THREE OPTIONS FOR REFORMING PART 3 ADMINISTRATIVE LITIGATION AT THE FEDERAL TRADE COMMISSION

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INTRODUCTION

Reform is in the air at the Federal Trade Commission. Since Chair Lina Khan took her seat, the Commission has passed omnibus resolutions vesting the chair with unprecedented authority in routine competition matters, revised policy statements and guidelines, and pushed forward on an ambitious program to issue substantive competition regulations. In these and many other cases, the commissioners—or at least those now in the majority—have declared a desire to "rethink" the scope of the Commission's authority.[1]

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[1] *See, e.g.*, *Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement*

Yet for every action, there is a reaction: many critics also seek to "rethink" the Commission's authority, either by clipping its wings or by abolishing it altogether. Two distinct strands have emerged.

One group seeks to retain the institution but revise its procedures. For example, Congress has long considered a bill dubbed the SMARTER Act that would strip the FTC of its quasi-judicial functions by requiring it to litigate all pre-merger challenges in federal district court.[2] A second group seeks to eliminate the FTC's antitrust mandate.[3] This effort is exemplified by the proposed One Agency Act, which would strip the FTC of antitrust authority and transfer its existing competition assets to the Department of Justice.[4] As bill cosponsor Senator Mike Lee explains it, "[t]he Department is more politically accountable, and its structure is better suited to the decisive enforcement we need to better protect American consumers."[5]

Although these proposals differ by degree, if enacted, both would homogenize federal antitrust enforcement by superimposing the DOJ's procedures (and under some proposals, the agency itself) on the FTC. Although not always the primary motivation, these efforts would also impose a system that more clearly distances the judge from the investigative process.

Today the Commission has the authority to vote to issue a complaint and then—through its Part 3 litigation process—determine the validity of that complaint. This path typically first runs through an administrative law judge (ALJ), who until recently conducted a trial and issued both findings of fact and conclusions of law that were appealable to the Commission. Earlier this year,[6] the Commission changed its procedure; for future trials, "the ALJ will issue only recommended decisions, not initial decisions" for the Commission

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Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, FED. TRADE COMM'N 7 (July 1, 2021), www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf ("[T]he time is right for the Commission to rethink its approach and to recommit to its mandate to police unfair methods of competition even if they are outside the ambit of the Sherman or Clayton Acts.").

[2] Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015, H.R. 2745, 114th Cong. (2016).

[3] *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

[4] One Agency Act, S. 4918, 116th Cong. § 4(a) (2020).

[5] Press Release, Sen. Lee Reintroduces One Agency Act to Streamline and Improve Antitrust Enforcement (Mar. 9, 2021), www.lee.senate.gov/2021/3/sen-lee-reintroduces-one-agency-act-to-streamline-and-improve-antitrust-enforcement.

[6] This article was written before the FTC announced its sudden rule change. The article has been revisited and updated in light of the Commission's change.

to "adopt, modify, or set aside."[7] Semantics aside,[8] the process remains essentially the same: quite unlike the procedure for appeals in federal court, the Commission can—and frequently does—revise the factual record as it sees fit. Or, as Axon Enterprise recently put it in its Due Process Clause challenge,[9] "if the FTC disagrees with the ALJ's ultimate decision on either the facts or the law, the same Commissioners who voted to file the enforcement action against [a respondent] have the right to review these findings de novo *and change them*."[10] There is some force to the charge; over the past 25 years, the Commission found its own facts and assessed liability in essentially every one of the antitrust cases it heard through Part 3,[11] though not always on every count.[12] The Commission will retain this power under the new format.[13]

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[7] *See* Rules of Practice, 88 Fed. Reg. 42872, 42873, 42877 (July 5, 2023) (to be codified at 16 C.F.R. pt. 3) ("The Commission is revising part 3 so that the ALJ will issue a 'recommended' decision after each administrative hearing, rather than an 'initial' decision. . . . In evaluating the recommended decision, the agency may affirm the recommended decision in full or may reject the ALJ's recommended decision, in whole or in part, and issue its own decision adopting different findings of fact or conclusions of law.").

[8] Agencies have long used a mix of different internal review formats. Among these choices, scholars have viewed the FTC's past "initial decisions" and its current "recommended decisions" as essentially equivalent. *See, e.g.*, RONALD A. CASS, BACKGROUND REPORT FOR RECOMMENDATION 83-3: AGENCY REVIEW OF ADMINISTRATIVE LAW JUDGES' DECISIONS 147 & nn.121–22 (1983), www.acus.gov/sites/default/files/documents/1983-03%20Agency%20Review%20of%20ALJ%20Decisions.pdf (identifying a range of discretionary review and "review as of right" administrative regimes, and lumping together in the "review as of right" category both a long list of initial-decision agencies, including the FTC at that time, and five agencies that "render recommended decisions (in some or all cases) that automatically are reviewed by the agency before becoming final").

[9] Axon Enter., Inc. v. FTC, 143 S. Ct. 890 (2023).

[10] Complaint for Declaratory and Injunctive Relief ¶ 7, Axon Enter., Inc. v. FTC, No. 20-cv-00014 (D. Ariz. Jan. 3, 2020) [hereinafter Axon Complaint]; *see id.* ¶ 58 (alleging a violation of Axon's due process rights). Indeed, recently in *Illumina*, the FTC reversed the ALJ and found liability. Opinion of the Commission at 2, Illumina, Inc., FTC Docket No. 9401 (Apr. 3, 2023), www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf.

[11] *See, e.g.*, David Balto, *Can the FTC Be a Fair Umpire?*, THE HILL (Aug. 14, 2013) ("Since 1995, the FTC has found a violation in every [antitrust] case in which it has voted on a complaint."). *But see* Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. COMPETITION L. & ECON. 623, 632–35 (2016) (noting several dismissals on the merits in the 1980s and 1990s, including Order Reopening the Record and Dismissing the Complaint, VISX, Inc., FTC Docket No. 9286 (Feb. 7, 2001), www.ftc.gov/sites/default/files/documents/cases/2001/02/ftc.gov-summitvisxorder.htm, and R.R. Donnelly, 120 F.T.C. 36 (1995), as well as a dismissal for procedural reasons in a more recent case, Order Returning Matter to Adjudication and Dismissing Complaint, Cabell Huntington Hosp., 162 F.T.C. 91 (2016)).

[12] The Commission has occasionally found liability on some, but not all, of complaint counsel's claims. *See, e.g.*, McWane, Inc., 157 F.T.C. 107, 109 (2014) ("On *de novo* review, we affirm the ALJ and find McWane liable on Count 6 for unlawfully maintaining its monopoly in the domestic fittings market. We dismiss all of the remaining counts."); Polypore Int'l, Inc., 150 F.T.C. 586, 588 (2010) (affirming liability in three of four relevant markets but reversing the ALJ's finding of liability in a fourth).

[13] *See* Rules of Practice, 88 Fed. Reg. 42872, 42877 (amending 16 C.F.R. § 3.54(a)) ("In rendering its decision, the Commission will adopt, modify, or set aside the recommended find-

While legislative efforts to increase due process protections are laudable, it is not clear that policymakers have considered the full range of alternatives that would achieve the desired result. To date, policymakers have considered what they view as "addition by subtraction"—eliminating either the Part 3 process or the FTC entirely. This article attempts to fill in some of the *terra incognita* by considering three other reforms that would retain some of the specialized features that Congress intended when it created the FTC in the first place.[14]

First, the Commission could revise its Rules of Practice so that it reviews the ALJ's findings of fact for clear error rather than de novo.[15] For simplicity, I refer to this as the *narrow procedural reform package*. Adopting a clear-error standard would resolve many of the most serious objections to the Part 3 process, some of which the Commission has in the past recognized but failed to solve,[16] while still preserving the Commission's ability to correct serious mistakes. It would also align more closely with the practice used by other agencies, many of which afford the ALJ's factual findings substantial deference regardless of whether the underlying decision is "recommended" or "initial."[17] Furthermore, it may also alter the course of some cases before they

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ings, recommended conclusions, and proposed rule or order contained in the recommended decision, and will include in the decision a statement of the reasons or basis for its action and any concurring and dissenting opinions.").

[14] *See, e.g.*, Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921–1925*, 77 ANTITRUST L.J. 145, 150–55 (2010) (describing early congressional visions for the agency).

[15] The Commission revises its Rules of Practice regularly. *See, e.g.*, *supra* note 7 and accompanying text; Delegation of Limited Authority, 83 Fed. Reg. 7109 (Feb. 20, 2018) (codified at 16 C.F.R. § 0.7); Rules of Practice, 80 Fed. Reg. 15157 (Mar. 23, 2015) (codified at 16 C.F.R. §§ 3.26, 4.9); Rules of Practice, 76 Fed. Reg. 52249 (Aug. 22, 2011) (codified at 16 C.F.R. §§ 3.31, 3.43–3.45, 3.52, 3.83, 4.2); Rules of Practice, 74 Fed. Reg. 20205 (May 1, 2009) (codified at 16 C.F.R. §§ 3.1, 3.25, 3.31, 4.2).

[16] For example, several years ago the Commission decided to videotape all testimony given before the ALJ because it would "enable the Commission, which is tasked with reviewing the record *de novo*, to independently assess witness demeanor when necessary." Rules of Practice, 76 Fed. Reg. at 52251 (cross-referencing 74 Fed. Reg. 1817 (Mar. 4, 2009)). This approach was quickly abandoned because it was too "expensive." *See id.*

[17] *See, e.g.*, 20 C.F.R. § 404.970(a)(3) ("The [Social Security Administration] Appeals Council will review a case at a party's request or on its own motion if . . . [t]he action, findings or conclusions in the hearing decision or dismissal order are not supported by substantial evidence."); Clarification of Evidentiary Standard for Determinations and Decisions, 73 Fed. Reg. 76940, 76941 (Dec. 18, 2008) (explaining the standard for appeals from the ALJ to the Social Security Administration Appeals Council and defining its substantial-evidence standard as one that "gives deference to the findings of the ALJ rather than requiring a decision based on a new evaluation of the evidence"); *see also* Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018) (noting that although the SEC's regulations do not formally defer to the ALJ's findings of fact, the SEC will adopt the credibility determinations of an ALJ "absent overwhelming evidence to the contrary") (citations omitted). In the Social Security Administration system, ALJs issue both initial and recommended decisions. *See, e.g.*, 20 C.F.R. § 404.953(c) ("Although an administrative law judge will usually make a decision, the administrative law judge may send the case to the Ap-

reach unfavorable (and precedential) decisions on appeal.[18] The Commission has the authority to make this change itself (even after its latest shift to recommended ALJ decisions),[19] which the Commission may prefer to the risk of having a legislative or judicial solution imposed upon it.

Second, the Commission could both adopt the clear-error standard of review *and* elevate the role of the ALJ by (1) reforming the way that ALJs are selected and (2) ensuring that an ALJ presides over each administrative trial. I refer to this as the *broad procedural reform package*.

