

Debunking *Humphrey's Executor*

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ABSTRACT

The Supreme Court's 1935 Humphrey's Executor decision paved the way for the modern administrative state by holding that Congress could constitutionally limit the President's powers to remove heads of regulatory agencies. The Court articulated a quartet of features of the Federal Trade Commission's ("FTC") statutory design that ostensibly justified the Commission's constitutional independence. It was to be nonpartisan and apolitical, uniquely expert, and performing quasi-legislative and quasi-judicial, rather than executive, functions. In recent years, the staying power of Humphrey's Executor has been called into question as a matter of constitutional design. This Essay reconsiders Humphrey's Executor from a different angle. At the end of a one-hundred-year natural experiment, the Commission bears almost no resemblance to the Progressive-technocratic vision articulated by the Court. The Commission is not politically independent, uniquely expert, or principally legislative or adjudicative. Rather, it is essentially a law enforcement agency beholden to the will of Congress. This finding has potentially important implications for agency design, constitutional doctrine and theory, and understanding of agency functioning.

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INTRODUCTION

In *Humphrey's Executor v. United States*,¹ the United States Supreme Court paved the way for the modern administrative state by holding that Congress could constitutionally limit the President's power to remove the heads of administrative agencies for political reasons.² The Court held that President Franklin Roosevelt's removal of Federal Trade Commissioner William E. Humphrey without cause contravened the Federal Trade Commission Act,³ which constitutionally limited the President's removal power to "for cause" termination.⁴ Although the immediate stakes in the case were picayune—some \$3,000 in back pay for the deceased Commissioner⁵—the implications for the constitutional, administrative, and political order were immense. Broadly speaking, that decision served to legitimize the modern regulatory state and remains one of the iconic judicial pillars of the technocratic, independent administrative system.⁶

In *Humphrey's Executor*, Justice Sutherland's affirmation regarding the constitutionality of FTC Commissioner immunity from presidential removal for political reasons rested on a quartet of broad assertions concerning the character of the FTC. According to the Court, the Federal Trade Commission (FTC) is (1) nonpolitical and nonpartisan, (2) uniquely expert, (3) "quasi-legislative," and (4) "quasi-judicial," rather than executive.⁷ Together, these four qualities ostensibly lent the FTC a character different from that of ordi-

1 *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

2 *Id.* at 629.

3 15 U.S.C. §§ 41–58 (2012).

4 *See id.* § 41; *Humphrey's Ex'r*, 295 U.S. at 629.

5 The executor of Humphrey's estate sought to recover \$3,043.06 plus interest. Brief for Samuel F. Rathbun, Executor at 2, *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (No. 667), 1935 WL 32964 (Mar. 19, 1935).

6 *See, e.g.*, Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 13, 17 (1998) (asserting that *Humphrey's Executor* "ratifies the Administrative State"); Larry Kramer, *What's a Constitution for Anyway? Of History and Theory*, Bruce Ackerman and the New Deal, 46 CASE W. RES. L. REV. 885, 926 (1996) (calling *Humphrey's Executor* one of the "administrative state's main support beams"); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 94 ("*Humphrey's Executor* has long been viewed as the fundamental constitutional charter of the independent regulatory commissions."); Richard H. Pildes, *Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act*, 5 N.Y.U. J.L. & BUS. 485, 520 (2009) (calling *Humphrey's Executor* "truly the seminal decision of the modern administrative state").

7 *See Humphrey's Ex'r*, 295 U.S. at 628.

nary law enforcers, hence the legitimacy of insulating commissioners from the President's constitutional responsibility to "take Care that the Laws be faithfully executed."⁸ At its core, *Humphrey's Executor* rests on the assertion that the FTC is something other than a conventional law enforcement agency and thus merits a different position in the political order than executive departments like the Justice Department that also enforce laws concerning antitrust and consumer protection.⁹

Unitary executive proponents and critics of the modern regulatory state have sharply criticized the Court's assumptions in *Humphrey's Executor*. They have argued that, contrary to the Court's assertion, the FTC serves quintessentially executive functions¹⁰ and that it impairs the President's ability to cohesively and consistently enforce the laws.¹¹ In a recent concurring opinion, Judge Brett Kavanaugh of the D.C. Circuit launched a vigorous assault on *Humphrey's Executor*, arguing that the decision deserved the same overruling as the company it kept during the 1935 term.¹² Despite a rising tide of

8 U.S. CONST. art. II, § 3.

9 See *About the Division*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/atr/about/index.html> (last visited Oct.17, 2015). On the scope and role of the FTC, see generally J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1972 Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157 (2015); Jeffrey A. Eisenach & Ilene Knable Gotts, *Looking Ahead: The FTC's Role in Information Technology Markets*, 83 GEO. WASH. L. REV. 1876 (2015); Andrew I. Gavil, *The FTC's Study and Advocacy Authority in Its Second Century: A Look Ahead*, 83 GEO. WASH. L. REV. 1902 (2015); Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919 (2015); Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230 (2015); David A. Hyman & William E. Kovacic, *Can't Anyone Here Play This Game? Judging the FTC's Critics*, 83 GEO. WASH. L. REV. 1948 (2015); Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979 (2015); Maureen K. Ohlhausen, *Weigh the Label, Not the Tractor: What Goes on the Scale in an FTC Unfairness Cost-Benefit Analysis?*, 83 GEO. WASH. L. REV. 1999 (2015); Richard J. Pierce, Jr. *The Rocky Relationship Between the Federal Trade Commission and Administrative Law*, 83 GEO. WASH. L. REV. 2026 (2015); Edith Ramirez, *The FTC: A Framework for Promoting Competition and Protecting Consumers*, 83 GEO. WASH. L. REV. 2049 (2015); D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064 (2015); David C. Vladeck, *Charting the Course: The Federal Trade Commission's Second Hundred Years*, 83 GEO. WASH. L. REV. 2101 (2015); Joshua Wright & John Yun, *Stop Chug-a-lug-a-lugin 5 Miles an Hour on Your International Harvester: How Modern Economics Brings the FTC's Unfairness Analysis Up to Speed with Digital Platforms*, 83 GEO. WASH. L. REV. 2130 (2015).

10 Miller, *supra* note 6, at 93 ("It was nonsense to assert that the FTC did not act in an executive role.").

11 Justice Scalia has been a particularly sharp critic of *Humphrey's Executor*. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 724–27 (1988) (Scalia, J., dissenting) (describing *Humphrey's Executor* as "six quick pages devoid of textual or historical precedent").

12 *In re Aiken Cnty.*, 645 F.3d 428, 441–42 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

unitary executive sentiment, reflected most recently in the Supreme Court's *Free Enterprise Fund v. PCAOB* decision,¹³ *Humphrey's Executor* remains a bedrock precedent for the administrative state.¹⁴

In 2014, the FTC celebrated its centennial anniversary. With the demise of the Interstate Commerce Commission (ICC) in 1992,¹⁵ the FTC is the surviving agency prototype for the alphabet soup of New Deal agencies that would follow. The Supreme Court's examination of the FTC's character and validation of its independence served to bless an entire category of agencies that followed the FTC blueprint.¹⁶ With a hundred years of natural experiment, it is worth pausing to consider the actual experience of the FTC and ask whether the Court's quartet of assumptions in *Humphrey's Executor* were correct.

In fact, they were largely incorrect—or, at least, fail to capture the dominant character of the FTC over time. First, the FTC's independence and nonpartisanship are overstated.¹⁷ Work in political science and economics has shown that the FTC tends to be compliant to the will of Congress and particular congresspersons.¹⁸ This may create some separation of powers between the FTC and other executive branch agencies that pursue similar goals under the will of the President, but separation of powers is a different justification than the sort of technocratic independence suggested in *Humphrey's Executor*. Second, the FTC is not uniquely expert.¹⁹ For much of its history, presidents appointed Commissioners as a matter of political patronage rather than expertise in competition and consumer protection.²⁰ Even as the FTC grew into a more professional and expert agency in the last several decades, it enjoyed no comparative advantage in expertise over purely executive agencies, like the Justice Department's Antitrust Division, which fulfills almost identical

13 *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (holding unconstitutional provisions of Sarbanes-Oxley Act creating accounting oversight board where members of board could only be removed for cause by Securities and Exchange Commission, whose Commissioners also could only be removed for cause).

14 Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 778 (2013) (observing that “[t]he constitutional status of independent agencies stems . . . from . . . *Humphrey's Executor*”).

15 *See infra* notes 99–101 and accompanying text.

16 *See, e.g., Mistretta v. United States*, 488 U.S. 361, 410–11 (1989) (upholding the constitutionality of the United States Sentencing Commission and invoking *Humphrey's Executor* to support limits on the President's removal of Commission members).

17 *See infra* Part II.A.

18 *See infra* note 114 and accompanying text.

19 *See infra* Part II.B.

20 *See infra* note 146 and accompanying text.

functions.²¹ Third, the description of the FTC as “quasi-legislative” has been more wrong than right.²² In its original antitrust capacity—the sole capacity it had at the time of *Humphrey's Executor*—the FTC has not been legislative at all, issuing virtually no substantive rules.²³ It has issued some consumer protection rules in the last few decades, although rulemaking remains a very limited portion of its docket.²⁴ Finally, adjudication is a very small part of what the agency does.²⁵ A new empirical study, reported in this Essay, shows that the FTC's predominant mode of law enforcement is through consent decrees, which involve no adjudication, and that the FTC is more prone to sue in federal district court as a plaintiff than to adjudicate matters administratively in the event there is adjudication.

The upshot is that the FTC has essentially become the executive agency that the *Humphrey's Executor* Court denied it was. The FTC functions primarily by enforcing the antitrust and consumer protection laws as a plaintiff, no more expert than the executive branch agencies doing the same thing. The principal structural difference from the executive branch agencies is that the FTC is beholden to Congress rather than to the President.

One may doubt the relevance of these findings for two reasons, one legal and one functional. First, post-*Humphrey's Executor* decisions on the constitutionality of limiting the President's removal power have not relied on the justifications discussed above. After *Morrison v. Olson*,²⁶ which allowed the independence of the independent counsel—an obviously executive function—*Humphrey's Executor's* reliance on the FTC's ostensibly nonexecutive character to justify independence seems quaint. Second, a substantial body of literature has shown the President's removal power and executive control over administrative agencies are too easily conflated.²⁷ The President has many devices to control agencies other than the removal power—and even where removal power is present, other structural features may create substantial independence.

In light of these considerations, the burden of this Essay is not to urge reconsideration of *Humphrey's Executor* on the narrow ground

21 See *infra* text accompanying notes 153–54.

22 See *infra* Part II.C.

23 See *infra* text accompanying notes 168–70.

24 See *id.*

25 See *infra* Part II.D.

26 *Morrison v. Olson*, 487 U.S. 654 (1988).

27 See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 667 n.402 (1984).

of its holding—that certain structural features of an agency justify its constitutional independence from presidential removal—but rather to debunk the case’s Progressive-technocratic narrative in light of a century of experience. As an archetypal case study, the FTC’s history shows the tendency of an agency over time to shift away from its ostensible statutory design as a politically detached, technocratic, rulemaking, and adjudicatory body toward a politically engaged law enforcement organization. This finding potentially has important implications for agency design, constitutional doctrine and theory, and understanding of agency functioning.

This Essay’s organization is as follows. Part I situates *Humphrey’s Executor* in the broader story of Progressive era technocratic experimentation, contestation between the executive, legislative, and judicial branches, and constitutional doctrine. Part II engages *Humphrey’s Executor*’s four-pronged justification for independence and shows that it is inconsistent with the historical reality of the FTC. Finally, Part III considers the implications of the FTC’s observed performance as a law enforcement agency for its ongoing competition and consumer protection missions.

