Introduction and Recommendations

1. INTRODUCTION

Congress established the Antitrust Modernization Commission "to examine whether the need exists to modernize the antitrust laws and to identify and study related issues."[1] This Report sets forth the Commission's recommendations and findings on how antitrust law and enforcement can best serve consumer welfare in the global, high-tech economy that exists today.

The antitrust laws seek to deter or eliminate anticompetitive restraints that impede free-market competition. To do so properly, antitrust law must reflect an economically sound understanding of how competition operates. As Congress recognized, competition in the twenty-first century increasingly involves innovation, intellectual property, technological change, and global trade.

In many high-tech sectors of the economy, firms must constantly innovate to keep pace in markets in which product life cycles are counted in months, not years.[2] To protect their innovations, firms may rely on intellectual property. In some cases, intellectual property assets may be more important to businesses than specialized manufacturing facilities.

The digital revolution has produced new, general-purpose technologies that enable firms to create many new goods and services for consumers.[3] New information and communication technologies have revolutionized firms' production and distribution processes as well, allowing faster and easier access to suppliers and distributors. Technological advances have played an important role in facilitating global integration,[4] as newly available communication technologies have shrunk the time and distance that separate markets around the world.[5] New markets across the globe have opened for trade following the determination by policymakers in many developing countries that free-market competition yields productivity and other benefits far superior to the results produced by central planning.[6]

Antitrust analysis must reflect a proper understanding of how these forces affect competition. To be sure, many of these seemingly new phenomena raise competitive issues parallel to those that confronted antitrust in earlier decades.[7] So-called "general-purpose technologies," such as electricity, railroads, and the internal combustion engine, for example, also revolutionized production, made many new goods and services available to consumers, and created industries that produced analogous competitive issues.[8] Nonetheless, a present-day assessment of how well antitrust law is operating to address current issues is important to ensure that competitive markets continue to benefit consumer welfare. As the nature of competition evolves, so must antitrust law.

A. Antitrust Law Seeks to Protect Competition and Consumer Welfare

The Supreme Court has explained:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions.[9]

As this language confirms, free-market competition is, and has long been, the fundamental economic policy of the United States.[10] Competition in free markets—that is, markets that operate without either private or governmental anticompetitive restraints—forces firms to lower prices, improve quality, and innovate.[11] Businesses in competitive markets develop and sell the kinds and quality of goods and services that consumers desire, and firms seek to do so as efficiently as possible, so they can offer those goods and services at competitive prices.[12]

In free markets, consumers determine which firms succeed. Consumers benefit as firms offer discounts, improve product reliability, or create new services, for example, to keep existing customers and attract new ones. The free-market mechanism generally provides greater success "to those firms that are more efficient and whose products are most closely adapted to the wishes of consumers."[13]

Competitive markets also drive an economy's resources toward their fullest and most efficient uses, thereby providing a fundamental basis for economic development.[14] Competition facilitates the process by which innovative, cutting-edge technologies replace less efficient productive capacity. Market forces continuously prod firms to innovate—that is, to develop new products, services, methods of doing business, and technologies—that will enable them to compete more successfully.[15] The ongoing churning of a flexible competitive economy leads to the creation of wealth, thus making possible improved living standards and greater prosperity.[16]

To be competitive, markets need not conform to the economic ideal in which many firms compete and no firm has control over price. In fact, the real world contains very few such markets.[17] Rather, competition generally "refers to a state of affairs in which prices are sufficient to cover a firm's costs, but not excessively higher, and firms are given the correct set of incentives to innovate."[18] Experience has shown that intense competition can take place in a wide variety of market circumstances.[19] Some factors—such as many sellers and buyers, small market shares, homogeneous products, and easy entry into a market—may suggest competitive behavior is likely.[20] The absence of those factors, however, "does not necessarily prevent a market from behaving competitively."[21] Economic learning in recent decades has afforded a greater appreciation of the variety of factors that can affect competitive forces at work in particular markets.

Antitrust law prohibits anticompetitive conduct that harms consumer welfare.[22] Antitrust law in the United States is not industrial policy; the law does not authorize the government (or any private party) to seek to "improve" competition. Instead, antitrust enforcement seeks to deter or eliminate anticompetitive restraints. Rather than create a regulatory scheme, antitrust laws establish a law enforcement framework that prohibits private (and, sometimes, governmental) restraints that frustrate the operation of free-market competition.

To determine whether and when particular forms of business conduct may harm competition requires an understanding of the market circumstances in which they are undertaken. Antitrust agencies and the courts have long looked to economic learning for assistance in understanding market circumstances and the likely competitive effects of particular business conduct.[23] Indeed, economics now provides the core foundation for much of antitrust law. Not surprisingly, as economic learning about competition has advanced over the decades, so have the contours of antitrust doctrine.

Antitrust law also must keep pace with developments in the business world. Business practices may change, especially as technological innovation and global economic integration alter the competitive forces at work in particular markets. To protect competition and consumer welfare, antitrust analysis must offer sufficient flexibility to take account of these changes, while maintaining clear and administrable rules of antitrust enforcement.

B. Periodic Assessments of the Antitrust Laws Are Advisable

The antitrust laws in the United States require ongoing evaluation and assessment to ensure they are keeping pace with both economic learning and the ever-changing economy.[24] In past decades, various entities have empowered six different commissions to assess how well antitrust law operates to serve consumers. The Antitrust Modernization Commission is the seventh such commission in almost seventy years.[25] Prior commissions have made recommendations about both the substance and procedure of antitrust law.

The tradition of assigning commissions to evaluate antitrust law began in 1938, when President Roosevelt recommended that Congress appropriate funds for the study of the antitrust laws.[26] Recommendations from that first commission, the Temporary National Economic Commission (TNEC), played a role in spurring Congress to strengthen the law against anticompetitive mergers.[27] In 1955 the Attorney General's National Committee to Study the Antitrust Laws recommended important changes to antitrust analysis, most notably to reduce the use of per se rules that deemed many types of conduct automatically illegal.[28] Twenty years later, these proposals combined with further economic learning to produce significant changes in antitrust law.[29]

Between 1969 and 1979, three commissions issued reports, each known by the names of those who led them—the Neal Report,[30] the Stigler Report,[31] and the Shenefield Report.[32] Among other things, these reports reflected ongoing debates about whether and when monopolies, or firms with large market shares in highly concentrated markets (oligopolies), should be subject to more stringent antitrust enforcement.[33] The recommendation of the Neal Report to reduce concentration in oligopolies by requiring firms to divest assets was opposed by the Stigler Report, which described the connection between concentration and competition as "weak."[34] The recommendation of the Shenefield Report to make it easier to prove monopolization also did not gain traction.[35]

Recommendations from these commissions for revised or new antitrust procedures and remedies were more successful. For example, the Neal Report recommended that, in certain circumstances, businesses be required to notify the antitrust agencies before consummating a merger;[36] in 1976 Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act, which imposed pre-merger notification requirements.[37] The Stigler Report recommended substantial increases in government antitrust penalties, a recommendation adopted into law through The Antitrust Procedures and Penalties Act of 1974.[38] The Shenefield Report led directly to passage of the Antitrust Procedural Improvements Act of 1980[39] and "provided important encouragement to federal judges to manage trials—including the massive *AT&T* trial—effectively."[40] The Shenefield Report also issued twenty recommendations for further deregulation, providing significant support to the deregulation movement.[41]

Most recently, the increasing importance of global trade spurred the 1998 establishment of the International Competition Policy Advisory Committee (ICPAC)—chaired by former Assistant Attorney General James F. Rill and former International Trade Commission Chairwoman Paula Stern—to study international aspects of antitrust law.[42] The ICPAC Report provided the impetus for the International Competition Network, through which nearly one hundred nations now discuss antitrust procedures and policies.[43]

C. Major Changes in Antitrust Analysis over the Past Twenty-Five Years Make this a Timely Report

In the decades since the Neal, Stigler, and Shenefield Reports undertook their assessments, antitrust law has gone through what is arguably the most important period in its development. The antitrust landscape differs greatly from earlier decades in terms of antitrust analysis and the role of antitrust enforcement agencies, among other things.

Most important, antitrust case law has become grounded in the related principles that antitrust protects competition, not competitors, and that it does so to ensure consumer welfare. Substantial economic learning now undergirds and informs antitrust analysis. Time and again in recent decades, the Supreme Court has used economic reasoning to develop standards for antitrust analysis. Case-by-case decision-making has provided myriad opportunities for the integration of economics into antitrust analysis, and litigating parties and the courts have used them.

Economic learning has provided the foundation for updated antitrust analysis in part by revealing the potential procompetitive benefits of some business conduct previously assumed to be anticompetitive. The accommodation of such advances in economic learning has increased the flexibility of antitrust law, with courts and the antitrust agencies now considering a wide variety of economic factors in their analyses. Improved economic understanding and greater analytical flexibility have increased the potential for a sound competitive assessment of business conduct in all industries, including those characterized by innovation, intellectual property, and technological change.

The improvements in economic understanding and the increases in analytical flexibility have added further complexity to antitrust law, however. In response, courts have searched for standards that can make antitrust analysis more manageable. They also have given increased attention to whether businesses can understand and comply with, and courts can efficiently and competently administer, particular antitrust rules. Whether particular antitrust rules overdeter procompetitive conduct or underdeter anticompetitive conduct has received greater scrutiny as well.

D. The Commission's History and Process

The Antitrust Modernization Commission began the three years of work that culminated in this Report in April 2004. The Commission met for the first time on April 1 that year, shortly after all appointments to the Commission had been made. The Commission has over those three years engaged in a careful, deliberate course of study to fulfill its statutory mandate of examining "whether the need exists to modernize the antitrust laws" and soliciting the "views of all parties concerned with the operation of the antitrust laws."[44] Interested members of the public have participated substantially through the submission of comments and testimony and attendance at the Commission's many hearings and meetings.

1. Legislative History of the Commission

The Commission was created by an act of Congress in 2002. The original bill was introduced by F. James Sensenbrenner, Jr., then-Chairman of the House Judiciary Committee.[45] Although the bill did not limit the scope of the Commission's study, at the time of its introduction, Chairman Sensenbrenner highlighted three issues he believed the Commission should review in the course of its study: (1) "the role of intellectual property law in antitrust law"; (2) "how antitrust enforcement should change in the global economy"; and (3) "the role of state attorneys general in enforcing antitrust laws."[46]

The Act obliged the Commission to perform four tasks:

1. "to examine whether the need exists to modernize the antitrust laws and to identify and study related issues";
2. "to solicit views of all parties concerned with the operation of the antitrust laws";

3. "to evaluate the advisability of proposals and current arrangements with respect to any issues so identified"; and
4. "to prepare and submit to Congress and the President a report . . . ."[47]

The Act provided the Commission with three years to complete these tasks[48] and authorized $4 million to be appropriated for the Commission to perform its work.[49]

2. Organization of the Commission

The Antitrust Modernization Commission Act called for the appointment of twelve Commissioners, four by the House of Representatives, four by the Senate, and four by the President.[50] Appointments by both houses of Congress were split equally between the Democratic and Republican parties.[51] No more than two of the President's four appointments could be from the same political party.[52] The Chair was designated by the President; the Vice-Chair was designated jointly by the Democratic leadership of the House of Representatives and the Senate.[53]

The House of Representatives appointed as Commissioners Donald G. Kempf, Jr., John L. Warden,[54] John H. Shenefield, and Debra A. Valentine.[55] The Senate appointed W. Stephen Cannon, Makan Delrahim,[56] Jonathan M. Jacobson, and Jonathan R. Yarowsky.[57] The President appointed to the Commission Bobby R. Burchfield, Dennis W. Carlton, Deborah A. Garza, and Sanford M. Litvack.[58] The President designated Commissioner Garza as Chair; the Democratic leadership of the House of Representatives and the Senate designated Commissioner Yarowsky as Vice-Chair. Pursuant to the AMC Act, the Commission appointed Andrew J. Heimert to be the Executive Director and General Counsel.[59] The Commission subsequently hired additional staff and appointed advisors to assist it in its work.[60]

3. Transparency and Involvement of the Public

The Commission's work proceeded in three general phases: selection of issues for study, study of those issues, and deliberation upon the recommendations the Commission would make on the issues it studied. At each phase, the public was invited to participate through written comments and testimony and by observing the Commission's hearings and deliberations.

The Commission's principal mechanism for informing the public of its work was through its website, *www.amc.gov*. All materials that the Commission discussed at its meetings were posted on the website in advance of the meetings. The Commission placed its entire record on the website as it was developed. Comments from the public were posted as soon after receipt as possible. Witness statements for hearings were made available on the website as far in advance of the hearing as the witnesses provided them, and transcripts from the hearings were posted shortly after each hearing.

a. Issue Selection Through Public Comment and Outreach

The first phase of the Commission's work was to select issues for study. Consistent with its mandate to solicit the views of interested persons, the Commission requested that the public propose issues for study.[61] The Commission received comments from fifty-six entities proposing a variety of issues for study.[62] Commissioners also specifically solicited the views of a variety of persons and organizations, including consumer organizations, current and former state and federal antitrust enforcement officials, and federal judges. The Commission met in January 2005 to deliberate publicly on a list of approximately sixty possible issues synthesized by Commission staff from the comments and input received in the fall of 2004.[63] Ultimately, the Commission adopted twenty-five issues (broadly defined) for study.

b. Information Gathering Through Public Comment and Hearings

Having selected issues for study, the Commission began an extended study and evaluation of these issues and proposals regarding them.[64] The Commission compiled its record through two principal mechanisms: comments from the public and hearings.[65]

The Commission requested comment from the public on the issues it selected, including specific questions about the U.S. antitrust laws and whether change was advisable to any of them.[66] Although the majority of comments were provided to the Commission in 2005—during the Commission's major study period—members of the public continued to submit comments throughout the entire period of the Commission's work. Overall, the Commission received 192 comments from 126 persons or organizations.[67]

Between June 2005 and October 2006, the Commission held 18 hearings over 13 days, with testimony by 120 witnesses, generating almost 2500 pages of transcripts.[68] Witnesses were selected to provide a balance and diversity of views. The public was invited to, and did, comment on issues addressed in the hearings.[69] All hearings were open to the public.

c. Deliberations on Possible Recommendations and Report Drafting

Commission deliberations on the recommendations in this Report occurred between May 2006 and February 2007. Overall, the Commission met to deliberate on eleven days. All deliberations of the Commission were held in public. Documents prepared by staff to assist the Commissioners in their deliberations were made available to the public in advance of the meetings and at the meetings themselves. The Report was drafted to explain the recommendations agreed to by a majority of Commissioners, and reflects the views of the Commissioners supporting each recommendation.

2. RECOMMENDATIONS

The charge to this Commission has been to study, evaluate, and make recommendations for the antitrust landscape as it now exists, much changed from earlier years. The current antitrust panorama, of course, covers a broad array of issues; to study all of the possible issues would be neither efficient nor desirable. To use its resources most productively, the Commission chose to focus on four primary areas: substantive standards of antitrust law; enforcement institutions and processes; civil and criminal remedies; and statutory and other exceptions to competition (such as immunities and exemptions from the antitrust laws). The Chapters that address these issues are briefly described below.

Chapter I addresses certain aspects of substantive antitrust law. Chapter I.A reviews changes in antitrust law in recent decades and discusses antitrust analysis in industries in which innovation, intellectual property, and technological change are central features (the “new economy”). Chapters I.B and I.C assess two areas of antitrust analysis—mergers and exclusionary conduct—in greater depth. Finally, in light of the importance of intellectual property to competition in a high-technology economy, Chapter I.D briefly discusses how the operation of patent law can affect competition.

Chapter II discusses enforcement institutions and processes. Chapter II.A deals with the two federal antitrust agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission, and Chapter II.B addresses issues surrounding these agencies’ implementation and enforcement of the Hart-Scott-Rodino Act’s pre-merger notification process. Chapter II.C discusses antitrust enforcement at the state level, while Chapter II.D addresses international antitrust enforcement.

Chapter III addresses civil and criminal antitrust remedies. Chapter III.A discusses the monetary remedies available to private parties, such as treble damages, as well as liability rules. Issues related to indirect purchaser litigation are assessed in Chapter III.B. Chapter III.C examines civil remedies available to the federal government, and Chapter III.D discusses criminal remedies that the government may obtain.

Finally, Chapter IV evaluates statutes and particular doctrines that provide exceptions to free-market competition. Chapter IV.A addresses the Robinson-Patman Act. Chapter IV.B discusses statutory immunities and exemptions from antitrust law, regulated industries, and the state action doctrine.

The following are recommendations agreed to by a majority of the Commission. Dissenting votes are identified in the text of the Report and, in some instances, are discussed in separate statements of Commissioners.

Chapter I: Substantive Standards of Antitrust Law

A. Antitrust Law and the "New Economy"

1. There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.
2. In industries in which innovation, intellectual property, and technological change are central features, just as in other industries, antitrust enforcers should carefully consider market dynamics in assessing competitive effects and should ensure proper attention to economic and other characteristics of particular industries that may, depending on the facts at issue, have an important bearing on a valid antitrust analysis.

B. Substantive Merger Law

3. No statutory change is recommended with respect to Section 7 of the Clayton Act.

   3a. There is a general consensus that, while there may be disagreement over specific merger decisions, and U.S. merger policy would benefit from continued empirical research and examination, the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound.

   3b. The Commission was not presented with substantial evidence that current U.S. merger policy is materially hampering the ability of companies to operate efficiently or to compete in global markets.

4. No substantial changes to merger enforcement policy are necessary to account for industries in which innovation, intellectual property, and technological change are central features.

   4a. Current law, including the Merger Guidelines, as well as merger policy developed by the agencies and courts, is sufficiently flexible to address features in such industries.

5. **The Federal Trade Commission and the Antitrust Division of the Department of Justice should ensure that merger enforcement policy is appropriately sensitive to the needs of companies to innovate and obtain the scope and scale needed to compete effectively in domestic and global markets, while continuing to protect the interests of U.S. consumers.**

6. **The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance efficiency.**

7. **The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase the weight they give to certain types of efficiencies. For example, the agencies and courts should give greater credit for certain fixed-cost efficiencies, such as research and development expenses, in dynamic, innovation-driven industries where marginal costs are low relative to typical prices.**

8. **The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance consumer welfare by enabling the companies to increase innovation.**

9. **The agencies should be flexible in adjusting the two-year time horizon for entry, where appropriate, to account for innovation that may change competitive conditions.**

10. **The Federal Trade Commission and the Antitrust Division of the Department of Justice should seek to heighten understanding of the basis for U.S. merger enforcement policy. U.S. merger enforcement policy would benefit from further study of the economic foundations of merger policy and agency enforcement activity.**

    10a. **The Federal Trade Commission and the Antitrust Division of the Department of Justice should conduct or commission further study of the relationship between concentration, as well as other market characteristics, and market performance to provide a better basis for assessing the efficacy of current merger policy.**

    10b. **The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase their use of retrospective studies of merger enforcement decisions to assist in determining the efficacy of merger policy.**

11. The Federal Trade Commission and the Antitrust Division of the Department of Justice should work toward increasing transparency through a variety of means.

11a. The agencies should issue "closing statements," when appropriate, to explain the reasons for taking no enforcement action, in order to enhance public understanding of the agencies' merger enforcement policy.

11b. The agencies should increase transparency by periodically reporting statistics on merger enforcement efforts, including such information as was reported by the Federal Trade Commission in its 2004 Horizontal Merger Investigation Data, as well as determinative factors in deciding not to challenge close transactions. These reports should emanate from more frequent, periodic internal reviews of data relating to the merger enforcement activity of the Federal Trade Commission and the Antitrust Division of the Department of Justice. To facilitate and ensure the high quality of such reviews and reports, the Federal Trade Commission and the Antitrust Division of the Department of Justice should undertake efforts to coordinate and harmonize their internal collection and maintenance of data.

11c. The agencies should update the Merger Guidelines to explain more extensively how they evaluate the potential impact of a merger on innovation.

11d. The agencies should update the Merger Guidelines to include an explanation of how the agencies evaluate non-horizontal mergers.

C. Exclusionary Conduct

12. In general, standards for applying Section 2 of the Sherman Act's broad proscription against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize overdeterrence and underdeterrence, both of which impair consumer welfare.

13. Congress should not amend Section 2 of the Sherman Act. Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. Although it is possible to disagree with the decisions in particular cases, in general the courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies not available to competitors are generally not improper, even for a "dominant" firm and even where competitors might be disadvantaged.

14. Additional clarity and improvement are best achieved through the continued evolution of the law in the courts. Public discourse and continued research will also aid in the development of consensus in the courts regarding the proper legal standards to evaluate the likely competitive effects of bundling and unilateral refusals to deal with a rival in the same market.

15. Additional clarity and improvement in Sherman Act Section 2 legal standards are desirable, particularly with respect to areas where there is currently a lack of clear and consistent standards, such as bundling and whether and in what circumstances (if any) a monopolist has a duty to deal with rivals.

16. The lack of clear standards regarding bundling, as reflected in *LePage's v. 3M*, may discourage conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare.

17. Courts should adopt a three-part test to determine whether bundled discounts or rebates violate Section 2 of the Sherman Act. To prove a violation of Section 2, a plaintiff should be required to show each one of the following elements (as well as other elements of a Section 2 claim): (1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product; (2) the defendant is likely to recoup these short-term losses; and (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition.

18. In general, firms have no duty to deal with a rival in the same market.

19. Market power should not be presumed from a patent, copyright, or trademark in antitrust tying cases.

D. Antitrust and Patents

20. Joint negotiations with intellectual property owners by members of a standard-setting organization with respect to royalties prior to the establishment of the standard, without more, should be evaluated under the rule of reason.

21. Congress should seriously consider recommendations in the Federal Trade Commission and National Academy of Sciences reports with the goal of encouraging innovation and at the same time avoiding abuse of the patent system that, on balance, will likely deter innovation and unreasonably restrain competition. In particular:

    21a. Congress should seriously consider the Federal Trade Commission and National Academy of Sciences recommendations targeted at ensuring the quality of patents.

    21b. Congress should ensure that the Patent and Trademark Office is adequately equipped to handle the burden of reviewing patent applications with due care and attention within a reasonable time period.

    21c. The courts and the Patent and Trademark Office should avoid an overly lax application of the obviousness standard that allows patents on obvious subject matter and thus harms competition and innovation.

Chapter II: Enforcement Institutions and Processes

A. Dual Federal Enforcement

22. The Federal Trade Commission and the Antitrust Division of the Department of Justice should develop and implement a new merger clearance agreement based on the principles in the 2002 Clearance Agreement between the agencies, with the goal of clearing all proposed transactions to one agency or the other within a short period of time. To this end, the appropriate congressional committees should encourage both antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing the new agreement.

23. **To ensure prompt clearance of all transactions reported under the Hart-Scott-Rodino Act, Congress should enact legislation to require the Federal Trade Commission and the Antitrust Division of the Department of Justice to clear all mergers reported under the Hart-Scott-Rodino Act (for which clearance is sought) to one of the agencies within a short period of time (for example, no more than nine calendar days) after the filing of the pre-merger notification.**

24. **The Federal Trade Commission should adopt a policy that when it seeks injunctive relief in Hart-Scott-Rodino Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties.**

25. **Congress should amend Section 13(b) of the Federal Trade Commission Act to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases.**

26. **Congress should ensure that the same standard for the grant of a preliminary injunction applies to both the Federal Trade Commission and the Antitrust Division of the Department of Justice by amending Section 13(b) of the Federal Trade Commission Act to specify that, when the Federal Trade Commission seeks a preliminary injunction in a Hart-Scott-Rodino Act merger case, the Federal Trade Commission is subject to the same standard for the grant of a preliminary injunction as the Antitrust Division of the Department of Justice.**

B. The Hart-Scott-Rodino Act Pre-Merger Review Process

27. **No changes are recommended to the initial filing requirements under the Hart-Scott-Rodino Act.**

28. **Congress should de-link funding for the Federal Trade Commission and the Antitrust Division of the Department of Justice from Hart-Scott-Rodino Act filing fee revenues.**

29. **The Federal Trade Commission and the Antitrust Division of the Department of Justice should continue to pursue reforms of the Hart-Scott-Rodino Act merger review process to reduce the burdens imposed on merging parties by second requests.**

30. The Federal Trade Commission and the Antitrust Division of the Department of Justice should systematically collect and record information regarding the costs and burdens imposed on merging parties by the Hart-Scott-Rodino Act process, to improve the ability of the agencies to identify ways to reduce those costs and burdens and enable Congress to perform appropriate oversight regarding enforcement of the Hart-Scott-Rodino Act.

31. The agencies should evaluate and consider implementing several specific reforms to the second request process.

31a. The agencies should adopt tiered limits on the number of custodians whose files must be searched pursuant to a second request.

31b. The agencies should in all cases inform the merging parties of the competitive concerns that led to a second request.

31c. To enable merging companies to understand the bases for and respond to any agency concern, the agencies should inform the parties of the theoretical and empirical bases for the agencies' economic analysis and facilitate dialogue including the agency economists.

31d. The agencies should reduce the burden of translating foreign-language documents.

31e. The agencies should reduce the burden of requests for data not kept in the normal course of business by the parties.

C. State Enforcement of Antitrust Laws

32. No statutory change is recommended to the current role of the states in non-merger civil antitrust enforcement.

33. State non-merger enforcement should focus primarily on matters involving localized conduct or competitive effects.

34. No statutory change is recommended to the current roles of federal and state antitrust enforcement agencies with respect to reviewing mergers.

