

NOTE

Strengthening the Federal Trade Commission: A Lesson from the Labor Board

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INTRODUCTION

The Federal Trade Commission (FTC) is facing significant challenges to its structure and the scope of its power. In March 2025, President Trump removed two Democratic-appointed FTC Commissioners from office without cause,¹ and

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1. See David McCabe & Cecilia Kang, *Trump Fires Democrats on Federal Trade Commission*, N.Y. TIMES (Mar. 18, 2025), <https://www.nytimes.com/2025/03/18/technology/trump-ftc-fires-democrats.html>; see also David McCabe, *Court Rules Trump's Firing of F.T.C. Commissioner Was Illegal*, N.Y. TIMES (July 18, 2025), <https://www.nytimes.com/2025/07/17/technology/judge-trump-ftc-commissioner.html> (describing Judge AliKhan's ruling in *Slaughter v. Trump*, which found that President Trump's dismissal of Commissioner Rebecca Kelly Slaughter was unlawful under current precedent); *Slaughter v. Trump*, 791 F. Supp. 3d 1, 6 (D.D.C. 2025).

the Supreme Court upheld these removals on a temporary basis in *Trump v. Slaughter*,² which all but overturned the ninety-year precedent that had insulated FTC Commissioners from at-will removal by the President.³ If the Supreme Court overturns *Humphrey's Executor*, the FTC will no longer function as an independent agency.⁴ The implications of at-will removal for the FTC's institutional mandate, as well as for the health and well-being of the American people, have been covered at length in legal news and scholarship to date.⁵

This Note will discuss a different constitutional challenge that has been less well-covered but poses no less of an existential threat to the FTC.⁶ Since the agency was founded in 1914, the FTC has had the ability to sue parties in an administrative forum within the agency rather than in federal court.⁷ Several parties who recently sued in this forum, known as "Part 3,"⁸ have argued that the "dual function" of the Commission as prosecutor and adjudicator violates the Due Process Clause of the Constitution.⁹ As the argument goes, because the Commission votes to approve any complaint filed by agency staff before an administrative law judge (ALJ) in Part 3, then reviews the ALJ's findings of fact

2. See *Trump v. Slaughter*, No. 25A264, 2025 WL 2692050 (U.S. Sep. 22, 2025) (granting a stay of a district court order that had reinstated Federal Trade Commissioner Rebecca Kelly Slaughter, and granting a writ of certiorari before judgment to decide whether *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), should be overruled); see also *Seila Law LLC v. CFPB*, 591 U.S. 197, 251 (2020) (Thomas, J., concurring in part and dissenting in part) ("[I]n the future, we should reconsider *Humphrey's Executor* in toto. And I hope that we will have the will to do so.").

3. See *Humphrey's Ex'r*, 295 U.S. at 632 (upholding the constitutionality of the for-cause removal provision of the FTC Act); 15 U.S.C. § 41 ("Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.").

4. See Michael D. Bopp et al., *Independent No More? The Implications of the Trump Administration's Actions on Independent Agencies*, GIBSON DUNN (Feb. 25, 2025), <https://www.gibsondunn.com/independent-no-more-implications-of-the-trump-administrations-actions-on-independent-agencies> [https://perma.cc/5RK7-G4R2].

5. See, e.g., Hayley Durudogan & Michael Sozan, *What Is Humphrey's Executor and Why Should You Care About It?*, CTR. FOR AM. PROGRESS (Feb. 27, 2025), <https://www.americanprogress.org/article/what-is-humphreys-executor-and-why-should-you-care-about-it> [https://perma.cc/8YSM-92CW] (noting that the FTC "could be blocked from passing pro-consumer rules" if no longer independent); Jonathan Nuechterlein, *You're Fired: How Direct Presidential Control Makes the FTC Redundant*, TECH. POL'Y INST. (May 6, 2025) <https://techpolicyinstitute.org/publications/antitrust-and-competition/youre-fired-how-direct-presidential-control-makes-the-ftc-redundant> [https://perma.cc/9REE-KA3N] ("[A]t-will presidential removal authority defeats each of Congress's rationales for creating the FTC."); ANDREW I. GAVIL & WILLIAM E. KOVACIC, PROGRESSIVE POL'Y INST., A DEFENSE OF THE "FOR CAUSE" TERMINATION PROVISIONS OF THE FEDERAL TRADE COMMISSION ACT 19 (2025), <https://www.progressivepolicy.org/wp-content/uploads/2025/07/PPI-A-Defense-of-the-For-Cause-Termination-Provisions-of-the-FTC-Act.pdf> [https://perma.cc/PT4N-XPU3] ("The model of a multimember, bipartisan, expert board will collapse if the protection against at-will dismissal disappears.").

6. See *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 180 (2023) (describing the due process challenge to Part 3 and a related challenge to the independence of administrative law judges in federal agencies as "fundamental" and "existential").

7. See 15 U.S.C. § 45(b).

8. This name comes from the relevant portion of the FTC's rules of procedure that govern administrative proceedings within the agency. See generally 16 C.F.R. pt. 3 (2025); *infra* Section I.A.

9. See, e.g., *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1047 (5th Cir. 2023); Complaint for Declaratory and Injunctive Relief at 18, *Meta Platforms, Inc. v. FTC*, 723 F. Supp. 3d 64 (D.D.C. 2024) (No. 23-cv-03562).

with no deference on appeal, the Commission acts as prosecutor and judge in the same case and thus violates litigants' right to an impartial forum.¹⁰

Although this argument is foreclosed by a fifty-year-old Supreme Court precedent,¹¹ a Court that has shown hostility towards the administrative state and a willingness to overturn other long-standing precedents could soon invalidate or curtail Part 3 on due process grounds.¹² The key case, *Withrow v. Larkin*, relied on a "presumption of honesty and integrity" in administrative adjudicators that may ring hollow to the modern Court.¹³ If the Court decides to hear one of the cases in which Part 3 respondents have raised a due process challenge, it could require the FTC to bring all of its cases in federal court or lower the burden of proof required for litigants to force certain Commissioners to recuse themselves from hearing Part 3 appeals.

Invalidating Part 3 or curtailing its effectiveness by forcing frequent recusals would have a detrimental effect on the FTC's ability to protect the American people from abuses of economic power. Although the FTC files most of its cases in federal court, Part 3 proceedings make up a significant part of the agency's work, especially in cases in which the agency seeks to advance the law.¹⁴ The burden of litigating constitutional challenges may also lead the agency to settle with parties in cases it otherwise would not settle. In one recent case, for example, the FTC reportedly settled with a Part 3 respondent in part because of the cost and uncertainty of litigating structural questions, like the due process challenge that seeks to declare Part 3 unconstitutional.¹⁵

In addition to describing this due process challenge to Part 3, this Note will explore a statutory reform to address litigants' concerns about fairness and impartiality in Part 3 that involves "bifurcating" the FTC's prosecutorial and adjudicative functions, which would reflect the structure of the National Labor Relations Board

10. See Complaint for Declaratory and Injunctive Relief, *supra* note 9, at 18; 6 C.F.R. § 3.51 (2025) (identifying the ALJ's decision, including on findings of fact, as a "recommended" one).

11. *Withrow v. Larkin*, 421 U.S. 35, 47, 58 (1975) (holding that agency heads do not violate due process by functioning as investigator, prosecutor, and adjudicator in the same case unless the appellant shows evidence of "actual bias"). Section I.B will discuss *Withrow* and related cases in greater depth.

12. See, e.g., *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (overturning *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), which had required courts to defer to an agency's interpretation of its organizing statutes); see also Philip Elman, *A Modest Proposal for Radical Reform*, 56 A.B.A. J. 1045, 1048 (1970) (arguing that "the blending of prosecutorial and adjudicative powers in a single tribunal imposes intolerable strains on fairness").

13. See *Withrow*, 421 U.S. at 47.

14. See Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. COMPETITION L. & ECON. 623, 624–25 (2016) (describing how "the FTC has used administrative litigation to advance the law on healthcare-merger enforcement, dominant-firm misconduct, pay-for-delay agreements in the pharmaceutical industry, state-action immunity, deceptive acts or practices, and beyond"); D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 ANTITRUST L.J. 319, 319–20 (2003) (describing Part 3 as a "uniquely effective vehicle for advancing the development of antitrust law in complex settings").

15. See Bryan Koenig, *FTC Reluctantly Abandons Axon Merger Challenge*, LAW360 (Oct. 10, 2023, at 16:51 ET), <https://www.law360.com/articles/1730951/ftc-reluctantly-abandons-axon-merger-challenge>.

(NLRB). The FTC and the NLRB are quite similar, but they differ in one crucial aspect—the NLRB’s dual functions are statutorily separate from one another.¹⁶ The NLRB’s Office of the General Counsel is independent from the quasi-judicial Labor Board and has the unilateral authority to prosecute alleged unfair labor practices before agency ALJs without approval from the Board.¹⁷ Although the NLRB has faced its own constitutional challenges recently,¹⁸ a due process claim regarding the “dual function” has not been among them.¹⁹

Bifurcating the FTC would prohibit the Commission from participating in the investigation or prosecution of Part 3 cases and would vest the unilateral authority to investigate and prosecute cases in the Directors of the Bureaus of Competition and Consumer Protection.²⁰ Like the General Counsel of the NLRB, these Directors would be independent officials appointed by the President and confirmed by the Senate, not subordinates of the FTC Chair.²¹ The Commission would be limited to carrying out its quasi-judicial function in Part 3 and to fulfilling the many other institutional roles it serves as the head of an agency with broad authority.²² Although bifurcation may have efficiency costs for the FTC, these

16. See *infra* Section II.A.

17. See *infra* Section II.A. The phrase “the Board” sometimes refers to the entire NLRB, including the General Counsel and the five-member “Board” that adjudicates unfair labor practice (ULP) charges (both entities are part of the same federal agency, the NLRB). This Note will refer to the entire agency as the “NLRB” and to the adjudicative body as the “Board” or the “Labor Board.”

18. See *Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025) (allowing President Trump to remove NLRB Board Member Gwynne Wilcox without cause); Robert Iafolla, *Employers Intensify Constitutional Attacks Against Labor Board*, BLOOMBERG L. (Aug. 12, 2024, at 05:00 ET), <https://news.bloomberglaw.com/daily-labor-report/employers-intensify-constitutional-attacks-against-labor-board> (describing cases brought by SpaceX and Energy Transfer against the NLRB). See generally Alexander MacDonald, *The Labor Law Enigma: Article III, Judicial Power, and the National Labor Relations Board*, 24 FEDERALIST SOC’Y REV. 304 (2023) (describing a more radical constitutional challenge that would require all “private rights,” including labor rights, to be adjudicated before an Article III judge).

19. One of the claims recently raised by SpaceX against the NLRB is similar to the due process argument against Part 3 and challenges the Board’s authority to seek injunctive relief while an administrative proceeding is pending before an agency ALJ. See Complaint for Declaratory and Injunctive Relief at 19–23, *Space Expl. Techs. Corp. v. NLRB*, No. 24-cv-00001 (S.D. Tex. Jan. 4, 2024). This argument will be addressed and distinguished in Section II.A.

20. Congress could alternatively create a separate “Office of the General Counsel” with supervision over the Bureau Directors, which would more closely mirror the current structure of the NLRB. But the FTC already has a General Counsel who serves as a legal adviser to the Commission. See *Office of the General Counsel*, FTC, <https://www.ftc.gov/about-ftc/bureaus-offices/office-general-counsel> [<https://perma.cc/T3QU-8B4X>] (last visited Jan. 3, 2026). Given the existence of this office and the potential friction associated with consolidating the Bureaus into a single office, it would likely be simpler for Congress to retain the distinction between Bureaus and make both Directors independent officials.

21. Bureau Directors at the FTC are currently appointed by and report directly to the Chairman. See, e.g., *FTC Chairman Ferguson Appoints Daniel Guarnera as Director of Bureau of Competition*, FTC (Feb. 10, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/02/ftc-chairman-ferguson-appoints-daniel-guarnera-director-bureau-competition> [<https://perma.cc/ZRK3-8TJP>] (appointing Director Daniel Guarnera).