I. HUMPHREY’S EXECUTOR IN CONTEXT

A. Myers, Humphrey’s Executor, and the Progressive Vision for Technocratic Independence

In constitutional history, *Humphrey’s Executor* assumes the role of counterpoint and correction to the earlier unitary executive decision in *Myers v. United States*²⁸ and the beginning of a line of cases establishing the constitutional legitimacy of independent agencies. In *Myers*, Chief Justice Taft held that the President enjoyed the constitutional power unilaterally to remove a postmaster appointed by the President with the advice and consent of the Senate.²⁹ The Court reasoned that the President’s constitutional obligation to take care that the laws be faithfully executed necessarily assumed the power to remove executive officers for whose performance the President had ultimate responsibility.³⁰ *Myers* articulated a hierarchical vision of the executive branch with the President atop, wielding plenary removal powers over officers of the United States.³¹

²⁸ *Myers v. United States*, 272 U.S. 52 (1926).

²⁹ *Id.* at 176.

³⁰ *Id.* at 117 (holding that the President must have some “power of removing those for whom he can not continue to be responsible”).

³¹ *See id.*

The run-up to *Humphrey's Executor* began in 1925, not only because that was the year of *Myers*, but also because in 1925 Calvin Coolidge appointed William E. Humphrey as a commissioner of the FTC.³² In 1931, Herbert Hoover appointed him to a second, seven-year term on the Commission.³³ From the outset, Humphrey proved a most controversial commissioner. He made vociferously clear his opposition to almost any coercive action by the FTC to reign in business and lambasted the FTC's interventionist agenda. Humphrey decried the FTC's "old policy of litigation" that had ostensibly rendered the FTC "an instrument of oppression and disturbance and injury instead of a help to business."³⁴ He vowed not to approve any Commission action that did not have as its goal to "help business help itself."³⁵ Humphrey pushed a policy of behind-the-scenes negotiation with industry to resolve matters quietly and without the imposition of legally enforceable sanctions.³⁶ He went so far as to threaten criminal prosecution against other commissioners who publicly dissented, contrary to new FTC rules.³⁷ When the FTC voted to investigate ties between DuPont, U.S. Steel, and General Motors, Humphrey, displaying his usual tact, called his fellow commissioners men "drunk with their own greatness."³⁸

Needless to say, Humphrey made some enemies. Congressmen who favored an interventionist FTC introduced legislation to abolish the agency altogether.³⁹ The newly inaugurated Franklin Delano Roosevelt, however, had a better idea. On July 25, 1933, a few months into his first term, Roosevelt wrote Humphrey, politely requesting his resignation.⁴⁰ Humphrey demurred, and Roosevelt wrote

³² See Marc Winerman & William E. Kovacic, *The William Humphrey and Abram Myers Years: The FTC From 1925 to 1929*, 77 ANTITRUST L.J. 701, 701–02, 715 (2011).

³³ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 618 (1935).

³⁴ William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective*, in PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 63, 105 n.93 (Robert J. Mackay et al. eds., 1987) (citing E. PENDLETON HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST 125 (1936)).

³⁵ *Id.* at 78.

³⁶ See Winerman & Kovacic, *supra* note 32, at 702, 713, 725 (noting that Humphrey "was skeptical about much enforcement activity" and "generally sought a relatively limited government role, preferably as a facilitator for business," and that under Humphrey the FTC expanded its trade practice conference program and restored its settlement process).

³⁷ Marc Winerman, *The FTC at Ninety: History Through Headlines*, 72 ANTITRUST L.J. 871, 878–79 (2005).

³⁸ *Id.* at 879.

³⁹ Kovacic, *supra* note 34, at 78.

⁴⁰ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 618 (1935).

again—more forcefully—on August 31, 1933.⁴¹ This time, the President explained that he had no problem with Humphrey personally but still made his concerns clear, stating, “You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence.”⁴² Humphrey again demurred.⁴³ On October 7, 1933, Roosevelt wrote Humphrey once more, this time simply firing him.⁴⁴

Humphrey died just five months later, on February 14, 1934,⁴⁵ but his passing did not moot the controversy concerning the legality of the President’s removal of an FTC commissioner for political reasons. The executor of Humphrey’s estate, Samuel F. Rathbun, brought suit on Humphrey’s behalf for the five months of salary that Humphrey allegedly should have earned between his unlawful removal and his death.⁴⁶ That suit gave rise to the Supreme Court’s *Humphrey’s Executor* decision.⁴⁷

Humphrey won a final battle from the grave when the Supreme Court ruled in his favor, thus establishing the principle that the President may not remove FTC commissioners for political reasons, but only for good cause (defined in the statute as “inefficiency, neglect of duty, or malfeasance in office”).⁴⁸ The crucial turn in the Court’s opinion comes from several paragraphs describing the character of the FTC as something other than a conventional executive law-enforcement body.⁴⁹ Rather, according to the Court, the FTC is a staunchly independent, objective, and technocratic body detached from the hurly-burly of politics and formulating industrial policy in the clear light of the public interest.⁵⁰ For analytic convenience, the Court’s account of the FTC’s nonexecutive character can be distilled into four components—what this Essay will refer to as the *Humphrey’s Executor* quartet.

⁴¹ *Id.* at 619.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 618.

⁴⁶ *Id.*

⁴⁷ *See id.*

⁴⁸ *Id.* at 619.

⁴⁹ *See id.* at 624 (“[The FTC’s] duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative.”).

⁵⁰ *See id.*

First, the Court characterized the FTC as a politically independent and nonpartisan body. In the opinion, Justice Sutherland stated that the FTC is “a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.”⁵¹ The FTC’s independence, the Court asserted, stemmed in part from its nonpartisan nature, emphasizing that “[t]he commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality.”⁵² One might observe that the “non-partisan” description was facially incorrect, because the only statutory requirement imposed by the FTC Act was—and is—that not more than three (out of five) Commissioners be appointed from the same party.⁵³ But the Court qualified its explanation by observing that, in addition to its composition, the FTC’s statutory mandate was devoid of partisan taint, as “[i]t is charged with the enforcement of no policy except the policy of the law.”⁵⁴

The idea that the law expresses some politically and ideologically neutral policy was surely subject to grave doubts at the time of *Humphrey’s Executor*, by which time legal realism had swept the elite law schools⁵⁵ and had made serious inroads on the judiciary.⁵⁶ The Court was thus compelled to offer a qualification about the type of “law” the FTC would practice, which contains the second ingredient in the Court’s characterization of the FTC—*expertise*. “Like the Interstate Commerce Commission, [the FTC’s] members are called upon to exercise the trained judgment of a body of experts appointed

⁵¹ *Id.* at 625–26.

⁵² *Id.* at 624.

⁵³ 15 U.S.C. § 41 (2012) (“Not more than three of the Commissioners shall be members of the same political party.”).

⁵⁴ *Humphrey’s Ex’r*, 295 U.S. at 624. For discussion on congressional intent that the FTC be insulated from politics, see ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS 188–95* (1972).

⁵⁵ See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 169–92* (1992).

⁵⁶ Signposts of the influences of legal realism on the judiciary include the publication of Benjamin Cardozo’s *The Nature of the Judicial Process* in 1921 and the Supreme Court’s decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 695 (1989) (book review) (asserting that *Erie* was “influenced by legal realism”); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 17 (2006) (asserting that “twentieth-century legal realism led the Court in *Erie Railroad Co. v. Tompkins* to relinquish its influence over state law”). But see Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998) (disputing view that legal positivism was important to *Erie*).

by law and informed by experience.”⁵⁷ Further, in support of the bill that would become the Federal Trade Commission Act, the Senate Committee on Interstate Commerce emphasized:

The work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry. It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.⁵⁸

The expertise claim came straight from the Progressive-technocratic playbook, which called for the separation of politics from economic and social administration and the entrustment of decisionmaking to neutral experts—economic engineers capable of improving the performance of the market through planning based on objective scientific principles.⁵⁹ As Woodrow Wilson famously put it, regulators would be experts in the “science of administration” that operated “outside the proper sphere of *politics*.”⁶⁰

Justice Sutherland swallowed the final two prongs of his FTC characterization in a single sentence: “Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative.”⁶¹ Because the FTC was not acting as a law enforcer, but instead as a judge and legislator, the President did not need to control FTC Commissioners in order to perform his constitutional obligation to see that the laws were faithfully executed. Like expertise and independence, the idea of administrative agencies blurring the traditionally Montesquieuan demarcations between the three branches of government and commingling executive, legislative, and judicial functions in order to achieve more efficient decisionmaking was central to Progressivism.⁶²

⁵⁷ *Humphrey's Ex'r*, 295 U.S. at 624 (quoting *Illinois Cent. R.R. Co. v. Interstate Commerce Comm'n*, 206 U.S. 441, 451 (1907)) (internal quotation marks omitted).

⁵⁸ *Id.* (quoting S. REP. NO. 63-597, at 10–11 (1914)).

⁵⁹ See WILLIAM E. AKIN, *TECHNOCRACY AND THE AMERICAN DREAM: THE TECHNOCRAT MOVEMENT, 1900–1941* ix–xi (1977) (summarizing the rise and fall of the technocratic movement); see also JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 7–8 (1938) (arguing for technocratic-administrative solutions to improve over the laissez-faire economic system).

⁶⁰ Woodrow Wilson, *The Study of Administration*, 2 *POL. SCI. Q.* 197, 197, 210 (1887).

⁶¹ *Humphrey's Ex'r*, 295 U.S. at 624.

⁶² Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 *DUKE L. J.* 1565, 1591–92 (2011).

A final piece of important context concerns the company that the *Humphrey's Executor* decision kept.⁶³ The decision was announced on Roosevelt's "Black Monday," May 27, 1935, in the midst of a sweep of cases in 1935–1936 in which the conservative Supreme Court waged combat against Roosevelt,⁶⁴ and on the same day as the *Schechter Poultry*⁶⁵ decision, which invalidated crucial aspects of the National Industrial Recovery Act on nondelegation and commerce clause grounds.⁶⁶ It is striking that this decision, ostensibly reflecting the "heyday of the progressive model within the judiciary,"⁶⁷ came from a predominantly conservative Court intent on reigning in the power of the New Deal presidency.⁶⁸ The conventional account has the Progressive takeover of the Supreme Court beginning in 1937 with the repudiation of the classical liberal and laissez faire doctrines favored by the Sutherland wing of the Court,⁶⁹ so it is odd to think of *Humphrey's Executor* as symbolizing the heart of Progressive-technocratic ideology. The *Humphrey's Executor* decision was unanimous (as was *Schechter Poultry*), with McReynolds writing separately only to point back to his dissenting opinion in *Myers*,⁷⁰ which had argued from a constitutional history standpoint for limitations on the President's removal power.⁷¹ That Justices Stone, Cardozo, and Brandeis joined without comment points to an anticentralization ideological strand in the decision—the Court's progressives in 1935 remained more in the Jeffersonian-Jacksonian camp that feared large aggregations of power, whether in the private sector or government, than later New Deal appointees who were more comfortable with the expansion of the federal government and executive branch power.⁷²

⁶³ See *supra* note 12 and accompanying text.

⁶⁴ See generally Miller, *supra* note 6, at 92–94 (discussing context of *Humphrey's Executor* decision).

⁶⁵ A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

⁶⁶ *Id.* at 541–42, 550–51.

⁶⁷ Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 100 (1994).

⁶⁸ See Christopher S. Yoo et al., *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1, 88 (2004).

⁶⁹ See generally RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* 13 (2006).

⁷⁰ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 632 (1935).

⁷¹ See generally *Myers v. United States*, 272 U.S. 52, 178–239 (1926) (McReynolds, J., dissenting).

⁷² An anecdote recounted by Peter Irons concerning the day of the *Schechter Poultry* and *Humphrey's Executor* decisions is telling: "Before Tommy Corcoran could depart, a Supreme Court page tapped him on the shoulder and said that Justice Brandeis would like to see him in the justices' robing room. Brandeis wanted Corcoran to convey a message to the White House:

Because the coalition that decided *Humphrey's Executor* was a mixed bag of conservative classicists and populist anticentralizationalists, it is perhaps best to understand the decision as accidentally or opportunistically Progressive rather than embodying true-belief Progressivism. Nonetheless, the decision articulated the heart of the Progressive vision for administrative agencies—politically detached and independent, uniquely expert and objective, and acting through a combination of political decisional modes, particularly those conventionally associated with legislatures and courts.

