

NOTES

FROM HUMPHREY'S EXECUTOR TO SEILA LAW: ENDING DUAL FEDERAL ANTITRUST AUTHORITY

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INTRODUCTION

In the summer of 2019, the Department of Justice and Federal Trade Commission announced that they would be dividing the investigations into four of the biggest American tech firms, with the DOJ investigating Google and Apple and the FTC investigating Amazon and Facebook. Senator Mike Lee was among the decision's many critics; he argued that the "splitting of this tech antitrust review across two federal agencies, despite the many similar competition issues that will be investigated, illustrates the absurdity of having two federal agencies handling civil antitrust enforcement."¹ But even this

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1 Mike Lee, *Just One Agency Should Enforce Antitrust Law*, WASH. EXAM'R (June 17, 2019), <https://www.washingtonexaminer.com/opinion/op-eds/just-one-agency-should-enforce-antitrust-law>; see also Diane Bartz & Dan Grebler, *Republican Senator Criticizes Potential Dual U.S. Antitrust Tech Probes*, REUTERS (June 12, 2019), <https://www.reuters.com/article/us-usa-tech-congress/republican-senator-criticizes-potential-dual-u-s-antitrust-tech-probes-idUSKCN1TD2RN> (quoting Senator Lee as stating that "[g]iven the similarity in competition issues involved, divvying up these investigations is sure to waste resources, split valuable expertise across the agencies, and likely result in divergent antitrust enforcement").

“brokered peace didn’t last long,”² and it soon became clear that the DOJ and FTC would be conducting *overlapping* investigations.³

The DOJ and FTC have shared civil antitrust enforcement since the early 1900s,⁴ and although their authority is not identical, “the core of the agencies’ jurisdiction is congruent.”⁵ This dual enforcement structure has been continuously challenged for the better half of the last century by both academics and government actors,⁶ although conventional wisdom holds that elimination of either agency’s civil antitrust authority would be politically costly.⁷ There are well-recognized efficiency costs to the dual enforcement structure, including the expensive and time-consuming merger-clearance process.⁸ The two agencies often compete in “turf wars” over cases,⁹ and have even filed amicus briefs against each other in federal court,¹⁰ raising serious questions of government efficiency and procedural and substantive fairness.

But in addition to the well-worn complaints about efficiency and fairness, there are significant, mounting reasons to subject this dual enforce-

2 Ben Brody & David McLaughlin, *FTC Turns Up Heat with Justice Department in Dueling Tech Probes*, BLOOMBERG (Feb. 13, 2020), <https://www.bloomberg.com/news/articles/2020-02-13/ftc-turns-up-heat-with-justice-department-in-dueling-tech-probes>.

3 See *id.* (noting the FTC made “sweeping request[s]” to Facebook, Amazon, Google, Apple, and Microsoft for non-public information under the FTC Act); David McLaughlin & Chris Strohm, *William Barr’s Antitrust Power Play Is Just What Trump Wants*, BLOOMBERG (Oct. 21, 2019), <https://www.bloomberg.com/news/articles/2019-10-21/william-barr-s-antitrust-power-play-is-just-what-trump-wants>.

4 *History of the Antitrust Division*, U.S. DEP’T OF JUST., <https://www.justice.gov/atr/history-antitrust-division> (Dec. 13, 2018); *Our History*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/our-history> (last visited Aug. 11, 2020).

5 William E. Kovacic, *Downsizing Antitrust: Is It Time to End Dual Federal Enforcement?*, 41 ANTITRUST BULL. 505, 523–24 (1996) (“Only the DOJ can enforce the Sherman Act criminally, and the FTC alone can enforce the ban in section 5 of the FTC against unfair methods of competition. But . . . [t]he DOJ and the FTC share power to enforce the Clayton Act, and the FTC may use section 5 to reach conduct that the DOJ prosecutes civilly under the Sherman Act.”).

6 See, e.g., ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 127 (2007); Eleanor M. Fox, *Antitrust and Institutions: Design and Change*, 41 LOY. U. CHI. L.J. 473, 486–87 (2010); Ernest Gellhorn, Charles A. James, Richard Pogue & Joe Sims, *Has Antitrust Outgrown Dual Enforcement? A Proposal for Rationalization*, 35 ANTITRUST BULL. 695, 713–14 (1990); Kovacic, *supra* note 5, at 538–40; Lee, *supra* note 1; William Simon, *The Case Against the Federal Trade Commission*, 19 U. CHI. L. REV. 297, 297 (1952).

7 See ANTITRUST MODERNIZATION COMM’N, *supra* note 6, at 130.

8 See *id.* at 130–31.

9 Lauren Feiner, *Here’s Why the Top Two Antitrust Enforcers in the US Are Squabbling over Who Gets to Regulate Big Tech*, CNBC (Sept. 18, 2019), <https://www.cnbc.com/2019/09/18/the-ftc-and-doj-are-squabbling-over-the-right-to-regulate-big-tech.html>; John D. McKinnon & James V. Grimaldi, *Justice Department, FTC Skirmish over Antitrust Turf*, WALL ST. J., <https://www.wsj.com/articles/justice-department-ftc-skirmish-over-antitrust-turf-11564997402> (Aug. 5, 2019).

10 See, e.g., Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, *FTC v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2019) (No. 19-16122).

ment authority to constitutional evaluation, especially in light of recent doctrinal shifts regarding the constitutionality of independent agencies. Last term, the Supreme Court held in *Seila Law* that the independence of the Consumer Financial Protection Bureau (CFPB) was an unconstitutional violation of the separation of powers, shrinking *Humphrey's Executor* down to a very thin, very wobbly protection of the FTC's constitutionality. Aggrieved parties are already challenging FTC actions on a range of constitutional grounds,¹¹ and the majority opinion in *Seila Law* provides a roadmap for doing so.

This Note catalogues and proposes solutions to both the traditional concerns of efficiency and fairness and the modern constitutional problems posed by the current dual enforcement structure. Part I will compare the two antitrust agencies on the basis of their structures, accountability, statutory authority, and enforcement procedures, as well as evaluate potential concerns with vesting either agency with the sole authority to enforce civil antitrust laws. Part II will evaluate the perils of the current dual enforcement structure, exploring both the traditional arguments about efficiency and fairness and the modern constitutional challenges. Part III will evaluate potential legislative solutions to the problem of dual antitrust enforcement authority in the United States. The constitutionality of the FTC's status as an independent agency is again under serious question; it is time for Congress to seriously rethink and restructure civil antitrust authority accordingly.

I. COMPARISON OF THE AGENCIES

Although the DOJ and FTC's overlapping jurisdiction is heavily criticized, there are potential problems posed by giving either agency the exclusive authority to enforce civil antitrust laws. This Part will analyze those concerns, starting with each agency's structure, accountability, statutory authority, and enforcement procedures.

11 See, e.g., Notice of Tentative Ruling at 3, *Axon Enter. Inc. v. FTC*, 452 F. Supp. 3d 882 (D. Ariz. 2020) (No. 20-cv-0014) (“*[F]irst*, that the FTC’s structure violates Article II of the Constitution because its commissioners are not subject to at-will removal by the President and its administrative law judges (‘ALJs’), who are appointed by its commissioners, are also insulated from at-will removal; *second*, that the FTC’s combined role of ‘prosecutor, judge, and jury’ during administrative proceedings violates the Due Process Clause of the Fifth Amendment; and *third*, that the FTC and the Antitrust Division of the U.S. Department of Justice, which are both responsible for reviewing the antitrust implications of acquisitions but employ different procedures and substantive standards when conducting such review, utilize an arbitrary and irrational ‘clearance’ process when deciding which agency will review a particular acquisition, in violation of the Equal Protection Clause”).

A. *The Antitrust Division of the Department of Justice*

1. Structure and Accountability

The Antitrust Division of the Department of Justice is headed by an Assistant Attorney General, who reports to the Associate Attorney General and is ultimately accountable to the President.¹² All officers in the DOJ serve at the pleasure of the President; no removal restrictions protect the Attorney General, Associate Attorney General, or the officers of the Antitrust Division.¹³ As such, the policy positions and enforcement actions of the Antitrust Division are properly attributed to the Attorney General and the President. The Antitrust Division is divided into several sections that report to the Assistant Attorney General, including Civil Sections, Criminal Sections, Economic Analysis Group, and other offices such as the International Section.¹⁴

2. Antitrust Enforcement Authority & Procedures

The Antitrust Division is empowered by the Sherman and Clayton Acts, which give the Division authority to enforce both civil and criminal antitrust laws.¹⁵ All enforcement of antitrust laws by the Division must take place in the federal courts.¹⁶ The Division must prove violations of antitrust laws to a federal judge, “who will examine the matter without deference to the Division’s views.”¹⁷ Accordingly, enforcement proceedings are governed by either the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure.¹⁸ Failure to abide by the applicable procedural rules results in the exclusion of evidence and potential sanctions against the Division.¹⁹ In civil cases, the Division can issue information compulsory requests through subpoenas, “[s]econd [r]equests,” and Civil Investigative Demands (CIDs); CIDs and subpoenas are subject to judicial review, while second requests can only be appealed internally.²⁰

The Division also shares jurisdiction with the FTC for mergers subject to notification and review under the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act).²¹ This statute provides the two agencies only thirty days after notification to investigate the merger; if either agency determines that more

12 *Organizational Chart*, U.S. DEP’T OF JUST., <https://www.justice.gov/agencies/chart> (last visited Feb. 5, 2018).