22. For example, the Commission would retain its information-gathering and rule-making functions. E.g., 15 U.S.C. § 46(a)–(b) (establishing additional powers in the Commission to gather and compile information on certain industries and to require businesses to file reports on their business activities); Nabil Shaikh, *Reviving FTC Rulemaking*, THE REGUL. REV. (Dec. 14, 2023), <https://www.thereview.org/2023/12/14/>

costs would likely be offset by the benefits of retaining Part 3 as an effective forum for antitrust and consumer protection enforcement.

Beyond insulating Part 3 from due process challenges, bifurcating the FTC will serve two other salutary purposes. First, it will strengthen the FTC's identity as a distinct enforcer of antitrust law that is not merely redundant with the Department of Justice's Antitrust Division.²³ Second, it will combat the impression that Commissioners are biased adjudicators in Part 3 proceedings.²⁴ This impression is not unfounded, especially given the expansive agenda pushed by former FTC Chair Lina Khan.²⁵ Ambitious advocates like former Chair Khan should certainly play a role in fulfilling the agency's mission, just as they do at the NLRB.²⁶ But they should function as prosecutors, not adjudicators. Bifurcation would have allowed former Chair Khan or another advocate with similar ambitions to direct the President's antitrust policy agenda as Director of the Bureau of Competition with the independent authority to prosecute Part 3 cases before the Commission.

Although a statutory change that strengthens rather than hampers the FTC is unlikely to be enacted by the current Congress, those who believe in an effective administrative state must still imagine a future where such reforms are possible.²⁷ Moments of constitutional change sometimes arise without warning. The structure of the NLRB, for instance, would not have been imaginable just a few years before Congress created it in 1935, when the Great Depression underscored the need for federal intervention to rebalance power across the economy.²⁸ A similar moment may soon come, and Congress may realize that an effective FTC is necessary to respond to the threats posed by the modern economy. If such a scenario occurs, Congress could learn a lesson from the Labor Board and adopt its bifurcated structure to strengthen the FTC.

shaikh-reviving-ftc-rulemaking [https://perma.cc/DB24-4BT9] (describing the rulemaking authority of the FTC and potential ways to revive it).

23. See *infra* Section III.A.

24. See *infra* Section III.B.

25. See Memorandum from Lina M. Khan, Chair, FTC, to Comm'n Staff & Comm'rs 2 (Sep. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf [https://perma.cc/K4SZ-74X3] (stating policy priorities such as "address[ing] rampant consolidation" by "focus[ing] [the FTC's] resources on scrutinizing dominant firms," and addressing "dominant intermediaries and extractive business models").

26. See Bryce Covert, *Meet the Activist Championing the Rights of Workers from the Inside*, THE NATION (Feb. 13, 2023), <https://www.thenation.com/article/society/jennifer-abruzzo-national-labor-relations-board> [https://perma.cc/B3PS-R32W] (highlighting ways that agency appointees can further an agency's mission).

27. See Fredy Vargas Lama, *Why Is Imagining a Positive Future Crucial for Progress?*, WORLD ECON. F. (Mar. 28, 2025), <https://www.weforum.org/stories/2025/03/why-is-imagining-a-positive-future-crucial-to-humanitys-progress> [https://perma.cc/XM63-CYN9] (describing how envisioning positive futures can motivate effective action and foster social transformation).

28. See Steve Early, *90 Years After Its Passage, the National Labor Relations Act Is Under Siege*, IN THESE TIMES (July 2, 2025), <https://inthesetimes.com/article/national-labor-relations-act-unions-wagner-nlra> [https://perma.cc/LL6Z-28RZ] (exploring the historical context of the NLRA as a "product of Depression-era concern" and the ongoing battle to secure economic power for workers).

Part I of this Note will describe the FTC's Part 3 adjudication process, the current wave of due process challenges, and previous reform proposals that fail to adequately address those challenges. It will then pitch the bifurcation model, which has only been briefly discussed in prior scholarship. Part II will summarize the history and structure of the NLRB and describe how a bifurcated FTC could operate. Part III will briefly discuss two arguments that suggest bifurcation will have benefits for the FTC beyond merely insulating Part 3 from due process challenges.

I. CHALLENGES TO FTC ADMINISTRATIVE ADJUDICATION

Administrative adjudication has been a key feature of the FTC since Congress passed the Federal Trade Commission Act in 1914.²⁹ The Act prohibits “[u]nfair methods of competition” and “unfair or deceptive acts or practices,” and Congress tasked the Commission with defining these terms through adjudication.³⁰ The original FTC was given “broad and flexible powers” to evaluate new business practices and was conceived of “not as a prosecutorial or enforcement body, but as an expert administrative tribunal” tasked with “developing an enlightened antitrust policy.”³¹ In fact, the original Commission could only make findings of fact and issue cease and desist orders that had to be enforced in federal court.³² Moreover, the status of Commissioners as experts with the power to define new “unfair methods of competition” in accordance with changing industry practices was essential.³³ As the Supreme Court has noted, Congress called on the Commission “to exercise the trained judgment of a body of experts” in enforcing its expansive mandate.³⁴

Since the agency's founding, the FTC has relied on “hearing examiners,” now known as ALJs, to preside over evidentiary proceedings and issue “initial

29. See Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717, 719–20 (1914) (codified as amended at 15 U.S.C. §§ 41–58).

30. 15 U.S.C. § 45(a)(1). See generally Hoffman & Royall, *supra* note 14 (describing President Woodrow Wilson and Congress's “vision of the FTC”); Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003) (outlining the history of legislative debates). The Commission only had authority to adjudicate unfair methods of competition (UMC) cases until 1938, when Congress expanded the scope of FTC jurisdiction to unfair or deceptive acts or practices (UDAP) cases in the Wheeler-Lea Amendments. See Wheeler-Lea Amendments, Pub. L. No. 75-447 § 3 52 Stat. 111, 111 (1938).

31. Philip Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777, 781 (1971); see also Hoffman & Royall, *supra* note 14, at 319 (noting that “Congress anticipated that the FTC, acting as an adjudicator, would facilitate the development of antitrust policy”).

32. Until the Wheeler-Lea Amendments were passed in 1938, the Commission had no authority to enforce its orders and could only seek prospective enforcement in the courts of appeal. See Hoffman & Royall, *supra* note 14, at 320–21.

33. See Eugene R. Baker & Daniel J. Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517, 520–25 (1962) (summarizing congressional frustration with judicial efforts to limit the scope of the Sherman Act and the desire of many legislators to create a body better equipped to adapt to changing industry practices).

34. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935) (noting that the Commission's duties, at least in 1935, were “neither political nor executive, but predominantly quasi-judicial and quasi-legislative”).

decisions” appealable to the full Commission for final resolution.³⁵ This administrative adjudication process, summarized below, has been criticized at length for its perceived unfairness. In addition, the fact that the Commission approves complaints filed before agency ALJs and does not defer to their decisions on appeal has led to the due process challenges that now threaten to destroy or significantly curtail the FTC’s Part 3 system of administrative adjudication.³⁶

This Part will (A) describe the Part 3 system, with an emphasis on the procedures that have raised due process concerns for litigants; (B) summarize the state of the litigation that seeks to invalidate or curtail Part 3; and (C) describe previous reform proposals that fall short before pitching the bifurcation model.

A. THE FTC’S ADMINISTRATIVE FORUM: 16 C.F.R. PART 3

The FTC Act authorizes the Commission to investigate alleged violations of the Act and prosecute those violations in federal court or in the agency’s administrative forum, known as Part 3.³⁷ The procedures in that forum, codified in Part 3 of the FTC’s Rules of Practice,³⁸ have evolved over time to reflect the changing expectations of due process in administrative proceedings. The Commission functioned much like a trial court during the first few decades of its existence, with “limited formal pleadings” before a hearing examiner that often consisted only of the agency’s complaint and an answer.³⁹ In 1946, the Administrative Procedure Act (APA) increased the role of the hearing examiner and required the agency to restrict ex parte contacts between prosecutorial and adjudicative staff.⁴⁰ Between the 1960s to the 1990s, the agency amended its rules to more closely reflect federal court practice, with pretrial discovery and consolidated trials before ALJs.⁴¹ Today, Part 3 provides robust, albeit expedited, procedures that are often amended in light of public input or the Commission’s agenda.⁴²

35. Hoffman & Royall, *supra* note 14, at 321–22. Of note, the FTC in 2023 amended Part 3 to refer to ALJ decisions as “recommended” rather than “initial.” The new rules also provide for automatic review of ALJ decisions rather than an appeal as of right. See Elliot Johnson, *FTC Modifies Rules for In-House Administrative Proceedings*, BALLARD SPAHR LLP: CONSUMER FIN. MONITOR (June 12, 2023), <https://www.consumerfinancemonitor.com/2023/06/12/ftc-modifies-rules-for-in-house-administrative-proceedings> [https://perma.cc/M29Z-FLGT].

36. See 16 C.F.R. § 1025.55(a) (2025) (“Upon appeal from or review of an Initial Decision, the Commission shall consider the record as a whole or such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, shall, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the Initial Decision.”).

37. See 15 U.S.C. §§ 45(b), 53(b); see also J. Robert Robertson, *Administrative Trials at the Federal Trade Commission in Competition Cases*, 14 SEDONA CONF. J. 101, 104 (2013) (noting that “there are many reasons why the FTC might choose to go to federal court for some kinds of cases and to Part 3 for others”).

38. 16 C.F.R. pt. 3 (2025).

39. Hoffman & Royall, *supra* note 14, at 320 (“Originally, the Commission itself served in most respects as a trial court.”). The agency could only seek prospective enforcement from a federal appeals court until 1938, when the Wheeler–Lea Amendments authorized the Commission to seek civil penalties for violations of its orders. See *id.* at 320–21.

40. See *id.* at 321 (describing how hearing examiners came to resemble ALJs after the APA).

41. See *id.* at 321–22.

42. The FTC amended its Part 3 procedures in 2009 after years of criticism that the existing procedures were too slow. For a summary of these changes, see Michael L. Sibarum & Jay L. Levine,

Investigations at the FTC can originate upon the request of the public or on the initiative of the Commission or agency staff, and the Commission plays a significant role in the investigative process.⁴³ Agency staff can use various tools for compulsory process, such as subpoenas or “civil investigative demands” (CIDs) that require parties to respond to agency inquiries.⁴⁴ Under Part 2 of the FTC’s Rules of Practice, which governs agency investigations, a Commissioner must approve the use of all CIDs and subpoenas.⁴⁵ After agency staff has finished an investigation into alleged misconduct, they typically send a memo to the Commission with a recommendation as to whether it should file a complaint in Part 3 or in federal court.⁴⁶ The Commission then votes on whether and where to file the complaint, which it has the authority to do if it has “reason to believe” an organization is violating the Act and if issuing a complaint is in the “interest of the public.”⁴⁷

The current Part 3 process has several built-in safeguards to protect the due process rights of parties after a complaint is filed. From the moment the Commission approves a complaint, FTC rules preclude *ex parte* communications between “complaint counsel” (the agency staff involved in case prosecution) and the ALJ, the Commission, and other employees involved in the Part 3 “decisional process.”⁴⁸ This so-called “Part 3 wall” is intended to ensure impartiality and protect the targeted party (known as the “respondent”).⁴⁹ Rule 4.7 of the FTC’s Rules of Practice also prohibits employees involved in the decisional process

Practical and Strategic Considerations in Litigating Under the FTC’s New Part 3 Rules, 24 ANTITRUST 33, 33 (2009). The FTC also amended its rules in 2023 to change the process by which ALJ decisions are reviewed by the Commission. See Carrie G. Amezcua, *FTC Revises Its Rule 3 Administrative Process*, BUCHANAN (July 18, 2023), <https://www.bipc.com/ftc-revises-its-rule-3-administrative-process> [<https://perma.cc/7EJ6-Q26P>].