B. *Presidential Control After Humphrey's Executor*

Despite its symbolic importance as an expression of Progressive-technocratic values, the importance of *Humphrey's Executor's* four-prong justification as a matter of constitutional law has eroded over time for two reasons—one doctrinal and one practical. The first reason has to do with subsequent doctrinal developments on presidential control over the removal of officers of the United States. In subsequent cases, the Supreme Court expanded *Humphrey's Executor* well beyond the limited frame presented in the 1935 opinion.

The first important decision was *Wiener v. United States*,⁷³ a 1958 decision involving President Eisenhower's removal of a Truman appointee to the War Claims Commission ("WCC").⁷⁴ Unlike the FTC tenure statute, which limited removal to for cause situations, the WCC statute was silent on removal.⁷⁵ Nonetheless, finding the War Claims Commissioner's three-year terms to imply protection against political removal, Justice Frankfurter's unanimous opinion for the Court held the President's removal unlawful.⁷⁶ The opinion pivoted from *Humphrey's Executor*, which had treated *Myers* as the background rule and articulated tailored reasons for departing from it. *Wiener* suggested instead that *Myers* was a "short-lived" and narrow aberration and that *Humphrey's Executor's* flexible and functional approach should be understood as the more general rule.⁷⁷ Only a duo—political independence and adjudicatory functions—of the *Humphrey's Ex-*

'This is the end of this business of centralization, and I want you to go back and tell the President that we're not going to let this government centralize everything. It's come to an end.'" PETER H. IRONS, *THE NEW DEAL LAWYERS* 104 (1982).

⁷³ *Wiener v. United States*, 357 U.S. 349 (1958).

⁷⁴ *Id.* at 349–50.

⁷⁵ *Id.* at 350.

⁷⁶ *Id.* at 350, 356.

⁷⁷ *Id.* at 352.

ecutor quartet made appearances to justify the Commissioner's tenure in office.⁷⁸

Unitary executive proponents saw a glimmer of hope for *Myers* in 1986 with the Court's decision in *Bowsher v. Synar*,⁷⁹ which held that the Gramm-Rudman-Hollings Act's⁸⁰ delegation of budget-reduction duties to the Comptroller General, over whom Congress held the removal power, was unconstitutional on separation of powers principles.⁸¹ *Myers* re-emerged as favored, along with a renewed focus on the executive character of the removed actor: "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."⁸² But the glimmer was short-lived, as just two years later in *Morrison v. Olson*,⁸³ the Court cast *Bowsher* as a case about congressional self-aggrandizement rather than presidential prerogative.⁸⁴

Morrison, in which the Court upheld the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978,⁸⁵ cast serious doubt on the continuing relevance of the *Humphrey's Executor* quartet.⁸⁶ Prosecution is manifestly a core executive function,⁸⁷ so the central thrust of *Humphrey's Executor*—recasting the FTC as something other than a law-enforcement agency—had to be abandoned. On the statute's restriction of the Attorney General's power to remove the independent counsel, Justice Rehnquist's opinion explicitly jettisoned the "quasi-legislative, quasi-judicial" criteria:

We undoubtedly did rely on the terms "quasi-legislative" and "quasi-judicial" to distinguish the officials involved in *Humphrey's Executor* and *Wiener* from those in *Myers*, but our present considered view is that the determination of whether the Constitution allows Congress to impose a "good

⁷⁸ See *id.* at 354–55 (discussing the Commissioners' political independence from the executive and legislative branches and discussing the Commission's judicial functions).

⁷⁹ *Bowsher v. Synar*, 478 U.S. 714 (1986).

⁸⁰ Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended at 2 U.S.C. §§ 900–907d, 922 (2012)).

⁸¹ *Bowsher*, 478 U.S. at 726.

⁸² *Id.*

⁸³ *Morrison v. Olson*, 487 U.S. 654 (1988).

⁸⁴ *Id.* at 685–86.

⁸⁵ Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 2, 5, and 28 U.S.C.)

⁸⁶ *Morrison*, 487 U.S. at 689–91.

⁸⁷ See *id.* at 706 (Scalia, J., dissenting) ("[P]rosecution of crimes is a quintessentially executive function.").

cause”-type restriction on the President’s power to remove an official cannot be made to turn on whether or not that official is classified as “purely executive.”⁸⁸

Rather than the *Humphrey’s Executor* quartet, removability analysis would turn on whether the removal restriction “unduly interfer[es] with the role of the Executive Branch.”⁸⁹

The Court’s most recent removal decision, *PCAOB*, renewed unitary executive theorists’ hopes of a *Myers* revival—indeed, in contradistinction to *Wiener*, which attempted to bury *Myers*, Justice Roberts’s opinion in *PCAOB* refers to *Myers* as a “landmark case.”⁹⁰ The 5-4 decision invalidated the Public Company Accounting Oversight Board’s (“PCAOB”) “dual for-cause” limitation, which gave for cause removal of PCAOB members to the Securities and Exchange Commission (“SEC”) and gave for-cause removal of SEC Commissioners to the president.⁹¹ The Court distinguished *Humphrey’s Executor* as a case that, unlike *Morrison* and *PCAOB*, did not involve “inferior officers” of the United States.⁹² The opinion focused on the multiple layers of protection issue, declined to reconsider *Humphrey’s Executor*,⁹³ and left untouched its quartet of rationales.

After the line of cases ending in *PCAOB*, *Humphrey’s Executor* occupies an uncertain position. Unitary executive advocates hope to scrap it altogether and find support in *Myers*, *Bowsher*, and *PCAOB*—whereas advocates of independent agencies have largely moved on from *Humphrey’s Executor’s* quartet to the authority of *Wiener* and especially *Morrison*. As demonstrated by the line of *PCAOB* cases, the quartet argument found in *Humphrey’s* has little remaining bearing on contemporary discussions of the removal power as a question of constitutional law.

This Part now turns to the practical reasons as to why the importance of *Humphrey’s* four-prong justification has eroded over time. Beyond doctrinal considerations, a second reason to be skeptical about the continuing relevance of the *Humphrey’s Executor* quartet is the now widely accepted understanding that removal power is less im-

⁸⁸ *Id.* at 689 (majority opinion).

⁸⁹ *Id.* at 693.

⁹⁰ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010).

⁹¹ *See id.* at 486–87.

⁹² *Id.* at 493.

⁹³ *Id.* at 483 (explaining that none of the parties had asked the Court to reconsider *Myers*, *Humphrey’s Executor*, *Morrison*, or *United States v. Perkins*, 116 U.S. 483 (1886), and that the Court would not do so on its own initiative).

portant in achieving practical control than is often assumed.⁹⁴ The formal power to fire may be structurally less important to controlling an agency or department than other mechanisms, such as the power to appoint members or the chair, budgetary control, or even less formal mechanisms like *ex parte* contacts.⁹⁵ In a recent case study of presidential control over administrative agencies in the financial sector, Lisa Bressman and Robert Thompson show that the executive branch exercises considerable influence through such mechanisms as statutory consultation and coordination obligations.⁹⁶ This strand of scholarship suggests that the President has effective tools for influencing administrative agencies even without the removal power, which diminishes the relevance of the direct legal question presented in *Humphrey's Executor* and *Wiener*.

There is a further potential twist on the removal power question concerning the scope of the remedy for a wrongful removal by the President. In the two independent agency cases in which the Supreme Court held that the Commissioner was wrongfully removed—*Wiener* and *Humphrey's Executor*—the suit was merely for back pay, not for reinstatement (which would have been a moot question in *Humphrey's Executor* given the Commissioner's death).⁹⁷ The implication is that a presidential order terminating the commissioner of an independent agency is effective though unlawful,⁹⁸ which would sug-

⁹⁴ See *infra* notes 95–96 and accompanying text.

⁹⁵ See Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 469–77 (2008) (showing empirically that the President exercises weak control over independent agencies through appointment of members, at least until a majority of commissioners are appointed from the President's own party); Elliott Karr, *Independent Litigation Authority and Calls for the Views of the Solicitor General*, 77 GEO. WASH. L. REV. 1080, 1087–90 (2009) (focusing on ability of Solicitor General to shape federal policy before the Supreme Court as an example of a presidential check on agency independence); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587–91 (1984) (suggesting that the President influences agencies through appointment of members and chairs and through assistance with budgetary negotiations); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 943–44 (1980) (describing President's power to influence administrative agencies through informal contacts); see also Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) (discussing ways to achieve agency insulation from "interest groups and partisan pressure" other than removal limitations).

⁹⁶ Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 628–33 (2010).

⁹⁷ Wiener brought a quo warranto action challenging the legality of his removal, but it was dismissed, and he proceeded to the Supreme Court solely on his back pay claim. *Wiener v. United States*, 357 U.S. 349, 351 n.* (1958).

⁹⁸ See, e.g., *Steffan v. Perry*, 41 F.3d 677, 720 n.27 (D.C. Cir. 1994) (Wald, J., dissenting)

gest that a President could freely fire independent agency Commissioners of whom he disapproved so long as he was willing to keep paying their salary—a relatively inconsequential check given the political stakes often at issue.

C. *Why Reconsideration? The FTC and Progressivism at One Hundred*

In light of the considerations discussed in the previous Section, *Humphrey's Executor* may be already operationally defunct—the quartet of justifications no longer fits into contemporary doctrinal and functional debates over agency independence, and the very question of the removal power has less efficacy than long assumed. Nonetheless, it is worth revisiting *Humphrey's Executor's* assumptions in light of the FTC's historical experience. Not only is the FTC one hundred years old, but with the demise of the Interstate Commerce Commission in 1995,⁹⁹ the Commission is the sole remaining archetype of the Progressive-era agency that inspired the alphabet soup of subsequent New Deal agencies in the 1930s¹⁰⁰ and other regulatory agencies in the second half of the twentieth century.¹⁰¹ Thus, to examine the actual conduct of the FTC's first century is to examine the template for the modern administrative state—to consider its foundational justifications as endorsed in real time by the judiciary.

Further, *Humphrey's Executor* does more than justify insulation from the presidential removal power. As Geoffrey Miller has put it, the decision serves as the “fundamental constitutional charter of the

(discussing possibility of ordering reinstatement of unlawfully discharged naval officer); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 74–76 (2013) (discussing possibility that exclusive remedy for unlawful termination by President could be back pay).

⁹⁹ Congress abolished the ICC with the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified as amended in scattered sections of 49 U.S.C.).

¹⁰⁰ HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 423 (2006) (reporting that the FTC served as the model for later independent agencies); LANDIS, *supra* note 59, at 111 (noting “the rise of the independent, regulatory administrative agency” due to a “desire to have the fashioning of industrial policy removed to a degree from political influence,” thereby increasing professionalism and more permanent policies); Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1130–36 (2000) (discussing the importance of the ICC and FTC in giving “the basic organizational model for the modern multi-member independent agency”).

¹⁰¹ *Cf.* Paul M. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 257–58 (discussing Progressive-era criticisms of independent agencies and the establishment of new agencies in the 1970s and 1980s).

independent regulatory commissions.”¹⁰² Despite whether the quartet remains important to the removal question, it succinctly articulates the Progressive-technocratic vision for market administration through apolitical experts regulating through legislative and judicial modalities rather than through the adversarial, individualized method of executive law enforcement in a common law system. It is thus relevant—highly relevant—to ask at the FTC’s centennial anniversary whether the agency has acted in conformity with *Humphrey’s Executor’s* description. If it has not, then the bedrock Progressive case for independent agencies requires reconsideration.