13 See Gellhorn et al., *supra* note 6, at 732.

14 *Sections and Offices*, U.S. DEP’T OF JUST., <https://www.justice.gov/atr/sections-and-offices> (last updated June 17, 2020).

15 ANTITRUST DIV., U.S. DEP’T OF JUST., TEMPLATE PURSUANT TO SECTION 3(a) OF THE ICN FRAMEWORK ON COMPETITION AGENCY PROCEDURES 1.

16 *Id.*

17 *Id.*

18 *Id.* at 2.

19 *Id.* at 3.

20 *Id.* at 4 (first citing 15 U.S.C. § 1314 (2012); and then citing FED. R. CRIM. P. 17(c)(2)).

21 *Id.* at 1, 4.

time or information is needed, the agency can issue a second request.²² During that same thirty days, the Division and the FTC must decide which agency will evaluate the transaction at issues through the “clearance” process.²³ When the Division decides to challenge anticompetitive mergers, it seeks both preliminary and permanent injunctions in federal district court.²⁴

3. Potential Problems with Sole Enforcement Authority

One persistent concern with lodging any, let alone all, antitrust enforcement power in the DOJ is the fear that antitrust statutes will be used by the President for political purposes. The DOJ has, recently and historically, been criticized as such.²⁵ This criticism has been directed toward the Trump administration, in light of the President’s public distaste for CNN, when the Division sought to enjoin the merger of AT&T and CNN’s parent company, Time Warner.²⁶ Most recently, the Antitrust Division was accused of improperly investigating cannabis mergers. Obama’s Assistant Attorney General, Bill Baer wrote that the investigations “reek[ed] of an effort to use law enforcement to burden an industry Barr dislikes” in a *Washington Post* op-ed.²⁷ A whistleblower from inside the Division testified to Congress that the investigations “were motivated by the fact that the cannabis industry is unpopular ‘on the fifth floor,’ a reference to Attorney General Barr’s offices in the DOJ headquarters building.”²⁸

22 *Id.* at 4–5 (citing 15 U.S.C. §§ 18a(b)(1)(B), (e)(1)(A) (2012)).

23 *See infra* notes 122–25 and accompanying text.

24 *See* ANTITRUST MODERNIZATION COMM’N, *supra* note 6, at 130.

25 Gellhorn et al., *supra* note 6, at 703 (“[A]t times [the DOJ] has been criticized for being too accommodating to the political desires of the executive branch.”); *see also* Brody & McLaughlin, *supra* note 2 (“Some antitrust experts found [Sen. Hawley’s] suggestion worrisome, coming as Barr is accused of politicizing [the Department of Justice] by doing President Donald Trump’s bidding, rather than following the rule of law. Similar allegations have been aimed at Barr’s antitrust chief, Makan Delrahim, whose division will take the unusual step of presenting arguments in federal court on Thursday against the FTC in a case involving mobile phone chipmaker Qualcomm Inc.—a former Delrahim client.”); Lauren Feiner, *DOJ’s Antitrust Chief Said He Talks to Trump But Not About Important Mergers*, CNBC (Nov. 6, 2019), <https://www.cnbc.com/2019/11/06/doj-antitrust-chief-makan-delrahim-says-he-talks-to-president-trump.html>. *See generally* Chris Strohm, *Barr Unleashes Justice Department Turmoil over Stone Case*, BLOOMBERG (Feb. 12, 2020), <https://www.bloomberg.com/news/articles/2020-02-12/barr-unleashes-justice-department-turmoil-over-roger-stone-case> (noting criticism that the DOJ’s law enforcement is improperly influenced by politics).

26 *See, e.g.*, Hadas Gold, *Report: Trump Asked Gary Cohn to Block AT&T–Time Warner Merger*, CNN, <https://www.cnn.com/2019/03/04/media/att-time-warner-trump-gary-cohn/index.html> (last updated Mar. 4, 2019) (“At the heart of the theories is Trump’s public dislike of CNN, which was a division of Time Warner.”).

27 Bill Baer, Opinion, *Think the DOJ’s Antitrust Division Is Immune from Political Meddling? Think Again.*, WASH. POST (June 24, 2020), <https://www.washingtonpost.com/opinions/2020/06/24/think-doj-s-antitrust-division-is-immune-political-meddling-think-again/>.

28 *Hearing Before the H. Comm. on the Judiciary*, 116th Cong. 6 (2020) (statement of John W. Elias, Former Chief of Staff, Antitrust Div.). *But see* Memorandum from Jeffrey R. Rag-

The Division's enforcement is also criticized for its use of nonexpert, generalist federal judges as adjudicators in complicated economic cases. This was a major reason why the FTC was established in the first place—the FTC was meant to serve as an “expert body to resolve what are essentially questions of economic policy”²⁹ that some thought could not properly be resolved in front of “conservative federal judges [who] were not the ideal guardians of consumer welfare.”³⁰ The problem of nonexpert judges was resurfaced in a very public way by the Division itself in the 2018 AT&T–Time Warner case when the DOJ criticized the federal district court judge for “erroneously ignoring fundamental principles of economics and common sense.”³¹ But the D.C. Circuit affirmed the district court's judgment,³² in part because findings of fact in such cases are reviewed under the “clearly erroneous” standard.³³ This deference to the trial court's findings of fact makes the identity of the assigned district court judge massively important to the DOJ's ability to enjoin anticompetitive mergers. Ernest Gellhorn and his coauthors raised this concern in 1990, writing that

[a]lthough the FTC system of administrative litigation has its drawbacks, the placement of all antitrust enforcement in the federal courts is not necessarily a panacea. The federal judiciary has been very uneven in its sophistication regarding antitrust issues. By the luck of the draw, judges with no prior economic, regulatory or antitrust experience whatsoever can be thrust into the role of deciding questions of major economic significance.³⁴

A more recent, albeit indirect, criticism of the Division's antitrust authority is that it is divorced from consumer protection. Bill Kovacic, who

sdale, Dir. and Chief Couns., U.S. Dep't of Just. Off. of Pro. Resp. to Bradley Weinsheimer, Assoc. Deputy Att'y Gen., U.S. Dep't of Just. (June 11, 2020), <https://www.justsecurity.org/wp-content/uploads/2020/06/opr-memorandum-from-jeffrey-ragsdale-to-bradley-weinsheimer-june-11-2020.pdf> (“The cannabis industry provided a unique challenge to federal and state regulators alike, and it was reasonable for ATR to seek additional information from the industry through its Second Request process.”); Roger Alford, *Regarding Those Marijuana Mergers: A Response to Accusers Who Question the DOJ*, JUST SEC. (July 13, 2020), <https://www.justsecurity.org/71295/regarding-those-marijuana-mergers-a-response-to-accusers-who-question-the-doj/> (“Given that both the Obama and Trump Administrations made clear that the mass commercialization of the sale and distribution of marijuana could implicate companies in criminal violations under the Controlled Substances Act, it is not surprising that the Antitrust Division would seek guidance on the critical questions of the constitutional laws and obligations as they relate to possible admissions of criminal conduct by these companies merely with the required submission of merger applications.”).

29 Gellhorn et al., *supra* note 6, at 734.

30 *Id.* at 699.

31 Cecilia Kang, *Judge in AT&T Case Ignored Economics and Common Sense*, *Government Says*, N.Y. TIMES (Aug. 6, 2018), <https://www.nytimes.com/2018/08/06/technology/att-time-warner-merger-appeal.html>.

32 *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019).

33 *Id.* at 1033.