43. See 16 C.F.R. § 2.1 (2025) (“Commission investigations and inquiries may be originated upon the request of the President, Congress, governmental agencies, or the Attorney General; upon referrals by the courts; upon complaint by members of the public; or by the Commission upon its own initiative.”).

44. 15 U.S.C. §§ 49, 57b-1. CIDs and subpoenas are similar, but only CIDs can be used to investigate unfair methods of competition, and they allow the agency to request “written reports or answers to questions.” See *id.* § 57b-1(c)(1).

45. See 16 C.F.R. § 2.7(a) (2025) (“The Commission or any Commissioner may . . . issue a subpoena, or a civil investigative demand, directing the recipient named therein to appear before a designated representative at a specified time and place to testify or to produce documentary material. . .”).

46. See Amy Schatz, *FTC Denies Report That Agency Ignored Staff Recommendation on Google*, VOX (May 25, 2015, at 16:40 ET), <https://www.vox.com/2015/3/25/11560716/ftc-denies-report-that-agency-ignored-staff-recommendation-on-google> (describing a reported leak of a confidential recommendation memo that agency staff prepared for the Commission after a years-long investigation into Google).

47. 15 U.S.C. § 45(b).

48. 16 C.F.R. § 4.7(b)–(c) (2025).

49. The term “Part 3 wall” is often used in practice to describe the system of rules within the FTC that siloes prosecutorial staff from adjudicative staff during the pendency of a Part 3 proceeding. See, e.g., Respondent Intuit Inc.’s Motion to Disqualify Chair Lina M. Khan at 3, Intuit Inc., 192 F.T.C. 3119 (2023) (No. 9408), https://www.ftc.gov/system/files/ftc_gov/pdf/608359_-_efile0002587_-_public_d9408_-_respondent_intuits_motion_to_disqualify.pdf [<https://perma.cc/GRC5-GR3L>] (describing a tweet made by Lina Khan about a pending proceeding “with the Part 3 wall in place”).

from communicating with anyone outside the FTC or with Commission employees involved in the original investigation.⁵⁰ In addition, the ALJs who preside over Part 3 proceedings are insulated from at-will removal by the Commission.⁵¹

Despite these formal protections, however, the Commission can exert significant control over Part 3 adjudications. For example, motions for summary judgment and motions to dismiss filed before an evidentiary hearing are directly referred to the Commission for judgment.⁵² The Commission also has the power to take the ALJ's place as presiding officer if it chooses.⁵³ This power is rarely used, and the Commission generally does not intervene with active matters in Part 3 until it hears the case on appeal.⁵⁴ But in two 2008 cases, former Commissioner J. Thomas Rosch presided over an administrative trial as the ALJ, and his *ex parte* communications with the parties prompted outcry and a motion to recuse by the respondents.⁵⁵

Perhaps the most significant difference between Part 3 and federal court procedures is that the Commission exercises *de novo* review over the ALJ's findings of fact on appeal.⁵⁶ This stems from the formal relationship between the Commission and the ALJs, who exercise the delegated adjudicative authority of the Commission itself and who issue "recommended" decisions that the Commission can decline to follow.⁵⁷ Respondents can appeal the Commission's final decision to "any circuit [court] where the method of competition or the act or practice in question was used" or where the respondent "resides or carries on business."⁵⁸ But on appeal, the Commission's findings of fact are typically reviewed under the lenient "substantial evidence" standard, which asks only whether there is evidence in the record that "a reasonable mind might accept as adequate."⁵⁹ The structure allows the Commission

50. See 16 C.F.R. § 4.7(b)(2) (2025); *see also* Administrative Procedure Act, 5 U.S.C. § 554(d) (prohibiting any employee engaged in the investigation or prosecution of a pending matter, except for agency heads, from participating in the decision or agency review of the matter).

51. See 5 U.S.C. § 7521(a) (noting that ALJs appointed under 5 U.S.C. § 3105 can only be removed by agency heads "for good cause established and determined by the Merit Systems Protection Board").

52. See 16 C.F.R. § 3.22(a) (2025).

53. See *Id.* § 3.42(a) ("Hearings . . . shall be presided over by a duly qualified Administrative Law Judge or by the Commission or one or more members of the Commission sitting as Administrative Law Judges. . .").

54. See Diana Gillis, Note, *Closing an Administrative Loophole: Ethics for the Administrative Judiciary*, 22 GEO. J. LEGAL ETHICS 863, 863 (2009) (noting that the APA permits the FTC to assign Commissioners to adjudicate Part 3 matters, but that this has "rarely occurred").

55. See J. Thomas Rosch, Comm'r, FTC, *So I Serve as Both a Prosecutor and a Judge – What's the Big Deal?*, 14–15, 15 nn.39–42 (Aug. 5, 2010) (transcript available at https://www.ftc.gov/sites/default/files/documents/public_statements/so-i-serve-both-prosecutor-and-judge-whats-big-deal/100805abaspeech.pdf [<https://perma.cc/J8GK-YFUK>]). For a description of the communications and the criticism that followed, see Gillis, *supra* note 54, at 874–75, 875 n.95.

56. See 16 C.F.R. § 1025.55(a) (2025) (noting that the Commission can "exercise all the powers which it could have exercised if it had made the Initial Decision" on appeal).

57. See *Id.* § 0.14 (describing ALJs as "officials to whom the Commission . . . delegates the initial performance of statutory fact-finding functions and initial rulings on conclusions of law"); Johnson, *supra* note 35 (explaining that, under new FTC rules, the ALJ will now issue recommended decisions that are automatically reviewed, rather than initial decisions that can be appealed.).

58. 15 U.S.C. § 45(c).

59. See, e.g., *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)); Hoffman & Royall, *supra* note 14, at 324 & n.28.

to simultaneously not “give any deference to the ALJ’s findings of fact” and obtain deferential review if their conclusion is appealed.⁶⁰

The general concern that the FTC simply “rubber stamps” its own complaints, regardless of the ALJ’s findings, has animated the current wave of due process claims against the agency.⁶¹ Much recent criticism of the Part 3 process has highlighted complaint counsel’s “unbeaten streak” of victories before the Commission as proof of bias.⁶² According to a 2013 article, the Commission found a violation of the FTC Act in every case in which it had voted on a Part 3 complaint in the preceding two decades, even in two cases in which the ALJ had originally found no violation.⁶³ Moreover, the courts of appeal in both of those cases reversed the Commission, citing insufficient evidence to support its decision.⁶⁴ Another 2008 study found that complaint counsel won every Sherman Act case with disputed facts in Part 3 over the preceding twenty-five-year period.⁶⁵

Notably, not all commentators agree that Part 3 has historically been used to rubber-stamp complaints or that the agency’s high success rate is evidence of institutional bias. In a 2016 article, former Commissioner Maureen Ohlhausen analyzed over one hundred Part 3 decisions and found that, although the Commission had consistently ruled in favor of complaint counsel in the previous decade, it often reversed itself between the 1970s and 1990s.⁶⁶ Ohlhausen also described how the Commission’s success rate in courts of appeal had improved significantly over the forty-year period she studied, which she attributed to better case selection by agency staff.⁶⁷

Regardless of why complaint counsel has fared so well in Part 3, the Commission exercises a significant role throughout the adjudication process that has led to valid concerns about its ability to function as an impartial forum.

60. Hoffman & Royall, *supra* note 14, at 324–25.

61. 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).

62. Keith Klovers, *Three Options for Reforming Part 3 Administrative Litigation at the Federal Trade Commission*, 85 ANTITRUST L.J. 409, 421 (2023) (quoting Congressman Spencer Bacchus).

63. See David Balto, *Can the FTC Be a Fair Umpire?*, THE HILL (Aug. 14, 2013, at 15:00 ET), <https://thehill.com/blogs/congress-blog/economy-a-budget/159122-can-the-ftc-be-a-fair-umpire> [<https://perma.cc/V3XG-MGCT>].

64. See *id.* The two cited cases were *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008), and *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005).

65. See Klovers, *supra* note 62, at 421 (citing 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).

66. See Ohlhausen, *supra* note 14, at 625–27. She attributed this higher reversal rate to the “seismic change in antitrust law” during that period and the fact that the same commissioners rarely approved and adjudicated the same complaint given the lengthy procedures in Part 3. *Id.* at 626.

67. See *id.* at 637–38. Ohlhausen takes issue with David Balto’s focus on *Rambus* and *Schering-Plough* as evidence of agency bias because they posed “difficult issues at the cutting edge of antitrust law.” *Id.* at 651–53; see also Jonathan Nuechterlein, Gen. Couns., FTC, “How the FTC Works: Lessons from the Commission’s Supreme Court Trifecta,” 10 (Mar. 20, 2015) (transcript available at https://www.ftc.gov/system/files/documents/public_statements/632081/150320adminlawreview.pdf [<https://perma.cc/MT6H-4V4P>]) (“There is a broad consensus, even among skeptics of the Part 3 process, that the Commission’s appellate success rate for Part 3 antitrust decisions is approximately 80 percent.”).

Commissioners can direct staff to investigate certain types of cases,⁶⁸ and a Commissioner must approve the use of compulsory process tools once an investigation has begun.⁶⁹ The full Commission then votes to approve a complaint and decides where it gets filed.⁷⁰ If the complaint is filed before an ALJ in Part 3, the Commission reviews the ALJ's factual findings de novo on appeal, and Article III courts often defer to the Commission's findings.⁷¹ Although FTC procedures and the APA isolate complaint counsel from adjudicative staff, this "Part 3 wall" has not assuaged the concerns of respondents, who have increasingly been raising due process claims against Part 3 that could soon be resolved against the agency.

B. DUE PROCESS CHALLENGES AND THE PRESUMPTION OF INTEGRITY

Several recent high-profile cases have challenged the FTC's authority to effectively serve as both prosecutor and adjudicator in Part 3 proceedings. These challenges have all failed because of the Supreme Court's decision in *Withrow v. Larkin*,⁷² which held that combining prosecutorial and adjudicative functions in agency heads does not violate the Due Process Clause unless litigants provide evidence of "actual bias."⁷³ The reasoning in *Withrow*, however, is at odds with the current Court's approach to the administrative state⁷⁴ and with a more recent case that has arguably replaced *Withrow* with a lower standard for proving agency bias.⁷⁵

In the last five years, at least seven parties have raised constitutional claims against the FTC, including the due process claim against the Commission's "dual function" in Part 3, after the agency challenged their proposed mergers as anti-competitive.⁷⁶ In one case, gene sequencing company Illumina raised four constitutional claims against the FTC, including the due process claim, after the agency blocked the company's proposed merger with a competitor.⁷⁷ As Illumina argued, "[t]he Commission voted out the complaint after investigation, directed its prosecution and then passed judgment in overruling the ALJ," thus "playing the roles

68. See 15 U.S.C. § 43.

69. See *id.* § 57b-1(i).

70. See 16 C.F.R. § 3.11 (2025).

71. See *id.* § 1025.55; Hoffman & Royall, *supra* note 14, at 324.

72. 421 U.S. 35 (1975).

73. See *id.* at 47; see also *Gibson v. FTC*, 682 F.2d 554, 559–60 (5th Cir. 1982) (applying *Withrow* to the FTC).

74. See, e.g., *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (overturning *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), which had required courts to defer to an agency's interpretation of its organizing statutes).

75. See *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016).

76. See Conner J. Dwinell & Craig D. Minerva, *Recent Challenges to FTC Constitutionality: Surveying the Landscape*, 38 ANTITRUST 42, 42–44 (2024) (citing the Meta/Within, Axon/VieVu, ICE/Black Knight, Amgen/Horizon, IQVIA/Propel, Illumina/Grail, and Novant Health/Davis mergers).

