

# Fresh Thinking About the FTC/DOJ Interface: Return to the Wilson-Brandeis-Elman Vision

**Robert N. Cook and Robert A. Skitol**

Senator Ernest Hollings's success in killing the FTC/DOJ Clearance Agreement that was announced earlier this year could be considered a pointed reminder of the role of Congress in the allocation of antitrust responsibilities between the two agencies. On the other hand, it left unaddressed more fundamental issues relating to the whole rationale for two separate antitrust agencies and the desirable relationship between them. The best starting point for fresh inspiration in addressing these issues is a speech delivered by former Commissioner Philip Elman in 1967 at the First New England Antitrust Conference. His main themes on that occasion are as timely today as they were when presented thirty-five years ago.

## The Elman Speech

Elman began by delineating the universe of antitrust concerns within the "majestic generalities of the Sherman and Federal Trade Commission Acts." He then focused on the differences between, on the one hand, "simple and easily applied" per se rules and, on the other, "difficult and complex gray problem areas" governed by "the broad and amorphous Rule of Reason." He suggested that, in dealing with unambiguously harmful conduct covered by per se rules, "the use of conventional judicial procedures and remedies in lawsuits brought in the federal courts by the Antitrust Division and private plaintiffs" had been "quite successful," "appropriate and effective." But in the gray areas antitrust "cannot be played as a cops-and-robbers game with 'good guys' on one side and the 'bad guys' on the other." Here "a determination that certain business conduct ought to be forbidden . . . should carry no necessary connotation of unethical or immoral behavior"; instead, for these areas, "a specialized, expert administrative agency, not functioning like a prosecutor or a court of general jurisdiction, is uniquely qualified to make an indispensable contribution to antitrust enforcement."

Elman thereupon reminded the audience that it was dissatisfaction with the judicial process that led Congress in 1914 to establish the FTC. While "full-blown Sherman Act violations" appeared amenable to judicial correction, Congress determined that prevention of incipient restraints "was too big and complex a job for untrained judges, unaided by expert assistants and compelled to work within the limits of traditional adversary litigation." In short, "[t]here was widespread agreement upon the need for an independent, expert administrative agency with broad and flexible powers to investigate and resolve trade regulation problems."

As he then elaborated, "the Congress of 1914 intended the Commission to supplement, and not to duplicate, the work of the courts and the Department of Justice in antitrust enforcement." The creation of the Commission, in his view, "reflected a basic shift in emphasis" from "punishment and moral opprobrium to administrative adjustment, correction, and regulation." Yet, he observed, "con-

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ventional case-by-case litigation in the courts” continued to be the principal method of antitrust enforcement “even in the gray problem areas where novel and difficult questions of law and policy are presented” and require analysis of complex economic facts. “Today, no less than in 1914, the ability of courts of general jurisdiction to handle such questions is subject to inherent limitations.” The FTC was intended to overcome those inadequacies and weaknesses:

As an instrument for helping make the antitrust laws more certain, more predictable, and more effective, the Commission is what the federal judiciary is not: a single tribunal whose only duty is trade regulation. Congress considered that a commission would be able to make reliable predictive judgments regarding the competitive effects of questioned business conduct. An administrative agency has methods of finding facts, and basing judgments of policy on its accumulated knowledge and specialized experience, that courts do not generally have. A judge typically knows about a general economic problem little more than what he can extract from the record of the particular case. A commission, however, can and should draw upon its collective institutional experience and expertise, as well as relevant economic studies and reports. Difficult factual and policy determinations required under the merger statute, for example, are most reliably made by a tribunal constantly immersed in problems of competition and trade regulation, rather than by a tribunal where such matters may be novel and esoteric.

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Those considerations led Elman to believe that “the time ha[d] come to reassess and redefine, in a more meaningful way, the respective functions and responsibilities” of the FTC and Antitrust Division. “We should develop a more creative and fruitful relationship between the two agencies” and “[c]ooperation should mean more than not competing” for the same defendants or cases. Specifically, he proposed:

- “the Commission’s role as policeman and prosecutor should be substantially deemphasized”;
- the “job of investigating and prosecuting specific violations of law by particular companies can be, and is, handled very well by” the Division;
- the FTC “should look to those areas of antitrust enforcement where an administrative agency, with distinctive powers of gathering and analyzing economic data, has special competence”;
- and
- the FTC’s “principal job should be to assist in the orderly development of a coherent body of antitrust policies and doctrines in harmony with economic realities and the basic regulatory goals established by Congress.”