II. HUMPHREY’S EXECUTOR DEBUNKED

Before turning to an evaluation of the *Humphrey’s Executor* quartet in historical perspective, a word on the historical mission of the FTC will set the stage. The FTC Act was one of two 1914 statutes (the other being the Clayton Act) designed to improve on the Sherman Act through simultaneous specificity and generality. The specificity came through the Clayton Act’s enhanced precision over the Sherman Act’s vague prohibitions on contracts in “restraint of trade” and “monopolizing.”¹⁰³ Instead of an amorphous rule of reason, there would be direct prohibitions on anticompetitive price discrimination, tying, exclusive dealing, mergers, and interlocking directorates.¹⁰⁴ But if the Clayton Act added specificity, the FTC Act went in the opposite direction with a single organic prohibition on “unfair methods of competition,”¹⁰⁵ a phrase even more indefinite and open-textured than the Sherman Act’s prohibitory language. The FTC Act’s bite was not in its prohibition, but in the institution it created to administer the prohibition—the five-member Commission wielding the broad investigatory and equitable powers described in *Humphrey’s Executor*.¹⁰⁶

¹⁰² Miller, *supra* note 6, at 94.

¹⁰³ See generally Sherman Antitrust Act, 15 U.S.C. §§ 1–2 (2012).

¹⁰⁴ See Clayton Act, Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27 (2012)); *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 459–60 (1922) (noting the Clayton Act is designed to supplement the Sherman Act, and prohibits contracts or leases where the effect “‘may’ be to substantially lessen competition or tend to create monopoly”).

¹⁰⁵ 15 U.S.C. § 45 (2012).

¹⁰⁶ The Senate Interstate Commerce Committee’s Report on the Federal Trade Commission Act explained its choice of an open-ended mandate for the FTC as follows:

The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid [them] . . . or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair.

Following *Humphrey's Executor*, in 1938, the Wheeler-Lea Act¹⁰⁷ added a new clause to the organic prohibition text of the FTC Act—a prohibition on “unfair or deceptive acts or practice.”¹⁰⁸ This amendment delegated a new consumer protection mission to the FTC.¹⁰⁹ As such, after 1938, the Commission continued to enforce the antitrust laws in parallel with the Justice Department but also assumed a completely separate responsibility for consumer protection, without a distinct executive department analog until the creation of the Consumer Financial Protection Bureau in 2011.¹¹⁰ Hence, the Commission that Justice Sutherland described in 1935 would soon obtain a new mission, even while retaining its institutional organization.

This Part will now evaluate each of the elements of the *Humphrey's* quartet based on the past 100 years of experience. First, this Part assesses the claim that the FTC is nonpartisan and independent from any other branch of government. Second, this Part addresses Justice Sutherland's notion of an FTC structure founded on expertise. Third, this Part evaluates whether the FTC has fulfilled its intended quasi-legislative purpose as a substantive rulemaking agency. Finally, this Part examines whether the FTC can accurately be described as quasi-judicial based on its powers regarding antitrust cases and its ability to hear matters administratively.

A. *Nonpartisan and Politically Independent*

The leading edge of the *Humphrey's Executor* quartet is the claim that the FTC is nonpartisan and independent from any other branch of government.¹¹¹ As noted earlier, the idea of detached, objective, neutral administration undergirded the Progressive-technocratic vision.¹¹² Independent regulatory commissions were to be politics-free zones.¹¹³ Given advances in public choice theory, it is unsurprising that the nonpolitical independence account does not reflect the FTC's

It concluded that the latter course would be better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.

S. REP. NO. 63-597, at 13 (1914).

¹⁰⁷ Wheeler-Lea Act of 1938, Pub. L. No. 447, 52 Stat. 111.

¹⁰⁸ *Id.*

¹⁰⁹ See Milton Handler, *The Control of False Advertising Under the Wheeler-Lea Act*, 6 LAW & CONTEMP. PROBS. 91, 96 (1939).

¹¹⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964 (2010) (establishing the Consumer Financial Protection Bureau).

¹¹¹ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935).

¹¹² See *supra* Part I.A.

¹¹³ See *supra* text accompanying notes 52–53.

historical reality. Although the Commission is operationally independent from the President, it has shown itself largely subservient to Congress's purse strings in important ways.¹¹⁴

That Congress exercises a high degree of control over the FTC is today largely a given.¹¹⁵ Congress deliberately structured the agency to be a congressional creature and left no doubt that it intended to remain in charge.¹¹⁶ As Senator Albert Cummins, a leading backer of the FTC Act, explained, the FTC was to be "a commission at all times under the power of Congress" and "always subordinate to Congress."¹¹⁷ The relevant question is what kind of control Congress exercises over the FTC. Does Congress control the FTC ideologically by pushing the FTC to adopt policy positions favored by Congress, or is the control of a more venial nature with individual congressmen extracting rents in individual enforcement matters?¹¹⁸

The answer is that both sorts of congressional influence show up in the historical record. Empirical work shows that Congress exerts its influence to control the FTC's ideological trajectory, to push it in particular enforcement directions.¹¹⁹ For example, William Kovacic, who later went on to become the FTC's chair, found in an empirical study analyzing FTC enforcement during the 1969–1979 period that the FTC consistently chose policy programs that followed the expressed will of the FTC's oversight committees in Congress, particularly by embarking on more aggressive enforcement programs in response to congressional pressure.¹²⁰

The existence of the Department of Justice ("DOJ")—a parallel agency in the executive branch with a nearly identical antitrust mission—provides a convenient natural experiment to gauge the magni-

¹¹⁴ William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869, 881–88 (1988) [hereinafter Kovacic, *Congress*]; Kovacic, *supra* note 34; Roger L. Faith et al., *Antitrust Pork Barrel*, in PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION, *supra* note 34.

¹¹⁵ See *supra* note 114.

¹¹⁶ See *supra* note 114.

¹¹⁷ 51 CONG. REC. 13,047–48 (1914).

¹¹⁸ See Kovacic, *Congress*, *supra* note 114, at 881–88 (contrasting three understandings of Congressional control over the FTC: (1) principal-agent model: close control, (2) principal-agent model: loose control, and (3) rent-seeking model).

¹¹⁹ Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 788, 792 (1983). But see Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance'*, 12 LEGIS. STUD. Q. 475, 476–77 (1987) (criticizing Weingast & Moran study); Timothy J. Muris, *Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control*, 94 J. POL. ECON. 884, 884–89 (1986) (same).

¹²⁰ Kovacic, *supra* note 34, at 63–65, 82–86, 89–93.

tude of the difference in effects of presidential or congressional control.¹²¹ Particularly during periods of divided government when the White House and the House of Representatives have been controlled by different parties, the two agencies have clashed along ideological lines.¹²² The clearest example occurred during the last two years of President George W. Bush's administration, when a snub by the Justice Department in 2005 set up an aggressive FTC counteroffensive following the 2006 Democratic takeover of the House.¹²³ The FTC lost an enforcement action against Schering-Plough over pharmaceutical "reverse payment" settlements in the U.S. Court of Appeals for the Eleventh Circuit¹²⁴ and sought a writ of certiorari in the Supreme Court.¹²⁵ The Solicitor General and the Antitrust Division then filed their own brief recommending that the Court deny certiorari,¹²⁶ which the Court did.¹²⁷ Following the 2006 Democratic takeover of the House, the FTC struck back. In 2007, in a private lawsuit, the Ninth Circuit ruled for the plaintiff on a "price squeezing" issue¹²⁸ and in response the Solicitor General and the Antitrust Division filed an amicus curiae brief supporting the defendant's certiorari petition in the Supreme Court.¹²⁹ The FTC then issued a lengthy press release explaining that it strongly disagreed with the Justice Department and refused to join the brief.¹³⁰ A year later, the FTC refused to join a report on unilateral exclusionary conduct that the agencies had been working on jointly for several years.¹³¹ Instead, the FTC issued a harshly worded dissent, complaining that the report "would be a

121 See William J. Kolasky, Jr. & James W. Lowe, *The Merger Review Process at the Federal Trade Commission: Administrative Efficiency and the Rule of Law*, 49 ADMIN. L. REV. 889, 911 (1997) (describing the DOJ and the FTC as parallel agencies).

122 See *id.* (discussing effect of divided government on DOJ and FTC enforcement).

123 See *infra* notes 124–32 and accompanying text.

124 *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1076 (11th Cir. 2005).

125 Petition for Writ of Certiorari, *FTC v. Schering-Plough Corp.*, 548 U.S. 919 (2006) (No. 05-273), 2005 WL 2105243.

126 Brief for the United States as Amicus Curiae, *FTC v. Schering-Plough Corp.*, 548 U.S. 919 (2006) (No. 05-273), 2006 WL 1358441.

127 *Schering-Plough Corp. v. FTC*, 548 U.S. 919 (2006).

128 *linkLine Commc'ns, Inc. v. SBC Cal., Inc.*, 503 F.3d 876, 885 (9th Cir. 2007).

129 Brief for the United States as Amicus Curiae, *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009) (No. 07-512), 2008 WL 2155265.

130 U.S. FED. TRADE COMM'N, STATEMENT OF THE FEDERAL TRADE COMMISSION: PETITION FOR A WRIT OF CERTIORARI, *Pacific Tel. Co. d/b/a AT&T California v. linkLine Comms., Inc.* (No. 07-512) (2008), http://www.appliedantitrust.com/17_predation/case_studies/linkline/linkline_cert/ftc_statement.pdf.

131 U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), <http://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf>.

blueprint for radically weakened enforcement of Section 2 of the Sherman Act” and threatening that the FTC “stands ready to fill any Sherman Act enforcement void that might be created if the Department actually implements the policy decisions expressed in its Report.”¹³²

Although overall enforcement trends at the two agencies have moved in parallel,¹³³ the FTC and DOJ have not been shy about expressing sharp differences of opinion, even during periods of unified government.¹³⁴ In the leading instances of intra-agency public dispute during periods of unified Democratic government, the FTC has almost always taken the more aggressively pro-enforcement position,¹³⁵ consistent with House of Representatives’ greater tendency toward populism. Similarly, during periods when Republicans controlled the White House and Democrats the House of Representatives, the FTC clashed with the Justice Department over the Commission’s advocacy of more aggressive antitrust norms.¹³⁶

Evidence that the FTC is responsive to the overall ideological will of Congress is hardly damning and may be democracy-enhancing, but it does contravene the *Humphrey’s Executive* objective independence narrative.¹³⁷ The FTC’s independence from the President is bought at the price of dependence on Congress.¹³⁸ This may contribute to checks and balances as between the executive and legislative branches, but it does not create a politically independent agency of the kind posited in the Progressive-technocratic narrative.

¹³² Press Release, Fed. Trade Comm’n, *FTC Commissioners React to Department of Justice Report, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, (Sept. 8, 2008), <https://www.ftc.gov/news-events/press-releases/2008/09/ftc-commissioners-react-department-justice-report-competition-and> (quoting statement of Commissioners Harbour, Leibowitz, and Rosch).

¹³³ See DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* 36–37 (2011) (discussing statistical data on FTC and DOJ enforcement trends).

¹³⁴ Examples of public disagreement between the agencies during periods when the Democrats controlled both the White House and Congress include a 1963 disagreement between the agencies on cooperative price advertising and the application of functional discounts to cooperative buying groups. See H.R. REP. NO. 88-699, at 25–32 (1963) (appendix reprinting dueling opinion letters and statements from FTC and DOJ officials).

¹³⁵ See A. Everette MacIntyre, *The Status of Regulatory Independence*, 29 FED. B.J. 1, 8–9 (1968); see also *supra* notes 124–32 and accompanying text.

¹³⁶ See Frederick M. Rowe, *The Federal Trade Commission’s Administration of the Anti-Price Discrimination Law—A Paradox of Antitrust Policy*, 64 COLUM. L. REV. 415, 422–23 (1964) (discussing FTC proposals—opposed by Justice Department—for legislative narrowing of the Robinson-Patman Act’s meeting competition defense); see also *supra* notes 124–32 and accompanying text.

¹³⁷ See MacIntyre, *supra* note 135, at 19–20.

¹³⁸ See *id.* at 7, 19.

