Essay

Rates of Dismissal in FTC Competition Cases from 1950–2011 and Integration of Decision Functions

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Abstract

Congress created the Federal Trade Commission ("FTC") to be an independent and expert body that would enforce competition law by both bringing and adjudicating complaints against violators. Since the FTC's creation, however, commentators have questioned whether housing these two functions in the same body biases the Commission's decisions. A special committee of the American Bar Association ("ABA") studied this issue in 1989, but ultimately concluded that the integration of decision functions should continue. The committee relied in part on statistics showing that the Commission dismissed forty percent of its competition cases on the merits in the 1980s, which the ABA committee took as evidence of a lack of bias.

This Essay encourages further study of whether the FTC's rates of dismissal of competition cases do in fact support a conclusion that its prosecutory functions do not bias its decisionmaking. The Essay compiles a dataset of competition cases decided by the FTC from 1950 to 2011 and determines the rate at which the FTC dismissed those cases on the merits. Further, it assesses whether the Commission's decisions are affected by the politics of presidential administrations by determining the rates at which the Commission dismissed

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cases brought by previous political administrations. Finally, to assess the ways in which perceived bias in the Commission's decisions could affect the Commission's goals, the Essay determines the rate at which the Commission's decisions are upheld by the U.S. courts of appeals.

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Introduction

When it created the Federal Trade Commission ("FTC") in 1914, Congress had high expectations for an independent and expert agency that could decide complex questions of antitrust law.[1] Since its creation, however, doubts about whether the Agency has lived up to these expectations have persisted.[2] A special committee of the American Bar Association ("ABA") found, in 1969, that if the measure of the FTC's performance was whether it had "broken new ground and made new law by resort to its unique administrative resources," the agency's record up until that point reflected a "missed opportunity."[3] Modern commentators point out that the FTC struggles to maximize its potential as an adjudicatory authority, and they warn that failure to improve will cause the United States to fall behind other competition

1 *See* 51 Cong. Rec. 8857 (1914) (statement of Rep. Morgan).

2 *See, e.g.*, Report of the ABA Commission to Study the Federal Trade Commission 1 (1969) [hereinafter 1969 ABA Report].

3 *Id.* at 65.

systems that are quickly advancing, and to thus forfeit the economic advantages that could result from such advancements.[4]

One criticism in particular has persisted throughout the years: that the FTC's role as both prosecutor and adjudicator compromises the fairness of its adjudicatory functions.[5] An ABA Antitrust Committee addressed the issue in a 1989 report ("1989 ABA Report"), and considered various proposals for ways that the FTC could be restructured to avoid housing the two functions within the same administrative body.[6] The Committee, however, was ultimately satisfied that the "current unity of functions should continue" because it did not pose a serious threat to the integrity of the Commission's adjudicatory decisions.[7] In support of its conclusion, the Committee made several observations, including observations about the institutional structure of the Commission as well as the observation that the Commission "has not hesitated to dismiss its [own] complaints."[8] The Committee reported that in the 1980s, at least forty percent of all antitrust complaints issued by the Commission were dismissed on the merits.[9]

This Essay aims to test whether the Commission does in fact readily dismiss its complaints, such that it is reasonable to conclude that the Commission's dual roles do not compromise the fairness of FTC adjudication. To perform this test, the Essay presents and analyzes a dataset comprised of all the competition cases decided by the Commission from 1950 to 2011. Based on this dataset, the Essay concludes that the Commission has not readily dismissed its complaints in the past. Further, it finds that many of the cases dismissed by the Commission are "straddle" cases—cases brought under a previous presidential administration—which may suggest that the dismissals that are made are politically influenced. Thus, the Commission's dismissal rates do not support the conclusion that the Commission is not biased by its role as both prosecutor and adjudicator.

The Essay proceeds as follows: Part I outlines the role of adjudication in the FTC, describing Congress's vision for the FTC as pro-

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4 *See, e.g.*, William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 MICH. L. REV. 1019, 1043–44 (2012) (reviewing DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT (2011)).

5 *See, e.g.*, REPORT OF THE AMERICAN BAR ASSOCIATION ANTITRUST SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION 118 (1989) [hereinafter 1989 ABA REPORT].

6 *Id.* at 119–20.

7 *Id.* at 123.

8 *Id.* at 124.

9 *Id.* at 124 n.181.

vided in the FTC Act and summarizing criticisms of the Commission's adjudicatory process. Part II sets out the data for this Study designed to assess the FTC's performance as adjudicator in competition cases. Finally, Part III presents the results of the Study, and Part IV contemplates the implications of the results for the FTC and U.S. competition law.

I. ADJUDICATION IN THE FTC

Congress created the five-member Federal Trade Commission ("FTC") in 1914, via the Federal Trade Commission Act ("FTC Act").[10] The Act—a response to public outcry over monopolistic trusts and perceived holes in the Sherman Act[11]—"empowered and directed [the Commission] to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce."[12] In using the open-ended phrase "unfair methods of competition in commerce" and declining to define it, Congress gave the FTC broad authority to decide the types of conduct that the FTC Act proscribes.[13] The FTC Act provided that, to exercise its enforcement powers under the statute,[14] the Commission would use administrative adjudication.[15]

A. The Process of Adjudication

Section 5 of the FTC Act lays out the adjudicatory process. By its terms, the Commission functions as both prosecutor and adjudicator in this process, meaning that it issues complaints and adjudicates those same complaints. The Act provides that the Commission "shall issue . . . a complaint" against an entity (the respondent) when it has "reason to believe" that the entity has used or is using an unfair method of competition, and when it further finds that a proceeding

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10 Federal Trade Commission ("FTC") Act of 1914, Pub. L. No. 63-203, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41–58 (2006)).

