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Presidential Power and Antitrust Politics: Part Three

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In July and August, we discussed the president's role in setting antitrust policy at the Department of Justice, Antitrust Division. Specifically, we pointed out that presidents routinely face competing domestic and foreign policy challenges that require a delicate balance and flexible approach to antitrust enforcement. For example, President John F. Kennedy directed the DOJ to investigate the steel industry for price fixing because of concerns about labor strikes and monetary inflation. Likewise, President Harry S. Truman chose not to pursue criminal antitrust charges against the oil industry because of national security concerns, specifically the threat of a political coup in Iran and concerns that the Soviet Union would encroach American interests in the Middle East. Therefore, we concluded that the Antitrust Division has not historically (and should not be constitutionally) completely independent from the White House.

In marked contrast to the DOJ, the Federal Trade Commission (FTC) was conceived by President Woodrow Wilson and others and designed by Congress to operate independently from the Executive Branch because of its broad power to define business norms as a necessary consequence of its broad authority to prosecute "unfair methods of competitions" and the adjudicatory functions carried out by the FTC's administrative law judges and the commission itself. The Supreme Court once noted, "the commission acts in part quasi legislatively and in part quasi judicially." Therefore, the Federal Trade Commission Act, which created the FTC in 1914 and authorized it to enforce the antitrust laws, contains a number of provisions designed to insulate the FTC from the White House.

First, the FTC Act mandates political diversity. It provides, "not more than three of the [FTC's] commissioners shall be members of the same political party." The other two members must be affiliated with a different party. In recent history, this means the commission has been populated by three Democrats and two Republicans or vice versa, depending on the political affiliation of the sitting president. Since the 1950s, the FTC Act permits the president to choose "a chairman from the commission's membership." Second, the FTC Act requires Congress to confirm the president's appointees and limits the president's authority to remove commissioners. It provides that FTC commissioners "shall be appointed by the president, by and with the advice and consent of the Senate" to staggered seven-year terms. Moreover, commissioners may only "be removed by the president for inefficiency, neglect of duty, or malfeasance in office," and "any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed." "A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission."

Two historical anecdotes demonstrate the FTC's independence and its resiliency to pressure emanating from the White House:

President Franklin D. Roosevelt Tries to Fire the FTC Commissioner

President Franklin D. Roosevelt ran his presidential campaign on the New Deal platform, which emphasized federal government spending and financial reform designed to lift the country out of depression. These reforms ran headlong into the prevailing ideology of the day that the Commerce Clause narrowly restricted the federal government's power to regulate the economy. Roosevelt was not afraid of controversy and demonstrated a willingness to sometimes resort to extreme means to achieve his policy initiatives (recall his court packing plan to appoint sympathetic Supreme Court justices by increasing the number of Supreme Court seats).

Roosevelt's economic agenda also put him at odds with the FTC. In 1933, FDR wrote to the FTC chairman and

President Herbert Hoover appointee William Humphrey, asking him to resign: "The aims and purposes of the administration with respect to the work of the commission can be carried out most effectively with personnel of my own selection." Roosevelt continued, "You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission." When Humphrey declined Roosevelt's thinly-veiled demand, Roosevelt terminated Humphry's employment with the FTC, providing no cause for his decision. Not one to be bullied, Humphrey simply ignored the letter and continued to serve until his death a year later.

Upon his death, the executor of Humphrey's estate sued the United States "to recover a sum of money alleged to be due the deceased for salary as a Federal Trade commissioner ... from when the president undertook to remove him from office, to the time of his death." The case made its way to the Supreme Court where Justice George Sutherland, writing for the court, opined: the "definite and unambiguous" "language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the congressional intent to create a body ... which shall be independent of executive authority." Therefore, the court held, the FTC Act obstructs the president's ability to remove commissioners "except for one or more of the causes named in the [FTC Act]" because "it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."

