

The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness

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I. INTRODUCTION

On March 16, 1915, the Federal Trade Commission (“FTC”) opened for business and began what has proven to be a uniquely compelling experiment in economic regulation.¹ The FTC was the first law enforcement agency to be designed “from the keel up” as a competition agency.² One vital consideration in forming the new institution was to define its relationship to the political process. Among other features in the original FTC Act, Congress provided

1. The creation of the FTC is recounted in Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003). One measure of the significance of the FTC's creation and operations is the extraordinary attention that the agency has commanded in commentary about competition policy. See generally DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT (2011) (examining the U.S. antitrust enforcement system and focusing chiefly on the FTC in discussing the federal antitrust agencies).

2. When Congress adopted the first U.S. federal antitrust statute, the Sherman Act, in 1890, it did not create a separate antitrust body to enforce the law. The Department of Justice (“DOJ”) assumed responsibility for enforcing the new law, and a dedicated enforcement unit, the Antitrust Division, was formed in 1933. For information on the creation of the Antitrust Division, see *History of the Antitrust Division*, U.S. DEP'T JUST., <http://www.justice.gov/atr/about/division-history.html> (last visited May. 18, 2015). Congress had created the FTC's predecessor agency, the Bureau of Corporations, in 1903. However, the Bureau, which was initially within the Department of Commerce and Labor (and later within the Department of Commerce), was a purely investigative agency without enforcement authority. Act of Feb. 12, 1903, 32 Stat. 827. Canada enacted the first national competition law in 1889, but did not establish a specialized institution to implement the statute. On the creation of Canada's antitrust system, see D. Jeffrey Brown, *Introduction to Competition Law*, in COMPETITION ACT & COMMENTARY 1, 6–13 (Stikeman Elliott LLP ed., 2015).

that the agency's commissioners would have fixed, seven-year terms and that a commissioner could be removed during his or her term only for cause.³

Through these and other design choices, Congress created what would come to be known as the world's first "independent" competition agency. The FTC's degree of insulation from direct political control supplied an influential model of institutional design and contributed to the acceptance of a norm, evident in modern commentary about competition law, that public enforcement agencies should be politically independent.⁴ This Essay examines the relationship of competition agencies to the political process. We use the experience of the FTC to address three major issues. First, what does it mean to say that a competition agency is "independent"? Second, how much insulation from political control can a competition agency achieve in practice? Third, how is the pursuit of political independence properly reconciled with demands that a competition agency be accountable for its decisions—an important determinant of legitimacy—and with the need to engage with elected officials to be effective in performing functions such as advocacy?

In addressing these questions, we seek to develop themes we have addressed in earlier work involving the establishment and operations of the FTC.⁵ We approach the topic in the spirit of Professor Herbert Hovenkamp, whose work shows how historical research can improve our understanding of a competition system. Professor Hovenkamp's scholarship has deeply influenced our approach to this field, and we are honored to participate in a

3. See 15 U.S.C. § 41 (2012). The Supreme Court upheld the constitutionality of the removal provision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

4. See R. Shyam Khemani & Mark A. Dutz, *The Instruments of Competition Policy and Their Relevance for Economic Development*, in REGULATORY POLICIES AND REFORM: A COMPARATIVE PERSPECTIVE 16, 28 (Claudio R. Frischtak ed., 1995) ("The competition agency should be independent and insulated from political and budgetary interference.").

5. See generally William E. Kovacic, *Competition Agencies, Independence, and the Political Process*, in COMPETITION POLICY AND THE ECONOMIC APPROACH: FOUNDATIONS AND LIMITATIONS 291 (Josef Drexel et al. eds., 2011); William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869 (1989); William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929 (2010) [hereinafter Kovacic & Winerman, *Section 5*]; Winerman, *supra* note 1; Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921-1925*, 77 ANTITRUST L.J. 145 (2010) [hereinafter Winerman & Kovacic, *Outpost Years*]; Marc Winerman & William E. Kovacic, *The William Humphrey and Abram Myers Years: The FTC from 1925 to 1929*, 77 ANTITRUST L.J. 701 (2011). Our own work is inspired both by the emphasis Professor Hovenkamp has placed on history as an informative tool for understanding regulatory agency behavior and by the work of scholars such as Eleanor Fox, Edward Iacobucci, and Michael Trebilcock who have focused attention on institutional design choices associated with the creation of numerous new competition law systems since the early 1990s. See generally Eleanor M. Fox, *Antitrust and Institutions: Design and Change*, 41 LOY. U. CHI. L.J. 473 (2010); Michael J. Trebilcock & Edward M. Iacobucci, *Designing Competition Law Institutions: Values, Structure, and Mandate*, 41 LOY. U. CHI. L.J. 455 (2010).

symposium that celebrates his extraordinary contributions to competition law and policy.

II. THE RELATIONSHIP OF THE COMPETITION AGENCY TO THE POLITICAL PROCESS: DESIGN TRADEOFFS

The suggestion that competition agencies be independent reflects a desire to enable enforcement officials to make decisions without destructive intervention by elected officials or by political appointees who head other government departments. One method of providing the desired independence from these forms of interference is for the law to state that competition agency leaders can be removed by elected officials only for good cause. Political intervention undermines sound policy making when it causes the agency to bend the application of competition law to serve special interests at the expense of the larger society's well being. As discussed below, because antitrust-relevant behavior (e.g., a merger) can involve large commercial stakes and affect the economic fortunes of individual firms and communities, the decisions of a competition agency can attract close scrutiny by heads of state, legislators, and cabinet officials.⁶

The need for independence arguably varies according to the function that the competition agency is performing. In carrying out some functions, particularly certain law enforcement functions, the agency requires greater insulation from political pressure. For other functions, broader involvement by elected officials in setting the agency's agenda and determining its choice of projects may be appropriate.

The utmost degree of independence is warranted when a competition agency functions as an adjudicative decisionmaker. Congress gave the FTC authority to use administrative adjudication to develop norms of business conduct. After the agency initiates a formal prosecution and functions as a trade court, the legitimacy of its decisions requires the highest degree of assurance that sound technical analysis, not political intervention, determined the outcome.

The earlier decision to initiate an administrative litigation or a similar decision to initiate a court proceeding—either of which requires the FTC to make a “reason to believe” determination⁷—similarly requires a high degree of independence. A system of competition law quickly loses its legitimacy when, for example, an elected official can force the agency to file cases to harass political adversaries, to fulfill campaign promises to contributors (even

6. See *infra* note 46 and text in accompanying paragraph for a discussion of how our analysis applies to the Antitrust Division of the DOJ.

7. 15 U.S.C. § 45(b) (2012) (stating that the Commission can issue an administrative complaint when it has reason to believe a “person, partnership, or corporation has been or is using any unfair method of competition . . . in or affecting commerce”); *id.* § 53(b) (explaining that before seeking an injunction in court, the Commission must find that the proposed defendant “is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission”).

worse, to make good on bribes), or to shield incumbent economic interests from challenge by new firms or business models which, if allowed to grow, will improve economic performance. Stepping further back in the process, there is substantial reason to minimize political oversight of ongoing investigations, which can potentially border on, or at least create the appearance of bordering on, micromanagement and congressional intervention in, for example, an investigation into a pending merger.

Stepping back even further, there is also reason to minimize the instigation of pre-complaint investigations that target a specific firm (or a small number of the firms in an industry). A pre-complaint investigation can impose substantial costs on its targets and, to the extent it becomes public, can quickly tar the targets' reputations. If improperly motivated, such investigations can reflect all of the concerns noted above. In still other instances, political demands can compel agencies to spend resources on futile investigations to address disruptive economic phenomena whose causes are not rooted in anticompetitive behavior. For example, in the face of rising gasoline prices, legislators or presidents may insist that a competition agency spend investigative resources to search for a supplier cartel when the evident cause of price spikes is a hurricane that disabled key refinery facilities. It is highly unlikely that such investigations will uncover competitive problems; at most, particularly where the legislators are reflecting rather than fanning public concerns, such investigations could conceivably serve as a type (albeit a costly type) of safety valve. It should also be noted that the FTC Act does provide that the agency may be directed to investigate specific firms at the behest of the President or legislature,⁸ a procedure that, on the legislative front, includes at least some check because it requires action by the full legislature; in any event, perhaps in part because this provision reflects conditions that obtained in the agency's earlier decades and no longer obtain today,⁹ it has fallen into disuse.

