Federal Trade Commission

Feb 9, 2009

Good afternoon. I have been asked to speak this afternoon on the Federal Trade Commission's role vis-à-vis the three branches of government. The FTC is accountable to all three branches. Commissioners are appointed (and can be reappointed) by the President. Commissioners are confirmed by the Senate and the Commission engages in rulemaking on issues assigned to us by Congress, which also controls our funding. And the Commission sits as a trial and appellate tribunal, with our decisions subject to review by the federal trial and appellate courts. All of this responsibility not only makes my job challenging and exciting, but it has several legal and practical implications which I will discuss with you today.

The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisors, Amanda Reeves and Darren Tucker, for their invaluable assistance preparing this paper.

First, I will discuss the two Constitutional

a hearing, Section 5 further empowers the FTC to make "findings as to the facts" and to issue a "cease and desist" order against any such violation.[3]

Following the FTC's creation, parties complained that the FTC and other similarly constructed administrative agencies could not, consistent with due process, simultaneously serve as prosecutor (by issuing a complaint), and an independent-minded tribunal (by considering the validity of the challenged conduct).[4] And, initially at least, there was a kernel of truth to those attacks:[5] when the FTC was first formed, hearing officers were typically subordinate employees of the agency who could be hired and fired based on their decisions and there was no internal separation required between the Commission and the hearing process.[6]

In 1946, Congress responded by enacting the Administrative Procedure Act. As the Supreme Court has since observed, a "fundamental . . . purpose [of the APA was] to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge . . . . The safeguards it did set up were intended to ameliorate the evils from the commingling of functions."[7] To that end, the APA required that independent administrative law judges (who are no longer subject to agency control)

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[3] Id.

[4] See, e.g., Ramspeck v. Federal Trial Exam'rs Conference, 345 U.S. 128, 131 (1953) (observing that "many complaints were voiced against the actions of the hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations"); Brinkley v. Hassig, 83 F.2d 351, 356 (10th Cir. 1936) (noting that "[t]he spectacle of an administrative tribunal acting as both prosecutor and judge has been the subject of much comment, and efforts to do away with such practice have been studied for years").

[5] Administrative Conference of the United States, Federal Administrative Law Judge Hearings 10 (1980).

[6] Id.

[7] Wong Yang Sung v. McGrath, 339 U.S. 33, 41, 46 (1950).

conduct the initial hearings and that the Commission would then handle appeals and prohibited agency employees who participate in the investigative or prosecutorial functions from playing a role in the decision-making process.[8] Once the Commission issues a decision, the FTC Act authorizes the respondent to appeal an unfavorable result to the relevant federal circuit court of appeals.[9]

In the APA's wake, the Supreme Court has repeatedly rejected claims that the lodging of legislative, prosecutorial, and judicial functions in one agency supplies the basis for a constitutional due process violation. In 1948, the Court held in FTC v. Cement Institute that the mere fact that the Commission members had previously testified before Congress about the legality of a party's pricing scheme did not disqualify the Commissioners from providing a fair tribunal in a subsequent investigation of that same party.[10] Likewise, in its 1975 decision in Winthrow v. Larkin, the Court rejected a claim that a state agency's power to investigate and adjudicate the same matter was a due process violation.[11] The Court observed that, "[t]he initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues doe not result in a procedural due process violation."[12]

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[8] 5 U.S.C. § 554(d).

[9] 15 U.S.C. § 45(c).

[10] FTC v. Cement Institute, 333 U.S. 683 (1948).

