Federal Trade Commission

Judging Antitrust

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at the

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I am especially pleased to be here today at the Inaugural Global Antitrust Institute Moot Court Competition. George Mason has an unparalleled history of attracting remarkable scholars to teach antitrust to its students. From former FTC Chairmen Tim Muris and Bill Kovacic, to Judge Douglas Ginsburg, economists Bruce Kobayashi and Tom Hazlett, and the late antitrust luminaries Ernest Gellhorn and Judge Robert Bork. The GAI Moot Court Competition is a

[♠] The views stated here are my own and do not necessarily reflect the views of the Commission or any of its other Commissioners. I am grateful to my attorney advisor, Angela Diveley, for her invaluable assistance in preparing these remarks.

wonderful addition to GMU's tradition of excellence in antitrust and yet another demonstration of its commitment to the development of future antitrust lawyers.

Let me begin my remarks today by extracting a commitment from all of you not to hold any views I express here today against any other Commissioners or the Federal Trade Commission.

Because we are here together at an Antitrust Moot Court competition today, what better topic to discuss than antitrust adjudication? I want to begin by raising a key question for the design of antitrust institutions: *who* should decide antitrust cases? A reasonable starting point for discussion is the observation that – as today's student competitors and panelists already know – antitrust analysis can and often does require rigorous economic analysis. As economics is integrated more deeply into antitrust, sophisticated analyses are more frequently presented to shed light upon key legal questions: will a merger increase prices? How much of the cost savings generated by a merger will be passed on to consumers? Or how will an exclusive dealing arrangement impact the incentives of a retailer to promote a product?

The increasing complexity of antitrust analysis – and by complexity here I mean increasing reliance upon economic analysis – begs the question: who decides? In other words, who should judge antitrust? A federal judge informed by expert testimony in the adversarial process? If so, should the judge be a

generalist or a specialist? If not, perhaps the decider should be an expert agency through administrative adjudication? There are various institutional design choices an antitrust regime can make in this regard. I'll start by discussing the tradeoffs inherent in those choices and the available evidence illuminating the relative performance of generalist judges and expert agencies in antitrust cases. I'll also preview for you my somewhat counterintuitive punchline: expert agencies appear to be underperforming relative to generalist judges when it comes to antitrust adjudication and that fact has important implications for the design of antitrust institutions.

I will conclude my remarks by turning from the more general antitrust institutional design question to a narrow but important legislative proposal that raises many of the same issues. The SMARTER Act would require the Federal Trade Commission, like its sister competition agency, the Antitrust Division at the Department of Justice, to challenge unconsummated mergers in federal court and preclude administrative adjudication when the FTC seeks a preliminary injunction. The legislative proposal fixes a longstanding problem: the potential for competition agencies to face different preliminary injunction standards when they challenge mergers in federal court. Harmonizing preliminary injunction standards has long attracted bipartisan support for good reason – the application

of different legal standards depending upon which agency is assigned to the merger simply doesn't make any sense.

Another important, but less discussed, aspect of the SMARTER Act is that it prevents the FTC from challenging unconsummated mergers through its Part 3 administrative adjudication process. Whether one thinks this part of the proposed legislation is a good or bad thing should depend greatly upon the relative performance of federal courts and administrative adjudicators – including the Commissioners. I will try to persuade you that in addition to equalizing the preliminary injunction standards between the FTC and DOJ – which is obviously a virtue of the SMARTER Act – sending both agencies to federal court to challenge unconsummated mergers also makes sense.