11 *See generally* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

12 15 U.S.C. § 45(a)(2).

13 *See, e.g.*, William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869, 872–73 (1989). The FTC Act prohibits conduct proscribed by the Sherman and Clayton Acts, but also reaches conduct beyond the scope of those Acts. *See* 1989 ABA REPORT, *supra* note 5, at 20 n.11.

14 The FTC is also empowered, along with the Department of Justice Antitrust Division, to directly enforce the Clayton Act. 15 U.S.C. § 21.

15 DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 96 (2011) ("Instead of regulation as an antitrust mode, Congress chose adjudication.").

with respect to that conduct would be "to the interest of the public."[16] Upon issuance of a complaint, the respondent has the right to appear at a hearing and "show cause why an order should not be entered by the Commission requiring [the respondent] to cease and desist from the violation of the law . . . charged in [the] complaint."[17] This process is called a "Part III" proceeding.[18]

After a hearing, if the Commission finds that an unfair method of competition was in fact used, it "shall issue . . . an order requiring [the respondent] to cease and desist from using such method of competition."[19] A cease and desist order will become final and enforceable sixty days after it is issued.[20] A respondent may seek review of a cease and desist order entered by the Commission in any U.S. court of appeals where the method of competition at issue was used or where the respondent resides or conducts business.[21] Upon review, the court may affirm, modify, or set aside the Commission's order.[22] On judicial review, the Commission's findings of fact and interpretations of the FTC Act are eligible for various levels of deference. Circuit courts must affirm the Commission's findings of fact if supported by substantial evidence,[23] and they must give substantial deference to the FTC's interpretations of the FTC Act.[24] As the D.C. Circuit stated in the preliminary injunction context, "[t]he district court's task is not to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance."[25] Judge Posner echoed this sentiment in *Hospital Corp. of America v. FTC*,[26] in which he concluded that it is "within the Com-

16 15 U.S.C. § 45(b).

17 *Id.*

18 *See* 16 C.F.R. pt. 3 (2012).

19 15 U.S.C. § 45(b).

20 *Id.* § 45(g)(2); *see also* A. Everette MacIntyre & Joachim J. Volhard, *The Federal Trade Commission*, 11 B.C. INDUS. & COM. L. REV. 723, 727 (1970) (noting the revision allowing the Commission to make orders final and enforceable, as opposed to applying to a court of appeals for enforcement).

21 15 U.S.C. § 45(b)(1)–(c). A respondent may also request review of an order by the Commission itself, as the Commission may alter, modify, or set aside any order entered by it upon a showing that "changed conditions of law or fact require" such a result. *Id.* § 45(b)(2).

22 *Id.* § 45(b).

23 Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1384, 1386 (7th Cir. 1986).

24 *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FED. TRADE COMM'N, http://www.ftc.gov/ogc/brfovrvw.shtm (last updated July 2, 2008).

25 FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1042 (D.C. Cir. 2008) (internal quotation marks omitted).

26 Hosp. Corp. of Am. v. FTC, 807 F.2d 1381 (7th Cir. 1986).

mission's primary responsibility" to infer competitive consequences from facts.[27]

After an order becomes final, the Commission may seek to enforce the order against a party who fails to comply with it in federal district court.[28] The district courts are empowered to enforce the order by "grant[ing] mandatory injunctions and such other and further equitable relief as [the court] deem[s] appropriate."[29]

In the merger context, federal courts may play a role earlier on in a case. The Commission is authorized, under section 13(b) of the FTC Act, to seek permanent or preliminary injunctions in federal district court to halt a merger pending completion of an administrative proceeding to determine whether the merger is unlawful.[30] If the court declines to grant an injunction, such a determination could affect the Commission's decision to pursue its complaint against the merging parties.[31]

B. The Promise of Adjudication

The FTC's conception as an adjudicatory body arose from dissatisfaction with competition law enforcement in the federal courts. As Judge Posner noted, "One of the main reasons for creating the Federal Trade Commission . . . was that Congress distrusted judicial determination of antitrust questions."[32] Moreover, commentators voiced dissatisfaction with the cases that the Attorney General had decided to bring under the Act.[33] Legislators thought that competition policy was inconsistent and ineffective due to political influences. They thought that competition law and enforcement "should reflect a continuous policy based on a body of precedents, and [should not be] subject to [the] changing political fortunes [of the] White House."[34] As was stated on the floor of the House of Representatives in advocating for the creation of the FTC:

> [W]e should . . . create a great, independent, non-partisan commission, independent of the President, independent of Cabinet officers, removed so far as possible from partisan

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27 *Id.* at 1386.

28 15 U.S.C. § 45(*l*).

29 *Id.*

30 *Id.* § 53(b).

31 *See* Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741 (Aug. 3, 1995).

32 *Hosp. Corp. of Am.*, 807 F.2d at 1386.

33 MacIntyre & Volhard, *supra* note 20, at 725.

34 *Id.*

> politics, that would command the respect and confidence of all parties and of all the people of the Nation. . . . Whatever we do in regulating business should be removed as far as possible from political influence.[35]

The FTC was thus created with this vision in mind. And, indeed, commentators still believe that administrative adjudication in the competition context offers distinct advantages. For one, it permits an independent agency with the relevant expertise to decide complex issues of antitrust law through the analysis of concrete facts.[36] Expertise is particularly important in modern proceedings, given that antitrust cases increasingly require complex economic proof and testimony about the alleged anticompetitive effects of charged conduct.[37] Administrative adjudication also offers advantages not necessarily specific to the competition context. It allows for experimentation and evolutionary adjustment of the law—both very important to federal agencies in light of their limited ability to evaluate the effects of previous enforcement measures in an effort to inform future actions.[38] Further, it produces fact-bound determinations of the conduct that constitutes a violation of the laws being enforced.[39] Such determinations yield more concrete and functional liability norms,[40] which provide the business community with necessary guidance. Moreover, adjudicatory decisionmaking is adaptive and flexible.[41]

Despite all of its perceived advantages, administrative adjudication by the FTC has been the subject of persistent criticism over the years. Prevalent among those criticisms is that the FTC's dual role as adjudicator and prosecutor gives rise to unfairness or perceptions of unfairness.