The “larger and more creative role” thus suggested for the FTC implied, in his view, an expansion rather than diminution of the responsibilities of the Antitrust Division. Specifically, he suggested that the Division’s investigative and prosecutorial functions be extended “to cover the whole area of antitrust violations,” including practices addressed by the FTC under the Robinson-Patman and FTC Acts. But, under his scheme, where the Division finds a probable violation of any of the antitrust laws, “it should have a choice of proceeding either in a federal district court or before the Commission,” selecting the latter for all matters within areas of that agency’s demonstrated expertise. He noted that this proposal would not necessarily require amendment of existing laws, “which permits the Attorney General to intervene in Commission proceedings under the Clayton and FTC Acts” (even though he has never done so).

—Philip Elman

Elman concluded that the “failure to differentiate clearly the role” of the FTC from that of the Division was “most regrettable”; that “[i]t is a fair question whether the unfinished business of antitrust and the unfulfilled promise” of the FTC “are not intertwined”; that Wilson and Brandeis conceived the FTC as “an indispensable instrument of information and publicity” and “an instrumentality for doing justice to business where the processes of the courts or the natural forces of cor-

rection outside the courts are inadequate”; that “[t]his should be a time for reexamination, and renovation, not complacency or indifference, in antitrust enforcement”; and that “[w]e should seek to fulfill the vision of Wilson and Brandeis and the Congress which enacted the great antitrust acts of 1914.”

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### **Antitrust Today**

Sound antitrust enforcement requires at least as much “special competence” today as in the past, and we tend to believe it now requires more expertise than at any time over the past several decades. Certainly over the 1990s, antitrust enforcement became increasingly involved with technologically complex businesses, such as the computer, telecommunications, and pharmaceutical industries, while at the same time antitrust questions increasingly had to be disentangled from questions relating to intellectual property rights. The end of the high-technology boom years at the beginning of the new millennium added a further layer of complexity by making it necessary to weigh already complex antitrust issues in the context of industries undergoing shakeouts. But the increasing need for special competence is not limited to high-profile enforcement actions against Microsoft or Intel, or high-profile mergers Like AOL/Time Warner or Hewlett-Packard/Compaq. Government antitrust enforcement actions generally have involved to a growing extent sophisticated factual and economic analysis.

The interagency clearance process that recently caused so much trouble between Senator Hollings and FTC Chairman Timothy J. Muris is in fact based on the indisputably sound principle of special competence. Where possible, investigations should be undertaken by the agency with the most institutional expertise in the industry to be investigated. This approach, however, unfortunately devolved some time ago into a form of institutionalized turf warfare, in which DOJ and the FTC vigorously contest each other's claims for clearance—especially on investigations involving the most intellectually and politically interesting industries—because the agency to which a matter is cleared has the superior claim to clearance on the next investigation in that industry. Some have seen an institutional incentive to expand the scope of investigations for the purpose of improving subsequent clearance claims. In the course of these interagency turf wars, the agencies describe their proposed investigations in terms closely adhering to descriptions of past investigations for the purpose of enhancing arguments for clearance. Of course, once clearance is resolved, the investigating agency is free to take its investigation wherever the facts lead. It is the final scope of the completed investigation, and not the initial proposal submitted for clearance purposes, that normally counts in the next clearance fight.

This approach to agency clearance has resulted in something of a patchwork, even when the system is at its best. When the system is not at its best, many firms—especially those with mergers subject to government review—have over the years found themselves bedeviled by a process they are powerless to influence. The government does not begin a merger review in earnest until agency clearance is resolved, and the entire process (including agency clearance) must be completed within the initial Hart-Scott-Rodino Act waiting period, which normally ends thirty days after a premerger filing is made. Waiting too long for clearance can be prejudicial for “close call” mergers, in which the government requires significant input from customers or other third-party sources. There have been far too many instances of the agency clearance process eating up three weeks or more of the thirty-day review period, so that Second Requests go out to companies that might have avoided them if agency clearance had been resolved more promptly. With non-merger matters, the agencies have at times seemed to let clearance languish indefinitely, though that has hardly been of concern to would-be targets of investigations.