I. Are Antitrust Cases Too Complicated for Generalist Judges, Expert Agencies, or Both?

Antitrust analysis has become increasingly complex since its inception. This is attributable, at least in part, to the economic revolution that took place in Supreme Court antitrust jurisprudence in the late 1970s and early 1980s. The revolution solidified the promotion of economic welfare as the exclusive goal of the antitrust laws. Since then, substantive antitrust law has seen a shift away from per se rules and bright-line prohibitions and toward a fact-intensive, effects-based approach as the dominant paradigm for evaluating conduct and

transactions that potentially violate the antitrust laws. The shift to an economic welfare-based antitrust regime required greater integration of economic analysis. There is broad consensus that the integration of economics into antitrust law has been a great success in terms of promoting consumer welfare and because it made intellectually coherent a body of law that had been hopelessly confused and pulled in opposing directions by a hodgepodge of vague, political, and often anticompetitive goals.[1]

The benefits to consumer welfare, predictability, and stability in antitrust enforcement arising from the integration of economics are both difficult to quantify and hard to overstate. But the marriage of antitrust law and industrial organization economics is not without its costs. Integrating basic economic ideas – downward sloping demand curves, elasticities of demand and supply, cost concepts, and barriers to entry – into court and agency thinking about antitrust was a relatively low-cost investment that paid great dividends. But advances in industrial organization economics and microeconomics generally have made antitrust a more mathematically rigorous and technically demanding field over time. Economic modeling is more sophisticated than ever. The availability of

[1] Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARVARD J.L. & PUB. POL'Y 217 (2010); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405 (2013).

data and increase in computing power spurred dramatic advances in econometric methods. In short, the economic toolkit required to produce antitrust economic analysis now often involves mathematical machinery unwise to operate without a Ph.D. in Economics; the increase in complexity can also be equally burdensome for consumers of those analyses – and in particular, lawyers and judges. That increase in economic sophistication at the core of modern antitrust motivates my talk today.

In court, economic expertise enters the decision-making process through a battle of experts wherein the parties engage economic experts to support their cases, judges and juries weigh the evidence, and they decide the cases accordingly. In the agency context, expertise flows from staff economists who conduct economic analysis to Commissioners. The fundamental question is whether one of these alternative methods of incorporating economic expertise into decision-making is generally preferable or clearly preferable in a subset of cases.

At first blush, it is easy to sketch out the case for an expert agency like the FTC. After all, it was specifically designed to be "unusually expert" on antitrust,[2] comprised of expert lawyers, economists, and businessmen; on the

[2] Congress expected the FTC's expertise to flow from four sources: commissioners of "high stature and accomplishment"; a staff of experts in law, economics, and accounting; long-term

other hand, tales of woe from antitrust lawyers lamenting the ability of generalist judges to understand modern antitrust cases are not hard to find. An ABA Task Force survey of antitrust economists found that only 24% of those economists believed generalist judges "usually" understand the economic issues in a case.[3] Former Commissioner Tom Rosch has pushed for increased enforcement of the FTC's Section 5 "unfair methods of competition" authority in administrative adjudication to compensate for the "problem" of generalist judges "not [being] required to be experts in antitrust law."[4]

There is some empirical evidence supporting this view of generalist judges in antitrust cases. Former Bureau of Economics Director Michael Baye and I find evidence that some antitrust cases involving sophisticated economic and econometric analyses are too complex for generalist judges, and that judges with basic economic training are appealed and reversed less often in simple

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exposure to antitrust accompanied by superior insight into what the proper policy should be; and powerful non-adjudicative tools to provide the opportunity to build a strong empirical foundation for pursuing its mission. William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915, 919-20 (1997).

[3] Memorandum from Jonathan B. Baker & M. Howard Morse, Final Report of the ABA Antitrust Division Economic Evidence Task Force (Aug. 1, 2006), app. II, at 2, *available at* http://www.americanbar.org/content/dam/aba/migrated/antitrust/at-reports/01_c_ii.authcheckdam.pdf.

[4] *See* J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, The Great Doctrinal Debate: Under What Circumstances Is Section 5 Superior to Section 2?, Remarks Before the New York State Bar Association Annual Antitrust Conference 14 (Jan. 27, 2011), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/great-doctrinal-debate-under-what-circumstances-section-5-superior-section-2/110127barspeech.pdf.

antitrust cases than their untrained counterparts.[5] The advantage disappears in more complex cases. The increasing complexity of antitrust cases over time supports a plausible argument for shifting the adjudication function from generalist judges – who rely upon economic experts to provide the pertinent analysis – to expert agencies with a presumed advantage in handling this kind of complexity.