[11] Winthrow v. Larkin, 421 U.S. 35 (1975)

[12] Id. at 1470. The federal appellate courts have likewise repeatedly recognized that, by functioning in a quasi-prosecutorial, quasi-judicial dual role, the FTC does not violate litigants' procedural due process. See, e.g., Cinderella Career & Finishing Schools, Inc. 404 F.2d 1308, 1315 (D.C. Cir. 1968) (holding that the Commission did not violate a party's due process rights by issuing a press release that was critical of the party's conduct following the issuance of a complaint, noting that "[i]t is well settled that a

myself from participating as ALJ.[16] The parties abandoned the merger before the Commission ruled on the motion.[17]

A similar series of events occurred last year in the Whole Foods litigation. There, the Commission again appointed me to serve as the ALJ. Whole Foods moved to disqualify any member of the Commission from serving as an ALJ on the grounds that the Commission's statements made in conjunction with the preliminary injunction proceedings showed that the Commission had prejudged the matter.[18] The Commission rejected Whole Foods' argument finding, first, that the public statements did not suggest prejudgment or that the Commission lacked impartiality and, second, that, a finding that the Commission had prejudged the matter would make it impossible for the Commission to ever vigorously litigate a preliminary injunction.[19] Whole Foods responded by suing

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[16] Respondents' Motion to Recuse Commissioner J. Thomas Rosch as Administrative Law Judge ("Respondents' Motion to Recuse") (May 23, 2008) available at http://www.ftc.gov/os/adjpro/d9326/080523respmorecuseroschasalj.pdf.

[17] Press Release, Inova Health System, Inova Health System, Statement from Inova Health System and Prince William Health System About the Proposed Merger (June 6, 2008), available athttp://www.inova.org/news/2008/inovapwhsmergerstatement.jsp. Prior to the parties' abandonment, I had certified the parties' motion and attached a statement that explained why I believed the parties' motion lacked merit. Order Certifying Respondents' Motion to Recuse the Commission and Accompanying Statement by J. Thomas Rosch (May 29, 2008) available at http://ftc.gov/os/adjpro/d9326/080529ordercert.pdf.

[18] Respondents' Motion to Recuse Commissioner J. Thomas Rosch as Administrative Law Judge ("Respondents' Motion to Recuse") (Aug. 22, 2008) available at http://www.ftc.gov/os/adjpro/d9324/080822respmodisqualifycomm.pdf.

[19] Order Denying Respondents' Motion to Disqualify the Commission (Sept. 5, 2008), available athttp://www.ftc.gov/os/adjpro/d9324/080905order.pdf. Tellingly, Whole Foods did not move to disqualify the entire Commission from hearing an appeal on these same grounds – a fact that, in the Commission's view, severely undercut the merits of its "prejudgment" claim. Notwithstanding the Commission's finding, the Commission subsequently named a new ALJ to oversee the trial proceedings after the scheduling order was in place. Order Designating Administrative Law Judge (Oct. 20, 2008), available at http://www.ftc.gov/os/adjpro/d9324/081020order.pdf.

The administrative agencies, in particular, present a separation of powers conundrum because they pose the question of whether, when Congress establishes an independent agency or commission in one branch with power that belongs to another, does it unconstitutionally vest legislative, executive, or judicial power in that entity?

The Supreme Court first confronted this question in 1935 in Humphrey's Executor v. United States when it considered whether Congress could constitutionally limit the President's power to remove Commissioners under the Federal Trade Commission Act.[25] President Hoover had nominated William Humphrey to succeed himself as a member of the Commission and he was confirmed by the Senate for a seven-year term that was to expire on September 25, 1938.[26] In 1933, however, President Franklin Roosevelt wrote Humphrey and asked him to resign because "the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection."[27] Commissioner Humphrey refused to resign and President Roosevelt sent him a letter terminating him from further service – a fact that Commissioner Humphrey ignored by continuing to

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powers" and that Madison thought the "greatest security against tyranny" rested "in a carefully crafted system of checked and balanced power within each Branch") with id. at 426 (Scalia, J., dissenting) ("Today's decision follows the regrettable tendency of our recent separation-of-powers jurisprudence to treat the Constitution as thought it were no more than a generalized prescription that the functions of the branches should not be commingled too much – how much is too much to be determined, case-by-case by this Court. The Constitution is not that.").

[25] 295 U.S. 602 (1935).

[26] Id. at 618.

[27] Id.

serve out his term.[28] Humphrey died while in office and his estate sued the United States to recover his salary from the time of his termination until his death.

