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The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord

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The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord

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I. INTRODUCTION

Antitrust law in the United States is the patchwork result of over two hundred years of evolving and often conflicting views of the government's proper role in regulating business. Depending upon the social and business climate of the era and the economic philosophies of Congress, the President, and the judiciary, federal antitrust jurisdiction has waxed and waned. The result is the current system wherein the Department of Justice Antitrust Division ("Antitrust Division") and the Federal Trade Commission ("FTC") share dual jurisdiction to enforce the federal antitrust laws.¹ However, in the push and pull of the changing eras, the intersection of the two agencies' jurisdiction has become hazy and often troublesome. Nowhere is the uncertainty more evident than in the process by which the two agencies decide which will review and investigate a proposed merger.

In 2002, FTC Commissioner Timothy Muris and Assistant Attorney General Charles James announced the Merger Clearance Accord in an attempt to replace the old merger clearance process with a streamlined one in which each agency was given jurisdiction over mergers in particular industries.² The agreement they reached was

1. While the Federal Trade Commission and Department of Justice share responsibility for enforcing the bulk of antitrust laws and will be the focus of this Note, there are other state and federal entities, such as State Attorneys General and the Federal Communications Commission, which wield varying degrees of lesser authority.

2. The Washington Post provided a colorful explanation of the clearance agreement in place when Muris and James attempted to implement the 2002 Merger Clearance Accord:

There are a handful of industries in which both the FTC and Justice Department have expertise. So when a hot merger comes up, and the staff of each agency wants a piece of it, the assistant attorney general for antitrust and the FTC chairman have to sort it out. This had been done in an ancient ritual that included a series of athletic events such as arm wrestling, mud wrestling, greased-pig wrestling and a bull-riding competition, and an essay contest. Okay, we're making that up. Well, most of it. The agencies really do write essays explaining why they are best to review the mergers. And there really has been a lot of wrangling over who would get to review a merger. The "discussions" would last more than two weeks sometimes, and that's almost half the 30 days in which investigators must decide whether to launch a more detailed review, called a "second request" for documents. Delays of more than 15 days occurred 32 times in 2000.

James V. Grimaldi, *Enron Case Attracts Lawyers Like a Flame Attracts Moths, More Than You Can Shake a Stick at*, WASH. POST, Jan. 28, 2002, at E2.

the result of cooperation between an independent agency and an executive branch agency in an admirable effort to improve the state of federal antitrust enforcement.

Senator Ernest F. Hollings, a Democrat from South Carolina, immediately, publicly, and dramatically raised the alarm, claiming that the allocation of review over media mergers to the Antitrust Division would result in a narrow-minded, unfair review by an executive branch agency completely beholden to the President.³ After a few months of theatrics and behind-the-scenes maneuvering, James and Muris publicly announced the abandonment of the agreement and returned to the status quo. The success of Hollings's solo efforts raises many important issues addressed in this Note.

The implications of the failed 2002 Merger Clearance Accord (the "Accord") are particularly worthy of examination in light of the political attention the federal antitrust agencies have attracted in recent years. Modern federal antitrust enforcement has a tremendous impact on the economy, and big business has a significant financial stake in how the antitrust laws are administered. The shortcomings of the pre-clearance process by which the two agencies allocate responsibility for reviewing mergers have not gone unnoticed by the legal, political, and business communities. Congress passed the Antitrust Modernization Commission Act of 2002 "to examine whether the need exists to modernize the antitrust laws and to identify and study related issues," by soliciting comments from all interested parties, evaluating proposals, and eventually reporting the findings to Congress and the President.⁴ The Antitrust Modernization Commission ("AMC") was charged with examining and suggesting improvements for the breadth of antitrust enforcement, including issues that arise out of dual merger enforcement.⁵ Any potential solution can be informed by the recently announced findings of the AMC.⁶

3. Martin Sikora, *Regulators Bow to Senator Hollings*, Mergers & Acquisitions J., July 1, 2002, at 13, 13.

4. Antitrust Modernization Commission Act of 2002 § 11053, 15 U.S.C. § 1 n.4 (2006) (Other Provisions). The Antitrust Modernization Commission ("AMC") is comprised of twelve bipartisan commissioners, broken down into groups of four appointed by the President, Senate leadership, and the House of Representatives leadership who are appointed for the duration of the Commission's life. *Id.* § 11054(a), (c). The AMC's tenure will terminate thirty days after it submits its report to the President and Congress, which is to be not more than three years after the Commission holds its first meeting. *Id.* §§ 11058-59.

5. *Id.* § 11053; ANTITRUST MODERNIZATION COMMISSION, INITIAL SLATE OF ISSUES SELECTED FOR STUDY 2 (2005), available at http://www.amc.gov/pdf/meetings/study_issues.pdf.

6. ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS (2007), available at http://www.amc.gov/report_recommendation/amc_final_report.pdf.

This Note will examine the failed 2002 Merger Clearance Accord in light of its implications for federal antitrust enforcement and any future attempts to improve the interaction between the FTC and the Antitrust Division and with Congress. The Accord had the potential to improve the quality of antitrust enforcement for both the corporations being investigated and the consumers being protected, but failed for narrow political reasons. A central tenet of administrative law scholarship is that political control of agencies is acceptable and helps to legitimize the otherwise shaky constitutional foundations of the "fourth branch."⁷ This game of political "chicken," however, in which an individual member of Congress used public threats of funding cuts to force the agencies to back down from a substantively good agreement, is not necessarily a practice to celebrate.

Part II will examine the history of the two agencies, particularly how previous inter-agency agreements regarding merger review laid the groundwork for the 2002 Accord. The history of the FTC and the Antitrust Division is marked by a tension between reconciling the separate missions and spheres of the agencies while formulating an effective federal antitrust enforcement regime. Part III will then analyze the legislative authority, found in the Hart-Scott-Rodino Antitrust Improvements Act of 1976, for the FTC and the Antitrust Division's entering into the Accord. Part IV will discuss the substantive merits of the accord that underscore the troubling nature of its defeat by a single senator. Part V will examine whether Senator Hollings's actions well served the role of congressional control of administrative agencies. Finally, Part VI will suggest three approaches to improving the interaction between the FTC, the Antitrust Division, and Congress: amending the organic statute to increase the specificity regarding the clearance process, devoting greater attention to the power of the officials appointed to head the agencies, and considering developing future accords through notice-and-comment rulemaking. These three approaches, or a combination thereof, may strengthen the position of the two agencies should they

7. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246-47 (2001) (discussing theories of congressional and presidential control of administrative agencies); Timothy A. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 GEO. WASH. L. REV. 479, 479-80 (1995) ("The central project of most American administrative law scholarship, practice, and jurisprudence has been the development of appropriate means to control agency discretion. Our overriding concern with the discretionary authority of administrative agencies finds its source largely in separation-of-powers-rooted fears." (citations omitted)).

make another attempt to streamline and improve federal antitrust enforcement.

II. BACKGROUND

A. History and Development of the Two Agencies

Historically, the United States has eschewed any substantial level of government restraint on commerce and trade, but there has been a widespread mistrust of and effort to thwart the formation of monopolies.⁸ It is unsurprising that the Sherman Antitrust Act, the watershed 1890 antitrust legislation, focused on making both monopolies and anticompetitive business practices, such as cartels, illegal.⁹ In the ensuing decades the Department of Justice, under the direction of ambitious presidents such as Theodore Roosevelt and William Taft, focused on breaking up “trusts,” including Standard Oil.¹⁰ It was not until the passage of the Clayton Act in 1914 that the focus of antitrust was further clarified to include price discrimination, tying and exclusive-dealing contracts, corporate mergers, and interlocking directorates where these practices “may substantially lessen competition” or “tend to create a monopoly.”¹¹

The Clayton Act, particularly § 7, broadened the government’s investigatory and regulatory powers under the Sherman Act by conferring authority to regulate potential monopolies before they are fully realized.¹² In the same year as the Clayton Act’s passage, the Federal Trade Commission Act established the FTC as an independent administrative agency charged with the prevention of “unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”¹³ Over the decades that followed, court decisions and congressional acts have expanded the scope of the FTC’s power to enforce the FTC, Sherman,

8. FREDERICK K. GRITNER & MARK A. ROTHSTEIN, WEST’S FEDERAL ADMINISTRATIVE PRACTICE § 3002 (3d ed. 2002).

9. *Id.*

10. *Id.*

11. *Id.*

12. H.R. REP. NO. 94-1373, at 7 (1976), *as reprinted in* 1976 U.S.C.A.N. 2637, 2639 (“As the preamble to the original Clayton bill proclaimed, its purpose was ‘to prohibit certain trade practices which . . . singly and in themselves are not covered by the Sherman Act . . . and thus to arrest the creation of trusts, conspiracies and monopolies in their incipency and before consummation.’” (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962))).

13. 15 U.S.C. § 45(a)(2) (2006).

and Clayton Acts.¹⁴ In 1933 President Franklin Roosevelt established the modern Antitrust Division within the Department of Justice, underscoring his administration's commitment to enforcing the antitrust laws as part of his broader scheme to help the country climb out of the Great Depression.¹⁵

In 1948, the two agencies reached an agreement to divide responsibility for merger enforcement which would be the precursor for the modern merger clearance agreements.¹⁶ The evolution of antitrust jurisprudence and economic analysis brought about many substantive changes in enforcement during the years that followed this initial agreement, yet the basic procedural question of how the agencies should interact with one another still lacked a definitive answer.

B. Hart-Scott-Rodino and the Merger Clearance Process

Congress passed the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") to remedy some of the perceived shortcomings of the existing patchwork of antitrust legislation.¹⁷ The aspect of the HSR Act that has had the greatest impact on the interaction of the two agencies was the establishment of

14. See, e.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 432 (2d Cir. 1945) (holding that Alcoa monopolized the ingot market); Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383, 1383 (1976) (current version at 15 U.S.C. § 18a (2006)) (stating that the Act's purpose was "[t]o improve and facilitate the expeditious and effective enforcement of the antitrust laws . . ."). While it is beyond the scope of this Note, over the years, Congress passed statutes and amendments expanding the FTC's mission to include administering truth-in-advertising and consumer protection laws, including the Wheeler-Lea Amendment in 1938, "which included a broad prohibition against 'unfair and deceptive acts or practices,'" as well as the "Magnuson-Moss Act, which gave the FTC the authority to adopt trade regulation rules that define unfair or deceptive acts in particular industries." FEDERAL TRADE COMMISSION, FACTS FOR CONSUMERS: GUIDE TO THE FEDERAL TRADE COMMISSION, available at <http://www.ftc.gov/bcp/online/pubs/general/guidetofc.htm> (last visited Apr. 9, 2007).

15. See DEPARTMENT OF JUSTICE, TIMELINE OF ANTITRUST ENFORCEMENT HIGHLIGHTS AT THE DEPARTMENT OF JUSTICE, available at <http://www.usdoj.gov/atr/timeline.pdf> (last visited Apr. 9, 2007) (showing that while the term "Antitrust Division" may have been used as early as 1919, it was not until June of 1933 that the first Assistant Attorney General for Antitrust Division, Harold M. Stevens, was confirmed and began his tenure).

16. See Janet D. Steiger, Chairman, Federal Trade Commission, Remarks at the Meeting of the Section of Antitrust Law of the American Bar Association: Report from the Federal Trade Commission (Apr. 8, 1994), in 63 ANTITRUST L.J. 277, 293 (1994) (noting the 45th anniversary of the original inter-agency agreement).