It is only natural to assume expert agencies like the FTC will perform better than generalist courts when it comes to complex decision-making. Indeed, this "expertise hypothesis" lies at the heart of much of the administrative state, including deference to administrative agencies. To support the hypothesis, observers often cite the fact that expert agencies are comprised of specialists in the field at issue while courts are staffed with generalists. But that observation begs the wrong question and could lead to the wrong answer. The correct question is not about the individual characteristics of judges and agency commissioners, or even a comparison of the relative value of economic inputs of agency economists versus hired economic expert witnesses, but rather a comparative institutional analysis of courts and agencies using substitute methods of incorporating economic expertise into their decision-making.

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[5] Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1 (2011).

When viewed this way, it is easier to understand why the FTC may not fulfill the goals Congress designed it to achieve. Indeed, empirical evidence suggests the FTC in fact does not perform as well at antitrust decision-making in administrative adjudication as generalist district court judges in Article III adjudication.[6] Angela Diveley and I find that Commission decisions are appealed and reversed significantly more often than the judicial opinions of generalist judges in antitrust cases. Moreover, there is no evidence supporting the hypothesis that Commission reversal or modification of administrative law judge ("ALJ") decisions adds significant value. In short, appeal and reversal rates were invariant to Commission reversal of the ALJ decision.

Criticism of the FTC's record in administrative adjudication is not new. In his comments on the Section 5 workshop in 2008, former Assistant Attorney General for the Antitrust Division Doug Melamed noted that, in the 26-year period from 1983 to 2008, the Commission ruled for FTC staff in 16 out of 16 cases. In four of those cases, the respondents won at trial, but the Commission reversed. Melamed described administrative adjudication of antitrust as "a deeply flawed process" and concluded "it is not suitable for the task of generating competition-law decisions that are sufficiently reliable and well-

[6] Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, 1 J. ANTITRUST ENFORCEMENT 82 (2013).

founded that they can be counted upon to send appropriate signals to economic actors about the conduct that the law requires of them."[7]

Similar criticisms have confronted the FTC in every decade at least since the 1960s.[8] In 1969, then Professor Richard Posner published a well-known critique of the FTC's performance.[9] Reviewing the historical record, Posner also found the FTC enjoyed no comparative advantage over Article III courts; that the combination of an executive and adjudicative function was both a distinguishing characteristic of the FTC and a significant source of weakness; and that the agency had made no distinctive contribution to antitrust law through the administrative process.[10] In fact, Posner believed any contribution was likely negative.[11] His findings focused largely upon documenting abuse of the administrative process. The vast majority of enforcement actions pursued in

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[7] A. Douglas Melamed, Comments to the Federal Trade Commission, Workshop Concerning Section 5 of the FTC Act 10 (Oct. 14, 2008), *available at* http://www.ftc.gov/sites/default/files/documents/public_comments/section-5-workshop-537633-00004/537633-00004.pdf.

[8] *See* Richard Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969); *see also* 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 (1998); Terry Calvani, *A Proposal for Radical Change*, 34 ANTITRUST L. BULL. 185 (1989); Terry Calvani & Angela M. Diveley, *The FTC at 100: A Modest Proposal for Change*, 21 GEO. MASON L. REV. 1169 (2014); Philip Elman, *A Modest Proposal for Radical Reform*, 56 ABA. J. 1045 (1970); Melamed, *supra* note 7.

[9] Posner, *supra* note 8.

[10] *Id.* at 53-54.

[11] *Id.* at 54.

administrative adjudication involved conduct that was "overwhelmingly likely" to be efficient,[12] and only a handful of the over 250 cases he reviewed were economically justified.[13]

Posner concluded that the costs of the FTC's administrative process were enormous.[14] In his words, "It is too much to expect men of ordinary character and competence to be able to judge impartially in cases that they are responsible for having instituted in the first place."[15]

Scholars have observed the FTC's history of underperformance in administrative adjudication as measured by other metrics as well. Consider the now well-documented history of the FTC's use of its Section 5 signature unfair methods of competition authority. Congress intended for the expert tribunal to further competition policy in areas the then-existing antitrust laws, including the Sherman and Clayton Acts, did not reach.