77. See *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1044, 1046–47 (5th Cir. 2023). Besides the due process claim, Illumina argued that (1) Congress violated the non-delegation doctrine by delegating to the Commission the decision of where to file a complaint; (2) Commissioners are unlawfully insulated from removal; and (3) the allocation of certain antitrust enforcement actions between the FTC and the DOJ violated the Equal Protection Clause. *Id.*

of ‘investigator, prosecutor, and judge’” in violation of due process.⁷⁸ The Fifth Circuit rejected this claim, citing *Withrow* and the “actual bias” requirement that it held had not been satisfied.⁷⁹

But this rejection has not stopped other companies from raising the same claim.⁸⁰ In *Meta Platforms v. FTC*, for example, Meta raised five constitutional claims against the FTC, including the due process challenge to Part 3, after the FTC tried to modify a cease-and-desist order alleging deceptive practices in the company’s privacy settings.⁸¹ Meta cited the FTC’s high success rate in Part 3 and the deferential standard of review on appeal in arguing that the agency’s “internal administrative process is vastly out of step with the substantive and procedural due process protections afforded to litigants in an Article III court.”⁸² Judge Randolph Moss rejected all five claims, finding each one foreclosed by Supreme Court precedent.⁸³ But in a sign of the times, he denied the FTC’s motion to dismiss the complaint, noting that he wanted to “await the Supreme Court’s decision in *Jarkesy*” before fully adjudicating the case.⁸⁴

Every judge who has heard the “dual function” due process claim against Part 3, including Judge Moss in *Meta* and the Fifth Circuit panelists in *Illumina*, has found it to be foreclosed by *Withrow v. Larkin*, which upheld the constitutionality of combining prosecutorial and adjudicative functions in one body.⁸⁵ In *Withrow*, the Supreme Court rejected a due process challenge to the structure of a state

78. Brief of Petitioners at 24, *Illumina, Inc. v. FTC*, 88 F.4th 1036 (5th Cir. 2023) (No. 23-60617), 2023 WL 4014761 (quoting *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 215 (2023) (Gorsuch, J., concurring)).

79. See *Illumina*, 88 F.4th at 1047 (“[T]he Supreme Court has held that administrative agencies can, and often do, investigate, prosecute, and adjudicate rights without violating due process.”).

80. See Dwinell & Minerva, *supra* note 76, at 42 & n.2.

81. See Complaint for Declaratory and Injunctive Relief at 18–20, *Meta Platforms, Inc. v. FTC*, 723 F. Supp. 3d 64, 89–90 (D.D.C. 2024) (No. 23-cv-03562). Meta raised additional constitutional arguments similar to those raised by *Illumina*. Compare Brief of Petitioners, *supra* note 78, at 16–26 (raising Article I, Article II, Due Process, and Equal Protection claims) with Complaint for Declaratory and Injunctive Relief, *supra*, at 18–20 (same, and raising a Seventh Amendment claim).

82. Complaint for Declaratory and Injunctive Relief, *supra* note 81, at 13. Meta cited the Ninth Circuit’s observation in *Axon* that the FTC “does not appear to dispute . . . that [it] has not lost a single [Part 3] case in the past quarter-century.” *Id.* (quoting *Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1187 (9th Cir. 2021), *rev’d*, 598 U.S. 175 (2023)). Judge Moss rejected this argument, citing Maureen Ohlhausen’s study of over one hundred Part 3 cases since the 1970s. See *Meta Platforms, Inc. v. FTC*, 723 F. Supp. 3d 64, 89–90 (D.D.C. 2024); see also Ohlhausen, *supra* note 14, at 626.

83. See *Meta Platforms*, 723 F. Supp. 3d at 86–96. The D.C. Circuit denied an emergency motion for an injunction pending appeal two weeks later. See *Meta Platforms, Inc. v. FTC*, No. 24-5054, 2024 WL 1549732 (D.C. Cir. Mar. 29, 2024).

84. *Meta Platforms*, 723 F. Supp. 3d at 71 (noting that the Supreme Court would be “considering a number of related issues” in *Jarkesy* that could implicate the constitutional challenges to the FTC). This admonition likely related to Meta’s argument that the FTC violated its Seventh Amendment right to a jury trial, which was similar to the appellant’s claim against the SEC in *Jarkesy*. See *SEC v. Jarkesy*, 603 U.S. 109, 120–21 (2024).

85. See 421 U.S. 35, 47, 55 (1975); see also *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 79 (10th Cir. 1972) (“[T]he Federal Trade Commission combines the functions of investigator, prosecutor and judge and. . . the courts have uniformly held that this feature does not make out an infringement of the due process clause of the Fifth Amendment.”).

medical examining board that was empowered to both investigate doctor misconduct and adjudicate whether to suspend medical licenses based on that investigation.⁸⁶ In a unanimous opinion, the Court found that the petitioner did not overcome the “presumption of honesty and integrity in those serving as adjudicators” and failed to provide evidence that conferring dual functions on the same people “poses such a risk of actual bias or prejudgment that the practice must be forbidden.”⁸⁷ Although the Court acknowledged potential agency bias as a “substantial” issue, it found that Congress has authorized “varying degrees of separation” in different agencies and that the APA’s prohibition on *ex parte* communications was sufficient to obviate due process concerns.⁸⁸

After establishing the presumption of integrity, the *Withrow* Court distinguished the dual role of the state medical board from a previous case, *In re Murchison*, in which the Court found a due process violation when a state judge had effectively functioned as prosecutor and adjudicator in the same case.⁸⁹ In *Murchison*, a state judge who sat as a “one-man” grand jury with the power to compel witness testimony later tried two of the witnesses whose testimony he had compelled and convicted them of criminal contempt.⁹⁰ The Court held that this dual role denied the due process rights of the witnesses because the judge “likely relied on his own personal knowledge and impression of what had occurred” in addition to his general role as prosecutor and adjudicator.⁹¹ By contrast, in *Withrow* there was “no more evidence of bias or the risk of bias” than the mere existence of the dual role vested in the board.⁹²

The *Meta* case and others have reaffirmed the *Withrow* rule that due process claims against agency officials with dual prosecutorial and adjudicative functions should be dismissed unless the plaintiff provides specific evidence of “actual bias” or prejudice.⁹³ *Withrow* is also consistent with the APA, which exempts agency heads from the rule prohibiting agency employees from engaging in the prosecution and adjudication of the same case.⁹⁴ As one commentator noted in

86. *Withrow*, 421 U.S. at 55.

87. *Id.* at 47.

88. *Id.* at 51–52; see 5 U.S.C. § 554(d)(1) (“The employee who presides at the reception of evidence . . . may not . . . consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate. . .”).

89. *Withrow*, 421 U.S. at 53–54.

90. See *In re Murchison*, 349 U.S. 133, 134–35 (1955).

91. See *Withrow*, 421 U.S. at 53 (citing *Murchison*, 349 U.S. at 138) (internal quotations omitted).

92. *Id.* at 54.

93. See Dwinell & Minerva, *supra* note 76. As one commentator has noted, *Withrow* was a “rousing defense of the administrative state” that “elevated legal formalities over the psychological tendencies and human weaknesses of individuals, praised the honesty and intellectual discipline of agency adjudicators, and diminished due process precedents.” Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. MICH. J.L. REFORM 103, 113 (2018).

94. See 5 U.S.C. § 554(d)(2) (“An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not . . . participate or advise in the decision, recommended decision, or agency review [of an initial decision], except as witness or counsel in public proceedings. This [restriction] does not apply . . . to the agency or a member or members of the body comprising the agency.” (emphasis added)).

1980, this “agency-head” exception was a “controversial compromise in 1946 but one now so thoroughly accepted that it would be unthinkable for the [Supreme] Court to cast doubt on it.”⁹⁵

Despite that prediction, the Court cast some doubt on *Withrow* in a 2016 case that arguably lowered the standard for proving bias in due process challenges against agency adjudicators. In *Williams v. Pennsylvania*,⁹⁶ the Court held that the Due Process Clause required a state Supreme Court justice to disqualify himself from reviewing a collateral challenge to a death penalty conviction because the justice had approved the sentencing decision as the district attorney three decades prior.⁹⁷ As the Court explained, the justice had “significant, personal involvement” in the case as a prosecutor that required him to recuse himself despite the lengthy period that had passed and the minimal role he played in the original investigation.⁹⁸

The *Williams* Court relied heavily on *Murchison*, which it cited for the proposition that the Court, in due process challenges, must ask not whether a judge harbors an “actual, subjective bias” but whether there is an “unconstitutional potential for bias.”⁹⁹ Such potential bias, the Court noted, can exist anytime “the same person serves as both accuser and adjudicator in a case.”¹⁰⁰ This potential existed in *Williams* even though the state justice had merely approved the death sentence after a long investigation by other prosecutors and thirty years had passed by the time the collateral challenge reached him on appeal. To the Court, he had nonetheless made the “critical decision” to approve the punishment, and the “involvement of multiple actors and the passage of time do not relieve the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process.”¹⁰¹ Notably, the conservative Justices dissented and would have held that due process requires disqualification only when a judge had a direct pecuniary interest in the previous case or had served as the actual lawyer in the case.¹⁰²

It is unclear whether the lower standard of proof for a due process violation in *Williams* and *Murchison* (“potential for bias”) has effectively superseded *Withrow* or whether it should be extended to the administrative context. If the Court decides to extend the standard, it might require agency heads with a dual function to disqualify themselves from participating in any adjudication in which they had authorized the original prosecution.¹⁰³ The Court could alternatively

95. Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 783 (1981).

96. 579 U.S. 1 (2016).

97. *Id.* at 14–15.

98. *Id.* at 28.

99. *Id.* at 8 (emphasis added) (internal quotations omitted) (citing *In re Murchison*, 349 U.S. 133, 136–37 (1955)).

100. *Id.*

101. *Id.* at 11.

102. See *id.* at 20–25 (Roberts, J., dissenting); *id.* at 36–37 (Thomas, J., dissenting).

103. Vollmer, *supra* note 93, at 107.

confine *Williams* to its facts, as it involved a death sentence in a publicly notorious case rather than a technical ruling on a matter of administrative compliance.¹⁰⁴ But as Professor Andrew Vollmer has argued, *Williams* cited many of the same cases as *Withrow* and simply reached a different conclusion as to the proper standard for when a judge must be disqualified.¹⁰⁵ The *Williams* majority also did not limit its reasoning to the facts before it and did not reference the “presumption of honesty and integrity” so crucial to the *Withrow* holding; only the dissenters noted this language in defense of the state justice.¹⁰⁶

There are signs that the Supreme Court could extend the logic of *Williams* to invalidate the current structure of Part 3 because of the “dual function” of FTC Commissioners, or at least require any Commissioner who approved the original complaint to recuse themselves on appeal. Professor Vollmer has argued that the Court has extended the logic of judicial neutrality to administrative decision-makers in many other cases and that “just as much or more is at stake” in enforcement proceedings as in federal court.¹⁰⁷ More broadly, the Court has moved away from the functional, deferential posture towards agencies it exhibited in *Withrow*,¹⁰⁸ and it has overturned or limited other administrative law precedents by applying a rigid view of the constitutional separation of powers.¹⁰⁹ Accordingly, if litigants continue to bring due process claims against Part 3, the Court could decide to intervene and potentially declare it unconstitutional under a non-frivolous extension of *Williams*.

Even if the Court applies *Williams* to the FTC, it may not invalidate Part 3 *in toto*. Instead, it could simply require Commissioners who had approved a Part 3 complaint to recuse themselves from hearing that case on appeal. *Williams* and *Murchison* both involved individual judges who had to recuse themselves from presiding over a case in which they had led or approved the prosecution, not structural concerns regarding an entire administrative agency.¹¹⁰ Even Professor Vollmer admits that the proper remedy for a due process violation under *Williams* would likely be Commissioner recusal, not the total invalidation of Part 3.¹¹¹ However, requiring Commissioners to recuse themselves anytime they adjudicate a Part 3 complaint they had previously approved would still pose a major impediment

104. *Id.* at 113–16.

105. *Id.* at 116.

106. *See id.* at 117 n.58; *see also id.* at 125–26 (noting major factual distinctions between *Withrow* and *Williams*, but concluding that “the reasoning of *Williams* did not depend” on any of them).

107. *Id.* at 131–33 (“Applying the standards of judicial neutrality to an agency official engaged in a judicial function is consistent with the high level of due process importance assigned to the impartiality of an adjudicator, whether in an agency or a federal court.”).