In a decision that is generally considered to provide the constitutional foundation for the administrative state – as well as, perhaps, retribution for the President's aggressive New Deal policies[29] – the Court held that Congress did not violate the separation of powers when it established the Federal Trade Commission and limited the president's removal power except for good cause. In so holding, the Court distinguished between administrative officials who performed "purely executive" functions (such as postmasters) and those officials who performed "quasi-legislative" and "quasi-judicial" functions (such as Federal Trade Commissioners). The Court held that, as to the former, the President had absolute removal power, but that, as to the latter, Congress could constitutionally limit the President's power.

Since *Humphrey's Executor*, the Supreme Court has repeatedly held the administrative framework does not violate the Constitution so long as the President nominates and the Senate confirms the principal officers, with the caveat that Congress

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[28] *Id.* at 619.

[29] *See Morrison v. Olson*, 487 U.S. 654, 724 (1988) (Scalia, J., dissenting) (noting that *Humphrey's Executor* "was considered by many at the time the product of an activist, anti-New Deal Court bent on reducing the power of President Franklin Roosevelt"). Indeed, Justice Jackson, who had been Roosevelt's Attorney General, later remarked:

> I really think the decision that made Roosevelt madder at the Court than any other decision was that damn little case of *Humphrey's Executor v. United States* The President thought they went out of their way to spite him personally and they were giving him a different kind of deal than they were giving Taft.

Synar v. United States, 626 F. Supp. 1374, 1398 n.27 (D.D.C. 1986) (per curiam) (quoting E. Gerhart, *America's Advocate: Robert H. Jackson* 99 (1958)).

may constitutionally limit the President to a good-cause removal power.[30] I will briefly touch on two of the most recent decisions.

First, in *Morrison v. Olson*, the Supreme Court rejected in a 7-1 decision a separation of powers challenge to the Ethics in Government Act which authorized the appointment of an Independent Counsel to investigate (and, if necessary) prosecute high-ranking government officials for violations of federal criminal laws.[31] As in *Humphrey's Executor*, the Act allowed for the Independent Counsel's removal only by the Executive Branch and only for good cause.[32] Ted Olson, who eventually became the Solicitor General under President George W. Bush and was the target of an independent counsel investigation, challenged the Act on the grounds that (1) unlike the FTC, the independent counsel was not merely "quasi-executive" but served in a "purely executive" role,[33] and (2) the Act more generally impermissibly interfered with the role of the Executive Branch. The Court was unmoved on both grounds. "The real question," the Court

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[30] Indeed, to date, the only cases in which the Supreme Court has held the structure of an administrative agency unconstitutional involved attempts by Congress to insert itself directly into the appointment process or to directly control an agency's decisions through a veto-like power. Richard H. Pildes, *Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act*, 33 (NYU Law and Economics Research Paper No. 08-51, Aug. 31, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1281083 (citing *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252 (1991) (direct congressional participation in agency decision-making); *Bowsher v. Synar*, 478 U.S. 714 (1986) (direct congressional involvement in removal process); *INS v. Chadha*, 462 U.S. 919 (1983) (direct congressional veto over agency decisions); *Buckley v. Valeo*, 424 U.S. 1, 1 (1976) (direct congressional participation in appointment process); *Myers v. United States*, 272 U.S. 52 (1926) (direct Senate participation in removal)).

[31] 487 U.S. 654 (1988). Justice Scalia dissented and Justice Kennedy did not participate in the decision.

[32] *Id.* at 686 (citing 28 U.S.C. § 596(a)(1) (providing that an independent counsel may be removed from office "only by the personnel action of the Attorney General, and only for good cause").