Reforming the selection of the ALJs would elevate the stature of the office. Historically the Office of Personnel Management has selected ALJs for many federal agencies, including the FTC.[20] Although this system insulates the se-

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peals Council with a recommended decision based on a preponderance of the evidence when appropriate."). In the SEC system, ALJs issue initial decisions. *See* 17 C.F.R. § 201.360.

[18] That is, without the ability to significantly rewrite the factual record, the Commission may have ruled against complaint counsel in several cases, or at least narrowed their own holding. *See, e.g.*, J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Three Questions About Part Three: Administrative Proceedings at the FTC, Remarks Before the American Bar Association Section of Antitrust Law Fall Forum 7–8 (Nov. 8, 2012), www.ftc.gov/sites/default/files/documents/public_statements/three-questions-about-part-three-administrative-proceedings-ftc/121108fallforum.pdf (citing *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005) and *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008) as examples where appellate courts did not necessarily believe that "as a doctrinal matter, the FTC should subject an ALJ's findings of fact to a de novo review," thereby contributing to the reviewing court's skepticism and the Commission's defeat).

[19] Although the Commission previously asserted that it is "compelled" by statute to review the ALJ's findings of fact de novo, the authorities the FTC cites do no such thing, and the Commission no longer makes this claim in its opinions. *Compare, e.g.*, RealComp II, Ltd., 148 F.T.C. 350, 370 n.11 (2009) ("The *de novo* standard of review with regard to findings of facts and inferences drawn from those facts, as well as conclusions of law, is compelled by the Administrative Procedure Act and the FTC Act.") (citations omitted), *with* 1-800-CONTACTS, Inc., 166 F.T.C. 250, 261 (2018) (omitting the claim). The new Part 3 rules rely upon the same statutory authority. *See* Rules of Practice, 88 Fed. Reg. 42872, 42877 ("The authority for subpart I of Part 3 continues to read as follows: Authority: 5 U.S.C. 504 and 5 U.S.C. 553(b).").

[20] *See, e.g.*, *Administrative Law Judge System: Hearing Before the Consumer Subcomm. of the S. Comm. on Com., Sci. & Transp.*, 96th Cong., 2d Sess. 26–28 (1980) [hereinafter Pertshuck testimony] (testimony of Michael Pertschuk, Chairman, Fed. Trade Comm'n), www.ftc.gov/system/files/documents/public_statements/688891/19800904_pertschuk_testimony_before_consumer_subcommittee._senate_committee_on_commerce_science.pdf (describing the ALJ selection process). Although there has been some discussion of changing this process and allowing the FTC to hire ALJs directly, this alternative process has never been used. The closest the Commission has come to date is in 2015, when it "ratified" the prior selection and appointment of the current FTC ALJ. *See* Order Denying Respondent LabMD, Inc.'s Motion to Dismiss at 2, 5, LabMD, Inc., FTC Docket No. 9357 (Sept. 14, 2015), www.ftc.gov/system/files/documents/cases/150914labmdmotion.pdf ("[A]lthough we conclude that the Appointments Clause does not apply to the hiring of Commission administrative law judges, the Commission, purely as a matter of discretion, has ratified Judge Chappell's appointment as a Federal Trade Commission administrative law judge and as the Commission's Chief Administrative Law Judge.").

lection process from political considerations, it also limits each agency's ability to select candidates with deep experience in the given field of law.[21]

Ensuring that an ALJ presides over the initial hearing would likewise strengthen the role these judges play, particularly if their findings of fact are afforded some deference by the Commission. Although it has not been exercised in many years,[22] the Commission arguably retains the ability to skip the ALJ entirely and hear the administrative trial directly.[23] It may alternatively appoint one of the commissioners to serve as the ALJ.[24] Yet it also arguably has the authority to forswear these approaches.[25] While a direct trial would be more efficient than the present two-step process, it also exacerbates the existing due process concerns by having the same Commission that just issued a complaint against a defendant *immediately* sit to pass judgment on the merits of the case, with its findings of fact then subject to review on appeal only for substantial evidence. The appointment of a single commissioner as ALJ raises similar concerns. To remove this potentially unsavory situation, the Commission could abrogate its ability to hear cases directly—whether as a Commission or by designating a particular commissioner as the hearing officer—by amending its Rules of Practice.

Third, Congress could convert the Commission's present administrative litigation process into a specialized Article III antitrust tribunal. I call this the *narrow structural reform package* to distinguish it from broader structural efforts like the One Agency Act. Congress has created new Article III courts several times in the past, including specialized Article III tribunals for interna-

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[21] *See* Pertshuck testimony, *supra* note 20, at 28 (arguing that the present selection method was designed to ensure "ALJ independence and impartiality" but could still be improved at the margin).

[22] The Commission exercised this authority at least once early in its history. *See* Winerman & Kovacic, *supra* note 14, at 187 (discussing how "[t]he FTC's case against Madeira Hill was unusual in several respects," including that "the case was tried by the full Commission, which sat for five consecutive days in December [1923] to hear testimony, followed by argument on a motion to dismiss").

[23] Administrative Procedure Act § 7, 5 U.S.C. §§ 556–57 (setting out the minimum procedural requirements for an administrative hearing); Reorganization Plan No. 4 of 1961 § 1, 75 Stat. 837, 838 (1961) (providing the Commission with the "authority to delegate . . . any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner," or specified others, but only to the extent consistent with § 7(a) of the Administrative Procedure Act, 5 U.S.C. § 556).

[24] *See, e.g.*, Order Designating Administrative Law Judge at 1, Inova Health Sys. Found., FTC Docket No. 9326 (May 9, 2008), www.ftc.gov/sites/default/files/documents/cases/2008/05/080509order.pdf (appointing Commissioner J. Thomas Rosch as the ALJ and explaining, "Section 556(b)(2) of the Administrative Procedure Act (APA) permits the Commission to determine whether the Commission itself, one or more Commissioners, or an administrative law judge . . . will 'preside at the taking of evidence' in adjudications") (citing 5 U.S.C. § 556(b)).

[25] *See id.* (noting that the Commission's own rules provide "full discretion to determine" who should preside, and therefore implying the ability to modify those rules to limit the range of potential choices).

tional trade and transportation matters.[26] Although some of these specialist tribunals are staffed by dedicated, full-time judges, in other cases these courts are staffed by judges drawn from other Article III courts. Commentators typically favor the latter model,[27] both because it reduces the risk of judicial "capture" by special interests or partisans and because it provides a group of seasoned judges with a broad legal perspective and substantial expertise with complex cases.[28]

Although none of these reforms is perfect, each merits serious consideration. Critics of the Commission's administrative litigation system have pointed to significant drawbacks, some of which have been studied and critiqued since the 1950s. Requiring the FTC to act more like the DOJ, or indeed transferring its authority to the DOJ, may be one way to solve these perceived problems. But it is hardly the only potential solution, nor is it necessarily the best one. Thus, in an era when many seek to "rethink" the Commission's role in antitrust enforcement, it makes sense to consider a broader range of alternatives such as the clear-error standard, a more independent fact finder, and even specialized courts. Helpfully, each of these alternatives already exists elsewhere in the American federal legal system, thereby offering some insight into how each reform may perform in practice.

I. THE COMMISSION'S ADMINISTRATIVE LITIGATION PROCESS HAS LONG BEEN ATTACKED AS PROCEDURALLY UNFAIR

Concerns about the Commission's quasi-judicial function stretch back decades. Since passage of the Administrative Procedure Act (APA),[29] which enacted the rules for administrative hearings, commentators, courts, and even the occasional FTC commissioner have expressed concern that the Commission's prosecutorial and quasi-judicial roles may at least appear to deny respondents their right to a fair hearing before an impartial decision-maker.

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[26] *See* Cong. Rsch. Serv., *Courts of Specialized Jurisdiction and Congress*, CONSTITUTION ANNOTATED, constitution.congress.gov/browse/essay/artIII-S1-8-6/ALDE_00013562 (describing the Commerce Court, which had exclusive jurisdiction to enforce non-monetary orders of the Interstate Commerce Commission, and the U.S. Court of International Trade and the Federal Circuit, which together have jurisdiction over many international trade matters).

[27] *See, e.g.*, Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists Versus Generalists*, 36 FORDHAM INT'L L.J. 788, 809 (2013); Diane P. Wood, *Judge of All Trades: Further Thoughts on Specialized Courts*, JUDICATURE, Winter 2015, at 10, 14–15; Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 779–80 (1983).

[28] *See* Ginsburg & Wright, *supra* note 27, at 807–10.

[29] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–59).

A. FTC Administrative Litigation Procedures Today

By statute, the Commission may choose to initiate a complaint in either a U.S. district court or its own administrative tribunal.[30] These paths differ in several ways.

In a federal court proceeding, the trier of fact—either a judge or a jury—is empowered to hear witness testimony, review record evidence, and find facts. District court decisions are appealable to the U.S. courts of appeals, which review findings of fact for clear error. Under the clear-error standard, "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."[31] Thus, the federal rules set a high bar for disturbing facts found by the trier of fact, at least in part because the trier of fact had the opportunity to judge the witnesses' credibility.

The FTC's in-house administrative litigation system functions somewhat differently. Although in theory the Commission could hear a case in the first instance, in practice the Commission has long delegated this function to ALJs, which are alternatively known as "hearing officers" or "presiding employees."[32] Historically, a hearing officer operated like a magistrate judge and made only recommended findings of fact to the Commission. For several decades thereafter, however, ALJs performed the role of hearing officer and were empowered to render an initial decision on both law and facts.[33] The initial decision was then appealable to the full Commission. As the U.S. Supreme Court noted recently in *Lucia v. SEC*, the ALJs have "last-word capacity" because the agency "can decide against reviewing an ALJ decision at all," in which case "the ALJ's decision itself becomes final."[34] Indeed, a recent

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[30] 15 U.S.C. §§ 11, 45(b) (authorizing administrative litigation); *id.* § 53(b) (authorizing actions in federal court seeking preliminary or permanent injunctive relief).

[31] FED. R. CIV. P. 52(a)(6).

[32] *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 557(b) ("When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision.").

[33] *See, e.g.*, Pertshuck testimony, *supra* note 20, at 3 (describing in 1980 the same process that prevails today).

[34] Lucia v. SEC, 138 S. Ct. 2044, 2053–54 (2018). The Supreme Court also viewed "last-word capacity" as evidence that ALJs have greater independence than the special trial judges at issue in *Freytag v. Commissioner*, 501 U.S. 868 (1991). *Id.* The finding of greater independence, although unhelpful in the context of *Lucia*, arguably weakens the basis for finding a Due Process Clause problem. Note, however, that the U.S. Supreme Court has granted certiorari in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 2023 WL 4278448 (U.S. June 30, 2023) (No. 22-859) over whether the SEC's use of ALJs is constitutional. That case could affect the FTC as well.

submission by the United States to the Organisation for Economic Co-operation and Development (OECD) described the FTC's authority to review findings of fact "de novo" as "one key, substantive difference between proceedings before the FTC and those before a federal circuit court,"[35] and even agency officials have described the FTC's authority to review facts de novo as "unusual."[36] As noted above, the FTC recently returned to "recommended" decisions,[37] perhaps as a reaction to *Lucia*.