108. *See Withrow*, 421 U.S. at 49–50, 52 (noting that invalidating the dual function “would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity,” and highlighting that “[t]he incredible variety of administrative mechanisms in this country will not yield to any single organizing principle”).

109. *See, e.g., SEC v. Jarkesy*, 603 U.S. 109, 140 (2024) (“[T]he dissent would permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch. That is the very opposite of the separation of powers that the Constitution demands.”).

110. *See Vollmer, supra* note 93, at 113–16.

111. *Id.* at 122 (“The larger separation of powers or due process question was not at stake in *Williams*. *Williams* was about the propriety of one decision maker’s participation in one particular case. . . .”).

to the Commission's ability to adjudicate cases given that it can only reach decisions with a majority of non-recused Commissioners.¹¹²

Regardless of whether the Court decides to hear the due process challenge to Part 3 or how disruptive its potential remedy would be, the current wave of due process litigation may already be hampering the FTC's ability to protect Americans from abusive corporate power. Litigating these structural challenges has likely strained the resources of an agency whose budget has not kept up with GDP growth,¹¹³ and there is some evidence that the FTC has been less aggressive in litigating against parties who raise these claims. In *Axon*, for example, the FTC settled with Axon in part because of the cost and uncertainty of protracted litigation after the Supreme Court endorsed the company's pre-enforcement constitutional challenges.¹¹⁴ And perhaps most importantly, the perception of bias in Part 3 has undermined the agency's credibility as a neutral enforcer of antitrust and consumer protection law.¹¹⁵ If Congress wants the FTC to retain its distinct identity as an adjudicative body, it should consider bifurcating the agency's prosecutorial and adjudicative functions even if the Court does not ultimately invalidate or curtail the current structure of Part 3.

C. THE MIDDLE GROUND SOLUTION: FTC BIFURCATION

This Note proposes a statutory bifurcation of the FTC to mirror the structure of the NLRB, which has an independent General Counsel with the unilateral authority to prosecute cases before the quasi-judicial Labor Board. This proposal would vest the authority to decide whether to file a complaint against a respondent in Part 3 (or a defendant in federal court) in the Directors of the Bureau of Competition and Consumer Protection.¹¹⁶ Although bifurcation comes with associated costs, this proposal offers a middle ground between potential self-imposed changes within the FTC that likely would not fix the due process issue and more radical changes that would either destroy Part 3 or attempt to establish a novel

112. See 16 C.F.R. § 4.14(b) (2025) ("A majority of the members of the Commission in office and not recused from participating in a matter . . . constitutes a quorum. . . ."); cf. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 687–88 (2010) (holding that the NLRB could not issue decisions in unfair labor practice and representation cases with only two members).

113. See *Testimony of Chair Lina M. Khan Before the H. Comm. on Appropriations Subcomm. on Fin. Servs. & Gen. Gov't*, 118th Cong. 2 (2024) (statement of Lina M. Khan, Chair, FTC) (noting that the FTC, in 2024, had 400 fewer employees than it had in 1980 despite a six-fold increase in GDP growth since then).

114. See Koenig, *supra* note 15 (explaining how the FTC decided to drop an antitrust case against Axon Enterprise Inc. rather than litigate structural constitutional issues).

115. See, e.g., Brent Skorup & Anastasia P. Boden, *Intuit v. FTC Brief: Federal Agencies Should Not Be Judge, Jury, and Executioner*, CATO INST.: CATO AT LIBERTY (May 6, 2024, at 15:48 ET), <https://www.cato.org/blog/intuit-v-ftc-brief-federal-agencies-should-not-be-judge-jury-executioner> [<https://perma.cc/2TYT-ZN39>].

116. This idea was first proposed by Terry Calvani in 1989. See Terry Calvani, *A Proposal for Radical Change*, 34 ANTITRUST BULL. 185, 206–07 (1989). In Calvani's proposal, the prosecutorial authority of the FTC would be vested in a single "General Counsel" rather than the Bureau Directors. See *supra* note 20 for a brief discussion of why retaining the current distinction between Bureaus may be a more feasible solution.

court with uncertain authority. Before exploring how bifurcation could work in Part II, this Section will briefly describe previous proposals to address due process concerns in Part 3 and explain how they fall short.

In a 2023 article, Keith Klovers proposed three solutions for the due process issues in Part 3.¹¹⁷ First, the Commission could implement a “narrow procedural reform package” by raising the standard of review of an ALJ’s factual findings from *de novo* to clear error, which would reflect a typical Article III-style appeal.¹¹⁸ Second, the FTC could implement a “broad procedural reform package” by adopting the clear-error standard *and* strengthening the role of the ALJs in Part 3.¹¹⁹ This reform would require ALJs to have specific antitrust experience and eliminate the Commission’s ability to directly hear administrative trials, a rarely used but still authorized power.¹²⁰ Third, Congress could adopt a “narrow structural reform package” by converting the FTC’s adjudicative function in Part 3 into a “specialized Article III court.”¹²¹ This special “Antitrust Court” would be akin to the Court of International Trade and other subject-matter-specific federal courts, with many details left to Congressional discretion.¹²²

Although Klovers’s first two proposals have great merit, neither would solve the core due process issue in Part 3. Each proposal involves only self-imposed reforms, and neither would prevent the Commission from functioning as both prosecutor and adjudicator. Raising the standard of review on appeal or strengthening the ALJ’s role does not change the basic fact that the same Commissioners who approve any Part 3 complaint often end up adjudicating that complaint on appeal.

His third proposal, a specialized Article III court, could solve the due process problem; but it would impose significant, unknown costs on the agency.¹²³ Eliminating Part 3 in favor of a novel, antitrust-specific court would likely be more challenging to implement than bifurcation and would destroy the Commission’s ability to define unfair methods of competition and unfair or deceptive practices through adjudication.¹²⁴ Klovers also did not address the impact

117. Klovers, *supra* note 62, at 412–15.

118. *See id.* at 425.

119. *Id.* at 431 (explaining that the FTC could adjust hiring practices to require ALJ candidates to have substantial experience with antitrust law).

120. *Id.* at 432. *See supra* note 55 and accompanying text for a discussion of former Commissioner Rosch sitting as an ALJ.

121. Klovers, *supra* note 62, at 433–34.

122. *See id.* at 433 (noting that this reform addresses the Court’s “apparent preference for Article III tribunals” in *Axon v. FTC*).

123. *See generally* Michael E. Solimine, *The Fall and Rise of Specialized Federal Constitutional Courts*, 17 U. PA. J. CONST. L. 115 (2014) (discussing the merits of vesting jurisdiction over practice areas in specialized Article III Courts as opposed to administrative agencies).

124. *Cf.* James A. Toupin, *The U.S. Court of International Trade and the U.S. International Trade Commission After Ten Years—A Personal View*, 14 FORDHAM INT’L L.J. 10, 14 (1990) (describing the influence of the Court of International Trade, a specialized, expert tribunal, as “both crucial and appropriately modest,” and noting that “CIT has in fact generally refrained from reviewing the Commission’s allocation of resources during its investigations”).

of eliminating Part 3 on the FTC's ability to bring consumer protection cases, which make up a large part of the agency's administrative docket.¹²⁵

Other potential solutions were proposed three decades ago in a report compiled by an ABA Antitrust Law Special Committee tasked with studying the FTC.¹²⁶ The report cited two proposals from a small group of committee members who believed the "unity of functions" in Part 3 should end.¹²⁷ First, the Commission could be forced to bring all cases in federal court.¹²⁸ This proposal garnered little support because it would have made the FTC's antitrust enforcement redundant with the DOJ and "frustrate[d] one of its principal functions," namely to serve as an adjudicative body tasked with developing antitrust law.¹²⁹ As the authors noted, administrative adjudication is "well suited to pursuing challenging cases" that require the "careful development of a factual record and a sensitive application of difficult legal principles."¹³⁰

The second solution involved "eliminating the [C]ommissioners' prosecutorial role" through a few possible methods, such as granting staff the authority to file complaints or transferring the prosecutorial role to an independent official.¹³¹ The latter option was proposed by former FTC Commissioner Terry Calvani, and it most closely parallels the proposal explored in this Note.¹³² To the authors who endorsed this solution, the unity of functions created an "unacceptable perception of fairness" that could only be solved by limiting the Commission to its adjudicative role.¹³³ A majority of committee members were unpersuaded, however, arguing that the proposal would dilute the agency's power and have an uncertain impact on the other functions of the Commission.¹³⁴

In a separate article written around the same time as the ABA report, former Commissioner Calvani fleshed out his proposal in greater detail, which would have vested all decisionmaking and prosecutorial authority in an independent

125. See *Legal Library: Adjudicative Proceedings*, FTC, <https://www.ftc.gov/legal-library/browse/cases-proceedings/adjudicative-proceedings> [https://perma.cc/CHA4-6N3F] (last visited Jan. 3, 2026) (listing both antitrust and consumer protection cases brought in Part 3).

126. See Miles W. Kirkpatrick et al., *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 119 (1989).

127. See *id.* The report noted that a majority of its drafters had concluded that "the current unity of functions, although troubling, is superior to the alternatives." *Id.*

128. *Id.* at 120 (noting the minority position that "courts are specialists in adjudication, whereas the Commission specializes in the kind of policy balancing identified with rulemaking and prosecutorial discretion"); see also Peter A. White, *F.T.C.: Wrong Agency for the Job of Adjudication*, 61 A.B.A. J. 1242, 1242 (1975) (arguing that the FTC "could be a more efficient and responsible enforcer if adjudicative tasks were given to the federal court system").

129. See Kirkpatrick et al., *supra* note 126, at 121.

130. *Id.* at 120. Although the report focused on the consequences of proposed reforms for antitrust law, the authors noted that Part 3 can also be an "effective method of addressing complicated consumer protection issues." *Id.* at 121.

131. See *id.* at 121–22.

132. See *id.* at 119 (referring to the latter option as the "NLRB model").

133. *Id.* at 121.

134. See *id.* at 121–22 (noting, for example, that the "impact on the Commission's rulemaking function is unclear").

General Counsel appointed by the President.¹³⁵ This reform, as he argued, would improve public accountability and minimize constitutional issues and the perception of unfairness in Part 3.¹³⁶ Calvani reiterated his proposal in a 2014 article that compared the FTC's dual function to the European Commission and other international tribunals.¹³⁷ But neither article explored the bifurcation proposal by reference to comparable NLRB practice, nor did they explain in detail how it would work at the FTC.

This Note picks up where Calvani left off and explores the implications of applying the NLRB's bifurcated structure to the FTC. Adopting this structure would vest all investigative and prosecutorial authority in the FTC's Bureau Directors, who would be independent officials rather than employees of the Commission.¹³⁸ The Commission would be confined to a quasi-judicial role in Part 3, although it would retain other important functions as the head of an agency with broad non-litigation powers. This proposal certainly has associated costs; but it would insulate the Part 3 process from constitutional attack and allow the FTC to retain a unique institutional feature that has distinguished and defined it for over one hundred years.

II. APPLYING THE NLRB MODEL TO THE FTC

The FTC and the NLRB have many striking similarities. Congress intended for both agencies to be led by a bipartisan body of experts tasked with substantiating a broad delegation of authority: the power to define and prohibit “unfair” practices in the economy.¹³⁹ Both agencies have a central office in Washington, D.C. and regional field offices with staff attorneys who investigate alleged violations of their organizing statutes.¹⁴⁰ And both agencies have a history of combining investigative, prosecutorial, and adjudicative functions in one body.¹⁴¹ But the NLRB's functions have been bifurcated by statute since 1947, which has largely

135. See Calvani, *supra* note 116, at 206.

136. See *id.* at 206–07. Regarding accountability, Calvani argued that the nature of Commission decisions as the product of many voices rendered them less accountable to the public and thus a single decisionmaker would be more responsive to the public will. See *id.* at 190.

137. See Terry Calvani & Angela M. Diveley, *The FTC at 100: A Modest Proposal for Change*, 21 GEO. MASON L. REV. 1169, 1173–75, 1185–87 (2014) (comparing Part 3 to tribunals in Canada, South Africa, and the UK).

