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The Voluntary Trade Council[1] is a nonprofit research and education organization that develops practical solutions to the problems caused by violent state intervention in free markets. The VTC focuses on the harm caused to individuals and businesses by the enforcement of antitrust and other ÿcompetitionþ laws. Through publications, filings with government agencies, and the Internet, the VTC applies the principles of free market economics and rational ethics to contemporary antitrust policies and cases.

The VTC has a longstanding interest in the Federal Trade Commissionýs formulation and enforcement of antitrust policy in the health care industry. The VTC and its officers have filed comments in nearly two dozen cases brought by the FTC against physician and hospital groups since 2001.

This brief presents objections to the constitutional legitimacy of the Commission and the economic principles of Complaint Counselýs case. VTC does not ask the Commission to affirm or reverse Judge Chappellýs Initial Decision. Instead, this brief constitutes a statement of objections on behalf of United States citizens that refuse to acknowledge the Commissionýs authority to act in their name and that of the ÿpublic interest.þ[2]

[1] The Voluntary Trade Council is the trade name of Citizens for Voluntary Trade, a Virginia corporation.
[2] The VTC thanks Douglas Messenger and Amanda Howe for their assistance in preparing this brief.

Argument

1. Introduction

Judge D. Michael Chappellý s Initial Decision employs every antitrust clichü in the book, finding NTSP guilty of, among other things, ÿrestraint of tradeþ, failure to demonstrate ÿa net procompetitive effect on competitionþ, failure to offer a ÿplausible and valid efficiency justificationþ, and ÿunfair methods of competition.þ None of this rhetoric, however, provides much useful information about the basic principles that drive the Commissionýs actions against NTSP.

Beginning in the late 1970s, and accelerating rapidly after 2000, the Commission has escalated its intervention in the health care market, prosecuting 21 organizations û comprising approximately 12,000 physicians û for alleged antitrust violations. Each case presented a similar fact pattern: A third-party health care payer, usually a managed care organization (MCO), would complain that a group of physicians had rejected a contract offer; the Commission then opened an investigation of the physicians for ÿprice-fixing,þ because the MCO either was unable to negotiate a contract, or it had agreed to pay a price higher than initially offered. The Commission took the position in each case that the physicians were obligated to accept the payerý s initial offer unless it could be shown that higher prices would result in greater efficiencies, as defined by the Commission.

Every group, except NTSP, declined to contest the charges and signed a consent order granting the Commission broad power over the physiciansý future business practices. The order proposed in Judge Chappellý s initial decision largely mirrors the

terms of those consent orders, although Complaint Counsel has cross-appealed those portions of the decision that diverge from the earlier settlements.

Complaint Counsel argues that NTSP must act in a ÿprocompetitiveþ manner that excludes any joint ÿnon-riskþ contracting not expressly approved under Commission policy (or more accurately, the Commission staffýs selective interpretation of that policy.) Complaint Counsel says this will increase competition, lower prices, and ultimately benefit consumers. But history has demonstrated that violent state intervention never benefits consumers, and it generally harms those producers that most efficiently meet consumer demand. Typically, the beneficiaries of violent intervention are those businesses that are unable to compete in a free market, and therefore divert their resources away satisfying customers through improved efficiency and towards currying favor with politicians and state regulators. Such behavior is truly ÿanticompetitiveþ in a free market, yet such actions are routinely condoned by government officials as being in the ÿpublic interest.þ There is, however, no *bona fide* public interest outside the protection

2. <u>The Commission lacks authority under the Constitution to hear any complaint brought against NTSP</u>.

NTSP has objected to Complaint Counselýs case on jurisdictional grounds, maintaining that as a memberless nonprofit corporation operating wholly within Texas, NTSPýs actions do not constitute ÿcommerceþ within the statutory reach of Section 5 of the FTCA.[4] NTSP has further suggested that elements of its challenged conduct û including comments made to physicians regarding particular contract offers û are protected acts of ÿcommercial free speechþ under the First Amendment.[5] Complaint Counsel and Judge Chappell disagreed with both of these arguments and found there was no jurisdictional or constitutional barrier to finding NTSP in violation of Section 5.