If the Commission renders a final decision unfavorable to the respondent, which as noted above is usually the case, the respondent may appeal to a U.S. court of appeals.[38] The court of appeals reviews the Commission's de novo findings under the substantial-evidence standard,[39] even though the Commission did not have the ALJ's "opportunity to judge the witnesses' credibility."[40] Under this standard of review, the reviewing court of appeals "must accept the Commission's findings of fact if they are supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[41]

However, the courts also have long interpreted the substantial-evidence standard to afford less deference to Commission findings of fact when they differ from those found by the ALJ. Thus, although the substantial-evidence standard "is not modified in any way when the [agency] and its examiner disagree," the "evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the [agency's] than when he has reached the same conclusion."[42] A commissioner's dissent may also

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[35] OECD, WORKING PARTY NO. 3 ON CO-OPERATION AND ENFORCEMENT: THE STANDARD OF REVIEW BY COURTS IN COMPETITION CASES – NOTE BY THE UNITED STATES ¶ 16 (2019), www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/standard_of_review_us-oecd.pdf.

[36] D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 ANTITRUST L.J. 319, 324 (2003). At the time, Royall and Hoffman were the Deputy Director and Associate Director for Regional Litigation, respectively, of the FTC's Bureau of Competition. *See id.* at 319.

[37] *See supra* notes 6–13 and accompanying text.

[38] 15 U.S.C. § 45(c) (providing that a losing respondent may appeal to "the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business").

[39] *Id.* ("The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."); *see also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 493 (1951).

[40] FED. R. CIV. P. 52(a)(6).

[41] FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986) (citation omitted).

[42] *Universal Camera*, 340 U.S. at 496; *see* Thiret v. FTC, 512 F.2d 176, 179 (10th Cir. 1975) ("Where, as here, the Commission in effect overrules the Judge and substitutes its findings for those of the Judge, the Commission's findings should be closely scrutinized.") (following *Universal Camera*, 340 U.S. at 496); Litton Indus., Inc. v. FTC, 676 F.2d 364, 369 (9th Cir. 1982)

affect the quantum of evidence deemed substantial.[43] And in one famous case, *Cinderella Career and Finishing Schools, Inc. v. FTC*,[44] the court found that the Commission wandered so far from the ALJ's findings of fact that it violated the defendant's due process rights. *Cinderella* therefore defines the outer boundaries of the Commission's fact-finding authority: it is limited largely to reviewing the facts found by the ALJ.[45] The same constraints apply to administrative agencies that review recommended decisions.[46]

("A reviewing court may examine the FTC's findings more closely where they differ from those of the ALJ.") (citing *Thiret*, 512 F.2d at 179); Cal. Dental Ass'n v. FTC, 128 F.3d 720, 725 (9th Cir. 1997) ("We do examine the findings of the full Commission more closely when they differ from those of the ALJ.") (citing *Litton*, 676 F.2d at 369), *rev'd on other grounds*, 526 U.S. 756 (1999); Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1062 (11th Cir. 2005) ("We may, however, examine the FTC's findings more closely where they differ from those of the ALJ.") (citing *Thiret*, 512 F.2d at 179); Chi. Bridge & Iron Co. v. FTC, 534 F.3d 410, 431 (5th Cir. 2008) ("We may scrutinize the HHI statistics more carefully when the Commission's conclusion differs from the ALJ, as in this case.") (citing *Schering-Plough*, 402 F.3d at 1062).

[43] *See* Minneapolis-Honeywell Regul. Co. v. FTC, 191 F.2d 786, 789, 792 (7th Cir. 1951) (relying on the findings of the ALJ and one dissenting commissioner to dismiss the complaint due to the lack of "'substantial' evidence," explaining that "we think the evidence supporting the [Commission's] conclusion may become even less substantial when it fails to persuade an experienced member of the Commission who dissents from its findings and conclusions") (quoting NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 502 (1951), and citing *Universal Camera*, 340 U.S. at 496). *But see* FCC v. Allentown Broad. Corp., 349 U.S. 358, 364–65 (1955) (making it clear that the "'clearly erroneous' rule" is not required in an agency's review of an ALJ's decision); Kopack v. NLRB, 668 F.2d 946, 952 (7th Cir. 1982) ("*Universal Camera* makes clear that it is the [agency]'s decision, rather than that of the ALJ, which is subject to scrutiny by a reviewing court under the substantial evidence test.") (citing *Universal Camera*, 340 U.S. at 488).

[44] 425 F.2d 583, 589 (D.C. Cir. 1970) ("The Commissioners may not turn away in haughty administrative aloofness from the entire body of law governing their procedures.").

[45] *Cf.* Rambus, Inc., 142 F.T.C. 617, 644 (2006) (reopening the record to add evidence and then stating, "*[d]e novo* review is particularly appropriate in this case because we must consider supplemental evidence, as well as new proposed findings of fact and conclusions of law, that were unavailable to the ALJ").

[46] *See, e.g.*, Castillo Condo. Ass'n v. U.S. Dep't Hous. & Urb. Dev., 821 F.3d 92, 97 (1st Cir. 2016) ("We hold that where, as here, the Secretary rejects the factual findings [in a recommended decision] of an ALJ, a reviewing court must first make certain that the Secretary has adequately articulated his reasons for overturning the ALJ's findings. The court must then proceed to ask whether those articulated reasons derive adequate support from the administrative record.") (citing Aylett v. Sec'y Hous. & Urb. Dev., 54 F.3d 1560, 1561, 1567 (10th Cir. 1995)); *id.* (explaining that, while "this heightened level of scrutiny does not alter the substantial evidence standard of review in any fundamental respect, it requires [the court] to apply that standard with special rigor, particularly with regard to credibility determinations"); Earle Indus., Inc. v. NLRB, 75 F.3d 400, 404 (8th Cir. 1996) ("We examine the Board's findings more critically when, as here, the Board's conclusions are contrary to the ALJ's, because the ALJ's [recommended decision] is part of the record we must consider."); *see also* 29 C.F.R. § 102.45 (providing for recommended decisions by NLRB ALJs).

B. PRIOR COMPLAINTS

Axon was not the first to argue that the FTC's quasi-judicial functions could raise due process concerns.[47] In the past, the federal appellate courts expressed discomfort on a case-by-case basis, particularly when the Commission decision diverged significantly from the ALJ's decision in ways that benefited the Commission.[48] More recently, courts have expressed deeper misgivings that the Commission's Part 3 decisions, if viewed as a whole, skew too heavily in the Commission's favor.[49] Various blue-ribbon panels of experts have also expressed concerns about the structure of the FTC's quasi-judicial functions, although they have always concluded that the present system—however flawed—is preferable to its abolition.

Courts have long held that the Commission's findings of fact are subject to heightened scrutiny when they diverge significantly from the facts found by the ALJ who actually heard the trial testimony.[50] Although courts applied heightened scrutiny as early as 1951,[51] the approach became widespread in the 1970s.

The 1970 case *Cinderella* is a leading example.[52] There, the ALJ found that certain advertisements were not deceptive.[53] On appeal, the Commission criticized the ALJ for discounting some of the evidence offered by complaint counsel (FTC staff), found the consumer evidence adduced at trial irrelevant, and deemed the advertisements deceptive by applying the commissioners' own personal assessment of it.[54] The D.C. Circuit granted the petition for re-

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[47] For a more comprehensive review of the literature, see Ohlhausen, *supra* note 11, at 644–45.

[48] *See supra* notes 42–45 and accompanying text.

[49] *See, e.g.*, Axon Enter., Inc. v. FTC, 986 F.3d 1173, 1187 (9th Cir. 2021) (noting that "[e]ven the 1972 Miami Dolphins" would envy the Commission's record in Part 3 litigation), *rev'd*, 143 S. Ct. 890 (2023); Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 907 n.1 (Thomas, J., concurring) (observing that the FTC and SEC have a "tendency to overwhelmingly agree with their respective agency's decisions") (quoting *Axon*, 986 F.3d at 1187).

[50] *See supra* note 42 and accompanying text.

[51] *See* Minneapolis-Honeywell Regul. Co. v. FTC, 191 F.2d 786, 789–90 (7th Cir. 1951) (holding that the FTC's decision was not based on substantial evidence when its reliance on inferences differed from actual "evidence calling for contrary inferences" found by the ALJ and one dissenting commissioner); *see supra* note 43 and accompanying text.

[52] Cinderella Career & Finishing Schs., Inc. v. FTC, 425 F.2d 583, 592 (D.C. Cir. 1970).

[53] School Servs., Inc., 74 F.T.C. 920, 997 (1968) (finding that "[c]omplaint counsel has failed to prove by a preponderance of reliable, probative and substantial evidence that the acts and practices alleged in the complaint to be deceptive, or any of such acts and practices, did and do constitute deceptive acts and practices which are proscribed by the Federal Trade Commission Act").

[54] *Cinderella*, 425 F.2d at 585–89. The court summarized the issue:

> The important question raised by petitioners here is whether the full Commission, in reviewing an initial decision, may consider the advertisements de novo, disregarding entirely the evidence adduced at a lengthy hearing, and arrive at independent findings

view and remanded the case back to the Commission, noting that the court "hardly think[s] it permissible for the Commission to draw such independent conclusions, while ignoring the record and consequently converting the entire hearing proceeding into a meaningless exercise, leaving it for the court to review the record to find whether there is evidence to support those conclusions."[55] The court then framed the question as one of due process:

> [W]hen a proceeding which involves sixteen days, 1,810 pages of testimony, fifty-two witnesses, and 247 exhibits, has been established, the Commissioners are not free to boil over in aggression and completely dismiss those proceedings either because they are dissatisfied with the outcome, or for any other reason. Such procedure is rooted in nothing and places the Commission in the position of being both the instrument and the musician at the same time. The result, legally, is a ragged and confusing mosaic defying the very archetype of due process, abandoning the merit in hearings of the power of persuasion for the persuasion of power and thereby producing a self-justifying system that makes fairness not really the controlling factor in practice that it seems in metaphor.[56]

Courts since then have addressed this perceived risk in the Part 3 process by increasing their scrutiny of the Commission's findings of fact. In *Thiret v. FTC*, the Tenth Circuit held that "[w]here, as here, the Commission in effect overrules the Judge and substitutes its findings for those of the Judge, the Commission's findings should be closely scrutinized."[57] In *Litton Industries, Inc. v. FTC*, the Ninth Circuit held that it "may examine the FTC's findings more closely where they differ from those of the ALJ,"[58] a position it reiterated several years later in *California Dental Ass'n v. FTC*.[59] The Fifth and Eleventh Circuits apply similar rules,[60] which parallel those applicable to recommended decisions.[61]

> of fact and conclusions of law, or whether the Commission is bound by its own rules and regulations, as well as conclusions of due process, to review the conclusions of the hearing examiner in light of the evidence.