The second type of congressional control—rent-seeking by particular congressmen—is also documented in the political science literature and is more troubling. In a broad empirical study, Roger Faith, Donald Leavens, and Robert Tollison found that case dismissals at the FTC were nonrandomly concentrated on defendants headquartered in the home districts of congressmen on committees and subcommittees with budgetary and oversight jurisdiction over the FTC, suggesting that influential congressmen leveraged their budgetary power over the FTC to shield powerful constituents from enforcement actions.¹³⁹ In contrast, particularly after Watergate and the scandal over presidential meddling in law enforcement, antitrust enforcement by the Justice Department became highly independent from White House control.¹⁴⁰

In sum, *Humphrey's Executor* may have it exactly backwards, at least as the facts appear at the FTC's centennial anniversary. Congressional influence over FTC enforcement decisions may create a greater opportunity for crony-capitalism and political influence peddling than exists at the Antitrust Division. At a minimum, the claims of apolitical independence are historically unfounded. The FTC has become the creature of Congress, just as its founders predicted.¹⁴¹

B. *Uniquely Expert*

Expertise is the second instrument in the *Humphrey's Executor* quartet. Consistent with Progressive belief in administration by the best and brightest of scientific experts, Justice Sutherland described an FTC structure founded on expertise.¹⁴² The relationship between independence and expertise is captured in the Court's suggestion that independence was necessary to attract the best experts and that the Commissioners' seven-year term, which required separation from the four-year presidential cycle, would allow the Commissioners to gain additional expertise through experience in office.¹⁴³

¹³⁹ Faith et al., *supra* note 114, at 19, 22, 26.

¹⁴⁰ See Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1172–74 (2008) (describing a dramatic shift in presidential involvement in antitrust enforcement pre- and post-Watergate).

¹⁴¹ 51 CONG. REC. 8857 (1914) (statement of Sen. Morgan) (“[I]t is unsafe for an administration in power, an administrative officer representing a great political party, to hold the power of life and death over the great business interests of this country Whatever we do in regulating business should be removed as far as possible from political influence.”).

¹⁴² *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935) (citing S. REP. NO. 63-597, at 10–11 (1914)).

¹⁴³ See *id.*

In order for expertise to have purchase as a justification for independence, a comparative assessment must be made with executive branch agencies. Expertise can only justify independence if the commission model allows the agency to attract, retain, or deploy experts more advantageously than a purely executive branch agency under the control of the President. The historical record shows that the FTC cannot claim any historical expertise advantage over its closest executive branch analog—the Justice Department’s Antitrust Division—except in particular market sectors, where the expertise comes from the FTC’s historical experience based on an informal market-division arrangement with the Antitrust Division.¹⁴⁴

Historically, FTC Commissioners have not been leading experts in their fields when appointed and have not stayed at the Commission long enough to acquire expertise.¹⁴⁵ Bill Kovacic’s comprehensive study of the FTC Commissioners over time found a striking “paucity” in the quality of the appointments.¹⁴⁶ Kovacic found that only a handful of appointees to the FTC had distinguished experience or training in competition or consumer protection.¹⁴⁷ By contrast, the list of former Assistant Attorneys General for the Antitrust Division boasts a plethora of distinguished names including Justice Robert Jackson, Judge Thurman Arnold, Donald Turner, William Baxter, Judge Douglas Ginsburg, and many other leading antitrust professionals and academics, as well as other distinguished jurists, such as Stephen Breyer and Michael Boudin, who served in other top posts in the Antitrust Division.¹⁴⁸ If the question is whether the political appointments to the “technocratic” FTC or the “political” DOJ have been more distinguished, at least until recent years, the DOJ clearly comes out ahead.

Moving beyond the Commissioner level, it has also not been the case that the FTC has held any lasting expertise advantage in its staff in the discipline where expertise should matter the most to the agency—economics. When the FTC came into being in 1914, it inherited the Economic Department (later transformed into the Economic Division and then the Bureau of Economics) of its predecessor—the

¹⁴⁴ See *The Enforcers*, FED. TRADE COMM’N, <http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers> (last visited Oct. 17, 2015).

¹⁴⁵ See Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 768 (2005).

¹⁴⁶ William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915, 917 (1997).

¹⁴⁷ *Id.* at 916–17.

¹⁴⁸ Justice Breyer served as special assistant to the Assistant Attorney General from 1965–67.

Bureau of Corporations.¹⁴⁹ The Antitrust Division did not hire its first economist or create an economics unit until 1936.¹⁵⁰ Until the early 1970s, economists played a relatively small role in the division—mostly in data gathering and statistical litigation support.¹⁵¹ The FTC's economics unit, by contrast, enjoyed earlier influence within the agency.¹⁵² Today, however, there is little distinction between the agencies on this score. At the Antitrust Division, a deputy assistant attorney general for economics—usually a prominent academic economist—heads a staff of approximately sixty Ph.D.-level economists.¹⁵³ At the FTC, the Bureau of Economics features about seventy Ph.D. level economists (although they spend about a quarter of their time on consumer protection issues).¹⁵⁴ The Bureau Director is also usually a prominent academic economist, and there is sometimes an economist among the Commissioners.¹⁵⁵ In sum, while there was a period of time when the FTC enjoyed an expertise advantage over the Justice Department in economics, that advantage had nothing to do with the FTC's independent agency model, and the advantage soon dissipated.¹⁵⁶

The one kind of unique expertise the FTC may claim is expertise in particular industries. The agencies have historically divided up the cases they bring based on their prior work with particular markets.¹⁵⁷ Thus, for example, the FTC has considerable experience with pharmaceuticals and health care, and the Antitrust Division has considerable experience with airlines and computer software.¹⁵⁸ Again, however, that comparative expertise is not a product of the agency model, but of the need to accomplish a rational workload division given agency duplication. If the FTC were folded into the Antitrust Division, that expertise would not disappear. Further, if we are simply tallying “expertise points” between the FTC and Justice Department, for every line of FTC industry-specific expertise there is an

149 Lawrence J. White, *The Growing Influence of Economics and Economists on Antitrust: An Extended Discussion* 9 (NYU Law & Econ. Research Paper No. 08-07, 2008).

150 R. Hewitt Pate, Tribute, *Robert H. Jackson at the Antitrust Division*, 68 ALB. L. REV. 787, 791 n.12 (2005).

151 White, *supra* note 149, at 10–11.

152 *Id.* at 10.

153 *Id.* at 11, 13.

154 *Id.*

155 *See id.* at 11.

156 *See id.*

157 *See* Crane, *supra* note 140, at 1198–99.

158 *See id.* at 1199.

equal and opposite industry-specific expertise at the Antitrust Division.¹⁵⁹

In sum, the FTC's experience in its first century gives no reason to believe that expertise is an advantage of the independent commission model. If anything, the Justice Department has been more successful in attracting distinguished figures as leaders and has, for at least the last three or four decades, enjoyed an equivalent level of economic expertise at the staff level.

C. *Quasi-Legislative*

The assertion in *Humphrey's Executor* that the FTC has a “quasi-legislative” character springs from Progressive-era ambitions that the FTC could address competition problems through a regulatory approach rather than through conventional prosecutorial litigation.¹⁶⁰ Much of the impetus behind the FTC Act was Progressive frustration with the sedulous pace, fact specificity, and conservative character of antitrust litigation in the federal courts. For example, President Woodrow Wilson's January 20, 1914 message to Congress on antitrust legislation—the presidential precursor to the passage of the FTC Act—asserted that a federal trade commission could provide clear rules and direction for business that courts had been incapable of providing.¹⁶¹ Consistent with Progressive values, the FTC would serve as an indispensable instrument of information and publicity, as a clearinghouse for the facts by which both the public mind and the managers of great business undertakings should be guided. The FTC would also serve as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts were inadequate to adjust the remedy to the wrong in a way that would meet all the equities and circumstances of the case.¹⁶²

¹⁵⁹ See *id.* (discussing division of expertise between FTC and Justice Department).

¹⁶⁰ See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624, 628 (1935) (describing the FTC as a “quasi-legislative” body); see also MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916*, at 325–26 (1988).

¹⁶¹ See President Woodrow Wilson, *Address to a Joint Session of Congress on Trusts and Monopolies*, AM. PRESIDENCY PROJECT (Jan. 20, 1914), <http://www.presidency.ucsb.edu/ws/?pid=65374> (“And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.”).

¹⁶² *Id.* See generally SKLAR, *supra* note 160, at 325–27.

The 1914 statute gave the FTC the authority to “make rules and regulations for the purpose of carrying out the [FTC Act’s] provisions,”¹⁶³ but it remained unsettled until 1973 whether this general provision applied only to procedural or noninvestigatory rulemaking, or whether it also applied to substantive rules fleshing out the open-ended prohibition of Section 5 of the FTC Act.¹⁶⁴ In 1973, the U.S. Court of Appeals for the D.C. Circuit held that Section 46(g) gave the FTC the power to promulgate trade regulation rules with the effect of substantive law.¹⁶⁵ Two years later, the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act of 1975 (“Magnuson-Moss”)¹⁶⁶ gave the FTC the power to frame substantive trade regulation rules in furtherance of its consumer protection mission, although with heightened notice and comment procedural requirements.¹⁶⁷

Despite the Progressive ambitions for an actively legislative agency and eventual affirmation by the federal courts of its substantive rulemaking power, the FTC’s substantive rulemaking activity has been quite limited.¹⁶⁸ For its first forty-nine years, until the passage of Magnuson-Moss, the FTC issued a few rules mostly related to discrete, industry-specific statutory grants of rulemaking authority under such statutes as the Wool Products Labeling Act of 1939,¹⁶⁹ the Fur Products Labeling Act of 1951,¹⁷⁰ and the Textile Fiber Products Identification Act of 1958.¹⁷¹ It promulgated few substantive rules related to its core mission under Section 5 of the FTC Act.¹⁷² Following Magnuson-Moss, the FTC embarked on a temporary surge of

163 15 U.S.C. § 46(g) (2012).

164 E.g., Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 551–55 (2002).

165 Nat’l Petroleum Refiners Ass’n v. FTC, 482 F.2d 672, 673, 698 (D.C. Cir. 1973).

166 Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended at 15 U.S.C. §§ 2301–2312 (2012)).

167 See *id.*

168 The FTC may issue both substantive rules and those controlling procedural matters internal to the agency. See FTC OPERATING MANUAL ch. 7, <http://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch07rulemaking.pdf>.

169 Wool Products Labeling Act of 1939, ch. 871, 54 Stat. 1128 (1940) (codified as amended at 15 U.S.C. § 68 (2012)); 16 C.F.R. pt. 300 (2015).

170 Fur Products Labeling Act, ch. 298, 65 Stat. 175 (1951) (codified as amended at 15 U.S.C. § 69 (2012)); 16 C.F.R. pt. 301 (2015).

171 Textile Fiber Products Identification Act, Pub. L. No. 85-897, 72 Stat. 1717 (1958) (codified as amended at 15 U.S.C. § 70 (2012)); 16 C.F.R. pt. 303 (2014).

172 See Mark E. Budnitz, *The FTC’s Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation*, 46 CATH. U. L. REV. 371, 415–16 (1997) (noting the “trivial” rules made before Magnuson-Moss).

rulemaking activity regarding consumer protection, but continued to ignore completely its power to pass substantive antitrust rules.¹⁷³

The antitrust side is arguably more relevant when evaluating the assertions made in *Humphrey's Executor*, because the FTC only had antitrust powers at the time the case was decided and would not receive its consumer protection mandate until the Wheeler-Lea Amendments three years later.¹⁷⁴ Over the course of its first century, the FTC promulgated exactly one substantive antitrust rule (in 1968),¹⁷⁵ which it apparently never enforced.¹⁷⁶ In its original capacity and only capacity at the time of *Humphrey's Executor*, the FTC has not been quasi-legislative at all.