35. Federal and state antitrust enforcers are encouraged to coordinate their activities and to seek to avoid subjecting companies to multiple, and possibly inconsistent, proceedings.

36. Federal and state antitrust enforcers should consider the following actions to achieve further coordination and cooperation and thereby improve the consistency and predictability of outcomes in merger investigations.

36a. The states and federal antitrust agencies should work to harmonize their application of substantive antitrust law, particularly with respect to mergers.

36b. Through state and federal coordination efforts, data requests should be consistent across enforcers to the maximum extent possible.

36c. The state antitrust agencies should work to adopt a model confidentiality statute with the goal of eliminating inconsistencies among state confidentiality agreements.

D. International Antitrust Enforcement

37. The Federal Trade Commission and the Antitrust Division of the Department of Justice should, to the extent possible, pursue procedural and substantive convergence on sound principles of competition law.

38. As a matter of priority, the Federal Trade Commission and the Antitrust Division of the Department of Justice should study and report to Congress promptly on the possibility of developing a centralized international pre-merger notification system that would ease the burden on companies engaged in cross-border transactions.

39. Congress should amend the International Antitrust Enforcement Assistance Act to clarify that it does not require that Antitrust Mutual Assistance Agreements include a provision allowing the non-antitrust use of information obtained pursuant to an AMAA.

40. Congress should provide budgetary authority, as well as appropriations, directly to the Federal Trade Commission and the Antitrust Division of the Department of Justice to provide international antitrust technical assistance.

41. The United States should pursue bilateral and multilateral antitrust cooperation agreements that incorporate comity principles with more of its trading partners and make greater use of the comity provisions in existing cooperation agreements.

    41a. Cooperation agreements should explicitly recognize the importance of promoting global trade, investment, and consumer welfare, and the impediment that inconsistent or conflicting antitrust enforcement poses. Existing agreements should be amended to add appropriate language.

    41b. Cooperation agreements should incorporate several principles of negative and positive comity relating to circumstances when deference is appropriate, the harmonization of remedies, consultation and cooperation, and "benchmarking reviews."

42. As a general principle, purchases made outside the United States from a seller outside the United States should not be deemed to give rise to the requisite effects under the Foreign Trade Antitrust Improvements Act.

Chapter III: Civil and Criminal Remedies

A. Private Monetary Remedies and Liability Rules

43. No change is recommended to the statute providing for treble damages in antitrust cases.

44. No change is recommended to the statute that provides for prejudgment interest in antitrust cases; prejudgment interest should be available only in the circumstances currently specified in the statute.

45. No change is recommended to the statute providing for attorneys' fees for successful antitrust plaintiffs. In considering an award of attorneys' fees, courts should consider whether, among other factors, the principal development of the underlying evidence was in a government investigation.

46. Congress should enact a statute applicable to all antitrust cases involving joint and several liability that would permit non-settling defendants to obtain reduction of the plaintiffs' claims by the amount of the settlement(s) or the allocated share(s) of liability of the settling defendant(s), whichever is greater. The recommended statute should also allow claims for contribution among non-settling defendants.

B. Indirect Purchaser Litigation

47. Direct and indirect purchaser litigation would be more efficient and more fair if it took place in one federal court for all purposes, including trial, and did not result in duplicative recoveries, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury. To facilitate this, Congress should enact a comprehensive statute with the following elements:

- Overrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law. Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers. Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered.
- Allow removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III.
- Allow consolidation of all direct and indirect purchaser actions in a single federal forum for both pre-trial and trial proceedings.
- Allow for certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers.

C. Government Civil Monetary Remedies

48. There is no need to give the antitrust agencies expanded authority to seek civil fines.

49. **There is no need to clarify, expand, or limit the agencies' authority to seek monetary equitable relief. The Commission endorses the Federal Trade Commission's policy governing its use of monetary equitable remedies in competition cases.**

D. Criminal Remedies

50. **While no change to existing law is recommended, the Antitrust Divsion of the Department of Justice should continue to limit its criminal enforcement activity to "naked" price-fixing, bid-rigging, and market or customer allocation agreements among competitors, which inevitably harm consumers.**

51. **No change should be made to the current maximum Sherman Act fine of $100 million or the applicability of 18 U.S.C. § 3571(d), the alternative fines statute, to Sherman Act offenses. Questions regarding application of Section 3571(d) to Sherman Act prosecutions should be resolved by the courts.**

52. **Congress should encourage the Sentencing Commission to reevaluate and explain the rationale for using 20 percent of the volume of commerce affected as a proxy for actual harm, including both the assumption of an average overcharge of 10 percent of the amount of commerce affected and the difficulty of proving the actual gain or loss.**

53. **The Sentencing Commission should amend the Sentencing Guidelines to make explicit that the 20 percent harm proxy (or any revised proxy)—used to calculate the pecuniary gain or loss resulting from a violation—may be rebutted by proof by a preponderance of the evidence that the actual amount of overcharge was higher or lower, where the difference would materially change the base fine.**

54. **No change to the Sentencing Guidelines is needed to distinguish between different types of antitrust crimes because the Guidelines already apply only to "bid-rigging, price-fixing, or market allocation agreements among competitors," and the Antitrust Division of the Department of Justice limits criminal enforcement to such hard-core cartel activity as a matter of both historic and current enforcement policy.**

Chapter IV: Government Exceptions to Free-Market Competition

A. The Robinson-Patman Act

55. Congress should repeal the Robinson-Patman Act in its entirety.

B. Immunities and Exemptions, Regulated Industries, and the State Action Doctrine

56. Congress should not displace free-market competition absent extensive, careful analysis and strong evidence that either (1) competition cannot achieve societal goals that outweigh consumer welfare, or (2) a market failure requires the regulation of prices, costs, and entry in place of competition.

Immunities and Exemptions

57. Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability *and* is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.

58. In evaluating the need for existing or new immunities, Congress should consider the following:

    - Whether the conduct to which the immunity applies, or would apply, could subject actors to antitrust liability;
    - The likely adverse impact of the existing or proposed immunity on consumer welfare; and
    - Whether a particular societal goal trumps the goal of consumer welfare, which is achieved through competition.

59. The following steps are important to assist Congress in its consideration of those factors:

- Create a full public record on any existing or proposed immunity under consideration by Congress.
- Consult with the Federal Trade Commission and the Antitrust Division of the Department of Justice about whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the existing or proposed immunity.
- Require proponents of an immunity to submit evidence showing that consumer welfare, achieved through competition, has less value than the goal promoted by the immunity, and the immunity is the least restrictive means to achieve that goal.

60. If Congress determines that a particular societal goal may trump the benefit of a free market to consumers and the U.S. economy in general, Congress should take the following steps:

- Consider a limited form of immunity—for example, limiting the type of conduct to which the immunity applies and limiting the extent of the immunity (for example, a limit on damages to actual, rather than treble, damages).
- Adopt a sunset provision pursuant to which the immunity or exemption would terminate at the end of some period of time, unless specifically renewed.
- Adopt a requirement that the Federal Trade Commission, in consultation with the Antitrust Division of the Department of Justice, report to Congress, before any vote on renewal, on whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the immunity proposed for renewal.

61. Courts should construe all immunities and exemptions from the antitrust laws narrowly.

Regulated Industries

62. Public policy should favor free-market competition over industry-specific regulation of prices, costs, and entry. Such economic regulation should be reserved for the relatively rare cases of market failure, such as the existence of natural monopoly characteristics in certain segments of an industry, or where economic regulation can address an important societal interest that competition cannot address. In general, Congress should be skeptical of claims that economic regulation can achieve an important societal interest that competition cannot achieve.

63. When the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible, consistent with that regulatory scheme. In particular, antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals.

64. Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all.

65. Courts should interpret savings clauses to give deference to the antitrust laws, and ensure that congressional intent is advanced in such cases by giving the antitrust laws full effect.

66. Courts should continue to apply current legal standards in determining when an immunity from the antitrust laws should be implied, creating implied immunities only when there is a clear repugnancy between the antitrust law and the regulatory scheme at issue, as stated in cases such as *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*.

67. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act; it does not displace the role of the antitrust laws in regulated industries.

68. Congress should evaluate whether the filed-rate doctrine should continue to apply in regulated industries and consider whether to overrule it legislatively where the regulatory agency no longer specifically reviews proposed rates.

69. Even in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act.

70. For mergers in regulated industries, the relevant antitrust agency should perform the competition analysis. The relevant regulatory authority should not re-do the competition analysis of the antitrust agency.

71. The federal antitrust agencies and other regulatory agencies should consult on the effects of regulation on competition.

72. The antitrust enforcement agencies and courts should take account of the competitive characteristics of regulated industries, including the effects of regulation.

73. Mergers in regulated industries should be subject to the requirements of the Hart-Scott-Rodino Act, if they meet the tests for its applicability, or to an equivalent pre-merger notification and investigation procedure, such as set forth in the banking statutes, so that the relevant antitrust agency can conduct a timely and well-informed review of the proposed merger.

74. Congress should periodically review all instances in which a regulatory agency reviews proposed mergers or acquisitions under the agency's "public interest" standard to determine whether in fact such regulatory review is necessary.

    - In its reevaluation, Congress should consider whether particular, identified interests exist that an antitrust agency's review of the proposed transaction's likely competitive effects under Section 7 of the Clayton Act would not adequately protect. Such "particular, identified interests" would be interests other than those consumers' interests—such as lower prices, higher quality, and desired product choices—served by maintaining competition.

The State Action Doctrine

75. Congress should not codify the state action doctrine. Rather, the courts should apply the state action doctrine more precisely and with greater attention to both Supreme Court precedents and possible consumer harm from immunized conduct.

76. **The courts should not grant antitrust immunity under the state action doctrine to entities that are not sovereign states unless (1) they are acting pursuant to a clearly articulated state policy deliberately intended to displace competition in the manner at issue, and (2) the state provides supervision sufficient to ensure that the conduct is not the result of private actors pursuing their private interests, rather than state policy.**

77. **As proposed in the FTC State Action Report, the courts should reaffirm a clear articulation standard that focuses on two questions: (1) whether the conduct at issue has been authorized by the state; and (2) whether the state has deliberately adopted a policy to displace competition in the manner at issue.**

78. **The courts should adopt a flexible approach to the active supervision prong, with different requirements based on the situation.**

79. **Where the effects of potentially immunized conduct are not predominantly intrastate, courts should not apply the state action doctrine.**

80. **When government entities act as market participants, the courts should apply the same test for application of the state action doctrine to them as the courts apply to private parties seeking immunity under the state action doctrine.**

Notes

[1] Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11053, 116 Stat. 1856, 1856 (2002), *amended by* Antitrust Modernization Commission Extension Act of 2007, Pub. L. No. 110-6, 121 Stat. 61 (2007) [hereinafter AMC Act].

[2] William J. Baumol, The Free-Market Innovation Machine: Analyzing the Growth Miracle of Capitalism 3 (2002) [hereinafter Baumol, Free-Market Innovation Machine].

[3] Ben S. Bernanke, Gov., Fed. Reserve, Productivity, Remarks at the C. Peter McColough Roundtable Series on International Economics, Council on Foreign Relations (Jan. 19, 2005) [hereinafter Bernanke, Productivity] (citing Timothy F. Bresnahan & Manuel Trajtenberg, *General Purpose Technologies: "Engines of Growth?"*, 65 J. of Econometrics 83–108 (1995)).

[4] Ben S. Bernanke, Chairman, Fed. Reserve, Global Economic Integration: What's New and What's Not?, Remarks Before Federal Reserve Bank of Kansas City's Thirtieth Annual Economic Symposium (Aug. 25, 2006) [hereinafter Bernanke, Global Economic Integration].

[5] Alan Greenspan, Chairman, Fed. Reserve, Current Account, Remarks at Advancing Enterprise 2005 Conference (Feb. 4, 2005).

[6] Alan Greenspan, Chairman, Fed. Reserve, Economic Flexibility, Remarks Before HM Treasury Enterprise Conference (Jan. 26, 2004) [hereinafter Greenspan, Economic Flexibility]; International Competition Policy Advisory Committee, Antitrust Division of the Department of Justice, Final Report 33 (2000) [hereinafter ICPAC Report].

[7] *See* Jonathan M. Jacobson, *Do We Need A "New Economy" Exception for Antitrust*, 16 Antitrust, Fall 2001, at 89, 89.

[8] *See* Bernanke, Productivity; Bernanke, Global Economic Integration.

[9] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[10] *See* National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General at 177 (1979) [hereinafter Shenefield Report] ("Free market competition, protected by the antitrust laws, should continue to be the general organizing principle of our economy."); Alan Greenspan, Chairman, Fed. Reserve, Economic Flexibility, Remarks Before National Association for Business Economics Annual Meeting (Sept. 27, 2005); *see also* J. Bruce McDonald, Statement at AMC Regulated Industries Hearing, at 1 (Dec. 5, 2005) ("The fundamental premise of the federal antitrust laws is that free and open competition is the most effective means to ensure lower prices, increased quality . . . and great innovation.").

[11] Ernest Gellhorn et al., Antitrust Law and Economics 57 (5th ed. 2004) [hereinafter Gellhorn, Antitrust Law and Economics] ("[C]ompetition presses producers to satisfy consumer wants at the lowest price while using the fewest resources.").

[12] *See, e.g.*, Terry Calvani, *Consumer Welfare is the Prime Objective of Antitrust*, Legal Times, Dec. 24, 1984, at 14 ("In a competitive equilibrium, each firm is forced to sell at the lowest possible production cost because it otherwise faces losing customers to competitors who undercut its prices.").

[13] Baumol, Free-Market Innovation Machine, at 10.

[14] *See* William W. Lewis, The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability 90–91 (2004).

[15] Baumol, Free-Market Innovation Machine, at 10.

[16] Greenspan, Economic Flexibility.

[17] Dennis W. Carlton & Jeffrey M. Perloff, Modern Industrial Organization 57 (4th ed. 2005) (stating that "perfect competition is rarely, if ever, encountered in the real world"); *see also* David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 Berkeley Tech. L.J. 729, 734–35 (Spring 2001).

[18] Herbert Hovenkamp, The Antitrust Enterprise: Principle and Execution 13 (2005) [hereinafter Hovenkamp, Antitrust Enterprise].

[19] *See, e.g.*, William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Legal and Economic Thinking*, 14 J.L. & Econ. Persp. 43, 52 (2000) [hereinafter Kovacic & Shapiro, *Antitrust Policy*] ("[E]conomists came to realize that departures from the perfect competition model are normal, indeed inevitable, even in 'competitive' industries.'").

[20] Gellhorn, Antitrust Law and Economics, at 72.

[21] *Id.* at 72–73.

[22] Debate continues about the precise definition of "consumer welfare." *See, e.g.*, Merger Enforcement Transcript at 112–195 (Nov. 17, 2005) (various witnesses debating the proper meaning). The Supreme Court has not ruled specifically on this issue. The Commission's use of the term "consumer welfare" does not imply a choice of a particular definition.

Judge Robert Bork argued that Congress's goal in passing the Sherman Act was to optimize efficiency, regardless of whether producers or consumers capture the gains. *See generally* Robert Bork, The Antitrust Paradox 61–66 (1978) [hereinafter Bork, Antitrust Paradox]. This will achieve consumer welfare, proponents maintain, because *all* consumers in the economy benefit when fewer resources are needed to make a product and those freed-up resources can be put to a higher and better use. *See, e.g.*, Merger Enforcement Trans. at 171–72 (Rule). In certain limited cases—for example, if a merger to monopoly would significantly lower costs and lead to a more efficient allocation of resources, but would also raise consumer prices—Judge Bork's approach would permit the transaction to be consummated, despite an increase in consumer prices, because the merger would create efficiency gains that outweighed deadweight losses. *See* Bork, Antitrust Paradox, at 91, 107–11.

Others, however, argue that Congress's main goal was to prevent price increases to consumers—that is, wealth transfers from consumers to producers. *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concerns of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65, 68 (1982) [hereinafter Lande, *Wealth Transfers*]. Proponents of this approach distinguish between the consumers of products in a relevant market (consumers) and the shareholders of the firms in that market (producers). *See, e.g.*, Merger Enforcement Trans. at 121, 161 (Baker). They maintain that antitrust law should not allow wealth transfers from consumers to producers, even if gains in overall efficiency must be sacrificed. *See* Lande, *Wealth Transfers*, at 69–70; Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 Cal. L. Rev. 1580, 1592 (1983).

The use of one standard or the other can have various implications for antitrust analysis. *See, e.g.*, Merger Enforcement Trans. at 118–19, 137–38 (Cary) (discussing circumstances in which fixed-cost savings should, or should not, be considered in merger analysis). Nonetheless, the use of one standard versus the other often does not change the results of that analysis, and the cases in which the choice of standard would make a difference are relatively few. *See* Merger Enforcement Trans. at 166–67 (Cary) (standards often do not produce inconsistent results); *id.* at 122 (Baker) (stating that "possibilities for conflict are largely hypothetical," and that in his experience, "agency investigations rarely turn on the welfare standard"); *id.* at 172–73 (Rule) (difficulties in calculating with precision different types of efficiencies raises questions about how much difference using one standard rather than another makes).

[23] *See generally* Kovacic & Shapiro, *Antitrust Policy*, at 43 ("As economic learning changed, the contours of antitrust doctrine . . . would shift as well.").

[24] *See generally* Timothy J. Muris, FTC Chairman, Improving the Economic Foundations of Competition Policy, Remarks at George Mason University Law Review's Winter Antitrust Symposium (Jan. 15, 2003) (referring to the "importance of regularly reassessing the economic assumptions of current policy, of distilling economic insights . . . and of doing empirical research . . . .").

[25] *See* Stephen Calkins, *Antitrust Modernization: Looking Backwards*, 31 J. Corp. L. 421, 425 (2006) [hereinafter Calkins, *Looking Backwards*]; Albert Foer, *Putting the Antitrust Modernization Commission into Perspective*, 51 Buff. L. Rev. 1029, 1029 (2003) [hereinafter Foer, *Putting AMC into Perspective*]; Thomas E. Kauper, *The Report of the Attorney General's National Committee to Study the Antitrust Laws:*

A Retrospective, 100 MICH. L. REV. 1867, 1867 (2002) [hereinafter, Kauper, *Antitrust Laws: A Retrospective*].

[26] Foer, *Putting AMC into Perspective*, at 1032–33. The TNEC had twelve members, including members of Congress and antitrust agency officials. *Id.* at 1033.

[27] *Id.* at 1036 (crediting the TNEC with leading to Clayton Act amendments that "strengthened the law against anticompetitive mergers").

[28] Kauper, *Antitrust Laws: A Retrospective*, at 1871–72 ("The general thrust of the Report is clear. It contemplates an antitrust world virtually free of per se rules.").

[29] *Id.* at 1873 (stating that "[m]ost of the per se rules adopted in the previous two decades have disappeared").

[30] PHIL C. NEAL ET AL., REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY, *reprinted in* 2 ANTITRUST L. & ECON. REV. 11 (1968–69).

[31] REPORT OF THE NIXON TASK FORCE ON PRODUCTIVITY AND COMPETITION, *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 413, at X-1 to X-14 (June 10, 1969).

[32] SHENEFIELD REPORT.

[33] *See generally* William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1134–38 (1989).

[34] Calkins, *Looking Backwards*, at 436; *see also* Foer, *Putting AMC into Perspective*, at 1040–41 (citing CHARLES R. GEISST, MONOPOLIES IN AMERICA 240 (2000)).

[35] *See* Foer, *Putting AMC into Perspective*, at 1043–44 & n.55.

[36] Calkins, *Looking Backwards*, at 434–35.

[37] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C. § 18a).

[38] Calkins, *Looking Backwards*, at 439.

[39] *Id.* at 442 ("The Shenefield Report's most immediate consequence was passage of the Antitrust Procedural Improvements Act of 1980 . . . ."); Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 2, 94 Stat. 1154, 1154–58; *see* H.R. REP. NO. 96-870 (1980) (legislative history). Among other things, the Act increased potential sanctions for attorney delay, authorized prejudgment interest especially in response to delay, and encouraged wider use of collateral estoppel. Calkins, *Looking Backwards*, at 442.

[40] Calkins, *Looking Backwards*, at 447.

[41] Foer, *Putting AMC into Perspective*, at 1043 ("Probably the most important contribution of [the Shenefield Report] was to underscore . . . the desirability of continuing the nation's . . . movement toward deregulation."); *see also* Calkins, *Looking Backwards*, at 440.

[42] Foer, *Putting AMC into Perspective*, at 1044; *id.* at 1045 (citing the launch of the International Competition Network as ICPAC's "most important effect" and "the materialization of [ICPAC's] Global Competition Initiative—a new venue where governmental officials, as well as private firms, nongovernmental organizations (NGOs) and others can exchange ideas and work towards common solutions of competition law and policy problems") (quoting ICPAC REPORT, at 29) (internal quotations and emphasis omitted).

[43] *See* International Competition Network Website, *available at* http://www.internationalcompetitionnetwork.org.

[44] AMC Act, § 11053.

[45] Antitrust Modernization Commission Act of 2001, H.R. 2325, 107th Cong. (2001).

[46] Press Release, H. Comm. On the Judiciary, Sensenbrenner Introduces Antitrust Study Commission Legislation (June 27, 2001), *available at* http://judiciary.house.gov/Legacy/news_062701.htm.

[47] AMC Act, § 11053.

[48] *Id.* § 11058.

[49] *Id.* § 11060. Actual appropriations to the Commission made in fiscal years 2004, 2005, 2006, and 2007 totaled slightly less than $4 million after application of across-the-board rescissions.

[50] *Id.* § 11054(a).

[51] *Id.*

[52] *Id.* § 11054(a)(1).

[53] *Id.* § 11054(i).

[54] 150 Cong. Rec. H224 (daily ed. Jan. 28, 2004).

[55] 149 Cong. Rec. H44 (daily ed. Jan. 7, 2003).

[56] 149 Cong. Rec. S2872 (daily ed. Feb. 26, 2003).

[57] 149 Cong. Rec. S87 (daily ed. Jan. 7, 2003).

[58] The White House, Personnel Announcement (Mar. 5, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/03/20040305-5.html. Bobby Burchfield was appointed by the President to replace Deborah Platt Majoras, who resigned her position as a Commissioner upon her appointment to be the Chairman of the Federal Trade Commission in August 2004. *See* The White House, Personnel Announcement (Dec. 17, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/12/20041217-17.html.

[59] AMC Act, § 11056(a)(1).

[60] *Id.* Short biographies of Commissioners and Commission staff are provided in Appendix D of the Report.

[61] *See* 69 Fed. Reg. 43,969 (July 23, 2004).

[62] *See generally* Appendix C (listing comments proposing issues for Commission study).

[63] *See* 69 Fed. Reg. 70,627 (Dec. 7, 2004). The Commission held brief subsequent meetings to consider the adoption of additional specific issues for study. *See* 70 Fed. Reg. 8568 (Feb. 22, 2005); 70 Fed. Reg. 37,747 (June 30, 2005).

[64] *See* AMC Act, § 11053(3).

[65] The Commission's Record is contained on the CD-ROM included with this Report.

[66] *See* 70 Fed. Reg. 28,902 (May 19, 2005). The Commission issued several additional requests for comment from the public on issues it adopted for study at later points and when its study revealed the desirability of obtaining more specific comments on certain issues. *See* 70 Fed. Reg. 46,474 (Aug. 10, 2005); 70 Fed. Reg. 69,510 (Nov. 16, 2005); 71 Fed. Reg. 30,863 (May 31, 2006); 71 Fed. Reg. 34,590 (June 15, 2006).

[67] *See* Appendix C of this Report (listing comments received on issues selected for study).

[68] Panels generally consisted of four or five witnesses each, although for some panels there were as few as one or two, or as many as seven, witnesses. A list of hearings and panelists appears in Appendix B of this Report.

[69] *See, e.g.*, 70 Fed. Reg. 37,746 (June 24, 2005); 71 Fed. Reg. 57,462 (Sept. 29, 2006).

Chapter II
Enforcement Institutions and Processes

In the United States, in addition to the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), fifty states and the District of Columbia are authorized to enforce federal antitrust laws as *parens patriae*, including in instances where the federal enforcers might have chosen not to challenge a transaction or conduct. Each state also has its own antitrust laws, which generally parallel federal law. In addition, numerous international competition authorities have begun to pursue enforcement much more aggressively, sometimes at odds with U.S. enforcement policies.

Principles of federalism and sovereignty support the authority of these many enforcers. Their existence is not without costs, however. Multiple enforcers may investigate the same conduct or transaction, increasing the burdens on companies and, ultimately, costs to consumers. In addition, different authorities may have divergent views as to how antitrust law should apply to certain types of conduct or mergers. These differences potentially subject companies to a range of different legal obligations, thus either imposing substantial compliance costs or compelling companies to follow the rules of the most restrictive jurisdiction. Multiple enforcers also may seek different remedies with respect to the same conduct or transaction, whether because they view the merits of the conduct or merger differently, or because the applicable law compels a different outcome. All of these differences across antitrust authorities have the potential to impose costs and inefficiencies on companies that may be passed on to consumers.

Of course, antitrust compliance and enforcement will always impose some costs on companies, regardless of the number of enforcers. It is important, however, to ensure that those costs do not overwhelm the benefits of antitrust enforcement or undermine consensus about the value of a strong antitrust enforcement regime. Enforcers should strive to avoid the imposition of unreasonable costs—for example, costs not reasonably justified by legitimate needs to gather further evidence or that could be avoided by coordination with, or deference to, other antitrust enforcers.