Id. at 585.

[55] *Id.* at 588.

[56] *Id.* at 588–89.

[57] 512 F.2d 176, 179 (10th Cir. 1975).

[58] 676 F.2d 364, 369 (9th Cir. 1982).

[59] 128 F.3d 720, 725 (9th Cir. 1997) ("We do examine the findings of the full Commission more closely when they differ from those of the ALJ.") (citing *Litton*, 676 F.2d at 369), *rev'd on other grounds*, 526 U.S. 756 (1999).

[60] *See* Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1062 (11th Cir. 2005) ("We may, however, examine the FTC's findings more closely where they differ from those of the ALJ."); Chi. Bridge & Iron Co. v. FTC, 534 F.3d 410, 431 (5th Cir. 2008) ("We may scrutinize the HHI statistics more carefully when the Commission's conclusion differs from the ALJ, as in this case.") (citing *Schering-Plough*, 402 F.3d at 1062).

[61] *See supra* note 46 (collecting illustrative cases).

Likewise, blue-ribbon panels have from time to time expressed reservations about the fairness of the administrative system. In 1989, for example, an ABA special committee recognized "concern about at least the appearance of fairness is inevitable" when, as here, "the same people who issued a complaint later decide[d] whether it should be dismissed."[62] The special committee nonetheless concluded "that the current unity of functions, although troubling, is superior to [two] alternatives," (1) "direct[ing] the Commission to bring all of its cases in federal court" or (2) "remov[ing] the prosecutorial function from the control of the Commission."[63]

More recent commentary has focused on complaint counsel's unusually lopsided winning streak in appeals from the ALJ to the FTC commissioners. In a 2008 article, Douglas Melamed found that from 1983 to 2008, complaint counsel won every Sherman Act case with disputed facts litigated in the FTC's own adjudicative process, with the Commission reversing the ALJ's decision in several of the cases.[64] In 2013, Congressman Spencer Bachus remarked that, "[w]ith this kind of record and an unbeaten streak that Perry Mason would envy, a company might wonder whether it is worth putting up a defense at all in a system in which the FTC brings a complaint, the case is tried before an administrative law judge at the FTC, and the FTC holds the authority to overturn a decision adverse to the agency."[65] In 2016, former Commissioner Joshua Wright noted that "the FTC has ruled for itself in 100 percent of its cases over the past three decades,"[66] and in related work, Wright

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[62] REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, AM. BAR ASS'N (1989), *reprinted in* 58 ANTITRUST L.J. 43, 119 (1989).

[63] *Id.* The panel noted only two alternatives: "direct[ing] the Commission to bring all of its cases in federal court" and "remov[ing] the prosecutorial function from the control of the Commission." *Id.* It also recognized that "[c]ombinations of these models and other alternatives also are possible." *Id.* at 120.

[64] *See* A. Douglas Melamed, *The Wisdom of Using the "Unfair Method of Competition" Prong of Section 5*, GLOB. COMPETITION POL'Y, Nov. 2008, at 1, 16–21; *see also* A. Douglas Melamed, *Paradigm Shopping: Section 5, the FTC, and the Courts*, *in* THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION 61 (James Campbell Cooper ed., 2013).

[65] David Balto, *FTC's Winning Streak Is Over*, ANTITRUSTCONNECT BLOG (Feb. 12, 2014), antitrustconnect.com/2014/02/12/ftcs-winning-streak-is-over (quoting Congressman Bachus).

[66] Joshua Wright, *Supreme Court Should Tell FTC to Listen to Economists, Not Competitors on Antitrust*, FORBES (Mar. 14, 2016); *see also* David A. Balto, *The FTC at a Crossroads: Can It Be Both Prosecutor and Judge?*, WASH. LEGAL FOUND. LEGAL BACKGROUNDER, Aug. 23, 2013, at 3 (describing the FTC's "winning streak [as] simply unprecedented") (quote marks omitted), wlf.org/2013/08/23/publishing/the-ftc-at-a-crossroads-can-it-be-both-prosecutor-and-judge. *But see* Ohlhausen, *supra* note 11, at 632–34 (quibbling with Wright's 100-percent figure, noting several potential exceptions from the 1980s and 1990s, but agreeing that "in the last decade the FTC has found liability in almost every Part 3 case that it had authorized").

argued that in practice the FTC's specialized tribunal performed worse than generalist judges.[67]

Of course, the FTC also has its defenders. Former Commissioner Maureen K. Ohlhausen has noted some exceptions to the claim that complaint counsel wins all appeals to the Commission, such as a complaint abandoned after an adverse ALJ ruling (*Visx*) and a complaint abandoned after state action immunized the challenged conduct (*Cabell St. Mary's*).[68] In other cases the Commission upheld some, but not all, of the proposed charges.[69] Former Commissioner J. Thomas Rosch also repeatedly rejected criticisms of the FTC, noting several precedents that uphold the constitutionality of the Commission's adjudicatory authority.[70]

By comparison, the Commission loses challenges in federal district court with some frequency.[71] For example, in *FTC v. Lundbeck, Inc.*, the FTC litigated in federal district court and lost; on appeal, it challenged the district court's findings of fact but sought to frame them as a legal problem subject to de novo review.[72] The Eighth Circuit declined the invitation, applied the clearly erroneous standard, and affirmed the findings, noting that although

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[67] *See* Joshua D. Wright & Angela Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, *in* THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION 40 (James Campbell Cooper ed., 2013).

[68] Ohlhausen, *supra* note 11, at 632 ("Technically, the Commission dismissed 22 percent of its Part 3 matters (11 cases) during that period. Not all of those dismissals, however, reflect a substantive merits determination. Earlier this year in *Cabell*, for instance, the FTC dismissed a Part 3 complaint challenging a healthcare-system acquisition because a change in the law created issues of state-action immunity.") (citing, *inter alia*, Order Reopening the Record and Dismissing the Complaint, VISX, Inc., FTC Docket No. 9286 (Feb. 7, 2001); Order Returning Matter to Adjudication and Dismissing Complaint, Cabell Huntington Hosp., Inc., FTC Docket No. 9366 (July 6, 2016)).

[69] *See supra* note 12 and accompanying text (discussing McWane, Inc., 157 F.T.C. 107, 109 (2014) and Polypore Int'l, Inc., 150 F.T.C. 586, 588 (2010)).

[70] J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, So I Serve as Both a Prosecutor and a Judge – What's the Big Deal?, Remarks Before the American Bar Association Annual Meeting 14 & nn.36–37 (Aug. 5, 2010), www.ftc.gov/sites/default/files/documents/public_statements/so-i-serve-both-prosecutor-and-judge-whats-big-deal/100805abaspeech.pdf (citing Withrow v. Larkin, 421 U.S. 35, 58 (1975); FTC v. Cement Inst., 333 U.S. 683 (1948); Kennecott Copper Corp. v. FTC, 467 F.2d 67, 79 (10th Cir. 1972); Cinderella Career & Finishing Schs., Inc. v. FTC, 404 F.2d 1308, 1315 (D.C. Cir. 1968)); Rosch, *supra* note 18, at 12 nn.33–34 (citing the same cases).

[71] *See, e.g.*, Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm'n, The FTC's Path Ahead, Remarks at the GCR Live 6th Annual Antitrust Law Leaders Forum 10 (Feb. 3, 2017), www.ftc.gov/system/files/documents/public_statements/1070123/gcr_the-ftc_path_ahead.pdf ("Time and again, [the Obama-era FTC] elected to forego administrative litigation in conduct matters in favor of federal court, which is where the money is. In two pay-for-delay cases (over my dissent)—*AbbVie* and *Endo*—the FTC sued in federal court, seeking disgorgement. Both cases struggled in the lower courts, which I see as a lost opportunity to develop the law.") (footnote omitted).

[72] 650 F.3d 1236, 1242, 1243 (8th Cir. 2011).

"the FTC disagrees with the district court's weighing of the facts[,] . . . [w]hether this court would come to the same conclusion [as the district court] is irrelevant" under the clear-error standard of review.[73]

C. THE *AXON* CASE

These due process concerns have taken on greater importance in the wake of the Supreme Court's April 2023 decision in *Axon Enterprise, Inc. v. FTC*.[74] There, the Court unanimously held that federal district courts have jurisdiction to hear constitutional challenges to the FTC's administrative litigation structure, including the manner in which ALJs are appointed and the fusion of prosecutorial and adjudicatory capabilities within a single agency.[75] The Court remanded the case for further proceedings.

The *Axon* case brings to the fore several of the complaints that have percolated in the literature. In its January 2020 complaint, Axon sought to enjoin the Commission from challenging an alleged merger to monopoly through administrative litigation.[76] Axon charged that it is procedurally "unfair," and therefore violative of Axon's due process and equal protection rights, for the FTC to "appoint the [ALJ]" who will preside over the trial and, "if the FTC disagrees with the ALJ's ultimate decision on either the facts or the law, the same Commissioners who voted to file the enforcement action against Axon have the right to review these findings de novo *and change them*."[77] Axon, citing former Commissioner Wright, argued that "in 100 percent of cases where the [ALJ] ruled in favor of the FTC staff, the Commission affirmed liability; and in 100 percent of the cases in which the [ALJ] . . . found no liability, the Commission reversed."[78]

Therefore, Axon charged that "[w]hich agency reviews a consummated transaction is critical" because the DOJ must "sue in federal court" while the FTC "has the option to sue in federal court . . . or to commence an internal administrative hearing."[79] Whereas "the DOJ cannot change the findings made by the district court when appealing a decision to the circuit court[,] . . . the FTC Commissioners, on appeal, can ignore and completely change the merits decision rendered in the administrative proceedings," and "different appellate

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[73] *Id.* at 1242–43.

[74] 143 S. Ct. 890 (2023).

[75] *Id.* at 905–06.

[76] Axon Complaint, *supra* note 10.

[77] *Id.* ¶ 7.

[78] *Id.* (quoting Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority, Remarks at the Symposium on Section 5 of the Federal Trade Commission Act 6 (Feb. 26, 2015), www.ftc.gov/system/files/documents/public_statements/626811/150226bh_section_5_symposium.pdf).