The Reagan Administration Tries to Defund the FTC

In 1981, President Ronald Reagan won the presidency on a platform that emphasized economic deregulation and laissez-faire economics, a sharp turn from the Carter administration. As Reagan's Attorney General William French Smith said in a June 1981 speech outlining the new administration's antitrust philosophy: "We must recognize that bigness in business does not necessarily mean badness, and that success should not automatically be suspect." To implement his policies, Reagan turned to his budget office and requested proposals to slash the budgets of a number of federal regulatory agencies he concluded to be suppressing economic growth.

In 1981, the Office of Management and Budget (OMB) proposed dramatic cuts to the FTC's budget. Reagan's budget director David Stockman's proposal would have eliminated the Bureau of Competition, the FTC department tasked with enforcing the antitrust laws. Stockman described the FTC as a "passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy." The Reagan administration also proposed closing the FTC's regional offices, which would significantly impede the commission's ability to conduct investigations. In total, the OMB proposed a 19-percent cut in funding for 1981 and a 50-percent cut in funding for 1982. Then-serving commissioner and Carter appointee Michael Pertschuk voiced his concern about the Reagan administration's "tilt toward large business" in a 1982 address to the National Association of Retail Dealers of America: "When the Reagan administration waxes eloquently about the glories of the unfettered free marketplace, what they are talking about is the freedom of the corporate elephants to dance with abandon among the small business chickens." But "FTC chairman and Reagan-appointee James Miller's simplistic faith in the benign workings of the unfettered marketplace has an Alice-in-Wonderland quality about it." (Miller would later pejoratively describe his predecessor's tenure as "national nannyism" and accuse the FTC in "prior years" of engaging in "Star Trek antitrust enforcement, that is, to boldly go where no man had dared to go before.").

If Pertschuk had been serving in the DOJ's Antitrust Division, his unvarnished remarks would have no doubt raised executive branch hacklers. Instead, he finished his term as commissioner in 1984, well into President Reagan's first term in office (although Reagan replaced him as chairman in 1981, a routine practice after the election of a new president). Moreover, the administration's initiative to effectively fiscally hobble the FTC and close its regional offices largely failed when Congress rejected Reagan's budget proposal (perhaps in response to strong disapproval expressed by small business groups and the general public). In 1983, when FTC chairman and staunch Reagan supporter James Miller closed several of the FTC's regional offices in anticipation of budget cuts, Chairman Lowell P. Weicker of the Senate subcommittee on state, justice, commerce, and the judiciary offered a swift rebuke, warning Miller in Senate proceedings not to close further regional offices until Congress voted on the appropriations bill to determine if further cutbacks were necessary.

Independent From The President But Accountable To Congress

Although the FTC remains independent from the White House, it remains accountable to Congress, which controls its budget and could theoretically repeal its mandate through legislation. The FTC's fiscal subordination to Congress has been a recurring subject of congressional commentary over the years. In 1914, Sen. Albert Cummins, one of the sponsors of the FTC Act, stated while debating the bill: "I would rather take my chance with a commission at all times under the power of Congress, at all times under the eye of the people ... If we find that the people are betrayed either through dishonesty or through mistaken opinion, the commission is always subordinate to Congress. I do not mean subordinate in the sense that Congress can compel a decision of a particular kind at a particular time, but Congress can always destroy the commission; it can repeal the law which creates it ..."

In 1969, during Caspar Weinberger's confirmation hearings for the FTC chairman position, Sen. Vance Hartke admonished Weinberger: "Let me make it perfectly clear to you, that under the Constitution and under the law which created it, the responsibility is only to the Congress, and not to the president, in any regard whatsoever." Weinberger responded in turn: "I was advised by the chairman of this committee just a few moments ago that this was an arm of Congress, the Federal Trade Commission; and I intend, as I mentioned to Sen. Moss, to consult frequently with the Senate Commerce Committee and with the appropriate committees of the House on matters that occur or in which it would appear there is some new direction desirable to take." President Donald Trump's Forthcoming Selection of FTC Commissioners To date, President Trump has yet to formally announce his nominees to the FTC's Commission, which currently has three gaping vacancies. Given the FTC's independence, Trump would be well advised to select compatible nominees he thinks will emulate his policy convictions once appointed as commissioners and the communications access door for such FTC commissioners largely closes. Stay tuned.

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