C. Criticisms of FTC Adjudication: Perceptions of Unfairness and the FTC's Dual Role

The FTC's dual role as adjudicator and prosecutor has consistently raised concerns about the fairness of FTC adjudication. As the

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35 51 CONG. REC. 8857 (1914) (statement of Rep. Morgan).

36 *See, e.g.*, CRANE, *supra* note 15, at 96 (noting that judges in adjudicative proceedings use facts to make liability standards "concrete, specific, and functional").

37 *See generally* William E. Kovacic, *Administrative Adjudication and the Use of New Economic Approaches in Antitrust Analysis*, 5 GEO. MASON L. REV. 313 (1997).

38 *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L. J. 377, 472 (2003) (explaining that experimentation in enforcement tests the efficacy of policy and creates equilibrium as policy evolves).

39 *See id.* at 398.

40 CRANE, *supra* note 15, at 96.

41 *Id.*

ABA explained in its 1989 Report, "no thoughtful observer is entirely comfortable with the FTC's . . . combining of prosecutory and adjudicatory functions. Whenever the same people who issued a complaint later decide whether it should be dismissed, concern about at least the appearance of fairness is inevitable."[42] The dual functions may give the Commission "incentives to skew rulings on liability or remedies to vindicate the same tribunal's earlier decision to prosecute."[43] Where the Commission has made budget requests for bringing important proceedings, it may be difficult for the Commission to turn around and dismiss those proceedings.[44] Moreover, even if the proceedings are in fact not prejudiced by an earlier decision to bring a complaint, the perception of unfairness or bias can cause problems, for example, by making the FTC vulnerable to legislative interference that compromises the Commission's ability to choose and adjudicate cases.[45]

Notwithstanding continued discussion about the effect of dual authority on the fairness or perception of fairness of the Commission's proceedings,[46] the ABA ultimately concluded in 1989 that these concerns were outweighed by the "substantial benefits of [the] unity of functions."[47] While acknowledging the "awkwardness" of the agency's dual roles, the ABA Committee concluded that:

> [T]he FTC should retain its unity of functions. All of us recognize that this is awkward, and the Commission should continue to be sensitive to the awkwardness. When a Commissioner has unduly prejudged an issue, he or she should consider recusing him or herself, as a matter of discretion. With sensitivity, however, the problems can be made

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42 1989 ABA REPORT, *supra* note 5, at 118.

43 Kovacic, *supra* note 13, at 898.

44 *See* 1989 ABA REPORT, *supra* note 5, at 118.

45 *See* Kovacic, *supra* note 13, at 898 (suggesting that Congress might feel freer to interfere in FTC adjudication because the Commission is an "intramural tribunal that might be said to have incentives to skew rulings on liability or remedies to vindicate the same tribunal's earlier decision to prosecute").

46 *See, e.g.*, 1989 ABA REPORT, *supra* note 5, at 8, 129 (noting that "observers continue to be uneasy about the FTC's twin roles as prosecutor and judge" even though the majority of the Committee "did not feel that the union of these functions seriously impedes the FTC's work or deprives respondents of fair adjudication of complaints brought against them"); Diana Gillis, *Closing an Administrative Loophole: Ethics for the Administrative Judiciary*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 149, 154 (2011) (arguing that the mitigating effects of independent Administrative Law Judges ("ALJs") on commissioner bias are compromised when the agency appoints one of its commissioners as an ALJ); Kovacic, *supra* note 13, at 902.

47 1989 ABA REPORT, *supra* note 5, at 125.

> manageable, and the substantial benefits of a unity of functions can be preserved.[48]

The Committee acknowledged that it came to this conclusion with "some uneasiness," but that it "[was] comforted by several factors," which it supported with various data collected from the FTC.[49] First among those factors was the length of time an FTC administrative adjudication took in the period between fiscal years 1975 and 1988—twenty-eight months on average.[50] The Committee argued that the lag made it plausible that a commissioner who voted for a complaint would change his mind based on changes in market conditions or the law, or advances in economics.[51] Moreover, it argued that the commissioner who voted for a complaint might not even be around to decide that complaint, given commissioner turnover.[52] Another factor was the Committee's determination that the Commission "has not hesitated to dismiss its complaints."[53] The Committee found that in the 1980s, the Commission dismissed sixty percent of all of its antitrust complaints.[54] Although the Committee noted that some of those complaints were dismissed because of changed circumstances (which it categorized as a non-merits determination), it ultimately concluded that more than forty percent of antitrust complaints "appear to have been dismissed on the merits."[55]

Other criticisms have persisted as well. Various observers have concluded throughout the FTC's tenure that the Commission has fallen short of its potential as an adjudicatory body. The 1969 ABA Report concluded that the Commission's overall performance was "disappointing."[56] It found that the Commission had failed to use its enforcement and adjudicatory powers to develop programs to address complex and unsettled questions of competition law and economics.[57] For example, it found that "the FTC resorted less frequently to formal proceedings, and ha[d] increased its reliance upon an 'informal' or

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48 *Id.*

49 *Id.* at 123, 143. The data was provided by the FTC pursuant to a Freedom of Information Act request. *Id.* at 143.

50 *Id.* at 162 tbl.3.