34 Gellhorn et al., *supra* note 6, at 734.

served as a Commissioner for the FTC from 2006–2011,³⁵ noted in a recent speech that part of what makes the FTC’s model successful is that more than half of modern competition agencies are tasked with “something other than competition law,” most frequently consumer protection.³⁶ He noted that this pairing is “a decided advantage” and offered that the FTC should “consider perhaps as a priority how to work in particular with agencies with a similar configuration with the aim of exploiting the full value inherent in the multidimensional mandate.”³⁷

B. *The Federal Trade Commission*

1. Structure and Accountability

The Federal Trade Commission is an independent federal agency within the executive branch charged with enforcing both competition and consumer protection laws. The FTC is led by five Commissioners, one of which is chosen by the President to act as Chairman.³⁸ The Commission is bipartisan, meaning that “[n]o more than three Commissioners can be of the same political party,”³⁹ but the Commission does not have to vote by consensus.⁴⁰ Each Commissioner must be nominated by the President and confirmed by the Senate, and all are appointed for terms of seven years.⁴¹ All five current Commissioners were nominated by President Trump in 2018, which means that for the first two years of his presidency, none of the Commissioners had been chosen by the sitting president.⁴² This is not uncommon; President Obama did not make his first appointment until April of 2010.⁴³ The Commission’s appropriations come from Congress.⁴⁴

The Federal Trade Commission Act states that “[a]ny Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office,”⁴⁵ which was interpreted in the famous⁴⁶ case of *Humphrey’s*

35 *Commissioners, Chairwomen and Chairmen of the Federal Trade Commission*, FED. TRADE COMM’N (Nov. 2018), https://www.ftc.gov/system/files/attachments/commissioners/commissioner_chart_november_2018_0.pdf.

36 William E. Kovacic, George Washington University Law School, Presentation on Setting the International Scene (Mar. 25, 2019), <https://www.ftc.gov/news-events/audio-video/video/ftc-hearing-11-march-25-session-1-remarks-ftc-chairman-joe-simons>.

37 *Id.*

38 *Commissioners*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/commissioners> (last visited Sept. 9, 2020).

39 *Id.*

40 See Gellhorn et al., *supra* note 6, at 726.

41 *Id.*

42 See FED. TRADE COMM’N, *supra* note 35.

43 See *id.*

44 15 U.S.C. § 42 (2018).

45 *Id.* § 41.

46 Or infamous, depending on whom you ask. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 725–26 (1988) (Scalia, J., dissenting) (“One can hardly grieve for the shoddy treatment given today to *Humphrey’s Executor*. . . . But one must grieve for the Constitution.”).

Executor to limit the power of the President to remove Commissioners to *only* those deficiencies.⁴⁷ This is a key feature of what makes the FTC “independent;” the President cannot remove Commissioners simply for policy or enforcement disagreements.⁴⁸

There are multiple bureaus and offices within the FTC, including the Bureau of Competition, the Bureau of Consumer Protection, the Bureau of Economics, the Office of International Affairs, and the Office of Administrative Law Judges.⁴⁹ Administrative Law Judges (ALJs) preside over administrative factfinding proceedings and issue initial decisions,⁵⁰ and they too have removal protections. ALJs can only be removed “for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.”⁵¹

2. Antitrust Enforcement Authority and Procedures

The FTC is empowered to enforce the Federal Trade Commission Act and the Clayton Act, which confer only civil antitrust enforcement authority to the Commission.⁵² As noted above, the FTC also shares jurisdiction with the DOJ over mergers filed under the HSR Act.⁵³ The FTC has the choice between using its own internal administrative process or filing actions in a federal district court.⁵⁴ When the Commission pursues cases administratively, parties can seek judicial review in the federal courts, but only after a full investigation and administrative proceeding presided over by an ALJ.⁵⁵ The ALJ issues an initial decision, which parties can appeal to the Commission, and, finally, to a federal court of appeals.⁵⁶ The practices and procedures of FTC administrative proceedings are codified in the agency’s “Rules of Practice.”⁵⁷ Parties before the FTC can object to subpoenas, second requests, and CIDs only through internal petitions to the Commission.⁵⁸

47 *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 621–26 (1935).

48 *Id.* at 625–26.

49 *Bureaus & Offices*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/bureaus-offices> (last visited Sept. 2, 2020).

50 *Office of Administrative Law Judges*, FED. TRADE COMM’N, [ftc.gov/about-ftc/bureaus-offices/office-administrative-law-judges](https://www.ftc.gov/about-ftc/bureaus-offices/office-administrative-law-judges) (last visited Sept. 2, 2020).

51 5 U.S.C. § 7521(a) (2018).

52 *See Statutes Enforced or Administered by the Commission*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement/statutes> (last visited Sept. 2, 2020) [hereinafter *Statutes Enforced or Administered*]; ANTITRUST MODERNIZATION COMM’N, *supra* note 6, at 129.

53 *Statutes Enforced or Administered*, *supra* note 52.

54 FED. TRADE COMM’N, TEMPLATE PURSUANT TO SECTION 3(a) OF THE ICN FRAMEWORK ON COMPETITION AGENCY PROCEDURES I.

55 *Id.*

56 *Id.* at 8–9.

57 *Id.* at 2.

58 *Id.* at 3.

3. Potential Problems with Sole Enforcement Authority

Many criticisms of the FTC stem from its status as an independent agency. The Commission technically sits within the executive branch, but neither the Commissioners nor its ALJs are subject to at-will removal by the President.⁵⁹ The Commission can be influenced by Congress through the appropriations process, but its actions are not attributable to the legislative branch.⁶⁰ The independence of the Commission supposedly shields it from unwanted political influence by Congress and the President, but as a result, the FTC is also unaccountable to American consumers. The advantages of this political insulation are also unclear; though the Commission is theoretically bipartisan, it is not required to vote by consensus, and thus one party almost always has a majority vote (regardless of whether it is the party of the President).⁶¹

In addition, the FTC's effective insulation from the President raises potential problems in the realm of foreign policy, which is often implicated by antitrust enforcement.⁶² In fact, as explained by Assistant Attorney General Makan Delrahim, "it would be inconsistent with our constitutional framework—in particular, the role of the Executive Branch under Article II—for the FTC to assert a policy position in an international forum that contradicts the policy position of the United States."⁶³ And like the criticism of the Antitrust Division's absence of consumer protection authority, vesting all civil antitrust authority in the FTC has been criticized due to the FTC's lack of criminal authority.⁶⁴

The FTC's authority to wield executive power has been subject to serious constitutional challenges. For example, in January of this year, Axon Enterprises Inc. filed a complaint in the District Court of Arizona seeking to enjoin FTC administrative proceedings, making three constitutional claims: (1) that having two levels of removal restrictions, insulating both the Commissioners and the ALJs from at-will removal by the President, is unconstitutional; (2) that the FTC's roles as "prosecutor, judge, and jury" in its administrative proceedings violate the Due Process Clause; and (3) that the clearance process used by the DOJ and FTC, which use different procedures and substantive standards to conduct merger review, is arbitrary and violates the Equal Protection Clause.⁶⁵ These first two charges will be evaluated presently; the third will be addressed in Part II.

59 See *supra* notes 45–51 and accompanying text.

60 See *supra* note 44 and accompanying text.

61 See *supra* notes 38–44 and accompanying text.

62 Kovacic, *supra* note 5, at 537.

63 Interview by Douglas H. Ginsburg with Makan Delrahim, Assistant Att'y Gen., Dep't of Just. (June 19, 2018), <https://www.competitionpolicyinternational.com/cpi-talks-with-makan-delrahim>.

64 Kovacic, *supra* note 5, at 536.

65 Notice of Tentative Ruling, *supra* note 11, at 3.

a. Agency Independence

Many recent changes in administrative law doctrine question the continued constitutionality of independent executive agencies. As noted above, the Court explicitly upheld the constitutionality of the for-cause removal protection of FTC Commissioners in *Humphrey's Executor*.⁶⁶ In that case, which regarded a challenge to the removal of an FTC Commissioner, the Court held that the removal restrictions were constitutional because the duties of the FTC were “neither political nor executive, but predominantly quasi-judicial and quasi-legislative.”⁶⁷ The Court noted that the FTC’s “members are called upon to exercise the trained judgment of a body of experts” and found that full removal powers for the President would threaten the independence of the agency.⁶⁸

The jurisprudence of the Court underwent a striking shift in 2010 by way of the case *Free Enterprise Fund v. PCAOB*.⁶⁹ The Public Company Accounting Oversight Board (PCAOB) was an invention of the Sarbanes-Oxley Act of 2002 to introduce “tighter regulation of the accounting industry.”⁷⁰ The PCAOB was placed under the oversight of the SEC, by whom its members were appointed to five-year terms, and the PCAOB members themselves were only removable by the SEC for good cause.⁷¹ And, like the FTC, the SEC is an independent agency whose Commissioners are only removable for good cause.⁷² The result was that *both* the Commissioners of the SEC *and* the members of the PCAOB were insulated from the President through removal restrictions.⁷³ Additionally, the President could not even remove a PCAOB member who he determined was neglecting his office because the removal power over malfeasant Board members was lodged in the SEC, not the President.⁷⁴

The question of the PCAOB’s constitutionality was brought to the Court by an accounting firm under formal investigation by the PCAOB.⁷⁵ The firm was seeking a declaratory judgment and an injunction on the theory that “conferring wide-ranging executive power on Board members without subjecting them to Presidential control” was unconstitutional.⁷⁶ In considering this structure in which the President is “restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer,” the Court found that such dual for-cause limitations “contravene[d]

66 *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626–32 (1935).