Within the confines of existing case law, there may be plausible grounds for rejecting NTSPýs jurisdictional and constitutional claims. NTSPýs error, however, was in not looking beyond those confines to the text of the Constitution itself. The constitutional problems with Complaint Counselýs case extend so far as to negate the prosecution itself, for the to

conditions, including price terms, on which any physician is willing to deal with a payor.þ[9]

NTSP has adequately addressed the issue of whether its alleged restraints of trade were ÿunreasonableþ under the prevailing Sherman Act case law. The larger question, however, is whether *private* restraints of trade are subject to blanket prohibition by the federal government consistent with the Constitution. This requires an analysis of the scope of federal power to govern commerce.

The United States receives its authority to regulate trade exclusively from the Constitution, which grants Congress the power ÿto regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.þ[10] NTSP has argued that its challenged activities do not constitute ÿcommerce,þ and that even if it was, it was not ÿamong the several States.þ Judge Chappell rejected those claims, but assuming *arguendo* that NTSPýs conduct does constitute interstate commerce, do the antitrust laws then constitute a valid ÿregulationþ of that commerce?

The Commerce Clause was adopted to give Congress the ability ÿto ensure a national market and a regime of free trade among the states.þ[11] The Constitutionýs framers understood the term *regulate* to mean ÿmake regular,þ or subject to a particular rule or method. The Commerce Clause allows Congress to decide *how* acts of interstate commerce should be performed. It does not, however, give the federal government

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[9] Initial Decision 94.
[10] U.S. Const. art. I, ÿ 8, cl. 3.
[11] Roger Pilon, (1999), *available at* <www.cato.org/pubs/catosletters/cl-13.pdf>.

blanket power to *prohibit* acts of commerce that Congress (or the President or the judiciary) considers merely imprudent or undesirable.

Law professor Randy Barnett discussed the constitutional distinction between ÿregulateþ and ÿprohibitþ in his book *Restoring the Lost Constitution*:

> Apart from the Commerce Clause, the terms ÿregulateþ or ÿregulationþ appear seven times in the body of the Constitution and three times in the amendments proposed by Congress to the states, though only once in the Bill of Rights as ratified. The term ÿprohibitþ is used once in the body of the Constitution and twice in the Bill of Rights. Article I, Section 4 gives Congress the power to ÿalter such Regulationsþ on the time, place, and manner of elections prescribed by the state legislatures. Clearly, the power to regulate or facilitate elections is not the power to prohibit them. Article I, Section 8 gives Congress the power ÿ[t]o regulate the Valueþ of money, not to prohibit the use of money or to ÿregulateþ its value to zero.
>
> In two places the Constitution makes an explicit distinction between prohibition and regulation. Article III, Section 2 gives the Supreme Court appellate jurisdiction, as to both law and fact, ÿwith such Exceptions, and under such Regulations as the Congress shall make.þ . . . If the power to make regulations included the power to prohibit that which is regulated, there would have been no need to give explicit power to Congress to make ÿexceptionsþ to appellate jurisdiction.[12]

Barnett said the power to regulate commerce does include the power to prohibit ÿwrongful acts with respect to commerce between state and state.þ Barnett adds, however, that ÿcommerce itself can rarely violate the rights of another,þ and therefore is not a ÿwrongful actþ subject to outright prohibition.[13]

In order to accept the Sherman Actýs ban on private restraints of trade as a legitimate application of the Commerce Clause, two standards must be satisfied: Does the ban ÿmake regularþ commerce among the states, and does it facilitate ÿa national

market and a regime of free tradeþ? Barnettýs analysis suggests that a *per se* prohibition on private restraints, ÿunreasonableþ or otherwise, contradicts the plain meaning of ÿregulateþ in use throughout the Constitution. Further examination of the Initial Decision only weakens the case for concluding otherwise.