Outside the law enforcement process, control by elected officials over an agency's selection of some types of projects may be less problematic. In the FTC Act, Congress gave the FTC power to conduct investigations, gather information, and prepare reports not related to the prosecution of cases.¹⁰ In its application of this power, the FTC could serve a valuable role in illuminating economic problems and providing, in some instances, recommendations for new legislation. A statute or resolution by which both

8. *Id.* § 46(d) (providing for investigations at the behest of "the President or either House of Congress"); *id.* § 46a (requiring, since June 16, 1933, that legislative resolutions be "concurrent resolution[s] of the two Houses of Congress").

9. For example, if the President wanted to direct an antitrust investigation today, he or she is more likely to turn to the Antitrust Division, which, since 1962, has had the authority to use pre-complaint processes in civil antitrust cases. ANTITRUST DIV., U.S. DEP'T OF JUST., ANTITRUST DIVISION MANUAL, at III-48 (5th ed. 2014).

10. 15 U.S.C. § 46.

chambers of Congress instruct the Commission to examine specific practices or conditions, for example, in many cases would represent valid political direction.

In any event, independence as we have discussed it here cannot mean complete isolation from the political process. Any system of competition law (including its law enforcement elements) involves tradeoffs between independence and accountability. The agency's interactions with courts, for example through judicial review of the agency's final decisions in adjudicative proceedings, helps ensure that it operates within the boundaries set by constitutions and statutes. But accountability goes further. Even within the law enforcement context, for example, there is no judicial review of FTC decisions to enter consent settlements in administrative litigation, or of agency decisions *not* to prosecute. Further, even when judicial review does not operate as a check, competition agencies should be accountable to the public to explain their policy choices and to demonstrate that they have wisely exercised the discretion inherent in their mandates. To suggest that independence is an absolute value, or that judicial review fully ensures accountability, is to overlook the tension between the autonomy needed to ensure the principled execution of law enforcement and adjudication duties and the accountability needed to provide legitimacy.

Even more generally, discussions about a competition agency's relationship to the political process often overlook difficult issues associated with the measures a competition agency must take to prosper within the political environment in which it resides. In observing discussions about the development of competition systems, we have noticed a tendency to assume that the absence of political influence is a measure of a system's maturity. In its strongest form, this view suggests that in the most sophisticated, highly-evolved regimes, elected officials respect the autonomy of competition so deeply that they have ceased to attempt to shape the agency's decisions—extending not only to adjudicative decisionmaking but also to (for example) decisions to conduct law enforcement and non-law enforcement investigations.¹¹ In this rarified stratum of agencies, there is no political pressure or influence.

11. As an academic and FTC official, one of us (Kovacic) has been a regular attendee at the meetings of international bodies, such as the International Competition Network, the Organisation for Economic Co-operation and Development ("OECD"), and the United Nations Conference on Trade and Development. In these gatherings, the representatives of older competition agencies often spoke as though political pressure was not a factor in deciding what to do or how to do it. For officials from newer authorities in transition economies, these comments were puzzling and disheartening. For them, political pressure from heads of state and legislators was a recurring and seemingly enduring concern. They wondered how they could attain the state of autonomy that their older counterparts appeared to enjoy. As we describe in this Essay, the image created by older agencies was an illusion. We also have noticed a refreshing recent trend in modern international gatherings to recognize the ubiquity of political pressure and to focus discussion on the serious issue of how older and newer agencies can cope with it. For example, the December 2014 meeting of the OECD's

The notion that any competition agency is so isolated from the political process is a fiction. For older and newer competition agencies alike, pressure from elected officials is ubiquitous and relentless. The real questions for those designing a competition agency are how much independence is desirable and what mechanisms will most likely allow effective agency functioning with adequate accountability. From the competition agency's perspective, a continuing challenge—even for an agency with years of experience and nominal institutional safeguards to create autonomy—is how to blunt attempts at destructive political intervention and see that harmful political influence does not infect the agency's operations and, ultimately, risk destroying it.¹²

A further tradeoff exists between independence and the agency's effectiveness. One valuable function of a competition agency is to advocate that legislatures and other government departments adopt pro-competitive policies. Fulfillment of this function requires engagement with elected officials. A completely autonomous competition agency is unlikely to build the political relationships needed to serve as an effective advocate, or to be consulted in a manner timely to ensure that its voice will be heard in the formulation of legislative or regulatory measures.

III. THE SOURCES OF POLITICAL PRESSURE

The intensity of political pressure a competition agency faces depends upon the functions it performs, the sanctions it can impose, and how aggressively it performs its duties. As powers grow, efforts by elected officials to determine how the agency uses such powers expand. Feeble public institutions generally attract tepid interest among politicians (except on rare

Competition Committee included a discussion of how the institutional design of a competition agency affects its relationship with the political process. For a description of the OECD proceedings, see *Changes in Institutional Design of Competition Authorities*, ORG. FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm> (last visited May. 18, 2015).

12. These phenomena are evident in the oldest and the newest of competition policy systems. See generally Theodore Voorhees, Jr., *The Political Hand in American Antitrust—Invisible, Inspirational, or Imaginary?*, 79 ANTITRUST L.J. 557 (2014) (discussing the role of politics in U.S. antitrust enforcement). On the experience of the FTC, see William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 664–67 (1982) [hereinafter Kovacic, *Congressional Oversight*]; William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective*, in PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 63, 93–94 (Robert J. Mackay et al., eds. 1987) [hereinafter Kovacic, *Historical Perspective*]; Timothy J. Muris & Bilal K. Sayyed, *The Long Shadow of Standard Oil: Policy, Petroleum, and Politics at the Federal Trade Commission*, 85 S. CAL. L. REV. 843 (2012). On the experience of the DOJ Antitrust Division, see generally James F. Rill & Stacy L. Turner, *Presidents Practicing Antitrust: Where to Draw the Line?*, 79 ANTITRUST L.J. 577 (2014).

occasions when the agency's perceived weakness itself becomes a political issue).¹³

In its century of experience, the FTC has occasionally had volatile relations with Congress. In part, the Commission's broad statutory mandate elicits interest from Congress. The FTC Act gives the FTC jurisdiction over much of the economy and directs the agency to operate in political terrain. Below we explore the implications, for drafting laws and designing institutions, of the tasks Congress assigned the FTC in 1914 and the design choices Congress made in creating the agency.

A. IMPLICATIONS FOR LAW DRAFTING AND INSTITUTIONAL DESIGN

One factor to consider in the design of a law's substantive commands and in the formulation of an implementation strategy is political risk. In identifying a preferred role for a competition agency, one must ask if that role is politically feasible.¹⁴ The political feasibility of a statutory mandate does not depend on technical proficiency alone. Political adroitness frequently assumes equal importance in determining success. As one student of administrative behavior has noted: "[E]ach agency must constantly create a climate of acceptance for its activities and negotiate alliances with powerful legislative and community groups to sustain its position. It must, in short, master the art of politics as well as the science of administration."¹⁵

B. THE FTC'S CHARTER

Two features of the FTC's mandate have considerable political significance. Section 5 gives the FTC power to ban "unfair methods of competition."¹⁶ By this measure, Congress gave the agency flexibility to set norms of business behavior. The Senate Interstate Commerce Committee's Report on the Federal Trade Commission Act explained:

The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid [them] or

13. Perceptions of weakness and timidity occasionally can provoke political attacks upon an agency. In 1969, the publication of two harsh critiques—one sponsored by Ralph Nader and the other prepared by a blue ribbon panel under the auspices of the American Bar Association ("ABA")—inspired Congress to demand basic changes in the FTC. See Kovacic, *Congressional Oversight*, *supra* note 12, at 592–602 (describing the impact of the Nader and ABA studies of the FTC).

14. The importance of political support to the effective functioning of competition agencies and other regulatory bodies is analyzed in David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446 (2014).