The Commission was urged to examine the need for multiple enforcers and the costs that multiple enforcers impose. In particular, it was suggested that the Commission consider whether it is necessary to maintain two federal enforcement agencies—the DOJ and the FTC—to enforce the antitrust laws and whether it is necessary, or even appropriate, for states to enforce federal antitrust law as *parens patriae*. In addition, many commenters expressed concern about international enforcement, including the potential that other jurisdictions might apply their competition laws to discriminate against U.S.-based companies, that international trade might be adversely affected by the policies of other jurisdictions that may be more restrictive than those of the United States, or that other regimes might be more hostile to intellectual property rights.

These important and interrelated questions focus attention directly on the procedural mechanisms used to enforce the antitrust laws. Accordingly, the Commission undertook to study a range of issues relevant to enforcement institutions and processes. The recommendations set forth in this Chapter address: (A) the consequences and costs of having two principal federal antitrust enforcers; (B) the costs of the merger review process used by the FTC and the DOJ pursuant to the Hart-Scott-Rodino Act; (C) the authority of the states independently to enforce federal antitrust laws; and (D) the implementation of mechanisms to enhance international cooperation in antitrust matters and appropriate convergence toward similar procedural and substantive approaches under each nation's antitrust laws.

Chapter II.A
Dual Federal Enforcement

1. INTRODUCTION

The Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have shared responsibility for government enforcement of the federal antitrust laws for decades. The position of Assistant Attorney General for Antitrust was created in 1903, and the Antitrust Division became a separate operating unit within the Department of Justice thirty years later.[1] Congress separately created the FTC in 1914, in part specifically to supplement the DOJ's enforcement of the antitrust laws.[2] Congress also believed that an administrative agency—conducting administrative adjudication of antitrust cases, and vested with broad information-gathering powers—would be a better vehicle for developing more flexible standards of antitrust law than were the courts.[3]

The antitrust enforcement authority of the DOJ and the FTC are similar. The DOJ enforces the Sherman Act and the Clayton Act through civil actions, and may also criminally prosecute certain "hard core" offenses under the Sherman Act. The FTC enforces the antitrust laws through Section 5 of the FTC Act, which prohibits "[u]nfair methods of competition," a term that is generally coextensive with the prohibitions of the Sherman and Clayton Acts.[4] In addition to actions in federal court, the FTC may enforce Section 5 through internal administrative litigation (known as Part III proceedings) before an administrative law judge, with review by the five FTC Commissioners and then a federal court of appeals.[5]

This system of "dual enforcement" has been the subject of periodic debate. Critics contend that having two agencies enforce the federal antitrust laws entails unnecessary duplication and can result in inconsistent antitrust policies, additional burdens on businesses, or other obstacles to efficient and fair federal antitrust enforcement. Some have suggested eliminating the FTC's antitrust authority; others propose reallocating nearly all antitrust enforcement authority to the FTC, with the DOJ prosecuting only criminal violations of the Sherman Act.

The Commission recommends no comprehensive change to the existing system in which both the FTC and the DOJ enforce the antitrust laws.* There appears to have been little, if any, duplication of effort between the two agencies, and they typically have worked together to develop similar, if not identical, approaches to substantive antitrust policy.[6] Although concentrating enforcement authority in a single agency generally would be a superior institutional structure,[7] the significant costs and disruption of moving to a single-agency system

* Commissioners Kempf, Litvack, and Shenefield would recommend eliminating the FTC's antitrust enforcement authority and vesting responsibility for all antitrust enforcement with the DOJ.

at this point in time would likely exceed the benefits.[8] Furthermore, there is no consensus as to which agency would preferably retain antitrust enforcement authority.

Because the Commission concluded that consolidation or reallocation of authority is not worth the costs (and any such efforts would likely be politically very difficult), the Commission focused its study and recommendations on the areas in which dual enforcement appears to have the most significant negative consequences. In particular, concerns regarding efficiency and fairness remain in the area of merger enforcement, where both agencies are responsible for enforcing the Clayton Act through the Hart-Scott-Rodino Act (HSR Act) premerger notification system. The Commission studied two particular ways in which having two agencies creates inefficiencies or unfairness to merging parties in certain situations.

First, the Commission reviewed the process through which the DOJ and the FTC decide which agency will investigate a proposed merger (known as the "clearance process"). In some instances—most frequently high-profile mergers between large companies—the agencies take a lengthy time, sometimes exceeding thirty days, to decide which agency will conduct the investigation of the merger. These delays impose significant burdens on companies with time-sensitive transactions that potentially provide great value to consumers and shareholders alike. The agencies attempted to address these concerns in 2002 by entering into an agreement regarding the clearance process that sought to ensure a decision would be made within ten days. However, the agencies abandoned this agreement after congressional opposition to its provisions allocating mergers based on industry area. The delays the agreement appeared to alleviate remain.

Second, the FTC and the DOJ take different approaches when seeking an injunction from a court to block a merger, in part because of the different statutes governing their authority in such instances. The DOJ generally seeks a permanent injunction (along with a preliminary injunction) against mergers it believes are anticompetitive, resolving the question fully and completely in a single proceeding before a judge. If the DOJ fails to obtain the permanent injunction it seeks, the parties can consummate the merger without further antitrust litigation (assuming the DOJ does not appeal). In contrast, the FTC seeks only preliminary injunctions—not permanent injunctions—in federal district court when challenging mergers it believes are anticompetitive. The FTC's approach permits it to seek permanent relief in administrative Part III proceedings if it fails to obtain a preliminary injunction. Thus, although the parties can consummate the proposed transaction (absent a stay), antitrust litigation may continue for the merged parties while the FTC pursues permanent relief via Part III proceedings. Such administrative litigation can be lengthy, leaving a completed transaction in the limbo of litigation for over a year. In addition, the statutory standard governing when the FTC is entitled to preliminary relief is arguably more favorable to the government than is the general standard governing motions by the DOJ for preliminary relief.

Some believe that these differences in DOJ and FTC practices and standards result in mergers' being treated differently depending on which agency is involved. The FTC's ability to continue a merger case in administrative litigation also may lead companies whose transactions are investigated by the FTC to feel greater pressure to settle a matter than if they had been investigated by the DOJ. Regardless of the degree of effect, these factors have led some knowledgeable practitioners to believe that companies whose mergers are investigated by the FTC are at a disadvantage as compared with those investigated by the DOJ. Any such differences—real or perceived—can undermine the public's confidence that the antitrust agencies are reviewing mergers efficiently and fairly and that it does not matter which agency reviews a given merger.

Based on its study of these issues, the Commission makes the following recommendations.

22. The Federal Trade Commission and the Antitrust Division of the Department of Justice should develop and implement a new merger clearance agreement based on the principles in the 2002 Clearance Agreement between the agencies, with the goal of clearing all proposed transactions to one agency or the other within a short period of time. To this end, the appropriate congressional committees should encourage both antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing the new agreement.

23. To ensure prompt clearance of all transactions reported under the Hart-Scott-Rodino Act, Congress should enact legislation to require the Federal Trade Commission and the Antitrust Division of the Department of Justice to clear all mergers reported under the Hart-Scott-Rodino Act (for which clearance is sought) to one of the agencies within a short period of time (for example, no more than nine calendar days) after the filing of the pre-merger notification.[*]

24. The Federal Trade Commission should adopt a policy that when it seeks injunctive relief in Hart-Scott-Rodino Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties.[†]

25. Congress should amend Section 13(b) of the Federal Trade Commission Act to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases.[**]

[*] Commissioners Burchfield, Cannon, and Yarowsky do not join this recommendation.

[†] Commissioners Cannon and Yarowsky do not join this recommendation.

[**] Commissioners Burchfield, Garza, Jacobson, and Kempf do not join this recommendation.

26. Congress should ensure that the same standard for the grant of a preliminary injunction applies to both the Federal Trade Commission and the Antitrust Division of the Department of Justice by amending Section 13(b) of the Federal Trade Commission Act to specify that, when the Federal Trade Commission seeks a preliminary injunction in a Hart-Scott-Rodino Act merger case, the Federal Trade Commission is subject to the same standard for the grant of a preliminary injunction as the Antitrust Division of the Department of Justice.*

2. THE MERGER CLEARANCE PROCESS

A. Background

Merger enforcement at both the DOJ and the FTC consists primarily of the review of proposed mergers pursuant to the HSR Act.[9] Although the DOJ and the FTC have concurrent, overlapping authority to review nearly all HSR-reportable transactions,[10] in practice only one agency takes responsibility for investigation of a particular merger. To eliminate duplication in agency merger enforcement efforts, the agencies decide between themselves which agency will conduct a formal investigation of a particular transaction.[11] They accomplish this through the "clearance process"—one agency requests authority to investigate a transaction from the other agency, which "clears" the request. Neither agency will request non-public information from the merging parties (or third parties) until clearance has been received from the other agency.[12]

A large majority of mergers reported under the HSR Act do not raise competitive concerns and therefore do not result in clearance requests by either agency. Indeed, in over 80 percent of transactions over the past five years, neither agency sought clearance.[13] In most other cases, one agency requests clearance, which the other agency grants quickly. Usually, such matters involve industries in which one agency has a long record of expertise and experience, which is the traditional basis for assigning a merger to one agency or the other.[14]

In a limited number of cases, however, both agencies seek clearance to investigate a transaction, and the agencies must jointly determine which agency will conduct the investigation. In some matters in which clearance is "contested," the dispute is relatively quickly resolved because one agency concedes the other has greater relevant expertise in the products or industry at issue. In other matters, however, resolution of the dispute takes more

* Commissioners Burchfield, Cannon, and Yarowsky do not join this recommendation.

steps. First, the staff of each agency submits a "claims memo," explaining that agency's relevant experience regarding the product or industry involved in the merger.[15] Then the dispute is passed to increasingly senior staff until it is resolved, sometimes by the Chairman of the FTC and the Assistant Attorney General for Antitrust.[16] As detailed below, these disputes can cause significant delays in the review of a merger.

The FTC and the DOJ have long recognized concerns over clearance delays and have periodically implemented procedures that aim to reduce those delays.[17] Indeed, they have longstanding procedures regarding clearance for both merger and non-merger investigations.[18] Most recently, in August 2001, then-FTC Chairman Timothy Muris and then-Assistant Attorney General Charles James launched an effort to address increasingly serious delays in clearance. After an internal review, and after seeking recommendations from former antitrust officials, the FTC and the DOJ in early 2002 reached agreement on a new clearance framework.[19]

The 2002 Clearance Agreement explicitly identified which industries would be the primary responsibility of each agency.[20] These allocations of responsibility generally were consistent with the existing practices of assigning a merger to the agency with greater experience and expertise in the particular industry.[21] Under the agreement, each agency had a "right of first refusal" to review transactions in industries within its primary responsibility; both agencies retained authority to seek clearance for mergers in industries allocated to the other agency.[22] Thus, the agreement did not transfer or alter "jurisdiction" over mergers in particular industries. This allocation (and the 2002 Clearance Agreement itself) was subject to review every four years.[23] Finally, in the event a dispute arose regarding a particular transaction, the agreement created a dispute resolution mechanism, proceeding though increasing levels of seniority to the agency head, and then, if necessary, to binding arbitration, with a specified time—ten days—within which a clearance decision was to be made.[24]

The 2002 Clearance Agreement was in effect for only about two months, at which point the Antitrust Division withdrew from the agreement at the direction of the Attorney General. This withdrawal followed objections by Senator Ernest Hollings (at the time the Ranking Member on both the Senate Commerce Committee and the Senate Appropriations Subcommittee on Commerce, Justice, State, and the Judiciary) relating to certain of the industry allocations.[25] The FTC and the DOJ have not subsequently sought to implement a revised version of the 2002 Clearance Agreement, and have therefore continued to follow previous agreements regarding clearance.

B. Recommendations and Findings

22. The Federal Trade Commission and the Antitrust Division of the Department of Justice should develop and implement a new merger clearance agreement based on the principles in the 2002 Clearance Agreement between the agencies, with the goal of clearing all proposed transactions to one agency or the other within a short period of time. To this end, the appropriate congressional committees should encourage both antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing the new agreement.

Clearance disputes impose substantial costs in a small but meaningful number of mergers. Although clearance disputes are relatively infrequent, when they occur they can cause significant delays in the review of a proposed transaction, since neither agency can investigate until the dispute is resolved.[26] Because these disputes reduce the time for initial review, they impose costs on merging parties either by extending the wait before they may consummate the transaction or by leading to the unnecessary issuance of a costly and burdensome second request, and sometimes both.[27] These effects can be especially significant because the transactions that spark clearance disputes are often among the largest mergers with the most substantial implications (whether positive or negative) for the U.S. economy.[28] These disputes, and the costs they impose, ultimately undermine the effectiveness and efficiency of agency review of proposed transactions under the HSR Act, and their elimination is of particular importance.[29] Moreover, the disputes create tension in the normally cooperative relationship between the two agencies and undermine public confidence in the U.S. antitrust enforcement regime.[30]

In the most serious instances, a clearance dispute may consume so much time that the agency cannot conduct an initial competitive assessment within the statutory thirty-day waiting period. In this situation, the agency may issue a second request, thereby preventing the parties from completing the transaction until they have complied with the second request, and imposing upon the parties the burden of responding to that request.[31] More commonly, the agencies provide the parties with an option to withdraw their pre-merger notification and re-file it, which restarts the thirty-day waiting period and allows the parties to forestall issuance of a second request.[32] This approach, in essence, transforms the statutory thirty-day waiting period into a sixty-day waiting period, so that the parties must wait an additional thirty days before either consummating their transaction or receiving and responding to a second request.[33]

The average number of clearance disputes each year (including merger and non-merger) increased more than seven-fold, from an average of ten during FY1982–89 to an average of eighty-three during FY1990–2001.[34] By comparison, reported transactions rose only 74 percent.[35] The number of clearance disputes since 2002 has remained stable when adjusted for the number of HSR filings.[36] The reasons for the increase are not clear. Some commentators suggest that the increase in clearance disputes is, in part, the result of changes in the economy, such as increased convergence between industries that were formerly distinct, which has made the existing arrangements that relied on industry experience less effective at providing clear determinations.[37] Whatever the cause, it is clear that clearance disputes continue to affect a small but meaningful number of mergers notified under the HSR Act.

The delays from clearance disputes are significant, however measured. Data compiled in developing the 2002 Clearance Agreement show that clearance disputes delayed review of a transaction an average of 17.8 business days during a twenty-one-month period.[38] Even where only one agency sought clearance, there were numerous instances in which the other agency delayed granting clearance for more than one week; clearance in these matters took an average of 12.8 days to resolve.[39] Recent data provided to the Commission by the agencies show that clearance-related delays remain. The FTC and the DOJ calculate that, over the past seven years, the average time for clearing HSR Act merger matters when both agencies sought clearance was 10.7 business days after the HSR filing.[40] This figure likely understates the magnitude of the problem for two reasons. First, this average is based on 297 matters in which both agencies made a claim for clearance; it is not limited to those in which the dispute was sufficiently significant to warrant an exchange of claims memos, which occurred 92 times.[41] It is the latter type of matter in which clearance delays can be most pronounced. Second, the agency data provide only averages, and do not give any indication of the incidence of lengthy delays. The agencies were unable to provide to the Commission such detailed data, which, if available, could shed additional light on the problems posed by clearance delays.

A clearance system containing the central elements of the 2002 Clearance Agreement is the most effective way to address the problems besetting the clearance process. The 2002 Clearance Agreement received uniform praise for being a fair and effective solution to the clearance dispute problem, and would be a marked improvement over the existing clearance process.[42] Moreover, the current agency heads recognize that approach as superior to the current arrangement.[43] Experience with the 2002 Clearance Agreement, although it was in place for only a short time, confirmed its effectiveness in expediting the clearance process and decreasing the number of clearance disputes.[44]

Ultimately, of course, the agencies should have final responsibility for developing the details of an improved clearance system, given their greater familiarity with the issues involved.[45] Nevertheless, because the 2002 Clearance Agreement provides the best starting point for the development of an improved clearance system, the Commission wishes to highlight two significant features of that agreement that should be part of any new agreement.

The most significant feature of the 2002 Clearance Agreement was its allocation of areas of primary responsibility by industry area.[46] This minimized room for clearance disputes in the first place, permitting quick determinations in the sizable majority of cases. It also provided transparency and predictability to the business community with respect to which agency would review a particular transaction.[47] Furthermore, by making an express allocation by industry in advance, the 2002 Clearance Agreement made further acquisition of expertise irrelevant to clearance decisions. In doing so, the agreement eliminated the agencies' incentives to conduct unnecessary, or more extensive, investigations in ongoing cases to enhance claims of expertise for use in future disputes.[48] Similarly, the allocation eliminated the agencies' incentives to fight for clearance to review a particular merger in order to preserve its claims of expertise in future mergers in the same or similar industries.[49]

The Commission does not take a position on how industries should be allocated between the two agencies or the specific allocations in the 2002 Clearance Agreement. However, those allocations may provide a useful starting point for discussion, because they were based largely on the agencies' historical experience and resulted from extensive negotiation between the agencies.[50] Far more important than the specific allocations is finding a procedure that permits the agencies to reach clearance decisions quickly.[51]

A second feature of the 2002 Clearance Agreement that should be part of any new clearance system is a "tie-breaker" to govern in the event the agencies cannot quickly agree to a clearance decision.[52] The agreement used an arbitrator to break deadlocks so that a final decision was ensured within ten days of the initial clearance request.[53] The Commission does not take a position on what tie-breaker the agencies should use. Although arbitration can result in clearance to the agency with greater relative experience, it takes additional time.[54] By comparison, a random mechanism—such as a coin flip, a "possession arrow" that alternates which agency gets clearance in disputed matters, or allocation of disputed matters depending on whether the transaction is assigned an odd or even file number—provides a nearly instantaneous decision, but sacrifices allocating a merger to the agency with greater relevant expertise and may be subject to "gaming."[55] Regardless of how the agencies balance these competing concerns and which tie-breaker they decide is best, however, any clearance agreement they adopt should include some tie-breaking mechanism that ensures final resolution within a short period (no longer than nine days) from the initial filing.

Finally, the Commission urges Congress and the agencies to work together in developing a new clearance system. Congressional opposition led to the demise of the 2002 Clearance Agreement, and concern over the potential for renewed congressional opposition has prevented the FTC and the DOJ from seeking to implement a new clearance agreement since 2002.[56] To facilitate congressional support and guidance, the agencies should consult with the appropriate congressional committees in developing a new clearance agreement. Congress should encourage the agencies in this process and provide guidance to allow the agencies to implement a clearance agreement that is satisfactory to Congress.[57]

23. To ensure prompt clearance of all transactions reported under the Hart-Scott-Rodino Act, Congress should enact legislation to require the Federal Trade Commission and the Antitrust Division of the Department of Justice to clear all mergers reported under the Hart-Scott-Rodino Act (for which clearance is sought) to one of the agencies within a short period of time (for example, no more than nine calendar days) after the filing of the pre-merger notification.*

The Commission also recommends that Congress enact a statute that requires the agencies to resolve clearance promptly. A statute will impose additional discipline on the agencies to ensure that clearance is resolved expeditiously. Furthermore, it will enhance the ability of Congress to use its oversight authority to monitor the agencies' compliance with the clearance requirement. Indeed, whether or not Congress enacts legislation in this area, the Commission believes that the timeliness of clearance dispute resolutions should be a part of Congress' continuing oversight of the agencies.

The legislation should require the agencies to make clearance decisions within a short period (*e.g.*, nine days) after the merging parties submit their pre-merger notification under the HSR Act. A period of this length is appropriate; indeed, the agencies have previously committed to resolving clearance within nine days from the date of filing.[58] The statute should not include a penalty for the failure of the agencies to comply with its terms, however, and Congress should make clear that the statute does not create any implied penalties (or rights) that would prevent effective merger enforcement on the merits of the transaction. A penalty that, for example, allowed the parties to consummate the transaction if the agencies failed to provide timely notification could harm consumers and would not effectively penalize the agency.[59] Rather, congressional oversight, facilitated by agency recordkeeping regarding compliance, should provide sufficient opportunity to impose any needed corrective action against the agencies.

Possible legislation that would impose such a requirement appears in Annex A.

* Commissioners Burchfield and Cannon do not join this recommendation.

Commissioner Burchfield notes that precatory, or even mandatory, congressional deadlines on agencies have rarely been effective in other contexts, and sees no reason to believe one would be more so here.

Although Commissioner Carlton joins this recommendation, he would impose some financial penalty on the agencies for failing to resolve clearance within the appropriate period.

3. INJUNCTIONS AND ADMINISTRATIVE LITIGATION IN MERGER MATTERS

A. Background

Both the FTC and the DOJ have essentially identical authority to conduct investigations under the HSR Act.[60] Both agencies are also authorized to seek an injunction in federal court to prevent consummation of a merger they believe may substantially lessen competition.[61] If the court grants an injunction, the parties almost always abandon the transaction because of the cost and uncertainty of keeping the deal in place while seeking reversal on appeal.[62] When a court denies the injunction, the parties typically complete the transaction nearly immediately (absent a stay by a court of appeals). Once a merger is completed, the agency is unlikely to seek any further action.[63]

Although both agencies have similar authority, their practices with respect to seeking permanent injunctions differ. Generally, the DOJ agrees with the parties to combine (or consolidate) proceedings for both a preliminary injunction and a permanent injunction before a district court.[64] The FTC's practice, in contrast, is to seek only a preliminary injunction in court (despite statutory authorization to seek permanent relief in court as well).[65] This practice results from its statutory authority to secure permanent relief through administrative litigation, an avenue not available to the DOJ. The FTC has never consolidated proceedings for preliminary and permanent relief in federal court in a merger case,[66] and has in fact affirmatively sought to prevent such consolidation.[67] The FTC's practice thus prevents consolidation under the rules of civil procedure.[68]

This difference in approach has two consequences. First, the DOJ generally faces a higher burden of proof before the court. Obtaining a permanent injunction requires the DOJ to prove its case by a preponderance of the evidence.[69] By comparison, the FTC needs to meet only a lower burden applicable to preliminary injunctions in government merger enforcement litigation (and, as explained below, the FTC arguably faces a preliminary injunction burden that is lower than that the DOJ would face if it sought only preliminary relief).[70] Second, the FTC, by not seeking a permanent injunction, retains the option to seek permanent relief through its internal administrative litigation process. It thus may pursue administrative litigation even when the district court does not grant a preliminary injunction.[71] In 1995 the FTC adopted a policy setting forth the circumstances in which it will bring administrative litigation after the denial of a preliminary injunction in merger cases.[72]

B. Recommendations and Findings

Parties to a proposed merger should receive comparable treatment and face similar burdens regardless of whether the FTC or the DOJ reviews their merger.[73] A divergence undermines the public's trust that the antitrust agencies will review transactions efficiently and fairly. More important, it creates the impression that the ultimate decision as to whether a merger may proceed depends in substantial part on which agency reviews the transaction. In particular, the divergence may permit the FTC to exert greater leverage in obtaining the parties' assent to a consent decree.[74] So long as both agencies retain authority to enforce the antitrust laws, such divergence should be minimized or eliminated. To accomplish this objective, the Commission makes three interrelated recommendations for administrative action and legislative change that, together, will ensure that parties before either agency face comparable procedural approaches and burdens when an injunction is sought, regardless of which agency reviews their merger.

24. The Federal Trade Commission should adopt a policy that when it seeks injunctive relief in Hart-Scott-Rodino Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties.*

The differences in the agencies' policies regarding consolidation of actions for preliminary and permanent relief impose significantly different burdens on the parties in two respects. The DOJ usually agrees with the merging parties to consolidate proceedings for preliminary and permanent injunctions; it therefore must establish that the proposed merger would violate Section 7 of the Clayton Act by a preponderance of the evidence.[75] By comparison, the FTC must meet the burden required for obtaining a preliminary injunction, which is generally regarded as lower.[76] Because the grant of any injunction (whether preliminary or permanent) almost always kills the deal, this difference could materially affect the parties' prospects for completing their transaction.[77] Second, the decision of the district court in a consolidated DOJ proceeding is final (barring an appeal); if the DOJ loses, the parties can be certain that the challenge is finished.[78] In contrast, if the FTC fails to obtain a preliminary injunction, it may pursue relief in a potentially lengthy and costly internal administrative proceeding.

The FTC has rarely sought administrative remedies after losing a preliminary injunction. This change in practice would eliminate that possibility altogether. The mere availability of such proceedings can harm parties by creating uncertainty as to the legal status of their transaction, a risk not faced when the DOJ brings a challenge to a merger. It thus can give the FTC greater leverage in seeking concessions in a consent decree. Although the FTC has not pursued a full administrative trial after denial of a preliminary injunction in at least fif-

* Commissioners Cannon and Yarowsky do not join this recommendation.

teen years,[79] its policy regarding the circumstances in which it would seek administrative litigation following the denial of a preliminary injunction does not rule out the possibility that it may pursue this course.[80] Indeed, in 2005 the FTC left an administrative complaint pending against Arch Coal for over eight months after it had failed to obtain a preliminary injunction, and has acted similarly in the recent past.[81]

This recommendation calls for the FTC to conform its practice to the DOJ's current practice regarding consolidation and thereby eliminate the difference in burden resulting from the agencies' divergent practices. There does not appear to be any obstacle to the FTC's adoption of the DOJ's approach: Section 13(b) of the FTC Act permits the FTC to seek permanent, as well as preliminary, injunctions in federal court.[82] This recommendation contemplates that the FTC may, as the DOJ does now, condition its consent to consolidation on the parties' agreement to a reasonable timetable for pre-hearing matters, in order to permit the FTC sufficient time to prepare its case on the merits.[83] The FTC should be able to agree to a reasonable schedule, just as the DOJ generally has been able to reach such agreements with merging parties.[84] In instances where the FTC cannot agree with the parties on timing and therefore seeks only a preliminary injunction, however, it should also seek any permanent relief in court, as the DOJ does, not in administrative litigation.