But does the FTC's presumed expertise advantage show up in its Section 5 enforcement efforts as intended by Congress? It does not. A century into the

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[12] Out of over 250 enforcement actions, 200 were Robinson-Patman Act cases, and not a single one of them involved even a suggestion that monopoly or monopsony power existed. *Id.* at 55. In one matter, the FTC prohibited a merger on the premise that reciprocal buying is inherently anticompetitive and the merger might facilitate such a practice. This rule could, to quote Posner, "also be used to justify attacking virtually any acquisition by a large company." *Id.* at 59-60.

[13] *Id.* at 60. These cases included one merger case and some conspiracy cases that should have been brought as criminal enforcement actions by the DOJ. *Id.*

[14] *Id.* at 61.

[15] *Id.* at 53.

agency's existence, the FTC has not employed its unfair methods of competition authority to contribute significantly to antitrust law. Former Chairman Bill Kovacic sums up the challenge to advocates of broader Section 5 unfair methods of competition authority nicely, observing that "[o]ne would be hard-pressed to come up with a list of ten adjudicated decisions that involved the FTC's application of Section 5 in which the FTC prevailed and the case can be said to have had a notable impact, either in terms of doctrine or economic effects."[16]

The primary contribution of the FTC's use of its Section 5 unfair methods of competition authority has been to condemn invitations to collude – that is, unsuccessful attempts to enter into an anticompetitive price-fixing agreement. These settlements are fine insofar as they go. They might even deter future anticompetitive behavior. But they do not make law, and they alone cannot possibly make out a case for Section 5.[17] Despite a number of attempts, enforcement efforts have resulted in very few adjudicated wins in the agency's hundred-year history where its analysis significantly contributed to antitrust

[16] William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 933-34 (2010).

[17] Joe Sims, *Section 5 Guidelines: Josh Wright as the New King of Corinth*, CPI ANTITRUST CHRONICLE, Sept. 2013, at 2.

jurisprudence. The FTC has not succeeded on appeal in a pure Section 5 case in over 40 years.[18]

It might sound like I am skeptical of the level of antitrust expertise among FTC staff. I am not. Not by a long shot. I know well the abilities and talents of the FTC economists and respect them greatly. The collection of economists at the FTC is, in my view, the single best at any agency in the United States. The agency is also full of extremely talented and skilled antitrust and consumer protection lawyers. To repeat once again: the issue is not whether FTC staff are sufficiently expert, but rather whether and to what extent expertise and related inputs are incorporated into Commission decision-making relative to how expert testimony is incorporated into the decision-making and outputs of generalist judges.

The reality of all institutions – courts and agencies included – is that there are frictions that prevent the seamless and costless transmission of expertise from one part of the institution to another. In this case, it is not costless to transmit the expertise that arises from the human capital of the staff or economic experts to the relevant decision-maker, be it commissioner or generalist judge. The frictions can be structural – for example, how economists are organized within the agency

[18] Kovacic & Winerman, *supra* note 16, at 1013; *see also* FTC v. Sperry & Hutchinson (1972) (the most recent case).

can play a significant role in their influence on decision-makers[19] – but they can also arise from resource constraints, ideological differences, or personalities. In any case, the right question is about comparing the relative performance of institutions, not individuals.

None of this is to say that the FTC has contributed little to competition policy in its hundred years of existence or that its expertise is not manifested in other ways. It is. Perhaps the most obvious example of the FTC's expertise having positive influence upon competition policy arises from its information-gathering, reporting, and advisory functions, including use of its 6(b) authority to collect information for wide-ranging studies and reports and the work of the Office of Policy Planning, which regularly engages in advocacy to state and local governments, regulatory boards, other federal agencies, and other similar entities.