51 *Id.* at 124; *see also* Gillis, *supra* note 46, at 153–54 (noting other factors mitigating commissioner bias such as the involvement of administrative law judges, who are independent because they are not employees of the Commission).

52 1989 ABA REPORT, *supra* note 5, at 124.

53 *Id.*

54 *Id.*

55 *Id.* at 124 n.181.

56 1969 ABA Report, *supra* note 3, at 35.

57 *See* Kovacic, *supra* note 13, at 874.

'voluntary compliance' approach to bring about industry-wide compliance."[58] Going forward, the report called for the FTC to create national policy through the administrative process by adjudicating cases.[59]

Apart from the ABA studies, there have been few efforts to study the Commission's performance as an enforcement authority in the competition context.[60] Commentators describe the lack of such study as a missed opportunity to improve, especially at a time when foreign jurisdictions are striving to strengthen their own enforcement systems and the U.S. system could serve as a model.[61] Improving the institutional structure of the competition enforcement system would give consumers important economic advantages, and it would allow the United States to positively influence other developing enforcement systems.[62]

II. Dataset and Methodology

As discussed above, the 1989 ABA Report concluded that the FTC's unity of functions should continue because it did not pose a real threat to the fairness of FTC adjudication.[63] In support of this conclusion, it cited several factors, one of which was that the Commission "ha[d] not hesitated to dismiss its complaints."[64] It explained that in the 1980s, the Commission dismissed over forty percent of its antitrust complaints on the merits.[65]

The Study presented in this Essay seeks to test whether the Commission has in fact readily dismissed its complaints, such that fairness concerns are mitigated. It looks at a broader sample of competition cases—from 1950 to 2011, and looks closely at which dismissals actu-

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58 1969 ABA Report, *supra* note 3, at 8.

59 *See id.* at 25–26.

60 Modern examples are limited in their analyses. *See, e.g.*, D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 Antitrust L.J. 319, 331 (2003) (analyzing the use of substantive FTC adjudicatory decisions to develop competition law policy and concluding that the Commission makes "extensive use of administrative litigation to resolve important and difficult antitrust issues"); Kovacic, *supra* note 38, at 410–12 (counting number of Robinson-Patman Act complaints issued by FTC from 1961 to 2000 and grouping by presidential administration, but not reporting disposition of those complaints).

61 Kovacic, *supra* note 4, at 1043–44.

62 *Id.* at 1044.

63 1989 ABA Report, *supra* note 5, at 129.

64 *Id.* at 124.

65 *Id.* at 124 n.181. The Committee did not count dismissals on account of "changed circumstances" as dismissals on the merits. *Id.*

ally indicate the Commission's willingness to reconsider the facts and theories of its complaints.

A. Dataset

The dataset analyzed consists of adjudicatory decisions made by the Commission from 1950 to 2011.[66] It is limited to decisions rendered in the competition law context—in both merger and nonmerger cases—brought by the Commission under the Clayton Act and the competition provisions of the FTC Act. Thus, it does not include consumer protection cases brought under other provisions of the FTC Act.

For purposes of this Study, a "decision" means any final decision or order entered by the Commission, which includes cease and desist orders, dismissals, and divestiture orders. It does not include approval of a consent agreement. It thus excludes cases appearing on FTC's consent docket—cases in which a complaint is resolved by a consent agreement on the same day it is issued—and it excludes cases resolved by a consent agreement subsequent to the filing of a complaint.

The dataset only includes the first decision rendered by the Commission in a given case. This means that decisions in the dataset are not removed from the dataset or changed based on subsequent reversal or modification by a federal court or by the Commission itself.

B. Treatment of Dismissals: Merits vs. Non-Merits

This Study uses the rate at which the Commission dismisses its complaints on the merits as an indicator of the Commission's willingness to reconsider its earlier decisions to bring those complaints. So, the higher the percentage of complaints dismissed on the merits, the less likely it is that the Commission is biased by its role as prosecutor and the more likely its adjudications are fair.

Dismissals on the merits include dismissals that require an evaluation of the conduct at issue and a determination that the conduct either did not occur or is not unlawful, i.e., the Commission decided not to vindicate its earlier complaint. In any of these situations, the Commission has reconsidered the merits of its original complaint and

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66 To collect and analyze these decisions, the author compiled information from various sources including: the official FTC reporter, FEDERAL TRADE COMMISSION DECISIONS, *available at* http://www.ftc.gov/os/decisions/; the FTC Docket of Complaints, http://www.ftc.gov/os/adjpro/index.shtml; and a database of recent cases on the FTC website, *Case Names Only (from June 1996)*, FED. TRADE COMM'N, http://www.ftc.gov/os/caselist/index.shtm. All research is on file with the author.

demonstrated a willingness to come out the other way. Examples include:

- The Commission's investigation did not reveal evidence sufficient to sustain the allegations in the complaint.[67]
- Newly discovered facts negated a finding that behavior was anticompetitive.[68]
- Respondent's conduct qualified for an exemption.[69]
- Respondent was not a "corporation" within the meaning of the Act.[70]

Dismissals not on the merits, on the other hand, do not require the Commission to revisit the substance of a complaint, and therefore do not suggest the absence of bias in the way that decisions on the merits do. Distinguishing between dismissals on the merits and dismissals not on the merits is not always straightforward, but this Essay treats the following as dismissals not on the merits:

- Circumstances of the parties changed such that the complaint was no longer in the public interest,[71] e.g., industry conditions had changed such that they no longer supported the allegations in the complaint,[72] or respondent company no longer existed because it had been subsequently dissolved.[73]
- Too much time had passed since the issuance of the complaint, such that evidence was no longer available or the Commission concluded that its resources would be better spent elsewhere.[74]

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67 *See, e.g.*, Dairymen, Inc., 102 F.T.C. 1151, 1158–59 (1983) (dismissing complaint for insufficient evidence that acquisition had anticompetitive effects on the milk processing market).