[79] *Id.* ¶ 31.

standards of review" mean that "the district court's factual findings in a DOJ case are reviewed for clear error, whereas the findings of the Commission as to the facts, if supported by evidence, shall be *conclusive*."[80]

The district court dismissed Axon's constitutional challenge for lack of jurisdiction (essentially on ripeness grounds); the Ninth Circuit affirmed but warned that "Axon raises legitimate questions about whether the FTC has stacked the deck in favor of its administrative proceedings," noting that "[e]ven the 1972 Miami Dolphins" would envy the Commission's record in Part 3 litigation.[81] Judge Bumatay dissented in part but concurred that the district court lacked jurisdiction to hear Axon's challenge to the Commission's Part 3 procedures.[82]

The Supreme Court unanimously reversed, holding that the district court had jurisdiction to hear Axon's constitutional challenge to the structure of the Commission's administrative litigation process. The Court held that district courts have federal question jurisdiction under 28 U.S.C. § 1331 and, applying the three factors set out in *Thunder Basin Coal Co. v. Reich*,[83] this jurisdiction was not impliedly stripped by the FTC Act.[84] Although the Court did not reach the merits of Axon's constitutional claims, Justice Thomas hinted in a concurrence that "when private rights are at stake," then "Article III adjudication is likely required."[85] He also signaled potential disagreement with several precedents holding administrative litigation to be constitutional.[86] The Court remanded the case for further proceedings, but the FTC decided to stop Axon's challenge by dismissing its complaint.[87]

Following the Supreme Court's decision in *Axon*, policymakers may wish to consider various reforms to the administration litigation model. Parts II, III, and IV below sketch three potential options.

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[80] *Id.* ¶ 32 (cleaned up).

[81] Axon Enter., Inc. v. FTC, 986 F.3d 1173, 1187 (9th Cir. 2021).

[82] *Id.* at 1189 (Bumatay, J., concurring in part and dissenting in part).

[83] 510 U.S. 200, 212 (1994).

[84] Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 900–06 (2023).

[85] *Id.* at 907 (Thomas, J., concurring).

[86] *See id.* at 908–09 (discussing the "appellate review model" first upheld in *ICC v. Illinois Central Railroad Co.*, 215 U.S. 452, 470 (1910), tracing its evolution through *Crowell v. Benson*, 285 U.S. 22 (1932) and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and concluding that "the appellate review model of agency adjudication thus raises serious constitutional concerns" because it "may violate the separation of powers," "Article III," "due process," and "the Seventh Amendment") (cleaned up).

[87] *Id.* at 906 (majority opinion); Order Returning the Matter to Adjudication and Dismissing the Complaint, Axon Enter., Inc., FTC Docket No. 9389 (Oct. 6, 2023).

II. THE NARROW PROCEDURAL REFORM PACKAGE

Although de novo review of legal questions is common, the Commission's authority to review the ALJ's findings of fact de novo differs markedly from the practice in federal court. That procedural difference can also have real consequences, both because antitrust law is notoriously fact-intensive and because the U.S. courts of appeals are required under the APA to afford the Commission's findings some degree of deference.

Therefore, the Commission could address many of the gravest complaints about the present Part 3 structure by tying its own hands and reviewing the ALJ's findings of fact only for clear error. The cleanest approach would be for the Commission to revise Part 3 of its Rules of Practice, a rulemaking procedure it uses regularly.[88] Doing so would confer three benefits.

First, this reform would ensure that the fact-finding inquiry in Part 3 matters is equivalent to the process used for actions brought in federal district court. It would therefore address concerns aired by the U.S. courts of appeals, which have from time to time been critical of the Commission for "substitut[ing] its findings for those of the Judge" who actually conducted the trial.[89] It would also address concerns among several congressional leaders—and even some former commissioners—that different procedures may lead the DOJ and the FTC to reach different substantive outcomes in antitrust cases.[90]

Second, the change would take advantage of the ALJ's comparative advantage in making credibility determinations. The ALJ alone hears oral testimony. Indeed, the Commission itself recognized the difficulty of second-guessing the ALJ's credibility determinations without hearing the testimony live, and it therefore experimented with—and quickly abandoned—an effort to videotape all trial testimony so the commissioners could review it themselves.[91] Thus, there are good legal reasons for the Commission to defer to the

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[88] *See supra* note 15.

[89] *E.g.*, Thiret v. FTC, 512 F.2d 176, 179 (10th Cir. 1975).

[90] *See, e.g.*, Press Release, Sens. Lee Tillis Grassley Introduce SMARTER Antirust [sic] Reform (Oct. 27, 2020), www.lee.senate.gov/2020/10/sens-lee-tillis-grassley-introduce-smarter-anti rust-reform (introducing the SMARTER Act as an effort to "creat[e] a system of consistency" by "requiring the Commission to satisfy the same standards that DOJ must meet in order to obtain a preliminary injunction to block a merger and requiring the Commission to litigate the merits of contested merger cases in federal court under the Clayton Act—just as DOJ does—rather than before its own administrative tribunals"); Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, A SMARTER Section 5, Remarks Before the U.S. Chamber of Congress 15 (Sept. 25, 2015), www.ftc.gov/system/files/documents/public_statements/804511/150925smartersection5.pdf ("Regarding the harmonization of the PI standards, given my concern about divergent standards between FTC and DOJ, I would support legislation that ensured that courts apply the same PI standard to actions brought by the FTC and DOJ.").

[91] The Commission adopted video recordation in 2009 and abandoned it in 2011. *See supra* note 16.

ALJ's findings on these topics. Indeed, the courts of appeals effectively already do so, applying a much more searching inquiry when the Commission overrides the ALJ's credibility determination.[92]

Third, adopting a clear-error standard would speed up Commission review by reducing the number of cases that require a second round of detailed fact-finding. Although Commission review is faster today than it was historically,[93] the two-stage administrative process is still sometimes described as "cumbersome and tedious."[94] To the extent this model is retained (see Part IV for an alternative), limiting the Commission's scope of review may at least shorten a process that "seems to add 6–12 months to a final decision."[95]

Fourth, the reform may paradoxically increase the Commission's win rate on appeal to a U.S. court of appeals. As explained above, the courts have applied a less deferential version of the substantial-evidence standard when the Commission overrules the ALJ's findings of fact.[96] By removing the risk that the Commission could do so, at least unless those findings were clearly erroneous, the Commission also mitigates the risk that the courts subject those findings to greater scrutiny on appeal.

In contrast, it is not clear what the Commission would lose from the change. Under this proposed reform, the Commission would be able to correct clearly erroneous findings, so serious mistakes could still be remedied. The Commission would lose only the ability to revise the ALJ's findings of fact on closer factual questions. While on the margin this may mean that a few more losses before the ALJ will be affirmed on appeal, this is not necessarily a bad thing, and it may avoid even more damaging (and precedential) losses in the U.S. courts of appeals.

Although the reform has not been discussed recently, it received substantial attention in the years immediately following passage of the APA. In 1941, the attorney general reported to Congress:

> In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law, and

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[92] *See, e.g.*, Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1070–71 (11th Cir. 2005) ("Substantial evidence requires a review of the *entire* record at trial, and that most certainly includes the ALJ's credibility determinations and the overwhelming evidence that contradicts the Commission's conclusion.").

[93] *See* Ohlhausen, *supra* note 11, at 629 (finding that "the duration of cases has shortened over time," including the time it takes the Commission to review an ALJ determination).

[94] J. Robert Robertson, *Administrative Trials at the Federal Trade Commission in Competition Cases*, 14 SEDONA CONF. J. 101, 101 (2013).

[95] *Id.* at 102.

[96] *See supra* notes 42–44 and accompanying text.

> policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, *the agency should be reluctant to disturb his findings unless error is clearly shown*.[97]

Two other reports adopted similar, albeit less explicit, recommendations. In 1954, the ABA Committee on Improvement of Administrative Procedures reported that "the independence which hearing officers should have, analogous in many respects to the independence of the trial judge, involves primarily the fact-determining function and is not inconsistent with agency control of policy and of efficiency in hearing procedure."[98] In 1955, the Second Hoover Commission concluded "[t]he person best qualified, apart from special circumstances, to arrive at a correct decision in an adversary matter is the person who actually hears and receives the evidence."[99]

Perhaps seeking to head off this critique, the Commission has occasionally claimed that it is "compelled" by statute to review the ALJ's findings of fact de novo. In 2009, following two high-profile losses in the U.S. courts of appeals,[100] the Commission asserted that its de novo review "of facts and inferences drawn from those facts . . . is compelled by the Administrative Procedure Act, 5 U.S.C. § 557(b), and the FTC Act, 15 U.S.C. § 45(b) & (c),"[101] and Commissioner Rosch publicly repeated the line in both 2010 and 2012.[102] Although the Commission adopted the same claim in *Polypore* and *North Carolina Dental*,[103] it adopted a somewhat weaker formulation in

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[97] ATT'Y GEN.'S COMM. ON ADMIN. PROC., DEP'T OF JUST., FINAL REPORT 51 (1941) (emphasis added).

[98] Raoul Berger et al., *Report in Re Hearing Officers of the Committee on Improvement of Administrative Procedures*, 6 ADMIN. L. BULL. 211, 212 (1954).

[99] TASK FORCE ON LEGAL SERVS. & PROC., COMM'N ON ORG. OF THE EXEC. BRANCH OF THE GOV'T, REPORT ON LEGAL SERVICES AND PROCEDURE 202 (1955).

[100] *See* Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008); Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005).

[101] Realcomp II, Ltd., 148 F.T.C. 350, 370 n.11 (2009).

[102] In 2010, Commissioner Rosch argued:

> This FTC's application of the de novo standard is compelled by the Administrative Procedure Act as well as the FTC Act, which give the agency all of the same powers that it would have had had it rendered the initial decision; these statutes therefore provide that the Commission's – not the ALJ's – findings of fact are what matters for appellate review. De novo review by the Commission is also compelled by a well-developed body of case law that holds that the Commission – not the ALJ – is responsible for resolving conflicts of testimony.

Rosch, *supra* note 70, at 7 (footnote omitted). Commissioner Rosch made the same points in a 2012 speech. Rosch, *supra* note 18, at 6.

[103] Polypore Int'l, Inc., 150 F.T.C. 586, 598 & n.15 (2010) ("The *de novo* standard of review is required by the Administrative Procedure Act . . . and the FTC Act . . . and applies to both findings of fact and inferences drawn from those facts.") (citing both statutes and *Realcomp II*,

Promedica,[104] omitted the language entirely for several years, and adopted it again in its 2019 *Impax* decision.[105] The *Promedica* formulation is particularly interesting, as the Commission there both reiterated that it was "compelled" to find facts de novo and—somewhat inconsistently—that it could defer to the ALJ's findings on any issues not contested on appeal and adopt the ALJ's findings of fact as its own.[106]

In fact, the APA authorizes, but does not "compel," de novo review. Section 557(b) governs administrative proceedings. It provides in pertinent part that: (1) an agency may decide to have a "presiding employee" make an initial decision; (2) "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule"; and (3) "[w]hen the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision."[107] The Commission has quoted this language selectively, highlighting the regulatory passage granting the agency "all the powers which it could have exercised if it had made the initial decision"[108] but omitting whenever possible the second half of the sentence in the statute: "except as it may limit the issues on notice or by rule."[109] Therefore, far from compelling de novo review of the facts, § 557(b) merely *allows* the Commission to do so while also expressly authorizing the Commission to adopt a more deferential standard of review.