25. Congress should amend Section 13(b) of the Federal Trade Commission Act to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases.*

The FTC's ability to pursue administrative litigation even after losing a preliminary injunction proceeding can impose unreasonable costs and uncertainty on parties whose mergers are reviewed by the FTC, as compared to the DOJ.[85] If, as recommended above, the FTC seeks permanent relief in federal court it will not be able to bring administrative proceedings to challenge mergers. Statutory change, however, will ensure that even where the FTC does not seek permanent relief in court, it will not be able to resort to administrative liti-

* Commissioners Burchfield, Garza, Jacobson, and Kempf do not join this recommendation.

Commissioner Burchfield would preserve the option of subsequent administrative proceedings for situations in which, for whatever reason, the preliminary injunction and permanent injunction phases are not consolidated. He also notes that removing the authority of the FTC would be practically meaningless so long as the FTC retains the ability to reinstitute administrative proceedings against a consummated merger.

Commissioners Garza and Jacobson believe that follow-on administrative litigation following the denial of a preliminary injunction is inappropriate except in highly unusual contexts. Because the FTC has already acknowledged this point in its internal policy, Commissioners Garza and Jacobson believe that statutory change is both unnecessary and potentially harmful.

gation.[86] As a result, an amendment of the statute to bar administrative litigation in HSR cases will provide further reason for the FTC to seek permanent relief in district court, as recommended above.

Elimination of administrative litigation in HSR Act merger cases will not deprive the FTC of an important enforcement option. Although administrative litigation may provide a valuable avenue to develop antitrust law in general,[87] it appears unlikely to add significant value beyond that developed in federal court proceedings for injunctive relief in HSR Act merger cases.[88] Whatever the value, it is significantly outweighed by the costs it imposes on merging parties in uncertainty and in litigation costs. Indeed, the FTC's own conduct confirms holding administrative trials after losing an injunction rarely, if ever, adds significant value, as the FTC has not held an administrative trial regarding an HSR Act merger after losing a preliminary injunction motion in recent years.

The proposed statutory bar would not preclude the FTC from pursuing an administrative complaint after the consummation of a merger, based on evidence that the merger has had actual, as opposed to predicted, anticompetitive effects. In such circumstances, the merger is no longer in the time-sensitive stage of HSR Act review and should be subject to the FTC's usual administrative process.[89]

26. Congress should ensure that the same standard for the grant of a preliminary injunction applies to both the Federal Trade Commission and the Antitrust Division of the Department of Justice by amending Section 13(b) of the Federal Trade Commission Act to specify that, when the Federal Trade Commission seeks a preliminary injunction in a Hart-Scott-Rodino Act merger case, the Federal Trade Commission is subject to the same standard for the grant of a preliminary injunction as the Antitrust Division of the Department of Justice.*

There is at least a perception, if not a reality, that the FTC and the DOJ face different standards for obtaining a preliminary injunction.[90] Some antitrust practitioners contend that the

* Commissioners Burchfield, Cannon, and Yarowsky do not join this recommendation.

Commissioner Burchfield believes the case law has become clear that, unless Congress has articulated a different standard for injunctive relief, as it did for the Endangered Species Act, 16 U.S.C. §§ 1531-1544, *see* Tennessee Valley Authority v. Hill, 437 U.S. 153, 194 (1978), the traditional equitable test governs the grant or denial of injunctions, *see* Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), and eBay, Inc. v. MercExchange, LLC, 126 S. Ct. 1837 (2006). This evolving authority suggests that the DOJ and the FTC confront the same preliminary injunction standards. Further legislation on this issue is as likely to confuse as clarify.

Commissioners Garza, Jacobson, and Kempf join this recommendation but believe that the standard today is the same and that such legislation is not truly necessary. Nevertheless, clarification can do no harm and may be beneficial by removing possible doubts.

standard applicable to FTC actions, as applied by the courts, is less burdensome, or is generally perceived to be less burdensome, than the standard applicable to DOJ actions.[91] This difference (or even a perception of difference) can lead to adverse consequences for parties whose transaction is reviewed by the FTC. In particular, the FTC may have greater leverage in negotiating a consent decree with the merging parties.[92] In addition, just the perception that the applicable rules depend on the happenstance of which agency is reviewing the transaction can undermine confidence in the fairness of the dual merger enforcement regime.

The agencies face nominally different standards governing whether a federal district court will issue a preliminary injunction. The FTC must meet a public interest standard under Section 13(b) of the FTC Act, which calls for an injunction to be granted "[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."[93] Courts have employed a number of formulations in describing the required burden, such as whether the FTC raises questions that are "so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation."[94] By comparison, Section 15 of the Clayton Act, pursuant to which the DOJ seeks injunctions, does not specify a standard for obtaining preliminary relief. Accordingly, courts generally apply a version of the traditional equity test, which does not require the usual showing of irreparable injury.[95] Some courts describe the proper test as "whether the Government has shown a reasonable likelihood of success on the merits and whether the balance of equities tips in its favor."[96]

While the magnitude of the difference between the two standards is not clear, the Commission believes Congress should remove all doubt by ensuring that courts apply the same standard in ruling on a motion for a preliminary injunction, whether the injunction is sought by the FTC or the DOJ.[97] The Commission recommends that the statute omit any specific standard for granting a preliminary injunction, which should lead courts to employ the version of the traditional equity test that they use in merger cases brought by the DOJ. This change should not hamper the FTC's ability to obtain injunctive relief in appropriate cases;[98] on the contrary, its ability should be identical to that of the DOJ.

This statutory change should not extend beyond HSR Act merger cases. Section 13(b) gives the FTC general authority with respect both to competition and consumer protection cases. The Commission did not undertake to study whether this standard was inappropriate in other areas, particularly consumer protection. The legislation therefore should make clear that the existing statutory language of Section 13(b) would continue to apply to injunctions sought by the FTC in consumer protection and other non-HSR merger cases.

ANNEX A

Amend 15 U.S.C. § 18a to add subsection (e)(1)(B) as follows, and redesignate existing subsection (e)(1)(B) as subsection (e)(1)(C).

> No later than the end of the ninth day after the beginning of the waiting period as defined in subsection (b)(1)(A) of this section, the Federal Trade Commission or the Assistant Attorney General shall inform both persons (or in the case of a tender offer, the acquiring person) whether the Federal Trade Commission or the Assistant Attorney General will have the authority to issue a request for additional information (if any) pursuant to this subsection.

Notes

[1] *See* Ernest Gellhorn et al., *Has Antitrust Outgrown Dual Enforcement? A Proposal for Rationalization*, 35 Antitrust Bull. 695, 717–18 (1990) [hereinafter Gellhorn, *Has Antitrust Outgrown Dual Enforcement?*].

[2] D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 Antitrust L.J. 319, 319–20 (2003). *See generally* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L.J. 1, 4–5 (2003).

[3] *See* American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Dual Federal Merger Enforcement, at 2 (Oct. 28, 2005) [hereinafter ABA Comments re Dual Federal Merger Enforcement]; David Balto, *Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies*, 72 Antitrust L.J. 1113, 1113–14 (2005) [hereinafter Balto, *Reassessing the Approach to FTC Remedies*] (citing Philip Elman, Antitrust Enforcement: Retrospect and Prospect, Remarks Before First New England Antitrust Conference (Mar. 31, 1967)). The FTC has specific authority to gather information, which it may use to "enhance the development of antitrust law through studies and publication of reports." Balto, *Reassessing the Approach to FTC Remedies*, at 1114; William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development*, 72 Antitrust L.J., 861, 865–66 (2005) (emphasizing the importance of "competition policy R&D"); *see also* Guide to the Federal Trade Commission, *available at* http://www.ftc.gov/bcp/conline/pubs/general/guidetoftc.htm#bc (stating that "Congress created the FTC as a source of expertise and information on the economy" and noting as an example the FTC's research and policy work public workshops on issues such as the development of electronic marketplaces).

[4] 15 U.S.C. § 45. Section 5 of the Federal Trade Commission Act generally covers conduct condemned by the Sherman, Clayton, and Robinson-Patman Acts, but in some circumstances it may cover unfair methods of competition that are not unlawful under those laws. *See, e.g.*, FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972); *see also* American Bar Association, Section of Antitrust Law, Antitrust Law Developments 647–56 (6th ed. 2007) [hereinafter Antitrust Law Developments] (describing antitrust laws and other laws that the FTC is authorized to enforce and its authority under Section 5 of the FTC Act). The FTC does not have criminal enforcement authority.

[5] *See* 15 U.S.C. § 45(b)–(c); 16 C.F.R. § 3 (2006). In merger cases, the FTC may seek a preliminary or permanent injunction in federal court. 15 U.S.C. § 53(b).

[6] *See* Federal Enforcement Institutions Transcript at 102 (Sohn) (Nov. 3, 2005) (discounting the need for diversity in decision makers in merger regulation since "[t]he agencies have gone to considerable pains

to get together on the substance of Section 7"); Prof. Timothy J. Muris, Statement at AMC Federal Enforcement Institutions Hearing, at 15 (Nov. 3, 2005) [hereinafter Muris Statement re Federal Enforcement] (describing the agencies' efforts "to develop[] common substantive standards and to apply[] them consistently" in merger regulation). The agencies' joint development of the *Horizontal Merger Guidelines* and the *Commentary on the Horizontal Merger Guidelines* has facilitated this convergence.

[7] *See, e.g.*, Joe Sims, Statement at AMC Federal Enforcement Institutions Hearing, at 2 (Nov. 3, 2005) [hereinafter Sims Statement] ("[n]o sensible person would design" a dual system); Federal Enforcement Institutions Trans. at 51 (Blumenthal) (in advising other jurisdictions "doing it from scratch, you probably would design it differently . . . [with] one independent agency"); Gellhorn, *Has Antitrust Outgrown Dual Enforcement?*, at 736 ("[D]ual enforcement is at best inefficient, and at worst inconsistent with sound economic policy."); William E. Kovacic, *Downsizing Antitrust: Is it Time to End Dual Enforcement?*, 41 ANTITRUST BULL. 505, 515, 521, 535 (1996). *But see* Federal Enforcement Institutions Trans. at 85 (Sohn) ("I think there are strong arguments for having both an FTC and a Justice Department at the federal level."); American Antitrust Institute, Public Comments Submitted to AMC Regarding Enforcement Institutions, at 2 (July 15, 2005) [hereinafter AAI Comments re Enforcement Institutions] (dual enforcement can promote a "diversity of viewpoints and policy competition over what merger enforcement policy and cases are best").

[8] *See* Deborah Platt Majoras, Statement at AMC Barnett/Majoras Hearing, at 14 (Mar. 21, 2006) ("[C]hang[ing] the current system would come at a cost that would not be offset by countervailing benefits."); Federal Enforcement Institutions Trans. at 51 (Blumenthal) (arguing that the system generally works well and that the transition costs are substantial relative to any inefficiencies of the current system); *Nomination of Robert Pitofsky to be Chairman of the Federal Trade Commission: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 104th Cong. 13 (1995) (statement of Robert Pitofsky) (explaining that, although one might not have to set up the antitrust agencies this way in the first place, "the fact of the matter is it works rather well"). *See generally Report of the American Bar Association, Section of Antitrust Law, Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 113–19 (1989) [hereinafter 1989 ABA Report] (discussing the advantages and disadvantages of dual enforcement). Previous ABA panels have declined to recommend termination of dual enforcement. 1989 ABA Report, at 119 ("[A] majority of the Committee believe that the case for ending the FTC's role has not been made."); REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 2 (1969) (proposing that concurrent jurisdiction be retained while urging reexamination of the allocation of enforcement resources).

[9] *See generally* Chapter II.B of this Report regarding the Hart-Scott-Rodino Act pre-merger review process.

[10] There are a limited number of exceptions to the HSR Act. *See* 15 U.S.C. § 18a(c) (exempting various types of transactions from HSR's requirements); *see also* 15 U.S.C. § 21(a) (limiting FTC jurisdiction to enforce Section 7 by excluding certain common carriers and banks).

[11] *See* AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, THE MERGER REVIEW PROCESS: A STEP-BY-STEP GUIDE TO FEDERAL MERGER REVIEW 134–36 (3d ed. 2006) [hereinafter ABA, MERGER REVIEW PROCESS].

[12] *See id.* at 135 ("As a consequence [of the understandings underlying the clearance process], neither agency may begin an antitrust-related investigation until clearance has been granted.").

[13] *See* Letter from Marian Bruno and J. Robert Kramer II to Andrew Heimert, at chart D (Nov. 22, 2006, revised Feb. 8, 2007, & Mar. 7, 2007) [hereinafter FTC/DOJ Data Submission].

[14] Federal Trade Comm'n & U.S. Dep't of Justice, FTC/DOJ Clearance Procedures for Investigations (Dec. 1993), *in* AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, THE MERGER REVIEW PROCESS: A STEP-BY-STEP GUIDE TO FEDERAL MERGER REVIEW 513 (2d ed. 2001) [hereinafter 1993 FTC/DOJ Clearance Procedures] ("[T]he principal ground for clearance is expertise in the product involved . . . gained through a substantial antitrust investigation of the product within the last five years."); Michael N. Sohn, Statement at AMC Federal Enforcement Institutions Hearing, at 2 (Nov. 3, 2005) [hereinafter Sohn Statement] ("Traditionally, clearance decisions have been made on the basis of prior experience in leading substantial investigations relating to the product or industry segment in question.") (citing U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION MANUAL (3d ed. 1998)).

[15] Such disputes can happen if, for example, both agencies have significant relevant expertise with respect to the industry or products at issue; if each agency has substantial expertise in different industries or products at issue; or if neither agency has significant expertise in the products or industries at issues.

[16] 1993 FTC/DOJ Clearance Procedures; ABA Comments re Dual Federal Merger Enforcement, at 11.

[17] Muris Statement re Federal Enforcement, at 3–5.

[18] ABA, Merger Review Process, at 134–36. The agencies entered into a revised letter agreement setting forth clearance procedures in 1993. 1993 FTC/DOJ Clearance Procedures.

[19] Dep't of Justice, Antitrust Div. & Federal Trade Comm'n, Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (Mar. 5, 2002) [hereinafter 2002 Clearance Agreement].

[20] *Id.* ¶ 17.

[21] Federal Enforcement Institutions Trans. at 133 (Sims, Muris) (allocation was based on "historical experience"); Number of Enforcement Actions and Substantial Investigations by DOJ and FTC, by Industry, *available at* http://www.ftc.gov/opa/2002/02/clearance/clearchart.htm.

[22] 2002 Clearance Agreement, ¶ 17d.

[23] *Id.* ¶ 31.

[24] *Id.* ¶¶ 11–16, 25–29.

[25] *See* Matt Andrejczak, *Federal Trustbusters Abandon Pact: Justice, FTC Succumb to Budget Threats*, Market Watch, May 21, 2002, *available at* http://www.marketwatch.com/news/story/federal-trustbusters-abandon-merger-review/story.aspx?guid=%7BD7016EC7%2D6F14%2D4975%2D8F56%2D353D8FC05CC0%7D; *see also* Sohn Statement, at 5–6; Sims Statement, at 4.

[26] *See* Sims Statement, at 3 (process works "most of time" but can impose unacceptable delay when it breaks down); U.S. Chamber of Commerce, Public Comments Submitted to AMC, at 15 (Nov. 8, 2005) [hereinafter U.S. Chamber of Commerce Comments]; ABA Comments re Dual Federal Merger Enforcement, at 10; William J. Baer, Statement at AMC Merger Enforcement Hearing, at 13 (Nov. 17, 2005) [hereinafter Baer Statement].

[27] *See, e.g.*, ABA Comments re Dual Federal Merger Enforcement, at 10 ("All too often clearance is substantially delayed during the initial HSR Act waiting period, resulting either in Second Requests being issued . . . , or in the merging parties being forced unnecessarily to withdraw and re-file . . . to trigger a new, post-clearance, initial waiting period."); Baer Statement, at 13 ("The existing clearance process unduly delays antitrust clearance."); Sohn Statement, at 3–4; Sims Statement, at 3; Business Roundtable, Public Comments Submitted to AMC, at 21 (Nov. 4, 2005) [hereinafter Business Roundtable Comments]. *See generally* Chapter II.B of this Report regarding the HSR Act pre-merger review process, which describes the costs of complying with the second request process.

[28] For example, the agencies' clearance dispute over review of the AOL/Time Warner merger, one of the largest deals ever, took 45 days. *See* Letter from John J. Castellani, President, The Business Roundtable, to Timothy Muris, Chairman, FTC, at 4 (Feb. 25, 2002), *available at* http://www.ftc.gov/opa/2002/02/clearance/brt.pdf; Business Roundtable Comments, at 20–21 (noting lengthy clearance delays in the AOL/Time Warner, AT&T/Media One, Whirlpool/Maytag, and Northrop/United Defense merger matters).

[29] *See, e.g.*, ABA Comments re Dual Federal Merger Enforcement, at 10 ("[T]here is a pressing need to fix the system by which merger matters are cleared between the agencies."); Business Roundtable Comments, at 21 (the "clearance process requires an immediate solution").

The Commission's recommendation is focused upon, but not limited to, clearance delays in HSR Act matters, where the problem "ar[ises] most acutely." Muris Statement re Federal Enforcement, at 6. Clearance disputes may also delay non-HSR Act investigations, although the problem for businesses is usually less acute because they are not precluded from engaging in the allegedly unlawful conduct pending agency review. Overall, the sizable majority of clearance disputes arise in HSR Act merger matters: Over 90 percent (92 of 104) of instances in which the agencies exchanged claims memos between FY2000 and FY2006 involved merger matters. *See* FTC/DOJ Data Submission, at chart C.

30 *See* Federal Enforcement Institutions Trans. at 96 (Sims); John M. Nannes, Statement at AMC Federal Enforcement Institutions Hearing, at 2–3 (Nov. 3, 2005) [hereinafter Nannes Statement]; Muris Statement re Federal Enforcement, at 4–5 (citing one battle in which each side thought the other "was acting in bad faith") (emphasis omitted).

31 *See* ABA Comments re Dual Federal Merger Enforcement, at 12; U.S. Chamber of Commerce Comments, at 15; ABA, MERGER REVIEW PROCESS, at 141.

32 *See* U.S. Chamber of Commerce Comments, at 15; ABA Comments re Dual Federal Merger Enforcement, at 10; Muris Statement re Federal Enforcement, at 6; Sohn Statement, at 4; Business Roundtable Comments, at 21.

33 *See* Merger Enforcement Transcript at 282 (Kramer) (Nov. 17, 2005) (estimating, based on recent experience, that about 40 percent of those who "pull and re-file" receive a second request).

34 Muris Statement re Federal Enforcement, at 6; Prepared Statement of the Federal Trade Commission Before the Subcommittee on Commerce, Justice, State, and the Judiciary of the Committee on Appropriations, United States Senate (Mar. 19, 2002), *available at* http://www.ftc.gov/os/2002/03/budgetstmt.htm.

35 Calculations are based on reports by the FTC and the DOJ of transactions in which a second request could be issued. *See* Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 2005, at app. A (2006); Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 1997, at app. A (1998); Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 1988, at app. A (1989).

36 FTC/DOJ Data Submission, at chart A (overlap clearance requests and HSR Act transactions increased by 56.7 percent and 52.9 percent, respectively, between 2002 and 2006).

37 Sohn Statement, at 2 (citing "increasing convergence of industry sectors"); Nannes Statement, at 1–2 (evolution of the economy makes "application of traditional [clearance] allocations more difficult"); ABA Comments re Dual Federal Merger Enforcement, at 12.

38 Clearance Delays, *available at* http://www.ftc.gov/opa/2002/02/clearance/cleardelaystats.htm. The data reflect the period from the initial request for clearance until clearance was granted.

39 *Id.*

40 FTC/DOJ Data Submission, at chart A.

41 *Id.* at chart A, n.3 & chart C. The data also did not include information on delays in granting clearance when only one agency seeks clearance.

42 Sohn Statement, at 6 (the Commission "should urge the enforcement agencies to re-endorse the 2002 agreement in consultation with the relevant congressional committees"); Federal Enforcement Institutions Trans. at 121 (Sohn); Sims Statement, at 4; Nannes Statement, at 4 (stating that "although their efforts were not successful, such an approach made sense then and would make sense now"); Merger Enforcement Trans. at 97–98 (Rill, Baer); Muris Statement re Federal Enforcement, at 11–13; Thomas B. Leary, Statement at AMC Government Civil Remedies Hearing, at 7 (Dec. 1, 2005) (describing the 2002 Clearance Agreement as "an act of enlightened statesmanship"); U.S. Chamber of Commerce Comments, at 15.

When the 2002 Clearance Agreement was announced, then-FTC Commissioner Mozelle W. Thompson argued that it had been reached without adequate consultation with other FTC Commissioners and that the problem of clearance delays was not as significant as claimed by proponents of the agreement. *See* Statement of Commissioner Mozelle W. Thompson, Concerning the Mar. 5, 2002, Clearance Agreement Between the Department of Justice and the Federal Trade Commission, *available at* http://www.ftc.gov/

opa/2002/03/clearancemwt.htm; Statement of Commissioner Mozelle W. Thompson, Concurring in Part in, and Dissenting in Part from, the Federal Trade Commission's Mar. 19, 2002, Testimony Before the Senate Commerce, Justice, State and the Judiciary Subcommittee of the Appropriations Committee, *available at* http://ftc.gov/os/2002/03/budgetmwt.htm.

[43] Barnett/Majoras Transcript at 43 (Majoras) (Mar. 21, 2006) (noting that the 2002 agreement is a "good idea"); *id.* at 43–44 (Barnett) (observing that an agreement would make the agencies "better off").

[44] Muris Statement, at 12; Sims Statement, at 4; Sohn Statement, at 6–7.

[45] Federal Enforcement Institutions Trans. at 94 (Nannes) (the resolution should be "accomplished by the antitrust agencies"); *id.* at 121 (Sohn) (the agencies should be "given deference" by Congress in allocating industries); *id.* at 110 (Sims) (agencies should receive "considerable deference" in making industry allocations).

[46] Federal Enforcement Institutions Trans. at 87 (Muris) (stating that having industry allocation was "the heart of the agreement"); *id.* at 88 (Sims); *id.* at 90, 93 (Sohn) (stating that the allocation agreement was "all the difference" and that any other approach would be a "distinct second best").

[47] *See* Federal Enforcement Institutions Trans. at 93 (Sohn); Business Roundtable Comments, at 22.

[48] *See* Business Roundtable Comments, at 22; Muris Statement, at 6 (stating that "agencies waste precious enforcement resources contesting the right to examine specific matters and in conducting investigations in marginal matters for the purpose of using the experience gained to assert claims to other cases in the future"); Nannes Statement, at 2–3.

[49] Anecdotal experience suggests that many recent clearance disputes were prolonged unnecessarily in debates over whether a particular clearance resolution would be a "precedent" in clearance disputes regarding future mergers in the same industry. *See* Deborah Platt Majoras, Deputy Ass't Att'y Gen., Antitrust Div., Dep't of Justice, Houston, We Have a Competitive Problem: How Can We Remedy It?, Remarks Before the Houston Bar Ass'n, Antitrust and Trade Regulation Sec. (Apr. 17, 2002) (clearance disputes sometimes arise due to one "agency's concern that granting clearance to the other agency would permit the other agency to gain expertise, and, perhaps, 'capture' that industry").

[50] *See id.* at 131 (Sims) (the agencies should adopt the 2002 Clearance Agreement allocation with minimal change rather than "open[ing] up" those arguments); *id.* at 133 (Muris) (while some changes in the allocation may be needed, "starting over again would be a heroic task"). *But see id.* at 121 (Sohn) (advising the Commission not to recommend that the agencies simply adopt the specific allocation in the 2002 Clearance Agreement).

[51] *Id.* at 102 (Sims) (arguing that "it doesn't make all that much difference which agency" reviews a particular merger); *id.* at 102 (Sohn) (same); *id.* at 103 (Muris).

[52] *See* Federal Enforcement Trans. at 113 (Muris) ("You need a way to break ties . . . ."); Federal Enforcement Trans. at 111–12 (Sims).

[53] 2002 Clearance Agreement, ¶¶ 25–29.

[54] *See id.* ¶ 27 (providing 48 hours for decision by arbitrator).

[55] *See* Federal Enforcement Trans. at 111 (Sims) (arguing that an arbitrator-based system is best, since others, such as the coin flip, "can be gamed in various ways"); ABA Comments re Dual Federal Merger Enforcement, at 14 (describing drawbacks with "random assignment" tiebreaker systems).

[56] *See* Barnett/Majoras Trans. at 54 (Majoras) (recounting expressions of concern from the Chairman of the Commerce Committee during her confirmation hearing and explaining the need for this Commission's help on clearance reform "as a practical and political matter").