68 *See, e.g.*, Exxon Corp., 100 F.T.C. 434, 438 (1982) (dismissing merger complaint because newly discovered evidence showed that party to be acquired was not a significant potential entrant in acquiring party's market).

69 *See, e.g.*, Middle Atl. Conference, 105 F.T.C. 406, 409 (1985) (dismissing complaint in light of a recent Supreme Court decision making a state action defense available to respondent association); Tristate Household Goods Tariff Conference, Inc., 106 F.T.C. 1, 4 (1985) (same).

70 *See* Coll. Football Ass'n, 117 F.T.C. 971, 986–87 (1994).

71 *See, e.g.*, Rhinechem Corp., 94 F.T.C. 132, 135 (1979) (merger case).

72 *See, e.g.*, Harper & Row Publishers, Inc., 122 F.T.C. 113, 113 (1996) (finding that changes in the industry, including private litigation on issues similar to those in the FTC complaint, sufficiently protected the public interest).

73 *See, e.g.*, Ark-La-Tex Warehouse Distrib., Inc., 73 F.T.C. 846, 871 (1968).

74 *See, e.g.*, H.P. Hood & Sons, Inc., 70 F.T.C. 302, 305–06 (1966) (finding that necessary witnesses were unavailable because they had become defendants in other proceedings); Pure Oil Co., 66 F.T.C. 1336, 1488 (1964) (dismissing case due to a change in industry conditions and Commission's decision that an industry-wide approach would better protect the public interest).

- Charged conduct had been discontinued and was not likely to resume, so complaint was no longer in the public interest.[75]
- Respondents required discovery about past and present commissioners and staff, which the Commission determined would be disruptive.[76]
- Parties agreed that the matter could not be resolved in the foreseeable future.[77]

Some non-merits dismissals are specific to the merger context, as they are tied to a district court's decision to grant or deny a preliminary injunction against the respondent. If a district court grants a preliminary injunction, the respondent may abandon its proposed transaction, rendering the complaint moot.[78] In that case, the Commission may dismiss the complaint because the preliminary injunction has effectively stopped the transaction. Where a district court denies a request for a preliminary injunction, however, the Commission might also decide to dismiss the complaint, knowing that the merger or acquisition will be consummated and any remedy it could obtain would be limited.[79] In each of these cases, the Commission's dismissal is based on a district court judge's consideration of the merits of the complaint,[80] not the Commission's. Thus, this Essay categorizes these dismissals as not on the merits.

Finally, there is a subset of dismissals that are somewhat difficult to categorize. These are dismissals that occur pursuant to the following sequence of events: The Commission enters a cease and desist order in a particular case, and that decision is appealed to a federal court. The federal court overturns the Commission's cease and desist order and remands to the Commission, which dismisses the case. In

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75 *See, e.g.*, Mason, Au & Magenheimer Confectionary Mfg., Co., 66 F.T.C. 1219, 1222 (1964).

76 *See* Frozen Food Forum, Inc., 84 F.T.C. 1211, 1217 (1974).

77 *See, e.g.*, Exxon Corp., 98 F.T.C. 453, 459–61 (1981).

78 *See, e.g.*, Swedish Match N. Am., Inc., No. 9296 (Fed. Trade Comm'n Jan. 4, 2001), *available at* http://www.ftc.gov/os/2001/01/swedishdismisscmp.htm.

79 *See, e.g.*, Arch Coal, Inc., No. 9316, at 3, 7–8 (Fed. Trade Comm'n June 13, 2005), *available at* http://www.ftc.gov/os/adjpro/d9316/050613commstatement.pdf (finding that the Commission would waste resources by evaluating the same record that the district court found insufficient to enjoin the merger); Butterworth Health Corp., 124 F.T.C. 424 (1997); *see also* Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741, 39,743 (Aug. 3, 1995).

80 One of the factors for consideration of the Commission's motion for preliminary injunction requires a judge to consider whether the Commission is likely to succeed on the merits of its complaint. *See, e.g.*, 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2948, at 133 (2d ed. 1995).

light of the reversal, the Commission decides to dismiss other related cases that are based on the same conduct or industry.[81] To view the data in a light most favorable to the Commission, this Study categorizes these dismissals as dismissals on the merits.

III. Results and Analysis

This Study first tests the fairness of FTC decisions by considering the rates at which the Commission has dismissed cases on the merits in each decade since 1950. Next, it tests the political independence of the Commission by considering whether the Commission is more likely to dismiss cases brought under a previous administration associated with a different political party.

A. Is the Commission Biased by Its Dual Role?

To assess whether the Commission's integration of functions affects its decisionmaking, this Study determines the rates at which the Commission dismissed its competition cases on the merits in the decades from 1950 to 2011. Table 1 shows the total number of competition cases decided in each decade.

Table 1. Number of Competition Decisions by Decade[82]

Decade	No. of Competition Cases Decided
1950–1959	195 (160)
1960–1969	265 (188)
1970–1979	67 (63)
1980–1989	52 (48)
1990–1999	22 (17)
2000–2011[83]	20

The numbers in parentheses show the number of decisions adjusted for "sweep" cases, meaning that decisions made on complaints that were brought as part of an enforcement "sweep" are not individually counted, but instead are counted together as one decision. A

81 *See, e.g.*, Crush Int'l, Ltd., 98 F.T.C. 428, 446 (1981) (dismissing complaints based on D.C. Circuit's decision setting aside FTC's cease and desist orders in companion cases *Coca Cola Co.*, 91 F.T.C. 517 (1978), and *PepsiCo, Inc.*, 91 F.T.C. 680 (1978)).