The phrase ÿmake regularþ signifies a process whereby a *uniform* method is prescribed to perform a particular act. A government act is not a valid regulation merely because it tells private parties what to do; the act must set forth an objective standard that is equally applicable to all similarly-situated parties. Additionally, to abide by the Constitutionýs ban on *ex post facto* laws[14], a valid regulation must allow a rational person to understand *ex ante* what conduct is necessary for compliance.

Neither the Sherman Act nor the FTCA prohibits the particular acts challenged by Complaint Counsel û NTSPýs ÿnon-riskþ joint contracting with third-party payers. Instead, Complaint Counsel relies on judicial and Commission policies that purport to interpret the two antitrust statutes. Complaint Counsel relies principally on the 1994 *Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care* (1994 Statements). These statements represent the executive branchýs view of what actions health care providers can take without risking antitrust prosecution. They describe ÿsafety zonesþ where certain types of conduct will not be challenged. Such safety zones, however, can be altered or abolished at the whim of the Commission or the Justice Department, because the 1994 Statements remain, at all times, a series of *opinions* rather than legislative acts.

[14] U.S. Const. art. I, ÿ 9, cl. 3.

The 1994 Statements state that to fall within the antitrust safety zone:

> [T]he participants in a physician network joint venture must share substantial financial risk in providing all the services that are jointly priced through the network. *The safety zones are limited to networks involving substantial financial risk sharing* not because such risk sharing is a desired end in itself, but because it normally is a clear and reliable indicator that a physician network involves sufficient integration by its physician participants to achieve significant efficiencies. Risk sharing provides incentives for the physicians to cooperate in controlling costs and improving quality by managing the provision of services by network physicians.[15] (Italics added for emphasis and citations omitted.)

The Initial Decision found NTSPýs conduct fell outside the safety zones, because it operated joint ventures *without* sharing financial risk. Although Complaint Counsel did not prove collusion had occurred, ÿNTSP had rejected initial payor offers based on poll results showing that most of the [NTSP member] physicians would not be interested in the offers.þ[16] NTSPýs rejections did not, according to Judge Chappell and Complaint Counsel, generate ÿa net procompetitive effect on competition,þ and therefore they were prohibited restraints of trade.

On first reading, the Commissionýs distinction between risk and non-risk contracting seems to offer a plausible basis for regulation. The 1994 Statements, it could be argued, ÿmake regularþ physician joint ventures by prescribing a particular method, risk contracting. In endorsing one method, non-conforming methods must be prohibited.

The 1994 Statements, however, do not simply prescribe a *method* of conducting inherently rightful commercial acts: they dictate the *content* of private economic transactions in pursuit of a particular set of *outcomes*. The 1994 Statements seeks to

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[15] U.S. Department of Justice and Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care* ÿ 8(a)(4) (Revised Aug. 1996).

[16] Respondentýs Appeal Brief 3.

ÿachieve significant efficienciesþ in trade between health care providers and third-party payers by ÿcontrolling costs and improving quality.þ To those ends, non-risk contracting is restricted and often prohibited because, in the executive branchýs opinion, risk contracting is a better indicator that the desired efficiencies are being achieved.

In predetermining economic outcomes û or at least attempting to û the Commission does not ÿmake regularþ interstate commerce, but in fact does the opposite. Restrictions on non-risk contracting create an *irregular* market where physicians are at a disadvantage in negotiating with payers. After all, insurers may collectively represent thousands (even millions) of individual consumers. If the payer seeks a contract shifting the bulk of financial risk to the physician, the 1994 Statements considers that the normal operation of a competitive market. But when even a handful of physicians join together and seek to shift financial risk to the insurers (or their customers), that is condemned by the Commission as illegal and ÿanticompetitive.þ

Regulation under the Commerce Clause must serve as a neutral arbiter of individual rights, not a mechanism for promoting the ÿspecial interestsþ of one economic group over another. Unlike regulations that direct the activities of the armed forces or the Post Office û entities that are creations of the federal government û commerce comprises the activities of private citizens that take place outside the ÿpublicþ sphere. Accordingly, any state regulation of commerce must yield to the inherent rights of private property owners.