15. *Administrative Agencies and Their Constituencies*, in BUREAUCRATIC POWER IN NATIONAL POLITICS 1, 2 (Francis E. Rourke ed., 4th ed. 1986).

16. Congress amended the Act in 1938 to encompass as well "unfair or deceptive acts or practices," although the FTC had brought what we would today call "consumer protection" cases under its unfair methods of competition authority from the outset. See Winerman & Kovacic, *Outpost Years*, *supra* note 5, at 193.

whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others.¹⁷

Section 5's open-ended command affects the Commission's relations with Congress in two ways. First, section 5 invites legislators to demand that the FTC attack conduct that escapes the reach of prevailing judicial interpretations of the other antitrust laws. On its face, section 5 seems to offer a flexible tool to remedy any apparent obstructions to competition.¹⁸ Congressional committees and subcommittees can urge the Commission to use section 5 to reach beyond existing antitrust principles. Such urgings can also come from individual legislators, including, but not limited to, committee chairs—and committees often speak through the individual legislators who chair them. Second, when relying on section 5, the FTC exposes itself to attack (by affected companies and sympathetic legislators) for departing from conventional interpretations of the law. Members of Congress can direct the FTC to use section 5 to expand the realm of enforcement, and other members—or sometimes the same members—can then attack the Commission's efforts to do so as dangerous adventurism.

A second politically noteworthy feature of the FTC's authority is its information-gathering and reporting provisions.¹⁹ Congress thought the use of these powers would guide the agency's choice of cases (including novel section 5 matters), help the agency give policy guidance to Congress and the President, and (though this function has dissipated over time) conduct investigations prior to DOJ litigation.²⁰ Applying these powers can also create

17. S. REP. NO. 63-597, at 13 (1914). Senator Francis Newlands, who chaired the Senate Commerce Committee and who was the FTC Act's chief Senate sponsor, explained the ban against unfair competition, "My belief is that this phrase will cover everything that we want, and will have such an elastic character that it will meet every new condition and every new practice that may be invented with a view to gradually bringing about monopoly through unfair competition." 51 CONG. REC. 12,024 (1914) (statement of Sen. Francis Newlands).

18. The section 5 ban upon "unfair methods of competition" enables the FTC to proscribe conduct not reached by prevailing interpretations of the Sherman and Clayton Acts. See generally Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980). Since 1914, the application of section 5 rarely has extended antitrust doctrine beyond the bounds of Sherman and Clayton Act jurisprudence. See Kovacic & Winerman, *Section 5*, *supra* note 5.

19. See FTC Act §§ 6, 9, 15 U.S.C. §§ 46, 49 (2012).

20. The Commission will still refer to the DOJ matters that appear appropriate for criminal prosecution. In the Agency's early days, though, the Department differed from the Commission far more than it does now. Indeed, while there was an Assistant to the Attorney General responsible for antitrust matters in 1914, a separate division under an Assistant Attorney General was not created until 1933. ANTITRUST DIV., *supra* note 9, at I-2. Further, the Division had no authority to use the pre-complaint process in civil cases before 1962. See *id.* at III-48.

political hazards. As one study of independent agencies has observed, “The authority to investigate . . . mammoth business concerns . . . is a power loaded with political dynamite. It is bound to arouse the bitter antagonism of those being investigated and to set in motion powerful political pressures.”²¹ In a number of instances, FTC efforts to use its investigation and reporting powers without explicit congressional approval have had destructive political reactions.²²

The FTC’s broad authority also creates rent-seeking and credit-claiming possibilities for legislators and helps explain how Congress intervenes in the agency’s affairs.²³ In the rent-seeking model, legislators seek votes and campaign contributions by affecting the FTC’s enforcement decisions. A legislator can demand that the FTC attack firms whom the legislator’s constituencies oppose, intervene to protect favored economic interests from FTC “overreaching,” or tentatively support or oppose a pending Commission initiative to signal receptivity to contributions from affected economic interests.

The rent-seeking model helps explain why Congress has left section 5’s broad language in place despite business demands for amendment or repeal.²⁴ Section 5’s breadth creates more occasions for legislators to demand FTC action or try to shield firms from an “out of control” agency. A decisive narrowing of section 5 would sacrifice future chances to exploit the FTC’s use or nonuse of its powers. Thus, in reacting to claims of FTC “excesses,”²⁵ Congress has not chosen to rewrite the agency’s mandate and instead has relied on piecemeal exemptions for individual industries or temporary limits on the agency’s use of funds that preserve more rent-seeking options. Thus, the existing mix of statutory powers and oversight devices affords legislators an agreeable set of opportunities either to press the FTC to bring cases or to insist that the agency abandon specific matters.²⁶

21. ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 219 (1941).

22. *Id.* at 220.

23. See generally Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987); Bruce Yandle, *Regulatory Reform in the Realm of the Rent Seekers*, in PUBLIC CHOICE AND REGULATION, *supra* note 12, at 121.

24. For a proposal to retrench or repeal section 5, see U.S. CHAMBER OF COMMERCE, UNFAIR METHODS OF COMPETITION UNDER THE FTC ACT: DOES THE U.S. NEED RULES “ABOVE AND BEYOND ANTITRUST”? (2009), available at https://www.uschamber.com/sites/default/files/documents/files/ogogantrust_o.pdf.

25. Examples of excess include the congressional response to the FTC’s report in 1919 on the meatpacking industry and the agency’s challenge delivered pricing arrangements in the cement and steel industries. See Kovacic, *Congressional Oversight*, *supra* note 12, at 623–27; Kovacic, *Historical Perspective*, *supra* note 12, at 78–80; Earl Latham, *The Politics of Basing Point Legislation*, 15 L. & CONTEMP. PROBS. 272 (1950).

26. For example, David Mayhew observes:

Regulatory statutes are the by-products of congressional position taking at times of public dissatisfaction. They tend to be vaguely drawn. What happens in enforcement is largely a result of congressional credit-claiming activities on behalf of the

This review of the FTC's experience indicates that it is somewhat misleading to call the Commission an "independent" agency unless one interprets the meaning of that characterization in light of congressional expectations.²⁷ Congress intended the FTC to be largely independent from the Executive Branch in its day-to-day operations, despite the provision authorizing the President to direct the agency to undertake specific investigations. But Congress intended far less independence from itself. In creating the FTC in 1914, Congress desired to restore the legislature's primacy in controlling antitrust policy.²⁸ Beyond initial concerns about the substantive content of the "rule of reason" announced in *Standard Oil Co. v. United States*,²⁹ Congress established a mechanism for administrative enforcement "to prevent subversion of the legislative intent by district courts that either were unsympathetic or otherwise preoccupied."³⁰ When *Standard Oil* appeared, Francis Newlands, who later sponsored the FTC Act in the Senate, stated the need for an administrative enforcement body that was "the servant of Congress."³¹ Later generations of legislators would adapt Senator Newlands' language in various forms.

In devising the new agency, Congress contemplated a substantial role for legislative oversight to ensure that the Commission used its authority wisely. Congress knew it was giving the agency unusually broad powers and discretion. Senator Albert Cummins, a leading sponsor of the FTC Act, underscored this point during the debates leading to the statute's enactment. "I realize," Cummins said, "that if these five men were either unfaithful to the trust reposed in them or if their economic thought or trend of thought was contrary to the best interests of the people, the commission might do great harm."³² Congress would ensure that the agency accounted to it for its use of its expansive mandate. "I would rather take my chance with a commission at all times under the power of Congress, at all times under the eye of the people," Cummins explained.³³ "If we find that the people are betrayed either through dishonesty or through mistaken opinion, the commission is always subordinate to Congress. . . . Congress can always destroy the Commission; it

regulated; there is every reason to believe that the regulatory agencies do what Congress wants them to do.

DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 134-35 (1974) (footnote omitted).

27. The same can be said for other U.S. regulatory commissions such as the Federal Communications Commission.

28. See Winerman, *supra* note 1 (describing congressional motivations in adopting FTC Act); see also Averitt, *supra* note 18, at 233 (same).

29. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

30. Averitt, *supra* note 18, at 233.

31. 47 CONG. REC. 1225 (1911) (statement of Sen. Francis Newlands).

32. 51 CONG. REC. 13,047 (1914) (statement of Sen. Albert Cummins).

33. *Id.*

can repeal the law which creates it”³⁴ In the century to follow, congressional committees often have reminded Commission nominees that they owe special obedience to the legislature.³⁵ (Such reminders, moreover, have also been extended to nominees for commission seats at other agencies, including the Interstate Commerce Commission that was founded decades before the FTC.³⁶) And, following their confirmation by the Congress, many Commission members have expressed awareness of that circumstance.³⁷

IV. THE MEANING OF INDEPENDENCE

Although the FTC’s broad enabling act gives it substantial independence, there is also a considerable amount of legislative oversight that may at times create political pressure on the administration of agency affairs. The same dichotomy can arise in the drafting of any competition agency’s organic law. We can imagine a large number of measures that a jurisdiction might take to ensure that a competition authority is insulated from the political process when it sets a policy agency and considers whether to pursue specific matters. A menu of “safeguards” that would tend to ensure insulation from political control would include:

- Protections that prevent the removal of the agency head, absent specified causes,³⁸ for the head’s term of office. (That office is usually a specified term, though an extreme variant might provide lifetime tenure comparable to that of federal judges.) For an independent

34. *Id.* at 13,047–48.

35. *See, e.g., Nominations—1969: Hearings Before the S. Comm. on Commerce*, 91st Cong. 31 (1970) (statement of Sen. Vance Hartke) (explaining to FTC Chairman-designate Weinberger: “Let me make it perfectly clear to you, that under the Constitution and under the law which created it, the [FTC’s] responsibility is only to the Congress . . . [as] this is an arm of the Congress”); *MacIntyre, Pautzke, and Ross Nominations: Hearings Before the S. Comm. on Commerce*, 87th Cong. 6 (1961) (statement of Sen. Andrew Schoeppel) (explaining to FTC nominee Everette MacIntyre: “Of course, you are aware that [the FTC] is one of the arms of Congress, are you not?”); *Sundry Nominations: Hearings Before the S. Comm. on Interstate & Foreign Commerce*, 84th Cong. 129 (1956) (statement of Sen. Warren Magnuson, Chairman, S. Comm. on Interstate and Foreign Commerce) (explaining to FTC nominee Sigurd Anderson: “We are constantly reminding people that [the FTC] is an arm of Congress and not an independent agency”).

36. *See Nominations of Everett Hutchinson and Kenneth H. Tuggle, to Be Members of the Interstate Commerce Commission: Hearing Before the S. Comm. on Interstate & Foreign Commerce*, 84th Cong. 5 (1955) (“Mr. Hutchinson, with your legal background I suppose that you, too, are familiar with the fact that the Interstate Commerce Commission was created by basic law years ago to be again an arm of Congress?”).

37. *One on One: Federal Trade Commissioner Chair Jon Leibowitz*, FOX NEWS (Apr. 22, 2010), <http://www.foxnews.com/on-air/on-the-record/2010/04/22/one-one-federal-trade-commission-chair-jon-leibowitz> (reporting that FTC Chairman Jon Leibowitz said, “[W]e will do anything that Congress tells us to do, of course. We’re an independent agency and a creature of Congress.”).

38. Section 1 of the FTC Act specifies “inefficiency, neglect of duty, or malfeasance in office.” 15 U.S.C. § 41 (2012).

agency with multiple members and a Chair, such protection could guard both the members and the Chair in holding their posts.

- Legal commands or customs that impede the head of state, government ministries, the legislature or individual legislators from taking direct or indirect steps to shape broad policy or to determine how the agency exercises its power to prosecute cases or adopt secondary legislation.
- To the extent that legal commands impede the political branches from taking such steps, judicial oversight to ensure that those commands are followed.
- The absence of, or severe limits upon, the ability of citizens, nongovernment bodies, or commercial entities to influence the agency's agenda or to monitor its operations by having access to the agency's records or by participating in its activities.
- Sources of funding that do not depend upon the exercise of discretion by the head of state, executive ministries, or the legislature.

A jurisdiction would achieve the highest level of independence for a competition agency by embracing all of these measures.

To adopt the complete roster of independence safeguards would come at a substantial—indeed, unacceptable—cost in accountability. The loss of accountability likely would be seen as a grave defect if the agency's powers were formidable. Moreover, no level of protection could prevent revision of the agency's organic statute.³⁹ The perceived weakness in accountability mechanisms could provoke a legislative backlash if the agency pressed an aggressive agenda. In fact, though, it is impossible to imagine that a jurisdiction would give broad powers to a competition agency without also adopting measures that constrain the agency's exercise of discretion. (These can include agency-specific measures or broadly applicable measures and processes, such as the Administrative Procedure Act or budgetary processes for congressionally sanctioned funding, to which the agency is subject.) Thus, we can posit that the complete insulation from external influence suggested in the roster of protections listed above would be viewed in most systems as illegitimate and unsupportable. To speak of an acceptable balance between independence and accountability requires a less expansive definition of what constitutes appropriate insulation from external influence.

A more suitable definition of independence focuses on the agency's exercising its power to prosecute cases or to enact secondary legislation, such as rules that set binding standards of conduct. Safeguards should discourage

39. We recognize that a jurisdiction could try to embed autonomy safeguards directly in the constitution, for which amendments presumably would be more difficult.

political branches of government from intervening to guide or force the disposition of investigations, cases, or rulemakings and, preferably, the initiation of cases as well. Such safeguards should not, however, prevent political institutions from offering guidance or recommendations about larger issues of policy. By this standard, it would be inappropriate for political authorities to have the capacity to prevent, by direct mandate or by persuasion, an agency from blocking a specific merger. It would be appropriate for political authorities to offer their views more generally—for example, in a legislative hearing—about whether an agency's approach to merger review is too tolerant or too strict.

V. ORGANIZATIONAL CHOICES THAT CAN DETERMINE INDEPENDENCE

Jurisdictions can influence the level of a competition agency's independence through a variety of choices that concern its structure and operations. These choices create tendencies that favor greater or lesser degrees of insulation from political interference in decisions about cases or rules. By themselves, the choices concerning organization and operations do not govern the level of independence an agency enjoys in practice. A variety of informal customs, norms, and habits can either increase or decrease the amount of independence that formal organizational structures and operating procedures might indicate.

The organizational structure often thought to be most consistent with independence from political interference is an administrative body that stands outside existing government ministries. In most instances, this administrative body is a commission whose members are appointed to fixed terms and who cannot be removed from office except for good cause. One common model for the selection of board members is a sequence that involves nomination by the head of state and confirmation by the legislature.⁴⁰

In theory, an additional degree of independence can be provided by a requirement that the political backgrounds of board members be diverse. For the FTC, no more than three of the five members of the board can be members of the same political party. This has two possible effects that might promote independence. First, the diversification of political backgrounds, combined with appointments that are staggered by years, tends to diminish or delay abrupt adjustments in policy—including adjustments that might be demanded by the political branches of government. Second, when the board reaches a unanimous decision in the resolution of visible, difficult issues, there may be a greater sense outside the agency of political legitimacy arising from the attainment of a consensus outcome. To the extent that such

40. The typical model in the United States, which was used in the FTC Act, provides for confirmation by the Senate. 15 U.S.C. § 41. This reflects the general norm in the United States. *See* U.S. CONST. art. II, § 2 (Presidential selection of "officers of the United States" is subject to the consent of the Senate).

outcomes increase respect for the agency, the agency's stature and independence may be enhanced.

The model often seen as least consistent with political independence is to place the competition agency within a ministry of the executive branch. In this model, the individual head of the competition authority, or the multiple members and the chairperson, have no tenure; they can be removed at the discretion of the head of state. In some jurisdictions, the head of the agency, including, for a multi-member agency, both its members and its chairperson, must be approved by the legislature. Judgments about the actual degree of independence that these organizational models yield in practice require a careful examination of norms, customs, and habits that shape the actual operation of the institutions within the jurisdiction. Some of these may be readily apparent, and some are not. For example, as a stand-alone commission with five members appointed by the President and confirmed by the U.S. Senate, with political diversity in its members and a provision that commissioners may be removed from office only for good cause, the FTC is generally considered an independent agency.