To keep with the empirical theme, let me share some citation data consistent with the view that the FTC's research-and-reporting function is its true crown jewel when it comes to influencing competition law and policy. More specifically, citation and other evidence suggest FTC studies, amicus briefs, and

[19] Luke M. Froeb, Paul A. Pautler & Lars-Hendrik Roeller, *The Economics of Organizing Economists*, 76 ANTITRUST L.J. 569, 571 (2009).

reports are and have been considerably more influential than the agency's Part 3 administrative cases.

To begin with, a rough comparison of citations to competition-related FTC studies and reports to citations of Part 3 decisions over the last 25 years by federal courts and law journals shows the former are cited twice as often. On average, each competition-related study and report has been cited an average of 30.3 times, whereas each Part 3 decision has been cited an average of 18.9 times. If we limit the citations to those Part 3 decisions where the FTC prevailed and was not reversed on appeal – presumptively the subset of favorable citations where the Commission decision is most likely to influence law in the intended direction – Commission opinions were cited only 570 times, less than a quarter of the citations arising from reports and studies.

Moreover, Part 3 opinion citations probably overstate their influence. After all, the FTC could bring the same cases in federal court. But would they have the same influence on antitrust law? The citation data suggests that the cases the FTC has pursued in federal court have been much more influential than those pursued through Part 3 adjudication. From 1980 to 2014, opinions in FTC antitrust cases litigated in federal court were cited 9,966 times in judicial opinions and articles. FTC-initiated federal antitrust cases are cited 85.7 times on average, and each federal case without appeal was cited an average of 120.7 times; again,

compare this to the Part 3 average of 18.9 citations each. When it comes to the FTC's influence on competition policy, it appears the agency is much more effective in its roles outside Part 3 administrative litigation. At a minimum, the view that administrative adjudication is required to influence competition law and policy appear to be dramatically overstated.

Thus far I've limited my focus to a relatively straightforward comparison of antitrust decision-making by expert agencies and generalist judges, respectively, across a variety of metrics: appeal rates, reversal rates, citations, and more generally, influence on antitrust law. These are admittedly imperfect attempts to measure performance in a way that sheds some light upon the question of who should judge antitrust cases. But these are not the only measures of concern. Certainly somewhere on the expert agency-versus-court report card would appear a grade for process and procedure.

Most antitrust observers are aware there is concern the FTC enjoys considerable institutional and procedural advantages in administrative adjudication.[20] From Professor Posner to former Assistant Attorney General

[20] *See* Todd N. Hutchinson, *Understanding the Differences Between the DOJ and the FTC*, AMERICANBAR.ORG, http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/understanding_differences.html; ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 130-32; *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) [hereinafter *SMARTER Act Hearing*] (statement of Rep. Bachus, Chairman,

Melamed, this has been a repeated theme for the FTC. For example, then Commissioner Terry Calvani addressed this issue in 1989,[21] and again just last year, stating that "[a] good argument can be made that fundamental fairness requires that the adjudicative function be separate from the decision to open proceedings in the first instance."[22] Whatever the congressionally intended promise of expert agency administrative adjudication in theory, in practice, the application has been problematic and raises significant concerns that the deck is stacked against firms and in the agency's favor.

Perhaps the most obvious evidence of abuse of process is the fact that over the past two decades, the Commission has almost exclusively ruled in favor of FTC staff. That is, when the ALJ agrees with FTC staff in their role as Complaint Counsel, the Commission affirms liability essentially without fail; when the administrative law judge dares to disagree with FTC staff, the Commission almost universally reverses and finds liability. Justice Potter Stewart's observation that the only consistency in Section 7 of the Clayton Act in the 1960s

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Subcomm. of Reg. Reform, Commercial and Antitrust Law); Letter from AAI on the SMARTER Act to Rep. Spencer T. Bachus, III, and Henry C. Johnson, Jr. (April 9, 2014); *SMARTER Act Hearing*, *supra*, at 13-14 (statement of Deborah A. Garza, Partner, Covington & Burling LLP).

[21] Calvani, *supra* note 8.

[22] Calvani & Diveley, *supra* note 8, at 1176-80.

was that "the Government always wins"[23] applies with even greater force to modern FTC administrative adjudication.