The reason for the FTC's failure to live up to its rulemaking assignment may be that antitrust simply does not lend itself to rulemaking of this kind. During the 1970s, administrative law maven Kenneth Culp Davis argued that the FTC's primary institutional advantage was its power to promulgate rules.¹⁷⁷ During that period, the FTC searched earnestly for practices to regulate, considering such candidates as delivered pricing in the cement industry, shopping center lease restrictions, physician influence over health insurance payments, and mergers affecting potential competition.¹⁷⁸ Despite its desire to regulate by rule, the FTC found no plausible candidates. Then the antitrust establishment hammered a nail into the coffin by weighing in against antitrust rulemaking. A 1989 American Bar Association ("ABA") report on the FTC—which included the participation of the eminent administrative law scholar Cass Sunstein—concluded, "We

¹⁷³ See *id.* at 416–17 (noting that the FTC used its rulemaking ability to address unfair and deceptive practices, not antitrust).

¹⁷⁴ See Ira M. Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 453–54 (1964).

¹⁷⁵ Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 16 C.F.R. pt. 412 (1968); C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 678 (2009). Max Huffman argues that the FTC's petroleum market manipulation rule, 16 C.F.R. pt. 317 (2015), promulgated in November 2009, could also be understood in part as an antitrust rule. Max Huffman, *Gen Next Antitrust? Reviewing Daniel Crane*, The Institutional Structure of Antitrust Enforcement, ANTITRUST & COMPETITION POL'Y BLOG 1, 3 (Sept. 19, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201067.

¹⁷⁶ Royce Zeisler, *Chevron Deference and the FTC: How and Why the FTC Should Use Chevron to Improve Antitrust Enforcement*, 2014 COLUM. BUS. L. REV. 266, 281.

¹⁷⁷ KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 70–74 (1969).

¹⁷⁸ Larry Lempert, *FTC Rulemaking Not Beginning of Deluge*, LEGAL TIMES WASH., Apr. 30, 1979, at 1, 7; *FTC Staff Narrows Rulemaking to Three Areas*, [July–Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 884, at A-13 (Oct. 12, 1978).

are not optimistic about the chances that the FTC could codify anti-trust-oriented prohibitions on specific types of business conduct.”¹⁷⁹

On the consumer protection side, the FTC has been more active in rulemaking, although with important qualifications. The FTC has issued twenty rules pursuant to specific Acts of Congress authorizing the FTC to regulate particular industries or practices, such as the sale of wool products or automotive fuel ratings.¹⁸⁰ These include some of its most popularly known rules, such as the Do-Not-Call Registry Rule¹⁸¹ and the Children’s Online Privacy Protection Rule.¹⁸² It has also promulgated a batch of rules concerning the Fair Credit Reporting Act, also pursuant to a specific delegation from Congress.¹⁸³ The FTC has promulgated only sixteen trade regulation rules—rules designed to implement the agency’s core organic mission to prevent deceptive and unfair trade practices and unfair methods of competition. Six of these rules were promulgated from 1965 to 1979,¹⁸⁴ including five during the 1970s, a period that corresponded with the passage of Magnuson-Moss and optimism that the FTC could address broad swaths of the consumer protection landscape through regulation.¹⁸⁵ In the late 1970s, the FTC’s rulemaking agenda suffered a serious setback as the ordinarily friendly *Washington Post* labeled the agency the “national nanny”¹⁸⁶—a cruel label that stuck—over a series of proposed consumer protection rules, culminating in its proposed “kidvid” rules relating to advertising to children.¹⁸⁷ As political will turned

179 *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, 91 n.103 (1989).

180 See 16 C.F.R. subchapter C (2015).

181 Telemarketing Sales Rule, 16 C.F.R. § 310.1 (2015) (implementing Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101–6108 (2012)).

182 Children’s Online Privacy Protection Rule, 16 C.F.R. § 312.1 (2015) (implementing Children’s Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506 (2012)).

183 16 C.F.R. §§ 310.4, 313.16 (2015).

184 Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 16 C.F.R. pt. 408 (1965); Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets, 16 C.F.R. pt. 410 (1971); Use of Prenotification Negative Option Plans, 16 C.F.R. pt. 425 (1973); Power Output Claims for Amplifiers Utilized in Home Entertainment Products, 16 C.F.R. pt. 432 (1975); Preservation of Consumers’ Claims and Defenses, 16 C.F.R. pt. 433 (1977); Labeling and Advertising of Home Insulation, 16 C.F.R. pt. 460 (1979).

185 Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended at 15 U.S.C. § 2301–2312 (2012)).

186 Editorial, *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22.

187 Children’s Advertising, 43 Fed. Reg. 17,967 (Apr. 27, 1978); see also J. Howard Beales III, *Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present*, 12 GEO. MASON L. REV. 873, 878–79 (2004).

sharply against the kidvid rules, the FTC was forced to back down.¹⁸⁸ Following the kidvid debacle, the pace of trade regulation rulemaking slowed. The FTC promulgated four rules during the 1980s,¹⁸⁹ three rules during the 1990s,¹⁹⁰ and only three rules since 2000.¹⁹¹

In sum, the report card on the FTC as a “quasi-legislative” body is historically a mixed bag, with the bottom line that the FTC’s rulemaking character has been considerably weaker than the Court suggested in 1935. As for the antitrust side of things—which currently makes up about half of the Commission’s activity and its only mandate at the time of *Humphrey’s Executor*—the quasi-legislative claim has no historical support at all. The FTC proceeds through adjudication only (although, as this Essay demonstrates next, not primarily through agency adjudication). The FTC has been most active as a rulemaking authority when Congress passes tailored legislation directing the FTC to pass rules on a particular topic, such as telemarketing practices, although even that activity has amounted to only one rule for every five years of the FTC’s first century. On consumer protection, the FTC had a spurt of activity in the 1970s, but trade regulation rulemaking slowed after the kidvid debacle and the trend line has been down ever since. Long periods pass—entire Commissions come and go—without new trade regulation rulemaking. Finally, claims about the FTC’s quasi-legislative and quasi-judicial character need to be evaluated in the context of the Commission’s overall character, which has increasingly become that of a conventional law enforcement department.

D. *Quasi-Judicial*

When the *Humphrey’s Executor* Court described the FTC as “quasi-judicial,” it likely had in mind two different aspects of the Commission’s powers. The first, which it alluded to early in the opinion,¹⁹² is Section 7 of the FTC Act, which allows district courts to refer

¹⁸⁸ Beales, *supra* note 187, at 879–80 (describing termination of rulemaking by FTC in response to political pressure).

¹⁸⁹ Care Labeling of Textile Wearing Apparel, 16 C.F.R. pt. 423 (1983); Credit Practices, 16 C.F.R. pt. 444 (1985); Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. pt. 455 (1985); Retail Food Store Advertising and Marketing Practices, 16 C.F.R. pt. 424 (1989).

¹⁹⁰ Ophthalmic Practice Rules, 16 C.F.R. pt. 456 (1992); Funeral Industry Practices, 16 C.F.R. pt. 453 (1994); Cooling-Off Period for Door-to-Door Sales, 16 C.F.R. pt. 429 (1995).

¹⁹¹ Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 C.F.R. pt. 436 (2007); Mail or Telephone Order Merchandise, 16 C.F.R. pt. 435 (2011); Disclosure Requirements and Prohibitions Concerning Business Opportunities, 16 C.F.R. pt. 437 (2011).

¹⁹² See *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 621 (1935).

Department of Justice antitrust cases to the FTC to sit as a “master in chancery” and determine the appropriate form of relief.¹⁹³ Several related powers, alluded to more indirectly early in the opinion,¹⁹⁴ include Section 6(c), which calls for the FTC to monitor compliance with antitrust decrees obtained by the Justice Department,¹⁹⁵ and Section 6(e), which allows the Attorney General to request that the FTC “make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.”¹⁹⁶

While these chancery-like powers make the FTC “quasi-judicial” in theory, practice has been entirely different. The powers simply have not been used, largely because the FTC and Justice Department have become rival enforcement agencies that have little interest in ceding power to one another. Indeed, the only instance of the use of the equity power of which this Author is aware is a 1962 letter to the chairman of the FTC, referring a decree matter to the FTC under Section 6(c), in which the Attorney General stated that the section had been “virtually unused since its enactment in 1914.”¹⁹⁷ To this Author’s knowledge, that power has been unused again since that time.

The FTC’s other “quasi-judicial” capacity concerns its power to hear matters administratively. Under its original statutory mandate, which was still in place at the time of *Humphrey’s Executor*, the FTC had no power to sue in federal district court.¹⁹⁸ It could bring only administrative actions and then seek to have those orders enforced by a court of appeals.¹⁹⁹ Conversely, defendants who lost before the Federal Trade Commission could seek vacatur of the Commission’s order in a Court of Appeals.²⁰⁰ The *Humphrey’s Executor* Court was thus correct in observing that the FTC wielded quasi-judicial powers in principle.

Legislative changes within three years of the *Humphrey’s Executor* decision began a trend that gradually reduced the FTC’s adjudicatory character significantly. The Wheeler-Lea Amendments of 1938 granted the FTC new powers to act as a party-litigant in federal dis-

193 15 U.S.C. § 47 (2012).

194 See *Humphrey’s Ex’r*, 295 U.S. at 621.

195 15 U.S.C. § 46(c).

196 *Id.* § 46(e).

197 *United States v. Int’l Nickel Co. of Can.*, 203 F. Supp. 739, 741 (S.D.N.Y. 1962).

198 Federal Trade Commission Act of 1914, Pub. L. No. 63-203, 38 Stat. 717, 719–20 (1914).

199 *Id.*

200 *Id.*

district court.²⁰¹ The thrust of the FTC's new power under Section 13 was to seek a preliminary injunction maintaining the status quo pending the filing of an administrative complaint.²⁰² Thus, a preliminary injunction obtained under Section 13 dissolves automatically if, within the time specified by the district court (not to exceed twenty days), the FTC fails to file an administrative complaint.²⁰³ Writing immediately in the wake of the Wheeler-Lea Amendments, the eminent trade scholar Milton Handler believed that, although the statutory language was unclear, "an injunction can not be sought independently of a proceeding by the Commission."²⁰⁴ In time, however, the FTC would obtain new statutory authority to seek injunctions without going through administrative proceedings at all. In 1973, Section 13 was amended to add a proviso that, with time, would become the rule rather than the exception: "[I]n proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."²⁰⁵ Eventually, the courts interpreted the language of Section 13(b) to permit a district court to grant a permanent injunction even though the Commission never brought an administrative action.²⁰⁶

Two years later, in 1975, Congress granted the FTC additional powers to seek monetary relief, primarily for consumer protection violations.²⁰⁷ The Commission could seek consumer redress in federal court for "dishonest or fraudulent" practices, but only after an administrative proceeding.²⁰⁸ As detailed in a recent article by Howard Beales and Tim Muris, however, the Commission soon fell into the habit of obtaining effective monetary relief without administrative action by suing in federal district court seeking asset freezes and mandatory injunctions requiring the defendant to return assets to defrauded consumers.²⁰⁹ This use of the federal courts' injunctive power

²⁰¹ 15 U.S.C. § 53(a).

²⁰² *Id.* § 53(b).

²⁰³ *Id.* § 53(b).

²⁰⁴ Handler, *supra* note 109, at 106.

²⁰⁵ 15 U.S.C. § 53(b).

²⁰⁶ *United States v. JS & A Group, Inc.*, 716 F.2d 451, 457 (7th Cir. 1983) ("[W]e hold that section 13(b) of the FTC Act authorizes the Commission to seek, in a proper case, and the court to grant, after proper proof, permanent injunctive relief, irrespective of whether a Commission proceeding regarding the alleged violations is pending or contemplated."); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1110–11 (9th Cir. 1982); *United States v. Nat'l Dynamics Corp.*, 525 F. Supp. 380, 381 (S.D.N.Y. 1981).

²⁰⁷ 15 U.S.C. § 57b; *see also* J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 *ANTITRUST L.J.* 1, 1–2 (2013) (detailing the events leading up to the 1975 amendments to the FTC Act).

²⁰⁸ 15 U.S.C. § 57b(a).