67 *Id.* at 624.

68 *Id.* at 624, 630.

69 561 U.S. 477 (2010).

70 *Id.* at 484.

71 *Id.* at 484–86 (citing 15 U.S.C. §§ 7211(e)(6), 7217(b)–(c) (2008)).

72 *Id.* at 487 (quoting *Humphrey's Ex'r*, 295 U.S. at 620).

73 *Id.* at 486–87.

74 *Id.* at 484.

75 *Id.* at 487.

76 *Id.*

the Constitution's separation of powers."⁷⁷ The Court explained that "multilevel protection from removal is contrary to Article II's vesting of the executive power in the President" because the President cannot "'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."⁷⁸ The Court noted that this structure subverted not only the President's ability to ensure faithful execution, but also "the public's ability to pass judgment on his efforts."⁷⁹

In 2018, the Court decided another important case that bears on the constitutionality of the FTC's current structure. In *Lucia v. SEC*, Petitioner Raymond Lucia challenged the appointment of the ALJ who had imposed sanctions "of \$300,000 and a lifetime [ban] from the investment industry," arguing that the ALJ's appointment by SEC staff members was unconstitutional under the Appointments Clause.⁸⁰ The Court found for the petitioner, holding that the ALJs at the SEC were "Officers of the United States" because ALJs exercise "significant authority pursuant to the laws of the United States" and their offices are "continuing and permanent."⁸¹ ALJs were found to exercise "significant authority" because they exercise significant discretion and have "nearly all the tools of federal trial judges"—taking testimony, receiving evidence, examining witnesses, taking pretrial depositions, conducting trials, administering oaths, ruling on motions, regulating the conduct of the parties at hearings, ruling on the admissibility of evidence, shaping the administrative record, enforcing compliance with discovery orders, punishing contempt, and issuing independent decisions.⁸² The Court also emphasized that the SEC could choose to adopt the ALJ's opinion as final.⁸³ Because the ALJ was an "Officer[] of the United States," he must be appointed by the President, a court of law, or a head of department, not an SEC staff member.⁸⁴ Although the Court in *Lucia* did not explicitly state that the ALJs at agencies other than the SEC were "Officers of the United States," there is a strong argument that this holding would apply to the ALJs

77 *Id.* at 484, 492.

78 *Id.* at 484 (quoting U.S. CONST. art. II, § 3).

79 *Id.* at 498.

80 138 S. Ct. 2044, 2049–50 (2018).

81 *Id.* at 2051 (first quoting U.S. CONST. art. II, § 3; and then quoting *United States v. Germaine*, 99 U.S. 508, 511–12 (1879); and then quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

82 *Id.* at 2051, 2053.

83 *Id.* at 2054 (quoting 17 C.F.R. § 201.360(d)(2) (2017); 15 U.S.C. § 78(d)-1(c) (2012)).

84 The Court did not explicitly decide whether ALJs were principal or inferior officers, but because SEC ALJs are "Officers of the United States," the Court held that they must be appointed by the President, a court of law, or a head of department according to the Appointments Clause of Article II. *Id.* at 2049–51. All ALJs at the SEC had been appointed by non-Commissioner SEC staff. *Id.* at 2049. The Court found that the appropriate remedy would be "a new 'hearing before a properly appointed' ALJ (who also could not be the ALJ who presided over the original hearing, even if his appointment defect was 'cure[d]')." *Id.* at 2055 (quoting *Ryder v. United States*, 515 U.S. 177, 183, 188 (1995)).

at the FTC.⁸⁵ The FTC's ALJs have the "duty to conduct fair and impartial hearings," and wield analogous powers to those of the SEC ALJs, including administering oaths, taking depositions, ruling on the admissibility of evidence, receiving evidence, shaping the administrative record, regulating the conduct of parties during the hearing, and suspending or barring attorneys for misbehavior.⁸⁶

In his partial concurrence in *Lucia*, Justice Breyer noted that if ALJs are "Officers," they may present a constitutional removal problem.⁸⁷ Because ALJs can only be removed "for cause" by the Merit Systems Protection Board, who in turn may only be removed for cause by the President, this structure presents the same dual for-cause limitation that was found unconstitutional in *Free Enterprise Fund*.⁸⁸ Justice Breyer warned that if *Free Enterprise Fund's* holding applied to ALJs, the Court risks "unraveling, step-by-step, the foundations of the Federal Government's administrative adjudication system as it has existed for decades."⁸⁹ The ALJs at the FTC are also shielded by the same statutory removal restrictions as the ALJs at the SEC.⁹⁰

The majority opinion in *Free Enterprise Fund* explicitly stated that the Court was not asked to reconsider *Humphrey's Executor* by any of the parties.⁹¹ But the Plaintiffs in *Seila Law LLC v. CFPB*⁹² did ask,⁹³ and in response the Court significantly shrunk the strength of *Humphrey's Executor* as a precedent for the constitutionality of the FTC.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which transferred the authority to administer eighteen existing statutes to the newly created agency, vested the CFPB with "potent enforcement pow-

85 See Peter Isajiw et al., *Cleanup on Title 5: Executive Agencies and Courts Begin to Unpack Lucia, as Litigants Eye Challenges to Administrative State*, BUS. L. TODAY (Sept. 26, 2018), <https://businesslawtoday.org/2018/09/cleanup-title-5-executive-agencies-courts-begin-unpack-lucia-litigants-eye-challenges-administrative-state/>.

86 *Id.* (quoting 16 C.F.R. § 3.42(c) (2017)). The FTC, in response to a challenge to the constitutionality of its current (and only) ALJ's appointment, "ratified" the appointment just as the SEC did when the *Lucia* case was pending. *Id.* The Court in *Lucia* did not decide the issue of whether such "ratification" cures the Appointments Clause violation. See *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.6 (2018).

87 *Lucia*, 138 S. Ct. at 2057 (Breyer, J., concurring in the judgment in part and dissenting in part).

88 *Id.* at 2060 (quoting 5 U.S.C. § 7521(a) (2012)).

89 *Id.* at 2064.

90 See 5 U.S.C. § 7521(a) (2018).

91 *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010) ("The parties do not ask us to reexamine any of these precedents, and we do not do so.").

92 140 S. Ct. 2183 (2020).

93 Petitioner in *Seila Law LLC v. CFPB* urged in its petition for certiorari that if the Court "were to agree with the court of appeals that *Humphrey's Executor* or *Morrison* are controlling here, petitioner respectfully submits that, in light of their gross departure from constitutional text, history, and the principles articulated in *Myers*, those cases should be overruled or limited." Petition for Writ of Certiorari at 24, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (No. 19-7).

ers.”⁹⁴ “The agency has the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court.”⁹⁵

The CFPB was designed as an independent agency with a single Director.⁹⁶ The Director is appointed by the President with the advice and consent of the Senate, serving a term of five years.⁹⁷ The President may only remove the CFPB Director for “inefficiency, neglect of duty, or malfeasance in office.”⁹⁸ As described by the Supreme Court, “[t]he CFPB Director has no boss, peers, or voters to report to. Yet the Director wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy.”⁹⁹ *Seila Law LLC*, a law firm subject to a civil investigative demand by the CFPB, challenged the independent structure of the CFPB as a violation of the separation of powers.¹⁰⁰ The Court agreed with the firm, holding that such executive power wielded by a single Director was unconstitutional.¹⁰¹

The Court, in an opinion authored by Chief Justice Roberts, took a strong stance on the vesting of the executive power solely in the President, describing *Humphrey’s Executor* as one of “only two exceptions to the President’s unrestricted removal power,” an exception that only applied to “multi-member expert agencies that do not wield substantial executive power.”¹⁰² But the CFPB *does* wield substantial executive power; “the Director’s enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in *Humphrey’s Executor*.”¹⁰³

Important to the question of the continued constitutionality of the FTC, the *Seila Law* Court significantly constrained the reach of *Humphrey’s Executor*, construing the eighty-five-year-old holding as one that only applied to the “New Deal-era FTC”.¹⁰⁴

Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising “no part of the executive power.” Instead, it was “an administrative body” that performed “specified duties as a legislative or as a judicial aid.” It acted “as a legislative agency” in “making investigations and reports” to Congress and “as an agency of the judiciary” in making recommendations to courts as a master in chancery.¹⁰⁵

94 *Seila Law LLC*, 140 S. Ct. at 2193.

95 *Id.* (citing 12 U.S.C. §§ 5562, 5564(a), (f) (2018)).

96 *Id.* (citing 12 U.S.C. § 5491(b)(1) (2018)).

97 *Id.* (citing 12 U.S.C. §§ 5491(b)(2), (c)(1) (2018)).