[57] *See* Muris Statement, at 19 (due to congressional opposition to the 2002 Clearance Agreement, "the agencies likely will feel it necessary to consult Congress before any global resolution regarding clearance"); Barnett/Majoras Trans. at 54 (Majoras).

[58] Dep't of Justice & Federal Trade Comm'n, FTC/DOJ Announcement of Expedited Clearance Procedure, (Mar. 23, 1995), *in* ABA, MERGER REVIEW PROCESS, at Appendix 18.

[59] *See* ABA Comments re Dual Federal Merger Enforcement, at 14.

[60] *See* ABA, Merger Review Process, at 22–30 (describing the agencies' investigative authority and the processes they follow in conducting HSR Act pre-merger investigations).

[61] 15 U.S.C. § 25 (DOJ); 15 U.S.C. § 53(b) (FTC); *see* ABA, Merger Review Process, at 30–31.

[62] *See* Sohn Statement, at 7, 11 (losing a preliminary injunction hearing is generally final for the parties, since "it is a rare seller whose business can withstand the destabilizing effect of a year or more of uncertainty" regarding the transaction); Sims Statement, at 7 (stating that "the entry of a preliminary injunction is fatal to the deal").

[63] *See* Sohn Statement, at 7 (losing a preliminary injunction hearing is generally final for the agencies, since they are generally unable to obtain effective relief post-consummation).

[64] *See* Federal Enforcement Institutions Trans. at 31–32 (Conrath); Craig Conrath, Statement at AMC Federal Enforcement Institutions Hearing, at 3 (Nov. 3, 2005) [hereinafter Conrath Statement] (the DOJ "agrees, pursuant to Rule 65(a)(2), to a consolidated proceeding combining the preliminary injunction hearing with the trial on the merits" when a reasonable schedule can be reached); Sohn Statement, at 13 (the DOJ "regularly agrees at the outset of a judicial proceeding to consolidate"). Fed. Rule Civ. Proc. 65(a)(2) provides, in part, that "before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application."

[65] Section 13(b) specifies that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b).

[66] The FTC has recently sought permanent injunctive relieve under Section 13(b) to enjoin anticompetitive, non-merger conduct violating Section 5 of the FTC Act. *See, e.g.*, Complaint for Injunctive and Other Equitable Relief, FTC v. Warner Chilcott Holdings Co., No. 1:05-CV-02179, 2005 WL 3439585, ¶ 68, (D.D.C. Nov. 7, 2005).

[67] *See* Pl. FTC's Mem. in Opp'n to Defs.' Mot. Seeking Consolidation of Prelim. & Permanent Injs., FTC v. Arch Coal, Inc., Case No. 1:04-CV-00534, at 3, 4 (Apr. 22, 2004) (arguing against consolidation).

[68] Sohn Statement, at 14 ("Because the preliminary injunction is aimed at preserving the status quo pending a trial before an FTC Administrative Law Judge, the opportunity provided by Rule 65 to consolidate a hearing on the application for preliminary relief with a trial on the merits is unavailable.").

[69] *See* United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1109 (N.D. Cal. 2004).

[70] Sohn Statement, at 13–14. As discussed below, the FTC or the DOJ need not make the traditional showing of irreparable injury in order to obtain a preliminary injunction to enjoin a merger, but rather must make a sufficient showing of likelihood of success on the merits. *See United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980); 15 U.S.C. § 53(b). *See generally* Antitrust Law Developments, at 408–10.

[71] Although the FTC's approach also permits the agency to seek administrative litigation if it obtains a preliminary injunction in court, in nearly all cases the merging parties moot further action by abandoning the transaction.

[72] Federal Trade Comm'n, Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741 (Aug. 3, 1995) [hereinafter FTC Administrative Litigation Policy Statement].

[73] American Bar Association, Public Comments Submitted to AMC Regarding Merger Enforcement Standards, at 1 (Oct. 28, 2005) [hereinafter ABA Comments re Merger Enforcement Standards]; Sohn Statement, at 8.

[74] *See* ABA Comments re Merger Enforcement Standards, at 4.

[75] Sohn Statement, at 13–14; *see also Oracle*, 331 F. Supp. 2d at 1109.

[76] *See Oracle*, 331 F. Supp. 2d at 1109 (in consolidated proceeding, "[p]laintiffs have the burden of proving a violation of Section 7 by a preponderance of the evidence"); Sohn Statement, at 13 (consolidation puts the "enforcer to its ultimate burden of proof" before their deal is lost).

[77] *See, e.g.*, Federal Enforcement Institutions Trans. at 28–29 (Sohn) (describing differences in applicable standards between DOJ consolidated proceedings and FTC preliminary injunction proceedings).

[78] The American Bar Association, Section of Antitrust Law (ABA Antitrust Section) reported that it had "not found any example" in which the DOJ sought a permanent injunction after failing to obtain a preliminary injunction under Section 7. ABA Comments re Merger Enforcement Standards, at 5.

[79] The FTC identifies only one instance in "modern history" in which the FTC used this authority. Barnett/Majoras Trans. at 50–51 (Majoras) (identifying the *R.R. Donnelley* case); *see* FTC Press Release, Federal Trade Commission Dismisses Case Against R.R. Donnelley over Acquisition of Meredith/Burda (Aug. 4, 1995) (stating that the FTC failed to obtain a preliminary injunction, issued a Part III complaint, but ultimately overturned the ALJ's decision requiring divestitures), *available at*: http://www.ftc.gov/opa/1995/08/donnelly.htm.

[80] FTC, Administrative Litigation Policy Statement (explaining that "it would not be in the public interest to forego an administrative trial solely because a preliminary injunction has been denied" and that it will make decisions on a "case-by-case" basis); *cf.* William Blumenthal, Statement at AMC Federal Enforcement Institutions Hearing, at 4 (Nov. 3, 2005) [hereinafter Blumenthal Statement] (stating that the FTC has restrained itself appropriately through promulgating and implementing the 1995 policy statement).

[81] *Compare* FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004) (order denying motion for preliminary injunction in August 2004), *appeal dismissed*, 2004 WL 2066879 (D.C. Cir. 2004) (ordering voluntary dismissal of FTC appeal in Sept. 2004) *with* Statement of the Commission, *In re* Arch Coal, Inc., FTC File No. 031-0191 (June 13, 2005) (reporting 4–1 vote in June 2005 not to pursue further administrative litigation in the *Arch Coal* matter); *see* Order Granting Motion to Dismiss, *In re* Butterworth Health Corp., FTC Docket No. 9283 (Sept. 25, 1997) (dismissing administrative complaint one year after preliminary injunction was denied and several months after denial was affirmed on appeal); *see also* ABA Comments re Merger Enforcement Standards, at 9 n.35.

[82] Section 13(b) specifies that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b).

[83] Federal Enforcement Institutions Trans. at 31–33 (Conrath) (pointing out that the government has a heavy burden and that key elements like expert reports require time).

[84] *See id.* at 31–32 (Conrath); Sohn Statement, at 13.

[85] *See* ABA Comments re Dual Federal Merger Enforcement, at 8–9.

[86] If the FTC does not consolidate the proceedings for preliminary and permanent relief, it would have to seek any necessary permanent relief in federal court.

[87] *See* AAI Comments re Enforcement Institutions, at 2 (stating that administrative litigation provides a forum in which facts can be more fully developed than in an injunction proceeding); Blumenthal Statement, at 3–4; Federal Enforcement Institutions Trans. at 8 (Blumenthal).

[88] Statement of Commission, *In re* Arch Coal, FTC File No. 031-0191, at 8 (June 13, 2005) ("The benefits of administrative litigation can be reduced greatly when the large majority of the relevant evidence already has been presented . . . at the preliminary injunction hearing.").

[89] *See* Initial Decision, *In re* Evanston Northwestern Healthcare Corp., FTC Docket No. 9315, at 1–2 (Oct. 20, 2005) (appeal pending before FTC).

[90] ABA Comments re Merger Enforcement Standards, at 3 (stating that the Section 13(b) standard is "more lenient" than the DOJ standard); Sohn Statement, at 10 ("[M]any practitioners believe the FTC is accorded more deference than the Antitrust Division at the preliminary injunction stage."); Sims Statement, at 6. *But see* Federal Enforcement Institutions Trans. at 57–58 (Blumenthal) (stating that the perception

continually changes, and that it is not invariably the case that people would rather be before the DOJ).

91 Sims Statement, at 6 ("most private practitioners today advise their clients that the FTC may have a greater legal ability to block a merger," and that FTC staff is "likely to be slightly more aggressive" since some FTC Commissioners believe the required showing is lower); Sohn Statement, at 10–11; ABA Comments re Merger Enforcement Standards, at 3 (stating that the Section 13(b) standard is "more lenient" than the DOJ standard). *But see* Barnett/Majoras Trans. at 49–50 (Majoras) (the courts are "treating the [preliminary injunction] hearing more like a trial on the merits" because granting the preliminary injunction "likely will block the deal"); Federal Enforcement Institutions Trans. at 33 (Conrath) (courts focus on merits considerations rather than the legal standard); Blumenthal Statement, at 4–6 (arguing that the standard applied to the FTC "is not meaningfully different from that applied by the courts to DOJ" and that both are subject to a "public interest" test).

92 *See* ABA Comments re Merger Enforcement Standards, at 4.

93 15 U.S.C. § 53(b); *see* Antitrust Law Developments, at 409. Courts have recognized that, in adopting this standard, "Congress intended this standard to depart from what it regarded as the then-traditional equity standard." FTC v. H.J. Heinz Co., 246 F.3d 708, 714 (D.C. Cir. 2001). The FTC's role as the "ultimate decision maker" regarding permanent relief has been cited as justification for applying a lesser standard. *See* ABA Comments re Merger Enforcement Standards, at 4; Antitrust Law Developments, at 409–10.

94 *Heinz*, 246 F.3d at 714–15; *see also* FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 44 (D.D.C. 2002); FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1051 (8th Cir. 1999); *Arch Coal*, 329 F. Supp. 2d at 116; FTC v. Staples, Inc., 970 F. Supp. 1066, 1071 (D.D.C. 1997). However, a showing of a "fair or tenable chance of success on the merits" will not suffice. *Tenet Health Care*, 186 F.3d at 1051. *See generally* Antitrust Law Developments, at 409 (describing standard).

95 United States v. Siemens Corp., 621 F.2d 499, 506 (2d Cir. 1980) (holding that "once the Government demonstrates a reasonable probability that [Section] 7 has been violated, irreparable harm to the public should be presumed"); *see* Conrath Statement, at 5–6; Federal Enforcement Institutions Trans. at 9–10 (Conrath); Sohn Statement, at 9–10. *See generally* Antitrust Law Developments, at 408.

96 *Siemens*, 621 F.2d at 505.

97 *See* Sims Statement, at 6–7 (arguing that the applicable preliminary injunction standards should be the same, especially since the preliminary injunction is fatal to the deal).

98 *See id.* at 7–8 (emphasizing that agency should be able to establish reasonable likelihood of success after second request and judicial discovery).

Exhibit D

Just one agency should enforce antitrust law

Jun 17 2019

Anonymous individuals at the Department of Justice's Antitrust Division and the Federal Trade Commission have recently taken it upon themselves to leak to the media that their respective agencies will soon open investigations of the largest U.S. tech companies. Policing markets with the antitrust laws is key to ensuring that competition benefits consumers.

No industry should be free from antitrust scrutiny, including Big Tech. But, splitting of this tech antitrust review across two federal agencies, despite the many similar competition issues that will be investigated, illustrates both the absurdity of having two federal agencies handling civil antitrust enforcement. It also shows why these investigations are likely to be less effective and coherent than they should be.

According to reports, the FTC will investigate certain conduct by Facebook and Amazon, while the Antitrust Division will look into whether Google and Apple have acted anti-competitively. These investigations will clearly cover much of the same ground. For example, Facebook and Google are both alleged to have used their market power to monopolize digital advertising. Splitting antitrust investigations of these firms between two agencies is just analytically inefficient.

Dividing review of the tech industry also invites conflicts between the agencies on how they analyze competition issues. We already are seeing this kind of dysfunction in how the agencies handle matters relating to intellectual property licensing. With their divvying up the various tech companies between themselves, we're likely to see further divergence in enforcement.

Having two agencies police the same beat also invites bureaucratic pettiness as civil servants place their own agency's interests over those of American consumers and taxpayers. This is perhaps best evidenced by the arcane and ad hoc clearance process used to determine which agency will lead which investigation. In some cases, the Department of Justice and FTC decide which agency will handle a case by a coin flip. Seriously.

The problem here is having two federal agencies responsible for civil antitrust enforcement. This creates a duplication of resources that could be better used on actual antitrust enforcement. Moreover, given the different policies and procedures each agency follows, some industries are subject to a different standard of review just due to an accident of history that determined which agency would have jurisdiction. This is particularly evident in merger review, where the FTC has the ability to litigate a challenged merger before its in-house administrative court, and then potentially overturn an adverse decision on an appeal that is decided by the very commissioners who voted out the original complaint.

In contrast, the DOJ has to litigate its merger challenges in federal court. The SMARTER Act, introduced during the last Congress, sought to remedy this issue, but that really just addresses a symptom and not the cause of the underlying problem.

Enforcement of the antitrust laws is critical to safeguarding competitive markets that benefit consumers. Congress should focus on ensuring that antitrust enforcement efforts are backed by appropriate resources. One way to further that goal would be to reorganize civil antitrust enforcement so that it is done under one roof. Doing so would result in more coherent, efficient, and effective antitrust enforcement.

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Exhibit E

No. 19-7

In the Supreme Court of the United States

SEILA LAW LLC, PETITIONER

v.

CONSUMER FINANCIAL PROTECTION BUREAU

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT SUPPORTING VACATUR

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
JONATHAN Y. ELLIS
Assistant to the Solicitor General
MARK B. STERN
DANIEL AGUILAR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MARY E. MCLEOD
General Counsel
JOHN R. COLEMAN
Deputy General Counsel
STEVEN Y. BRESSLER
Assistant General Counsel
Consumer Financial Protection Bureau
Washington, DC 20552

QUESTIONS PRESENTED

1. Whether 12 U.S.C. 5491(c)(3) violates the separation of powers by prohibiting the President from removing the Director of the Consumer Financial Protection Bureau except for "inefficiency, neglect of duty, or malfeasance in office."

2. Whether, if 12 U.S.C. 5491(c)(3) violates the separation of powers, it can be severed from the rest of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

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BRIEF FOR RESPONDENT SUPPORTING VACATUR

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 923 F.3d 680. The order of the district court (Pet. App. 9a-23a) is not published in the Federal Supplement but is available at 2017 WL 6536586.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2019. The petition for a writ of certiorari was filed on June 28, 2019. The petition for a writ of certiorari was granted on October 18, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-22a.

STATEMENT

1. In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (Dodd-Frank Act or Act). The legislation provided "a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008." S. Rep. No. 176, 111th Cong., 2d Sess. 2 (2010) (Senate Report). Its overarching purpose was to "promote the financial stability of the United States" through the establishment of measures designed to improve accountability, resiliency, and transparency in the financial system. *Ibid.*

Among other things, the Act created the Financial Stability Oversight Council to "monitor emerging risks to U.S. financial stability," Senate Report 2; granted financial regulators orderly liquidation authority to prevent future bailouts of financial institutions, *id.* at 4; imposed new limitations on certain high-risk financial activity by banks and bank holding companies, *id.* at 8; and authorized regulation of over-the-counter derivatives that many believed were a key contributor to the financial crisis, *id.* at 32. Finally, as most pertinent here, the Act established the Consumer Financial Protection Bureau (Bureau or CFPB) to ensure "that all consumers have access to markets for consumer financial products and services and that markets for [such] products and services are fair, transparent, and competitive." Dodd-Frank Act § 1021(a), 124 Stat. 1979 (12 U.S.C. 5511(a)).

a. The Dodd-Frank Act vests the new Bureau with authority to regulate a substantial segment of the Nation's economy. The Act directly prohibits any "covered person"—generally an entity or person involved in "offering or providing a consumer financial product or service"—or any "service provider" from "engag[ing] in any unfair, deceptive, or abusive act or practice." 12 U.S.C. 5481(6)(A), 5536(a)(1)(B). And it authorizes the Bureau to issue regulations adopting requirements for "covered person[s]" and "service provider[s]" for the purpose of preventing them from engaging in such acts or practices. 12 U.S.C. 5531(b). In addition, the Act transfers to the Bureau much of the authority to regulate consumer financial products and services that had been vested in other federal agencies, including the authority to prescribe regulations implementing 18 other federal consumer protection statutes, ranging from the Equal Credit Opportunity Act and the Fair Credit Reporting Act to the Fair Debt Collection Practices Act and the Truth in Lending Act. 12 U.S.C. 5481(12) and (14), 5581. The laws administered by the Bureau are referred to collectively as "[f]ederal consumer financial law." 12 U.S.C. 5481(14).

The Bureau is also authorized to conduct investigations, initiate administrative adjudications, and commence civil actions to seek penalties and appropriate legal and equitable relief for violations of federal consumer financial law. 12 U.S.C. 5562-5565. Potential relief includes restitution, disgorgement, an injunction, and civil monetary penalties of up to $1,000,000, adjusted for inflation, "for each day during which such violation continues." 12 U.S.C. 5565(a) and (c); see 12 C.F.R. 1083.1.

Before the Bureau institutes an enforcement proceeding, it may issue a civil investigative demand (CID) to any person whom the Bureau has reason to believe "may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation" of federal consumer financial law. 12 U.S.C. 5561(5), 5562(c)(1). A person served with such a demand must provide the Bureau with the demanded items. 12 U.S.C. 5562(c)(1)(A)-(E). If the person objects to all or part of the demand, the person may petition the Bureau for an order modifying it or setting it aside. 12 U.S.C. 5562(f)(1). Although the Bureau's CIDs are not self-enforcing, if the person refuses to comply, the Bureau may petition a district court to enforce the demand. 12 U.S.C. 5562(e)(1).

b. The Dodd-Frank Act establishes the Bureau as an "independent bureau" within the Federal Reserve System. 12 U.S.C. 5491(a). The Bureau is headed by a single Director, appointed by the President with the advice and consent of the Senate. 12 U.S.C. 5491(b)(1)-(2). The Director serves for a five-year term, although he or she may continue serving as Director "until a successor has been appointed and qualified." 12 U.S.C. 5491(c)(1)-(2). Under the provision at issue here, the President may remove the Director only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3).

The Bureau's operations are largely funded from the combined earnings of the Federal Reserve System. See 12 U.S.C. 5497(a)(1)-(2) (establishing a cap of 12% of the Federal Reserve System's total 2009 operating expenses, adjusted annually by any increase in the employment cost index). The Director may also request additional funds from Congress if necessary. See 12 U.S.C. 5497(e).

c. Section 3 of the Dodd-Frank Act, entitled "Severability," provides that "[i]f any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby." 124 Stat. 1390 (12 U.S.C 5302).

2. a. Petitioner is a law firm that provides "debt-relief services" to its clients. Pet. App. 1a. The Bureau issued a CID to petitioner, requesting written answers to interrogatories and the production of documents to aid the Bureau's investigation into potential enforcement action for violations of federal consumer financial law. *Id.* at 10a. Petitioner initially asked the Bureau to modify or set aside the demand, which the Bureau's Director denied. *Ibid.* Petitioner then responded to the demand, but the Bureau considered the response inadequate in various ways. *Id.* at 10a-11a. After petitioner declined to modify its response to comply, the Bureau filed a petition to enforce the demand in district court. *Id.* at 11a.

The district court granted in part the petition to enforce. Pet. App. 9a-23a. The court rejected petitioner's claim that the removal restriction unconstitutionally insulated the Bureau's Director from presidential control, concluding that the restriction did not interfere "with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." *Id.* at 12a-13a (citation omitted).[1]

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[1] In the alternative, the district court concluded that, even if the removal restriction unconstitutionally encroached upon executive authority in some contexts, the Bureau could at least lawfully issue and seek to enforce a CID, because "Congress unquestionably wields the subpoena power" and can "establish offices that 'perform duties . . . in aid of [its own] functions.'" Pet. App. 14a (citation omitted). The Bureau did not defend that erroneous rationale in the court of appeals, see Resp. C.A. Br. 22 n.4, and the court of appeals did not rely on it.

The district court also largely rejected petitioner's statutory challenges to the CID, except for ordering one modification limiting the demand's request for certain information and documents. Pet. App. 23a. With that modification, the district court granted the Bureau's petition for enforcement and ordered petitioner to comply within 10 days. *Ibid.* The court of appeals stayed the district court's order pending appeal. C.A. Doc. 8 (Sept. 13, 2017).

b. The court of appeals affirmed. Pet. App. 1a-8a. The court observed that the arguments for and against the constitutionality of the Director's removal restriction "have been thoroughly canvassed in the majority, concurring, and dissenting opinions in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc)." *Id.* at 2a. The court saw "no need to re-plow the same ground" and only "explain[ed] in brief why [it] agree[d] with the conclusion reached by the *PHH Corp.* majority." *Ibid.*

The court of appeals acknowledged that "[t]he Director exercises substantial executive power similar to the power exercised by heads of Executive Branch departments," and that petitioner's challenge to the constitutionality of the statutory restriction on removing the Director "is not without force." Pet. App. 3a. But it concluded that the restriction was permissible under *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), and *Morrison* v. *Olson*, 487 U.S. 654 (1988). Pet. App. 3a. The court explained that the Director "is subject to the same for-cause removal restriction" that applied to the members of the Federal Trade Commission (FTC) in *Humphrey's Executor*, and that the Bureau and the FTC both "exercise[] quasi-legislative and quasi-judicial powers," such that the agencies may "discharge[] those responsibilities independently of the President's will." *Id.* at 4a.

The court of appeals found irrelevant any differences between the FTC and the Bureau. Pet. App. 4a-5a. It reasoned that, although the Bureau "possesses substantially more executive power than the FTC did back in 1935," *Morrison* upheld "a for-cause removal restriction for an official exercising one of the most significant forms of executive authority: the power to investigate and prosecute criminal wrongdoing." *Id.* at 5a. And the court concluded that *Morrison* likewise "preclude[d] drawing a constitutional distinction between multi-member and single-individual leadership structures." *Id.* at 5a-6a.

Like the district court, the court of appeals rejected petitioner's statutory objections to the CID. Pet. App. 6a-8a. It therefore affirmed the district court's order directing petitioner to comply with the demand. *Id.* at 8a. The court of appeals subsequently stayed the mandate for a 90-day period and, if petitioner sought certiorari, "until final disposition by the Supreme Court." C.A. Doc. 49 (June 18, 2019).

SUMMARY OF ARGUMENT

I. Article II of the Constitution provides that "[t]he executive Power shall be vested in [the] President" alone, U.S. Const. Art. II, § 1, Cl. 1, and that he shall "take Care that the Laws be faithfully executed," Art. II, § 3. Since 1789, it has been generally recognized that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting 1 Annals of Cong. 463 (1789) (Joseph

Gales ed., 1834) (Madison)) Accordingly, the Court has recognized that, "as a general matter," the President must have the "power to remove" principal officers "who assist him in carrying out his duties." *Id.* at 513-514.

In *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the Court recognized a limited exception to that general rule for a multimember, "quasi-legislative" and "quasi-judicial" commission. That exception should not be expanded to single-headed agencies for several reasons. First, the rationale for the exception necessarily rests on the structure of multimember bodies, not on their rulemaking and adjudicative functions alone. Second, consistent with that rationale, the exception has historically been applied only to multimember bodies; removal restrictions on single-headed agencies are relatively new and have been subject to constitutional objection from their inception. Third, single-headed independent agencies would pose heightened dangers to the President's control of the Executive Branch. Fourth, extending *Humphrey's Executor* to this context would allow Congress to turn virtually the entire Executive Branch into a series of independent Departments with Heads shielded from presidential supervision and accountability. If the Court were to conclude that *Humphrey's Executor* requires upholding the removal restriction at issue, the decision should be narrowed or overruled as necessary.

II. Because the statutory restriction on the President's authority to remove the Bureau's Director is unconstitutional, it should be invalidated. This Court, however, should sever the provision from the remainder of the Act. When the Court finds a statutory provision unconstitutional, even in the absence of a severability clause, the Court's normal rule is to invalidate only the unconstitutional provision, leaving the rest of the Act intact. Where Congress has included an express severability clause, the Court applies it according to its terms, absent strong evidence that Congress intended otherwise. The Dodd-Frank Act includes an express severability clause, providing that "[i]f any provision of this Act * * * is held to be unconstitutional, the remainder of this Act * * * shall not be affected thereby." 12 U.S.C 5302. And there is no evidence—much less strong evidence—that Congress intended otherwise.

ARGUMENT

The Constitution vests "[t]he executive Power" in one individual—the "President of the United States." U.S. Const. Art. II, § 1, Cl. 1. That is no accident. The Framers sought to ensure that the executive power would be wielded in a manner that is both decisive and politically accountable. By vesting the executive power in the President alone, the Constitution ensures that *all* exercises of this great power of the government are ultimately subject to the will of the people. The statutory restriction on the President's authority to remove the CFPB Director contravenes this basic principle.

In *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), this Court recognized that "as a general matter," to maintain accountability to and dependence on the people, the President must possess "the authority to remove those who assist him in carrying out his duties" to faithfully execute the laws. *Id.* at 513-514. While the Court has recognized a narrow exception for multimember, quasi-legislative and quasi-judicial commissions, that exception cannot plausibly be extended to the CFPB—a single-headed agency "exercis[ing] substantial executive power similar to the power exercised by heads of Executive

Branch departments." Pet. App. 3a. Otherwise, Congress could impose similar restrictions on virtually any governmental agency. And that, in turn, would immunize massive exercises of governmental power from the very political accountability that is at the core of the Constitution's system of separated powers.