82 The dataset from which the numbers in the tables presented in this Essay are drawn is available at *The George Washington Law Review*'s website, www.gwlr.org.

83 To capture as many decisions as possible in this period, the dataset includes decisions from 2010 and 2011.

"sweep" is an enforcement effort by which the Commission targets unlawful conduct in a specific industry by bringing multiple complaints against multiple respondents operating in that industry.[84] The complaints are typically brought at the same time, or roughly around the same time, and they are typically decided at the same time and on the same grounds, given that they deal with the same conduct. For example, of the forty-seven cases decided in 1962, fifteen related to the same anticompetitive conduct by fifteen different toy companies, and nine to the same conduct of various dairy companies. Further, of the sixty-one cases decided in 1964, eleven related to the price discrimination behavior of carpet companies, eleven related to payment of discriminatory allowances by catalog companies, and four related to the price discrimination behavior of oil companies. Because sweep cases are often counted as one decision as opposed to as multiple decisions,[85] this Study counts them both ways.

Table 1 demonstrates that the number of cases decided by the FTC dropped off significantly after the publication of the 1969 ABA Report: 265 cases in the 1960s, compared to only 67 in the 1970s. This could be the result of the ABA's recommendation in the 1969 Report that the Commission should pursue more economically significant matters, as opposed to the "trivial" matters it had previously pursued.[86] Pursuing more economically significant matters would necessarily require more resources to be devoted to each case, meaning that the Commission would bring fewer cases.

Table 2 shows the number and percentage of the total cases decided that were dismissed on the merits.

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84 *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Sweep Stops Peddlers of Bogus Cancer Cures (Sept. 18, 2008), *available at* http://www.ftc.gov/opa/2008/09/boguscures.shtm.

85 *See, e.g.*, Kovacic, *supra* note 37, at 411.

86 *See* Kovacic, *supra* note 13, at 874–75 ("The FTC of the early 1970s took this advice seriously.").

TABLE 2. PERCENTAGE OF COMPETITION CASES DISMISSED ON THE MERITS

Decade	No. of Cases Decided	No. of Cases Dismissed on the Merits	% of Cases Dismissed on the Merits
1950–1959	195 (160)	41 (32)	21% (20%)
1960–1969	265 (188)	38 (28)	14% (15%)
1970–1979	67 (63)	12 (8)	18% (13%)
1980–1989	52 (48)	19	38% (40%)
1990–1999	22 (17)	4	18% (24%)
2000–2011	20	0	0%
	621 (496)	**115 (92)**	**19% (19%)**

First, the ABA's estimated dismissal rate of 40% for the 1980s finds some support in the observed data.[87] The data show that the rate at which the Commission dismissed cases on the merits in the 1980s is 38% (42% adjusted for sweeps cases).

It appears, however, that the dismissal rate for the 1980s is somewhat of an outlier. Whereas the 38% rate of dismissal for the 1980s and the 40% rate calculated by the ABA report are not significantly different, the rates for the 1950s, 1960s, 1970s, and 1990s and the 40% ABA rate *are* significantly different.[88] This suggests that relying on the 1980s dismissal rate to conclude that the Commission readily dismisses its cases may be misleading. Moreover, looking at the dismissal rates for each decade since the 1950s, there is little assurance that the FTC is readily dismissing its cases. The dismissal rates thus cannot be relied upon in concluding that FTC adjudication is free from bias resulting from the Commission's dual functions.

Of course, there could be many explanations for a low rate of dismissals on the merits—explanations that do not suggest bias in FTC adjudication. For one, perhaps the Commission only brings those cases that are particularly strong, so that it can be sure that its resources are allocated to address conduct with the most potential to harm competition. For example, in the merger context, the FTC must dedicate a substantial amount of resources to bring and investigate a complaint.[89] Thus, the Commission might only bring complaints that

87 *See* 1989 ABA REPORT, *supra* note 5, at 124 n.181.

88 These rates are significantly different at a 5% significance level: For the 1950s, 1960s, and 1970s, the p-value is less than 0.001. For the 1990s, the p-value is less than 0.05. There were no dismissals in the 2000s, so there is no data to calculate a p-value. If the numbers adjusted for sweeps cases are used, these results stay the same except for the 1990s rate, which is no longer significantly different from 40% at a 5% significance level.

89 *See* 1989 ABA REPORT, *supra* note 5, at 16, 144 app. C graph 3.

have the highest likelihood of resulting in a finding of liability because those complaints are the most worthy of its limited resources. Similarly, in the general competition context, the Commission might want to go after only those companies with substantial marketing power.[90] Such cases naturally require more resources to adjudicate, and the Commission might again not want to dedicate those resources without being sure that the case will result in liability.

Even if the low dismissal rates can be explained by factors other than bias stemming from institutional design, it still remains that the observed dismissal rates do not provide strong evidence in support of a conclusion that the Commission readily dismisses its cases and thus the FTC adjudicatory process is free from bias.

B. Is the Commission Politically Independent?

While the previous Section investigates whether the Commission's rate of dismissals suggests institutional bias, this Section investigates what those dismissals may tell us about another type of bias–political bias. As explained in Part I, housing the prosecutory function within the Commission was in part an attempt to free antitrust policy from political influence and the resulting inconsistencies.[91] Accordingly, some institutional bias resulting from the Commission's dual prosecutory and adjudicatory authority could be understood as the price of political independence. Yet, if the Commission's decisions are not free from political influence, the Commission is not realizing the benefits of this compromise.