98 *Id.* (quoting 12 U.S.C. § 5491(c)(3) (2018)).

99 *Id.* at 2191.

100 *Id.* at 2194.

101 *Id.* at 2197–207.

102 *Id.* at 2192, 2199–200.

103 *Id.* at 2200.

104 *Id.*

105 *Id.* at 2198 (citations omitted) (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 628 (1935)).

The dissent criticizes the majority's suggestion that the FTC in 1935 might have had less responsibilities than the FTC in 2020. The Chief Justice acknowledges this point: "Perhaps the FTC possessed broader rulemaking, enforcement, and adjudicatory powers than the *Humphrey's* Court appreciated," noted Roberts.¹⁰⁶ "Perhaps not."¹⁰⁷

b. Due Process

Another constitutional concern raised by the FTC is the problem of due process. This is not a novel concern; "[t]he efficacy and basic fairness of the Commission's administrative adjudicatory procedures have . . . been a continuing source of controversy."¹⁰⁸ In fact, William Simon made this argument almost seventy years ago:

[T]here is little opportunity for a businessman to receive a fair and impartial trial before the Federal Trade Commission. . . . [H]earings are held before one of the Commission's trial examiners. The attorneys who appear to support the Commission's complaint are from its staff. . . . [T]he examiner is necessarily influenced by the fact that the Commissioners had reason to believe that there was a violation of law.¹⁰⁹

Similarly, Gellhorn and his coauthors argued in 1990 that while the DOJ must prove all their cases to a federal judge, "[t]he FTC, at least until the very last step, must only convince itself."¹¹⁰ In 1989, the ABA's Section of Antitrust Law reported that "between 1975 and 1988 the Commission took an average of 15.1 months from oral argument to issuance of an FTC final order There is no excuse for taking more than a year to write an opinion."¹¹¹

Possibly worse than the due process concerns raised by the FTC's administrative processes is the Commission's treatment of the constitutional claims brought against it. In its amicus brief supporting Axon Enterprises, the New Civil Liberties Alliance (NCLA) noted that

[the] FTC requires all parties to waive any right to petition the circuit court on their constitutional claims should they settle. The Court should take judicial notice of this practice. We have a situation where the agency at issue does not rule on constitutional issues, requires defendants who settle any

106 *See id.* at 2200 n.4.

107 *See id.* This footnote on changed circumstances from Chief Justice Roberts is more interesting if one considers his commentary on stare decisis in another opinion handed down on the same day as *Seila Law*. *See* June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2133–35 (2020) (Roberts, J., concurring).

108 Gellhorn et al., *supra* note 6, at 702. Further, these authors noted that "[i]ndeed, most commentators who have studied the question of dual enforcement seem to favor transferring the FTC's antitrust enforcement authority to DOJ." *Id.*

109 Simon, *supra* note 6, at 335.

110 Gellhorn et al., *supra* note 6, at 721.

111 Miles W. Kirkpatrick et al., *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 116 n.167 (1989).

portion of the claim to waive subsequent federal-court review of constitutional issues, and can moot any petition for review by failing to rule for itself. Add to this the *in terrorem* effects of an agency that says divest your acquisition and transfer your intellectual property as we say, or we will tie you up in administrative proceedings designed to favor FTC and extinguish your claims altogether, and the lack of meaningful review is plain.¹¹²

NCLA further illustrated this problem with the story of LabMD. The FTC put LabMD through “an administrative hearing that was costly, long and burdensome;” as a result, LabMD “ceased business and was completely shut down.”¹¹³ As it turns out, the ALJ ended up finding for LabMD, but the Commission “voided the ALJ’s decision and issued its cease-and-desist order.”¹¹⁴ LabMD appealed to the Eleventh Circuit and won on the only issue decided by the court—the specificity of the FTC injunction.¹¹⁵ The FTC did not file for a writ of certiorari.¹¹⁶ “Thus, after the destruction of the company, its being subjected to an unconstitutional proceeding, and its having ‘won’ because of the ridiculous unenforceability of the Order—the original constitutional matters raised by LabMD were never addressed. FTC’s position was so unjustified that attorney’s fees were awarded.”¹¹⁷

II. PROBLEMS WITH THE DUAL ENFORCEMENT STRUCTURE

A. *Traditional Criticisms*

To put the problem of dual enforcement in the most general terms, there is significant international and domestic consensus that having multiple federal antitrust agencies is inefficient and undesirable.¹¹⁸ No other leading antitrust enforcement country has more than one civil competition

112 Brief for New Civil Liberties Alliance as Amicus Curiae Supporting Plaintiff at 8, *Axon Enter. Inc. v. FTC*, 452 F. Supp. 3d 882 (D. Ariz. 2020) (No. 20-cv-0014) (citations omitted) (citing Plaintiff’s Consent Motion for Entry of Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief, and Memorandum in Support, United States v. Facebook, Inc., No. 19-cv-2184 (D.D.C. July 24, 2019), ECF No. 2).

113 *Id.* at 9.

114 *Id.*

115 *Id.* at 10 (citing *LabMD, Inc. v. FTC*, 894 F.3d 1221 (11th Cir. 2018)).

116 *Id.*

117 *Id.* at 10.

118 *But see Kovacic, supra* note 5, at 510 (“One reason for having two agencies perform the same government function is to foster interagency competition that increases the output and improves the quality of the product that the agencies are intended to supply.”). Kovacic notes that the primary form of competition between the two agencies is the competition for preeminence. *See id.* at 524; *see also Fox, supra* note 6, at 487 (“[T]he sword of Damocles over the head of the FTC (for the threat is usually to the FTC) seems to inspire the FTC to new heights.”). In 1996, Kovacic himself was unconvinced by this argument. *See Kovacic, supra* note 5, at 539–40 (“I suspect that the careful empirical studies will confirm my intuition that the costs of dual enforcement by the DOJ and the FTC have exceeded the benefits of competition and diversification in antitrust oversight by the federal government.”). This piece was published before Kovacic himself served as a Commissioner of the FTC from 2006–2011. *See supra* note 35 and accompanying text.

agency; in fact, China, the United Kingdom, Brazil, and Portugal have all recently condensed their duplicative antitrust agencies into singular antitrust authorities.¹¹⁹ The current American system of two enforcement agencies with “directly overlapping responsibilities” is “more the product of historical accident than a conscious decision.”¹²⁰ The sitting FTC Chairman and Assistant Attorney General for the Antitrust Division have both said that they would not split antitrust authority “if given a blank slate.”¹²¹

Among others, there are three commonly made arguments for why the dual enforcement structure is inefficient and unfair: merger clearance delays, different procedural standards, and the agencies’ enforcement of different substantive standards. Each of these will be addressed in turn.

1. Merger Clearance Delays

The HSR Act only allots thirty days post-notification for merger review, but the DOJ and FTC often take much of, or more than, the thirty days just to decide *which* agency is going to investigate a merger.¹²² The Antitrust Modernization Commission (AMC), which studied the problem of dual enforcement in the mid-2000s, argued that this inefficiency places “significant burdens on companies with time-sensitive transactions.”¹²³ When the agencies fail to come to a timely resolution, they frequently initiate second requests that are expensive for parties to comply with.¹²⁴ This is because, prior to clearance, staffers “cannot reach out either to the merging companies or third parties,” and they frequently need more time than what is left over of the thirty days to complete their review.¹²⁵

Unlike disputes between other executive agencies, there is no way to quickly resolve these disputes through the chain of command because the FTC is not accountable to the President. Assistant Attorney General Makan Delrahim has stated that one standstill was solved with a coin toss.¹²⁶ Axon Enterprises called the clearance process an “uncodified black box” that can have “real consequences” for parties.¹²⁷ Such turf wars are a waste of taxpay-

119 See ELEANOR M. FOX & DANIEL A. CRANE, *GLOBAL ISSUES IN ANTITRUST AND COMPETITION LAW* 487 (2d ed. 2018); Stephen Crosswell & Tom Jenkins, *China to Integrate Its Three Antitrust Agencies into a Single Authority*, *GLOB. COMPLIANCE NEWS* (Mar. 26, 2018), <https://globalcompliancencews.com/china-antitrust-agencies-20180326/>.

120 Gellhorn et al., *supra* note 6, at 714; *see also id.* at 716 (arguing that the legislative history around the FTC does not definitively answer the question of whether the FTC was meant to have concurrent enforcement authority with the DOJ).

121 Bryan Koenig, *For DOJ and FTC, Clearing Deals Remains a Gray Area*, *LAW360* (Mar. 20, 2020), <https://www.law360.com/articles/1255073/for-doj-and-ftc-clearing-deals-remains-a-gray-area>.

122 ANTITRUST MODERNIZATION COMM’N, *supra* note 6, at 130, 151.

123 *Id.* at 130.