The FTC's structure was substantially modified and its independence in no small regard compromised, however, by Reorganization Plan No. 8 of 1950.⁴¹ Before 1950, the Commissioners chose their own chairperson, and that chairperson had only limited powers beyond those of his colleagues; further, the FTC Commissioners rendered their chairperson even weaker than those of many other administrative agencies in 1916, when they began to rotate the position annually.⁴² However, under a 1950 reorganization plan (which President Harry S. Truman issued under a 1949 law), the chairperson exercises the agency's "executive and administrative functions." Further, although the 1950 plan required approval of certain major decisions by the full Commission, and although it broadly required that the chairperson act subject to the "general policies" of the full Commission, the latter constraint, in particular, has been weak. Most tellingly, chairs who took office relatively early in a new administration, such as James C. Miller III in 1981, have felt little constraint in diverting staff to develop their own agenda, even before they had a Commission majority that fully supported that agenda. The chairperson's augmented powers, moreover, are particularly important because section 3 of the Reorganization Plan authorized the President to select a chairperson from among the commissioners, and the chairperson serves in that capacity at the President's pleasure.⁴³ In a particularly strong formulation, Sidney Milkis argues that the 1950 Plan for the FTC, and

41. Reorganization Plan No. 8 of 1950, 15 Fed. Reg. 3175 (May 24, 1950).

42. Winerman & Kovacic, *Outpost Years*, *supra* note 5, at 165.

43. Reorganization Plan No. 8 of 1950, 15 Fed. Reg. 3175. Section 3 of Plan No. 8 states: "The functions of the Commission with respect to choosing a Chairman from among the membership of the Commission are hereby transferred to the President." *Id.*

comparable plans for many other agencies, “eventually eroded the independent regulatory commission’s autonomy.”⁴⁴

However much the agency’s independence has been compromised since 1950, though, the claim that the Commission is an independent agency begs the question: independent from whom? From the view of the U.S. Congress, the FTC is deemed to be independent from the executive branch of government, but not from the legislative branch. As noted above, legislators often describe the Commission as an agent of the Congress and intend for the Commission to be responsive to congressional preferences. As one indication of the nature of this relationship, the FTC’s procedural rules acknowledge that FTC officials have no authority to withhold otherwise confidential information from Congress,⁴⁵ and have been construed to authorize agency staff, pursuant to a vote of the Commission, to give confidential briefings to the chairs of committees and subcommittees about ongoing merger investigations and other pending law enforcement matters. Such chairs routinely request and receive such briefings.

At first glance, the Antitrust Division of the DOJ might appear far more subject to direct political influence than the FTC. The Antitrust Division is part of an executive branch ministry, and the Assistant Attorney General for Antitrust can be dismissed at the will of the President. This initial impression requires two qualifications. As a matter of custom developed over a period of decades, the Antitrust Division has developed a substantial degree of insulation from the president. Reported episodes of direct political interference to shape the disposition of cases are rare, and there are important instances in which the Antitrust Division has proceeded with major cases despite the vehement opposition of other executive branch ministries.⁴⁶ The Antitrust Division also is less inclined than the FTC to respond to congressional demands for information. For example, contrary to the practice of the FTC, the Antitrust Division does not provide confidential briefings about law enforcement matters to members of Congress.

VI. UNIVERSAL PRESSURE POINTS FOR POLITICAL CONTROL OR INFLUENCE

Regardless of the organizational form given to the competition agency, there remain pressure points that political branches of government can exploit to control or influence the institution. These pressure points exist in most jurisdictions even if the competition agency is created as a stand-alone commission whose members have tenured appointments. The reason for

44. SIDNEY M. MILKIS, *THE PRESIDENT AND THE PARTIES: THE TRANSFORMATION OF THE AMERICAN PARTY SYSTEM SINCE THE NEW DEAL* 160 (1993).

45. 16 C.F.R. § 4.11(b) (2014).

46. William Baxter, who headed the Antitrust Division from 1981 through 1983, pressed ahead for the restructuring of AT&T Corp. to resolve the DOJ’s monopolization suit against the telecommunications firm despite strong opposition from the Department of Commerce and the Department of Defense. On the Division’s independence, see Rill & Turner, *supra* note 12.

considering these pressure points is that they demonstrate that complete insulation from the political process is unattainable. Thus, in considering how to attain institutional autonomy for the competition agency, the analysis should focus on how and whether to reduce political interference rather than how to eliminate it.

One or more of the following pressure points inevitably limit a competition agency's freedom from political influence: the need for appointment of board members, the need to obtain funding, the possibility that the legislature will amend the law to curb the agency's powers, the ability of the legislature to impose significant costs upon the agency through demands for information and hearings, and the dedication to third parties of power to set the agency's agenda and shape its allocation of resources. These measures can be used individually or in combination to increase the agency's responsiveness to the preferences of political actors outside the institution.

A. THE APPOINTMENTS PROCESS

The selection of agency leaders is an opportunity to choose individuals who are likely to be sympathetic to the wishes of the Head of State, executive ministries, or the legislature. Alternatively, in an agency that must have multi-party representation,⁴⁷ custom or legislative leverage may enable the minority party (that party that does not control the executive) essentially to select some of the Commissioners. The nominating entity (often the executive branch) and the approving entity (often the legislature) can use their power as gatekeepers to filter out candidates who seem certain to ignore external political preferences and, by reason of background and experience, are more likely to share the views of one or more political organs of government or party interests.

The desire to appoint individuals with shared values is evident in the frequency with which appointees to the FTC have been former members of Congress, members of the White House staff, or members of congressional staffs.⁴⁸ Screening on the basis of these attributes does not ensure fidelity to executive branch or legislative preferences, but it can create a common understanding by which the appointee anticipates or responds favorably to

47. For example, no more than three of the Federal Trade Commissioners—a full complement of the agency includes five commissioners—can come from a single political party. 15 U.S.C. § 41 (2012).

48. See William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915, 937 (1997) (documenting frequency with which individuals with experience as members of Congress or employees of congressional staffs receive appointments to FTC). In the agency's early decades, many former House members, and even two former Senators, served as commissioners. Today, as fewer House members are defeated in a typical election cycle, and as those who are defeated often have lucrative job prospects elsewhere, such appointees are rare; indeed, there have been none in recent decades. On the other hand, members of the White House staff and congressional staffs have increasingly succeeded in obtaining Commission seats.

those with whom the appointee shares a professional background. The proceedings that lead to approval by the body entrusted with the confirmation of the candidate also provide opportunities for the confirming body to extract commitments (subject, of course, to reneging by an individual after a tenured appointment is approved) for future action. In a system that allows reappointment for multiple terms, the desire to please the entity that holds the keys to reappointment and the entity that approves can induce a board member to alter behavior.

One additional factor can affect the behavior of an appointee once Senate approval is obtained and the fixed term (with removal only for cause) begins. The autonomy of an FTC commissioner (or member of any other independent regulatory commission) depends heavily upon how much the appointee desires to be independent from Congress or the White House. Individuals nominated to serve on the FTC ordinarily have generally demonstrated their fidelity to the party of the officials who are the gatekeepers for the appointment.⁴⁹ Upon beginning their terms, an occasional appointee may feel little or no need to remain in good standing with the elected officials who selected them or, more generally, to be viewed within the party as loyal to the party's preferences. Because they do not desire or intend to seek future political favors (e.g., appointments to other positions that require political approval), they may be relatively unconcerned about whether their decisions on the Commission please various political overseers or observers.

By contrast, most appointees may hope for future benefits from their party and therefore may be more reluctant to dismiss requests (or demands) for action from same-party leaders, either in Congress or in the executive branch. Such appointees may be particularly attentive and responsive to the expressed preferences of elected officials from their own party. Even with the protection of a fixed term, failure to heed these preferences could damage an individual's post-Commission career (by eliminating the prospect of appointment to a new government post, or causing political loyalists to withhold support for positions outside the government), or cause an unwelcome personal isolation that comes about when one's political cohort imposes ostracism for disloyalty.⁵⁰ In short, members of nominally independent agencies may be no more independent than they want to be.