17. See H.R. REP. NO. 94-1373, at 5 (1976), as reprinted in 1976 U.S.C.C.A.N. 2637, 2637 ("The purpose of H.R. 14580 is to amend the federal anti-merger law, Section 7 of the Clayton Antitrust Act by establishing premerger notification and waiting requirements for corporations planning to consummate very large mergers and acquisitions." (citation omitted)).

a premerger notification process and waiting period.¹⁸ Under § 7 of the Clayton Act, both agencies are charged with the prevention of potential and probable monopolies.¹⁹ Prior to the passage of the HSR Act, however, the agencies had to be proactive in seeking out news of impending mergers. If an agency received word of a potential merger that seemed troubling, theoretically it could seek a temporary restraining order or preliminary injunction to halt the transaction to allow the agency to investigate further.²⁰ In practice, it was very difficult to obtain a timely injunction because the government agencies carried the burden of proof in seeking a preliminary injunction, “without advance notice of an impending merger, data relevant to its legality, and at least several weeks to prepare a case, the government often ha[d] no meaningful chance to carry its burden of proof, and win a preliminary injunction against a merger that appears to violate section 7.”²¹

The Congress that enacted the HSR Act recognized the high stakes involved if the FTC and Antitrust Division were not able to prevent an anticompetitive merger. Post-consummation,

many large mergers become almost unchallengeable. . . . [because d]uring the course of the post-merger litigation, the acquired firm’s assets, technology, marketing systems, and trademarks are replaced, transferred, sold off, or combined with those of the acquiring firm. Similarly, its personnel and management are shifted, restrained, or simply discharged.²²

At this point, any victory on the part of the government would be largely symbolic and even if they could succeed in breaking up the merged corporation, it would likely have anticompetitive effects.²³

The HSR Act implemented a premerger notification process and waiting period which attempted to alleviate the government’s considerable burden of proof and informational disadvantages. Under the new law, prospective acquiring corporations whose proposed acquisition was worth more than a particular monetary value were

18. The other effect of the HSR Act was to give the DOJ’s Antitrust Division broader powers to issue civil investigative demands “to compel the submission of documents, answers to written interrogatories, and oral testimony from any person having information relevant to a possible civil antitrust violation.” H.R. REP. NO. 94-1343, at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2596, 2596. The FTC already possessed similar broad powers. *Id.*

19. 15 U.S.C. § 18 (2006).

20. *See id.* §§ 25, 53(b) (describing the processes available to obtain these restraint devices).

21. H.R. REP. NO. 94-1373, at 8 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2637, 2640.

22. *Id.*

23. *See id.* at 5, *as reprinted in* 1976 U.S.C.C.A.N. 2637, 2637 (stating that the purposes of the bill include strengthening the government’s ability to mergers before they occur, “before the assets, technology, and management of the merging firms are hopelessly and irreversibly scrambled together, and before competition is substantially and perhaps irremediably lessened . . .”).

required to file notice with the Antitrust Division and the FTC.²⁴ The Act further provided that along with the notification, the merging parties were to submit “documentary material and information relevant to the proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate antitrust laws.”²⁵

If the agencies found nothing potentially anticompetitive about the merger within the thirty-day waiting period, they could terminate the waiting period (“early termination”) or simply let it run out, leaving the parties free to proceed with the acquisition.²⁶ If the submission raised issues that one or both of the agencies wished to pursue, they could require the parties to submit additional supporting material (a “second request”). Issuing a second request stopped the clock on the waiting period and allowed the agencies additional time to decide whether to seek a preliminary injunction in District Court to halt the merger while the agency brought a suit claiming that the merger violates § 7 of the Clayton Act.²⁷ The HSR Act aimed to decrease reliance on the Sherman Act to “break up” already consummated mergers and to shift the focus on preventing anticompetitive mergers before they were finalized.

While the HSR Act detailed the framework of the premerger notification process, it did not specify how the two agencies were to determine which agency, if any, would pursue an investigation and suit against the merging parties. In fact, Congress explicitly delegated authority to the FTC and Antitrust Division to “define the terms used in this section; . . . and prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.”²⁸ While most of the time, only one or neither of the agencies seeks to pursue an investigation, there are times when both wish to investigate the proposed merger. Decades before the HSR Act, “the clearance process resulted from a 1948 interagency agreement to determine whether the

24. 15 U.S.C. § 18a(a) (“no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons . . . file notification pursuant to rules under subsection (d)(1) of this section and the waiting period described in subsection (b)(1) of this section has expired”).

25. *Id.* § (d)(1). The FTC has promulgated rules which instruct merging parties as to the type of documentation they must submit. Notification and Report Form for Certain Mergers and Acquisitions, 16 C.F.R. § 803 app. I (2006).

26. The waiting period is shortened to fifteen days in the case of a cash tender offer. 15 U.S.C. § 18a(b)(1)(B).

27. *Id.* § (e)(1)(A).

28. *Id.* § (d)(2)(A), (C).

FTC or Antitrust Division is best suited to address a matter.”²⁹ Before either agency can open an investigation, the two agencies must agree which will conduct it. The broad delegation under the HSR to fill in the procedural blanks allowed the agencies to maintain control over the structure and implementation of the clearance process.³⁰

The HSR Act may not have provided any procedures for inter-agency division of responsibility for investigating mergers, but the premerger notification process it implemented created an environment that intensified the importance of a good working relationship between the Antitrust Division and the FTC. The HSR premerger notification requirements gave the agencies the tools necessary to learn of every proposed merger over a certain size and to mount a challenge against them successfully before the merging companies became hopelessly entangled. As the focus of antitrust enforcement began to shift, the agencies devoted more and more of their energies to investigating HSR mergers. In this context, the speed with which they could resolve any clearance disputes became even more important. Under the HSR Act, these investigations were constrained by statutorily enforced time limits.³¹ If the agencies failed to resolve disputes in a timely fashion, they risked missing the only window of opportunity for thwarting the merger before it occurred.

C. The Ill-Fated 2002 FTC/DOJ Merger Clearance Accord

1. The 1993 and 1995 Agreements—Setting the Stage for Reform

In the years following the passage of the HSR Act, the relatively loose interagency clearance agreement needed refinement; it failed to reach a desirable level of efficiency and effectiveness.³² In 1993, the FTC and the Antitrust Division issued “Clearance Procedures for Investigations,” under which “the principal consideration in clearance decisions is agency expertise in the product

29. William J. Baer, Deborah L. Feinstein & Randal M. Shaheen, *Taking Stock: Recent Trends in U.S. Merger Enforcement*, 18 ANTITRUST, Spring 2004, at 15, 20.

30. See 15 U.S.C. § 18a(d) (permitting the agencies to define terms, exempt persons and transactions from the requirements of the section, and promulgate rules “necessary and proper to carry out the section’s purposes”).

31. See *id.* § (b)(1)(B) (setting forth thirty- or fifteen-day waiting periods, unless extended per statute for further examination).

32. See SECTION OF ANTITRUST LAW OF THE AMERICAN BAR ASSOCIATION, COMMENTS IN RESPONSE TO THE ANTITRUST MODERNIZATION COMMISSION’S REQUEST FOR PUBLIC COMMENT REGARDING GOVERNMENT ENFORCEMENT INSTITUTIONS 10 (2005), available at http://www.amc.gov/public_studies_fr28902/enforcement_pdf/051028_ABA_Fed_Enforc_Inst_Dual_Enforc.pdf [hereinafter ABA AMC Comments] (noting recent efforts and the failure to cure efficiency problems).

in question.”³³ The 1993 guidelines provided a hierarchy of experience by which the agencies were to determine who had the greater expertise.³⁴ These guidelines failed to substantially expedite the clearance procedure because neither agency had much incentive to cede any turf in the name of more timely enforcement. Consequently, the agencies adopted the Hart-Scott-Rodino Premerger Program Improvements agreement in 1995, which memorialized a commitment by the FTC and the Antitrust Division to resolve all clearance disputes within nine business days of the filing of a merger.³⁵

Efforts to reduce the length of clearance disputes met with mixed results, and the legal, government, and business communities remained dissatisfied.³⁶ Clearance disputes were still taking up a considerable percentage of the thirty-day waiting period, leaving the “winning” agency with a truncated period of time within which to investigate and determine whether to issue a second request.³⁷ Anecdotal evidence confirms that the reduction in time predisposes the reviewing agency to issue a second request to compensate for the lack of time for thorough review.³⁸ Issuing a second request delays the earliest possible date at which the parties could consummate the merger, triggers massive document production and increased legal fees, and can potentially scare off one or more parties to the merger.³⁹ Accordingly, it is in the best interests of both the regulated entities and the regulatory beneficiaries to ensure that the clearance process is resolved swiftly and efficiently. An efficient clearance process allows the reviewing agency as much time as possible within the waiting period to make an informed decision on whether to issue a second

33. Baer et al., *supra* note 29, at 20.

34. *See id.* (“Expertise results from experience conducting ‘a substantial investigation’ of the product in the same geographic area within the past five years.”).

35. *Id.*

36. *See* FEDERAL TRADE COMMISSION, CLEARANCE DELAYS, <http://www.ftc.gov/opa/2002/02/clearance/cleardelaystats.htm> (last visited Apr. 9, 2007) (criticizing clearance delays during the 28 months following the start of FY 2000).

37. *See id.* (finding the average delay in a clearance dispute to be 17.5 days during the time period in question).

38. *See* Letter from John J. Castellani, President, The Bus. Roundtable, et al., to Timothy Muris, Chairman, Fed. Trade Comm. 4 (Feb. 25, 2002), *available at* <http://www.ftc.gov/opa/2002/02/clearance/brt.pdf> (identifying Second Requests or withdrawn filings as results of clearance delays); ABA AMC Comments, *supra* note 32, at 10 (same).

39. *See* Letter from Roxane C. Busey, Chair, ABA Section of Antitrust Law, to Charles A. James, Assistant Attorney Gen. for Antitrust & Timotby J. Muris, Chairman, Fed. Trade Comm. 1-2 (Jan. 23, 2002), *available at* <http://ftc.gov/opa/2002/02/clearance/aba.pdf> (“[T]he ‘clearance process’ had in the past consumed a significant part of the 30-day waiting period in a number of transactions, leading to either ‘second requests’ occasioned solely by a lack of time for a preliminary review of the proposed transaction, or unnecessary re-filings to avoid such ‘second requests.’”).

request. When the clearance process is efficient, merging parties have a better opportunity to receive a fair review and consumers are protected by agencies that do not have to make enforcement decisions in an artificially reduced timeframe.

2. Muris and James Strike a Deal

By the time Timothy Muris inherited the reins as Commissioner of the FTC in 2001, conflicts between the FTC and the Antitrust Division had escalated into the truly absurd. Though the two agencies had long shared their jurisdiction for merger review and enforcement by operating pursuant to inter-agency agreements, the effectiveness of the 1995 agreement, still in place in 2001, had become strained.⁴⁰ Muris had been warned by his predecessor that clearance disputes were having a severe effect on the FTC, but he soon

learned of the existence of a pending, year-long clearance dispute concerning matters involving the digital distribution and sale of music. At each agency, the overwhelming belief among those familiar with the dispute was that the other agency did not have a reasonable claim. In short, the prevailing view on both sides was that the other *was acting in bad faith*.⁴¹

The image of entrenched bureaucrats, fighting for more than a year over who would be allowed to initiate an investigation, brings to mind the unkindest caricatures of bureaucratic waste and inefficiency. The merger clearance process was a perfect candidate for reform.