Occasionally, there are attempts to defend the FTC's perfect win rate in administrative adjudication by attributing the Commission's superior expertise at choosing winning cases. And don't get me wrong – I agree the agency is pretty good at picking cases. But a 100% win rate is not pretty good; Michael Jordan was better than pretty good and made about 83.5% of his free throws during his career, and that was with nobody defending him. One hundred percent isn't Michael Jordan good; it is Michael Jordan in the cartoon movie "Space Jam" dunking from half-court good.[24] Besides being a facially implausible defense – the data also show appeals courts reverse Commission decisions at four times the rate of federal district court judges in antitrust cases suggests otherwise.[25] This is difficult to square with the case-selection theory of the FTC's record in administrative adjudication.

There have been some undoubted successes in using Part 3 to develop and create antitrust norms as intended by Congress. The most often discussed example is the agency's enforcement activity in the area of hospital mergers since Tim Muris's tenure as Chairman. When he became Chairman, the FTC had lost

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[24] *Space Jam Dunk*, YOUTUBE (Jan. 28, 2013), https://www.youtube.com/watch?v=-S9W9xZikkA.

[25] Wright & Diveley, *supra* note 6, at [pin cite].

seven hospital merger cases in a row in federal courts. Under his direction, the FTC undertook to conduct a retrospective review of hospital merger cases using its 6(b) authority, refined its analytical strategy, and pursued hospital merger challenges in Part 3. The FTC has since played an important and influential role in antitrust enforcement in this subset of cases and has a number of victories to show for its efforts in federal court, including its recent win in *St. Luke's* in the Ninth Circuit.[26] There certainly are potential benefits associated with the FTC's use of Part 3 adjudication in terms of developing antitrust law relative to what the FTC might be able to achieve in federal court. The question is whether those benefits outweigh the costs.

While the FTC has played a major role in promoting sound competition policy and practice over the past hundred years, and even over the past 50, this has little if anything to do with administrative adjudication. Indeed, given its record of success in federal court and its weak substantive record in administrative adjudication, the better side of the argument is that it has been successful in spite of it. It should be clear to any objective observer that the FTC has not lived up to Congress's intent for the role of administrative litigation in

[26] Saint Alphonsus Medical Center – Nampa Inc. v. St. Luke's Health Sys., Ltd., No. 14-35173, 2015 WL 525540 (9th Cir. Feb. 10, 2015).

influencing antitrust law and competition policy. But the question then becomes: compared to what? Is there a better institutional alternative?

The data show three things with significant implications for those important questions. The first is that, despite modest but important achievements in administrative adjudication, it can offer in its defense only a mediocre substantive record and a dubious one when it comes to process. The second is that the FTC can and does influence antitrust law and competition policy through its unique research-and-reporting function. The third is, as measured by appeal and reversal rates, generalist courts get a fairly bad wrap relative to the performance of expert agencies like the FTC.

Let me now shift from the general benefits and costs of administrative adjudication at the FTC relative to litigation in federal courts to a specific manifestation of the same debate of interest to the agencies, practitioners, and currently facing Congress.

II. Mergers, Preliminary Injunction Standards, and The SMARTER Act

The Standard Merger and Acquisition Reviews Through Equal Rules—or SMARTER—Act, is aimed at resolving a disparity between the FTC and DOJ when each seeks a preliminary injunction blocking a proposed merger in federal court.

The FTC is commonly understood to face a more lenient standard for obtaining a preliminary injunction against unconsummated mergers in federal court.[27] The statutory standard for the FTC to obtain a preliminary injunction is to show that "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[28] Although the case law is not settled on the issue, some courts have held the FTC can raise a presumption in favor of granting a preliminary injunction by showing simply that it has raised questions "so serious, substantial, difficult and doubtful as to make them"—and I emphasize this—"fair ground for further investigation."[29] Unlike the FTC, the DOJ does not have a special statutory preliminary injunction standard and therefore is governed by the traditional equitable standard, which, includes weighing the equities, likelihood of success, the public interest, and the burdensome element of likelihood of suffering irreparable harm in the absence of preliminary relief.[30] The D.C. Circuit in *Whole*

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[27] *See, e.g.*, ANTITRUST MODERNIZATION COMM'N, *supra* note 20, at 130-32; *SMARTER Act Hearing*, at 20 (statement of Deborah A. Garza); *SMARTER Act Hearing*, at 33-34, 56 (statement of Richard G. Parker, Partner, O'Melveny & Myers LLP).