49. See William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST L.J. 687, 690–91 (2014) (describing political screening that occurs for appointments to the U.S. antitrust agencies). Due to the political diversification requirement of the FTC Act, the White House can select up to three Commission members from its own party. See *supra* note 46 and accompanying text. To fill these seats, the President typically will select individuals who share the President's party affiliation. For the other two slots on the FTC, the modern custom is to allow the leaders of the other party in the Senate to designate the nominees they regard as suitable for the remaining positions.

50. Take the example of two different chairs of a regulatory agency. On a particular issue, both have chosen what they regard to be the best policy. Imagine that a President who belongs to the same party as these chairs vocally proposes that the agency repudiate its existing policy and

B. FUNDING

Every competition agency requires funding to operate. A major factor of whether an agency prospers or flounders is the adequacy of its resources. One can imagine a system in which the agency's source of funds is, to some degree, insulated from the political process. For example, an agency might be permitted to collect and retain user fees associated with merger filings. It also might be allowed to retain all or part of the fines it collects from firms that violate competition laws.⁵¹

In one sense, none of these funding mechanisms is entirely sheltered from the political process. A legislature always can decide to alter the means of financial support if it is truly unhappy with the agency's performance. Moreover, each of these autonomous funding techniques has serious difficulties. User fees tied to specific forms of activity depend upon the level of relevant activity, and a substantial drop in chargeable events (e.g., merger filings) can confront the agency with a large revenue shortfall. For example, user fees for merger filings can provide robust funding for an agency when stock markets are booming and parties can use appreciating share prices to purchase other companies. Amid a recession, the filings and the funding diminish dramatically. Allowing an agency to fund itself from the fines it collects can create perverse incentives that undermine sound public administration. Agencies might be tempted to strain to "discover" infringements of the law and accept settlements that fund operations but have questionable substantive merit.

The most common method of funding for competition agencies consists of regular legislative appropriations that are set annually or for a period of years. The need for the agency to obtain regular appropriations creates two possible pressure points. If the agency must submit its budget estimates through an executive branch ministry, the process gives that ministry the ability to reward or punish the competition agency for past behavior. If the legislature is the final gatekeeper for budget approval, the agency must consider how legislators might take the agency's behavior into account in deciding how to vote on the budget. The legislature can remind the agency regularly during the course of the fiscal year that the agency's fidelity to its preferences will influence the next year's budget. Not only can the legislature augment or reduce the overall budget, in some jurisdictions it can specify the purposes for which funds must be used or shall not be used.

adopt a position more to the President's liking. An individual who has no desire to remain in the good graces of the party is more likely to resist this form of pressure from the executive branch than a chair who wants to be seen as a team player.

51. Another example, albeit one that does not involve a competition agency, is the highly controversial funding mechanism for the recently created Consumer Financial Protection Board. The Board draws on funding from the Federal Reserve Board rather than appropriated funds. 12 U.S.C. § 5497. These features are discussed in Hyman & Kovacic, *supra* note 14, at 1487–88.

The threat to slash a budget can have powerful effects. In January 2002, the FTC and the DOJ announced that a new plan for allocating matters that came within the jurisdiction of the two agencies. The reforms to the agencies' "clearance" procedure involved some redistribution of industries based on earlier customs that the FTC and DOJ had followed. The Chairman of the Senate Commerce Committee, Ernest Hollings, scorned the proposal. In words that would have made a gangster proud, Hollings said he wanted to "eliminate" Timothy Muris, the FTC's Chairman.⁵² At the time, Hollings also served as the chairman of the Senate Appropriations Subcommittee responsible for the budgets of the Justice Department and the FTC. Hollings threatened to reduce the appropriations for the DOJ and the FTC if the two agencies implemented the clearance process reforms. The DOJ withdrew from the agreement, and the proposed reforms foundered.⁵³

C. LEGISLATIVE CHANGES

Political institutions that are displeased with a competition agency's work can threaten to advance legislation that will withdraw authority. The credibility of this threat depends on how difficult, as a matter of law and custom, it is within the jurisdiction to amend existing legislation. At a minimum, a promise to consider a reduction in authority will force the agency to expend considerable resources to make the case against a retrenchment of its powers. It may be possible to create a competing enforcement agent by establishing a new institution or making a grant of overlapping authority to an existing government body—as the FTC was itself created in 1914 to supplement existing enforcement by the DOJ. In general, it may be necessary for the legislature to amend existing statutes occasionally to get the agency's attention and to consider more carefully whether future initiatives will elicit this form of backlash.

D. ROUTINE OVERSIGHT

A legislature can impose substantial costs upon an agency through methods that fall well short of amending legislation or threatening to do so. Legislators can demand that agency officials appear before them in hearings. Such events tend to require extensive preparation within the agency and compel top leadership to devote substantial effort to preparation. A legislature also can submit demands that the agency assemble and present information about its operations. Here, also, the collection and assimilation of records can consume a great deal of staff time. The political branches of

52. James V. Grimaldi, *Hollings and Muris Go Another Round in the Battle of the Merger-Review Titans*, WASH. POST, Apr. 22, 2002, at E11 (quoting Senator Ernest Hollings, speaking of FTC Chairman Muris: "I'm going to eliminate him.").

53. Paige Albiniak, *Justice Denied as Hollings Prevails*, BROADCASTING & CABLE (May 26, 2002), <http://www.broadcastingcable.com/news/news-articles/justice-denied-hollings-prevails/92634>.

government also may have the ability to direct government authorities (such as the U.S. Government Accountability Office) to audit the competition agency and prepare reports on the agency's work.

Oversight may extend to efforts to obtain information about the status of pending law enforcement matters. The FTC's rules provide that the Commission can authorize its staff to provide confidential briefings to members of Congress.⁵⁴ The Commission has used this rule to provide confidential briefings to committee chairs and subcommittee chairs on pending law enforcement investigations. By this mechanism, the FTC's staff provided briefings on the agency's investigation of alleged anticompetitive practices by Google, Inc. to, among others, Senator Herbert Kohl, the Chairman of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights.⁵⁵

E. SETTING THE FORM OF JUDICIAL REVIEW

The political branches of government can constrain a competition agency's discretion by providing for or increasing judicial oversight of the agency. Legislatures can impose political constraints in the form of legislation that directs courts to engage in careful, painstaking review of agency decision making. For example, if the legislature is dissatisfied with the agency's choice of cases, it can alter the agency's statutory mandate to set a more demanding standard of judicial review. Such a signal can be particularly confining if the agency already does not generally receive deference from the courts.

F. INCREASED MONITORING BY EXTERNAL PARTIES

A competition agency's freedom of action is determined partly by the extent to which external parties—individual citizens, nongovernment organizations, private companies, or academics—can obtain information about the agency's operations or force the agency to take certain forms of action. If the legislature imposes expansive disclosure requirements, freedom of information laws can give third parties broad access to agency records and supply an important tool for monitoring agency performance. A competition law or an administrative procedure statute can shape the agency's agenda by forcing it to open a file in response to all complaints from external parties, explain all decisions to prosecute or not to prosecute, and by subjecting the agency to lawsuits by external parties who believe the agency's justifications for action or inaction are inadequate. Legislators can also enact statutes, such as the U.S. Government in the Sunshine Act, which require many types of

54. 16 C.F.R. § 4.11(b) (2014).

55. See Letter from Donald S. Clark, Sec'y, Fed. Trade Comm'n, to Senator Herbert Kohl, Chairman, Senate Subcomm. on Antitrust, Competition Policy and Consumer Rights 21–23 (Dec. 5, 2011), *available at* https://www.ftc.gov/sites/default/files/attachments/frequently-requested-records/130131google_o.pdf (informing Senator Kohl that FTC had authorized its staff to provide a confidential briefing on the agency's investigation into Google's search engine practices).

administrative agency deliberations to take place in public.⁵⁶ A further mechanism is to establish procedural requirements that force the agency to permit the participation by outsiders in deliberations that could lead to the adoption of secondary legislation or in proceedings that resolve litigated disputes by settlement.