Six U.S. courts of appeals have reached consistent interpretations of § 557(b), with several noting the statute's express grant of authority to adopt a more deferential standard of review.[110] For example, the Third Circuit has said

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148 F.T.C. at 370 n.11); N.C. Bd. of Dental Exam'rs, 152 F.T.C. 640, 653–54 & n.9 (2011) (same).

[104] Promedica Health Sys., Inc., 153 F.T.C. 473, 478 & nn.4–5 (2012).

[105] Impax Labs., Inc. 167 F.T.C. 443, 456–57 (2019) (citing, *inter alia*, *Realcomp II*, 148 F.T.C. at 370 n.11).

[106] *Promedica*, 153 F.T.C. at 478 & nn.4–5 ("We adopt the ALJ's findings of fact to the extent that those findings are not inconsistent with this opinion.").

[107] 5 U.S.C. § 557(b).

[108] *See* 16 C.F.R. § 3.54(a) ("Upon appeal from or review of an initial decision, the Commission will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision."); *Impax*, 167 F.T.C. at 456–57 (quoting 16 C.F.R. § 3.54(a) and citing 5 U.S.C. § 557(b)).

[109] 5 U.S.C. § 557(b).

[110] *See* Vineland Fireworks Co. v. ATF, 544 F.3d 509, 514 (3d Cir. 2008) (interpreting 5 U.S.C. § 557(b) as "permit[ting] the agency to limit its review using its regulation-promulgating powers, but if it chooses not to do so, it exercises de novo review over the ALJ's decision"); Miller v. CFTC, 197 F.3d 1227, 1235 (9th Cir. 1999) (recognizing that 5 U.S.C. § 557(b) means "[t]he Commission was free to decide [a penalty imposed by a CFTC ALJ] de novo"); Vercillo v. CFTC, 147 F.3d 548, 553 (7th Cir. 1998) (reaffirming "the reasoning in *Ryan*" that "the CFTC is

that "Congress permits the agency [there, ATF] to limit its review using its regulation-promulgating powers, but if it chooses not to do so, it exercises *de novo* review over the ALJ's decision."[111] Although the Supreme Court has authorized de novo review in holding that § 557(b) does not compel a clear-error standard for findings of fact,[112] it has never said that § 557(b) "compels" de novo review.

Nor does the FTC Act compel de novo review. Section 45(c) prescribes the standard of review (substantial evidence) that the U.S. courts of appeals must apply when reviewing an appeal *from* the Commission, rather than an appeal from the ALJ *to* the Commission.[113] Section 45(b) is relevant but does not "compel" a de novo standard any more than the APA does.[114] The statute provides that, in any administrative litigation before the FTC, "[t]he testimony . . . shall be reduced to writing and filed in the office of the Commission," and if the Commission concludes the practice violates the law, then "it shall make

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authorized to undertake a *de novo* review of the initial decision of an ALJ"; noting the statute allows the CFTC to limit its own review; reviewing CFTC regulations; and concluding that "[t]he CFTC has not, however, so limited its powers"); Ryan v. CFTC, 145 F.3d 910, 917 (7th Cir. 1998) (finding "no problem with the Commission evaluating an ALJ's findings and determinations with a *de novo* standard of review. . . . [b]ecause the APA authorizes the Commission to review an ALJ's findings and determinations *de novo*"); JCC, Inc. v. CFTC, 63 F.3d 1557, 1566 (11th Cir. 1995) (concluding that 5 U.S.C. § 557(b) "empower[s]" the CFTC "to conduct an independent review of the factual record before it" and finding that the Commission's regulations authorizing de novo review "are in accord with the APA"); Robinson v. United States, 718 F.2d 336, 338 (10th Cir. 1983) (concluding that, after an initial finding by an ALJ of the Secretary of Agriculture, on appeal "the Judicial Officer [of the Department of Agriculture] could have decided all issues de novo under the Administrative Procedure Act, 5 U.S.C. § 557(b), when it reviewed the ALJ's decision"); 41 N. 73 W., Inc. v. U.S. Dep't of Transp., 408 F. App'x 393, 399 (2d Cir. 2010) (concluding that the relevant DOT regulation "does not provide the agency with a standard for reviewing the Director's initial determination" and noting the default presumption of de novo review); Piasio v. CFTC, 54 F. App'x 702, 704 (2d Cir. 2002) ("The CFTC has the authority to review an ALJ decision de novo under both [§ 557(b)] and its own regulations.") (citations omitted).

[111] *Vineland Fireworks*, 544 F.3d at 514.

[112] FCC v. Allentown Broad. Corp., 349 U.S. 358, 364 (1955) (holding that a court of appeals could not require an agency (the FCC) to defer to an ALJ's "findings based on [the] demeanor of a witness" because it would "adopt for examiners of administrative agencies the 'clearly erroneous' rule . . . applicable to courts" that the Court had rejected in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492 (1951)).

[113] 15 U.S.C. § 45(c) ("The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."); *see* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986) ("The question involves review of both factual and legal determinations. As to the former, our review is governed by 15 U.S.C. § 45(c), which provides that '[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive.'") (quoting 15 U.S.C. § 45(c)); *id.* ("[A]s under the essentially identical 'substantial evidence' standard for review of agency factfinding, the court must accept the Commission's findings of fact if they are supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'") (quoting *Universal Camera*, 340 U.S. at 477); Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1062 (11th Cir. 2005) (citing 15 U.S.C. § 45(c)); Irwin v. FTC, 143 F.2d 316, 323 (8th Cir. 1944) (stating that § 45(c) means "it is not within our province to try the issues of fact de novo").

[114] 15 U.S.C. § 45(b).

a report in writing in which it shall state its findings as to the facts."[115] Thus, by its terms, the statute requires the Commission to "state its findings as to the facts" in a written decision. A requirement to state its findings of fact is not the same as a commandment to find them de novo; after all, the U.S. courts of appeals must also state the relevant facts upon which they rely, but that does not mean they find them de novo. The meaning of § 45(b) is even clearer when it is read in conjunction with § 557(b), which, as noted above, expressly allows the Commission to "limit the issues on notice or by rule."[116] The latter statute is both more specific than § 45(b) and was promulgated more recently.[117]

Finally, the Commission's previous—and erroneous—claim of compulsion does not limit its ability to change course now by adopting a more deferential standard of review. The compulsion claim came in an adjudicatory setting and thus is likely to receive only *Skidmore* deference. Under that standard, "[t]he weight of [an agency's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[118] In this case, the compulsion claim first appeared in 2009 in a three-line footnote, evolved in brief mentions in three more cases, vanished for several years, and recently (and perhaps inadvertently) reappeared.[119] Therefore, the compulsion claim is inconsistent with almost all "earlier and later pronouncements," which focus only upon the standard prescribed by the Commission's own Rules of Practice.[120]

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[115] *Id.*

[116] *See supra* note 109 and accompanying text (quoting 5 U.S.C. § 557(b)).

[117] *Compare* Federal Trade Commission Act § 5, 38 Stat. 717 (1914) (codified at 15 U.S.C. § 45(b)), *with* Pub. L. No. 79-404 § 8(a) (1946) (codified at 5 U.S.C. § 557(b)).

[118] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see also* United States v. Mead Corp., 533 U.S. 218 (2001) (explaining *Skidmore* deference: "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires.") (quoting *Skidmore*, 323 U.S. at 139); Yehonatan Givati & Matthew C. Stephenson, *Judicial Deference to Inconsistent Statutory Interpretations*, 40 J. LEGAL STUD. 85, 89–92 (2011); Kristen E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007).

[119] *See supra* notes 100–06 and accompanying text.

[120] *See, e.g.*, POM Wonderful LLC, 155 F.T.C. 1, 10 (2013) ("The Commission reviews the record *de novo* by considering 'such parts of the record as are cited or as may be necessary to resolve the issues presented and exercising all the powers which the Commission could have exercised if it had made the initial decision.' In this case, the Commission adopts the ALJ's findings of fact to the extent those findings are not inconsistent with this opinion.") (quoting 16 C.F.R. § 3.54(a)).

III. THE BROAD PROCEDURAL REFORM PACKAGE

Alternatively, the Commission could adjust the standard of review (as described above) *and* strengthen the stature and role of the ALJ.

To elevate the ALJ's stature, the Commission could adjust the hiring process by requiring candidates to have substantial experience with antitrust law, ideally from multiple perspectives.[121] Several reforms have made this path easier. In 2018, and in response to the Supreme Court's decision in *Lucia v. SEC*,[122] President Trump signed Executive Order 13843, which gave agencies substantial control over the process of hiring ALJs by excepting ALJs from the "competitive service selection procedures" and instead requiring "[a]ppointments of ALJs [to] be made under Schedule E of the excepted service."[123] As implemented by the Office of Personnel Management, this reform increases the Commission's ability to tailor the selection of future ALJs to the agency's subject matter; other agencies have embraced this new flexibility,[124] although it still does not override the strong preference for military veterans.[125] Thus, the Commission now has some authority—albeit still limited—to consider substantive legal experience in the ALJ hiring process, which is something it emphasized years ago when it temporarily designed Commissioner Rosch as an ALJ.[126]

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[121] For a related point about the qualifications for commissioners, see William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915 (1997).

[122] 138 S. Ct. 2044, 2049 (2018) (holding that ALJs at the SEC are officers of the United States and must be appointed in accordance with the Appointments Clause).

[123] *See* Exec. Order No. 13843, 83 Fed. Reg. 32755 (July 10, 2018), www.govinfo.gov/content/pkg/DCPD-201800476/pdf/DCPD-201800476.pdf ("Excepting Administrative Law Judges From the Competitive Service").

[124] *See, e.g.*, Procedures for Appointment of Administrative Law Judges for the Department of Labor, 83 Fed. Reg. 44307 (Aug. 16, 2018); U.S. DEP'T OF HEALTH & HUM. SERVS., ADMINISTRATIVE LAW JUDGE APPOINTMENT PROCESS: DEPARTMENTAL APPEALS BOARD, OFFICE OF MEDICARE HEARINGS AND APPEALS (2018), www.hhs.gov/sites/default/files/alj-appointment-process.pdf.

[125] *See* Administrative Law Judges, 85 Fed. Reg. 59207, 59207–10 (Sept. 21, 2020).