124 Koenig, *supra* note 121.

125 *See id.*

126 *Id.*

127 *Id.*

ers' resources and frequently shift considerable burdens to parties under investigation.

2. Different Procedural Standards

Companies often feel that they are treated differently depending on whether their case is assigned to the DOJ or the FTC.¹²⁸ These perceptions primarily stem from the fact that the DOJ and FTC pursue different injunctive relief in federal court.¹²⁹ In the case of anticompetitive mergers, the DOJ pursues preliminary and permanent injunctions, which give parties finality.¹³⁰ The FTC, however, pursues only preliminary injunctions; regardless of the outcome of the injunction, the FTC then proceeds through a lengthy administrative process for permanent relief.¹³¹ The AMC noted that the "FTC's ability to continue a merger case in administrative litigation . . . may lead companies whose transactions are investigated by the FTC to feel greater pressure to settle a matter than if they had been investigated by the DOJ."¹³² As a result, the agencies' procedural differences "can undermine the public's confidence" in antitrust authorities.¹³³

3. Different Substantive Standards

A third commonly made argument about the undesirability of the dual enforcement structure is the uncertainty and cost to businesses seeking to comply with both the DOJ and FTC when they apply different substantive standards.¹³⁴ The two agencies frequently disagree on legal standards, as evidenced by the amicus brief filed by the DOJ against the FTC in the Qualcomm litigation,¹³⁵ as well as broader antitrust policy.¹³⁶ Is it fair to

128 See ANTITRUST MODERNIZATION COMM'N, *supra* note 6, at 130–31; see also Simon, *supra* note 6, at 309 ("[The FTC] creates further problems for businessmen by requiring conduct which the Department of Justice (Attorney General) prohibits.").

129 See ANTITRUST MODERNIZATION COMM'N, *supra* note 6, at 138.

130 See *id.*

131 See *id.* at 138; see also H.R. REP. NO. 115–412, at 3 (2017) (footnotes omitted) (citing ANTITRUST MODERNIZATION COMM'N, *supra* note 6, at 141–42) (stating that although "[i]t is difficult to quantify the degree to which the disparate preliminary injunction standards yield different results," there is "a perception that a disparate preliminary injunction standard exists. Some commentators go as far as to suggest that the FTC may even be subject to a more lenient standard than DOJ.").

132 ANTITRUST MODERNIZATION COMM'N, *supra* note 6, at 130–31.

133 *Id.* at 131. For a potential legislative solution to this problem, see *infra* notes 173–76 and accompanying text.

134 See, e.g., Kovacic, *supra* note 5, at 521 ("If agencies apply dissimilar analytical techniques or standards," one cost "is the expense that businesses incur to evaluate commercial plans and strategies under both sets of enforcement approaches.").

135 Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur *supra* note 10, at 1 (DOJ filing amicus brief against the FTC in the interest of "correct application" of federal antitrust law).

136 For example, in recent years the two agencies publicly took different positions on patent hold-up theory. See Makan Delrahim, Assistant Att'y Gen., Dep't of Just., Take It to

companies that there is not always a unified, knowable antitrust position of the United States?

The problem of differential substantive standards in dual enforcement looms large in the current debates about antitrust enforcement and big tech, especially in the current cases of Facebook, Google, Amazon, and Apple.¹³⁷ These overlapping investigations raise the possibility that the DOJ and FTC might not only present different litigating positions of the United States on certain *topics*, but the agencies might actually enforce different substantive standards on *shared plaintiffs*. When both the FTC and the DOJ, in addition to states and congressional committees, are inquiring into internet platforms, companies “‘trying to make decisions with some level of comfort and certainty’ are finding out that there is little of either.”¹³⁸

The Qualcomm litigation is further evidence of the undesirability of competing antitrust policy visions. This litigation arose out of the fundamental disagreements between the FTC and DOJ on the relationship between antitrust and intellectual property law. Qualcomm sells chips used in modern cellphones to manufacturers and licenses patents which are essential to certain cellphone technology standards.¹³⁹ The FTC sued Qualcomm, arguing that because the company’s chips were the standard for cellphones, the company had a duty to make its chips available for licensing.¹⁴⁰ The DOJ disagreed, arguing in its amicus brief against the FTC that Qualcomm’s refusal to license was justified by its patents.¹⁴¹ This conflict, if the FTC were not independent, would normally have been resolved through the Executive Branch’s interagency dispute resolution process. Instead, the conflict had to be litigated, at the expense of the party trying to compete in the international market and comply with American antitrust law.

the Limit: Respecting Innovation Incentives in the Application of Antitrust Law (Nov. 10, 2017), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-usc-gould-school-laws-center> (DOJ’s position); Terrell McSweeney, Comm’r, Fed. Trade Comm’n, Holding the Line on Patent Holdup: Why Antitrust Enforcement Matters (Mar. 21, 2018), https://www.ftc.gov/system/files/documents/public_statements/1350033/mcsweeney_-_the_reality_of_patent_hold-up_3-21-18.pdf (FTC’s position); FED. TRADE COMM’N, STANDARDS, LICENSING, AND INNOVATION: A RESPONSE TO DOJ AAG’S COMMENTS ON ANTITRUST LAW AND STANDARD-SETTING (2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0055-d-0031-155033.pdf (noting the difference).

137 Ylan Mui, *Congress is Getting Ready to Grill Top DOJ and FTC Officials About Being Too Lenient on Big Tech*, CNBC (Sept. 17, 2019), <https://www.cnbc.com/2019/09/17/congress-to-grill-doj-delrahim-ftc-simons-on-big-tech-enforcement.html>.

138 Brody & McLaughlin, *supra* note 2.

139 Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, *supra* note 10, at 2.

140 John O. McGinnis & Linda Sun, *Justice-FTC Feud Is the Wrong Kind of Competition*, WALL ST. J. (Aug. 13, 2020), <https://www.wsj.com/articles/justice-ftc-antitrust-feud-is-the-wrong-kind-of-competition-11597336577>.

141 *Id.*; Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, *supra* note 10, at 8–13.

B. Constitutional Problems

1. Equal Protection

As mentioned previously, the third and final constitutional claim made by Axon Enterprises is one of Equal Protection.¹⁴² Axon claims that the government treatment of companies in the merger-clearance process is arbitrary and violates even rational basis review.¹⁴³ Axon alleges that there are “outcome-determinative differences between merger challenges by the DOJ under the Clayton Act and by the FTC under the FTC Act” and that these differences in treatment put merging parties under review by the FTC at a disadvantage.¹⁴⁴ The complaint lists important differences between the two agencies, including the forum for adjudicating the merits, the independence of the factfinder, the substantive test of a violation, the result if a U.S. district court denies a preliminary injunction, the applicable procedural and evidentiary rules, the capacity to alter the merits decision prior to circuit court appeal, and the circuit court appellate review standards.¹⁴⁵ That final difference is especially crucial for parties; circuit courts review successful merger challenges by the DOJ under the clearly erroneous standard, while FTC decisions are upheld if there is “substantial evidence” in the record supporting the decision.¹⁴⁶ ALJs play a crucial role in shaping that record.¹⁴⁷

This constitutional argument does not rely on any modern doctrinal changes; instead, it reflects many of the traditional arguments about the lack of fairness in the dual enforcement structure. As explained in Section I.B of

142 See *supra* note 65 and accompany text. Of course, the text of the Fourteenth Amendment’s Equal Protection Clause only applies to the states. U.S. CONST. amend. XIV. Although the Fifth Amendment, which applies to the federal government, does not include an explicit equal protection *clause*, the Court has held that “[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (citing *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)); see also *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.”).

143 Plaintiff’s Motion for Preliminary Injunction and Supporting Memorandum of Points and Authorities at 9, *Axon Enter. Inc. v. FTC*, 452 F. Supp. 3d 882 (D. Ariz. 2020) (No. 20-cv-0014) (“The Equal Protection Clause secures every person against intentional and arbitrary discrimination by the Government and promises equal justice under law.” (citing *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 446 (1923))).

144 *Id.*

145 *Id.* at 10–12. By “difference in result if a U.S. district court rules against a merger challenge,” Axon is referring to the fact that if the district court rules against the DOJ for an injunction, all the DOJ can do is appeal to a circuit court; the FTC, however, can still put companies through its administrative processes. See *supra* notes 128–33 and accompanying text.

146 Plaintiff’s Motion for Preliminary Injunction and Supporting Memorandum of Points and Authorities, *supra* note 143, at 12.

147 See *Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018) (noting that ALJs receive evidence, “rule on the admissibility of evidence,” and “shape the administrative record” (quoting *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 882 (1991))).

this Note, the due process concerns arising from the FTC's administrative processes are significant. The thrust of this equal protection claim is that parties in front of the FTC receive less procedural protection than those in front of the DOJ, are subjected to different substantive standards, and have less opportunity for judicial review. Because the merger clearance process is one of discretion (and, in the case of a coin toss,¹⁴⁸ arbitrariness), Axon is right to argue that this arbitrary government action has real consequences for parties undergoing merger review before the agencies.

