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Recent Challenges to FTC Constitutionality: Surveying the Landscape

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THIS IS A TIME OF GREAT ACTIVITY and debate in antitrust. Much attention has been paid, appropriately, to the updated merger guidelines and to the proposed overhaul of Hart-Scott-Rodino notification requirements. At the same time, parties defending against Federal Trade Commission (FTC) actions now almost routinely challenge the constitutionality of the agency's structure and practices. What are these attacks, and how are they faring?

Constitutional Challenges to the Structure and Practices of the FTC

The constitutional arguments that have been levied against the FTC are numerous and varied. Consistent with a broader trend in legal challenges to the administrative state,[1] the FTC has faced constitutional challenges to its agency structure and practices in seven separate Clayton Act Section 7 cases since late 2022.[2] These challenges, brought either as counterclaims or as affirmative defenses, encompass six different constitutional arguments. As described below, the first three focus on various aspects of the principle of separation of powers, while the latter three focus on procedural rights granted to parties under the Fifth and Seventh Amendments.

Removal of Officers. One of the most common constitutional challenges to the FTC is that the agency's structure violates Article II, Section I of the Constitution—the executive power to remove officers. This claim was brought in the *ICE/Black Knight, Axon/VieVue, Amgen/Horizon, Illumina/Grail*, and *Novant/Norman & Davis* cases. Supreme Court precedent in cases such as *Seila Law* establishes that the executive power of the President "generally includes the ability to *supervise and remove* the agents who wield executive power in his stead."

Challengers of the FTC argued that the agency's structure betrays this fundamental principle of executive authority vested in the President by Article II. They argue that although FTC commissioners and administrative law judges (ALJs) are executive officers, neither group is easily removable by the President. Commissioners are not removable by the President without a finding of "inefficiency, neglect of duty, or malfeasance in office."[3] Moreover, FTC ALJs are removable only by the FTC commissioners themselves and only for "good cause."[4] This creates a "dual layer of protection" for ALJs, which the Supreme Court ruled unconstitutional in the context of another agency in *Free Enterprise Fund v. Public Accounting Oversight Board*.[5]

The FTC's response to the removal power argument is two-fold. First, the FTC claims that *Humphrey's Executor*, a seminal administrative law case, which dates back to 1935 and dispels this precise claim against the FTC, remains good law. Second, the agency argues that, even if *Humphrey's Executor* were to be overruled, *Collins v. Yellen* requires that, in order to be actionable, an unconstitutional restriction on removal power must cause harm, as defined by the following test:

1. A substantiated desire by the President to remove the unconstitutionally insulated actor;
2. A perceived inability to remove the actor due to the infirm provision; and
3. A nexus between the desire to remove and the challenged actions taken by the insulated actor.

The FTC argued in its Fifth Circuit reply brief is *Illumina/Grail* that there was no dispute that the Commissioners were properly appointed that the parties "cannot show any harm traceable to the removal restriction," and that the claim therefore failed.[6] The Fifth Circuit found that, as the claim was barred by *Humphrey's Executor*, Illumina's Article II challenge failed. The court did not address the causation test outlined in *Collins*.

Nondelegation Doctrine. Another separation of powers argument is based on the "nondelegation doctrine," a longstanding principle regarding the constitutional limitation on Congress's ability to delegate authority to officers of the executive branch.[7] Since 1928, the U.S. Supreme Court has consistently held that the threshold for determining the constitutionality of a Congressional delegation of power to a federal agency is a low one: the only requirement is that Congress must lay down in an agency's enacting statute some "*intelligible principle*" by which the executive branch can carry out the duties assigned to it by the legislature.[8]

Yet, several merging parties have claimed the FTC fails the nondelegation doctrine's low bar. According to arguments in the *Meta/Within*, *ICE/Black Knight, Amgen/Horizon,* and *Illumina/Grail* cases, the FTC's enabling statute fails to set forth any intelligible principle by which the agency can

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legitimately exercise executive powers granted to it by Congress in Section 13(b) of the FTC Act. The language at issue states:

> Whenever the Commission has reason to believe—
>
> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, *would be in the interest of the public*—
>
> the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice.[9]

Challengers have argued that this language does not provide any clarity on the circumstances under which such enforcement actions may be brought and therefore lacks an intelligible principle. Accordingly, they have argued that any enforcement action taken by the FTC is prima facie unconstitutional.