138. Calvani proposed vesting the prosecutorial power in the agency's General Counsel, rather than in the Bureau Directors. See Calvani, *supra* note 116, at 206. Although Congress could decide to consolidate decisionmaking authority in a single official, it would likely be less disruptive to the agency to retain the distinction between Bureaus. See *supra* note 20.

139. See 15 U.S.C. § 41 (“Not more than three of the Commissioners shall be members of the same political party.”). The NLRB does not need to be bipartisan by statute, but Presidents have historically abided by the same bipartisan split as the FTC for NLRB members. See William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501, 1507 (2015).

140. See *About the FTC*, FTC, <https://www.ftc.gov/about-ftc> [https://perma.cc/22S6-R6YG] (last visited Jan. 3, 2026); *About NLRB*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are> [https://perma.cc/D7R5-TB2N] (last visited Jan. 3, 2026).

141. See *infra* Section II.A.

insulated it from the structural due process claims currently being raised against the Part 3 administrative process.

This Part will (A) explore why Congress bifurcated the NLRB and created an independent Office of the General Counsel with the authority to set agency policy and prosecute cases before agency ALJs and the Labor Board. It will then (B) describe what the FTC's prosecution and adjudication process could look like if Congress adopted a similar model as the NLRB.

A. THE ADJUDICATIVE PROCESS AT THE NLRB

The National Labor Relations Act (NLRA)¹⁴² is administered by the NLRB,¹⁴³ a five-member body like the FTC that, among other things, reviews decisions made by agency ALJs and seeks enforcement in the appropriate court of appeals.¹⁴⁴ The NLRB and the FTC are similar in size,¹⁴⁵ and they share a similar mandate to protect the public from abuses of economic power by powerful actors. In fact, the NLRA was specifically modeled after the FTC Act.¹⁴⁶ Section 1 of the NLRA sets forth its purposes, citing the free flow of commerce and the "inequality of bargaining power" that unionization was intended to rectify.¹⁴⁷ Although Section 1 of the FTC Act does not expressly state Congress's purpose for enacting the law,¹⁴⁸ the Congressional Record reveals that several of its drafters believed the Commission would use its power to protect small enterprises from predatory business practices.¹⁴⁹

142. See Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

143. Note that "the Board" can refer to the entire NLRB, including the General Counsel's Office and all subordinate Regional Offices, or the five-member body at the agency's head. See *supra* note 17.

144. 29 U.S.C. § 153(a) (noting that a Board member "may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause."). But see *Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025) (allowing President Trump to remove NLRB Board Member Gwynne Wilcox on a temporary basis). Although both the Commission and the Board are supposed to have five members, they have often functioned with fewer members because of lengthy vacancies.

145. The NLRB employs around 1,658 permanent workers and the FTC employs around 1,032. See *Federal Trade Commission (FTC)*, U.S. EEOC, <https://www.eeoc.gov/federal-sector/reports/federal-trade-commission-ftc> [<https://perma.cc/3Q2V-JFWL>] (last visited Jan. 3, 2026); *National Labor Relations Board (NLRB)*, U.S. EEOC: FED. REPS., <https://www.eeoc.gov/federal-sector/national-labor-relations-board-nlr-0> [<https://perma.cc/ZR43-WQNP>] (last visited Jan. 3, 2026). In Fiscal Year 2024, the FTC's budget was \$425.7 million. See *Budget and Strategy*, FTC, <https://www.ftc.gov/about-ftc/budget-strategy> [<https://perma.cc/F87X-KUKW>] (last visited Jan. 3, 2026). The NLRB's FY 2024 budget was \$299.2 million. See Braden Campbell, *NLRB's Budget Stays at \$299M in Final Budget Deal*, LAW360 (Mar. 25, 2024, at 17:21 ET), <https://www.law360.com/employment-authority/articles/1817103/nlr-0-s-budget-stays-at-299m-in-final-budget-deal> [<https://perma.cc/5JAN-NNXK>].

146. See J. Warren Madden, *Origin and Early Years of the National Labor Relations Act*, 18 HASTING L.J. 571, 572 (1967) ("Senator Wagner drafted a statute, modeled after the *Federal Trade Commission Act*, creating a quasi-judicial tribunal with defined legal authority and power to have its orders enforced by court decree." (emphasis added) (footnote omitted)).

147. See 29 U.S.C. § 151 ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to . . . protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing. . . .").

148. See 15 U.S.C. § 41 (noting only that "[a] commission is created and established" with a particular structure).

149. See William E. Kovacic & Mark Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 932 n.15 (2010) ("[Senator

The agencies employ similar processes as well, aside from the bifurcation of prosecutorial and adjudicative functions. Both the FTC and the NLRB have a process by which members of the public can report alleged violations of their respective statutes. Consumers who feel aggrieved by allegedly abusive or collusive practices can submit a report on the FTC's website,¹⁵⁰ and workers alleging unfair labor practices can file a charge with an NLRB regional office.¹⁵¹ Parties sued in Part 3 or before an NLRB ALJ have similar rights, and ALJs in both agencies issue recommended decisions to the Commission or to the Board.¹⁵² If a party receives an adverse decision in either forum, they can appeal it to the Commission or to the Board, and then to any court of appeals with jurisdiction.¹⁵³ In addition, both bodies can seek injunctive relief or civil penalties in federal court against parties that violate an ALJ's order,¹⁵⁴ although the Board has no independent authority to sue parties in federal court absent a pending administrative proceeding.¹⁵⁵

Unlike the Commission, however, the Labor Board does not supervise most of the agency's employees and has no role in prosecuting cases before agency ALJs.¹⁵⁶ Instead, the General Counsel (GC) of the NLRB exercises "general supervision over all attorneys employed by the Board (other than [ALJs] and legal assistants to Board members)" and has authority over officers and employees in the agency's regional offices.¹⁵⁷ In addition, the GC has "*final authority*, on behalf of the Board, in respect of the investigation of charges and issuance of complaints [in unfair labor practice cases], and in respect of the prosecution of such complaints before the Board."¹⁵⁸ The GC plays a central role in carrying out the President's labor agenda and is generally recognized as one of the most powerful labor attorneys in the country.¹⁵⁹

Henry] Hollis observed that the DOJ would be able to focus on 'the great task of prosecuting suits for the dissolution of monopolies, leaving to the trade commission the important service of policing competition, so as to protect small business men, keep an open field for new enterprise, and prevent the development of trusts.'" (quoting 51 CONG. REC. 12146 (1914)).

150. See FTC: REP. FRAUD, <https://reportfraud.ftc.gov> [<https://perma.cc/7LWF-M8FB>] (last visited Jan. 4, 2026) (consumer protection reports); *Antitrust Complaint Intake*, FTC, <https://www.ftc.gov/advice-guidance/competition-guidance/antitrust-complaint-intake> [<https://perma.cc/7GUB-QAFN>] (last visited Jan. 4, 2026) (antitrust reports).

151. See *Investigate Charges*, NLRB, <https://www.nlr.gov/about-nlr/what-we-do/investigate-charges> [<https://perma.cc/P6XU-G62A>] (last visited Jan. 4, 2026) (describing the process to file a charge with an NLRB regional office).

152. See *Administrative Law Judge Decisions*, NLRB, <https://www.nlr.gov/cases-decisions/decisions/administrative-law-judge-decisions> [<https://perma.cc/4JCE-8T2R>] (last visited Jan. 4, 2026); *supra* note 35 (describing change in FTC ALJ policy).

153. See 15 U.S.C. § 45(c); 29 U.S.C. § 160(f).

154. See 15 U.S.C. § 45(c); 29 U.S.C. § 160(j).

155. See *infra* notes 192–94 and accompanying text for a brief discussion of the implications of this difference for the bifurcation model at the FTC.

156. See Ida Klaus, *The Taft-Hartley Experiment in Separation of NLRB Functions*, 11 INDUS. & LAB. REL. REV. 371, 378 (1958).

157. 29 U.S.C. § 153(d).

158. *Id.* (emphasis added).

159. See Lynn Rhinehart, Celine McNicholas & Margaret Poydock, *The Biden Board: How President Biden's NLRB Appointees Are Restoring and Supporting Workers' Rights*, ECON. POL'Y INST. (May 1, 2024), <https://www.epi.org/publication/bidens-nlr-restoring-rights> [<https://perma.cc/CQT4->

Interestingly, the NLRB was not always bifurcated by statute. Under the original NLRA, passed by Congress in 1935, the Board had control over all agency staff and policies.¹⁶⁰ Regional offices were under the Board's control and investigated "charges" filed by workers alleging unfair labor practices (ULPs).¹⁶¹ Staff attorneys then decided whether to prosecute these charges before a "trial examiner," whose decision was reviewed de novo by the Board.¹⁶² By 1941, however, the Board became concerned with the perception of fairness within the agency and devised an internal "separation of functions" that isolated staff who performed prosecutorial tasks from adjudicative staff.¹⁶³ As one former NLRB official noted, even though the combination of both functions in one body was "not contrary to judicially approved standards of fairness," the agency was nonetheless concerned about "public confidence in the integrity and independence of the final decision."¹⁶⁴

To avoid claims that the Board prejudged cases or exhibited systemic bias, the directors of each regional office started issuing ULP complaints without the Board's authorization except in limited circumstances involving questions of agency policy.¹⁶⁵ And when the case eventually came before the Board, anyone previously involved with the prosecution was isolated from the decisionmaking process.¹⁶⁶ This was in accord with the requirements of the then-new Administrative Procedure Act, which required the informal separation of prosecutorial and adjudicative staff within each agency.¹⁶⁷ Nonetheless, employers and some segments of labor continued to raise claims of bias and prejudice against the Board throughout the 1940s, and Congress decided to act.¹⁶⁸

In 1947, Congress amended the NLRA and formalized the separation between the Board's prosecutorial and adjudicative functions in the Taft-Hartley Act.¹⁶⁹ The act established the NLRB General Counsel as an independent presidential

XUJJ]; Steven Greenhouse, *Too Radical or Not Radical Enough? US's Top Labor Lawyer in the Spotlight*, THE GUARDIAN (Aug. 5, 2022, at 06:00 ET), <https://www.theguardian.com/us-news/2022/aug/05/jennifer-abruzzo-nlr-labor-lawyer-starbucks> [<https://perma.cc/E4HP-MZCN>] (identifying former NLRB GC Jennifer Abruzzo as the "top labor lawyer" in the nation).

160. See Klaus, *supra* note 156, at 371–72. Private parties are still tasked with filing "charges" of unfair labor practices (ULPs) with a Regional Office of the Board. Those offices are now merely overseen by General Counsel, not the Board itself. See *id.* at 379.

161. See *id.* at 372.

162. See *id.* ("The initial aspects of both types of case-handling [ULP and union representation cases]. . . were prosecuted by regional office personnel at hearings conducted in the field before trial examiners assigned from Washington. . . . Decisions were made by the Board members."); *Investigate Charges*, NLRB, <https://www.nlr.gov/about-nlr/what-we-do/investigate-charges> [<https://perma.cc/P6XU-G62A>] (last visited Jan. 4, 2026) (setting forth the current procedures for private parties to file ULP charges with an NLRB Regional Office).

163. See Klaus, *supra* note 156, at 373.

164. *Id.*

165. *Id.*; see also Richard A. Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305, 325 (1972) (noting that all ULP complaints had to be formally approved by the Board before October 1942 but that 70% of complaints were issued without such approval in 1943).

166. See Klaus, *supra* note 156, at 373.

167. See *id.* at 374 (citing Administrative Procedure Act § 5(c), 5 U.S.C. § 554(d)(2)).

168. See *id.* at 375 (noting only two specific cases in which the "charge of prejudgment" was based on specific conduct).