The Initial Decision relies on a classic antitrust argument: the rights of payers were violated by NTSPýs collective action because it raised prices. This is an attempt to

condemn NTSPý's actions as ÿcoercion,þ[17] creating a pretext for abridging NTSPý's rights in order to protect the ÿrightsþ of NTSPý's customers. Economist Dominick T. Armentano has explained the flaws with this line of reasoning:

> Some critics would argue that business people and corporations forgo their right to full liberty when they collude and restrict production, since such behavior violates the right of potential buyers. But this understanding of rights is misguided. Producers own their property, or are the trustees of property for owners, and possess *all* the rights to it, including the absolute right *not* to use it at all. Similarly, consumers have full rights to their own property, including the absolute right to spend or not spend their own money. The individual rights (property rights) of neither party can be violated by a refusal to deal or by a partial refusal to deal through, say, some voluntary restraint of trade.[18]

Armentanoý's observations are particularly important in this case, as there is no evidence of collusion by NTSP, and the Initial Decision inferred illegal behavior from a pattern of similar behavior by independent physicians. The thrust of this argument is that the government will cease to protect the individualý's property rights when the owner chooses to act in concert with other property owners. There is no economic difference between

Thomas DiLorenzo, the framers strived to protect individual economic liberties against the encroachment ofnt

especially in light of the undisputed lack of collusion among physicians.þ These conditionals are unnecessary, however. The First Amendment enjoins *all* infringements of private speech by the federal government. There are no exceptions for ÿcommercial free speechþ or speech that incites behavior the executive branch arbitrarily labels economic ÿcollusion.þ

While NTSPý's arguments are consistent with prevailing Supreme Court precedent, the case law contradicts the Constitutionýs unambiguous

The Commission is classified as an independent agency of the executive branch. Section 5 of the FTCA directs the Commission to punish ÿunfair methods of competition . . . and unfair or deceptive acts or practices in and affecting commerce.þ[21] The Commission is empowered to define which specific acts are prohibited by Section 5; to appoint staff to investigate potential violations; to decide whether to prosecute a particular person or company; to decide questions of fact and law before a Commission-appointed administrative law judge; to issue a final order that is presumed correct on appeal; and to monitor compliance with final orders.

This combining of executive, legislative, and judicial powers within the Commission sharply contrasts with James Madisonýs warning in *Federalist No. 47*:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.[22]

The Constitution vests ÿthe judicial Power of the United Statesþ in the Supreme Court and any ÿinferior courtsþ established at the discretion of Congress. Article III, Section 1, requires all judges hold their office ÿduring good Behaviour,þ subject only to impeachment and removal by Congress. As the Supreme Court has explained, ÿThe provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government.þ[23]

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[21] 15 U.S.C. ÿ 45(a)(1).
[22] *The Federalist* 336 (Benjamin F. Wright, ed., 1961).
[23] *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955).

Section 1 of the FTCA, in contrast, vests the Commissionýs adjudicatory powers with five commissioners appointed for seven-year terms, subject to removal by the President for ÿinefficiency, neglect of duty, or malfeasance in office.þ[24] The Commissionýs chairman serves in that post solely at the Presidentýs pleasure.