[28] 15 U.S.C. § 53(b).

[29] FTC v H.J. Heinz Co., 246 F.3d 708, 714-15 (D.C. Cir. 2001).

[30] *Compare id. with* Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

Foods clearly found a significantly lower standard exists for the FTC, stating, "the FTC need not show any irreparable harm."[31]

In practice, the agencies pursue permanent relief in vastly different processes. It is DOJ practice to consolidate preliminary and permanent injunction proceedings when possible, allowing for a full hearing on the merits. The FTC must seek preliminary injunctions in federal court, but it is authorized to seek permanent injunctions in either federal court or administrative proceedings. The FTC prefers to seek permanent injunctions through Part 3. This strategy allows the agency to leverage its preliminary injunction standard, which is both lower than that of the DOJ and lower than the permanent injunction standard. Once the FTC has obtained a preliminary injunction, parties often abandon the transaction in light of the high costs, time commitments, and uncertainty associated with enduring further proceedings.

Denial of a preliminary injunction does not necessarily mean parties falling within the FTC's jurisdiction are safe. Although parties may close the transaction after a victory, a denial of a preliminary injunction, the FTC can and sometimes does continue to pursue its challenge in administrative proceedings. Many will remember the uproar caused by the FTC's decision to so in the Whole Foods-Wild Oats merger. Both houses of Congress, with support from both sides

[31] FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1034-35 (D.C. Cir. 2008).

of the aisle, sent letters to then Chairman Kovacic criticizing the agency's perceived misuse of its statutory mandates and invoking a 2007 recommendation by the Antitrust Modernization Commission that the FTC's merger review authority be removed from Part 3.[32]

Many will also remember that, around the same time, the FTC pursued an administrative challenge to the Inova-Prince William Health System merger. The FTC indicated its intent to pursue the case in administrative adjudication by initiating proceedings prior to seeking a preliminary injunction in federal court. Notably, the agency appointed sitting Commissioner Tom Rosch as the ALJ to hear the matter, a move that raised – at the very least – the perception of unfairness due to his role as a prosecutor.

The FTC has taken some modest steps to ensure the agency process is fair by committing to reopen an administrative proceeding after losing the preliminary injunction battle in federal court only under limited circumstances. Under Chairman Robert Pitofsky, the Commission promulgated a rule providing for automatic withdrawal of an administrative proceeding upon motion by respondents after an FTC loss on a preliminary injunction hearing in federal

[32] *See* Letter from Eight Senators to William E. Kovacic, Chairman, Fed. Trade Comm'n (Dec. 12, 2008) (with six Democratic and two Republican Senators), *available at* http://legaltimes.typepad.com/files/ftc-rule-letter.pdf; Letter from Reps. John Conyers, Jr. and Lamar S. Smith to William E. Kovacic (Dec. 18, 2008) (with one Democratic and one Republican Representative), *available at* http://legaltimes.typepad.com/files/whole-foods-house-letter.pdf.

court and no objection from the agency.[33] Although the rule still allowed for continued administrative adjudication despite an FTC loss in federal court, it provided some modest level of certainty to businesses that a win in federal court is in fact a win, and that they can proceed with their transactions in a timely manner. The Commission subsequently revised the rule to eliminate automatic withdrawal and strengthen the agency's ability to continue pursuing challenges after losing a preliminary injunction .[34] Reversion to the previous rule would be an obvious step in the right direction; however, it would not address the fundamental question about the appropriate role of administrative adjudication for unconsummated mergers at the FTC in light of the current structure of dual enforcement by the FTC and DOJ.