169. See Pub. L. No. 63-101, 61 Stat. 136, 139 (1947). The Act also curtailed the power of unions in several ways that are not relevant to this Note.

appointee rather than a direct employee of the Board and granted the GC “full and unreviewable authority” to investigate and prosecute ULP cases before the Board.¹⁷⁰ The Board was given only a limited adjudicative role in ULP cases, although it retained the authority to handle union representation cases and administer other portions of the NLRA.¹⁷¹ The Board also retained the ability to seek injunctive relief in federal court during the pendency of an ALJ proceeding.¹⁷²

A few years after passing the Taft–Hartley Act, Congress considered whether to repeal the independent General Counsel provision and restore the Board’s “dual function” with an informal separation in response to a Reorganization Plan submitted by President Truman.¹⁷³ The Chairman of the Board testified at a hearing in support of the proposal and questioned whether “a single policy of Congress” could be “administered effectively by a two-headed agency.”¹⁷⁴ The Board argued that bifurcation had caused friction within the agency, provoked uncertainty about the coverage of the NLRA, and led to less vigorous enforcement of the Act.¹⁷⁵ But Congress decided to keep Taft–Hartley intact, leaving formal bifurcation in place within the NLRB.

Why did Congress decide to bifurcate the NLRB while leaving the “dual function” of the FTC intact? In 1972, then-Professor Richard Posner explored this question in a paper dedicated to testing accusations of administrative bias through empirical research.¹⁷⁶ As Posner noted, the multiple hearings in Congress when the Taft–Hartley Act was under debate had developed “no firm evidence of bias in adjudication.”¹⁷⁷ Instead, Posner attributed the NLRB’s bifurcation in the Taft–Hartley Act to the efforts of the business lobby, which was more organized in its opposition to the Board than to the FTC.¹⁷⁸ This lobby pushed for bifurcation not necessarily because of the presence of actual bias, but because the new separation of functions “apparently imposed at least short-term costs in the form of lowered efficiency due to problems of coordination between the Board and the

170. See Klaus, *supra* note 156, at 378; 29 U.S.C. § 153(d).

171. See *id.* at 379.

172. See National Labor Relations Act, ch. 372, § 10(j), 49 Stat. 449 (1935) (codified at 29 U.S.C. § 160(j)) (“The Board shall have power, upon issuance of a complaint . . . to petition any district court of the United States [with jurisdiction] . . . for appropriate temporary relief or restraining order.”); see also *infra* notes 184–86 and accompanying text for a discussion of SpaceX’s due process challenge against this provision and its implications for the bifurcation proposal.

173. See Klaus, *supra* note 156, at 384. The President’s plan, Reorganization Plan No. 12, would have abolished the General Counsel’s Office and “place[d] in the Board unified authority and responsibility.” *Id.*

174. *Id.* at 385 (citation omitted).

175. See *id.* at 385–86.

176. See Posner, *supra* note 165, at 343. Much of Posner’s paper was dedicated to predicting how a “rational utility-maximizing agency” should divide its attention between different types of cases. See *id.* at 305. But Posner also tested, among other ideas, the thesis that a low dismissal rate by a quasi-judicial body on appeal from an ALJ implied bias in a non-bifurcated agency. See *id.* at 323–25 (describing the “Elman thesis”); *id.* at 326–27 (describing how the NLRB’s dismissal rate is lower than the FTC’s).

177. See *id.* at 343.

178. *Id.* at 343–44 (citing HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT–HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 381–91 (1950)).

General Counsel.”¹⁷⁹ Despite these short-term efficiency costs, however, bifurcation helped establish the perception of the NLRB as a neutral adjudicator of labor disputes and has largely insulated the agency from the structural due process challenges currently being raised against the FTC.

The NLRB’s structure and administrative process have remained largely the same since 1947.¹⁸⁰ The General Counsel oversees all agency attorneys who prosecute ULP cases, both at the agency’s headquarters in Washington and at regional offices.¹⁸¹ Regional Directors at those offices, under the authority of the General Counsel, issue complaints before agency ALJs based on “charges” filed by workers who believe they were subjected to unfair labor practices.¹⁸² Those ALJs preside over trials and issue final decisions that parties can appeal to the Labor Board, which acts exclusively as a quasi-judicial body on appeal. The Board has no authority to pick the cases that come before it, and its limited prosecutorial function arises only when it decides whether to seek injunctive relief in federal court during the pendency of an administrative proceeding.¹⁸³

This limited prosecutorial function—*i.e.*, the Board’s power to seek an injunction in federal court while a ULP case is pending—was recently the subject of a due process challenge similar to those being raised against Part 3.¹⁸⁴ In January 2024, after the NLRB filed a ULP charge against SpaceX, the company argued that the Labor Board’s power to authorize Regional Directors to seek injunctive relief under Section 10(j) of the NLRA rendered it prosecutor and judge in the same case.¹⁸⁵ It is unclear whether or how this issue will be resolved; the parties recently obtained a stay of the proceedings while a mediation moves forward.¹⁸⁶

179. *Id.* at 344. The perceived efficiency costs of bifurcation were reflected in the Board’s testimony before Congress in 1950 as well. See Klaus, *supra* note 156, at 385.

180. Taft–Hartley Act, Pub. L. No. 63-101, 61 Stat. 136, 139 (1947) (bifurcating the NLRB’s functions).

181. See *Who We Are*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are> [<https://perma.cc/D7R5-TB2N>] (last visited Jan. 4, 2026).

182. See 29 C.F.R. § 101.8 (2025). The General Counsel also effectively has control over and discretion to file “representation” cases, in which a union majority is certified by the Board. *Id.* § 101.22. But this Note has focused on comparing the “charge” process, which relate to adjudicating “unfair labor practices,” to the FTC’s process in Part III.

183. See National Labor Relations Act, ch. 372, § 10(j), 49 Stat. 449 (1935) (codified at 29 U.S.C. § 160(j)) (authorizing the Board to petition federal district courts for “appropriate temporary relief or restraining order” to remedy unfair labor practices).

184. See Steven Porzio, Joshua Fox & Elizabeth Dailey, *Launching into New Territory: SpaceX Claims NLRB Unconstitutionally Structured*, PROSKAUER (Jan. 8, 2024), <https://www.laborrelationsupdate.com/2024/01/launching-into-new-territory-spacex-claims-nlr-unconstitutionally-structured> [<https://perma.cc/HWS2-3L3R>] (summarizing the challenges). In the SpaceX case, the Regional Director overseeing the ULP case sought approval from the Board to seek an injunction in federal court. *Id.* The Board retains the formal authority to seek such injunctions under § 10(j).

185. See Complaint for Declaratory and Injunctive Relief, *supra* note 19, at 6. In a separate case, SpaceX sought to invalidate the for-cause removal protections for NLRB ALJs and Board members, and the Fifth Circuit recently ruled in its favor on that issue. See *Space Expl. Techs. Corp. v. NLRB*, 151 F.4th 767, 775 (5th Cir. 2025). But this case did not decide whether the Labor Board’s 10(j) authority violates the Due Process Clause.

186. See Robert Iafolla, *NLRB Gets Closer to Axing Case on SpaceX Firing Musk Critics* (3), BLOOMBERG L. (May 6, 2025, at 12:14 ET), <https://news.bloomberglaw.com/daily-labor-report/nlr->

But if a court hears this challenge, it may require Board members to recuse themselves from adjudicating ULP cases in which they had previously approved or sought an injunction.¹⁸⁷

This due process challenge underscores the fact that Congress did not *fully* bifurcate the NLRB when it passed the Taft–Hartley Act. Instead, it left a residual prosecutorial function vested in the Board. As such, strictly transferring the structure of the NLRB to the FTC would reserve in the Commission the same power to seek injunctive relief while a Part 3 case is pending, which may leave the FTC open to one of the due process challenges that bifurcation was intended to avoid. Perhaps Congress should learn another lesson from the Labor Board and fully bifurcate the FTC by vesting the sole authority to seek injunctive relief in the Bureau Directors.

B. ADOPTING THE BIFURCATION MODEL

This Section will describe how the FTC could function as a bifurcated agency, like the NLRB. Consider a small business that believes a competitor is using predatory tactics to drive it out of business, or a consumer who has been subjected to a predatory marketing scheme. What if the FTC had a similar process for reporting “unfair methods of competition” or “unfair or deceptive acts” as the NLRB has for reporting ULPs?¹⁸⁸ This business or consumer would file a “charge” or a report with a regional office or with the respective Bureau staff in Washington. Staff attorneys would use compulsory process tools to investigate the claim and debate with their respective Bureau Director whether to file a complaint in Part 3 or in federal court. The Director would then decide where to file the complaint and whether to seek injunctive relief when the case is pending, while Bureau staff adjudicates the complaint in Part 3.

This is largely how the case process works now, with one crucial difference—none of the relevant decisions would require approval from the Commission. The Commission would have no role in approving investigatory practices or directing

moves-closer-to-nixing-case-on-spacex-firing-musk-critics [https://perma.cc/74L6-ARYZ]. The case has been subject to a lengthy jurisdictional battle between the Southern District of Texas and the Central District of California. *Id.*

187. See Porzio, *supra* note 184 (describing possible holdings if a court decides the merits of the § 10(j) case).

188. As noted above, FTC already has a mechanism for members of the public to report violations of the FTC Act. See *supra* note 43. But the NLRB seems to have a more transparent case selection and generation process than the FTC, with evidence of variation across regional offices. See MICHELE M. HOYMAN, DIANE SCHMIDT & JAMIE R. MCCALL, IS THERE POLICY VARIATION ACROSS THE ADMINISTRATIVE REGIONS OF THE NATIONAL LABOR RELATIONS BOARD? 9–10 (2008), <https://michelehoymann.web.unc.edu/wp-content/uploads/sites/8395/2017/02/Hoyman-Schmidt-and-McCall-2008.pdf> [https://perma.cc/EVG8-CC4W]. This likely reflects the localized nature of labor disputes, as opposed to antitrust or consumer protection disputes with national implications. But one incidental benefit of bifurcating the FTC could be a more regionalized approach to FTC Act enforcement, which may be of interest to the Trump Administration. See Adam Candeub, *Federal Trade Commission*, in MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 869, 876 (Paul Dans & Steven Groves eds., 2023) (“Over the past few decades, the reach and influence of regional offices has shrunk dramatically. The FTC should consider returning authority to these offices.”).

the prosecution of a complaint, and it would be limited to a quasi-judicial role in Part 3 cases. If Congress adopted the exact structure of the NLRB, the Commission would retain a limited prosecutorial role when it approves requests for injunctive relief in federal court while a Part 3 case is pending. Alternatively, Congress could vest the sole authority to seek injunctive relief in the Bureau Directors. In either case, the Commission would be limited to its adjudicative role in Part 3 and to fulfilling the other non-prosecutorial functions specified in the FTC Act, such as the authority to make rules and investigate particular industries.¹⁸⁹

Adopting the NLRB model would effectively protect the FTC from due process challenges by extending the current “Part 3 wall” backwards in time. As it currently stands, the wall prohibits FTC complaint counsel from discussing an ongoing matter with the ALJ or with the Commission once a complaint is filed in Part 3.¹⁹⁰ Although these internal procedures have satisfied courts in due process challenges for nearly eighty years, they may not suffice for a Supreme Court that decides to ignore the “presumption of honesty and integrity” at the heart of *Withrow v. Larkin* and applies the lower “potential for bias” standard from *Williams v. Pennsylvania* to FTC Commissioners.¹⁹¹ Bifurcation would prohibit discussions at *all* points in the investigation and prosecution process, which would ensure that the Commission remains unbiased and impartial in its quasi-judicial capacity.