In a response to this claim in Illumina's Fifth Circuit brief, the FTC contended that Section 13(b) is not an unconstitutional delegation of executive power because Congress *did* provide such an intelligible principle, namely that the FTC was to act in the public interest. The FTC argued that federal courts have repeatedly found that "regulation in the public interest" meets the intelligible principle standard.[10] Therefore, Section 13(b) does not run afoul of Article I of the Constitution, and neither do the FTC's enforcement actions.

In its Fifth Circuit reply brief, Illumina responded by highlighting that this same language of acting "in the interest of the public" appears in the statute that authorizes the Commission to bring actions in a Part III administrative proceeding.[11] But, they say, this does not provide clear guidance to the agency as to how it should decide in *which* forum to bring the case: federal court or in a Part III administrative proceeding, which is the real question at issue. The brief argued that this problem is virtually identical to the one in *Jarkesy v. SEC*, where the Fifth Circuit found that this same ambiguity about venue for the SEC created the "power to assign disputes to agency adjudication," which is a "legislative power."[12] And, as in *Jarkesy*, this constitutes a violation of the nondelegation doctrine, which "independently warrants vacating the agency's decision." The *Jarkesy* case was argued before the Supreme Court on November 29, 2023, and a decision is pending at the time of this article.

Judicial Powers. The final separation of powers argument is that the structure of the FTC is an improper delegation of Article III *judicial* powers to the Commission. Article III, Section I of the Constitution states: "[t]he *judicial power* of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[13] The Supreme Court has interpreted this clause to mean that Congress may not "withdraw from judicial cognizance any matter that, from its nature, is the subject of a suit at the common law, or in equity, or admiralty."[14] Further, "private rights" issues, which include the three "absolute" rights to life, liberty, and property, must be adjudicated by Article III courts.

Defendants in the *ICE/Black Knight, Axon/VieVue,* and *Novant/Norman & Davis* cases argued that, because the FTC's administrative proceedings determine the rights of parties to engage in private transactions, these proceedings necessarily invoke private rights issues. Further, an FTC order can also bring about the possibility of future civil penalties, requiring a party to surrender its private property. Thus, such rights should be determined not by Commissioners sitting to reach a decision on the validity of an ALJ's ruling, but by Article III courts.[15]

Additionally, these same defendants have argued that while judicial review of agency decisions exists, it is limited. Although courts review application of the law de novo, the agency's findings of fact are conclusive if supported by evidence.[16] Defendants argued that, coupled with the fact that FTC enforcement actions frequently determine private rights issues, this unconstitutionally strips power from the federal courts and places it in the hands of the agency.

The FTC has not directly addressed this argument but, as discussed below, has responded to related claims that its administrative practices violate the due process clause of the Fifth Amendment.

Due Process. Claims that the FTC's adjudicative proceedings violate Article III are closely related to Fifth Amendment due process arguments. Both claims argue that Article III judges, rather than ALJs, are required to adjudicate Clayton Act Section 7 cases.