2. Recent Doctrinal Changes

Dual antitrust enforcement faces new challenges due to the recent doctrinal changes that project a waning confidence in the constitutionality of the FTC's structure, independence, and processes.¹⁴⁹ Any aggrieved party who loses its case in FTC administrative proceedings would stand to gain by challenging the processes and structure of the Commission.¹⁵⁰

The Take Care Clause has also been recently invoked as a limit on the independence of executive officers, as seen in *Morrison* and *Free Enterprise Fund*. In both cases, the Court used a text-based functional test, asking if Congress had interfered with the President's "constitutionally appointed duty to 'take care that the laws be faithfully executed.'"¹⁵¹ Although those cases considered removal restrictions, the same argument could be presented regarding whether the combination of the FTC's (a) independence and (b) overlapping civil antitrust jurisdiction with the DOJ "interfere[s] impermissibly with [the President's] constitutional obligation to ensure the faithful execution of the laws."¹⁵² This will be especially relevant in antitrust enforcement cases that implicate foreign policy.¹⁵³

As previously explained, *Lucia* and *Free Enterprise Fund* suggest that the current removal restrictions of the FTC's ALJs are unconstitutional.¹⁵⁴ That alone is a sufficient challenge to the constitutionality of the administrative

148 See *supra* note 126 and accompanying text.

149 See *supra* subsection I.B.3.

150 See Isajiw et al., *supra* note 85 (noting that "the Supreme Court [in *Lucia*] left open the possibility that a private litigant may contend that it has standing to challenge the constitutionality of the removal restrictions in an attempt to have an enforcement action declared invalid"). Less than a month after *Lucia* was decided, President Trump signed an executive order that exempted all ALJs from the civil service requirements; this order did not, however, alter the statutory provision governing the removal of ALJs. *Id.*

151 *Morrison v. Olson*, 487 U.S. 654, 690 (1988) (quoting U.S. CONST. art. II, § 3); see *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010) (citing *Morrison*, 487 U.S. at 693).

152 *Morrison*, 487 U.S. at 693.

153 See Interview by Douglas H. Ginsburg with Makan Delrahim, *supra* note 63; see also *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 943 (5th Cir. 2011) (holding that a private antitrust suit against foreign, nationally owned oil companies engaged in price fixing "deeply implicate concerns of foreign and defense policy" and barring the suit on the jurisdictional political question doctrine).

154 See *supra* notes 69–91 and accompanying text.

processes at the FTC, which uses ALJs for factfinding and the issuance of initial decisions. But if ALJ removal restrictions are erased, so too will any semblance of ALJ independence from the Commission. This will heighten due process concerns of the FTC serving as “‘prosecutor, judge, and jury’ during administrative proceedings.”¹⁵⁵

As noted by Justice Breyer in *Lucia*, the potential application of the *Free Enterprise Fund* holding to ALJs risks “unraveling” the “administrative adjudication system as it has existed for decades.”¹⁵⁶ *Seila Law* moves such an unraveling one notch forward. At oral arguments, it was contended that the Court has “essentially disemboweled the reasoning of” *Humphrey’s Executor*.¹⁵⁷ If that was not true before, it certainly is now. Not only is the independence of the Commission’s ALJs in question, but the independence of the FTC itself is unlikely to withstand future scrutiny.¹⁵⁸ Because the CFPB is an independent agency headed by a single director, rather than a multimember commission like the FTC, finding the CFPB to be unconstitutional did not *require* the Court to overrule *Humphrey’s Executor*.¹⁵⁹ But future litigants against the FTC will certainly give the Court an opportunity to do so. Ten years after the Court noted that the “parties [did] not ask us to reexamine” *Humphrey’s Executor*,¹⁶⁰ we might finally find out what happens when they do.

III. LEGISLATIVE SOLUTIONS TO THE PROBLEMS OF DUAL ENFORCEMENT

A. *Elimination of the FTC’s Enforcement Authority*

The strongest statutory fix to the problem of dual enforcement would be to strip either the DOJ or FTC of their civil antitrust authority. As noted in Part I, giving sole civil antitrust authority to either agency presents a set of traditional concerns and criticisms. The Antitrust Division of the DOJ is accountable to the President, and thus at risk for being used as a political tool; it uses nonexpert judges for enforcement of complex, economic cases; and it does not have consumer protection authority.¹⁶¹ The FTC is not accountable to the President, and thus its enforcement power creates foreign policy concerns, as well as concerns about being accountable to voters; its administrative processes are subject to viable criticism regarding the due process they afford; and it lacks criminal authority.¹⁶² But deciding which agency should be vested with the sole antitrust enforcement authority of the United States, if Congress chose to make such a change, does not require a

155 Notice of Tentative Ruling, *supra* note 11, at 3.

156 *Lucia v. SEC*, 138 S. Ct. 2064 (2018) (Breyer, J., concurring in the judgment in part and dissenting in part).

157 Transcript of Oral Argument at 19–20, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (No. 19-7); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

158 See *supra* Section I.B.

159 See Transcript of Oral Argument, *supra* note 157, at 26.

160 *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010).

161 See *supra* subsection I.A.3.

162 See *supra* notes 59–64 and accompanying text; *supra* sub-subsection I.B.2.b.

judgment of which of the above sets of concerns are weightier.¹⁶³ The new constitutional challenges facing the FTC tip the scale in favor of the DOJ.

The argument to vest the United States' civil antitrust enforcement authority solely in the DOJ is neither novel nor untenable.¹⁶⁴ William Simon made this argument in 1952 in his article *The Case Against the Federal Trade Commission*, writing

The Attorney General and the Federal Trade Commission have virtually concurrent jurisdiction to enforce the Sherman and Clayton Antitrust Acts. The same statutes may in effect be enforced against the same businessmen by two different agencies of the government. Worse, these agencies appear to have conflicting economic philosophies and diverse views of . . . antitrust laws. The result is an inconsistent, irresponsible, and inefficient antitrust enforcement program, with a failure to give the taxpayers maximum accomplishment for Congressional antitrust appropriations.

. . . [T]he only tenable solution is to take antitrust jurisdiction away from the Federal Trade Commission and to give exclusive antitrust jurisdiction to the Attorney General.¹⁶⁵

Although the Antitrust Modernization Commission and others have concluded that it is too politically costly to consolidate these two agencies after 100 years of overlapping jurisdiction,¹⁶⁶ many of the United States' peer countries have consolidated their competition agencies in the last decade.¹⁶⁷ As detailed in this Note, the costs of dual enforcement are too great, and if the United States wants to continue to be a global leader in antitrust, it may

163 Several commentators have made such a judgment and called for sole enforcement authority to be granted to the DOJ. See, e.g., Kovacic, *supra* note 5, at 536 (“The need to relate criminal enforcement to other elements of federal antitrust policy arguably creates a presumption favoring consolidation of antitrust authority in DOJ.”); *id.* at 537 (“Because these initiatives have important foreign policy implications, it is difficult to imagine a consolidation solution that locates antitrust enforcement authority outside the executive branch.”); Simon, *supra* note 6, at 297 (arguing that President Hoover’s call for “[c]learer lines of responsibility and authority” in the Executive branch “could best be achieved by vesting unified authority in the Attorney General”).

164 *But see* Kovacic, *supra* note 5, at 507 (“The most frequently suggested change—folding the FTC’s antitrust resources into the DOJ—is usually scorned as hopelessly naive.”).

165 Simon, *supra* note 6, at 297 (footnotes omitted); see also Kovacic, *supra* note 5, at 540 (noting that if the choice was made to end the dual enforcement system in the United States, the DOJ was “the best locus for consolidation”).

166 The AMC recommended no comprehensive change to the dual enforcement structure, noting that “[a]lthough concentrating enforcement authority in a single agency generally would be a superior institutional structure, the significant costs and disruption of moving to a single-agency system at this point in time would likely exceed the benefits.” ANTITRUST MODERNIZATION COMM’N, *supra* note 6, at 129–30 (footnotes omitted). Additionally, the AMC noted that there is no consensus regarding whether it would be better to eliminate the antitrust authority of the DOJ or the FTC. *Id.* at 130.