Accordingly, the restriction on the President's authority to remove the Director should be declared unconstitutional and, in accordance with the Dodd-Frank Act's express severability clause, severed from the remainder of the statute.

I. THE STATUTORY RESTRICTION ON THE PRESIDENT'S ABILITY TO REMOVE THE BUREAU'S DIRECTOR VIOLATES THE SEPARATION OF POWERS

Article II of the Constitution provides that "[t]he executive Power shall be vested" in the President alone, U.S. Const. Art. II, § 1, Cl. 1, who is obligated to "take Care that the Laws be faithfully executed," Art. II, § 3. "The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known." *Printz* v. *United States*, 521 U.S. 898, 922 (1997). The Framers "sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many." *Clinton* v. *Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment). "Energy in the executive," Hamilton explained, "is a leading character in the definition of good government," and is essential to "the steady administration of the laws." *The Federalist No. 70*, at 471 (Hamilton) (Jacob Ernest Cooke ed., 1961). Unity of authority is a necessary "ingredient[]." *Id.* at 472. And the Constitution vests that unified authority in an elected President to ensure that a "dependence on the people" is the "primary controul on the government." *The Federalist No. 51*, at 349 (Madison) (Jacob Ernest Cooke ed., 1961).

Of course, "the President alone and unaided could not execute the laws." *Myers* v. *United States*, 272 U.S. 52, 117 (1926). "[A]s part of his executive power," the President therefore must "select those who [are] to act for him under his direction in the execution of the laws." *Ibid.* Accordingly, the Appointments Clause provides that the President must appoint principal officers with the advice and consent of the Senate, and inferior officers—who generally work under the supervision of principal officers, *Edmond* v. *United States*, 520 U.S. 651, 662-663 (1997)—must be appointed in the same manner unless Congress provides for their appointment by the President alone, the Heads of Departments, or the Courts of Law. U.S. Const. Art. II, § 2, Cl. 2.

Just as the President's ability to "select[] * * * administrative officers is essential" to the exercise of "his executive power," so too is his ability to "remov[e] those for whom he can not continue to be responsible." *Myers*, 272 U.S. at 117. "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, *overseeing, and controlling* those who execute the laws." *Free Enterprise Fund,* 561 U.S. at 492 (quoting 1 Annals of Cong. 463 (Madison)) (emphasis added). "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986) (citation omitted). This case concerns whether Congress may restrict the President's ability to remove the single principal officer of an agency exercising "substantial executive power." Pet. App. 3a. It may not.

A. As A General Rule, The President Must Possess Unrestricted Authority To Remove Principal Executive Officers

A series of decisions—one by the First Congress and three from this Court—make clear that, as a general rule, Article II requires that the President have unrestricted removal power over principal executive officers.

1. The Decision of 1789

The First Congress extensively debated the scope of the President's removal authority over principal officers when creating the first three executive Departments. On May 19, 1789, Representative James Madison, before the Committee of the Whole, moved for the creation of the Departments of Foreign Affairs, War, and the Treasury. See Debates in the House of Representatives (Debates), in 10 *Documentary History of the First Federal Congress of the United States of America* 725 (Charlene Bangs Bickford et al. eds., 1992) (*History of First Congress*). The motion proposed that each Department be headed with a Secretary, "who shall be appointed by the president, by and with the advice and consent of the senate, and to be removable by the president." *Ibid.* The motion passed, *id.* at 740, and the first bill to create the Department of Foreign Affairs was taken up on June 16, 1789. See Debates, in 11 *History of First Congress* 860 (1992).

As Madison would subsequently explain in a letter to Thomas Jefferson, the bill "gave birth to a very interesting constitutional question—by what authority removals from office were to be made." Letter from James Madison to Thomas Jefferson (June 30, 1789), in 16 *History of the First Congress* 893 (2004). Four possibilities were advanced: (1) that "no removal could be made but by way of impeachment"; (2) that the means of removal "devolved on the Legislature, to be disposed of as might be proper"; (3) that the power of removal should jointly "belong[] to the President and Senate"; and (4) that "the Executive power being generally vested in the President, and the Executive function of removal not expressly taken away, it remained with the President." *Ibid.*

Immediately upon the introduction of the first bill, Representative Alexander White moved to delete a provision providing that the Secretary was "to be removed at the will of the President." Debates, in 11 *History of First Congress* 860 (1992). Over the course of several months during the summer of 1789, the House and then the Senate "passionately debated the removal provision." Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1031 (2006); see *id.* at 1029-1034. "The view that 'prevailed' * * * was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not 'expressly taken away, it remained with the President.'" *Free Enterprise Fund*, 561 U.S. at 492 (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), in 16 *History of First Congress* 893 (2004)).

The First Congress memorialized its resolution of the constitutional question in two ways. It struck the removal provision, thereby avoiding any implication that the power was granted by the statute; and it amended a separate provision to provide that the Chief Clerk would take custody of the departmental papers "whenever the said principal officer * * * shall be removed from Office by the President," Act of July 27, 1789, ch. 4, § 2, 1 Stat. 29, thereby acknowledging the President's inherent constitutional removal authority. See Akhil Reed Amar, *America's Unwritten Constitution* 321 (2012). Similar language was included in the enacted bills creating the Departments of War and the Treasury. Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 50; Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 67.

The view of the First Congress "soon became the 'settled and well understood construction of the Constitution.'" *Free Enterprise Fund*, 561 U.S. at 492 (quoting *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839)). "This 'Decision of 1789' provides 'contemporaneous and weighty evidence' of the Constitution's meaning since many of the Members of the First Congress 'had taken part in framing that instrument.'" *Bowsher*, 478 U.S. at 723-724 (citation omitted).

***2.* Myers**

This Court first addressed the constitutional authority of the President to remove principal officers in *Myers* v. *United States*, *supra*. The case concerned President Wilson's removal of Frank Myers, a postmaster of the first class—an inferior officer who, like all principal officers, had been presidentially appointed with the advice and consent of the Senate. *Myers*, 272 U.S. at 106. Federal law at the time provided that such postmasters "shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended." *Id.* at 107. Less than three years into Myers' four-year term, the President requested Myers' resignation. *Id.* at 106. When Myers refused, however, the President ordered his removal without the Senate's consent. *Ibid.* Myers brought suit in the Court of Claims to recover his salary from the date of his removal through the end of his appointed four-year term. *Ibid.*

This Court explained that the case "present[ed] the question whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate." *Myers*, 272 U.S. at 106. The Court observed that, although appointment of principal and inferior officers is addressed in Article II, § 2, "no express provision" of the Constitution addresses the removal of such officers, except through impeachment. *Id.* at 109. And it acknowledged that the "subject was not discussed in the Constitutional Convention." *Id.* at 109-110. "[A]fter an examination of the record," however, the Court possessed "not the slightest doubt" that the decision of the First Congress "was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone." *Id.* at 114. In a comprehensive 70-page analysis, the Court "concur[red]" in that view for several reasons. *Id.* at 115.

The Court first focused on Article II's vesting of "the executive power in the President" alone and its charge that the President would "take care that th[e laws] be faithfully executed." *Myers*, 272 U.S. at 117; see *id.* at 115-118. The debates in the Constitutional Convention, the Court explained, "indicated an intention to create a strong Executive, and after a controversial discussion the executive power of the Government was vested in one person." *Id.* at 116. Because no one person could possibly carry out that function "alone and unaided," the executive power must, "even in the absence of express words," include the authority to "select those who were to act for him under his direction." *Id.* at 117. And the Court reasoned that "in the absence of any express limitation respecting removals, [just] as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible." *Ibid.*

The Court also found support in the express vesting of the appointment power in the President. *Myers*, 272 U.S. at 119-125. The Court relied on the "well approved principle" that "the power of appointment carrie[s] with it the power of removal." *Id.* at 119. Indeed, with only "one or two exceptions," even the opponents of the bills establishing the first executive Departments agreed with that principle. *Ibid.* "[T]hose in charge of and responsible for administering functions of government who select their executive subordinates need in meeting their responsibility to have the power to remove those whom they appoint" after they have lost confidence in them. *Ibid.*

The Court rejected any suggestion that the "power to make provision for removal" of officers appointed by the President might be "vested in the Congress" under Article I. *Myers*, 272 U.S. at 125; *id.* at 125-131. The Court acknowledged that "[t]he powers relative to offices are partly Legislative and partly Executive." *Id.* at 128 (citation omitted). "The Legislature creates the office, defines the powers, limits its duration and annexes a compensation." *Ibid.* But "[t]his done," the Court explained, "the Legislative power ceases." *Ibid.*

The Court further reasoned that allowing Congress to limit the President's removal authority would grant it the "means of thwarting the Executive in the exercise of his great powers and in the bearing of his great responsibility, by fastening upon him, as subordinate executive officers, men who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy, might make his taking care that the laws be faithfully executed most difficult or impossible." *Myers*, 272 U.S. at 131; see *id.* at 131-135. In executing the laws, the Court explained, "the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it." *Id.* at 134. In undertaking that important task, the President "must place in each member of his official family, and his chief executive subordinates, implicit faith." *Ibid.* And therefore, the Court concluded, he must have "an unrestricted power to remove" those officers "[t]he moment that he loses confidence in the[ir] intelligence, ability, judgment or loyalty." *Ibid.*

The Court observed that the First Congress's resolution of the removal question was quickly "accepted as a final decision of the question by all branches of the Government." *Myers*, 272 U.S. at 136. "The acquiescence" in the decision "for nearly three-quarters of a century" was "affirmed by this Court" in statutory cases like *Hennen*, *supra*, and *Parsons* v. *United States*, 167 U.S. 324, 330 (1897). *Myers*, 272 U.S. at 148; see *id.* at 153. "Congress, in a number of acts, followed and enforced the legislative decision of 1789 for seventy-four years." *Id.* at 145. And although disputes between Congress and the Executive would subsequently lead Congress to "enact legislation to curtail the then acknowledged powers of the President," *id.* at 165; see *id.* at 165-166 (citing, *e.g.*, the Tenure of Office Act, ch. 154, 14 Stat. 430), the Court noted that "[t]he attitude of the

Presidents on this subject ha[d] been unchanged and uniform to the present day whenever an issue ha[d] clearly been raised," *id.* at 169. The Court refused to "set aside" the First Congress's construction simply "because the Congress of the United States did so during a heated political difference of opinion between the then President and the majority leaders of Congress over the reconstruction measures adopted as a means of restoring to their proper status the States which attempted to withdraw from the Union at the time of the Civil War." *Id.* at 174-175. Accordingly, the Court declared that "the provision of the law of 1876, by which the unrestricted power of removal of first class postmasters is denied to the President, is in violation of the Constitution, and invalid." *Id.* at 176.

***3.* Humphrey's Executor**

Nine years later, the Court recognized the only exception to the general rule that the President must have unrestricted power to remove principal executive officers. In *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the Court upheld a restriction on the President's authority to remove commissioners of the multimember Federal Trade Commission (FTC). Section 1 of the FTC Act, ch. 311, 38 Stat. 717, created the commission comprising five members to be appointed by the President with the advice and consent of the Senate. See *Humphrey's Executor*, 295 U.S. at 619-620. It provided that the commissioners would serve for staggered seven-year terms. *Id.* at 620. It required that no more than three of the five commissioners be members of the same political party. *Ibid.* And it stated that "[a]ny commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." *Ibid.* (quoting FTC Act § 1, 38 Stat. 718).

The Act declared unlawful "unfair methods of competition in commerce," and it empowered the Commission, among other things, to prevent certain persons from engaging in "unfair methods of competition" through administrative adjudication proceedings that resulted in cease-and-desist orders. *Humphrey's Executor*, 295 U.S. at 620 (citation omitted). The Act granted the Commission "powers of investigation in respect of certain corporations subject to the act, and in respect of other matters," the results of which were reported to Congress with recommendations for additional legislation. *Id.* at 621. And the Act provided that, "in any suit in equity" brought by the Attorney General under the antitrust laws, the court may "refer said suit to the [FTC], as a master in chancery, to ascertain and report an appropriate form of decree," which the court may then "adopt or reject" "in whole or in part." *Ibid.* (citation omitted).

William Humphrey had been appointed commissioner in 1931 by President Hoover for a seven-year term. *Humphrey's Executor*, 295 U.S. at 618. After a presidential election the following year, President Roosevelt asked Humphrey for his resignation. *Ibid.* The President stated that, in his view, "the aims and purposes of the Administration with respect to the work of the Commission c[ould] be carried out most effectively with personnel of [his] own selection." *Ibid.*

After Humphrey refused to resign, the President removed him. *Humphrey's Executor*, 295 U.S. at 619. But Humphrey never acquiesced in the order. *Ibid.* After his death, the executor of his estate brought suit in the Court of Claims to recover Humphrey's salary as a commissioner from the date of his removal until his death in 1934. *Id.* at 618. The Court of Claims certified two questions to this Court: (1) whether the FTC Act restricted the President's authority to remove commissioners of the FTC except upon "inefficiency, neglect of duty, or malfeasance in office"; and (2) if so, whether that restriction on the President's removal power was constitutional. *Id.* at 619 (citation omitted).

As to the first question, the Court held that the causes for removal listed in Section 1 of the FTC Act were exclusive. *Humphrey's Executor*, 295 U.S. at 621-626. The Court reasoned that "the fixing of a definite term subject to removal for cause, unless there be some countervailing provision," indicates Congress's intent "that the term is not to be curtailed in the absence of such cause." *Id.* at 623. And it held that this indication was confirmed by the "character of the commission" as "neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *Id.* at 624.

The Court explained that the commissioners were "called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'" *Humphrey's Executor*, 295 U.S. at 624 (citation omitted). And it reasoned that the fixed terms and the removal restriction were necessary to ensure that the commissioners served "long enough to give them an opportunity to acquire the expertness in dealing with these special questions * * * that comes from experience," and that the Commission's membership "would not be subject to complete change at any one time." *Ibid.* (citation omitted). In other words, because Congress had set out "to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority," the grounds of removal had to be exclusive: allowing commissioners to serve "at the mere will of the President" might "thwart, in large measure, the very ends which Congress sought to realize." *Id.* at 625-626.

As to the second question, the Court acknowledged that the *Myers* decision had "fully review[ed] the general subject of the power of executive removal" and "examine[d] at length the historical, legislative and judicial data bearing upon the question, beginning with what is called 'the decision of 1789' in the first Congress and coming down almost to the day when the opinions were delivered." *Humphrey's Executor*, 295 U.S. at 626. But the Court characterized *Myers* as "actually decid[ing] * * * only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress." *Ibid.* The Court asserted that "[t]he office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* case [could not] be accepted as controlling [its] decision" in the case before it. *Id.* at 627. And in a cursory six-page analysis, the Court "disapproved" much of *Myers*' reasoning. *Id.* at 626.

In the Court's view, unlike the postmaster in *Myers*, the FTC commissioners were not "purely executive officers." *Humphrey's Executor*, 295 U.S. at 632. Rather, repeating its characterization from the statutory analysis, the Court reasoned that the Commission was "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed." *Id.* at 628. "Such a body," the Court explained, "cannot in any proper sense be characterized as an arm or an eye of the executive." *Ibid.* Rather, in "filling in and administering the details embodied by [the FTC Act's] general standard," the Court stated that "the commission acts in part quasi-legislatively and in part quasi-judicially." *Ibid.* "In making investigations and reports thereon for the information of Congress, * * * it acts as a legislative agency." *Ibid.* And in acting "as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary." *Ibid.*

The Court concluded that "[w]hether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause[] will depend upon the character of the office." *Humphrey's Executor*, 295 U.S. at 631. For "purely executive officers," like the postmaster in *Myers*, the President alone must retain the unrestricted power to remove. *Id.* at 632. "[A]s to officers of the kind here under consideration," the Court held that "no removal [could] be made during the prescribed term for which the officer is appointed, except for one or more of the causes named." *Ibid.* And as for other officers, the Court "le[ft] such cases * * * for future consideration and determination as they may arise." *Ibid.*

Humphrey's Executor was later held to authorize a similar removal restriction for members of the War Claims Commission, a three-member body that was charged with adjudicating war-related compensation claims. See *Wiener* v. *United States,* 357 U.S. 349, 356 (1958). And it has been understood to apply to other multimember commissions with similar features and functions. See *Morrison* v. *Olson,* 487 U.S. 654, 724-725 (1988) (Scalia, J., dissenting).

4. **Free Enterprise Fund**

Finally, in *Free Enterprise Fund*, the Court reaffirmed that "as a general matter," the President must possess "the authority to remove those who assist him in carrying out his duties," 561 U.S. at 513-514, and held that the "limited restrictions on the President's removal power" that had previously been upheld should not be materially extended in novel ways, *id.* at 495. *Free Enterprise Fund* concerned the constitutionality of the for-cause removal restriction on members of the Public Company Accounting Oversight Board (PCAOB), a five-member regulatory board created by the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), Pub. L. No. 107-204, 116 Stat. 745, to provide tighter regulation and investigation of, and enforcement against, the accounting industry in the wake of several celebrated accounting scandals. *Free Enterprise Fund*, 561 U.S. at 484; see *id.* at 485 (detailing the PCAOB's powers). Members of the PCAOB were appointed to staggered five-year terms by the Securities and Exchange Commission (SEC). *Id.* at 484. The PCAOB operated under the SEC's oversight, but the PCAOB's members could be removed by the SEC only under a particularly high standard of cause. *Id.* at 486. And although the statute creating the SEC does not contain any express restriction on the President's authority to remove SEC commissioners, the Court decided the case on the understanding that the President must satisfy the *Humphrey's Executor* standard to do so. *Id.* at 487.

After the PCAOB initiated an investigation of an accounting firm, the firm and a nonprofit organization of which it was a member brought suit seeking a declaratory judgment that the removal restriction on the PCAOB's members violated the separation of powers. *Free Enterprise Fund*, 561 U.S. at 487. The plaintiffs argued, in particular, that members of the SEC were themselves removable by the President only for cause, and thus PCAOB members were impermissibly insulated from the President's control by two layers of for-cause removal protection. See *id.* at 483-484.

The Court first addressed the President's authority to remove principal officers. It discussed the First Congress's adoption of the view that "the executive power included a power to oversee executive officers through removal." *Free Enterprise Fund*, 561 U.S. at 492. It described the "landmark case of *Myers*" as "reaffirm[ing]" that principle. *Ibid.* And it described *Humphrey's Executor* as holding only that *Myers* did not "prevent Congress from conferring good-cause tenure on the principal officers of certain independent agencies" characterized "as 'quasi-legislative and quasi-judicial' rather than 'purely executive.'" *Id.* at 493 (citation omitted).

As for inferior officers, the Court observed that when Congress vests their appointment in a Department Head, it is that person, rather than the President, who "enjoys the power of removal." *Free Enterprise Fund*, 561 U.S. at 493 (citing *Myers*, 272 U.S. at 119, 127). The Court noted that it had also previously "upheld for-cause limitations on that power" in two cases. *Ibid.* In *United States* v. *Perkins*, 116 U.S. 483 (1886), the Court upheld a restriction on the Secretary of the Navy's power to remove a naval cadet-engineer during peacetime without making a misconduct finding or convening a court-martial. *Id.* at 485. And in *Morrison* v. *Olson*, *supra*, the Court upheld a statute that required the Attorney General to show "good cause" for removal of an independent counsel appointed to investigate and prosecute serious crimes committed by certain high-ranking executive officers. 487 U.S. at 685-693.

The Court explained, however, that the Sarbanes-Oxley Act presented a "new situation not yet encountered by the Court." *Free Enterprise Fund*, 561 U.S. at 483. In its previous cases in which the Court had upheld "limited restrictions on the President's removal power," "[i]t was the President—or a subordinate he could remove at will—who decided whether the officer's conduct merited removal under the good-cause standard." *Id.* at 495. By contrast, the Sarbanes-Oxley Act created executive officers insulated from presidential control not only through their own "unusually high standard" for removal, *id.* at 503, but also through the good-cause protection for SEC commissioners who could remove them, "withdraw[ing] from the President any decision on whether" the high standard was met, *id.* at 495.

The Court concluded that "[t]his novel structure does not merely add to the Board's independence, but transforms it." *Free Enterprise Fund*, 561 U.S. at 496. "Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee," the President could "neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith." *Ibid.* The Court held that such an arrangement "violates the basic principle that the President 'cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,' because Article II 'makes a single President responsible for the actions of the Executive Branch.'" *Id.* at 496-497 (citation omitted).

The Court rejected the PCAOB's argument that the Court's conclusion was "contradicted by the past practice of Congress." *Free Enterprise Fund*, 561 U.S. at 505. It observed that the parties had "identified only a handful of isolated positions in which inferior officers might be protected by two levels of good-cause tenure." *Ibid.* Far from undermining its holding, the Court reasoned that "the lack of historical precedent" was "[p]erhaps the most telling indication of the severe constitutional problem." *Ibid.* (citation omitted).

B. The *Humphrey's Executor* Exception Should Not Be Extended To A Single-Headed Agency Like The Bureau

The question presented here is whether the *Humphrey's Executor* exception for multimember, "quasi-legislative" and "quasi-judicial" bodies should be expanded to single-headed agencies. The answer is no, for four related reasons. First, the rationale for the *Humphrey's Executor* exception necessarily rests in part on the structure of multimember bodies, not on their rulemaking and adjudicative functions alone, which are executive in nature in this context. Second, consistent with the rationale for the exception, it has historically been applied only to multimember bodies; removal restrictions on single-headed agencies are relatively new and have been subject to constitutional objection from their inception. Third, single-headed independent agencies would pose heightened dangers to the President's control of the Executive Branch. Fourth, extending *Humphrey's Executor* to single-headed agencies would lack any meaningful limiting principle, and thus would allow Congress to turn virtually the entire Executive Branch into a series of independent Departments with Heads shielded from presidential supervision and accountability.

1. *Humphrey's Executor* recognized an exception to the President's unrestricted removal power over principal executive officers for members of a commission with staggered terms established as a "quasi-legislative" or "quasi-judicial" "body of experts," which was intended

to operate in an interactive and deliberative manner and was "so arranged that the membership would not be subject to complete change at any one time." 295 U.S. at 624, 628; see *id.* at 631 (emphasizing that its holding "depend[ed] upon the character of the office"). The rationale for that exception is tied to the structural attributes of such a commission, not just its rulemaking and adjudicative functions. Indeed, the exception cannot properly be based on such functions alone, because "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison*, 487 U.S. at 690 n.28 (citation omitted). The structure of the FTC is the only reason *Humphrey's Executor* could plausibly describe that commission as "quasi-legislative" and "quasi-judicial," and thus is the critical reason why the Court upheld the restriction on the President's authority to remove its members.

a. As then-Judge Kavanaugh has noted, "the multi-member structure of independent agencies is not an accident." *PHH Corp.* v. *CFPB*, 881 F.3d 75, 186 (D.C. Cir. 2018) (en banc) (dissenting). An extensive study of independent agencies conducted in 1977 by the Senate Committee on Governmental Affairs concluded that "[t]he size of the commission, the length of [its members'] terms, and the fact that they do not all lapse at one time are key elements of the independent structure." *Study on Federal Regulation*, *Vol. V, Regulatory Organization*, S. Doc. No. 91, 95th Cong., 2d Sess. 35 (1977) (*Study on Federal Regulation*). These features were "the basic structural features which [had] marked every independent regulatory commission, beginning with" the Interstate Commerce Commission in the 1880s. *Id.* at 36. It has been generally recognized that a removal restriction is concomitant of such a body. Robert E. Cushman, *The Independent Regulatory Commissions* 188 (1941).

Restricting the President's power to remove the members of such agencies was generally thought, for example, to reinforce the long-term continuity and expertise that the structure of multimember agencies with staggered-term memberships was designed to promote. See Marshall J. Breger & Gary J. Edles, *Established By Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1137-1138 (2000). As the 1977 Senate study observed, "regulatory policies would tend to be more permanent and consistent to the extent that they were not identified with any particular administration or party," and "[a]brupt change would therefore be minimized." *Study on Federal Regulation* 29-30; see 51 Cong. Rec. 10,376 (1914) (contemplating that FTC "would have precedents and traditions and a continuous policy and would be free from the effect of * * * changing incumbency"). Ensuring that "[a] multimember agency structure * * * will not be immediately influenced by changes in Presidential administrations" requires protecting the ability of "the members [to] serve their full terms." Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 795 (2013).

This justification for independence, however, does not apply to a single-headed agency. The agency completely turns over when the agency head's term expires, and is heavily influenced at that point by any intervening changes in presidential administrations. Rather than promoting continuity and expertise, restricting the President's authority to remove the head of such an agency merely saddles an incoming President with a principal executive officer whom he did not appoint and with whom he may not agree, until that officer's term expires or the President can establish cause for removal—at which point the President can replace the agency head with an individual who aligns with his views.