To investigate political bias, this Section determines how many of the Commission's dismissals are dismissals of "straddle" cases, meaning cases in which complaints are brought under a presidential administration associated with one political party, but are decided during an administration associated with another. Because it is often the case that a new administration brings with it a new FTC Chairman, this means that many straddle cases are brought by a Commission chaired by an appointee of one political party's administration, and decided by a Commission chaired by an appointee of a different party's administration. So, if the Commission is affected by the political agenda of the White House, it might be hypothesized that the dismissal rate of

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90 This could be as a result of the ABA's recommendation in the 1969 Report that the Commission should pursue more economically significant matters, as opposed to the "trivial" matters it had previously pursued. *See* Kovacic, *supra* note 13, at 874.

91 *See supra* notes 33–35 and accompanying text (noting that the Attorney General's decisions were distrusted).

straddle cases would be high when one party's administration takes over after an opposing party's administration.[92]

Table 3 below shows how many cases were decided and dismissed under three presidential administrations, each of which marked a change from one political party to another. First is the Republican administration of President Dwight D. Eisenhower, who assumed office in 1953 and appointed Republican Edward F. Howrey as FTC Chairman that same year.[93] Second is the Democratic administration of President John F. Kennedy, who assumed office in 1961 and replaced Eisenhower's Chairman with Democrat Paul Rand Dixon.[94] And third is the Republican administration of President Ronald Reagan, who assumed office in 1981 and replaced the former Democratic administration's Chairman with Republican James C. Miller III.[95]

TABLE 3. PERCENTAGE OF COMPETITION CASES DISMISSED ON THE MERITS BY ADMINISTRATION

	No. of Cases Decided	**No. of Cases Dismissed on the Merits**	**% of Cases Dismissed on the Merits**
Eisenhower (1953–1961)	146 (127)	32 (30)	22% (24%)
JFK/LBJ (1961–1969)	241 (165)	36 (26)	15% (16%)
Reagan (1981–1989)	42 (36)	15	36% (42%)
	429 (328)	**83 (71)**	**19% (22%)**

Tables 4 and 5 below show how many of the cases decided and dismissed by these administrations were straddle cases versus non-straddle cases.

92 Some might expect that the rate of dismissals would be highest when a Republican administration takes over after a Democratic administration, given that Democratic administrations are perceived as more likely to bring cases on novel and expansive theories of the laws. *Cf., e.g.*, Daniel A. Crane, *A Neo-Chicago Perspective on Antitrust Institutions*, 78 ANTITRUST L.J. 43, 57 (2012) (describing a conservative perspective as one that is "increasingly suspicious of the administrative methods of regulation") (internal quotation marks omitted).

93 FED. TRADE COMM'N, COMMISSIONERS AND CHAIRMEN OF THE FEDERAL TRADE COMMISSION (2013), *available at* http://ftc.gov/ftc/history/commisionerchartlegal.pdf.

94 *Id.*

95 *Id.*

TABLE 4. PERCENTAGE OF STRADDLE CASES DISMISSED ON THE MERITS BY ADMINISTRATION

	No. Straddle Cases Decided	No. Straddle Cases Dismissed on the Merits	% of Straddle Cases Dismissed on the Merits
Eisenhower (1953–1961)	59 (51)	17 (15)	29%
JFK/LBJ (1961–1969)	171 (111)	32 (22)	19% (20%)
Reagan (1981–1989)	30	11	37%
	260 (192)	**60 (48)**	**23% (25%)**

TABLE 5. PERCENTAGE OF NON-STRADDLE CASES DISMISSED ON THE MERITS BY ADMINISTRATION

	No. Non-Straddle Cases Decided	No. Non-Straddle Cases Dismissed on the Merits	% of Non-Straddle Cases Dismissed on the Merits
Eisenhower (1953–1961)	87 (76)	15	17% (20%)
JFK/LBJ (1961–1969)	70 (54)	4	6% (7%)
Reagan (1981–1989)	12	4	33%
	169 (142)	**23**	**14% (16%)**

Comparing Tables 3 and 4 shows that 72% of the total competition cases dismissed under these three administrations combined were straddle cases. Comparing Tables 4 and 5 reveals that, on balance, the Commission more often dismissed straddle cases as opposed to non-straddle cases; looking at the cases decided under the three administrations combined, dismissal of straddle cases was 1.6 times more likely. Under the Eisenhower and Reagan administrations, however, the rates of dismissal of the straddle cases versus non-straddle cases were not significantly different.[96] Under the JFK/LBJ administration, by contrast, the Commission was more than three times as likely to dismiss a straddle cases as opposed to a non-straddle case, and the rates of dismissal for the two types of cases were significantly different.[97]

In other words, these Tables show that the Commission was more often dismissing cases that were brought under a previous administra-

96 The rates for the Eisenhower and Reagan administrations are not significantly different at a 5% significance level.

97 The rates for the JFK/LBJ administration *are* significantly different at a 5% significance level.

tion associated with another political party—an administration that presumably took different approaches to competition law and government regulation than the current administration.[98] Thus, the Commission less often dismissed cases that had been brought under the same administration.

This might suggest that some of the Commission's dismissals during these three administrations were influenced by the politics of the current administration. This analysis, however, grossly oversimplifies the antitrust policy of a given administration, and it assumes that dismissing a case brought by a previous administration is at least in part politically motivated. But, just as was the case with the Commission's dismissal rates of all competition cases studied in the previous Section, this data does not offer support for the conclusion that the Commission enjoys the political independence that would make any bias resulting from its dual functions tolerable.