167 See *supra* note 119 and accompanying text.

become critical to have one efficient, authoritative agency that speaks for the United States.¹⁶⁸

This proposal is actually in harmony with President Wilson's original vision for the FTC, which was not for the FTC to be a separate law enforcement agency, but an agency whose "principal function was to aid the DOJ and the courts in conducting investigations and supervising the dissolution of trusts found to be unlawful."¹⁶⁹ This would allow the FTC to be an expert body without the problem of dual *enforcement*. It would also cure the constitutional issues of removal restrictions, due process, and equal protection that were presented in Parts I and II of this Note.¹⁷⁰

Senator Josh Hawley released a proposal in February of this year to consolidate the two agencies by moving the FTC inside the DOJ, replacing the multimember commission with a single director who would report to the Associate Attorney General (the same officer to which the head of the Antitrust Division of the DOJ reports).¹⁷¹ This would allow the FTC and DOJ to coexist as separate, peer divisions, both under the direction of the Attorney General. Further, Hawley's proposal would end jurisdictional overlap by transferring all authority to review mergers and acquisitions to the DOJ, while the FTC would "aid and support" the DOJ's work.¹⁷² Hawley also suggests creating a new "Digital Market Research Section" in the FTC to conduct "comprehensive studies about digital markets" and support enforcement litigation at the DOJ.¹⁷³

This proposal and others might become more attractive to Congress in light of the CFPB's new lack of independence.¹⁷⁴ If Congress does not want an agency that answers to the President to be vested with the power that is currently vested in the CFPB, Congress will have to restructure consumer protection enforcement. Such legislative momentum gives Congress a

168 See Lee, *supra* note 1 ("Enforcement of the antitrust laws is critical to safeguarding competitive markets that benefit consumers. Congress should focus on ensuring that antitrust enforcement efforts are backed by appropriate resources. One way to further that goal would be to reorganize civil antitrust enforcement so that it is done under one roof. Doing so would result in more coherent, efficient, and effective antitrust enforcement.").

169 Gellhorn et al., *supra* note 6, at 715.

170 Of course, the dubious constitutionality of the removal restrictions protecting FTC Commissioners and ALJs would still be present if the FTC continued to have separate enforcement power over consumer protection statutes.

171 Josh Hawley, *A Proposal from Sen. Josh Hawley: Overhauling the Federal Trade Commission*, HAWLEY.SENATE, <https://www.hawley.senate.gov/overhauling-federal-trade-commission> (last visited Sept. 9, 2020); see also Lauren Feiner, *Republican Senator Proposes Overhauling FTC and Making it Part of the DOJ to Take on Big Tech*, CNBC (Feb. 10, 2020), <https://www.cnbc.com/2020/02/10/senator-hawley-proposes-putting-the-ftc-under-doj-control.html>.

172 Hawley, *supra* note 171.

173 *Id.*

174 See *supra* notes 94–104 and accompanying text. The Court found that the removal restrictions were severable, leaving the CFPB in place but accountable to the President. See *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2209–10 (2020).

chance to rethink the FTC's role in consumer protection, and possibly its overlapping jurisdiction with the DOJ.

B. *Other Solutions*

1. For Traditional Concerns

In the alternative, this Note proposes smaller legislative changes designed to tackle some of the discrete problems of dual enforcement. As recommended by the AMC in 2007, Congress could enact legislation that specifies a new, short time period by which the DOJ and FTC must clear mergers.¹⁷⁵ This would prevent merger clearance disputes from intruding on the thirty-day postnotification merger-review period provided by the HSR Act, as well as allow parties with time-sensitive mergers to proceed more quickly.

Considering the problem of the FTC's lack of accountability to the President, the HSR Act could also be amended to give the President a tiebreaker vote regarding contentious merger clearances. Although this would impinge on the independence of the FTC as currently designed, it seems to be a better resolution method than a coin toss.

In May of 2018, the SMARTER (Standard Merger and Acquisition Reviews Through Equal Rules) Act was passed in the House of Representatives and introduced to the Senate by Senators Lee, Hatch, Tillis, and Grassley.¹⁷⁶ It aims to eliminate the differential procedural treatment of mergers challenged by the FTC and DOJ under the HSR Act.¹⁷⁷ The SMARTER Act requires the FTC to try its merger-review cases in federal court, eliminating the Commission's ability to adjudicate such cases through administrative proceedings.¹⁷⁸ Through this change, the SMARTER Act would also eliminate the difference in appellate standards of review. In support of the SMARTER Act, Senator Hatch urged that "[b]usinesses seeking to merge deserve consistent treatment without regard to which agency decides to review the merger."¹⁷⁹ There has been no action taken on this bill in the Senate since its introduction.

Alternatively, the political branches could restructure the FTC's budget, making the agency financially dependent on congressional appropriations and thus reducing its independence. This would give Congress the discretion to refrain from appropriating funds for FTC antitrust enforcement (and to increase funding for DOJ antitrust enforcement). Such an amendment

175 ANTITRUST MODERNIZATION COMM'N, *supra* note 6, at 131–32.

176 Standard Merger and Acquisition Reviews Through Equal Rules Act of 2018, S. 2847, 115th Cong. (2018).

177 *Id.*

178 *Id.* Such a change was also recommended by the AMC. *See* ANTITRUST MODERNIZATION COMM'N, *supra* note 6, at 131–32.

179 Press Release, Sens. Lee, Hatch, Tillis, and Grassley Introduce SMARTER Act (May 15, 2018), <https://www.lee.senate.gov/public/index.cfm/2018/5/sens-lee-hatch-tillis-and-grassley-introduce-smarter-act>.

could be modeled off of the proposed legislative reforms of the CFPB's budget.¹⁸⁰

2. For Constitutional Concerns

Some of the constitutional concerns created by the current dual enforcement structure are cured by the legislative solutions already listed. Eliminating the FTC's antitrust enforcement authority cures all of the constitutional issues raised in this Note. The SMARTER Act attends to equal protection complaints about the merger-clearance process. An amendment to the HSR Act that gives the President a tiebreaker vote starts to cure the constitutional concern that the dual enforcement structure intrudes on the President's ability to "take Care that the Laws be faithfully executed."¹⁸¹

Additionally, the ALJ statute could be amended to abolish ALJ removal restrictions to solve the new constitutional concern created by the combination of the *Free Enterprise Fund* and *Lucia* holdings. Congress could also pass a statute to reform the FTC's administrative processes in order to afford more procedural protections to the parties before the Commission.

The problem of different substantive standards, however, seems more challenging to fix through piecemeal attempts at harmonizing the work of the FTC and DOJ. As long as there are two autonomous agencies who wield overlapping civil antitrust enforcement authority, there will be two sets of substantive standards enforced on the parties before them.

CONCLUSION

Although the debates surrounding the overlapping jurisdiction of the DOJ and FTC are not novel, this particular historical moment provides an opportunity to reevaluate the wisdom of the status quo. Several Supreme Court cases in the last decade raise significant doubts of the constitutionality of the current regime, and leading Republicans and Democrats in the Senate have called for significant antitrust reform, especially in response to the challenges posed by Big Tech.¹⁸²

180 See, e.g., OFFICE OF MANAGEMENT & BUDGET, A BUDGET FOR AMERICA'S FUTURE: MAJOR SAVINGS AND REFORMS, FISCAL YEAR 2021 185 (2020) ("The Budget proposes legislative reforms to restructure and bring accountability to the CFPB. The proposed reforms would reinforce financial discipline, reduce unnecessary spending, and ensure appropriate congressional oversight by subjecting the CFPB to discretionary appropriations starting in 2022. The proposal would also cap transfers by the Federal Reserve Board to the CFPB during 2021 to \$485 million, equivalent to the 2015 level. These changes would allow the CFPB to focus its efforts on enforcing enacted consumer protection laws.").

181 U.S. CONST. art. II, § 3.

182 See, e.g., Hawley, *supra* note 171; Lee, *supra* note 1; Chris Mills Rodrigo, *Klobuchar Introduces Bill to Strengthen Antitrust Enforcement*, HILL (Mar. 10, 2020), <https://thehill.com/regulation/technology/486866-klobuchar-introduces-bill-to-strengthen-antitrust-enforcement>; Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>.

The strongest solution is to finally reverse the “historical accident” of the overlapping civil antitrust jurisdiction of the DOJ and FTC.¹⁸³ The United States should have a singular, unified voice regarding civil antitrust enforcement; this is especially relevant when swift, collaborative action with other agencies and nations is needed.¹⁸⁴ Smaller legislative changes are available, but will not ultimately solve the traditional or constitutional problems of dual enforcement. As Senator Lee noted of the SMARTER Act, such statutes “really just address[] a symptom and not the cause of the underlying problem.”¹⁸⁵

Legislators should make use of this moment of bipartisan focus on anti-trust laws and enforcement structures to reshape American antitrust to be responsive to modern challenges and consistent with the Court’s current understanding of the separation of powers.

183 Gellhorn et al., *supra* note 6, at 714.

184 See, e.g., *Joint Antitrust Statement Regarding COVID-19*, U.S. DEP’T OF JUST., https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19?utm_medium=email&utm_source=govdelivery (May 1, 2020).

185 Lee, *supra* note 1.