Removal restrictions were also intended to promote the deliberative group decisionmaking that the structure of multimember agencies was already designed to facilitate. The Senate study concluded that the "[c]hief" consideration in determining whether to create an independent commission, rather than a standard executive agency, "is the relative importance to be attached to group decision-making." *Study on Federal Regulation* 79. Similarly, Professor Kenneth Culp Davis expressed the view that independent commissions were often created because they exercise adjudicative functions, and that these bodies should have multiple members "just as we want appellate courts to be made up of plural members, to protect against the idiosyncrasies of a single individual." *Administrative Law of the Seventies* § 1.09-1, at 15 (1976); see Datla & Revesz 794 (noting that "a multimember structure can foster more deliberative decision making," which is thought to "lead[] to better-informed and reasoned policy outcomes from the agency"). Removal restrictions facilitate a frank and open exchange of views among the members of such bodies.

Again, this justification is inapplicable to single-headed agencies. Instead, a single-headed executive agency embodies a quintessentially executive structure. "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any great number." *The Federalist No. 70*, at 472 (Hamilton) (Jacob Ernest Cooke ed., 1961); see *Clinton,* 520 U.S. at 712 (Breyer, J., concurring in the judgment) (describing how the Founders "consciously decid[ed] to vest Executive authority in one person rather than several," in contrast with their vesting of legislative and judicial powers in multimember bodies). Rather than deliberation, such a unitary structure permits the officer to act with "vigor." *Printz*, 521 U.S. at 922. The Constitution, however, specifies the official who must exercise that sort of executive power: the President, acting either personally or through subordinate officers who are accountable to him and whose actions he can control. The Constitution leaves no room for "a sort of junior-varsity" President. *Mistretta* v. *United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

b. Nor can the rulemaking or adjudicative functions of an agency alone justify characterizing it as "quasi-legislative" or "quasi-judicial." Describing those powers themselves as anything less than fully executive when exercised by a single-headed executive-branch agency would have been wrong even when *Humphrey's Executor* was decided, and it is untenable today. Instead, the exercise of rulemaking and adjudicative functions by such an agency is—and must be—the exercise of *executive* power.

Before *Humphrey's Executor*, the Court on several occasions recognized that executive agencies exercised executive power even when promulgating regulations or adjudicating disputes pursuant to federal statutes. "[F]rom the beginning of the government, the Congress has conferred upon executive officers the power to make regulations." *Panama Ref. Co.* v. *Ryan*, 293 U.S.

388, 428 (1935). Likewise, an "executive department charged with the duty of enforcing [an] Act" may properly "interpret[]" the meaning of the statutes that it administers, *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420, 435 (1930), and may act as a "tribunal" to adjudicate disputes between parties, *Morgan* v. *Daniel*s, 153 U.S. 120, 124 (1894). In both instances, however, the Executive Branch is exercising executive power. Accordingly, even at the time of *Humphrey's Executor*, the Court could not plausibly have described the FTC's functions as "quasi-legislative" and "quasi-adjudicative," if the agency instead had consisted of a single Secretary rather than a multimember commission. Such an agency would have been virtually indistinguishable from other executive Departments. See *Freytag* v. *Commissioner*, 501 U.S. 868, 911 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("[O]ur cases demonstrate [that] a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned.") (citation omitted; brackets in original).

The Court's modern decisions, moreover, make crystal clear that agencies engaged in rulemaking and adjudicative functions are wielding executive power in the constitutional sense. Although "[a]gencies make rules * * * and conduct adjudications * * * and have done so since the beginning of the Republic," and "[t]hese activities take 'legislative' and 'judicial' forms," at bottom "they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power'" when performed by the Executive Branch. *City of Arlington* v. *FCC*, 569 U.S. 290, 304 n.4 (2013) (citation omitted); see *INS* v. *Chadha*, 462 U.S. 919, 953 n.16 (1983) (although the Attorney General's administration of the Immigration and Nationality Act "may resemble 'lawmaking,'" he nevertheless "acts in his presumptively Art. II capacity" and "does not exercise 'legislative' power").

As noted, this Court has already acknowledged that the FTC's powers "at the time of *Humphrey's Executor*" would now "be considered 'executive,' at least to some degree." *Morrison*, 487 U.S. at 690 n.28 (citation omitted). And the executive power exercised by independent agencies has only expanded since then. Unlike the FTC in 1935, the FTC, the CFPB, and myriad other independent agencies now have the ability to bring enforcement suits in federal court seeking retrospective relief, compare FTC Act § 5, 38 Stat. 719, with, *e.g.*, 15 U.S.C. 45(m), 12 U.S.C. 5564(a), which "cannot possibly be regarded" as anything other than an exercise of the executive power and duty vested solely in the President. *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam).

For those reasons, *Humphrey's Executor*'s "quasi-legislative" and "quasi-judicial" characterizations are best regarded as referring to the *manner* in which a multimember body is intended to operate—through an interactive deliberative process and voting in the nature of a true "legislative" or "judicial" body—not to its functions. Because the CFPB exercises indisputably executive functions in a quintessentially executive manner, those characterizations are inapt—and the *Humphrey's Executor* exception does not apply.

2. The historical dearth of single-headed independent agencies underscores why *Humphrey's Executor* should not be extended to this new context. This Court

has recognized that "'long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President." *NLRB* v. *Noel Canning*, 573 U.S. 513, 524 (2014) (brackets and citation omitted). Novelty in this context can itself be a "telling indication of [a] severe constitutional problem." *Free Enterprise Fund*, 561 U.S. at 505 (citation omitted). Defenders of the removal restriction on the Director, however, have identified only a handful of agencies in the history of the Republic headed by a single principal officer subject to for-cause removal. All of them are recent innovations whose constitutionality has been disputed.

In 1978, for example, Congress established the Office of Special Counsel, headed by a Special Counsel who is appointed by the President by advice and consent of the Senate for a term of 5 years, removable only for "inefficiency, neglect of duty, or malfeasance in office." Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 202(a), 92 Stat. 1122. The Office does not regulate private citizens, but instead is responsible for enforcing certain laws governing federal employment, such as civil-service personnel protections and restrictions on political conduct by government employees. 5 U.S.C. 1212 (2012 & Supp. V 2017). The Office of Legal Counsel nevertheless contemporaneously objected that "Congress may not condition the President's power to remove the Special Counsel." *Memorandum Opinion for the General Counsel, Civil Service Commission*, 2 Op. O.L.C. 120, 122 (1978). And President Reagan vetoed subsequent legislation regarding the Office of Special Counsel, citing "serious constitutional concerns" about the agency's independent status. See *Memorandum of*

Disapproval on a Bill Concerning Whistleblower Protection, Pub. Papers 1391, 1392 (Oct. 26, 1988).[2]

In 1994, Congress removed the Social Security Administration (SSA) from the Department of Health and Human Services, creating a standalone agency headed by a single commissioner appointed for a six-year term and removable only for cause. Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 102, 108 Stat. 1466. SSA does not bring enforcement actions against private citizens, but rather primarily engages in adjudication of private claims for benefits. In President Clinton's signing statement, he nevertheless made clear that "in the opinion of the Department of Justice, the provision that the President can remove the single Commissioner only for neglect of duty or malfeasance in office raises a significant constitutional question." *Statement on Signing the Social Security Independence and Program Improvements Act of 1994*, Pub. Papers 1471, 1472 (Aug. 15, 1994).

During the 2008 financial crisis, Congress created the Federal Housing Finance Agency (FHFA) to oversee Fannie Mae and Freddie Mac. 12 U.S.C. 4511. Like the CFPB, the FHFA is also headed by a single Director subject to removal only for cause. 12 U.S.C. 4512. That, of course, is neither surprising nor probative, as Section 4512 was enacted roughly contemporaneously with the Dodd-Frank Act. For substantially the same

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[2] President Bush signed legislation the following year even though it "retain[ed]" the removal restriction. *Remarks on Signing the Whistleblower Protection Act of 1989*, Pub. Papers 391 (Apr. 10, 1989). But the Executive Branch had been clear about its constitutional objections, and the bill was the result of a "compromise" intended to partially address those concerns. 135 Cong. Rec. 5032-5033 (1989).

reasons offered here, the United States has explained that the removal restriction on the FHFA Director is also unconstitutional. See Dep't of Treasury Supp. Br. at 20-23, *Collins* v. *Mnuchin*, No. 17-20364 (5th Cir. Jan. 11, 2019). The Fifth Circuit recently agreed. *Collins* v. *Mnuchin*, 938 F.3d 553 (2019) (en banc), petition for cert. pending, No. 19-422 (filed Sept. 25, 2019).

Finally, the *PHH* majority pointed to President Lincoln's failure to object to a removal restriction briefly imposed on the Comptroller of the Currency in 1863. 881 F.3d at 104. But the Comptroller was likely an inferior rather than a principal officer; he worked "under the general direction of the Secretary of the Treasury." Act of Feb. 25, 1863, ch. 58, 12 Stat. 665. And in any event, the restriction on his removal was repealed one year later. See Act of June 3, 1864, ch. 106, 13 Stat. 99. The Court in *Myers* rightly declined to place any weight on President Lincoln's decision to carefully pick his constitutional battles with the Republican Congress in the heat of the Civil War. See *Myers*, 272 U.S. at 165.

3. Although the inapplicability of the rationale of *Humphrey's Executor* is a sufficient basis not to extend that exception to single-headed agencies, applying the exception to such agencies would also pose unique threats to the President's control over the exercise of executive power. The President's removal authority over individual officers on a multimember commission is identical to his authority over a single head, but a single-headed independent agency presents a greater risk than a multimember independent agency of taking actions or adopting policies inconsistent with the President's executive policy.

Unlike a multimember commission, which generally must engage in at least some degree of deliberation and collaboration, a single Director can decisively implement his own views and exercise discretion without those structural constraints. Indeed, it is for precisely that reason that the Framers adopted a strong, unitary Executive—headed by the President—rather than a weak, divided one. See pp. 10-12, *supra*. Vesting executive power in a single person not answerable to the President "does not merely add" to the intrusion on executive authority, "but transforms it." *Free Enterprise Fund*, 561 U.S. at 496.

The difference in decisionmaking is reinforced by the difference in the timing and composition of appointments to the two types of agencies. For a multimember commission with staggered terms, the President is generally assured to have an opportunity to appoint at least some of its members, and the partisan-balance requirement that is common for such commissions further increases the likelihood that at least some of the holdover members share the President's views. Many multimember commissions, moreover, afford the President the unfettered ability to appoint and remove their chairs, which is a significant means of influence. See Datla & Revesz 796-797 & n.146. By contrast, the statutory term of a single agency head may insulate that principal officer from presidential control for a significant portion of the President's term in office. And where the single head has a term greater than four years, a President may never have the opportunity to appoint that officer. See 12 U.S.C. 5491(c)(1).

To be sure, the frequency with which the threat of departures from the President's executive policy materializes will depend on the particular circumstances, but the "added" risk of such departures "makes a difference." *Free Enterprise Fund*, 561 U.S. at 495. The interference with executive power caused by the removal restriction on the Bureau's Director is exacerbated by both the Bureau's single-headed nature and its wide-ranging policymaking and enforcement authority over private conduct.

4. Finally, if *Humphrey's Executor* were extended to single-headed agencies like the Bureau, there would be no meaningful limiting principle. If the Director—responsible for enforcing, interpreting, and adjudicating 19 different statutes—may be insulated from supervision by the President, it is difficult to see why Congress could not equally impose removal restrictions on every principal executive officer.

After all, each of them heads "an administrative body created by Congress to carry into effect legislative policies embodied in [their organic] statute[s] in accordance with the legislative standard therein prescribed." *Humphrey's Executor*, 295 U.S. at 628. And trying to draw lines among them based on their perceived importance cannot establish the "high walls and clear distinctions" that are "judicially defensible in the heat of interbranch conflict." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). The *PHH* majority's vague suggestion that "the nature of the agency's function" would prevent this "[s]lippery [s]lope" is thus illusory. 881 F.3d at 106. Extending *Humphrey's Executor* to the CFPB would "provide[] a blueprint for extensive expansion of the legislative power" by "impair[ing] [the President] in the performance of [his] constitutional duties" to oversee the exercise of executive power. *Free Enterprise Fund*, 561 U.S. at 500 (citations omitted).

The *PHH* majority attempted to carve off "Cabinet-level officers," based on their presence in the presidential line of succession and their ability under the 25th Amendment to remove the President temporarily from office. 881 F.3d at 107. But the presidential line of succession is entirely within the control of Congress. U.S. Const. Art. II, § 1, Cl. 6; 3 U.S.C. 19. And the 25th Amendment similarly provides for the temporary removal of the President by "the Vice President and a majority of either the principal officers of the executive departments *or of such other body as Congress may by law provide*." U.S. Const. Amend. XXV, § 4 (emphasis added). Even if there is a core set of executive officers who must be included in such a body, there is no sound basis for limiting the scope of the President's removal authority vested by Article II based on an unrelated constitutional amendment adopted in 1967.

The *PHH* majority also suggested that at least a few "core" executive Departments might be distinguishable because they assist the President in exercising inherent constitutional powers "specifically identified in Article II"—"prominently, the Secretaries of Defense and State." 881 F.3d at 107. Even if that were so, it would not prevent Congress from restricting the President's authority over the overwhelming majority of the "vast power" of the modern administrative state, which "touches almost every aspect of daily life," by virtue of statutory, rather than inherent constitutional, authority —*e.g.*, the Departments of Labor, Health and Human Services, and so forth. See *Free Enterprise Fund*, 561 U.S. at 499. The Framers could not possibly have envisioned such a limited role for the chief Executive when they vested the President alone with "*[t]he* executive Power" and charged him to "take Care that *the*

Laws be faithfully executed." U.S. Const. Art. II, §§ 1, 3 (emphases added).

C. The Contrary Reasoning Of The Ninth And D.C. Circuits Is Erroneous

Neither the decision below nor the D.C. Circuit's en banc decision in *PHH* successfully justifies extending *Humphrey's Executor* to this new context.

1. The Ninth Circuit principally reasoned that this Court had already extended *Humphrey's Executor* to single-headed executive agencies in *Morrison*, *supra*. See Pet. App. 4a-5a; accord *PHH*, 881 F.3d at 97. But *Morrison* is inapposite. To be sure, the Court there disregarded the "purely executive" nature of the independent counsel, reasoning that "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 690-691. But critically, the Court emphasized that its negative answer rested on its view that the independent counsel was "an inferior officer * * * with limited jurisdiction and tenure and lack[of] policymaking or significant administrative authority." *Id.* at 691; see *id.* at 671-672; see also *Free Enterprise Fund*, 561 U.S. at 494 ("We * * * considered the status of inferior officers in *Morrison*."). Indeed, in *Free Enterprise Fund*, the Court never even mentioned *Morrison*'s "real question," and it made clear that, at least for "principal officers," the *Humphrey's Executor* exception for "'quasi-legislative and quasi-judicial'" officers is the sole exception from the general rule of unrestricted presidential removal. *Id.* at 493 (citation omitted). Here, "no one disputes[] the Director is a *principal officer*." *PHH*, 881 F.3d at 152 (Henderson, J., dissenting).

Although the *PHH* majority noted that "[t]he degree of removal constraint effected by a single layer of for-cause protection is the same whether that protection shields a principal or inferior officer," 881 F.3d at 97 n.2, the distinction between principal officers and inferior officers appointed by Department Heads is fundamental. The fact that the Appointments Clause allows Congress to exempt the appointment of inferior officers from Senate confirmation, U.S. Const. Art. II, § 2, Cl. 2, has historically been part of the justification for why Congress may exempt at least certain inferior officers from the general rule of unrestricted removal. See *Myers*, 272 U.S. at 127 (citing *Perkins*, 116 U.S. at 485).

Moreover, that textual distinction reflects common sense: "[t]he more important the officer's assignments, the more directly his actions implicate the President's responsibility to faithfully execute the laws." *PHH*, 881 F.3d at 152 (Henderson, J., dissenting). Imposing for-cause removal restrictions on inferior officers poses fewer constitutional concerns given the principle that such officers generally may be removed for "failure to accept supervision" from "principal officers who (being removable at will) have the President's complete confidence." *Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting). And while *Morrison* permitted a limited incursion on that principle for the independent counsel, it relied heavily on the perceived "necessary independence of the office" while engaged in the "limited" task of investigating and prosecuting high-ranking executive officials. *Id.* at 691-693.

By contrast, allowing removal restrictions for the principal officers of even single-headed executive agencies would thwart the Framers' design that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." *Free Enterprise Fund*, 561 U.S. at 498 (quoting 1 Annals of Cong. 499 (Madison)). Simply put, "*Morrison* did not hold—or even hint—that a single *principal* officer could be the sole head of an independent regulatory agency with broad enforcement, rulemaking, and adjudication powers." *PHH*, 881 F.3d at 195 (Kavanaugh, J., dissenting).

2. The *PHH* majority also claimed to identify a "longstanding tradition of affording some independence to the government's financial functions." 881 F.3d at 91. But most of the financial regulators identified by the D.C. Circuit are multimember commissions created more than a hundred years after the Founding. See *id.* at 92. As for the court's discussion of individual officers, its historical analysis cannot withstand scrutiny.

The D.C. Circuit observed that the First Congress "specified the responsibilities of the Treasury Secretary and other officers in the Treasury Department in some detail." *PHH*, 881 F.3d at 91. But just as with the Secretaries of Foreign Affairs and War, the First Congress recognized that the Treasury Secretary was removable by the President at will. See Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 67. Indeed, the startling implication of the *PHH* majority's reasoning that Congress could restrict the President's ability to remove the Treasury Secretary only underscores that "this wolf comes as a wolf." *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting).

The D.C. Circuit next claimed that it was at least unclear whether the original Comptroller of the Treasury could be removed only "if found to 'offend against any of the prohibitions of th[e] act.'" *PHH*, 881 F.3d at 91. But the section of the Act on which the *PHH* majority relied refers to punishment and automatic removal from office for anyone who violates the conflict-of-interest provisions in the Act, including the Treasury Secretary himself. See Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67 (prohibiting any "person appointed to any office instituted by this act" from, *e.g.*, "carrying on the business of trade or commerce"). That provision plainly did not impliedly restrict the President's constitutional authority to remove the Comptroller or the Secretary. See *Free Enterprise Fund*, 561 U.S. at 517 (Breyer, J., dissenting) (acknowledging that the Act "did not directly limit the President's authority to *remove* any of those officials").[3]

The *PHH* majority lastly claimed that the current Comptroller of the Currency is "insulated from removal." 881 F.3d at 97 (citing 12 U.S.C. 2); see *id.* at 91. But the cited provision provides that the Comptroller will "hold his office for a term of five years *unless sooner removed by the President*." 12 U.S.C. 2 (emphasis added). It does not provide any insulation from removal, but merely requires the President to "communicate[]" his reasons for removal to the Senate, whatever

[3] The D.C. Circuit also attributed to Madison the view that the Comptroller "should not hold his office at the pleasure of the Executive branch." *PHH*, 881 F.3d at 91 (quoting 1 Annals of Cong. 612). "But Madison's actual proposal, consistent with his view of the Constitution, was that the Comptroller hold office for a term of 'years, unless sooner removed by the President'; he would thus be 'dependent upon the President, because he can be removed by him,' and also 'dependent upon the Senate, because they must consent to his [re-appointment] for every term of years.'" *Free Enterprise Fund*, 561 U.S. at 500 n.6 (quoting 1 Annals of Cong. 612).

those reasons may be. *Ibid.* The Comptroller therefore serves at the pleasure of the President.

3. Finally, in his *PHH* concurrence, Judge Griffith suggested that any constitutional concern about the removal restriction for the Director could be alleviated by interpreting the removal standard—"inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. 5491(c)(3)—to impose "only a minimal restriction on the President's removal power, even permitting him to remove the Director for ineffective policy choices." 881 F.3d at 124. To be sure, this Court's cases have given conflicting signals about the breadth of that standard, compare *Bowsher*, 478 U.S. at 729, with *Free Enterprise Fund*, 561 U.S. at 502, and the United States agrees that, where the standard can constitutionally be applied at all, it should be interpreted as broadly as textually possible in light of the serious constitutional concerns. But even broadly construed, such a restriction on the President's power to remove the sole principal officer of an executive agency is unconstitutional.

As the Court explained in *Myers*, "[e]ach head of a department is and must be the President's *alter ego*" in whom the President places his "implicit faith." 272 U.S. at 133-134. Such officers are the "arm[s]" and "eye[s] of the executive." *Humphrey's Executor*, 295 U.S. at 628. The President cannot be forced to retain and monitor such officers until a federal court is satisfied that he has offered "a reasoned, non-pretextual explanation" for their termination. *PHH*, 881 F.3d at 135 (Griffith, J., concurring in the judgment). The contrary rule would be deeply problematic even within one Administration. It would be nonsensical between two of them, potentially requiring a new President to maintain the Cabinet of a prior President until he could complete the "time-consuming and cumbersome" process of their removal for cause. *Id.* at 201 n.1 (Randolph, J., dissenting). The President "must have the power to remove" such principal officers "[t]he moment that he loses confidence in the[ir] intelligence, ability, judgment or loyalty." *Myers*, 272 U.S. at 134.

D. If This Court Were To Conclude That *Humphrey's Executor* Cannot Be Distinguished, It Should Narrow Or Overrule That Decision

For these reasons, *Humphrey's Executor* does not control this case. Because "the narrow point actually decided [in *Humphrey's Executor*] was only" that Congress could limit the President's ability to remove a commissioner of the multimember FTC, statements in that opinion "beyond the point involved * * * do not come within the rule of *stare decisis*." *Humphrey's Executor*, 295 U.S. at 626 (distinguishing *Myers* in this fashion). That is all the more so since *Humphrey's Executor* expressly left "for future consideration and determination" whether Congress may restrict the President's power to remove principal officers different from "such as that [were] [t]here involved." *Id.* at 632.

If the Court were to conclude, however, that *Humphrey's Executor* or any of its progeny requires upholding the removal restriction for the Bureau's Director, those decisions should be narrowed or overruled as necessary. *Stare decisis* is "not an inexorable command." *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). And the doctrine "is at its weakest when [the Court] interpret[s] the Constitution because [the] interpretation can be altered only by constitutional amendment or by overruling [the] prior decisions." *Janus* v. *American Fed'n of State, County, & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018) (citation omitted). In considering whether *stare* *decisis* justifies the maintenance of an erroneous constitutional holding, the Court has considered (1) "the quality of [a prior decision's] reasoning," (2) "its consistency with other related decisions," (3) "developments since the decision was handed down," (4) "the workability of the rule it established," and (5) "reliance on the decision." *Id.* at 2478-2479; see *Franchise Tax Bd.* v. *Hyatt*, 139 S. Ct. 1485, 1499 (2019). None of those factors justifies preserving *Humphrey's Executor* to the extent it would apply to the CFPB.

First, as explained, the reasoning for *Humphrey's Executor* does not withstand careful analysis. Even at the time of the decision, there was little reason to conclude that the FTC exercised anything other than executive authority. See pp. 30-31, *supra*. Second, the decision was concededly inconsistent with the exhaustive and careful reasoning of the *Myers* decision, *Humphrey's Executor*, 295 U.S. at 626, and, if applied to the novel structure of the CFPB, would be inconsistent with the Court's subsequent decision in *Free Enterprise Fund*, see pp. 32-37, *supra*. Third, legal developments since *Humphrey's Executor* have only clarified that independent agencies exercise executive power—particularly those agencies like the CFPB that have the authority to bring enforcement actions in federal court seeking civil penalties. See pp. 31-32, *supra.* Fourth, if extended to single-headed agencies, *Humphrey's Executor* would not provide a workable rule for distinguishing between principal executive officers whose removal may or may not be restricted. See pp. 37-39, *supra*. And fifth, there are minimal reliance interests in the removability of principal executive officers, particularly for single-headed independent agencies given their novelty. See pp. 32-35, *supra*. Taken together, these factors amply provide "special justifications," *Janus*, 138 S. Ct. at 2486 (brackets and citation omitted), for overruling or narrowing *Humphrey's Executor* as necessary.

II. THE REMOVAL RESTRICTION IS SEVERABLE FROM THE REST OF THE DODD-FRANK ACT

Because the statutory restriction on the President's authority to remove the Bureau's Director is unconstitutional, it should be invalidated. This Court, however, "should refrain from invalidating more of the statute than is necessary." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987) (citation omitted). When the Court finds a statutory provision unconstitutional, even in the absence of a severability clause, the Court's "normal rule" is to sever the provision from the rest of the Act, *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (citation omitted), unless it is "'evident'" that the Congress that enacted the invalid provision "would have preferred" that those additional provisions be invalidated as well. *Free Enterprise Fund*, 561 U.S. at 509 (citation omitted). Where Congress has included an express severability clause, the Court applies it according to its terms, absent "strong evidence that Congress intended otherwise." *Alaska Airlines*, 480 U.S. at 686.

The Court has generally severed unconstitutional restrictions on the removal of executive officers while maintaining the unchallenged portions of the relevant statutes. Of particular relevance here, in *Free Enterprise Fund*, the Court held that the invalid removal restriction on members of the PCAOB was severable from the rest of the Sarbanes-Oxley Act. Even without a severability clause, the Court held that it was not "'evident'" that Congress "would have preferred no Board at all to a Board whose members are removable at will."

Free Enterprise Fund, 561 U.S. at 509 (citation omitted). The same result follows *a fortiori* here.

The Dodd-Frank Act provides that "[i]f any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby." Dodd-Frank Act, § 3, 124 Stat. 1390 (12 U.S.C 5302). That language is "unambiguous." *Chadha*, 462 U.S. at 932. The removal restriction at 12 U.S.C. 5491(c)(3) is a "provision of this Act," 12 U.S.C. 5302; see Dodd-Frank Act § 1011(c)(3), 124 Stat. 1964. If this Court holds the removal provision "to be unconstitutional," Congress plainly intended for the "remainder of th[e] Act * * * not [to] be affected thereby." 12 U.S.C. 5302.