It was apparently with the good intention of reforming such an ungainly process that FTC Chairman Timothy J. Muris and DOJ Assistant Attorney General Charles A. James sought to institute reforms reducing delay in the agency clearance process. The centerpiece of reform was an expanded list of areas in which matters would be allocated automatically to a particular agency instead of bargained for in horse-trading sessions between the front offices of the two agencies. The reformed process was followed for a while and appeared to be successful at reducing time lost to interagency clearance fights, until the reform had to be abandoned as a result of political opposition born of political mistakes. Criticisms of the now-defunct reform focused on the fact that, in the name of simplification, markets were not always allocated to the agency with the historical claim of expertise. No one appeared to question the rationality of the ad hoc expertise system as the basis for the clearance process, whether in simplified form as adopted by Muris and James, or with all the intricacies of its original.

The attempted reform of the agency clearance process incorporated the input of a panel of former antitrust officials from both political parties but apparently no input from either Congress or Chairman Muris's fellow FTC Commissioners. As a result, the reform effort drew strident criticism, both from Capitol Hill and from inside the FTC. One lingering criticism, for example, was that the new allocation of responsibility would have given cable television mergers to DOJ under the broader rubric of "media and entertainment" even though the FTC, which investigated the AOL/Time Warner merger, arguably has greater cable television expertise than DOJ. The underlying concern, however, appears to have been a lack of prior consultation.

Perhaps in response to political criticism, the final release of the FTC/DOJ Clearance Agreement included testimonials from the Chair and the Ranking Member of the Antitrust Subcommittee of the Senate Judiciary Committee.<sup>1</sup> Additional endorsements came from the Business Roundtable, the National Association of Manufacturers, the U.S. Chamber of Commerce, and the Antitrust Section of the American Bar Association.

FTC Commissioner Mozelle Thompson was not appeased, however. He particularly criticized Chairman Muris for committing the FTC to the arrangement without involving the other Commissioners, especially as private-sector attorneys (though from both parties) were consulted and provided significant input.<sup>2</sup>

The Senate Commerce Committee, which oversees the FTC, was likewise not consulted, which enraged at least one powerful senator, who was not mollified by the endorsement of his colleagues on the Senate Judiciary Committee. Senate Commerce Committee Chairman Hollings told the press, "I am trying to eliminate" FTC Chairman Muris in retaliation for taking such action without even a "heads up" to the agency's oversight committee, which he chairs. Senator Hollings also ordered a study of cost savings that might be realized if the FTC were to eliminate the salaries of FTC Commissioners, senior managers, and public affairs staff—a total of approximately 50 jobs out of a workforce of 1,100. Because Senator Hollings also chairs the Senate Appropriations Committee, he wields considerable influence over the FTC's annual budget.

Much of the sound, though perhaps not all the fury, emerging from Senator Hollings's office died down once the agencies dropped the Agency Clearance plan, which meant a return to a status quo ante that virtually all knowledgeable observers regard as far less than ideal. Neither Senator Hollings nor Commissioner Thompson ever denied that the clearance process needed reform even as they objected to the manner in which reform was attempted.

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<sup>1</sup> See <http://www.ftc.gov/opa/2002/03/clearance/kohldewine.pdf>.

<sup>2</sup> See <http://www.ftc.gov/opa/2002/03/clearancemwt.htm>.

## A Modest Proposal

Philip Elman believed the lack of meaningful differentiation between FTC and DOJ enforcement activities created a muddle, a situation that many believe to have continued up to the present day. Elman's solution was to preserve the FTC's role as an expert antitrust adjudicator while making DOJ the principal antitrust investigator and prosecutor. His willingness to consider virtually scuttling the FTC's enforcement mission may have been a product of his time. He presented these ideas in 1967, only two years before the Kirkpatrick and Nader Reports seriously weighed the option of closing down the FTC as a way of protecting the integrity of the antitrust enforcement mission—so far had the FTC fallen. As a Commissioner in 1967, he saw that the FTC had a serious institutional malady and may have assumed the condition to be incurable. Today, however, thirty-five years after his speech, the FTC has recovered to become a well-regarded agency, the professionalism of which is not seriously questioned.

Senator Hollings may or may not have been thinking of consolidating the FTC and DOJ antitrust enforcement operations when he threatened to eliminate the salaries of the FTC's top managers and government relations experts. It may be that the foremost thought in his mind was puzzlement that the agency's management and government relations specialists would not have notified the agency's oversight committee of a major policy development prior to releasing it to the press. (In all fairness to Muris and company, agency clearance decisions had historically been a matter of negotiation between the two agencies without input from Congress.) Senator Hollings, however, might just as well have focused upon the proposition that the national budget did not need to support two organizations with largely overlapping responsibilities.