The clearance agreements in 1993 and 1995 had failed to produce the desired improvements. In fact, there is evidence that the number of clearance fights actually increased and that they were becoming a considerable problem.⁴² Aware of the shortcomings of their clearance process and the consequences of these inadequacies, the FTC and the Antitrust Division undertook a study to determine the severity of the problem.⁴³ The study covered twenty-eight months from the beginning of Fiscal Year 2000:

There were 136 matters in which clearance was contested. In other words, there were 136 matters in which both agencies filed for clearance. On average, these contested matters took 17.8 business days, or approximately three and a half weeks, to resolve.

40. See TIMOTHY J. MURIS, COMMENTS ON THE FTC-DOJ CLEARANCE PROCESS BEFORE THE ANTITRUST MODERNIZATION COMMISSION 3-4 (2005), available at http://www.amc.gov/commission_hearings/pdf/Muris_Statement.pdf (recognizing "deficiencies" and "deterioration" in the clearance process).

41. *Id.* at 4-5.

42. *Id.* at 5-6.

43. CLEARANCE DELAYS, *supra* note 36; see also MURIS, *supra* note 40, at 4-5 (discussing a year-long clearance dispute he inherited from his predecessor over a digital music and distribution investigation which was eventually settled by consulting a neutral arbitrator).

....

In another 164 matters, clearance took more than one week to resolve, although no formal clearance dispute occurred.

....

On average, these 300 matters—24 percent of all matters for which clearance requests were filed—imposed delays of three weeks.⁴⁴

The FTC Commissioner, Timothy Muris, and the Assistant Attorney General for Antitrust, Charles James, commissioned an independent group of former agency officials to propose new guidelines for the clearance process.⁴⁵ The result of their recommendations, which would form the basis for the 2002 Merger Clearance Accord, was a division of authority according to the industry of the merging parties.⁴⁶ The industries were allocated by the independent advisors based upon the same considerations of agency expertise and experience promulgated in the 1993 and 1995 guidelines.⁴⁷

Unlike the earlier guidelines, these were to be permanent allocations, eliminating the protracted disputes that arose when the separate agencies challenged each other's expertise in an industry. If the Accord's division of industries failed to provide a clear guide as to which agency should handle a particular investigation, it established a process whereby the agency heads could submit the dispute to a third-

44. CLEARANCE DELAYS, *supra* note 36.

45. Letter from Kevin Arquit, Bill Baer, Joe Sims & Steve Sunshine to Timothy Muris, Chairman, Fed. Trade Comm. & Charles James, Assistant Attorney Gen. for Antitrust (Dec. 21, 2001), available at <http://ftc.gov/opa/2002/02/clearance/clearideas.htm>. The four authors of the new guidelines were alumni of the FTC and the Antitrust Division and were evenly split between those who worked for Republican administrations and those who worked for Democratic ones. *Id.*

46. See *id.* (setting forth the recommender's division); Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations 8-11 (Mar. 5, 2002), available at <http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf> [hereinafter 2002 Agreement] (setting forth the final negotiated division). The FTC was given jurisdiction over mergers in the following industries: airframes; autos and trucks; building materials; chemicals; computer hardware; energy; healthcare; industrial gases; munitions; operation of grocery stores and grocery manufacturing, including distilled spirits and tobacco; operation of retail stores; pharmaceuticals and biotechnology; professional services; satellite manufacturing and launch, and launch vehicles; and textiles. 2002 Agreement, *supra*. The Antitrust Division was given authority over the following types of mergers: agriculture and associated biotechnology; avionics, aeronautics, and defense electronics; beer; computer software; cosmetics and hair care; financial services/insurance/stock and option, bond, and commodity markets; flat glass; health insurance and healthcare products and services over which the FTC determines it may lack jurisdiction; industrial equipment; media and entertainment; metals, mining and minerals; missiles, tanks, and armored vehicles; naval defense products; photography and film; pulp, paper, lumber, and timber; telecommunications services and equipment; travel and transportation; and waste. *Id.*

47. See 2002 Agreement, *supra* note 46, at 4 (detailing the general standard for clearance as whether an agency had "expertise in the product involved in the proposed investigation gained through a substantial antitrust investigation of the product within the last seven years").

party arbitrator.⁴⁸ In short, the Accord sought to institutionalize the standards the agencies were already using to determine who would proceed with an investigation in an effort to eliminate the inefficiencies in time and resources and to combat the perceived problem of skewed agency incentives.⁴⁹

III. THE ANTITRUST LAWS & CONGRESS'S BROAD GRANT OF DISCRETION TO THE AGENCIES

The various agreements between the FTC and Antitrust Division regarding the clearance process occupy a precarious position within the gaps in Congress's delegation to the agencies. While each agency has exclusive jurisdiction over particular aspects of antitrust regulation, both are charged with enforcing §§ 2, 3, 7, and 8 of the Clayton Act.⁵⁰ This dual jurisdiction creates many opportunities for duplication and inefficiency. As discussed previously, the two agencies have struggled to find an effective system for reconciling conflicts that arise out of their shared authority since their first agreement in 1948.⁵¹ Congress has provided a paucity of guidance in both the legislative history and the text of the applicable legislation, which set

48. *See id.* at 3, 6. The Agreement stated:

If the staff or senior officials at each agency are unable to resolve a clearance dispute within 144 hours following receipt of the initial clearance request, the matter will be referred to the Chairman of the FTC and the Assistant Attorney General in charge of the Antitrust Division ("the agency heads").

Within 48 hours of submission of a dispute to them, the agency heads will determine whether to submit the dispute to the Neutral Evaluation dispute resolution mechanism described below.

....

... [The Neutral] shall be selected, by lot, from a pre-established, mutually-agreeable panel of experts (such as academics, retired government employees or other knowledgeable individuals). . . .

The Neutral will tender a recommendation within 48 hours of the Neutral's appointment.

Id.

49. *See* MURIS, *supra* note 40, at 5-7 (identifying the four categories of problems with the status quo that the Accord sought to remedy: delays in clearing matters, distortion in internal agency resource allocation, interagency friction, and diminished transparency).

50. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST DIVISION MANUAL ch. 7 § A (rev. 3d ed. 1998), available at <http://www.usdoj.gov/atr/foia/divisionmanual/ch7.htm> (adding that "[j]udicial interpretation of Section 5 of the FTC Act permits the FTC to challenge conduct that also may constitute a Sherman Act violation, and thus, there is an overlap with the Division in this area as well").

51. *See* Victor R. Hansen, *Functioning of the Antitrust Division—Its Relationship to the Federal Trade Commission and Current Policies of the Division*, 13 A.B.A. ANTITRUST SEC. 20, 21 (1958) (describing the agreement for "systematic mutual exchange of information regarding pending investigations and new investigations being handled by each agency").

the stage for difficulties in resolving disputes and division of labor throughout the existence of the FTC and the Antitrust Division.

Prior to its amendment by the HSR Act, the Clayton Act made nearly no reference to the issue of overlapping jurisdiction.⁵² Implicit in the delegation of authority to regulate mergers was the discretion to determine which agency would undertake a particulate investigation. However, the HSR Act, which implemented the reporting requirement for mergers above a certain value, provided the FTC and the Antitrust Division a loose framework within which the agencies devised their clearance agreements.⁵³ The provisions of the Act that pertain to the premerger notification clearance process are as follows:

The Federal Trade Commission, with the concurrence of the Assistant Attorney General . . .

(1) shall require that the notification required under subsection (a) be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws; and

(2) may—

(A) define the terms used in this section;

(B) exempt, from the requirements of this section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws; and

(C) *prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.*⁵⁴

The HSR Act's delegation of authority to the two agencies is broad, allowing them to "prescribe other such rules as may be necessary and appropriate to carry out the purposes of this section."⁵⁵ The Act does not give any other indications how the agencies are supposed to decide who reviews a proposed merger. It specifies that notification of the merger is to be submitted to both agencies, but that a second request is to be issued by only one agency:

The waiting period required under subsection (a) of this section shall—(A) begin on the date of the receipt by the Federal Trade Commission *and* the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice . . .⁵⁶

52. See Clayton Act, ch. 323, 38 Stat. 730, 730-40 (1914) (current version at 15 U.S.C. §§ 12-27 (2006)), 29 U.S.C. §§ 52-53 (2006)).

53. 15 U.S.C. § 18a (§ 7A of the Clayton Act).

54. *Id.* § (d) (emphasis added).

55. *Id.* § (d)(2)(C).

56. *Id.* § (b) (emphasis added).

The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period . . . , require the submission of additional information or documentary material relevant to the proposed acquisition⁵⁷

Accordingly, the agencies have filled in the gaps with inter-agency agreements to determine who will pursue an investigation after both have had the opportunity to review the initial HSR filing.⁵⁸

The HSR Act does not provide much indication as to how Congress expected the agencies to implement the merger clearance process, and the legislative history sheds little more light on Congress's intent with regards to the division of labor between the two agencies. The House Committee Reports explicit state that one of the major purposes of the legislation is to "strengthen the enforcement of Section 7 [of the Clayton Act] by giving the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated," but they do nothing to further specify the procedure the agencies should follow to resolve any disputes over clearance.⁵⁹

The agencies resolved the issue through inter-agency agreement but they could have used notice-and-comment rulemaking instead. There are advantages to using notice-and-comment rulemaking in this context—transparency, participation by the public, and binding effect.⁶⁰ Notice-and-comment rulemaking is more formal than the process by which Muris and James reached their agreement. The process is set out in and governed by the Administrative Procedure Act and removes much of the opaqueness of less formal deal-making by bringing it out into the relative open.⁶¹ But there are also costs—the process can consume considerable time and resources. An agency may value the speed, flexibility, and efficiency afforded by less formal methods of rulemaking over the possible benefits of the long notice-and-comment process. A party, including a regulated entity, may challenge an agency's choice of procedures, so it is possible that the FTC and the Antitrust Division may have faced a challenge if they had been successful in implementing the 2002 Accord through

57. *Id.* § (e)(1)(A) (emphasis added).

58. Admittedly, of course, there is no dispute over who will conduct the investigation for the majority of cases.

59. H.R. REP. NO. 94-1373, at 6 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2637, 2638 (limiting the discussion of the agencies' discretion with respect to pre-merger clearance procedures to a summary of subsection (d) as requiring "the FTC, with the concurrence of the Assistant Attorney General in charge of the Antitrust Division, to specify by rule the information which must be supplied on the premerger notification form").

60. *See* 2 AM. JUR. 2D *Administrative Law* § 153 (2007) (discussing the purposes and benefits of notice-and-comment rulemaking).

61. *See* 5 U.S.C. § 553 (2006) (setting out the procedures for notice-and-comment rulemaking).

informal means.⁶² But neither the HSR Act⁶³ nor the APA⁶⁴ plainly required the agencies here to choose notice-and-comment rulemaking.⁶⁵ In fact, the lack of guidance both in the text of the statutes themselves and the accompanying legislative history indicate that Congress has given little thought to controlling the division of authority between the agencies.⁶⁶ The agencies took the most important steps of settling the distribution of authority in a rational fashion and then communicating that settlement to the public. The next Part discusses these steps.

IV. THE MERITS OF THE MERGER CLEARANCE ACCORD

The impact of this episode hinges on the merits of the Merger Clearance Accord. If the Accord itself was not a meritorious proposal for resolving the clearance issues that have plagued the interaction of the two agencies, then Senator Hollings's success in derailing it would be less troubling from a policy standpoint. It is the potential positive impact that the Accord would have had upon federal antitrust enforcement that makes its defeat for narrow political reasons both troublesome and worthy of study. The Accord would have reinforced the agencies' longstanding policies and benefited consumers and entities under investigation alike by improving the transparency, efficiency, and quality of merger review. These benefits likely would outweigh any arguable decrease in the quality or independence of enforcement due to the loss of competition between the two agencies for clearance approval.