If Congress considers bifurcating the FTC, one unsettled question is how to deal with the Commission’s authority to sue parties in federal court *without* an ongoing Part 3 proceeding under § 13(b) of the FTC Act.¹⁹² In contrast to the FTC’s broad authority under § 13(b), the NLRB has no independent cause of action to sue parties in federal court except pursuant to an ongoing administrative proceeding.¹⁹³ This is a major difference between the agencies, and strictly applying the NLRB’s structure would limit the FTC to only filing complaints in Part 3. The thrust of the FTC’s “consumer protection enforcement program” has been “using Section 13(b) to attack fraud in federal district court,” so limiting the agency’s litigation authority to Part 3 would significantly limit its power to prosecute violations of the FTC Act.¹⁹⁴

The simplest solution would retain the agency’s existing § 13(b) authority and vest the power to decide where to sue alleged wrongdoers in the Bureau

189. See *supra* note 22 and accompanying text.

190. See *supra* notes 48–51 and accompanying text.

191. See *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016).

192. See Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b) (noting that the Commission “may bring suit in a district court of the United States to enjoin any such act or practice” if it has “reason to believe” the conduct violates the Act); see also *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 70 (2021) (affirming this authority but limiting the FTC’s ability to seek disgorgement in federal court absent a Part 3 proceeding).

193. See 29 U.S.C. § 160(j).

194. See J. Howard Beales III, Benjamin M. Mundel & Timothy J. Muris, *Section 13(b) of the FTC Act at the Supreme Court: The Middle Ground*, ANTITRUST SOURCE, Dec. 2020, at 1, 1.

Directors. This would effectively transfer *all* of the Commission's prosecutorial authority to the Directors, with the Commission confined to its quasi-judicial function in all cases. While this would fully protect Part 3 from constitutional attack, it could lead otherwise qualified experts to avoid the Commissioner role given its lack of discretionary authority.¹⁹⁵ Congress would need to consider how to remove the Commission's prosecutorial function without rendering it a nullity, perhaps by reinforcing that the Commissioners would retain significant powers unrelated to litigation regardless of potential changes to Part 3.¹⁹⁶

Although a bifurcated FTC would likely face coordination and efficiency issues inherent in a "two-headed" management structure,¹⁹⁷ the benefits of protecting Part 3 seem worth the potential costs given the rising tide of due process challenges that threaten to destroy or upend the system. The NLRB absorbed these costs decades ago, and it no longer faces the same existential threat to its enforcement efforts as the FTC. Part 3 adjudications have been a defining feature of the FTC for over one hundred years, and bifurcation would protect the administrative forum from constitutional attack and render it a more effective site for enforcement moving forward.

III. AFFIRMATIVE ARGUMENTS FOR BIFURCATION

This Part will briefly explore the broader implications for the FTC if Congress decides to restructure the agency to reflect the bifurcated structure of the NLRB. In addition to insulating the Part 3 system from due process challenges, bifurcation could (A) reinforce the FTC's identity as a distinct antitrust enforcement agency despite perceived redundancies with the DOJ Antitrust Division and (B) combat the perception that the Commission is a body of biased advocates rather than an impartial tribunal. Although this Note does not take a position on the ideal implementation of the bifurcation model, these arguments suggest that bifurcating the FTC would benefit the agency as a proactive measure regardless of whether the Supreme Court invalidates or curtails Part 3 on due process grounds.

A. IMPROVING INSTITUTIONAL LEGITIMACY

Strengthening Part 3 through bifurcation could help the FTC stave off calls to consolidate federal antitrust enforcement in the Department of Justice, which has joint jurisdiction over civil antitrust actions in federal court.¹⁹⁸ To many international observers, it seems strange that the United States has two federal agencies that enforce antitrust law.¹⁹⁹ For a practice area preoccupied with "efficiency," in

195. See Kirkpatrick, *supra* note 126, at 122 (noting the argument that "limiting the Commission to adjudication might make it more difficult to attract talented, experienced commissioners").

196. See *supra* note 22 for a summary of these powers.

197. See Klaus, *supra* note 156, at 384.

198. See 15 U.S.C. § 4; 15 U.S.C. § 53(a).

199. See Calvani & Diveley, *supra* note 137, at 1170 n.7 ("'Why does the U.S. have two antitrust enforcement agencies?' This is a question that is posed by one or more students in almost every competition law course, in almost every lecture on U.S. competition law to a foreign audience, and sometimes in discussions among U.S. competition law practitioners.").

a nation governed by a party bent on with shrinking the administrative state,²⁰⁰ the continued existence of the FTC may seem superfluous. In fact, Congress recently considered a bill, known as the “One Agency Act,” that would have stripped the FTC of antitrust authority and transferred its enforcement divisions to the DOJ Antitrust Division.²⁰¹ The Republican-controlled House of Representatives tried to include this act in the 2025 reconciliation bill, but it was removed because of concerns about compliance with budget reconciliation rules.²⁰² A more limited bill, proposed a decade ago, would have stripped the FTC of its quasi-judicial function in merger cases and required the agency to litigate all pre-merger challenges in federal district court.²⁰³

What these bills forget is that the FTC has played a unique, and uniquely effective, role in antitrust enforcement because of its flexible Part 3 powers.²⁰⁴ After experiencing twenty years of ineffective Sherman Act enforcement by the DOJ and the federal courts,²⁰⁵ Congress created the FTC as an “expert administrative tribunal” tasked with responding to industry practices and defining new unfair methods of competition through adjudication.²⁰⁶ The FTC has not always functioned as the expert tribunal Congress intended it to be. But the agency has frequently been at the forefront of new developments in antitrust law, and it has a more expansive mandate under the FTC Act than the DOJ Antitrust Division.²⁰⁷ If the FTC could no longer utilize Part 3, its antitrust enforcement staff would effectively become redundant with the DOJ. By protecting the Part 3 system from constitutional attack, bifurcation would thus strengthen the normative justification for the FTC’s continued existence and reinforce its status as a crucial forum for antitrust enforcement.

200. See Exec. Order No. 13043, 90 Fed. Reg. 53 (Mar. 20, 2025).

201. See One Agency Act, H.R. 7737, 118th Cong. (2024). Under the One Agency Act, the FTC would retain its jurisdiction over consumer protection issues. See *The “One Agency Act” is a Dangerous Rollback of Antitrust Law*, AM. ECON. LIBERTIES PROJECT (Mar. 21, 2024), <https://www.economicliberties.us/press-release/the-one-agency-act-is-a-dangerous-rollback-of-antitrust-law> [https://perma.cc/MES2-5QWR] (stating that the Act “would essentially fold the FTC’s competition authorities into the DOJ Antitrust Division”).

202. See Lee Berger & Jason Abel, *Two Agencies Are Better Than One?*, STEPTOE (May 7, 2025), <https://www.steptoelaw.com/en/news-publications/steptahead-antitrust-and-competition-insights/two-agencies-are-better-than-one.html> [https://perma.cc/ATB8-T8Q9].

203. See Klovers, *supra* note 62, at 410 (citing the Standard Merger and Acquisition Reviews Through Equal Rates [SMARTER] Act of 2015, H.R. 2745, 114th Cong. (2016)).

204. See Elman, *supra* note 31, at 785; Hoffman & Royall, *supra* note 14, at 319 & n.2.

205. The Sherman Act was passed in 1890 and was the only federal antitrust law until Congress passed the Clayton Act and the Federal Trade Commission Act in 1914. See *The Antitrust Laws*, FTC, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> [https://perma.cc/XW9G-3GJH] (last visited Jan. 4, 2026).

206. See William E. Kovacic, *Adaptable Platforms for Platform Regulation: The Role of the Federal Trade Commission*, 7 J.L. & INNOVATION 106, 113 (2024) (describing the FTC Act as an instruction to the Commission to create “new, binding principles of competition law through the resolution of individual cases”); Kovacic & Winerman, *supra* note 149, at 930 (“Section 5 would be applied by an expert administrative tribunal. . .”).

207. See 15 U.S.C. § 45(b); FTC, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT 7 (2022).

B. THE COMMISSION AS AN IMPARTIAL BODY

Bifurcation would also address the common perception that FTC Commissioners serve as “advocates” rather than impartial adjudicators when they hear Part 3 appeals. Critics of Part 3 have long argued that combining prosecutorial and judicial power in a single body is inherently unfair.²⁰⁸ As Judge Posner once put it, “[i]t is too much to expect men of ordinary character and competence to be able to judge impartially in cases that they are responsible for having instituted in the first place.”²⁰⁹ During the Biden Administration, former FTC Chair Lina Khan publicly advocated for expanding liability for large corporations,²¹⁰ which industry leaders argued was proof that she would not be impartial in her quasi-judicial capacity.²¹¹ These criticisms will likely continue if the Trump Administration attempts to use Part 3 to push its own antitrust agenda.

The perceived hypocrisy of former-Chair Khan’s public advocacy underscores that vesting one body with prosecutorial and adjudicative functions has made it harder for the FTC to carry out *either* of its functions effectively. The constant challenges to the FTC’s authority in Part 3 have made it a less attractive forum for enforcement, and the dual function of the Commission has cast doubt on its ability to function as an impartial adjudicative body. Bifurcating the FTC would strengthen both functions by allowing practitioners who embody the qualities of an advocate or an adjudicator to inhabit their proper roles within the Commission.

To put it another way: If Lina Khan were a labor attorney, she almost certainly would have been appointed General Counsel of the NLRB rather than Chair of the Labor Board. The General Counsel is the most powerful attorney at the NLRB and directs the President’s labor policy before the Board.²¹² By contrast, the Board Chair sits as first among equals on a quasi-judicial panel with a limited adjudicative role. This division of duties has increased the credibility of Board decisions among practitioners,²¹³ and it has arguably allowed the agency to more effectively fulfill its mission without facing widespread accusations of systemic bias. Anyone with an interest in effective antitrust and consumer protection

208. See, e.g., Elman, *supra* note 31, at 782–83 n.11, 785.

209. See Ohlhausen, *supra* note 14, at 627 n.11 (citing Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 53 (1969)).

210. See Khan, *supra* note 25, at 3.

211. See, e.g., Laurence H. Tribe, *Big Tech Calls for Agency Heads to Recuse Are a Groundless and Cynical Strategy to Obstruct Enforcement*, PROMARKET (Oct. 17, 2023), <https://www.promarket.org/2023/10/17/big-tech-calls-for-agency-heads-to-recuse-are-a-groundless-and-cynical-strategy-to-obstruct-enforcement> [<https://perma.cc/AMK8-VP3B>] (describing “Big Tech’s efforts to push Federal Trade Commission Chair Lina Khan and Assistant Attorney General Jonathan Kanter to recuse themselves from participating in lawsuits against the companies”).

212. See *supra* note 159 and accompanying text.

213. See, e.g., Emma Barudi, *An Assumed Tradition: How the 3-2 Balance of the NLRB Is More than the Sum of its Appointments and an Argument for Its Continuation*, 26 LEGIS. & PUB. POL’Y 817, 817 (2024) (“The counteracting needs of practicing impartiality in adjudication and responding to the public interest on the labor issue results in the 3-2 split. . . . Institutional actors within the NLRB ecosystem can rely on the Board’s relative consistency on most issues . . . while also using their moments in power to push for change on fundamental policies.”).

enforcement at the federal level should recognize the value of strengthening the perceived legitimacy of the Commission in Part 3 adjudications.

CONCLUSION

This Note has described a potent constitutional challenge to the FTC's "Part 3" system of administrative adjudication and proposed a structural reform to address the due process concerns of Part 3 litigants by bifurcating the FTC's prosecutorial and adjudicative functions. This proposal would vest the power to investigate cases and prosecute complaints in the newly independent Bureau Directors rather than in the Commission. In this scenario, Commissioners would have no influence over case selection or strategy until the case came before them on appeal in Part 3. The Commission would be limited to reviewing ALJ decisions and to defining new unfair methods of competition and deceptive practices through adjudication, in addition to its non-litigation-related functions.

Powerful litigants have every incentive to continue challenging the constitutionality of Part 3, and the Supreme Court may soon invalidate or curtail Part 3 if it takes up one of these challenges and revisits the established presumption of agency integrity. Bifurcating the agency would insulate the FTC from these challenges and allow it to continue utilizing a uniquely effective forum that has defined the agency for over one hundred years. In addition, bifurcation could strengthen the FTC's justification for its continued existence as a distinct body and restore the legitimacy of the Commission as an impartial adjudicator in Part 3 appeals. If a future Congress wants to strengthen the Federal Trade Commission, it should learn a lesson from the Labor Board and adopt the bifurcation model to insulate the agency's administrative forum from constitutional attack.