²⁰⁹ Beales & Muris, *supra* note 207, 3.

became known as the “Section 13(b) Fraud Program.”²¹⁰ In combination with other institutional pressures and strategic considerations, it had the effect over time of shifting the FTC’s enforcement activities in the consumer protection field from internal adjudication to executive enforcement in federal district court.²¹¹

The FTC began to face other incentives, beyond the power to recover monetary penalties, to sue in district court rather than proceed administratively. On the one hand, the FTC staff’s adjudicatory success rate was very high when it proceeded through administrative adjudication. For example, a study by Doug Melamed found that, between 1983 and 2008, the staff won all sixteen antitrust cases adjudicated before an administrative law judge (ALJ) on review by the Commission.²¹² But proceeding through agency adjudication resulting in a perceived rubber stamp by the Commission may have created disadvantages at the appellate level. Since 1973, the FTC’s appellate success rate has been considerably higher in actions initiated in district court than in actions adjudicated before the agency; in cases decided on the merits, it has lost on appeal in twenty-eight percent of the cases that originated in an adjudicatory proceeding in the Commission and in only seven percent of the cases that originated in the district court.²¹³ This may suggest that appellate courts are more likely to rule in favor of the FTC when there is a genuine adjudicatory contest in district court than when the outcome of adjudicatory effort in the agency appears to be a foregone conclusion.

An additional factor pushing the FTC toward litigation in district court rather than agency adjudication is the odd appellate review statute that allows a defendant who loses before the FTC to lodge its appeal in essentially any of the appellate federal circuits where the case could have been brought originally.²¹⁴ The upshot is that, in cases adjudicated before the FTC, defendants have an opportunity for highly effective forum shopping. For example, when the FTC sued pharmaceutical companies over “pay for delay” patent settlements,

²¹⁰ *Id.*

²¹¹ *Id.* at 4 (describing the increasing use of the Section 13(b) Fraud Program and increasing amount of redress ordered); *id.* at 22 (explaining that FTC could have accomplished asset freezes in the district court and then returned to the administrative forum, but there was little reason to use such a clunky procedure).

²¹² A. Douglas Melamed, *The Wisdom of Using the “Unfair Method of Competition” Prong of Section 5*, GLOBAL COMPETITION POL’Y, Nov. 2008, at 1, 16–17. The study Melamed cites found that the respondents won four of the sixteen cases before the administrative law judge, but then lost those cases before the Commission. *Id.* at 17.

²¹³ A list of relevant appellate cases appears in the Appendix.

²¹⁴ See Crane, *supra* note 133, at 133.

the defendants were able to appeal to the Eleventh Circuit, which had previously announced a pro-defendant rule in private litigation.²¹⁵ In order to avoid this forum shopping, the FTC began to bring its patent settlement cases in federal district court where the defendants could not forum shop for a favorable appellate jurisdiction.²¹⁶

For all of these reasons, and perhaps others, agency adjudication has become a smaller part of the FTC's work in recent decades. In order to test the incidence of the FTC's adjudicatory effort, this Author conducted a review of all FTC enforcement actions from 1996 to the present.²¹⁷ Jennifer Fischell, this Author's research assistant, hand-coded 2,092 enforcement actions (1,600 consumer protection cases and 492 antitrust cases) during this period. This Author and Ms. Fischell categorized each of these cases into one of three categories. First, a case could involve no adjudication at all—meaning that either a court or the agency enters a consent decree without a impartial decisionmaker doing anything at all of an adjudicatory character. Second, a case could involve adjudication within the agency. Finally, a case could involve adjudication in federal district court. Cases were coded as involving adjudication—whether in court or in the agency—if the docket showed any indication that a judge (whether Article III or ALJ) was called on to make any sort of adjudicatory decision, even as simple as entering a scheduling order or a default judgment. Most such cases eventually end up in a consent decree, but we nonetheless coded them as adjudicatory because our effort was to identify any positive instances of adjudicatory activity.

Overall, this research indicated that 1,183 cases proceeded in federal court and 909 before the agency. In total, 1,524 cases ended in consent decrees without any adjudicatory activity at all, whether in court or before the agency, and 475 cases saw adjudicatory activity in federal district court. Over the eighteen-year period studied, only 79 cases of agency adjudication were identified—just over four a year.

In sum, adjudication is a vanishingly small aspect of what the FTC does. The Commission does not serve the adjudicatory function of a special master in equity, as designed by Congress, at all. It participates in agency adjudication in only a small fraction of its overall workload. Far more often, it either enters into consent decrees requiring

²¹⁵ *Id.* at 134–35.

²¹⁶ *Id.*

²¹⁷ 1996 was chosen out of convenience. It is the beginning date for the online case database maintained on the Commission website. The concluding date for our study was September 1, 2014.

no adjudication or litigates in federal district court in an executive law enforcement style—just as the Justice Department or traditional law enforcement agencies or institutions do.

III. THE COMMISSION'S PREDOMINANTLY EXECUTIVE CHARACTER

With the benefit of a century of experience, some broad conclusions can now be drawn about FTC's predominant character as an institution. The *Humphrey's Executor* Court articulated a vision of the FTC drawn largely from statutory design and Progressive-technocratic aspiration.²¹⁸ On paper, the agency does look independent, expert, quasi-legislative, and quasi-judicial. But its actual behavior has generally tended away from those qualities.²¹⁹ Though independent from the President, the Commission has been quite evidently responsive to the will of Congress.²²⁰ While certainly expert in many ways, the agency's expertise has not arisen from structural features of the Commission model.²²¹ Instead, it has obtained the expertise of any department—executive or administrative—given sufficient resources and tasked with doing a job for long enough. Legislative activity, in the sense of rulemaking, has not been an aspect of its original and continuing antitrust mission at all, and only a sporadic aspect of its consumer protection mission.²²² Finally, the Commission has increasingly turned its back on agency adjudication, preferring instead to enter into consent decrees or litigate in an executive style in federal district court.²²³ At a rate of four internally adjudicated cases per year—many of which involve only the early stages of adjudication before they are settled through consent decree—adjudication can hardly be said to be a significant part of the Commission's continuing portfolio of activities.²²⁴

The predominant character of the agency has become that of a traditional law enforcement department. This is most apparent on the antitrust side, where the Commission does no rulemaking and little adjudication, essentially dividing enforcement responsibility with the Justice Department based on superior expertise and prior experience, and participates with the Justice Department in promulgating guidelines spelling out the agencies' joint perspective on a variety of en-

218 See generally *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

219 See *supra* Parts II.A–D.

220 See *supra* Part II.A.

221 See *supra* Part II.B.

222 See *supra* Part II.C.

223 See *supra* Part II.D.

224 See *supra* Part II.D.

forcement topics.²²⁵ Apart from the FTC's arguable advantage in securing preliminary injunctions to block mergers,²²⁶ the occasional case proceeding to litigation before an ALJ, and the DOJ's monopoly over criminal enforcement, the two agencies basically do the same thing—promulgate guidelines, investigate, threaten suit, enter into consent decrees, and in rare cases, litigate. In antitrust, the Commission is for all intents and purposes a traditional law enforcement agency.

The consumer protection side is somewhat more complicated because of the presence of some rulemaking activity and, at least until the creation of the Consumer Financial Protection Board, no obvious executive agency analogue. Still, even on the consumer protection side, the agency's predominant character is executive, with an increasing amount of the Commission's effort dedicated to consent decrees and federal district court enforcement where monetary remedies and their equivalent through injunctive relief are available.²²⁷ As a composite of its two functions, the FTC is very far from the quartet of qualities announced in *Humphrey's Executor*.

The Commission's de facto nondistinctiveness from executive enforcement has had important implications for the agency's position in the legal landscape. It shows up in particular when the FTC demands the privileges of being the sort of institution described in *Humphrey's Executor*—and the legal community raises a skeptical eyebrow. Take, for instance, the ongoing question whether the FTC has powers to condemn as illegal under Section 5 unfair methods of competition that would not be illegal under the Sherman Act.²²⁸ Commentators have pointed out the difficulties inherent in giving the FTC enforcement powers beyond those available to the Justice Department, as that could entail differential treatment of similarly situated firms in different industries.²²⁹ More fundamentally, one can wonder why the FTC should have enforcement powers greater than the DOJ when the two agencies perform essentially the same law enforcement function. The case for an independent Section 5 is strongest if the FTC is going to

²²⁵ See *supra* Parts II.B–D.

²²⁶ See Crane, *supra* note 133, at 41.

²²⁷ See *supra* Part II.D.

²²⁸ Crane, *supra* note 133, at 135–36.

²²⁹ See, e.g., Maureen K. Ohlhausen, *100 is the New 30: Recommendations for the FTC's Next 100 Years*, 21 GEO. MASON L. REV. 1131, 1140 (2014) (“[W]hen we rely on Section 5, which only the FTC enforces, rather than the antitrust laws, which both the FTC and the Justice Department enforce, we risk creating two different standards for patent holders depending on which agency happens to review the alleged misconduct.”).

behave like the technocratic rulemaking and adjudicatory agency the Supreme Court thought it was in 1935. It is considerably weaker if the agency is essentially just another law enforcement agency.

By the same token, the possibility that the FTC's antitrust positions on the meaning of Section 5 would be eligible for *Chevron* deference is weakened given the Commission's de facto transformation into a law enforcement agency.²³⁰ Courts do not generally afford *Chevron* deference if two different agencies are assigned to enforce the same statute,²³¹ which is the functional status quo with respect to antitrust enforcement.

The questions raised by the Commission's de facto law enforcement character are many. Should *Humphrey's Executor* itself be reconsidered, as Judge Kavanaugh urged²³² and some on the Supreme Court would probably favor? Should the President obtain plenary political control over the Commission in order to harmonize antitrust enforcement between the two agencies? Should the FTC "right the ship" and work to become the agency it was ostensibly created to be—for example, by taking seriously the possibility of rulemaking in antitrust, relying more on internal agency adjudication, and offering itself as a chancellor in equity?²³³ Should the entire antitrust enforcement mission of the FTC be transferred to the Justice Department, as urged by three members of the Antitrust Modernization Commission,²³⁴ given the fungibility of the two agencies' antitrust functions?

At a minimum, the historical record needs to be set straight. The FTC bears little resemblance to the Progressive-technocratic vision enunciated in *Humphrey's Executor*.

CONCLUSION

Humphrey's Executor was the product of a broad coalition of Supreme Court Justices concerned with the overexpansion of presidential power. It legitimized the administrative state by enunciating a

²³⁰ See, e.g., Zeisler, *supra* note 176, at 269.

²³¹ See Kevin M. Stack, *The President's Statutory Authority to Administer the Laws*, 106 COLUM. L. REV. 263, 292 n.129 (2006) (collecting cases).

²³² *In re Aiken County*, 645 F.3d 428, 441–42 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

²³³ See generally Rebecca Haw Allensworth, *The Influence of the Areeda–Hovencamp Treatise in the Lower Courts and What it Means for Institutional Reforms in Antitrust*, 100 IOWA L. REV. 1919 (2015).

²³⁴ ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 129 n.* (2007) (reporting that "Commissioners Kempf, Litvak, and Shenefield would recommend eliminating the FTC's antitrust enforcement authority and vesting responsibility for all antitrust enforcement with the DOJ.").

vision for Progressive-technocratic administrative legislating by independent and nonpolitical experts, and adjudicating of anticompetitive practices. A century of experience has shown that the FTC's actual practice conforms very little to this vision. It is independent from the President but inclined to the will of Congress, not uniquely expert, and not predominantly legislative or adjudicatory. Rather, its predominant character is that of a law enforcement agency.