The Accord's primary effect would have been to codify the standards by which the agencies divided authority for merger review,

62. See *W. Oil & Gas Ass'n v. U.S. Env'tl. Prot. Agency*, 633 F.2d 803, 813 (9th Cir. 1980) (stating that ordinarily an agency's action will be invalidated for failure to comply with the APA notice-and-comment requirements).

63. 15 U.S.C. § 18a (2006).

64. Section 553 of the APA carves out an exception to the notice-and-comment rulemaking requirement for agency actions other than substantive rulemaking: "Except when notice or hearing is required by statute, this subsection does not apply—(A) to *interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.*" 5 U.S.C. § 553(b)(A) (2006) (emphasis added).

65. I will, however, discuss in Section VI.C. the separate issue of whether it would have been wise for the agencies to have used notice-and-comment rulemaking, even if not required to do so.

66. See Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 92 (2003). Winerman, in describing the process by which the FTC and Clayton Acts were passed, wrote, "The conference accepted the Senate's replacement of criminal with administrative enforcement, leaving intact the Justice Department's civil enforcement authority (and allowing the Department to challenge the same practice under both the Sherman and Clayton Acts). The result, almost inadvertently, was dual jurisdiction under the Clayton Act." *Id.*

increasing the transparency of the process while eliminating the time-consuming battles for clearance that occurred at the margins. It would have done little to change the status quo of merger enforcement as experienced by the majority of investigated entities.

A. The Accord Could Provide Increased Transparency and Meet the Expectations of Consumers, Parties, and Congress

The history of interagency liaison agreements includes a motley collection of informal letters and handshake agreements, as well as the more formal agreements since the 1990s. What has remained constant throughout is the commitment to avoid unnecessary conflict and to ensure that whichever agency has “expertise” in a field is assigned the particular matter. The 2002 Accord embodied all of the material aspirations of its predecessors, and utilized a similar algorithm for determining who has jurisdiction over the case. The difference was in the finality of the division of labor. By setting out the industries over which each agency will have authority, the 2002 Accord eliminated most of the inter-agency turf battles and wasted resources and provided transparency that had been lacking in the prior agreements.⁶⁷ The informal, multi-factored nature of the earlier agreements had created an opaque status quo. The 2002 Accord appeared to be a step in the direction of greater transparency: It took the division of responsibility that has remained relatively constant through decades of earlier agreements and removed the uncertainty at the margins.

If the Accord had been successful, it would have not only met the expectations of consumers and parties under investigation, but it would have drawn support from the longstanding Congressional acquiescence in earlier inter-agency agreements. While Congress had not explicitly addressed the merger clearance process, the history of Congressional acquiescence in earlier inter-agency liaison agreements provides support for the agencies’ actions in 2002. The agencies have engaged in informal correspondence and agreements, which have attempted to resolve the problems inherent in dual enforcement, since 1948.⁶⁸ Muris’s and James’s attempt to formalize the division of

67. The earlier agreements are so informal and so poorly documented that even the FTC and Antitrust Division had to cite to loose-leaf services when referring to the 1993 and 1995 agreements.

68. FEDERAL TRADE COMMISSION, OVERVIEW OF THE FTC/DOJ CLEARANCE AGREEMENT, available at <http://www.ftc.gov/opa/2002/04/clearanceoverview.htm> (last visited Apr. 9, 2007) (“Since 1948, the agencies have agreed that neither would proceed until the other ‘cleared’ the investigation to it.”); see also Inter-Agency Cooperation, 4 Trade Reg. Rep. (CCH) ¶ 9,565.05 (2002). The Regulation states:

responsibility was the first agreement which provoked the ire of a member of Congress. For the most part, Congress has appeared indifferent to how the agencies handled their relations with one another.

While there have been numerous refinements to these informal agreements, the general standards guiding the division of labor have remained remarkably constant over the years. Victor Hansen, Assistant Attorney General in charge of the Antitrust Division from 1956 to 1959, explained that the original agreement, reached only a few years earlier, was successful because "the activity of each agency is not dependent on a mere arbitrary allocation of jurisdiction, but is based upon a case-by-case account by past experience, present manpower, and remedies available to each agency."⁶⁹ Little about the essential nature of the first interagency agreement changed over the years as the agencies refined their relationship in response to changing economic and political circumstances.

After operating under informal agreements for decades, the two agencies responded to criticism regarding delays by instituting the "Clearance Procedures for Investigations" in 1993.⁷⁰ These procedures announced the specific criteria the agencies would utilize in resolving a clearance dispute.⁷¹ While the 1993 procedures provided

Because there is some overlap between the Justice Department and the Federal Trade Commission antitrust responsibilities, the jurisdictional area would be even more confusing were it not for a liaison agreement worked out between these two agencies in 1948. It was agreed that dual jurisdiction would not be taken in any particular case where it might otherwise occur.

4 Trade Reg. Rep. (CCH) ¶ 9,565.05.

69. See Hansen, *supra* note 51, at 21. Hansen wrote:

In June of 1948 the Department [of Justice] and the Commission established a systematic mutual exchange of information regarding pending investigations being handled by each agency. Under this procedure each agency agreed to notify the other by an exchange of cards before initiating any new investigation, grand jury proceeding, or trade practice conference. . . . Upon receipt of this information, each agency can then determine whether or not this new matter causes a conflict in any matter then pending within that agency, and if so, can object to the proposed action. If there is no conflict or duplication of effort involved, clearance is then given the other agency to proceed with the investigation. This mutual exchange of information has been primarily responsible for the fact that the two agencies have with increasing success been able to cooperate in their dual administration of the antitrust laws without serious conflict or duplication of effort.

Id.

70. Clearance Procedures Between Division and FTC, 65 Antitrust & Trade Reg. Rep. (BNA) 746 (1993).

71. See Baer et al., *supra* note 29, at 20. Baer et al. wrote:

Under the 1993 guidelines, the principal consideration in clearance decisions is agency expertise in the product in question. Expertise results from

the criteria for determining who would undertake a given investigation which have survived relatively intact through today, they did not include any commitment to resolving disputes within a certain time period.

Recognizing the inadequacies of the procedures adopted in 1993, the agencies announced a plan in March 1995 to improve their interaction on merger clearance matters with “initiatives [that] were designed to increase consistency between the agencies that share responsibility for enforcing the [Clayton] Act and reducing compliance burdens on businesses,” by implementing commitments to resolving clearance disputes within nine business days.⁷² This 1995 agreement was in place in 2002 when James and Muris announced the new Accord.

Despite the history of many agreements, it was not until the 2002 Accord that any of the agreements provoked a significant response from members of Congress. For the most part, Congress was content to leave the details of inter-agency interaction to the agencies themselves.⁷³ The Accord codified the allocations and value judgments embodied in the earlier agreements and eliminated any of the uncertainty that had been left unresolved over the decades of agreements.

experience conducting a “substantial investigation” of the product in the same geographic area within the past five years. A “substantial investigation” refers to any civil investigation that resulted in a second request and in which the agency received and reviewed documents. If neither agency examined the industry during the previous five years, the window is extended to a ten-year period. When both agencies have substantial expertise, the 1993 agreement specified that the agency with litigation experience would take precedence, followed, in descending order of importance, by the agency that had filed a case, announced a challenge, conducted an ordinary second request merger investigation, and conducted a civil conduct investigation. If neither agency has undertaken a relevant substantial investigation, then nonsubstantial matters will be considered.

Id. (citations omitted).

72. 1995 Joint U.S./FTC Premerger Program Improvements, 6 Trade Reg. Rep. (CCH) ¶ 42,520 (2002); see also 6 Trade Reg. Rep. (CCH) ¶ 42,521, which states:

The Agencies announce today eight major steps: (1) The Agencies will determine which Agency will review proposed mergers within nine business days from the date of filing and are implementing procedures to ensure that deadline is met. . . . (3) The Agencies are establishing a procedure for preclearance coordination by the Agencies and mechanisms to reduce undue burdens on private parties during that time period. . . . (8) The Agencies are increasing their efforts to work together through joint training, cross staffing, and other cooperative acts to harmonize merger review efforts and promote consistency.

73. See MURIS, *supra* note 40, at 17 n.12 (noting that Congress hasn’t expressed much interest in the clearance process, with one exception: “In 1981, Chairman John Dingle indicated concern that the DOJ had deviated from existing inter-agency clearance policies and had chosen to exercise jurisdiction over Mobil’s possible takeover bid for Conoco”).

B. The Accord Could Have Eliminated the Negative Side Effects of Agency Competition

In addition to meeting the mainly settled expectations of the corporate world and Congress as to which agency would be charged with undertaking an investigation in a particular industry, the merger accord would have eliminated the negative side effects of the competition between the two agencies. The elimination of competition between the two agencies may have a significant impact on how each agency undertakes their investigations, which may in turn affect regulated entities.

The Accord had the potential to eliminate or reduce many of the delays experienced under the earlier merger clearance processes. The escalation in the number of clearance disputes through the 1990s negatively impacted both the potential merging parties and consumers in general.⁷⁴ During the short life of the Accord, "it took an average of less than two business days to clear a matter to an agency, after the agency submitted a request for clearance . . . [and] there were no clearance disputes over HSR filings."⁷⁵ While the importance of these statistics must be tempered by the realization that the Accord was only in effect for eleven weeks, they indicate a possible shift of the agencies' focus from battling over clearance to concentrating on the task of enforcing the antitrust laws.

The goals of the agencies may shift if they are secure in their jurisdiction over a particular industry and do not have to keep an eye on racking up a "win" to add to their portfolio for the next clearance battle. The clearance process in place both before and after the failed 2002 Accord could "actually create perverse incentives by penalizing, rather than rewarding, agency efficiency."⁷⁶ Agencies are credited with greater expertise if they have issued second requests in a particular industry, so in the name of establishing precedent, they may decide to issue a second request even if they could sufficiently resolve all issues during the initial waiting period.⁷⁷ Conversely, if the allocation of responsibility were settled, the FTC and the Antitrust Division may be

74. CLEARANCE DELAYS, *supra* note 36.

75. Memorandum from the AMC Staff to the AMC Commissioners 13 (May 19, 2006), available at http://www.amc.gov/pdf/meetings/EnfInst_Fed_DiscMemo_pub.pdf (citing MURIS, *supra* note 40, at 12).

76. *Antitrust Modernization Commission, Hearings on the FTC-DOJ Clearance Process 2* (2005) (statement of John M. Nannes, Assistant Attorney Gen., Antitrust Division, Dep't of Justice), available at http://www.amc.gov/commission_hearings/pdf/Nannes_Statement.pdf; see also MURIS, *supra* note 40, at 6 ("The agencies waste precious enforcement resources contesting the right to examine specific matters and in conducting investigations in marginal matters for the purpose of using the experience gained to assert claims to other cases in the future.").

77. MURIS, *supra* note 40, at 6.

more open to remedies that take into account factors other than whether the agency looks like they are “successful.” By concentrating on a limited number of industries, the respective agencies may over time develop a greater understanding of the unique markets and may implement that knowledge in selecting mergers for investigation and in fashioning remedies.⁷⁸ Agency resources that were previously diverted toward fighting for clearance could be redeployed in improving the substance and breadth of the agency’s antitrust enforcement.