There are two broad categories of due process claims levied against the FTC.[17] The first, exemplified by the *Illumina/Grail* appellant brief, argues that the very structure of the FTC violates due process because it fails to provide parties with a neutral arbitrator. Federal judges and juries are deemed impartial; whereas, in Part III proceedings, critics argue, the FTC acts as the accuser, fact finder, and adjudicator. Appellants in the *Illumina/Grail* case argued that while simply combining investigative, prosecutorial, and judicial functions in the Commission does not necessarily violate due process, it does where "the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable."[18] Such an unconstitutional potential for bias exists "when the *same person* serves as both accuser and adjudicator in a case."[19]

According to Illumina, the adjudicatory process within the FTC embodies this exact type of potential for unconstitutional bias because "[t]he Commission voted out the complaint after investigation, directed its prosecution and then passed judgment in overruling the ALJ." This, they claimed, means the FTC played the roles of "investigator, prosecutor, and judge."[20] Therefore, the FTC violated the due process

rights of the parties by "exercising investigative, prosecutorial and adjudicative powers in the same case, in a manner that rode roughshod over Petitioners' rights" because "a fair trial in a fair tribunal is a basic requirement of due process."[21] The Fifth Circuit concluded that the FTC's structure combining prosecutorial and adjudicative functions does not deprive parties of due process under the court's 1982 decision in *Gibson v. FTC.*

However, the Fifth Circuit determined that the *Illumina* parties never offered evidence of "actual bias" but rather focused on the potential due process concerns by presenting a theoretical bias. According to the FTC, the fact that the Commission ruled in Illumina's favor on "several important issues" evidenced a lack of bias implicating a due process violation.

The second type of due process claim argues that practical differences between litigating a Section 7 merger challenge against the FTC versus the Department of Justice result in inconsistencies that violate merging parties' due process rights under the Constitution.[22]

For instance, federal courts are bound by the Federal Rules of Evidence (FREs) and of Civil Procedure (FRCPs), and FTC administrative proceedings are not.[23] Because the DOJ may bring cases only in federal district courts, appeals proceed directly to a federal court of appeals, whereas findings of an FTC ALJ are first reviewed by the Commission itself.[24] The Commission is granted the authority by the FTC Act to "modify or set aside, in whole or in part, any report or any order made or issued by it" under the enabling statute. This is particularly relevant given recent changes to formal FTC procedural rules. On July 5, 2023, the Commission formally amended its rules of practice so that ALJs presiding over an administrative hearing render a "recommended" decision rather than an "initial" decision.[25]

The FTC Act also states that the Commission's findings of fact, if supported by evidence, "shall be conclusive."[26] However, even if parties attempt to adduce additional evidence on appeal to a federal court *and* the judge finds that the FTC should have addressed this evidence, the court is directed to simply send the parties back to Part III for the evidence to be taken in front of the Commission, which "*may* modify its finding as to the facts, or make new findings. . . ."

So while Section 7 cases brought by the DOJ are subject to the procedural and evidentiary rigors of the federal court system, FTC administrative proceedings may differ dramatically as: (i) the Commission is not bound to follow the FREs or FRCPs; (ii) it may determine the findings of fact itself; (iii) it may rewrite or disregard the ALJ's decision; and (iv) on appeal to a circuit court, the Commission's findings of fact are given differential treatment. These differences, it is argued, may be outcome determinative.

Equal Protection. Defendants in the *ICE/Black Knight, Axon/VieVue, Amgen/Horizon, Illumina/Grail*, and *Novant/Norman & Davis* cases contended that the differential treatment of Section 7 cases litigated against the FTC and the DOJ also violates the Equal Protection Clause of the Fifth Amendment.[27] The Equal Protection Clause prevents differential treatment between similarly situated parties when there is no rational relationship between the disparity in treatment and some legitimate governmental purpose (i.e., if the differential treatment does not survive rational basis review).[28] The argument here is that assignment of the case to the FTC rather than the DOJ is arbitrary, lacks a rational basis, and is potentially outcome-determinative, rendering it a violation of defendants' rights to equal protection.

The FTC responded that its procedure with the DOJ for allocating merger enforcement cases meets this standard because allocation is based on agency resource constraints, avoidance of duplicative proceedings, and experience of the agencies in bringing enforcement cases in the relevant industries, all of which are legitimate governmental interests. Further, the Commission argued, equal protection does not guarantee the subject of the government enforcement action a right to its preferred forum, even when substantive rights are at issue. And in any event, Illumina did not allege that any of these procedural differences materially affected the outcome of the actual case at issue.