[33] *Id.* at 690.

observed, "is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light."[34] Because the "imposition of a 'good cause' standard for removal by itself" did not "unduly trammel[] on executive authority," and because the statute did not vest Executive Branch power in the Judicial or Legislative Branches, the Court rejected Olson's separation of powers challenge.[35]

In the second case, *Mistretta v. United States*, the Court further extended *Humphrey's Executor* and *Morrison* to uphold the constitutionality of the United States Sentencing Commission in an 8-1 decision.[36] In contrast to the Independent Counsel, which Congress lodged in the Executive Branch, Congress created the Sentencing Commission as an independent Commission within the Judicial Branch. Congress mandated that the Commission would have seven members (including a minimum of three federal judges) appointed by the President and gave the Commission authority to promulgate binding guidelines that established sentencing ranges for categories of federal offenses. A defendant sentenced under the Commission's guidelines challenged the Commission's constitutionality, claiming, among other things, that Congress (1) violated the separation of powers doctrine by combining the functions of rulemaking (a legislative function) and sentencing judgment (a judicial function), and (2) undermined the judicial branch's independence by making the Commissioners removable by the President. The Supreme Court was again unmoved. The Court rejected the claim that Congress had given away legislative power reasoning that, before the Sentencing Commission's

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[34] *Id.* at 691.

[35] *Id.* at 691, 695-96.

[36] *Mistretta*, 488 U.S. 361.

creation, the courts had rulemaking power within the areas of its expertise and, in any event, the courts had always possessed wide discretion to engage in sentencing.[37] And it rejected the argument that the President's appointment and limited removal power eroded the Judicial Branch's authority, reasoning that these powers did not give the President undue sway over the Judicial Branch.[38]

Justice Scalia, whom you heard from this morning, has long criticized this line of decisions on the grounds that Humphrey's Executor authorized the creation of a "headless fourth branch" of government by recognizing "independent" agencies that are, in his words, "within the Executive Branch (and thus authorized to exercise executive event, the courts had always possessed

with Judge Kavanaugh (whom you will hear from next) writing a lengthy dissent, the D.C. Circuit rejected these arguments

it presents the altogether different question of whether an agency within an agency is constitutionally permissible. It will nevertheless be interesting to see where the justices come out in this latest chapter

Deference in Preliminary Injunction Proceedings. In the preliminary injunction context, the courts have vacillated over the years in the quantum of proof that they have required the FTC to show to carry its burden. Section 13(b) of the FTC Act allows a district court to grant preliminary relief "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[48] Yet, for much of the past decade, federal district courts in Section 13(b) proceedings required the Commission to meet the same higher standard that applied to private litigants. In doing so, the courts disregarded Congress's intent for the FTC to be able to readily obtain preliminary injunctions so that it could conduct a more comprehensive plenary trial of the merger itself.

In 2004, for example, the Commission challenged a proposed acquisition by Arch Coal of two coal mines in the Southern Powder River Basin ("SPRB"), a coal-rich region in Wyoming that would have combined two of the four leading producers of SPRB coal and substantially increased concentration in an already concentrated market. The Commission had developed evidence that the transaction would combine the two firms that held the principal sources of excess capacity in the SPRB, that the SPRB coal market was susceptible to coordination by producers, that the acquiring coal company had actually attempted to lead coordinated SPRB output reductions in the past, and that dozens of utility customers anticipated higher prices as a result of the transaction. On the applicable public interest standard, it is hard to imagine how the FTC would not be entitled to an injunction.

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[48] 15 U.S.C. § 53(b).

Yet, after conducting what could only be described as a full-blown two-week plenary trial complete with more than 20 witnesses and almost a thousand pages of pre- and post-hearing briefing, the district court denied th

petroleum business. This was quite a surprise, given the FTC's unparalleled expertise in petroleum industry competition and merger econometrics.

Finally, I would be remiss if I did not mention our challenge to Whole Foods' $670 million acquisition of its chief rival, Wild Oats. Whole Foods was and is the largest premium natural and organic supermarket chain in the United States. Wild Oats was its closest competitor. The FTC had developed compelling evidence that premium natural and organic supermarkets, such as Whole Foods and Wild Oats, were differentiated from conventional retail supermarkets. In several dozen local markets across the country, the transaction would reduce the number of these premium natural and organic supermarkets from 3 to 2 or 2 to 1. Buttressing the case were numerous party documents demonstrating that the transaction's purpose was to eliminate a competitor.