C. The Arguments in Favor of Agency Competition Have Weakened with Time

It can also be argued that the potential gains in efficiency and transparency as a result of the Accord would not have been offset by the loss of benefits of competition between the two agencies. While it may have once been true that the two agencies approached merger enforcement from substantially different viewpoints, each using its own unique tools and procedures, the procedural and substantive evolution of antitrust merger enforcement has narrowed and even eliminated many of the former differences.⁷⁹ If the type of investigation and enforcement actions undertaken will be similar regardless of which agency has clearance for a particular merger, then it becomes more difficult to justify these protracted turf battles.

Admittedly, the agencies are different from one another in a number of respects. The FTC, an independent agency, is headed by a five person bi-partisan commission whose terms are staggered and who are only removable for cause.⁸⁰ The FTC has both internal and external processes at its disposal, so if in the course of investigating a merger the agency determines that it warrants some type of legal action, it can either initiate internal proceedings before an Administrative Law Judge (“ALJ”) or can seek an injunction in the

78. See *id.* at 11 (identifying the benefits of specialization).

79. See *Antitrust Modernization Commission: Hearings on the FTC-DOJ Clearance Process 3* (2005) (statement of Joe Sims, Senior Antitrust Partner, Jones Day), available at http://www.amc.gov/commission_hearings/pdf/Sims_Statement.pdf (“[B]oth agencies share the same mission—protect consumers from anticompetitive conduct. The important thing is accomplishing the mission, not which agency does it. In the vast majority of situations, it should make absolutely no substantive difference which agency handles the matter.”).

80. The removable “for cause” aspect of the FTC Commissioners was famously upheld in *Humphrey’s Executor v. United States*, when the Supreme Court held that President Roosevelt could not discharge Commissioner Humphrey except for inefficiency, malfeasance, or neglect of duty. 295 U.S. 602, 631-32 (1935). Roosevelt’s purported objective of removing his predecessor’s appointee because he disagreed with him politically, *id.* at 618-19, did not meet the for cause standard. *Id.* at 631-32.

federal district court.⁸¹ If the FTC elects to conduct an ALJ hearing, the ALJ's decision is reviewable by the Commissioners, whose final decision is also subject to judicial review.⁸² This internal process may be preferable because of the review by the Commissioners, who ostensibly have greater expertise in antitrust than federal court judges. Their expertise may make them better able to come to a decision or fashion a remedy that is more beneficial for the economy and consumers because it is grounded in antitrust jurisprudence and economic theory.

The Antitrust Division, on the other hand, is a subsection of the Department of Justice. The Department of Justice is headed by the Attorney General, who serves at the pleasure of the President.⁸³ Accordingly, the investigations and enforcement activities undertaken by the Antitrust Division are more likely to be in line with the overall agenda of the current Presidential administration and as a result may enjoy more support and wield more political clout.⁸⁴ The Antitrust Division does not have an internal hearing process akin to that of the FTC, so it pursues its cases against corporations solely in federal court.⁸⁵

Over time Congress has provided the two agencies with tools which have obscured the procedural differences between them. In fact, the HSR Act's other primary effect, the expansion of the authority to the Antitrust Division to issue Civil Investigative Demands ("CIDs"), was perhaps the greatest change in the balance between the agencies' available arsenals.⁸⁶ Until 1962, only the FTC had an investigatory

81. 15 U.S.C. § 45 (2006).

82. *Id.*

83. See ANTITRUST DIVISION MANUAL, *supra* note 50, at ch.1 § B(3), available at <http://www.usdoj.gov/atr/foia/divisionmanual/ch1.htm> (describing organization of Antitrust Division in relation to the Department of Justice).

84. However, the extent to which presidential control over executive branch agencies is greater than presidential control over independent agencies is not settled. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 586-90 (1984). Strauss wrote:

The independent agencies are often free, at least in a formal sense, of other relationships with the White House that characterize the executive branch agencies. The President's influence reaches somewhat more deeply into the top layers of bureaucracy at an executive agency than at an independent commission. . . . Yet these differences are at best matters of degree.

Id. at 589-90.

85. See DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST ENFORCEMENT AND THE CONSUMER 3, available at http://www.usdoj.gov/atr/public/div_stats/211491.htm (last visited Apr. 9, 2007).

86. Hart-Scott-Rodino Act, Pub. L. No. 94-435, 90 Stat. 1383, 1383-97 (1976) (current version at 15 U.S.C. §§ 18a, 1311-14 (2006)).

subpoena power.⁸⁷ The Department of Justice requested the use of CIDs to ease its burden in investigations.⁸⁸ Congress first granted the Antitrust Division limited authority to issue CIDs in 1962 and significantly expanded that authority when it passed the HSR Act.⁸⁹ The HSR Act solidified and accelerated the gradual convergence of the agencies' powers by instituting a merger clearance process and granting the Antitrust Division the power to issue CIDs.

Beyond the procedural differences, the two agencies historically differed in their mission and outlook. The FTC was created in the watershed year of 1914 and was conceived as a regulatory committee to complement and supplement the DOJ's law enforcement focus.⁹⁰ Both the Federal Trade Commission Act and the HSR Act were passed in part to remedy problems and inadequacies in the Sherman Antitrust Act and in the Department of Justice's enforcement thereof.⁹¹ As a result, the two agencies began their life together as mismatched twins, bound by much of the same law, but each with a unique agenda and assortment of tools.

Despite different origins, their missions gradually grew more alike.⁹² Whereas the Antitrust Division's original role in antitrust law

87. Antitrust Civil Process Act, Pub. L. No. 87-664, 76 Stat. 548, 548-52 (1962) (current version at 15 U.S.C. §§ 1311-14); E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U. L.Q. 997, 1014 (1986).

88. See Sullivan, *supra* note 87, at 1013-14 ("The committee's recommendations included the possible use of investigatory tools, such as Civil Investigative Demands (CID's), which the Department had requested to aid in the production of evidence for litigation." (citation omitted)).

89. *Id.* at 1013-18.

90. *Id.* Professor Sullivan notes:

The legislative history underlying the creation of the Federal Trade Commission illustrates how Congress viewed the Department of Justice at the time. The debates made clear that a new regulatory commission would introduce new investigative tools and an administrative 'body of law' necessary to make antitrust enforcement more effective. The Senate Committee observed that many of the present antitrust problems could have been avoided if a regulatory commission, not the Department of Justice, initially had been entrusted with the enforcement of the Sherman Act. The Committee noted that changes in administrations had caused inherent problems in the Attorney General's office. The Committee favored a separate administrative agency in part because it believed the public was not ready for a sharp swing in enforcement as carried out by the Department of Justice. Thus while maintaining the Department's law enforcement role under the Sherman Act, Congress created the Federal Trade Commission . . . for the purpose of establishing a framework for the regulation of corporations engaged in interstate commerce.

Id. at 1012 (citations omitted).

91. *Id.* at 1012-18.

92. See Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 765-66 (2005) (stating that though it originally was thought that the FTC Act had a broader reach than the Sherman and Clayton Acts, both of the latter acts have been interpreted so broadly that the FTC Act no longer plays a gap-filling role). In the years since 1914, Congress

was as an enforcer and a litigator, by the 1970s agency officials and legislators sounded the alarm out of concern that the Division was creeping into the jurisdiction of the FTC.⁹³ In the 1975 and 1976 congressional hearings for the HSR Act, then-FTC Chairman Thomas Engman “expressed the view that the proposed pre-merger notification might get the Antitrust Division (and the Commission) into the business of ‘controlling’ mergers rather than ‘maintaining their proper role [of] enforc[ing] the antitrust laws.’ ”⁹⁴ The statement of the minority members of the Senate Judiciary Committee emphasized the inherent differences between the two agencies and their concerns in giving them identical powers:

The Department of Justice is not a regulatory agency subject to direct congressional oversight, but is the prosecuting arm of the U.S. Government. There is a vast difference between a prosecutor and a regulator. Conferring the investigatory powers of a regulatory commission on a prosecutor is alien to our legal traditions and contrary to the premise of the [F]ifth [A]mendment, which contemplates that a prosecutor can investigate crime only through the grand jury process.⁹⁵

While these concerns were registered in the legislative history, they did little to impede the passage of the HSR Act, which was enacted without a conference resolution.⁹⁶

Armed with the tools and procedures established by the HSR Act and preceding legislation, the Antitrust Division completed its transition from a mere enforcement arm of the executive to a regulatory agency.⁹⁷ Furthermore, the missions and outlook of the two

has passed the Celler-Kefauver Act Pub. L. No. 81-899, 64 Stat. 1125, 1125-28 (1950) (current version at 15 U.S.C. § 18 (2006)) (amending § 7 of the Clayton Act to include asset acquisitions); the 1962 Antitrust Civil Process Act, Pub. L. No. 87-664, 76 Stat. 548, 548-52 (1962) (current version at 15 U.S.C. §§ 1311-1314); and the Hart-Scott Rodino Act, Pub. L. No. 94-435, 90 Stat. 1383, 1383-97 (1976) (current version at 15 U.S.C. § 18a) (amending § 7A of the Clayton Act).

93. Sullivan, *supra* note 87, at 1014-16.

94. *Id.* at 1014 (citation omitted).

95. *Id.* at 1016 (citing S. REP. NO. 94-803, at 196 (1976)). The Judiciary Committee minority also worried about conferring CID power on the Antitrust Division because it “did not perceive the Department as a regulatory agency subject to the safeguards of the Administrative Procedure Act.” *Id.* at 1015-16. They also “characterized the FTC as an investigator and factfinder with no authority to determine civil or criminal liability and noted that the ‘rigorous protections relevant to criminal prosecutions would, therefore, be unnecessary.’ ” *Id.* at 1016 (citation omitted).

96. *Id.* at 1017.

97. *Id.* at 1024. Sullivan wrote:

[T]he Antitrust Division engages in regulatory-type conduct by: 1) setting standards through its announced Guidelines, 2) reviewing data through the required disclosure provisions, 3) screening out potentially anticompetitive mergers through the preclearance screening process, 4) negotiating a restructured merger if necessary, and finally, 5) if the bargaining process is successful, issuing an approval, similar to a ‘license,’ through a business review letter.

Id.

agencies have grown even closer since the two agencies adopted of Horizontal Merger Guidelines in 1992, amending and reconciling the guidelines that each agency has operated under since the first guidelines were issued by the DOJ in 1968.⁹⁸ The joint guidelines coordinated the economic and legal theory underpinning both agencies' actions and provided regulated entities with greater certainty as to the challenges they would face regardless of which agency conducted the investigation of their potential merger. The shift in missions and changes in available tools have weakened the argument that the differences between the agencies support maintaining an active competition between the two in the preclearance process.

Opponents of the Accord may also argue that it would eliminate the effect that competition itself may have on the agencies' performance. Perhaps a significant benefit of dual jurisdiction is the conflict it creates between the two agencies with overlapping missions. One could argue that by having to compete with one another to lead investigations, each is continually pushed to strengthen its expertise and to develop a better "track record" than the other agency. If an agency is able to demonstrate that it has won more cases, entered into more favorable consent decrees, and has a stable of seasoned "experts" in a particular industry, it is more likely to "win" clearance and be authorized to proceed with the investigation. This type of competition could prevent each agency from falling into complacency because neither is completely secure.

However, the benefits of competition between the FTC and the Antitrust Division are likely outweighed by the negatives. An uncertain merger clearance process could skew agency incentives,⁹⁹ tie up valuable resources,¹⁰⁰ and lead to an opaque regulatory climate for

98. 1992 Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1997) (announcing that the DOJ and the FTC were releasing joint Horizontal Merger Guidelines for the first time, updating the DOJ's 1984 Merger Guidelines and the FTC's 1982 Statement Concerning Horizontal Merger Guidelines).

