Judging Antitrust

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

at

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

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

Because we are here together at an Antitrust Moot Court competition today, what better topic to discuss than antitrust adjudication? I want to begin by raising a key question for the design of antitrust institutions: *who* should decide antitrust cases? A reasonable starting point for discussion is the observation that – as today's student competitors and panelists already know – antitrust analysis can and often does require rigorous economic analysis. As economics is integrated more deeply into antitrust, sophisticated analyses are more frequently presented to shed

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

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

of

transactions that potentially violate the antitrust laws. The shift to an economic welfare-based antitrust regime required greater integration of economic analysis. There is broad consensusthat the integration of economics into antitrust law has been

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

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

At first blush, it is easy to sketch

other hand, tales of woe from antitrust lawyers

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

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

---

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

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

Similar criticisms have confronted the FTC in every decade at least since the 1960s.[8] In 1969, then Professor Richard Posner published a

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

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

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

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

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

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

3o rtifact <</Att TJ 0 Tc 0 1J 1.4002 Tc 0 l Tc

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

It might sound like I am skeptical of the level of antitrust expertise among FTC staff. I am not. Not by a long shot. I know well the abilities and talents of the FTC economists and respect them greatly. The collection of economists at the FTC is, in my view, the single best at any agency in the United States. The agency is also full of extremely talented and skilled antitrust and consumer protection lawyers. To repeat once again: the issue is not whether FTC staff are suf ess. 0.0Tw ( )Tj -0.001 Tc 0.001 Tw 2.54 0 Td (is)Tj 0 T Td ( )T the-0.001 oiiJ 0Tw (To)T0.001

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

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

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

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

Thus far I've limited my focus to a relatively straightforward comparison of antitrust decision-making by expert agencies and generalist judges, respectively, across a variety of metrics: appeal rates, reversal rates, citations, and more generally, influence on antitrust law. These are admittedly imperfect attempts to measure performance in a way that sheds some light upon the question of who should judge antitrust cases. But these are not the only measures of]TJ 0 Tc 0 Tw ( )Tj 0.001 Tc -0.001 Tw 3pTT4t3.45 0 BMTj -0.003 Tc 16pput

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

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

---

Between the DOJ and the FTC, AMERICANBAR.ORG, http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/understanding_differences.html.

[21] Calvani, *supra* note 8.

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

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

Occasionally, there are attempts to defend the FTC's perfect win rate in administrative adjudication by attributing the Commission's superior expertise at choosing winning cases. And don't get me wrong – I agree the agency is pretty good at picking cases. But a 100% win rate is not pretty good; Michael Jordan was better than pretty good and made about 83.5% of his free throws during his career, and that was with nobody defending him. One hundred percent isn't Michael Jordan good; it is Michael Jordan in the cartoon movie "Space Jam" dunking from half-court good. [24] Besides being a facially implausible defense – the data also show appeals courts reverse Commission decisions at four times the rate of federal district court judges in antitrust cases suggests otherwi2/m5 0 T(8.002 Tw 0.345 0 Tw 0.45 0 Td [(d)2(ef)-1(en)3(se)]TJ 0 Tc 0 Tw ( )dis)-

Tim Muris's tenure as Chairman. When he became Chairman, the FTC had lost seven hospital merger casesin a row in federal courts. Under his direction, the FTC undertook to conduct

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

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

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

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

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

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

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

Denial of a preliminary injunction does not necessarily mean parties falling within the FTC's jurisdiction are safe. Although parties may close the transaction after a j u a v . 1 7 5 o D M ( ) s J 1 . - 0 . 0 0 (8 5 3 . 6 8 2 . 0 3 5 0 T

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

The SMARTER Act embraces the bipartisan AMC recommendations by proposing to harmonize the FTC's and DOJ's preliminary injunction standards. It solves the disparity in preliminary injunction standards by authorizing the FTC to challenge unconsummated mergers in federal court [illegible]

The SMARTER Act would remove from the FTC's structural design the due process concerns raised by its ability to get two bites at the apple and the incomplete separation of the agency's prosecutorial role from its adjudicative role. It would do so with limited scope. The FTC would still be able to pursue

the uniqueness of the FTC does not rise and fall with administrative adjudication. The FTC does play a special role in antitrust law and policy. The FTC's history and data show that its research-and-reporting functions have been highly influential to legal and policy development. The FTC also can leverage advantages from the fact that it has a dual compq.pq.0 62.1 f 0 Tc 45 0 Td ( )Tj -39.2 70.0 (1)-1 Td ( )T