APPENDIX²³⁵*Administrative Actions*

Won: *FTC v. Watson Pharmaceuticals, Inc.*, 677 F.3d 1298 (11th Cir. 2012), *rev'd* 133 S. Ct. 2223 (2013); *North Carolina State Bd. of Dental Examiners v. FTC*, 717 F.3d 359 (2013); *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208 (11th Cir. 2012); *Realcomp II, Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011); *Daniel Chapter One v. FTC*, 405 F. Appx. 505 (D.C. Cir. 2010); *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410 (5th Cir. 2008); *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008) (FTC's order overbroad, but liability upheld); *Kentucky Household Goods Carriers Ass'n v. FTC*, 199 Fed. Appx. 410 (2006); *South Carolina State Bd. of Dentistry v. FTC*, 455 F.3d 436 (2006); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005); *Novartis Corp. v. FTC*, 223 F.3d 783 (D.C. Cir. 2000); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000); *Jones v. FTC*, 194 F.3d 1317 (9th Cir. 1999); *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129 (3d Cir. 1993) (won following Supreme Court remand); *Olin Corp. v. FTC*, 986 F.2d 1295 (9th Cir. 1993); *Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992); *In re Detroit Auto Dealers Ass'n, Inc.*, 955 F.2d 457 (6th Cir. 1992); *Removatron Intern. Corp. v. FTC*, 884 F.2d 1489 (1st Cir. 1989); *Superior Court Trial Ass'n v. FTC*, 856 F.2d 226 (D.C. Cir. 1988), *rev'd in part*, 493 U.S. 411 (1990); *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354 (1988); *Figgie Intern. Inc. v. FTC*, 817 F.2d 102 (1987); *Hospital Corp. of America v. FTC*, 807 F.2d 1381 (7th Cir. 1986); *Thompson Medical Co. v. FTC*, 791 F.2d 189 (1986); *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431 (9th Cir. 1986); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985) (remedy narrowed); *Amrep Corp. v. FTC*, 768 F.2d 1171 (10th Cir. 1985); *Indiana Federation of Dentists v. FTC*, 745 F.2d 1124 (7th Cir. 1984), *rev'd* 476 U.S. 447 (1986); *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146 (9th Cir. 1984); *Grolier v. FTC*, 699 F.2d 983 (9th Cir. 1983); *Bristol-Myers Co. v. FTC*, 738 F.2d 554 (2d Cir. 1984); *Gibson v. FTC*, 682 F.2d 554 (5th Cir. 1982); *Lee v. FTC*, 679 F.2d 905 (D.C. Cir. 1980); *Sears, Roebuck and Co. v. FTC*, 676 F.2d 385 (9th Cir. 1982); *Litton Indus., Inc. v. FTC*, 676 F.2d 364 (9th Cir. 1982); *Borden, Inc. v. FTC*, 674 F.2d 498 (6th Cir. 1982); *American Home Prods. Corp. v. FTC*, 659 F.2d 681 (3d Cir. 1982); *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294 (7th Cir.

²³⁵ Cases are categorized as won or lost by the FTC based on ultimate appellate resolution; i.e., if there was an appeal to Supreme Court, Supreme Court resolution controls the win/loss determination. List excludes preliminary injunction actions pursuant to 15 U.S.C. § 13(b).

1979); *Encyclopedia Britannica, Inc. v. FTC*, 605 F.2d 964 (7th Cir. 1979); *RSR Corp. v. FTC*, 602 F.2d 1317 (9th Cir. 1979); *Jay Norris, Inc. v. FTC*, 598 F.2d 1244 (2d Cir. 1979); *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212 (9th Cir. 1979 (won in part, but order narrowed)); *Simeon Manag. Corp. v. FTC*, 579 F.2d 1137 (9th Cir. 1978); *Ash Grove Cement v. FTC*, 577 F.2d 1368 (9th Cir. 1978); *Standard Oil Co. v. FTC*, 577 F.2d 653 (9th Cir. 1978); *Rubbermaid, Inc. v. FTC*, 575 F.2d 1169 (1978); *National Com'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977) (won in part, but order narrowed); *Liggett & Myers, Inc. v. FTC*, 567 F.2d 1273 (4th Cir. 1977); *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977); *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir. 1977); *Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir. 1976) (won in part, but order narrowed); *Beatrice Foods Co. v. FTC*, 540 F.2d 303 (7th Cir. 1976); *ITT Continental Baking Co. v. FTC*, 532 F.2d 207 (2d Cir. 1976) (won in part, but order narrowed); *Fedders Corp. v. FTC*, 529 F.2d 1398 (2d Cir. 1976); *Ger-Ro-Mar-Inc. v. FTC*, 518 F.2d 33 (2d Cir. 1975); *Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962 (9th Cir. 1975); *Thiret v. FTC*, 512 F.2d 176 (10th Cir. 1975); *Avnet, Inc. v. FTC*, 511 F.2d 70 (7th Cir. 1975); *Corning Glass Works v. FTC*, 509 F.2d 293 (7th Cir. 1975); *Alterman Foods, Inc. v. FTC*, 497 F.2d 993 (5th Cir. 1974); *Adolph Coors Co. v. FTC*, 497 F.2d 1178 (10th Cir. 1974); *Credit Card Serv. Corp. v. FTC*, 495 F.2d 1004 (D.C. Cir. 1974); *Diener's Inc. v. FTC*, 494 F.2d 1132 (D.C. Cir. 1974); *Spiegel, Inc. v. FTC*, 494 F.2d 59 (7th Cir. 1974); *National Dynamics Corp. v. FTC*, 492 F.2d 1333 (2d Cir. 1974); *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171 (1st Cir. 1973); *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246 (6th Cir. 1973); *Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976); *Charnita, Inc. v. FTC*, 479 F.2d 684 (3d Cir. 1973); *National Ass'n of Women's & Children's Apparel Salesmen, Inc. v. FTC*, 479 F.2d 139 (5th Cir. 1973); *Zale Corp. v. FTC*, 473 F.2d 1317 (5th Cir. 1973).

Lost: *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005); *California Dental v. FTC*, 224 F.3d 942 (9th Cir. 2000) (lost in Court of Appeals following Supreme Court remand); *Coca-Cola Bottling Co. of the Southwest v. FTC*, 85 F.3d 1139 (5th Cir. 1996); *Trans Union Corp. v. FTC*, 81 F.3d 228 (D.C. Cir. 1996); *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064 (1st Cir. 1990); *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988); *Massachusetts Furniture & Piano Movers Ass'n, Inc. v. FTC*, 773 F.2d 391 (1st Cir. 1985); *Borg-Warner Corp. v. FTC*, 746 F.2d 108 (2d Cir. 1984); *E.I. du Pont de Nemours &*

Co. v. FTC, 729 F.2d 128 (2d Cir. 1984); Russell Stover Candies, Inc. v. FTC, 718 F.2d 256 (8th Cir. 1983); Montgomery Ward & Co. v. FTC, 691 F.2d 1322 (9th Cir. 1982); Tenneco, Inc. v. FTC, 689 F.2d 346 (2d Cir. 1982); Equifax Inc. v. FTC, 678 F.2d 1047 (11th Cir. 1982); Kaiser Alum. & Chem. Corp. v. FTC, 652 F.2d 1324 (7th Cir. 1981); TRW, Inc. v. FTC, 647 F.2d 942 (9th Cir. 1981); Coca-Cola Co. v. FTC, 642 F.2d 1387 (D.C. Cir. 1981); Official Airlines Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980); Jim Walter Corp. v. FTC, 625 F.2d 676 (5th Cir. 1980); Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); Equifax, Inc. v. FTC, 618 F.2d 63 (9th Cir. 1980); Fruehauf Corp. v. FTC, 603 F.2d 345 (2d Cir. 1979); USLIFE Credit Corp. v. FTC, 599 F.2d 1387 (5th Cir. 1979); SCM Corp. v. FTC, 565 F.2d 807 (2d Cir. 1977); Great Atlantic & Pacific Tea Co. v. FTC, 557 F.2d 971 (2d Cir. 1977), rev'd 435 U.S. 922 (1978); BOC Int'l, Ltd. v. FTC, 557 F.2d 24 (2d Cir. 1977); Heater v. FTC, 503 F.2d 321 (9th Cir. 1974); Papercraft Corp. v. FTC, 472 F.2d 927 (7th Cir. 1973).

Judicial Actions

Won: F.T.C. v. Lalonde, 545 Fed.Appx. 825 (11th Cir. 2013); FTC v. LoanPointe, LLC, 525 F. Appx. 696 (10th Cir. 2013); FTC v. Chapman, 714 F.3d 1211 (10th Cir. 2013); FTC v. Washington Data Resources, Inc., 704 F.3d 1323 (11th Cir. 2013); FTC v. Lucas, 483 Fed. Appx. 378 (9th Cir. 2012); FTC v. Inc21.com Corp., 475 F. Appx. 106 (9th Cir. 2012); FTC v. Trudeau, 662 F.3d 947 (7th Cir. 2011); FTC v. Bronson Partners, LLC, 654 F.3d 359 (2d Cir. 2011); FTC v. Magazine Solutions, LLC, 432 F. Appx. 155 (3d Cir. 2011); FTC v. USA Financial, LLC, 415 F. Appx. 970 (11th Cir. 2011); FTC v. Direct Marketing Concepts, Inc., 624 F.3d 1 (1st Cir. 2010); FTC v. Network Services Depot, Inc., 617 F.3d 1127 (9th Cir. 2010); FTC v. Wells, 384 F. Appx. 712 (9th Cir. 2010); FTC v. Neovi, Inc., 604 F.3d 1150 (9th Cir. 2010); FTC v. Accusearch Inc., 570 F.3d 1187 (10th Cir. 2009); FTC v. Stefanichik, 559 F.3d 924 (9th Cir. 2009); FTC v. QT, Inc., 512 F.3d 858 (7th Cir. 2008); FTC v. Check Investors, Inc., 502 F.3d 159 (3d Cir. 2007); FTC v. People's Credit First, LLC, 244 Fed. Appx. 942 (11th Cir. 2007); Telebrands Corp. v. FTC, 457 F.3d 354 (4th Cir. 2006); FTC v. Cyberspace.Com LLC, 453 F.3d 1196 (9th Cir. 2006); FTC v. Verity Intern., Ltd., 443 F.3d 48 (2d Cir. 2006) (affirming on liability but requiring recalculation of restitution); FTC v. Capital Choice Consumer Credit, Inc., 157 Fed. Appx. 248 (11th Cir. 2005); FTC v. Bay Area Business Council, Inc., 423 F.3d 627 (7th Cir. 2005); FTC v. World Media Brokers, 415 F.3d 758 (7th Cir. 2005); FTC v. Tashman, 318

F.3d 1273 (11th Cir. 2003); *FTC v. Think Achievement Corp.*, 312 F.3d 259 (7th Cir. 2002); *Trans Union Corp. v. FTC*, 267 F.3d 1138 (D.C. Cir. 2001); *FTC v. Gill*, 265 F.3d 844 (9th Cir. 2001); *FTC v. Munoz*, 17 Fed. Appx. 624 (9th Cir. 2001); *FTC v. Affordable Media, LLC*, 11 Fed. Appx. 934 (9th Cir. 2001); *FTC v. Febre*, 128 F.3d 530 (7th Cir. 1997); *FTC v. Spectrum Resources Group, Inc.*, 107 F.3d 877 (9th Cir. 1997); *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168 (9th Cir. 1997); *FTC v. NCH, Inc.*, 106 F.3d 407 (9th Cir. 1997); *FTC v. Gem Merchandising Corp.*, 87 F.3d 466 (11th Cir. 1996); *FTC v. Osborne*, 69 F.3d 543 (9th Cir. 1995); *FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994); *FTC v. Magui Publishers, Inc.*, 9 F.3d 1551 (9th Cir. 1993); *FTC v. Figgie Intern., Inc.*, 994 F.2d 595 (9th Cir. 1993) (won except on some remedy questions); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312 (8th Cir. 1991).

Lost: *FTC v. Financial Freedom Processing, Inc.*, 538 F.3d 488 (5th Cir. 2013); *American Bar Ass'n v. FTC*, 430 F.3d 457 (D.C. Cir. 2005); *FTC v. Garvey*, 383 F.3d 891 (9th Cir. 2004).