In 2007, the bipartisan Antitrust Modernization Commission ("AMC") made three recommendations to help resolve the FTC's and DOJ's differing procedural rules to resolve their perceived and potentially actual unfairness. First, the AMC proposed that the FTC seek both preliminary and permanent injunctive relief in federal district court. Second, the AMC proposed amending

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[33] Final Rule, Administrative Litigation Following the Denial of a Preliminary Injunction, 60 Fed. Reg. 149 (Aug. 3, 1995).

[34] Interim Final Rules with Request for Comment, 16 CFR Parts 3 and 4, 74 Fed. Reg. 8, 1806 (Jan. 13, 2009). Pitofsky objected to this rule change in a public comment. Robert Pitofsky & Michael N. Sohn, Comments on P072104- Parts 3 and 4 Rules of Practices Rulemaking 1-6 (Nov. 6, 2008), *available at* http://www.ftc.gov/sites/default/files/documents/public_comments/rules-practice-16-cfr-parts-3-and-4-538311-00004/538311-00004.pdf.

the FTC Act to harmonize the preliminary injunction standard between the FTC and DOJ. Finally, the AMC proposed revising the FTC Act to prohibit the FTC from pursuing administrative litigation in unconsummated-merger cases.

The SMARTER Act embraces the bipartisan AMC recommendations by proposing to harmonize the FTC's and DOJ's preliminary injunction standards. It solves the disparity in preliminary injunction standards by authorizing the FTC to challenge unconsummated mergers through Section 7 of the Clayton Act, the same authority vested in the DOJ for this purpose. While antitrust commentators may debate reasonably whether the perceived difference in preliminary injunction standards has much of an impact in practice, there is a consensus that the disparity cannot possibly do good and does give rise to serious potential for harm.

The SMARTER Act would also divest the FTC of its authority to initiate and pursue administrative challenges to unconsummated mergers, thus requiring the agency to head to federal court to challenge those deals. What one makes of this particular dimension of the SMARTER Act depends greatly upon one's views of the costs and benefits of administrative adjudication at the FTC. Having shared with you my view of the evidence of the FTC's relatively poor substantive and procedural record in this regard, it should be no surprise that I believe this aspect of the SMARTER Act also makes sense.

The SMARTER Act would remove from the FTC's structural design the due process concerns raised by its ability to get two bites at the apple and the incomplete separation of the agency's prosecutorial role from its adjudicative role. It would do so with limited scope. The FTC would still be able to pursue conduct cases and challenges to consummated mergers in Part 3, areas where it has shown stronger performance than in the narrow unconsummated-merger arena. Federal courts have significant experience deciding these cases. They have a proven record of superior performance to the FTC in Part 3, and their adoption of the FTC and DOJ's Horizontal Merger Guidelines is ubiquitous. The Guidelines are an important and highly successful avenue through which the agencies have influenced antitrust law and the courts and could continue to do so without administrative adjudication.

Some have raised concern that harmonizing the FTC's merger process with the DOJ implicates whether the FTC should exist at all. The logic appears to be that the case for a single agency is stronger as the agencies' institutional designs increase in symmetry. This is a fair question. But it is not a reason to avoid a debate on the costs and benefits of Part 3 on the merits. As many antitrust regimes around the world are currently assessing how best to structure their antitrust institutions – it seems more than appropriate for the United States to continuously examine the design of our own institutions. My own view is that

the uniqueness of the FTC does not rise and fall with administrative adjudication. The FTC does play a special role in antitrust law and policy. The FTC's history and data show that its research-and-reporting functions have been highly influential to legal and policy development. The FTC also can leverage advantages from the fact that it has a dual competition and consumer protection function.

The SMARTER Act solves a practical problem of potentially disparate preliminary injunction standards between the FTC and DOJ. Furthermore, it addresses due process concerns associated with litigation and the Part 3 administrative adjudication process. Given the FTC's record in premerger Part 3 enforcement, as compared to that of the federal courts, the case for removing the asymmetry between it and the DOJ is a strong one, and I am hopeful Congress passes the proposed legislation.

Thank you very much for your time.