[126] *See, e.g.*, Order Designating Administrative Law Judge, Inova Health Sys. Found., FTC Docket No. 9326 (May 9, 2008), www.ftc.gov/sites/default/files/documents/cases/2008/05/080509order.pdf (appointing Commissioner J. Thomas Rosch as the ALJ); Press Release, FTC Designates Commissioner J. Thomas Rosch as ALJ in Case Challenging Inova Health System Foundations [sic] Acquisition of Prince William Health System, Inc. (May 9, 2008), www.ftc.gov/news-events/press-releases/2008/05/ftc-designates-commissioner-j-thomas-rosch-alj-case-challenging ("The FTC designated Commissioner Rosch based on his 40 years of experience as a trial lawyer, predominantly in the context of complex competition law cases."). The Commission also initially designated Commissioner Rosch as the "Presiding Official" for the "Scheduling Conference" in the *Whole Foods* merger challenge. *See* Order Rescinding Stay of Administrative Proceeding, Setting Scheduling Conference, and Designating Presiding Official, Whole Foods Mkt., Inc., FTC Docket No. 9324 (Aug. 8, 2008), www.ftc.gov/sites/default/files/documents/cases/2008/08/080808wholefoodsorder.pdf.

To strengthen the ALJ's role, the Commission could remove its own ability to hear administrative trials in the first instance. Under § 3.42 of its Rules of Practice, the administrative adjudicative proceeding "shall be presided over by a duly qualified [ALJ] or by the Commission or one or more members of the Commission sitting as [ALJs],"[127] and the term "Administrative Law Judge" is defined to include the Commission if it opts to hear the matter directly.[128] The full Commission sat as the initial fact finder at least once early in its history,[129] but there is no precedent for doing so in modern times. Rather, in the 2008 *Inova* matter, the Commission instead designated Commissioner Rosch to preside over the administrative trial as the ALJ.[130] The decision to appoint Commissioner Rosch—which was described publicly as an attempt to quicken the pace of ALJ proceedings[131]—was loudly criticized at the time on due process grounds.[132] Although these concerns remain today, so does the Commission's authority to bypass the ALJ.

Thus, the narrow procedural reform package could be strengthened and augmented by ensuring that there are ALJ findings of fact in the first place. The FTC could achieve this result—at least temporarily—by amending

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[127] 16 C.F.R. § 3.42(a) (2020) (laying out the FTC Rules of Practice for Adjudicative Proceedings).

[128] *Id.* ("[T]he term *Administrative Law Judge* as used in this part means and applies to the Commission or any of its members when so sitting.").

[129] *See supra* note 22 and accompanying text.

[130] *See, e.g.*, J. Thomas Rosch, Comm'r, Fed. Trade Comm., A Peek Inside: One Commissioner's Perspective on the Commission's Roles as Prosecutor and Judge, Presented at the NERA 2008 Antitrust & Trade Regulation Seminar 14 (July 3, 2008), www.ftc.gov/sites/default/files/documents/public_statements/peek-inside-one-commissioners-perspective-commissions-roles-prosecutor-and-judge/080703nera.pdf ("In the *Inova* matter, the Commission designated this Commissioner to act as an [ALJ].").

[131] *See id.* at 15 (noting the schedule mandated trial "approximately five months after the complaint was issued, and the Commission committed to reviewing any Initial Decision appealed in short order. That compares favorably to the schedules adopted in the federal court antitrust cases in which [Commissioner Rosch had] been involved, including merger cases") (footnotes omitted).

[132] *See, e.g.*, Respondents' Motion to Recuse Commissioner J. Thomas Rosch as Administrative Law Judge, Inova Health Sys. Found., FTC Docket No. 9326 (May 23, 2008), www.ftc.gov/sites/default/files/documents/cases/2008/05/080523respmorecuseroschasalj.pdf; *see also* Diana Gillis, *Closing an Administrative Loophole: Ethics for the Administrative Judiciary*, 22 J. GEO. J. LEGAL ETHICS 863, 863–64 (2009) (arguing that the FTC's authority to avoid ALJs and its specific use of that authority in *Inova* "enables the agency to circumvent safeguards in the APA that were established to ensure that administrative hearings, much like those in typical judicial courts, would be in front of an independent and impartial decision-maker"); Robert C. Jones & Aimee E. DeFilippo, *FTC Hospital Merger Challenges: Is a "Fast-Track" Administrative Trial the Answer To the FTC's Federal Court Woes?*, ANTITRUST SOURCE, at 1, 12 (Dec. 2008) ("An ALJ might have been less likely than Commissioner Rosch to ignore the Commission's own rules to impose fast-track procedures over respondents' objections."); Deborah Feinstein, Comments at ABA Section of Antitrust Law Brown Bag Teleconference, An Autopsy of the FTC's Challenge to the Inova Deal (July 22, 2008) (criticizing the designation of Commissioner Rosch to be the ALJ as "inappropriate").

§ 3.42(a) of its Rules of Practice to require an ALJ to preside at the administrative trial. However, a future Commission could just as easily reinstate the alternative. Thus, a more permanent solution may require Congress to formalize the ALJ's role by statute.

IV. THE NARROW STRUCTURAL REFORM PACKAGE

The reforms to date have considered reforming but retaining the Commission's administrative litigation process. If one decides that reforming the FTC's judicial function is either insufficient or undesirable, then making the FTC more like the DOJ (or folding it into the DOJ) is not the only alternative. Rather, one might consider removing and reconstituting the FTC's judicial function into a new and specialized Article III court, which could only be done by Congress. This reform should address any potential outcome of the *Axon* litigation on remand, including Justice Thomas's apparent preference for Article III tribunals.[133]

At the outset, it is important to note that this "Antitrust Court" proposal would expand the jurisdiction of Article III courts by moving cases from an administrative process *to* an Article III trial court. It therefore differs from proposals to transfer jurisdiction *from* generalist Article III courts to specialized—Article III or administrative—courts.[134] It also differs from proposals that would retain the existing Part 3 apparatus and instead shift the authority to issue a complaint from the Commission to the director of the Bureau of Competition.[135]

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[133] *See* Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 907 (2023) (Thomas, J., concurring) ("[W]hen private rights are at stake, full Article III adjudication is likely required.").

[134] *See, e.g.*, Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1171 (1990) (addressing two situations, "specialized courts that supplant the function of the generalist, regional courts of appeals, and specialized courts that are subject to review by the courts of appeals"); Ginsburg & Wright, *supra* note 27 (discussing the merits of generalist and specialized courts generally and in various contexts); Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Presentation of the Sherman Award to the Honorable Judge Douglas H. Ginsburg 2–3 (Oct. 23, 2020), www.justice.gov/opa/speech/file/1330981/download (noting Judge Ginsburg's article approvingly and endorsing "an Article III Court, into which generalist Article III judges with an interest in antitrust law could rotate for a number of years" without specifying the tribunals it would replace).

[135] *See* Terry Calvani & Angela M. Diveley, *The FTC at 100: A Modest Proposal for Change*, 21 GEO. MASON L. REV. 1169 (2014) (proposing this arrangement); Daniel A. Crane, *Institutional Reforms and Agency Design* (noting the Calvani-Diveley proposal and pairing it with a proposal limiting the number of U.S. courts of appeals that may hear appeals from the Commission), *in* THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 1223, 1245–46 (Joshua D. Wright & Douglas H. Ginsburg eds., 2020). And it is even further afield from other institutional reform proposals focused on rulemaking and other efforts. *See generally* DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT (2011) (describing various alternatives); William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 MICH. L. REV. 1019 (2012) (reviewing Professor Crane's book).

This is hardly the first time a specialized "trade court" has been debated,[136] and indeed there is ample precedent for creating new, specialized Article III courts at both the trial and appellate levels.[137] In 1910, shortly before the FTC itself was created, Congress created the short-lived Article III Commerce Court to handle all appeals from the Interstate Commerce Commission (ICC).[138] Notably, this court had its own judges (five at a time), each of whom served five-year terms before rotating to a geographically based circuit court of appeals.[139] In 1956, Congress converted the existing U.S. Court of Customs Appeals from an Article I tribunal to an Article III court,[140] a structure it retained in 1980 when it became the U.S. Court of International Trade (CIT), which comprises nine judges headquartered in New York City.[141] In 1974, Congress created the Special Railroad Court, a three-judge panel designated to hear cases arising from the bankruptcy and reorganization of several railroads, but abolished that court in 1997.[142] In 1978, Congress created the Foreign Intelligence Surveillance Court (FISC), a Washington, D.C.-based court initially comprising seven district court judges—later increased to eleven—drawn from seven circuits for terms of up to seven years each.[143] And in 1982, Congress created the Federal Circuit with twelve judgeships to hear appeals from both Article I and Article III courts, including the aforementioned CIT.[144]

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[136] *See, e.g.*, Earl W. Kintner, Gen. Couns., Fed. Trade Comm'n, The Trade Court, the ABA, the Lawyer and the Public Interest 4 (Apr. 5, 1957), www.ftc.gov/system/files/documents/public_statements/678251/19570405_kintner_the_trade_court_the_aba_the_lawyer_and_the_public_interest.pdf ("As stated by the proponents of the Trade Court, the question is 'Should the judicial functions of the Federal Trade Commission be transferred to a court or courts?'"); Herbert W. Clark, *The Judicial Functions of the Federal Trade Commission Should Be Transferred to the District Courts*, 10 A.B.A. ANTITRUST SECTION 51, 51, 82, 98 (1957) (advocating that a trade court be established).

[137] For an exhaustive accounting, see Revesz, *supra* note 134, at 1138 tbls.II & III (listing and categorizing specialized U.S. courts).

[138] Act of June 18, 1910, ch. 309, § 1, 36 Stat. 539, 539 (1910) (creating the Commerce Court and granting it "the jurisdiction now possessed by circuit courts . . . over all cases . . . brought to enjoin, set aside, annul, or suspend . . . any order of the [ICC]").

[139] *Commerce Court, 1910–1913*, FED. JUD. CTR., www.fjc.gov/history/courts/commerce-court-1910-1913.

[140] James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 658 & n.54 (2004).

[141] *U.S. Court of International Trade, 1980–Present*, FED. JUD. CTR. [hereinafter *CIT*], www.fjc.gov/history/courts/u.s.-court-international-trade-1980-present; *About the Court*, U.S. CT. OF INT'L TRADE, www.cit.uscourts.gov/about-court.

[142] *Special Railroad Court, 1974–1997*, FED. JUD. CTR., www.fjc.gov/history/courts/special-railroad-court-1974-1997.

[143] *Foreign Intelligence Surveillance Court and Court of Review, 1978–Present*, FED. JUD. CTR. [hereinafter *FISC*], www.fjc.gov/history/courts/foreign-intelligence-surveillance-court-and-court-review-1978-present.

[144] *Creation of Judicial Circuit Defined by Subject Matter*, FED. JUD. CTR., www.fjc.gov/history/timeline/creation-judicial-circuit-defined-subject-matter.