The Commissionýs exercise of judicial power in the present case is indisputable. The commissioners issued the complaint against NTSP in their name, authorized subpoenas to various parties in connection with the initial investigation and complaint, supervised Judge Chappellýs trial of the facts and law, and now sits as a quasi-appellate body reviewing the Initial Decision *de novo*. All of these a1 0 0m body I n i

> to invest the judges with an independence in keeping with the delicacy and importance of their task and with the imperative need for its impartial and fearless performance.þ And, in *United States* v. *Will*, 449 U.S. 200, 218 (1980), the Court explained that Article IIIý's tenure and compensation clauses recognized that a ÿ[j]udiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.þ The Court also observed that Article III was intended to prohibit the English monarchyý's practice, in colonial times, of ÿmak[ing] Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.þ *Id.* at 219.[25]

The Commissionýs unconstitutional exercise of judicial power infringes upon numerous other constitutional rights guaranteed to NTSP: The right to a trial by jury under Article III and the Sixth and Seventh Amendments, the right to be secure against unreasonable searches under the Fourth Amendment, and the right not to be deprived of liberty or property without due process of law under the Fifth Amendment.

c. The Commission is not an impartial judge of fact because of the actions of former Chairman Muris.

NTSPý's constitutional rights have also been violated by the bias of former Commission chairman Timothy J. Muris, who presided over the Commission when the complaint in this case was issued. Chairman Muris failed to publicly disclose a material conflict-of-interest: His paid consulting work for Aetna, one of NTSPý's alleged victims, during a previous Department of Justice antitrust investigation where NTSP was an

[25] Howard J. Bashman, *Questioning the Constitutionality of Recess Appointments to the Federal Judiciary*, The Legal Intelligencer (March 12, 2001) <available online at http://hjbashman.blogspot.com/2001_03_01_hjbashman_archive.html#107564728859468484>.

adverse party. NTSP counsel, for unknown reasons, apparently chose not to mention Chairman Muris's conflict at trial or in its Appeal Brief.[26]

The Initial Decision actually describes the DOJ investigation of Aetna in some detail. In June 1999, the Antitrust Division sued Aetna to block its acquisition of Prudential Insurance Company of America. According to Judge Chappell,

During

> these skills so that a young lawyer had a great deal to gain by working in the Antitrust Division. What's more, he or she had even more to gain from the specific experience of arguing cases at trial in the federal courts. Lawyers at the Antitrust Division have every incentive to choose cases that will go to trial, and go to trial quickly, regardless of the efficacy of the action in combating monopoly, or its effect on consumer welfare.
>
> A similar study focuses on the FTC. The study found that the ultimate career objective of most FTC lawyers was a job at a prestigious private law firm. Robert Katzmann writes that some cases threaten the morale of the staff because they often involve years of tedious investigation before they reach the trial stage. Therefore, the FTC opens a number of easily prosecuted matters, which may have little value to the consumer . . . in an effort to satisfy the staff's perceived needs. One FTC attorney is quoted in the study as saying, for me, each complaint is an opportunity, a vehicle which someday could take me into the courtroom. I want to go to trial so badly that there are times when I overstate the possibilities which the particular matter might offer.
>
> It's clear from studies like these that the antitrust bureaucracy doesn't select cases to prosecute on the basis of their potential net benefit to society. Instead, the staff at FTC and the Antitrust Division use the discretion that they do have to further their own private interests and careers rather than those of the public at large. The antitrust bureaucracy cannot be counted on to uphold the public interest in enforcing antitrust laws. (Citations omitted.) [29]

An agency that combines executive, legislative, and judicial powers, staffed with lawyers whose careers depend on expanding the reach of antitrust to the heavens and beyond, is a recipe for the very tyranny Madison cautioned against in *Federalist No. 47*. NTSP is simply the latest target of opportunity for a group of staff lawyers (and former commissioners) looking to generate future business in the private sector. The Constitution was supposed to prevent such extra-judicial muggings from taking place.

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[29] Edward J. Lopez, *Breaking Up Antitrust*, The Freeman: Ideas on Liberty (Jan. 1997) <available at http://209.217.49.168/vnews.php?nid=208>.