The district court again denied the FTC's preliminary judgment request.[51] Although the Whole Foods hearing lasted only two days, the trial record was nevertheless substantial, consisting of 35 deposition transcripts, 17 declarations, expert reports from five experts, and over 1,500 exhibits. The court disregarded the FTC's documentary evidence almost entirely, resulting in a battle of the experts. The court rejected the testimony of the FTC's economic expert and adopted the testimony of Whole Foods' expert. As in Western Refining, the district court gave no deference to the FTC's expertise in merger analysis and the particular industry at issue.

I think it is fair to say that the district court loss in Whole Foods represented the low point in the FTC's recent merger enforcement efforts. Since then, however, there has been a noticeable change. The key turning point was the FTC's decision to appeal the

[51] FTC v. Whole Foods Market, Inc., 502 F. Supp. 2d 1 (D.D.C. 2007), rev'd, 548 F.3d 1028 (D.C. Cir. 2008).

apply the law of the D.C. Circuit. Of course, there are 11 other regional circuit courts for which *Whole Foods* is not binding authority, but I expect that these courts will adopt the D.C. Circuit's 13(b) standard as the opportunity arises.

Appellate Court Deference to Commission Decisions on the Merits. The federal

is to be condemned as 'unfair.'"[61] But, it seems very clear to me that when a Court wants to reject the Commission's conclusions as a matter of law, it reviews the Commission's analysis de novo and gives the Commission's factual findings little deference.

In Schering-Plough, for example, the Eleventh Circuit rejected the Commission's finding that a reverse payment settlement was anticompetitive. In so holding, the court took creative license with the substantial evidence standard citing a Tenth Circuit case that that preceded Indiana Federation of Dentists for the proposition that the "we may . . . examine the FTC's findings more closely where they differ from those of the ALJ."[62] The Eleventh Circuit cited a pair of cases that preceded Indiana Federation of Dentists for the proposition that "[s]ubstantial evidence requires a review of the entire record at trial, and that most certainly includes the ALJ's credibility determinations and the overwhelming evidence that contradicts the Commission's conclusion."

In contrast, in the *Toys 'R Us* litigation, for example, the Seventh Circuit affirmed the FTC. In so holding, the Seventh Circuit observed that "[o]ur only function is to determine whether the Commission's analysis of the probable effects of thee acquisitions . . . is so implausible, so feebly supported by the record, that it flunks even the deferential test of substantial evidence."[67] Likewise, in *Polygram Holding*, the D.C. Circuit affirmed the Commission's finding that PolyGram Holding violated Section 5 of the FTC Act by entering into a series of agreements that prohibited discounts and advertising.[68] In its discussion of the legal standard it cited the *Indiana Federation of Dentists* test[69] and the substantial evidence standard, which it later concluded that the Commission had met.[70]

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Last, I'd like to discuss some reforms that the Commission has made (or should make) in the context of our investigatory and judicial processes to minimize skepticism about the agency. In April, the Commission adopted several amendments to our Rules of Practice designed to improve the Part 3 adjudicatory process.[71] The Commission also recently implemented a task force to consider reforms to the Commission's Part 2

Rambus unlawfully monopolized the relevant markets." *Id.* Only after making that finding did the Court then separately analyze the deference owed to the Commission's fact finding.

[66] *Id.* at 469.

[67] *Toys 'R Us v. FTC*, 221 F.3d 928, 934-35 (7th Cir. 2000).

[68] *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

[69] *Id.* at 33.

[70] *Id.* at 38.

[71] On October 7, 2008, the FTC published a Notice of Proposed Rulemaking detailing proposed rule revisions and inviting public comment. *See* 73 Fed. Reg. 58832. On January 13, 2009, the FTC published interim final rules, which governed all proceedings commenced after that day. *See* 74 Fed. Reg. 1804. On May 1, 2009, the Commission published final rules, adopting the interim rules subject to a few revisions. *See* 74 Fed. Reg. 20205. The final rules govern all proceedings initiated on or after May 1, 2009. *See id.*

investigation process. I am hopeful that these reforms will silence some of the critics that I have mentioned today and, perhaps, help the Commission's decisions earn the deference that they should receive.