These examples illustrate the range of choices available to Congress. For example, Congress would have to choose the number of judges, with existing precedents ranging widely: three for the Special Railroad Court, five for the Commerce Court, seven (later eleven) for the FISC, nine for the CIT, and twelve for the Federal Circuit.[145] Congress also would have to decide whether the judges are full time or part time, whether they are borrowed from other courts or dedicated to the new endeavor, and their length of service on the hypothetical Antitrust Court. Congress could also specify a headquarters or venue, as it did for the CIT in New York or the FISC in Washington, D.C.[146] Finally, it would have to provide for appeals, which are typically handled by one designated court, as is the case for appeals from the CIT and the FISC.[147]

There is significant disagreement in the literature about the merits of creating a specialized antitrust tribunal, let alone the form it should take. Circuit Judges Richard Posner and Diane Wood have at various times voiced their opposition to the idea of stripping generalist Article III trial courts of jurisdiction over antitrust cases and substituting a specialized antitrust trial court.[148] As Judge Wood explained in her most recent discussion on the topic, her opposition is grounded in two drawbacks: (1) the perception that the quality of the bench may be diminished by the monotonous role of a specialized, full-time tribunal, and (2) bias, to the extent that judges qualified to sit on the court are likely either to take the bench with strong preconceived notions or to be "capture[d]" over time by special interests.[149] Judge Wood nonetheless also notes the potential benefits of specialization, including greater speed and accuracy.[150] On the other side of the debate, Circuit Judge Douglas H. Ginsburg and former FTC Commissioner Joshua Wright see some value, particularly if safeguards are adopted to ameliorate the drawbacks identified by Posner and Wood.[151]

Enthusiasm may be greatest outside the United States, with international scholars advocating for the broader adoption of specialized courts such as the

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[145] *See supra* notes 138–44 and accompanying text.

[146] *See supra* notes 141, 143 and accompanying text.

[147] The Federal Circuit has jurisdiction over all appeals from the CIT, *see CIT*, *supra* note 141, and the U.S. Foreign Intelligence Surveillance Court of Review has jurisdiction over all appeals from the FISC, *see FISC*, *supra* note 143.

[148] Their proposal is different than the proposal here, which would instead move cases from a specialized administrative tribunal (the FTC's Part 3 system) to an Article III court.

[149] Wood, *supra* note 27, at 12, 14–16; *see also* Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755 (1997); Diane P. Wood, *Keynote Address: Is it Time To Abolish the Federal Circuit's Exclusive Jurisdiction in Patent Cases?*, 13 CHI.-KENT J. INTELL. PROP. 1 (2013); *see also* Posner, *supra* note 27, at 779–80.

[150] Wood, *supra* note 27, at 16 (arguing that gains from specialized antitrust tribunals may include "efficiency, higher accuracy in assessing facts, and consistency in results").

[151] Ginsburg & Wright, *supra* note 27, at 792–93.

UK Competition Appeals Tribunal (CAT) and the Tel Aviv Special Economic Court. For example, Athanasios Psygkas touts the CAT "as a model for other countries facing similar questions of effective review of expert regulatory decisions" because its membership includes both generalist "chair[s]" (judges) drawn from other courts and specialist "ordinary members" drawn from academia, private practice, civil service, and the private sector.[152] The Canadian Competition Tribunal likewise includes members with varied backgrounds.[153] In contrast, Israel's Tel Aviv Special Economic Court combines generalist judges with specialized subject-matter jurisdiction that encompasses a range of business torts, including securities cases. Some also rate this model favorably,[154] although they view it as a refinement on a model common among state trial courts in the United States.[155]

Considering that the FTC's administrative court is already a specialized antitrust body, the question is not whether Congress should *increase* the number of specialized tribunals. Rather, the question is whether Congress should *convert* an existing administrative court—akin to the Board of General Appraisers, a forerunner to the CIT—into an Article III court like the CIT. For many reasons, including the due process concerns described earlier, Congress may find this route appealing.

If Congress chooses this route, it may be best to adopt—as Ginsburg and Wright suggest—a nuanced model that maximizes the benefits of specialization while minimizing its costs. For example, staffing a hypothetical Antitrust Court with part-time judges (in the sense that they also hear non-antitrust matters) who rotate off the court after a fixed term should address Posner and Wood's twin concerns of bias and monotony. This approach would be consistent with both the bygone Commerce Court, which lent and borrowed judges and limited them to five years on the court, and today's FISC, which draws judges from other courts for seven-year terms.[156] Of the two, the FISC's

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[152] Athanasios Psygkas, *The 'Double Helix' of Process and Substance Review Before the UK Competition Appeal Tribunal: A Model Case or a Cautionary Tale for Specialist Courts?* (describing the structure of the CAT), *in* COMPARATIVE ADMINISTRATIVE LAW 462, 462 (Susan Rose-Ackerman et al. eds., 2d ed. 2017); *see also id.* at 465.

[153] *Id.* at 476.

[154] Yifat Aran & Moran Ofir, *The Effect of Specialised Courts over Time* (manuscript at 30), papers.ssrn.com/sol3/papers.cfm?abstract_id=2802353 (rating the Israeli experience a success and suggesting it may "provide guidance for constructing judicial policy in other countries").

[155] *Id.* at 11 ("In the United States, the movement for specialised courts arose in the 1990s and led to the creation of business and commercial dockets within state trial courts in approximately half of the 50 states. These 'business courts' assign specialist judges to manage and decide commercial and business cases. . . . In 2010, Israel established the EDTA, distinctive from the other specialised business courts because it adjudicates only corporate and securities cases and not general commercial disputes.") (footnotes omitted).

[156] *Commerce Court, 1910–1913*, Fed. Jud. Ctr., www.fjc.gov/history/courts/commerce-court-1910-1913; *FISC*, *supra* note 143.

slightly longer term and ability to draw from the district courts may provide the better model.

It may also be worthwhile to retain a method, albeit limited, through which the commissioners can offer their views on novel questions of law and thereby honor Congress's original intent to have the commissioners shape and develop the law. At this stage, the simplest approach may be to grant the commissioners authority to file amicus briefs by right, either collectively (i.e., one brief, as the Commission does now after a vote) or individually. This approach is hardly novel; indeed, the Antitrust Division already enjoys this right and has substantially increased its use in recent years.[157] It also resembles the role played by the Advocates General in the European Union.[158]

It is not obvious, at least at this stage, whether appeals should be centralized in a single circuit. While a single forum would promote consistency, there are also benefits under the current system, which allows the circuits to experiment with separate and at times conflicting legal rules.[159] A middle ground may allow for only a few circuits to hear appeals. For example, if a hypothetical Antitrust Court was composed of district court judges sitting in the Northern District of California, the Northern District of Illinois, the District for the District of Columbia, and the Southern District of New York, then appeals from those judges could be limited to their corresponding geographic court of appeals (the Ninth, Seventh, D.C., and Second Circuits, respectively).

Finally, there is a question of scope: Should the hypothetical Antitrust Court hear only FTC antitrust cases, or should it encompass a broader range of antitrust matters, such as actions by the Antitrust Division, the state attorneys general, and even private plaintiffs? Even more broadly, should it hear other FTC matters, such as those sounding in consumer protection or privacy? Given the strong and public desire for consistency, both procedurally and sub-

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[157] *See Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies: Hearing Before the Subcomm. on Antitrust, Com. & Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. 29, 41 (2019) (statement of Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just.) ("In FY 2018, the Division filed five statements of interest . . . and eight amicus briefs . . . in cases where the United States is not a party, as compared to just three such amicus briefs and no statements of interest in FY 2017. So far in FY 2019, the Division has filed eight statements of interest and nine amicus briefs.").

[158] *See, e.g.*, Rafał Mañko, Eur. Parliamentary Res. Serv., PE 642.237, Role of Advocates General at the CJEU (Oct. 2019), www.europarl.europa.eu/RegData/etudes/BRIE/2019/642237/EPRS_BRI(2019)642237_EN.pdf (describing the role of an advocate general, which includes "consider[ing] the interpretive alternatives and various options of deciding on a case, before proposing their own solution").

[159] *See* 15 U.S.C. § 45(c) (subject to various filing requirements, authorizing "[a]ny person, partnership, or corporation" subject to an FTC cease-and-desist order to "obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business").

stantively, it would seem natural to cover all antitrust cases, or at a minimum all public antitrust matters. Yet that would also be a significant departure from the present arrangement. Therefore, it may be wise to limit the court's jurisdiction to the FTC, at least until the concept has proven meritorious and worth expanding.

The safeguards and limits described above should—at least in theory—increase the benefits of specialization while reducing its risks. The hypothetical Antitrust Court would be staffed by judges already steeped in the procedural aspects of complex litigation, but it would also offer terms long enough for these judges to develop and apply subject-matter expertise. The result should be faster *and* more accurate rulings. Retaining a docket beyond antitrust and limiting a judge's tenure on the Antitrust Court should also ameliorate potential bias or capture considerations. Likewise, providing for a sufficient number of judges, presumably with cases assigned at random, would limit the impact that any single appointment might have on the development of antitrust law. Retaining a role for the commissioners, at least as amicus curiae—would preserve their ability to offer their views without compelling the judge to defer to them.

Finally, shifting to an Article III structure would likely resolve any objections to the "double-for-cause tenure protection" afforded to FTC ALJs.[160] These concerns address efforts to insulate executive branch officers from removal by the president.[161] The president plainly has no such authority over Article III officers.[162]

CONCLUSION

Concerns about the FTC's dual role in matters litigated in its administrative courts are nearly as old as the agency itself. Current proposals to address perceived defects, including the proposed SMARTER and One Agency Acts, would homogenize federal antitrust enforcement by abolishing this unusual feature and transferring all FTC litigation to federal district court. While this effort would be simple and effective, it would also eliminate the only specialized forum for antitrust cases that presently exists in the United States.

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[160] *See* Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 900, 902 (2023) ("Axon asserted that the Commission's ALJs could not constitutionally exercise governmental authority because of their dual-layer protection from removal.").

[161] *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492–508 (2010).

[162] To be clear, in this article I do not consider the constitutionality of the Commission's structure or its independence from the executive branch. *Cf. Axon*, 143 S. Ct. at 897 (noting that "[o]ur task today is not to resolve" arguments "that the [FTC and SEC], as currently structured, are unconstitutional in much of their work"); Axon Complaint, *supra* note 10, ¶¶ 41–43 (urging the court to overrule *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which "uph[eld] the Constitutionality of the FTC's removal structure").

Policymakers may therefore wish to consider three alternatives that retain the present specialization while providing additional procedural safeguards. First, the Commission could adopt a more deferential standard when reviewing the ALJ's findings of fact, such as the clear-error standard used in the federal circuit courts. Second, the Commission could adopt the clear-error standard *and* elevate the position of ALJ by, at a minimum, reforming the process by which ALJs are selected and ensuring that an ALJ presides over each administrative trial. Third, and mimicking efforts involving transportation, international trade, and intellectual property, Congress could convert the Commission's current administrative court into a specialized Article III court for antitrust matters. This effort would also require Congress to decide how such a court should be constituted, where it should sit, how long its judges should serve, and whether the commissioners themselves should retain any role in the proceedings. Given the wide range of alternatives, it is difficult to say—at least at this conceptual stage—that making the FTC more like the DOJ is the best and only cure for potential due process concerns.