Industry expertise is the name of the game in antitrust, and the FTC was originally established for the purpose of developing the expertise—or “special competence” in Elman's words—necessary to understand difficult antitrust issues. The nature of disputes between the DOJ and the FTC over the right to particular antitrust investigations underscores the importance of expertise, since clearance claims are developed piecemeal based on each agency's history of conducting particular investigations in particular industries.

The apparently unquestioned acceptance of expertise as the basis of agency clearance is an acknowledgement of the need to apply special competence in antitrust investigations and also of the fact that no one has come up with a better idea. The system, however, does have shortcomings that are rooted in the fleeting nature of institutional expertise, which depends on the willingness of individuals with expertise to stay with the institution. As a result, the importance of expert lawyers and economists in antitrust investigations is confirmed by the very fact of the controversy over agency clearance reform.

Like a private sector service business, antitrust enforcement agencies watch their principal assets go down the elevator every night and head for home. Institutional expertise can exist only to the extent it is embodied in individual lawyers and economists who remain employed by the institution. Because individual lawyers and economists are free to move on to other pursuits, clearance fights between the FTC and DOJ are sometimes based on assertions of expertise derived from investigations that were conducted primarily by lawyers and economists who have since departed. FTC or DOJ institutional expertise may thus reside in a lawyer who, no matter how talented, played only a subordinate or niche role in the investigation on which the claim of expertise is based. Such situations are not uncommon, given that the gap between public sector and private sector compensation has now increased to where even the agencies' most senior executive and managerial staff are paid salaries comparable to those of first year associates at the largest national law firms. The DOJ's increasing use of “special counsel” during the 1990s

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may have created additional problems of vanishing expertise.

It should by now be self-evident that having two antitrust agencies with overlapping responsibilities is more costly and less efficient than having only one. After all, the two agencies do not actually compete; they merely allocate, and do so in a markedly inefficient manner. One solution worthy of consideration would be to transfer the DOJ's civil antitrust enforcement role to the FTC—along with economists and the lawyers now handling civil cases—while moving the DOJ's criminal antitrust enforcement role from the Antitrust Division to the Criminal Division, along with the lawyers who perform that role.

Consolidating all civil antitrust enforcement activity within the FTC would in one stroke eliminate the entire clearance problem. More fundamentally, it would bring to all civil antitrust enforcement activity the strengths of the FTC's administrative process and its advantages over the judicial system that Commissioner Elman so eloquently described thirty-five years ago and that remain true to this day. Similarly, folding all criminal antitrust enforcement activity into the Criminal Division could generate significant economies of both scale and scope in the prosecution of white-collar crime of all kinds.

Consolidation of all merger enforcement with the FTC would also eliminate anomalous differences between the two agencies in their merger programs. In the current environment, the FTC is better positioned to obtain preliminary injunctions under Section 13(b) of the FTC Act, which provides a considerably more deferential standard than that confronting the DOJ under general equity principles; the FTC is not burdened by Tunney Act requirements that often induce the DOJ to resolve merger concerns without consent decrees; and the FTC can challenge consummated deals in administrative proceedings, an option the DOJ cannot effectively pursue in district court. In all three of these respects, the FTC is the more advantaged merger enforcer. There is no logical argument for a system in which these advantages are available with regard to mergers in some industries because they have been assigned to the FTC but not with regard to mergers in other industries because they have been assigned to the DOJ.<sup>3</sup>

Finally, savings from these consolidations could be used to increase the ability of the government's antitrust enforcement apparatus to retain institutional expertise. This could be accomplished by increasing the pay of the lawyers and economists whose expertise makes it possible for the government effectively to perform its antitrust enforcement mission, thereby reducing their incentives to take their industry-specific antitrust expertise out of the government.

Under our proposed reallocation, the FTC would be responsible for all of what Commissioner Elman characterized as the "difficult and complex gray areas" of antitrust, while the DOJ would concentrate on what he called "simple and easily applied per se rules." The result would be the "more creative and fruitful relationship between the two agencies" that he sought. The FTC, moreover, would come closer to fulfilling what he portrayed as "the vision of Wilson and Brandeis" under which this uniquely situated agency would promote "the orderly development of a coherent body of antitrust policies and doctrines in harmony with economic realities and the basic regulatory goals established by Congress." We would in this light expect to see Senator Hollings leading the applause from Capitol Hill for this proposed allocation plan. ●

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<sup>3</sup> See Robert Skitol, *How the Agencies' Clearance Agreement Can Affect Merger Review Outcomes*, FTC: WATCH, May 20, 2002, at 2–4.