99. MURIS, *supra* note 40, at 6-7. Muris wrote:

There is a natural and healthy competitive rivalry between the agencies. Both hire highly capable and motivated attorneys and economists who strive to make their institution preeminent. Yet both also must work together routinely. The competition to excel is commendable and useful, but acrimonious battles over enforcement terrain place destructive pressure on the agencies and divert attention from their overriding mutual responsibility—to enforce the antitrust laws effectively.

Id.

100. *Id.* at 6 ("The agencies waste precious enforcement resources contesting the right to examine specific matters and in conducting investigations in marginal matters for the purpose of using the experience gained to assert claims to other cases in the future.").

parties to potential mergers.¹⁰¹ As a result, the rationale for maintaining a more combative clearance process is counterbalanced by many strong policy and legal arguments for streamlining the process.¹⁰²

Regardless of the procedural and institutional differences between the Antitrust Division and the FTC, it is difficult to argue effectively that the Accord would have led to the loss of many benefits of competition. There may be some situations where the outcome of an investigation or a trial would differ depending upon which agency was involved. The operative inquiry, however, is whether the Accord would have altered this outcome or whether this is just a duality inherent in the modern patchwork of antitrust enforcement. The Accord does not substantively alter the possible inequality between the investigations and outcomes of action by the different agencies. Prior to the 2002 Accord, the FTC and the Antitrust Division still had to fashion a system by which one or the other would investigate a merger. Moreover, over the course of more than fifty years, they interacted pursuant to informal agreements which gradually evolved into a status quo where each agency developed expertise in particular industries.¹⁰³ While there were certainly turf battles where the agencies fight over a case for weeks or months on end, this occurred in a minority of the cases.¹⁰⁴ Functionally, the Accord did not “rob” either agency of jurisdiction over certain industries. The agencies themselves had carved up the antitrust pie decades earlier in a less than transparent manner. The agreement essentially solidified those divisions to eliminate the costly squabbling that sprung up on the periphery of industries and in politically attractive situations. In fact, in the years since the deal was aborted, the investigations that

101. *Id.* at 7. Muris stated:

The clearance process created considerable ambiguity over the likely assignment of specific matters to the DOJ or the FTC. In certain sectors, such as energy and media, the parties to a merger could not predict accurately which agency would obtain clearance. This precluded the parties from approaching an agency before filing a premerger notice to begin identifying and addressing competitive concerns. Recourse to prefiling discussions, which the European Commission has used effectively to expedite merger reviews, would not be feasible in the U.S. if the identity of the reviewing agency could not be determined with certainty in advance.

Id.

102. *Id.*; Letter from Roxane C. Busey, *supra* note 39.

103. See OVERVIEW OF THE FTC/DOJ CLEARANCE AGREEMENT, *supra* note 68 (describing the history of informal agreements based on expertise).

104. See *Antitrust Modernization Commission: Hearings on the FTC-DOJ Clearance Process*, *supra* note 79 (describing how the majority of clearance disputes are cleared in a timely fashion though some take much longer to resolve).

agencies have pursued have been largely in line with the allocations that would have governed under the 2002 Accord.¹⁰⁵

The Accord had many strengths and could have made significant strides toward streamlined, transparent, and effective administration of the antitrust laws. While opponents of the agreement may point to the historical differences in mission and procedure in each agency, time has bridged much of the gap between the FTC and the Antitrust Division. Further, Congressional acquiescence in inter-agency agreements since 1948, coupled with the lack of material substantive differences between previous agreements and the 2002 one, bolstered the conclusion that not only was the Accord a positive proposal, it was one that would not encounter substantial dissent from Congress and the business community.

V. HOLLINGS'S SUCCESS IN DERAILING THE ACCORD IS TROUBLING

If James and Muris acted within their authority when they entered into the 2002 Merger Clearance Accord, and the Accord was a substantively strong agreement, the next inquiry is whether the actions taken by Senator Hollings were a proper exercise of congressional control of administrative agencies. Much of the historical uneasiness with the constitutional status of administrative agencies has been explained away by scholars who identify and support both presidential and Congressional control of agencies.¹⁰⁶ It is desirable for both Congress and the President to have a certain level of control over the actions of agencies: The two branches are politically accountable for their actions.¹⁰⁷ Here, however, Congress itself did not

105. See Baer et al., *supra* note 29, at 21. Baer et al. wrote:

The proposed allocations were based, in large part, upon historical trends, so even without the agreement those trends might well have persisted. . . . And what about the entertainment and media mergers that Senator Hollings fought so hard to preserve for the FTC? Prior to the agreement, five of the seven most recent entertainment and media deals were cleared to the Antitrust Division. Since the collapse of the agreement, there have been at least two antitrust investigations involving such mergers—one cleared to the Antitrust Division and the other to the FTC.

Id.

106. See Kagan, *supra* note 7, at 2255 (“The rationale for strong congressional supervision of administrative action is straightforward. Congress is a democratically elected and accountable decisionmaking body, charged by the Constitution to make law for the nation.”).

107. See *id.* (adding that “[i]n establishing mechanisms to secure agencies’ compliance with legislative will, Congress does no more than assert its unquestioned constitutional primacy over the lawmaking function”).

act to overrule the 2002 Accord.¹⁰⁸ Rather, it appears that a single Senator effectively threatened to use his clout in the appropriations process to force the two agencies to back down from their agreement. It is important to examine Hollings's actions to determine whether his efforts well served the role of congressional control, and if they did not, what implications his success may have in the future.

The agreement fashioned between the FTC and the Antitrust Division came to an abrupt halt with the objection of Senator Hollings. James and Muris were scheduled to announce the plan at a news conference on January 17, 2002, but postponed and then cancelled the announcement in response to concerns expressed by the two Democratic FTC Commissioners, and pressure from the senator.¹⁰⁹ Dissatisfied by the agreement,

Hollings made headlines by threatening to hold up or cut the regulators' funding if the agreement [wasn't] revised. Speaking to FTC Chairman Timothy Muris at a March 19 Appropriations Committee hearing, Hollings said, 'I can tell you here and now, Mr. Chairman, that we know how to act. . . What we'll have to do is, by gosh, just come here and cut that budget around so that we get your attention. . . . Since Hollings and Muris crossed swords, Washington insiders have been treated to the spectacle of a public spat between the executive and legislative branches of government. Highlights of the dispute, which at times seemed more in the realm of tabloid TV shows than the normally stolid committee rooms on Capitol Hill, included a threat by Hollings to cut the salaries of Muris and other senior regulators. Speaking to a reporter in a Capitol Hill hallway, Hollings said he was going to "eliminate" Muris.¹¹⁰

In response to Hollings's public indignation, Attorney General John Ashcroft instructed James "not [to] sign the agreement; the press conference was cancelled and the disappointed spectators told that any decision on clearance would be delayed."¹¹¹ The senator, who was the Chairman of the Commerce, Justice, and State Appropriations Subcommittee, "said through a spokesman that he had 'very substantial concerns' about shifting antitrust oversight from the trade agency—which does not answer directly to the White House—to political appointees at the Justice Department."¹¹²

108. See MURIS, *supra* note 40, at 17 ("[T]here is a myth that the 2002 Clearance Agreement failed because of opposition from 'Congress.' The opposition came from only one member, albeit an important one.").

109. 2002 Agreement, *supra* note 46; MOZELLE W. THOMPSON, CONCERNING THE MARCH 5, 2002 CLEARANCE AGREEMENT BETWEEN THE DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION (2002), available at <http://www.ftc.gov/opa/2002/03/clearancemwt.htm>; Philip Shenon, *Plan to Split up Antitrust Oversight Stalls*, N.Y. TIMES, Jan. 18, 2002, at C2.

110. Brent Shearer, *Merger Clearance Accord Turns Nasty*, MERGERS & ACQUISITIONS J., Jun. 1, 2002, at 4, 6.

111. Neal R. Stoll & Shepard Goldfein, *Politics and Power and Antitrust, Oh My!*, 227 N.Y. L.J., Apr. 16, 2002.

112. Shenon, *supra* note 109.

Despite Hollings's objections, James and Muris officially announced the agreement two months later on March 5.¹¹³ In the ensuing months, Hollings escalated his efforts to thwart implementation of the plan, threatening to use his clout to hold up or cut funding for the agencies.¹¹⁴ In response, the FTC and the Antitrust Division sought support for the agreement from members of Congress, industry groups, and the Section of Antitrust Law of the American Bar Association.¹¹⁵ However, perceiving that they lacked enough political clout to fight Hollings, Muris and James issued a statement on May 20, announcing their withdrawal of the agreement.¹¹⁶

It is important for Congress to be able to effectively monitor agency activity. Scholarly support of congressional control of administrative agencies is predicated on the legitimizing effect Congress can have upon agencies by virtue of its constitutional powers.¹¹⁷ Elected officials are ultimately answerable to voters and have been constitutionally endowed with the responsibility to make the laws of the nation.¹¹⁸ Congress has finite resources, so over time it has delegated responsibility to various agencies, while retaining the tools and authority to oversee the activities of those agencies.¹¹⁹ Among the strongest rationalizations for delegating lawmaking and enforcement authority to agencies is that it is impractical, and indeed probably impossible, for Congress to deal with all of the minutiae

113. 2002 Agreement, *supra* note 46.

114. Shearer, *supra* note 110.

115. See Letter from Senator Herb Kohl, Chairman, Subcommittee on Antitrust, Bus. Rights, & Competition, & Senator Mike DeWine, Ranking Member, Subcommittee on Antitrust, Bus. Rights, & Competition, to John Ashcroft, Attorney Gen., Charles James, Assistant Attorney Gen. for Antitrust & Timothy Muris, Chairman, Fed. Trade Comm'n (Mar. 1, 2002), available at <http://ftc.gov/opa/2002/03/clearance/kohldewine.pdf>.

116. Charles A. James, Statement Regarding DOJ/FTC Clearance Agreement (May 20, 2002), available at http://www.usdoj.gov/opa/pr/2002/May/02_ag_302.htm. James's entire statement was as follows:

The Department stands by its view that the agreement was good public policy that was working to make antitrust enforcement more effective. In fact, since the agreement became effective, antitrust investigations were being commenced within a matter of days, and there were no clearance disputes between the agencies. However, in view of the opposition expressed by Sen. Hollings, Chairman of the Commerce, Justice, and State Appropriations Subcommittee, to the agreement and the prospect of budgetary consequence for the entire Justice Department if we stood by the agreement, the Department will no longer be adhering to the agreement.

Id.

117. Kagan, *supra* note 7, at 2255.

118. U.S. CONST. art. I, § 1.

119. See Kagan, *supra* note 7, at 2255-56 (describing the manner in which Congress has delegated discretion to administrative agencies and has attempted to retain oversight of the activities of those agencies).

involved in today's regulatory regime.¹²⁰ The fact that agencies can be staffed with individuals who possess an expertise that may translate into a superior ability to make and enforce specialized regulations also bolsters the case for delegation.¹²¹ Reined in by Congressional control, these agencies can serve a critical role in the administration and development of regulatory law.