After the invalidation of the removal provision, the Dodd-Frank Act, including its Bureau-related provisions, will remain "fully operative." *Free Enterprise Fund,* 561 U.S. at 509 (citation omitted). And there is no evidence—much less strong evidence—that Congress would have preferred that the remaining provisions also be invalidated. The Dodd-Frank Act addresses a host of issues arising from the financial crisis, and it contains hundreds of provisions designed to "promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices." 124 Stat. 1376; see p. 2, *supra*. Petitioner has not pointed to strong evidence that Congress would have chosen to enact none of those provisions if the Bureau's Director were subject to at-will removal by the President.

Even considering only the Bureau-specific provisions contained in Title X of the Dodd-Frank Act, 124 Stat. 1955, there is no basis to conclude that Congress would have preferred to have no Bureau at all rather than a Bureau headed by a Director who would be removable like almost all other single-headed agencies. Congress charged the Bureau with implementing and enforcing "[f]ederal consumer financial law," 12 U.S.C. 5511(a), because, among other things, the existing system for protecting consumers "suffer[ed] from a number of serious structural flaws" caused by "conflicting regulatory missions, fragmentation, and regulatory arbitrage," Senate Report 10. Nothing in the statutory text or history of the Bureau's creation suggests, much less clearly demonstrates, that Congress would have preferred, for example, that the regulatory authority vested in the Bureau revert back to the seven federal agencies that previously administered those responsibilities if a court were to invalidate the Director's removal restriction.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to the court of appeals for further proceedings.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
JONATHAN Y. ELLIS
Assistant to the Solicitor General
MARK B. STERN
DANIEL AGUILAR
Attorneys

MARY E. MCLEOD
General Counsel
JOHN R. COLEMAN
Deputy General Counsel
STEVEN Y. BRESSLER
Assistant General Counsel
Consumer Financial Protection Bureau

DECEMBER 2019

Exhibit F

UNITED STATES OF AMERICA
THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Maureen K. Ohlhausen, Acting Chairman**
Terrell McSweeny

In the Matter of	)	
	)	
CORELOGIC, INC.,	)	**Docket No. C-4458**
a corporation.	)	

ORDER TO SHOW CAUSE AND ORDER MODIFYING ORDER

Pursuant to Commission Rule of Practice 3.72(b), the Commission issues this Order to Show Cause stating the changes the Commission proposes to make to the Decision and Order ("Order") issued in this matter and the reasons the Commission deems these changes necessary. 16 C.F.R. §3.72(b).

The Commission issued the Order in May 2014 to resolve concerns regarding the competitive impact of the acquisition by CoreLogic, Inc. ("CoreLogic" or "Respondent") of certain assets from TPG VI Ontario 1 AIV L.P. ("TPG"). Through the acquisition, Respondent acquired TPG subsidiary, DataQuick Information Systems, Inc. ("DataQuick"). Among other things, DataQuick licensed to customers nationwide, real property data known as assessor and recorder data. The Complaint alleged that the acquisition would significantly increase concentration in the market for national assessor and recorder data ("bulk data"). CoreLogic denied the Commission's allegation but agreed to settle the matter through entry of the Order requiring divestiture of certain DataQuick assets. The Order became final on May 20, 2014.

The Order's central requirement is that CoreLogic provide Commission-approved Acquirer Renwood RealtyTrac LLC ("RealtyTrac") with bulk data and certain ancillary data marketed by DataQuick (collectively "licensed data"). Prior to the acquisition, DataQuick licensed the majority of its bulk data from CoreLogic. The Order requires that CoreLogic license and deliver bulk data to RealtyTrac and provide RealtyTrac with the same service, timeliness and quality as CoreLogic provided DataQuick. CoreLogic is further required to provide RealtyTrac with updated bulk data of the same scope and quality as DataQuick used in its business for at least 5 years. The Order requires CoreLogic to provide DataQuick's existing licensed data and begin providing updated bulk data within 60 days of executing the Remedial Agreement. CoreLogic and RealtyTrac executed the Remedial Agreement on March 26, 2014 and sixty days after that date is May 25, 2014.

The Order also contains a number of provisions typically found in divestiture orders that ensure RealtyTrac has the information and assistance necessary to become a successful entrant. First, CoreLogic is required to provide RealtyTrac with DataQuick business records. Second, CoreLogic must provide RealtyTrac with access to knowledgeable employees and information related to "DataQuick's collection, manipulation, storage and provision" of data. Third, CoreLogic must allow certain legacy DataQuick customers to terminate their DataQuick contracts in order to do business with RealtyTrac, and, during a period lasting until nine months after the Divestiture Date, include a six month termination clause in all new agreements with former DataQuick bulk data customers. Fourth, the Order requires CoreLogic to facilitate RealtyTrac's ability to hire experienced DataQuick employees. Finally, the Order appoints Mr. Mitchell S. Pettit as monitor to oversee CoreLogic's compliance with the Order.

As required by Commission Rule 2.32, CoreLogic executed an Agreement Containing Consent Order ("Consent Agreement") consenting to entry of the Order. In the Consent Agreement, CoreLogic represented and warranted that it could fulfill the terms of, and accomplish the full relief contemplated by, the Order. Further, in April 2014, CoreLogic submitted its first verified report of compliance under the Order. In this report, Respondent asserted that it was delivering to RealtyTrac all bulk data required by the Order.

Nevertheless, soon after CoreLogic began delivering bulk data to RealtyTrac, RealtyTrac discovered that the deliveries were missing certain required data. RealtyTrac continued to uncover additional missing data for at least the next 2 years. CoreLogic responded to RealtyTrac requests for missing data but did not identify the full scope of bulk data that DataQuick had used. Further, CoreLogic did not take adequate steps to ensure it was providing all of the required data to RealtyTrac. In addition, CoreLogic did not provide RealtyTrac, Commission staff, or the monitor with complete and accurate information regarding the manner in which DataQuick provided bulk data to customers.

CoreLogic also failed to deliver to RealtyTrac certain required data that DataQuick licensed from third parties. This data was included in the scope of licensed data in the Order and by signing the consent agreement CoreLogic represented it could provide this data to RealtyTrac. However, CoreLogic subsequently informed Commission staff that it could not produce certain existing bulk data and ancillary data because of limitations on its right to sublicense the data. CoreLogic offered to provide information and introductions to enable RealtyTrac to attempt to license the data directly. Although useful, this offer is not sufficient to comply with the Order because it does not guarantee access to the required data and requires RealtyTrac to expend resources not contemplated by the Order.

It further appears that CoreLogic did not provide the full level of support required by the Order. One example of this concerns an ancillary product, known as an AVM, which CoreLogic provided to RealtyTrac pursuant to the Order. In 2015, CoreLogic ceased standard third party testing of the AVM without informing RealtyTrac. RealtyTrac subsequently discovered a serious technical issue with the product that CoreLogic did not discover through internal quality control processes. The issue was resolved and third party testing resumed.

In February 2015, the Monitor hired a Technical Assistant who helped the Monitor develop and recommend a technical plan to (i) identify the data that CoreLogic was required to provide under the Order, (ii) provide all missing data and information to RealtyTrac, and (iii) verify that the required data and information had been provided. The parties are implementing this technical plan and are in the final stages of verifying that CoreLogic is providing all data and information necessary to duplicate DataQuick's bulk data offerings to customers. CoreLogic will thereafter complete transfer of all required information regarding DataQuick's bulk data business.

CoreLogic's actions violated the Order and interfered with its remedial goals. CoreLogic slowed RealtyTrac's acquisition of the full scope of DataQuick bulk data and the information necessary to provide data in the same manner as DataQuick. Further, RealtyTrac appears to have relied on CoreLogic's assertions regarding the scope of DataQuick data that CoreLogic was delivering. This reliance harmed RealtyTrac's reputation and required that it expend technical and financial resources to uncover missing data and redress the effects of CoreLogic's order violations.

In light of the foregoing, the Commission proposes to modify the Order so that it is better able to achieve its stated purpose. The modifications require, among other things, CoreLogic to extend the initial licensing term and comply with a technical transfer addendum and a service level addendum. The addenda contain clearly defined obligations that promote the remedial purpose of the order. CoreLogic is also required to provide technical assistance for one year after the technology transfer to RealtyTrac is complete. In addition, CoreLogic and RealtyTrac have agreed to modify their license agreement to conform to these modifications. The Order incorporates the license agreement as a Remedial Agreement. As required by the Order, CoreLogic seeks permission to implement the agreed modifications to the Remedial Agreement.

Respondent denies that it has violated the terms of the Order and does not agree with the facts and conclusions as stated in the Order to Show Cause. However, in settlement of the Commission's claims regarding violation of the Order as described, Respondent consents to issuance of an Order Modifying Order, and waives any further rights it may have under Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R §3.72(b). Respondent, its attorney, and counsel for the Commission executed an Agreement Containing Order to Show Cause and Order Modifying Order ("Modification Agreement"). The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. Now, in conformity with Rule §3.72(b) the Commission determines in its discretion that it is in the public interest to modify the Order in Docket No. C-4458.

Accordingly,

IT IS ORDERED that this matter be, and it hereby is, reopened; and

IT IS FURTHER ORDERED that **Paragraph II.F** of the Order in Docket No. C-4458 is revised to read as follows (revisions underlined):

F. Continuing until one year after completion of paragraphs 1 to 10 of Technical Transfer Plan, Respondent shall, upon reasonable request, provide the Acquirer with access to knowledgeable employees and information related to DataQuick's collection, manipulation, storage and provision of Assessor Data, Recorder Data and Other Related Data as needed to assist the Acquirer in collecting, manipulating, storing and providing to customers the Licensed Data and Licensed Historical Data as required by the Order and the Remedial Agreement. As part of this obligation, Respondent shall, on or before the day the Remedial Agreement is executed, designate one or more employees as transition coordinator(s) and shall provide the name and contact information for the transition coordinator(s) to the Acquirer, to the Commission and the Monitor. The transition coordinator(s) shall be responsible for ensuring Respondent complies with its obligations to provide transition assistance as required by this Paragraph and the Remedial Agreement, including by timely providing knowledgeable employees and information to the Acquirer. Respondent shall ensure that the transition coordinator(s) has the authority, capability and resources necessary to meet Respondent's obligations under this paragraph and the Remedial Agreement.

IT IS FURTHER ORDERED that **Paragraph II.G** of the Order in Docket No. C-4458 is revised to read as follows (revisions underlined):

G. In any agreement to provide a DataQuick Customer with Assessor Data or Recorder Data that Respondent executes less than 9 months after completing paragraphs 1 to 6 of the Technical Transfer Plan, Respondent shall include a provision allowing the customer to terminate the agreement in order to license or purchase Assessor Data or Recorder Data from the Acquirer so long as the DataQuick Customer provides 180-days' written notice of its intent to terminate the agreement, *provided, however*, that the DataQuick Customer may, at any time after providing its written termination notice, revoke or postpone the effective date of such notice.

IT IS FURTHER ORDERED that **Paragraph VI.A.1** of the Order in Docket No. C-4458 is revised to read as follows (revisions underlined):

A. Respondent shall submit to the Commission and any Monitor appointed by the Commission:

1. Verified written reports:

a. Within 30 days after the date this Order becomes final and every 90 days thereafter until completion of paragraphs 1 to 10 of the Technical Transfer Plan;

b. On the first anniversary of the date on which this Order becomes final, and annually thereafter until one year after termination of the Remedial Agreement,

which reports shall set forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order and the Remedial Agreement since the filing of any previous compliance report, and shall, *inter alia*, describe the status of any transition project plan in a Remedial Agreement, and identify all DataQuick Customers who have provided notice of termination pursuant to Paragraph II above, when such customer provided notice of termination and whether the relevant contract has been terminated; and

IT IS FURTHER ORDERED that the Order in Docket No. C-4458 is amended to include the following **Paragraph IX**:

IX.

IT IS FURTHER ORDERED that:

A. As used in the Order and Modifying Order the following definitions shall apply:

1. "AVM" means Automated Valuation Model.

2. "AVM Resale Agreement" means an agreement to resell the following automated valuation models ("AVMs") owned by CoreLogic: PASS®, ValuePoint®4 (VP4), Prospector™, GeoAVM Core™, and GeoAVM Core Precision™ that conforms in substance to the form agreement attached to the Modifying Order as Confidential Addendum C.

3. "DataQuick Architecture" means the architecture for the DataQuick Fulfillment Platform. A diagram of the DataQuick Architecture as of the entry of the Modifying Order is attached as Confidential Addendum D.

4. "DataQuick AVM" means an automated valuation model that CoreLogic obtained from DataQuick.

5. "DataQuick Fulfillment Platform" shall have the meaning defined in the Technical Transfer Plan.

6. "First Amendment to the CoreLogic-RealtyTrac Agreement," means Amendment 1 to the Data License Agreement and Statement of Work between CoreLogic Solutions, LLC. ("CoreLogic") and Attom Data Solutions ("Customer").

7. "Independent AVM Testing" means testing of the AVM by AVMetrics, LLC (or another recognized independent third party AVM testing company selected by CoreLogic and consented to in writing by the Acquirer) using national benchmark sales values to determine accuracy (unless otherwise agreed to by the Acquirer after entry of the Modifying Order).

8. “Service Level Addendum” means the Service Level Addendum attached to the Modifying Order as Confidential Addendum A.

9. “Technical Transfer Plan” means the Technical Transfer Plan attached to the Modifying Order as Confidential Addendum B.

B. The Commission approves the First Amendment to the CoreLogic-RealtyTrac Agreement and incorporates it into the Order as part of the Remedial Agreement.

C. Respondent shall extend the initial license term of the Remedial Agreement for 3 years in accordance with the terms of the First Amendment to the CoreLogic-RealtyTrac Agreement.

D. Respondent shall comply with the requirements of the Service Level Addendum.

E. Respondent shall comply with the requirements of the Technical Transfer Plan.

F. Within ten days of receiving a written request by the Acquirer, Respondent shall enter an AVM Resale Agreement with the Acquirer.

G. So long as Acquirer is marketing, offering, selling or supplying a DataQuick AVM to customers, Respondent shall comply with the terms of Paragraph K of the Service Level Agreement. Respondent shall bear the cost of providing Independent AVM Testing required by paragraph K of the Service Level Addendum.

H. Respondent shall not modify the DataQuick Architecture without providing at least 60 days’ written notice to the Monitor and the staff of the Commission explaining the reason for the modification and providing a diagram of the revised DataQuick Architecture, which diagram shall be incorporated into Confidential Addendum D of the Modifying Order.

I. The purpose of the Modifying Order is to resolve the matters described in the Order to Show Cause that occurred before Respondent executed the Modification Agreement.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED:

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than April 6, 2018.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Van Financial Corporation, Breda, Iowa;* to continue engaging in extending credit and servicing loans, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, March 19, 2018.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2018–05840 Filed 3–21–18; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

[Docket No. C–4458]

CoreLogic Inc.; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter is intended to remedy the impact of CoreLogic's failure to comply fully with the Decision and Order previously issued in In the Matter of CoreLogic, Inc., Docket No. C–4458. The attached Analysis to Aid Public Comment describes the terms of the Order To Show Cause and Order Modifying Order—embodied in the consent agreement—that would remedy CoreLogic's failure to comply fully with the Decision and Order.

DATES: Comments must be received on or before April 16, 2018.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write: ''In the Matter of CoreLogic, Inc., Docket No. C–4458'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/corelogicconsent* by following the instructions on the web-based form. If you prefer to file your comment on paper, write ''In the Matter of CoreLogic, Inc., Docket No. C–4458'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Susan Huber (202–326–3331), Bureau of Competition, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for March 15, 2018), on the World Wide Web, at *https://www.ftc.gov/news-events/commission-actions.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before April 16, 2018. Write ''In the Matter of CoreLogic, Inc., Docket No. C–4458'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission website, at *https://www.ftc.gov/policy/public-comments.*

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/corelogicconsent* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that website.

If you prefer to file your comment on paper, write ''In the Matter of CoreLogic, Inc., Docket No. C–4458'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible FTC website at *https://www.ftc.gov,* you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC website—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before April 16, 2018. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Analysis of Agreement Containing Consent Orders To Aid Public Comment

I. Introduction

The Federal Trade Commission (''Commission'') has accepted for public comment, subject to final approval, an Agreement Containing Consent Order (''Consent Agreement'') from Respondent CoreLogic Inc. (''CoreLogic''). The Consent Agreement is intended to remedy the impact of CoreLogic's failure to comply fully with the Decision and Order previously issued in this matter.

Under the terms of the proposed Consent Agreement, CoreLogic consents to the Commission issuing an Order to Show Cause and Order Modifying Order. In the Order to Show Cause, the Commission describes the changes it proposes to make to the Decision and Order and the reasons these changes are necessary. CoreLogic disputes the allegations in the Order to Show Cause but consents to the Commission issuing the Order Modifying Order amending the Decision and Order.

The Commission has placed the proposed Consent Agreement on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

II. The Respondent

Respondent CoreLogic is a publicly-traded company headquartered in Irvine, California. It provides real property information, analytics, and services to a broad array of customers. As part of its business, CoreLogic collects, maintains, and licenses aggregated county tax assessor and recorder data (''bulk data'') from across the United States.

III. The Decision and Order

In 2014, CoreLogic sought to acquire DataQuick Information Systems, Inc. (''DataQuick''), a subsidiary of TPG VI Ontario 1 AIV L.P. Both CoreLogic and DataQuick licensed bulk data to customers, and the Commission alleged that the acquisition would significantly increase concentration in the market for national bulk data in violation of the federal antitrust laws. CoreLogic agreed to settle the matter by divesting assets to Renwood RealtyTrac LLC (''RealtyTrac'') that would enable RealtyTrac to replace DataQuick in the market for national bulk data. The Commission issued the Decision and Order requiring the divestiture on May 20, 2014 and CoreLogic completed the acquisition of DataQuick soon thereafter.

The central requirement of the Decision and Order is that CoreLogic provide RealtyTrac with DataQuick's bulk data, and certain ancillary data that DataQuick sold with its bulk data so that RealtyTrac could compete on the same basis as DataQuick in the market affected by CoreLogic's acquisition. In addition, CoreLogic is required to license and provide updated bulk data to RealtyTrac for at least five years. CoreLogic is also required to provide information and assistance to RealtyTrac so that RealtyTrac can replicate DataQuick's ability to gather, license and maintain national bulk data after RealtyTrac's license with CoreLogic expires.

The Decision and Order requires CoreLogic to enter an agreement with RealtyTrac to license the required data within 10 days of purchasing DataQuick. Sixty days after entering the license with RealtyTrac, CoreLogic was to provide DataQuick's bulk data and begin delivering updated bulk data. CoreLogic and RealtyTrac entered their license agreement on March 26, 2014.

The Order also contains a number of provisions to support RealtyTrac's efforts to maintain competition in the bulk data market. CoreLogic must allow certain legacy DataQuick customers to terminate their DataQuick contracts in order to do business with RealtyTrac, and, during a period lasting until nine months after the Divestiture Date, include a six month termination clause in all new agreements with former DataQuick bulk data customers. In addition, the Decision and Order requires CoreLogic to facilitate RealtyTrac's ability to hire experienced DataQuick employees. Finally, the Order appoints Mr. Mitchell S. Pettit as monitor to oversee CoreLogic's compliance with the Order.

IV. The Order To Show Cause

When CoreLogic signed the Consent Agreement, it represented that it could fulfill the terms of the Decision and Order. Instead, soon after CoreLogic began delivering bulk data to RealtyTrac, RealtyTrac discovered that it was missing data that DataQuick has provided to bulk data customers. RealtyTrac continued to uncover additional missing data for at least the next 2 years. When RealtyTrac contacted CoreLogic about the missing data, CoreLogic provided the data, but at a time well after the deadline for providing data in the Order. Contrary to the requirements of the Order, CoreLogic did not proactively identify the full scope of bulk data that DataQuick had used and ensure CoreLogic was delivering this data to RealtyTrac. In addition, CoreLogic did not provide RealtyTrac, Commission staff, or the monitor with complete and accurate information regarding the manner in which DataQuick provided bulk data to customers.

CoreLogic also did not provide RealtyTrac certain data that DataQuick licensed from third parties. The Decision and Order requires CoreLogic to provide all of the bulk data that DataQuick used, including data licensed from third parties. CoreLogic agreed to this provision when it signed the Decision and Order. However, after the Commission entered the Decision and Order, CoreLogic informed Commission staff that it could not provide RealtyTrac with some of the required data because of limitations on DataQuick's rights to sublicense the data. CoreLogic offered to provide information and introductions to enable RealtyTrac to attempt to license the data from its owners. Although useful, this offer did not comply with Decision and Order and required RealtyTrac to expend additional resources not contemplated when the Commission issued the Decision and Order.

It also appears that CoreLogic did not provide all of the support to RealtyTrac that was required by the Order. For example, CoreLogic stopped standard third party testing of an ancillary product, in violation of the Decision and Order, and did not tell RealtyTrac or Commission staff that it had stopped this testing. RealtyTrac subsequently discovered a quality issue with the product that CoreLogic did not discover through its internal quality control processes. The issue was ultimately resolved and third party testing resumed.

To help resolve the issue of missing data, the Monitor hired a Technical Assistant, Dr. Thomas Teague. Dr. Teague helped the Monitor develop and recommend a technical plan to (i) identify the data that CoreLogic was required to provide under the Order, (ii) provide all missing data and information to RealtyTrac, and (iii) verify that the required data and information had been provided. With the help of the Monitor, CoreLogic is in the final stages of completing this plan with RealtyTrac. After that, CoreLogic will transfer of all required information regarding DataQuick's bulk data business to RealtyTrac.

CoreLogic's actions violated the Decision and Order and interfered with its remedial goal of maintaining competition in the market affected by CoreLogic's acquisition of DataQuick. CoreLogic slowed the delivery of DataQuick's bulk data and information to RealtyTrac. Further, RealtyTrac relied on CoreLogic's inaccurate assertions that it was providing RealtyTrac with all of DataQuick's bulk data. These actions, which violated its obligations under the Order, harmed RealtyTrac's reputation and required RealtyTrac to expend technical and financial resources to uncover missing data.

V. The Order Modifying Order

The most significant modification to the Decision and Order is a three-year extension of the period during which CoreLogic must provide updated bulk data to RealtyTrac. The initial five-year term in the Decision and Order will expire in March 2019. This extension will remediate the effect of CoreLogic's delays in providing all of the required data to RealtyTrac and extend CoreLogic's obligations through March 2022.

The Order Modifying Order also adds two detailed addenda to the Decision and Order: A Technical Transfer Plan and a Service Level Addendum. The Technical Transfer Plan identifies the steps CoreLogic will take to transfer required data and information. The Service Level Addendum requires CoreLogic to meet certain data quality metrics and identifies the steps that CoreLogic must take to resolve any quality issues that arise. The Order Modifying Order also requires CoreLogic to provide prior notice before modifying the DataQuick Fulfillment Platform, which will allow the Commission to verify that CoreLogic has not altered the platform in a manner that violates the Order.

Finally, the Order Modifying Order resets two deadlines and decreases the frequency of required compliance reports. CoreLogic must provide customers early termination rights until nine months after completion of the first portion of the Technical Transfer Plan and provide technical assistance to RealtyTrac until one year after completion of the Technical Transfer Plan. The frequency of interim compliance reports is extended from every 60 days to every 90 days. This reduces the burden on CoreLogic without diminishing the ability of the staff and the Monitor to effectively monitor CoreLogic's compliance with the Decision and Order and Order Modifying Order.

The Commission does not intend this analysis to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

By direction of the Commission. Commissioner McSweeny not participating by reason of recusal.

Donald S. Clark,

Secretary.

[FR Doc. 2018–05799 Filed 3–21–18; 8:45 am]

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FEDERAL TRADE COMMISSION

[File No. 161 0230]

Oregon Lithoprint, Inc.; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; correction.

SUMMARY: The Federal Trade Commission published a document in the **Federal Register** of March 15, 2018, concerning the proposed consent agreement in Oregon Lithoprint, Inc. The document contained the incorrect date by which comments must be received. This document corrects the date by which comments must be received; they must be received on or before April 10, 2018.

FOR FURTHER INFORMATION CONTACT: Michael Turner (202–326–3619), Bureau of Competition, 600 Pennsylvania Avenue NW, Washington, DC 20580.

Correction

In the **Federal Register** of March 15, 2018, in FR Doc. 83–51, on page 11529, in the third column, correct the **DATES** caption to read:

DATES: Comments must be received on or before April 10, 2018.

Dated: March 16, 2018.

Donald S. Clark,

Secretary.

[FR Doc. 2018–05800 Filed 3–21–18; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket Number CDC–2018–0025, NIOSH–308]

Draft—National Occupational Research Agenda for Musculoskeletal Health

AGENCY: National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Request for comment.

SUMMARY: The National Institute for Occupational Safety and Health of the Centers for Disease Control and Prevention announces the availability of a draft NORA Agenda entitled *National Occupational Research Agenda for Musculoskeletal Health* for public comment. To view the notice and related materials, visit *https://www.regulations.gov* and enter CDC–2018–0025 in the search field and click ''Search.''

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DATES: Electronic or written comments must be received by May 21, 2018.

ADDRESSES: You may submit comments, identified by CDC–2018–0025 and docket number NIOSH–308, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov*. Follow the instructions for submitting comments.