The first set of reforms relates to timing. Whole Foods' complaint that our procedures provided them with too speedy of a trial notwithstanding, the most frequent complaint that I have heard over the years is that our investigation and adjudicatory processes take way too long. In merger cases, parties frequently argue that drawn out proceedings will cause them to abandon transactions before the antitrust merits can be adjudicated. I call this a "pocket veto" because, as I explained in conjunction with our failure to conclude our investigation in the Endocare/Galil matter, when we sit on an investigation for too long, it has the practical effect of killing the deal.[72] Along the same lines, I believe that the protracted nature of our Part 3 adjudicatory proceedings has contributed to the reluctance of some federal courts to grant preliminary injunctive relief in merger cases brought under Section 13(b) of the FTC Act. Moreover, protracted Part 3

[72] In Endocare/Galil, Endocare abandoned its merger with Galil Medical as a result of a

proceedings do not necessarily result in decisions that are more just or fair, and instead may result in substantially increased litigation costs for the Commission and respondents whose transactions or practices are challenged.[73]

In the Part 3 adjudicatory context, the most significant changes we recently implemented accelerate the hearing and impose tighter deadlines on the ALJ and the Commission to issue their decisions. We now require, for example, that a hearing be held five months from the date of the complaint in cases in which the Commission is also seeking preliminary injunctive relief in federal court, and eight months in all other cases.[74] We have also required that an ALJ issue an initial decision issue within 70 days of the post-trial briefs that the Commission's decision issue within 100 days of the initial decision for cases in which the agency seeks preliminary relief under Section 13(b) of the FTC Act,[75] and within six months of the initial decision in all other cases.[76]

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[73] Indeed, some federal courts have demonstrated that these matters can be handled quickly. For example, in United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004), a complex merger trial in 2004, Judge Walker issued his opinion approximately seven months after the complaint was filed. The disparity between that timeframe and the administrative litigation timeframe (which was much longer) existed despite the fact that federal district court dockets are much more substantial than the dockets handled by the Commission and its ALJs.

[74] The rules also authorize the Commission to delay the hearing date or extend the length of the hearing for good cause.

[75] Briefing is to be completed within 45 days of the issuance of the initial decision, and the Commission is to issue its final decision within 45 days of the oral argument.

[76] Briefing is to be completed within 67 days of the initial decision, and the Commission is to issue its final decision within 100 days of the oral argument. There are other changes aimed at expediting the process as well, including (1) earlier deadlines for answers, the initial meet-and-confer session, and the initial scheduling conference in order to facilitate earlier commencement of discovery; (2) a requirement that the ALJ to issue a standard protective order designed to limit delays and ensure that privileged or confidential information is treated consistently in all Part 3 cases; (3) a requirement that the Commission issue decisions on all prehearing dispositive motions within 45 days.

I am hopeful that our Part 2 reforms will also result in more expeditious work on the Commission's end. Lengthy investigations, particularly when combined with "one-way" discovery conducted by the staff, can be enormously burdensome and expensive for companies. Moreover, a prolonged investigation can sometimes injure a respondent's reputation in the marketplace, even if later cleared by the agency. To that end, I have urged the Commission to consider implementing deadlines on the duration of investigations. At minimum, the Commission needs to receive reports from staff at specific intervals so that it can decide whether additional investigation is warranted. Moreover, in those cases where Commission staff believe that a protracted investigation is attributable to the parties' conduct, it can remedy that problem by, for example, refusing to grant extensions of time, enforcing compliance with compulsory process,[77] or at a minimum, staff can advise the Commission specifically what the parties are doing to stall the investigation.

Among other things, our Part 3 rule changes seek to improve the discovery process and

parties are not asked to respond to a legal theory or concern until the eve of a Commission vote when a Commissioner is finally able to raise his/her concerns. We can take steps to prevent those occurrences.

Along the same lines, I am hopeful that the Commission will make the use of compulsory process mandatory at the beginning of every formal investigation. In some cases, Commission staff use voluntary reques

wrong. This is all to say that the FTC is hardly insulated from the legislative or political process or judicial review – rather, we are subject to all three.