Congress has a variety of methods of control at its disposal in engaging with administrative agencies. These include general monitoring and oversight, "ad hoc monitoring," legislation, and appropriations.¹²² While it has not been the focus of as much scholarly literature as other forms of legislation, Congress's constitutional appropriations power has long been an extremely effective tool in controlling federal agencies.¹²³ In fact, in recent history Congress successfully used its power of the purse to coerce the Federal Trade Commission into revising its policies and priorities by drastically slashing its budget.¹²⁴ Regardless of the effectiveness of many of these means of control, the principles of non-delegation counsel restraint, particularly in the use of monitoring to influence agency actions.¹²⁵

Congressional control is certainly vital to the legitimacy of the administrative state, but where the control becomes absolute, influential legislators have a cheap and easy lawmaking tool at their disposal. Rather than having to gather enough support for an appropriations bill to cut the agencies' funding or for an amendment to

120. *Id.* at 2261 (identifying expertise as a traditional justification for delegating broad powers to agencies).

121. *Id.*

122. See Kenneth W. Clarkson & Timothy J. Muris, *Constraining the Federal Trade Commission: The Case of Occupational Regulation*, 35 U. MIAMI L. REV. 77, 90 (1980) (listing possible methods of Congressional control).

123. See PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, GELLHORN AND BYSE'S ADMINISTRATIVE LAW CASES AND COMMENTS 222 (rev. 10th ed. 2003), which states:

One of the most important determinates of regulatory behavior is virtually invisible to administrative law. Rarely do legislative decisions to appropriate, or executive decisions to spend, present themselves in a form that the judiciary will see as a 'case' or 'controversy.' The other two branches, however, have long recognized the power of money to shape public policy.

124. See U.S. CONST. art. 1, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."); *id.* § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ."); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 775 (1983) (describing Congress's success in 1979 in forcing changes in FTC policy by withholding appropriations).

125. There is a concern about congressional aggrandizement that if Congress can delegate broad authority to an agency and can easily take some of that power back through means that are less than those required by the legislative process, that Congress has a cheap and easy means to make "law."

the Clayton Act to alter the mission and procedures of the FTC and the Antitrust Division, Senator Hollings was able to accomplish his goal with a few vocal outbursts.¹²⁶ Administrative agencies may be most effective when they are allowed to undertake their delegated mission within the boundaries of clear controlling legislation.¹²⁷ Here Hollings was able to exploit the broad delegation to the FTC and the Antitrust Division by stepping into the void of explicit legislation and inserting his personal preferences.

Hollings's actions appear to reflect the political maneuverings of a single congressman rather than the will of a Congress interested in derailing the Accord. The troubling aspect of this episode is not that Congress *could* cut or threaten to cut agency funding in an expression of displeasure at agency activities, for it is undisputed that it could.¹²⁸ The troubling notion is that a lone Senator was able to change a substantively sound agency policy *simply by threatening* to cut funding. That he was able to succeed is potentially indicative of systematic failure where, despite the strength of their agreement and having precedent on their side, the heads of these two administrative agencies were vulnerable to the pressure of one legislator.

Realistically, this type of behavior happens all of the time and it is very unlikely to change. Members of Congress influence law and policy through informal channels on a regular basis, and they find particular success in doing so where the delegations of authority to agencies are broad and vague.¹²⁹ But when this type of informal pressure wins out over a well-considered positive administrative reform, there is cause for concern that legitimate policy considerations are being subsumed by a powerful legislator's idiosyncratic desires.

Individual members of Congress will continue to find success in controlling the actions of administrative agencies, particularly where Congress has delegated broad authority to the agencies. It is important to identify possible solutions which will bring balance to the relationship between the FTC, the Antitrust Division and Congress. There will always be the risk that a single politician will be able to steer federal antitrust policy and procedures until the FTC and the

126. See Sikora, *supra* note 3, at 13.

127. See Kagan, *supra* note 7, at 2255-56 (describing one theory of administrative action, the "classical 'transmission belt' theory," under which Congress delegates "specifically and clearly to administrative agencies" and "administrative officials may exercise coercive powers only as authorized by and in conformity with legislative directives").

128. *Id.* at 2259 & n.38; see also STRAUSS ET AL., *supra* note 123, at 234 (explaining that "Congress has become adept at using the appropriations power as a way to force course-corrections in administrative policy").

129. See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 55-56 (1993) (discussing Congress's tactic of delegating broad powers to agencies, allowing pressures from powerful interests to influence the agencies).

Antitrust Division are sufficiently empowered to withstand such pressure. If we are concerned about the outcome of Hollings's actions, we may be able to minimize the effect of similar occurrences by narrowing the delegation to agencies, empowering agency heads, or restructuring agency decisionmaking. The following Part will address these three possible approaches.

VI. SOLUTION: THREE APPROACHES TO FOSTERING AN ENVIRONMENT CONDUCTIVE TO INTERAGENCY ENFORCEMENT REFORM

The status quo in federal antitrust enforcement is inadequate. The current system is opaque, inefficient, and it is overseen by administrators who have been procedurally and politically crippled. The inequities in the relationship between the federal antitrust agencies and Congress must be addressed before meaningful and lasting reform can occur. This Note proposes three approaches to improving the current state of federal antitrust enforcement and creating an environment in which the 2002 Accord could succeed: (1) amending the HSR Act; (2) improving the political strength of appointees to head the FTC and Antitrust Division; or (3) engaging in notice-and-comment rulemaking.

An important caveat regarding the highly politicized nature of this situation must accompany any proposal. Regardless of what structural or procedural reforms are introduced, the actors involved are political creatures, and there will always be informal political tensions. Senator Hollings was able to do what he did because of his political capital, including his seniority in the Senate, and his connections. Some legislators, and for that matter some agency heads, will wield more power than others simply due to personal and political peculiarities. Hollings's threats would not have been successful if James and Muris had not believed that he would likely be successful in slashing their budgets or upending their careers.¹³⁰ While we cannot know what would have happened had they not rescinded their agreement, Hollings may have been able to garner the support to cut appropriations to the Antitrust Division and the FTC or to propose and pass legislation altering the organic statutes with respect to division of responsibility.¹³¹ If it reached that point, then the aforementioned policy objections to the outcome of the 2002 Accord episode would disappear. These proposals are not directed at

130. See MURIS, *supra* note 40, at 17 (describing Muris' and James' belief that Senator Hollings would object).

131. An additional player who must be taken into account is the President. Presidential acquiescence would have also been necessary for the Merger Accord to survive.

preventing Congress from exercising such power; they suggest only what the FTC, the Antitrust Division, or Congress could do to possibly foster an environment in the future where a substantively strong proposal by the agencies will be more resistant to the political desires of a single politician.

A. Congress Should Increase the Specificity of the HSR Act

First, the most promising solution would require Congress to amend the HSR Act to increase the statute's specificity with respect to the merger clearance process. Paradoxically, the agencies would have a greater ability to resist pressures such as the ones that came from Senator Hollings if the organic statutes delegated *less* discretion with regard to the merger clearance process. As noted above, the Clayton and HSR Acts, along with their accompanying legislative history, provide little guidance to the FTC and Antitrust Division as to how to divide responsibility for enforcement of the merger laws and how to handle potential conflicts between the two agencies.¹³² If Congress were to amend the legislation to provide some general constraints as to how they should set up the clearance process, then there would be less uncertainty about the process that they did implement as long as it did not run afoul of the law's requirements. At present, the legislation delegates nearly complete discretion to set up the procedures and even to define the terms in the Act.¹³³ Because of Congress' broad delegation empowering the FTC with responsibility:

the agency could respond to the needs of a changing economy, shifting its focus to the most serious problems in the economy and enabling it to cope with novel . . . anticompetitive practices. . . . [T]hat broad flexibility takes its toll. It means that, unlike such regulatory agencies as the Federal Communications Commission, the Interstate Commerce Commission, or the Food and Drug Administration, the Federal Trade Commission lacks an industry with a strong vested interest in its continued vitality. Thus any significant law enforcement activity by the agency is likely to receive little support but to generate much controversy and criticism.¹³⁴

Congress could take a number of approaches to amending the HSR Act to provide a more desirable clearance process. On the least invasive end of the spectrum, the amended statute could clarify who should craft pre-clearance agreements and whether they should be subject to periodic congressional scrutiny. Much of the dissent from the two FTC Commissioners who objected to the Accord arose out of a belief that the FTC Chairman should include the entire Commission

132. See 15 U.S.C. § 18a (2006).

133. See *id.* § 18a(d).

134. William J. Baer, *Where to from Here: Reflection on the Recent Saga of the Federal Trade Commission*, 39 OKLA. L. REV. 51, 56 (1986).

in the process.¹³⁵ A simple statutory indication of which actors should be involved in the development of inter-agency agreements would clear up such disagreements. At the other end of the spectrum, Congress could enact language that would control the details of pre-clearance agreements. The new statute could clarify what factors should be considered in determining which agency investigates a given merger, or it could go as far as to divide permanently responsibility for mergers according to industry.

Amending the HSR Act to clarify the manner in which the FTC and the Antitrust Division should construct their inter-agency agreements would be the best of both worlds. As it stands now, the FTC and the Antitrust Division have total discretion over the entire pre-clearance process, which potentially leaves the agencies vulnerable to informal pressures. Not only will more specific legislation strengthen the position of the agency heads in defending their pre-clearance system, it will signal a greater level of formal congressional control as well.

B. Agency Heads Should Be Empowered

Second, if agency heads are not sufficiently empowered, they are more likely to bow to the pressure of vocal politicians. It may be difficult, however, to ensure that agency heads are both sufficiently independent to undertake the actions statutorily delegated to them, but sufficiently beholden to Congress (and the President) to ensure that they remain responsive to the branches that created and empowered them in the first place. Just as in all politics, personality, experience, and connections matter, so a politically savvy and influential individual would be the ideal appointee to lead either agency.¹³⁶ A strong leader could ameliorate some of the inherent weakness in his or her agency's position and would be in a better position to resist "illegitimate" external pressures.¹³⁷ A strong agency head does not necessarily translate into a runaway agency that oversteps its bounds: Congress as a whole, as well as the President, still firmly hold the upper hand regardless of who is in charge of an agency at a given time. But a leader who could push back when Congress moves in would ultimately contribute to a balance in which the agency would be more likely to be free to pursue its legislative

135. 2002 Agreement, *supra* note 46; THOMPSON, *supra* note 109.

136. See William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915, 927-29 (1997) (developing a desirable profile for the ideal FTC Commissioner).

137. *Id.* at 917 ("Strong appointees help shape policies that compel assent—or at least discourage challenge—by external bodies.").

mandate within the confines of the delegation, without either overstepping its authority or bowing unnecessarily to encroaching politicians.¹³⁸ Just as the legislative process benefits from the give and take of the two-party system, the administrative state would operate more effectively if there were powerful players on both sides of the debate.

Control follows money, so any examination of the strength of an agency head must keep in mind the impact of appropriations on agency actions. It almost goes without saying that if the agencies were less dependent upon Congress for their funding, the threat of revoked or slashed funding would be substantially dampened, leaving the agencies freer to operate. While the appropriations power rests unquestionably within Congress's constitutional authority, there is room to slightly lessen the impact of a threat to use the power of the purse. In fact, when the economy is strong and a greater number of corporations are merging, the FTC in particular is less dependent upon Congress for its operating budget. Under the HSR Act, corporations who are large enough to trigger the mandatory merger clearance process must pay a fee with their filing.¹³⁹ While filing fees offset a large portion of the FTC's annual budget in the late 1990s, that portion drops substantially in leaner economic times.¹⁴⁰

If the agencies can offset much of their budget requests with the collection of fees, then they will have to rely on Congress for a much smaller portion of their budgets. Budgetary battles may decrease, and the agencies will be at their most powerful to resist Congressional encroachment and will be more likely to carry out policy and procedural initiatives. Thus while there is no way to control

138. See *id.* at 917-18 (arguing that "weak or merely adequate" commissioners have prevented the FTC from achieving its statutory goals).

139. Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act § 605, 15 U.S.C. § 18a n.5 (2006) (Assessment and Collection of Filing Fees). This Act, enacted as a note to the statute, reads in part:

[T]he Federal Trade Commission shall assess and collect filing fees established in subsection (b) which shall be paid by persons acquiring voting securities or assets who are required to file premerger notifications by [the] section 7A of the Clayton Act and the regulations promulgated thereunder. . . . Fees collected pursuant to this section shall be divided evenly between and credited to the appropriations, Federal Trade Commission, 'Salaries and Expenses' and Department of Justice, 'Salaries and Expenses, Antitrust Division'

Id. The filing fees have been adjusted over the years, as have the levels of assets that trigger them, but currently the fees are \$45,000, \$125,000, and \$280,000, depending upon the value of the merger. *Id.*

140. See, e.g., FEDERAL TRADE COMMISSION, CONGRESSIONAL BUDGET JUSTIFICATION 15 (2007), available at <http://www.ftc.gov/os/2006/02/fy07ftccongressbudgetjustification.pdf> (requesting a budget of \$223,000,000, offset by a predicted \$120,000,000 in HSR filing fees and \$18,000,000 in Do Not Call Fees (a new fee collection implemented in FY 2003)).

the economy to ensure that there are enough mergers every year to fund the regulatory agencies that police them, it is clear that the agencies are likely at their height of power in the years when they have less of a stake in the outcome of the appropriations process. The law pertaining to the collection and disbursement of filing fees could be amended to keep any fees collected in excess of budgetary requirements, in an "operating account" of sorts from which the FTC could draw in leaner years. This could lessen the variability in agency independence from the budgetary process from year to year, and would possibly, once again depending on the economy's performance, provide the agencies with a buffer to ameliorate the impact of a threat to cut funding.¹⁴¹ It is also clear that an FTC Chairman will face greater challenges in years with fewer filings, and accordingly will be in greater need of political acumen and influence.

C. The FTC and the Antitrust Division Should Consider Using Notice-and-Comment Rulemaking

Under the HSR Act, the FTC and the Antitrust Division are authorized to "prescribe such other rules as may be necessary and appropriate. . . ." with respect to the premerger notification clearance process.¹⁴² These rules are likely of an interpretive nature, and thus need not be promulgated through notice-and-comment rulemaking.¹⁴³ The agencies may, however, elect to use more formal procedures even though they are not required to do so. The outcome of the 2002 Accord counsels that perhaps they would have found success in fashioning their accord if they had undertaken notice-and-comment rulemaking.

Agencies usually prefer to engage in actions less formal than notice-and-comment rulemaking whenever possible. Informal rulemaking affords them greater flexibility and requires much less in the way of resources. Notice-and-comment rulemaking entails a substantial commitment of time and personnel on the part of the agency. It also locks the agency into the resulting regulations in a way that less formal rulemaking does not. Once a regulation has been promulgated through notice-and-comment rulemaking, the agency is bound thereby; the agency may only amend or repeal the regulation

141. Of course, Congress could "cut" some of the money from filing fees from the FTC's budget during the appropriations process, but the political argument to take money away from the agency is likely weaker than the argument to refrain from appropriating money to the agency.

142. 15 U.S.C. § 18a(d)(2)(C) (2006).

143. See 5 U.S.C. § 553(b)(A) (2006).

through further notice-and-comment rulemaking.¹⁴⁴ As a result, it is usually in an agency's interest to use the least amount of procedure required.

This was a situation, however, where the FTC and the Antitrust Division may have strengthened their position if they had elected to undertake notice-and-comment rulemaking when fashioning the Accord. If, rather than hammering out an agreement through informal means, the agencies had utilized more formal procedure, the resulting agreement would have been better protected from political pressure. It would have provided them with a legal shield should Hollings or another legislator have attempted to thwart the Accord through informal means. The loss of flexibility and the devotion of additional resources may have been justified if the outcome was an agreement that could withstand the political maneuverings of a single vocal Senator. If the agencies were to revisit the proposed Accord, they should therefore consider utilizing notice-and-comment rulemaking.

VII. CONCLUSION: THE RECOMMENDATIONS OF THE ANTITRUST MODERNIZATION COMMISSION AND THE FUTURE

The 2002 struggles over and ultimate defeat of the Accord brought to light some troubling issues with respect to federal antitrust enforcement. While constitutional concerns advocate ensuring that administrative agencies can be controlled to some extent by either or both of the political branches, there is a delicate balance between a runaway agency and an agency which becomes a tool for individual legislators to engage in cheap and easy lawmaking. The lessons of the 2002 stand-off between Muris, James, and Hollings will hopefully inform an examination of possible structural and procedural deficiencies in the relationship between the federal antitrust authorities and Congress.

An examination of these issues must not be performed in a vacuum, for Congress has taken notice of the shortcomings of federal merger enforcement. In 2002 the Antitrust Modernization Committee was charged with a broad mission of "examin[ing] whether the need exists to modernize the antitrust laws and to identify and study related issues."¹⁴⁵ In particular, the AMC identified problem areas in

144. See *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 413 (7th Cir. 1987) (stating that if a regulation is adopted through notice-and-comment rulemaking, "its text may be changed only in that fashion").

145. Antitrust Modernization Commission Act of 2002 § 11053, 15 U.S.C. § 1 n.4 (2006) (Other Provisions).

the interaction between the two agencies.¹⁴⁶ The AMC requested comments concerning whether the continuation of dual federal merger enforcement is advisable, whether there was a difference between the two agencies' actions, and whether in response to "[c]ommenters [who] have advised that disagreements between the FTC and DOJ concerning the clearance of mergers for review by one or the other agency have unreasonably delayed regulatory review in some cases, . . . the FTC-DOJ merger review clearance process [should] be revised to make it more efficient?"¹⁴⁷ The deadline for comments on these issues was July 15, 2005,¹⁴⁸ and the AMC recently presented their final report to the President and Congress on April 2, 2007.¹⁴⁹ The report endorses the substance of the failed 2002 Merger Accord and calls for action on the part of the agencies and Congress to remedy the shortcomings of the current clearance process:

The Federal Trade Commission and the Antitrust Division of the Department of Justice should develop and implement a new merger clearance agreement based on the principles in the 2002 Clearance Agreement between the agencies, with the goal of clearing all proposed transactions to one agency or the other within a short period of time. To this end, the appropriate congressional committees should encourage both antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing the new agreement.¹⁵⁰

Further, the AMC's report recommends that Congress enact legislation requiring the clearance of mergers within a short window of time.¹⁵¹

The AMC highlighted two aspects of the 2002 Merger Accord in particular that it recommends should be part of any new agreement.¹⁵² The commission's final recommendations endorsed the division of responsibility according to industry.¹⁵³ The AMC identified a number

146. INITIAL SLATE OF ISSUES SELECTED FOR STUDY, *supra* note 5, at 2.

147. Request for Public Comment: Enforcement Institutions, 70 Fed. Reg. 28,902-28,907 (May 19, 2005), available at http://www.amc.gov/comments/request_comment_fr_28902/enforcement_comments.pdf.

148. *Id.*

149. ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS, *supra* note 6, at i.

150. *Id.* at 13, 131, 134 (recommendation 22).

151. *Id.* at 14, 131, 137 (recommendation 23). Three commissioners, Burchfield, Cannon, and Yarowsky, did not join this recommendation. *Id.* at 137 n.*.

152. *Id.* at 135-36.

153. *See id.* at 136. The AMC clarified its endorsement of the industry allocations, explaining:

The Commission does not take a position on how industries should be allocated between the two agencies or the specific allocations in the 2002 Clearance Agreement. However, those allocations may provide a useful starting point for discussion, because they were based largely on the agencies' historical experience and resulted from extensive negotiation between the agencies. Far more important than the specific allocations is finding a

of benefits of clearly defined division of responsibility, including improved transparency and predictability, the elimination of “the agencies’ incentives to conduct unnecessary, or more extensive, investigations in ongoing cases to enhance claims of expertise for use in future disputes,” and the elimination of “incentives to fight for clearance to review a particular merger in order to preserve its claims of expertise in future mergers in the same or similar industries.”¹⁵⁴ The recommendations also focused on the 2002 Merger Accord’s use of a “tie-breaker” when the agencies cannot resolve a clearance dispute swiftly.¹⁵⁵ The 2002 Merger Accord instituted an arbitration process in the event of such disputes, but the AMC is open to a number of types of tie-breakers as long as they serve to resolve any disputes quickly.¹⁵⁶

The recommendation that will perhaps have the greatest impact in preventing the recurrence of an episode similar to the 2002 one is the AMC’s recognition of the importance of the agencies’ relationship with Congress to the success of any new proposals.¹⁵⁷ While the AMC recommendations also endorse Congressional enactment of legislation requiring the agencies to clear matters within a statutorily prescribed time, they understand that regardless of any new legislation the underlying relationship between the agencies and Congress will be a key factor in the future development of federal antitrust enforcement.¹⁵⁸ In advocating for the adoption of the principles of the 2002 Merger Accord, the AMC recognizes that

Congressional opposition led to the demise of the 2002 Clearance Agreement, and concern over the potential for renewed congressional opposition has prevented the FTC and the DOJ from seeking to implement a new clearance agreement since 2002. To facilitate congressional support and guidance, the agencies should consult with the appropriate congressional committees in developing a new clearance agreement.

procedure that permits the agencies to reach clearance decisions quickly recommends including an allocation of responsibility.

Id.

154. *Id.*

155. *Id.*

156. *Id.* The AMC discusses other tie-breakers that may be faster than arbitration, including random approaches like coin-flips or a possession arrow. *Id.*

157. *Id.*

158. See *id.* at 137, which states:

The Commission also recommends that Congress enact a statute that requires the agencies to resolve clearance promptly. A statute will impose additional discipline on the agencies to ensure that clearance is resolved expeditiously. Furthermore, it will enhance the ability of Congress to use its oversight authority to monitor the agencies’ compliance with the clearance requirement. Indeed, whether or not Congress enacts legislation in this area, the Commission believes that the timeliness of clearance dispute resolutions should be a part of Congress’ continuing oversight of the agencies.

Congress should encourage the agencies in this process and provide guidance to allow the agencies to implement a clearance agreement that is satisfactory to Congress.¹⁵⁹

The AMC report underscores the fact that before the substantive and procedural reforms of the 2002 Merger Accord can find a new incarnation in future agreements, the troubles that sank Muris's and James's efforts must be addressed fully.

The Antitrust Modernization Commission's recommendations will likely play a large role in the implementation of any solution. If the agency heads possess too little power to assert their interests and particular members of Congress have been able to "capture" the agencies, the weight of recommendations from a bipartisan commission could be an ideal interim solution. If Congressional committees do encourage the agency heads to construct a new merger clearance agreement, the resulting process will be less vulnerable to attack by an individual member of Congress. And if Congress enacts legislation requiring clearance within a set time period, it will narrow the delegation to agencies, eliminating some of the vulnerability the agencies now face. Perhaps the AMC's report will spur Congress to reconsider the merits of the failed 2002 Accord, fostering an environment in which the agencies will be empowered to implement a similar agreement. If the AMC's recommendations go unheeded, however, there will still be considerable work to do to repair the underlying problems in the relationship between these agencies and Congress. Without action on the part of Congress, the President, or the agency heads themselves, the FTC and the Antitrust Division will still suffer from the weaknesses inherent in broad delegation and they will continue to find it difficult to solve the problems of the clearance process on their own.

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159. *Id.* at 136.

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