3. <u>Complaint Counsel relies on false economic premises in attempting to discern an ÿobjectiveþ price for physician services</u>.

Although the Commission has no authority to prosecute or try NTSP, a brief analysis of the Initial Decisionýs economic reasoning is useful to furthering the publicýs understanding of this case. All parties to this matter û including Judge Chappell and NTSP û are operating under false assumptions about how a ÿfree marketþ for health care should operate. These errors in economic reasoning only compound the numerous constitutional defects in the antitrust laws and the Commissionýs enforcement of them.

Throughout Complaint Counselýs case and the Initial Decision, there is heavy emphasis on the role of the *federal government* in determining prices for physician services. That role centers around the reimbursement schedules used to determine physician compensation under Medicare:

> The Medicare RBRVS fee schedule is Medicareýs Resource Based Relative Value System (ÿRBRVSþ), a system developed by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for each service rendered to Medicare patients. Health plans that contract with physicians on a fee-for-service basis often do so based on a stated percentage of the Medicare RBRVS fee schedule, which provides reimbursement rates for a large number of specific procedures. The Medicare RBRVS establishes weighted values for each medical procedure, such that the application of a percentage multiplier enables one to determine the fees for thousands of different services simultaneously.
>
> NTSPý s polling form, which asks each physician to disclose the minimum price that he or she would accept for the provision of medical services pursuant to a fee-for-service HMO or PPO agreement, asks member physicians to indicate their price selection by placing a check mark next to one of several pre-printed Medicare RBRVS ranges. On October 15, 2001 , the NTSP Board received annual poll results. Based on the poll results, NTSP established

minimally acceptable fee schedules. On November 11 2002, NTSP conducted another annual poll to determine minimum reimbursement rates for use in negotiation of HMO and PPO products and anesthesia contracts with health plans. On its 2002

while minimizing the amount of health care actually provided. The system is designed to collectivize patient care by making it impossible to determine market prices; RBRVS prices are based on the arbitrary, often random, drawing of relationships between various medical services. It is akin to determining the prices of food by relating the price of bananas to the price of peanut butter and then to the price of tomato soup.

The paradox, of course, is that it is government intervention through Medicare and Medicaid û and the subsequent creation of MCOs through subsidies û that has driven up health care expenditures in the first place.

In contrast, the **subjective theory of economic value** proposes that the value of an object is not inherent in the thing itself, but exists in the mind of the person who values it.

As Bettina Bien Graves pointed out, this theory ``represented a completely new, revolutionary approach to economics. For the first time, the individual actor himself became the unit with which economics was concerned. His

RBRVS, Dr. Orient noted, abolished the right of individual patients to contract with physicians and replaced it with a form of central planning where ÿ[t]he patientsý values are completely

Conclusion

If the Initial Decision were under review by an Article III court, the Voluntary Trade Council would urge reversal in the strongest possible terms. But because this case remains within the closed world of the Federal Trade Commission, we decline to lend the appearance of credibility to this proceeding by calling for a particular result. The Commission has no right to exist, much less to take action under the federal Constitution. A call for reversal implies this Commission has a theoretical right to affirm, and that is too

New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.þ More than two centuries later, the Federal Trade Commission has sent its swarms of antitrust lawyers to harass the nationýs physicians and price them out of the marketplace. Such tyranny should only be met with resistance. Physicians may not declare independence from the United States, but they must build upon NTSPýs example and resist the Commission with every intellectual and legal tool at their disposal.

Appealing to the Supreme Judge of the world for the rectitude of our intentions,

/s/

S.M. ÿSkipþ Oliva
President

Baylen Linnekin
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Dated: February 18, 2005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 18, 2005, I caused true and correct copies of the foregoing Motion for Leave to File Amicus Curiae Brief and accompanying Brief Amicus Curiae of The Voluntary Trade Council to be served as described below.

Service by courier of paper copies, including an original, signed version, and 12 photocopies, and by electronic mail, was provided to:

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