IV. Potential Effects of Perceived Unfairness of FTC Adjudication: Less Deference on Appeal?

The data presented above does little to dispel concerns about whether the Commission's decisions suffer from institutional or political bias. And without sufficient evidence to the contrary, the Commission's effectiveness could be questioned. As explained in Part I, if its decisions are perceived as unfair, the Commission may become vulnerable to legislative interference with its agenda, rendering it less capable of choosing and adjudicating its own cases to develop antitrust policy as it sees fit.[99]

There is, however, another potential type of interference: reversal by the courts of appeals. If the U.S. courts of appeals perceive FTC rulings as unfair or biased, perhaps they uphold FTC decisions less often than they do the decisions of other federal agencies. This Part thus tests whether the Commission's decisions are reversed at a higher rate than administrative decisions across all agencies. It analyzes a subset of the dataset—those cases in which the Commission's decision was appealed to a U.S. court of appeals. Table 6 reports the number of appeals heard by the courts of appeals starting in the 1970s, and shows the number of appeals that resulted in a reversal of the Commission's decision below.

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98 *See supra* note 92.

99 *See* Kovacic, *supra* note 13, at 902.

TABLE 6. PERCENTAGE OF FTC APPEALS IN WHICH COMMISSION'S DECISION WAS REVERSED OR VACATED

	No. of Appeals of FTC Decisions[100]	**No. of Appeals in which FTC Decision Was Reversed, Set Aside, or Vacated**[101]	**% of Time FTC Decision Was Reversed, Set Aside or Vacated**
1950–1959	35	10	29%
1960–1969	81	30	37%
1970–1979	31	9	29%
1980–1989	14	9	64%
1990–1999	5	1	20%
2000–2011	9	2	22%

Again, the 1980s rate appears to be an outlier, with nine out of fourteen, or 64% of decisions reversed on appeal. By contrast, however, only nine out of thirty-one appeals (29%) resulted in a reversal of the Commission's decision in the 1970s. And in the 1990s and 2000s, the reversal rates were 20% and 22%, respectively. Of course the sample sizes for these rates—the number of appeals—are low, so it is difficult to conclude that these rates would remain the same if the sample size were to grow.

For comparison, Table 7 shows the rate at which all federal administrative decisions are reversed by the U.S. courts of appeals. Based on reports published by the *Judicial Business of the United States Courts*, the U.S. courts of appeals terminated on the merits 52,664 appeals from administrative decisions in the fiscal years from 1997 to 2011.[102] Of those appeals, 3813 resulted in reversals of the agency decision below and 3065 resulted in remands,[103] meaning that 13.06% of the administrative appeals resulted in reversal or remand.

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100 "Appeals" include consideration by a court of appeals of a petition for review of an FTC order. If a court of appeals denied a petition for review and considered the merits of the FTC's order in doing so, that denial is counted as affirming the FTC order.

101 Cases counted in this column do not include remands for reconsideration of a defense. *See, e.g.*, *U.S. Steel Corp. v. FTC*, 426 F.2d 592, 609 (6th Cir. 1970). If the court of appeals affirmed in part and reversed in part, the court of appeals opinion was analyzed to determine whether the decision could be fairly categorized as one or the other.

102 The *Judicial Business of the United States Courts* reports for Fiscal Years 1997 to 2011 are available online at http://www.uscourts.gov/Statistics/JudicialBusiness.aspx. Each report has a Table B-5, which reports the number and disposition of all federal administrative appeals heard by the U.S. courts of appeals in that fiscal year. The total number of administrative appeals for 1997 to 2011 (52,664) was calculated by summing up all of the administrative appeals reported in the "Total" column under the "Terminations on the Merits" heading. *See, e.g.*, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR 89 tbl.B-5, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf.

103 The total numbers of reversals and remands were calculated by summing up all of the

TABLE 7. PERCENTAGE OF ADMINISTRATIVE APPEALS IN WHICH ADMINISTRATIVE DECISION WAS REVERSED

	No. of Administrative Appeals Terminated on the Merits	No. of Appeals in Which Administrative Decision Was Reversed or Remanded	% of Time Administrative Decision Was Reversed or Remanded
1997–present	52,664	6878	13.06%

Comparing the FTC reversal rates with the all-agency reversal rate seems to suggest that the FTC's decisions are reversed more often than other agencies, i.e., the Commission's decisions receive less deference than other agencies' decisions. The rates of dismissal on appeal for the 1950s, 1960s, 1970s, and 1980s are significantly different from 13.06%.[104] However, as has been reiterated throughout this Essay, the small sample sizes used to calculate the FTC rates undermine the reliability of those rates. Moreover, even assuming that the reversal rate is high in comparison to other agencies, the data cannot show whether the courts of appeals judges reverse FTC decisions because they perceive the Commission to be unfair or biased.

Nevertheless, it still remains that a high rate of reversal of Commission decisions stands to undermine Congress's original vision for the FTC. The Commission was created in part because Congress did not trust the courts' resolution of complex antitrust questions.[105] Congress committed those questions to the Commission because it was presumed to have the expertise necessary to develop consistent and thoughtful competition policy.[106] If the Commission is not permitted to exercise that expertise in its decisionmaking, it cannot make the contributions to competition law and policy that Congress intended.

CONCLUSION

The results of this Study suggest that concerns about the fairness of FTC adjudication and its unity of functions cannot be dispelled by the rate at which the Commission dismisses its complaints on the merits. By testing the Commission's willingness to reconsider its own complaints as well as its political independence, this Essay intends to encourage and inform discussion about the fairness or perception of

administrative appeals reported in the "Reversed" and "Remanded" columns under the "Terminations on the Merits" heading. *See, e.g.*, *id.*

104 The rates are significantly different at a 5% significance level.

105 *See supra* note 32 and accompanying text.

106 *See supra* note 35 and accompanying text.

fairness of FTC adjudication, and more generally, about whether the Commission is realizing the potential of adjudication in the competition law context.