G. *THE TRADEOFF BETWEEN ACCOUNTABILITY AND THE BREADTH OF DELEGATED AUTHORITY*

A legislature's judgment about how much power to delegate to a competition agency is likely to depend, in part, on the legislature's views about the adequacy of devices to ensure that the agency is accountable to legislators and the public for its policy choices. The more insulated the competition agency is from the political process, the narrower the powers that a legislature is likely to entrust to the agency. It is difficult to imagine that a jurisdiction would give broad powers to a competition agency—for example, to gather business records, to review a wide range of business behavior, and to impose strong sanctions—without also creating some mechanisms that press the agency to exercise its powers in ways that serve society's interests.

H. *SUMMARY: SIGNIFICANCE OF THE PRESSURE POINTS*

The political branches of government have a variety of measures to influence competition agencies to consider and respond to their preferences, even when the competition agency is established as an administration body that stands outside any government ministry and is headed by a board whose members have fixed terms and can be removed only for good cause. In many jurisdictions, executive bodies and legislatures have shown their willingness to use these techniques.

Actual or threatened recourse to pressure points has major implications for the operations of a competition agency. No agency can prosper unless it takes account of these pressure points and considers how to maneuver through the external political environment. The formulation of an agency's strategy requires it to consider the political consequences of its actions. Every day, an agency acquires or spends political capital. The agency should consider new projects in light of their political costs in several respects. The agency should identify how it can amass political support—for example, through the media—for projects that are certain to arouse political opposition. The agency also should be careful to avoid choosing so many politically sensitive targets at any one time that a critical mass of opposition

56. See Government in the Sunshine Act of 1976, Pub. L. No. 94-409, 90 Stat. 1241 (codified as amended in 5 U.S.C. (2012)). Such statutes, however, may not necessarily have their intended effect—where matters would be subject to the Sunshine Act if they were discussed in meetings, for example, the Act may create disincentives to conduct deliberations at meetings in the first place. And, by defining a “meeting” broadly, it may create barriers to effective communications among multiple decision makers.

will form and overwhelm the agency, as happened to the FTC from the late 1970s until restrictive legislation was adopted in 1980.⁵⁷

VII. HOW MUCH INDEPENDENCE IS DESIRABLE IN PRACTICE?

The discussion above has indicated that, in practice, complete autonomy from the political process is unlikely to be attainable for a competition agency. Several considerations also indicate that it may not be desirable, for purposes of agency effectiveness, to seek the greatest possible insulation from political forces. More complete forms of insulation from the political process may deny the agency the ability to be an effective advocate for competition when it uses policy tools other than litigation. Public institutions outside the competition agency take a number of decisions that determine the form and strength of competition. These include the choices by sectarian regulators regarding entry and pricing, legislative decisions about matters such as subsidies and trade protection, and actions taken by authorities at the regional and local level concerning manners such as the issuance of licenses to operate in the market. If a competition agency has no connection to the political process, it runs a risk that its voice will not be heard when these and other decisions are made.

A second, and closely related, concern is that the political branches of government will find ways to bypass the competition authority. Suppose that the competition agency has expansive powers and enjoys significant insulation from the political process. It has authority to make choices that deeply influence economic performance, but it is largely shut off from the views of other public institutions (e.g., legislators, government ministries) about how its power should be exercised. If other public authorities believe that the competition authority is inattentive to their concerns, they are likely to find ways, directly and indirectly, to diminish the importance of its decision-making role. Short-term autonomy, exercised aggressively, may provoke legislative changes that compromise that very autonomy.

There are a number of means to this end. One important technique is to increase the importance of other policymaking tools to override or limit the scope of the competition agency's decisions. A legislature might enact laws that either divest the competition agency of specific powers or to grant other government bodies the power to make decisions that overrule the choices of the competition agency. The scope of authority of other government bodies with closer links to the political process (e.g., sectoral regulators) might be expanded to offset what the legislature might regard as the "unresponsiveness" of the competition authority. As new issues arise and require legislative intervention, the legislature may decide to assign new regulatory tasks to institutions other than the competition agency.

57. See Kovacic, *Congressional Oversight*, *supra* note 12, at 664–67 (describing congressional backlash to FTC programs of the 1970s).

These considerations require a more cautious answer to the question of how much independence is appropriate. Implicit or explicit in many discussions of independence are conditions that we believe represent a sensible core domain of decisions that are shielded from political interference. The most important of these is the exercise of law enforcement authority, which can lead to the imposition of significant sanctions upon juridical persons and natural persons. The political branches of government ought not to be able to (a) determine whether the agency will prosecute particular parties; or (b) influence how specific disputes will be resolved, including the choice of punishments for alleged wrongdoers. It can also be problematic if government officials outside the agency seek to micromanage pre-complaint investigations and, to a lesser extent, there are potential risks when such outside officials can demand that the agency open pre-complaint investigations. These conditions assume greater importance as the severity of the agency's power to punish increases. As noted earlier, by this approach we would not preclude guidance by legislators about which sectors or types of commercial phenomena deserve the agency's attention.

We have focused on law enforcement because the power to gather information, to prosecute cases, and to impose sanctions often is perceived to be the most formidable of the agency's policymaking tools. The same observations would apply, however, to other exercises of the agency's authority, such as the issuance of rules that implement statutory commands and the preparation of reports. A basic test is whether the form of attempted intervention from external bodies diminishes, in fact or in appearance, the capacity of the agency to exercise independent professional judgment in the administration of its responsibilities.

There are a variety of ways to ensure that the agency is accountable for its decisions without interfering in its decision to investigate, to prosecute, to punish, or to exercise other powers. A legislature can hold periodic hearings at which legislators can press the agency's leadership to explain its action in completed matters and to discuss general trends in policy. The agency itself can issue statements explaining specific decisions to prosecute or not to prosecute. It can maintain and disclose data sets about its activities to permit informed external debate about its allocation of resources. An agency can also implement a program of *ex post* assessment by which the consequences of individual initiatives are measured.⁵⁸ All of these techniques make the agency accountable for its policy choices without permitting the political branches of government to determine how power will be exercised in specific matters.

58. The dimensions for a possible program of *ex post* assessment are presented in William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, 31 J. CORP. L. 503 (2006).

VIII. MEANS TO PRESERVE NECESSARY DEGREES OF AUTONOMY

Longevity for its own sake is hardly a worthy aim. There is little evident value in preserving a competition agency that ensures its survival by committing itself to unobtrusive law enforcement and declining to confront important and potentially controversial market failures. If a competition agency is to retain an economically significant enforcement role, one must ask how the agency is to perform that role without: (a) succumbing to pressure that undermines its capacity to make merits-based decisions about how to exercise its power to bring and resolve cases or use other instruments in its policy-making portfolio; and (b) losing the accountability and effectiveness that requires some connection to and engagement with the political process. What measures might enable a competition agency to resist suggestions that it undertake fundamentally flawed initiatives? How can one protect meritorious enforcement programs from political attack and intervention by political branches of government as such programs come to fruition? Presented below are some possible solutions.

A. GREATER SPECIFICATION OF AUTHORITY

One approach is to avoid extremely open-ended grants of authority which application invites objections that the agency has overreached its mandate or inspires political demands that it use seemingly elastic powers to address all perceived economic problems. A fuller specification of powers and elaboration of factors to be considered in applying the agency's mandate can supply a more confident basis for the authority's exercise of power and a stronger means to resist arguments that it enjoys unbounded power.

B. MORE TRANSPARENCY, INCLUDING RELIANCE ON POLICY STATEMENTS AND GUIDELINES

Greater transparency in operations can increase the agency's perceived legitimacy and supply a useful barrier to destructive political intervention. The foundations of a strong transparency regime include the compilation and presentation of complete data sets that document agency activity and matter-specific transparency devices, such as the preparation of statements that explain why the agency closed a specific investigation.⁵⁹

Competition agencies can usefully rely extensively upon policy statements and guidelines to communicate their enforcement intentions and delimit the intended application of their powers. One purpose of such statements is to suggest how the agency defines the bounds of the more open-ended and inevitably ambiguous grants of authority its enabling statutes. For example, the FTC's policy statements in the early 1980s concerning consumer unfairness and deception were important steps towards defining how the

59. On the value of these transparency methods, see William E. Kovacic et al., *How Does Your Competition Agency Measure Up?*, 7 EUR. COMPETITION J. 25, 36-43 (2011).

agency intended to apply its generic consumer protection powers.⁶⁰ By articulating the bases upon which it would challenge unfair or deceptive conduct, the Commission strengthened external perceptions (within the business community and within Congress) that it would exercise its powers within structured, principled boundaries, and it increased, as well, its credibility before courts. The FTC has never issued a policy statement concerning its authority to ban unfair methods of competition, and the failure to do so has impeded the effective application of this power.

A second important use of policy statements is to introduce plans for innovative enforcement programs. Before embarking upon a new series of initiatives, the competition agency would issue a policy statement that identifies conduct it intends to examine and, in stated circumstances, proscribe. Here, again, the FTC's experience provides a useful illustration. Policy statements would be useful when the agency seeks to use section 5 of the FTC Act to reach beyond existing interpretations of the Sherman and Clayton Acts, or to apply conventional antitrust principles to classes of activity previously undisturbed by antitrust intervention. By issuing a policy statement before commencing lawsuits, the FTC would give affected parties an opportunity to comment upon the wisdom of the agency's proposed course of action and to adjust their conduct. Such an approach would likely increase confidence within industry and within Congress that the Commission is acting fairly and responsibly, and it could well make courts more receptive to the FTC's application of section 5 as well.⁶¹

C. STRENGTHEN THE AGENCY'S PROCEDURAL SAFEGUARDS

A frequently asserted basis for political intervention in a competition agency's affairs is that the agency's existing procedures deny respondents fair treatment. This concern is especially acute where the exercise of the agency's authority has major consequences—for example, in the decision to prosecute a case or to set sanctions. One way to increase perceptions of the agency's

60. The Commission issued its Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction in a letter of October 17, 1980 to Senators Wendell Ford and John Danforth, Chairman and Ranking Minority Member, respectively, of the Senate Committee on Commerce, Science, and Transportation. See 4 Trade Reg. Rep. (CCH) ¶ 13,203. (The standard set forth in the 1980 letter was later codified in modified form. 15 U.S.C. § 45(n).) The Commission's Statement on Enforcement Policy Against Deceptive Acts or Practices appeared in a letter of October 14, 1983 to Congressman John Dingell, Chairman of the House Committee on Energy and Commerce. See 4 Trade Reg. Rep. (CCH) ¶ 13,205. The Commission also issued an important policy statement on advertising substantiation, clarifying requirements that the agency had determined to arise under the statutory prohibition of unfair or deceptive acts or practices. 1983 FTC Policy Statement Regarding Advertising Substantiation, in *In re Thompson Medical Co.*, 104 F.T.C. 648, app. 839-42 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

61. See Kovacic & Winerman, *Section 5*, *supra* note 5, at 944 (recommending that FTC issue section 5 enforcement guidelines); see also Caswell O. Hobbs, *Antitrust in the Next Decade—A Role for the Federal Trade Commission?*, 31 ANTITRUST BULL. 451, 477 (1986) (same).

fairness is to adopt one of many possible measures that give parties more information about the theory of proposed enforcement measures and greater opportunities to examine and test the agency's evidence. For example, in the pre-complaint phase of a civil matter an agency might make more complete disclosure to respondents (consistent with protections for confidential informants) of the evidence it has gathered and of the specific theory of harm it intends to advance if the matter is litigated. An institution that integrates, in a single agency, the functions of investigation, prosecution, and adjudication might strengthen organizational and operational measures to ensure that the body which decides guilt or innocence is separated from the decision to prosecute.

D. ADJUST THE FOCUS OF THE LEGISLATIVE OVERSIGHT PROCESS

A competition agency could use authorization, appropriations, and general oversight hearings to address more explicitly the political feasibility of proposed or ongoing enforcement initiatives. Agency officials could press legislators to consider the political hazards the agency might face in undertaking a long-term program which success would hinge upon sustained legislative support. The agency, likewise, could use annual hearings to solicit approval for continued pursuit of ongoing matters. Agency officials should impress upon authorization and appropriations bodies how the agency's past experiences can illuminate the desirability of undertaking or continuing a given initiative.

Oversight committees also should be encouraged to use hearings to conduct comparatively frequent (biennial) reviews of government antitrust and consumer protection enforcement policy. Among other subjects, these hearings would address the appropriate focus of competition policy and the institutional forces that shape the agency's allocation of resources and execution of programs. The hearings would emphasize a historical perspective, as current and former agency officials would be called upon to assess current and emerging enforcement trends in light of past experience.

The suggested measures sketched above have some common threads. They place a premium upon the competition agency's willingness to act with sufficient transparency that the public can trust the agency's decisional processes even when its decisions are not subject to the rigors of judicial review, and to make investments in the development and maintenance of institutional processes for taking stock of past experience and incorporating its lessons into the formulation of current policy. The more difficult question for competition agencies and for other policymaking institutions of government is whether they are capable of learning, retaining, and applying the lessons of their past to improve their future performance. The incentives that guide legislators and agency officials in allocating their resources make it difficult to obtain a middle- or long-term view in what is essentially a short-term policymaking environment. The path to improvement requires a

reorientation in agency management that emphasizes greater attention to institution-building rather than a calculus that measures agency quality by the sheer number of new program outputs, including the number of new prosecution events.⁶²

IX. CONCLUSION

Until recently, discussions about the relationship of competition agencies to the political process have focused on two divergent alternatives—autonomy and obeisance. A simple model that sharply sets apart these poles may be a useful starting point to think about institutional design, but it does not take us very far in understanding how competition agencies actually function or in identifying what agencies should do to be effective. More recent contributions to the literature on competition agencies recognize that the choice is not between autonomy or obeisance, but rather how much of each. Complete autonomy can extract an unacceptable price in accountability and effectiveness. Obeisance in the form of willing submission to demands of powerful elected officials can make an antitrust system a menace. In a conversation, one of our colleagues once likened the ideal place of a competition agency in the political environment to the location of Earth in the solar system: far enough away from the Sun of politics to avoid being burned to a crisp, but close enough to avoid being frozen out of important policy deliberations.

The century-long experience of the FTC demonstrates the value of historical inquiry for modern policy making. The FTC's evolution illuminates the nature of the trade-offs among autonomy, accountability, and independence yields important insights about the practical significance of specific institutional design features. The FTC's history may not invariably yield clear guidance about the best path for an agency going forward, but it teaches how to avoid being blindsided by tensions that arise when formidable competition commands are brought to bear upon politically powerful economic interests. An agency that examines the FTC's experience (and the development of other regulatory systems) will gain a better understanding the relevant design choices, will be more farsighted in anticipating problems, and can devise solutions sooner rather than later.

The study of regulatory agency history also points to a useful path for the future work of international organizations and academic institutions with an interest in competition law. We see great benefit in future activities that enable agency leaders to discuss the political demands they confront and to engage the skills of historians, political scientists, and public administration

62. The importance of a longer term focus on institution building is addressed in William E. Kovacic, *The Digital Broadband Migration and the Federal Trade Commission: Building the Competition and Consumer Protection Agency of the Future*, 8 J. ON TELECOMM. & HIGH TECH. L. 1 (2010). See also William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903 (2009).

scholars in helping competition agency officials, especially new appointees to leadership positions, to define their relationship to the political process.⁶³ More generally, there is a need for instruction, perhaps in the form of short courses that convey to new officials the know-how that is acquired on the job and tends to evanesce once the appointed official leaves office. Initiatives of this type would built upon what we see to be a growing awareness among competition policy specialists and other students of economic regulation that issues of institutional design are as urgent and important as substantive questions about the ideal content of regulatory policy.

63. An outstanding example of an academic institution that seeks to perform this function is the Australia and New Zealand School of Government, which offers an extensive collection of courses and degree programs for civil servants, including top agency officials.