Right to Jury Trial. Finally, the *Amgen/Horizon* and *ICE/Black Knight* defendants claimed that the Commission's structure violates the parties' Seventh Amendment right to a jury trial. For the reasons discussed above, administrative adjudication by the Commission determines the fate of the parties' private property rights. The Seventh Amendment is implicated when claims arise "at common law," which includes private rights cases. Therefore, FTC Part III proceedings subject parties in Section 7 cases to an adjudication of private rights issues without the benefit of a jury trial. The FTC has not responded to this argument, as it is no longer at issue following the dismissal of both administrative proceedings.

Precedent: the FTC and the Administrative State

Humphrey's Executor and the Presidential Removal Power. *Humphrey's Executor*[29] is a key precedent that is controlling on many relevant points here. The decision concerned the FTC specifically and describes in detail the reasons why the Commission's structure justifies its insulation from the removal power vested in the President by Article II.

The plaintiff was the executor of William E. Humphrey's estate. Humphrey was a former Commissioner of the FTC, appointed by President Hoover, with a seven-year term set to expire in September 1938. However, roughly two years into his term, in July 1933, the newly sworn in President Roosevelt asked Humphrey to resign, claiming that "the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection."[30] After some correspondence, President Roosevelt wrote Humphreys again, expressing that he felt their minds did not "go along together on either the policies or the administering of the Federal Trade Commission."[31] But Humphreys refused to

resign and instead was removed from office by President Roosevelt in October 1933. Humphreys did not heed the President's final letter and insisted he was still a member of the Commission and was entitled to the salary owed to him. The Supreme Court case that followed addressed two issues: (i) whether the FTC Act limited the removal power of the President (except in the instance of the causes listed in the statute); and (ii) if yes, whether such a restriction was unconstitutional.

On the first question, the Court held that the intent of the FTC Act was indeed to restrict the removal power of the President based on the congressional intent it found in the language of the statute and legislative debates and reports to create a "body of experts . . . independent of executive authority."[32]

Turning to the second question, the Court upheld the constitutionality of the statute, holding first that the FTC could not "in any proper sense be characterized as an arm or an eye of the executive" because its duties were to act as a "legislative or as a judicial aid."[33] This meant that the FTC functioned solely as an "administrative body," whose powers were "quasi legislative" or "quasi judicial" rather than executive in nature. The Court supported this rationale by pointing to the following characteristics: (i) Commissioners have fixed terms, allowing them to act independently of the executive; (ii) the Commission by statute may not have more than three of five Commissioners from the same political party, making it "non-partisan" by design; and (iii) the Commissions' actions require "the trained judgment of a body of experts" who are "informed by experience," which is not an executive function. Therefore, because the Commission did not exercise executive powers, the Court held that "illimitable power of removal is not possessed by the President in respect of officers of the character of those just named."[34]

Seila Law* Refused to Expand *Humphrey's Executor. Several decades later, the Supreme Court took up a similar case involving the Consumer Financial Protection Bureau (CFPB) in *Seila Law*. Similar to FTC Commissioners, the Director of the CFPB serves a five-year term and may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." However, unlike the FTC whose Commissioners were appointed to the Commission in a "non-partisan" manner and served staggered terms to promote the "accumulation of technical expertise," the CFPB had no sitting committee or board, and the Director was the sole leader of the agency. Justice Roberts writing for the majority noted that while the Court was not revisiting *Humphrey's Executor,* it declined to expand its ruling to "a freestanding invitation for Congress to impose additional restrictions on the President's removal authority."[35] The Court held the Congressional restriction on the President's removal power unconstitutional.

Axon and Justice Thomas's "Open Door" Solicitation. *Axon Enterprises, Inc. v. FTC* is the most recent constitutional challenge to the FTC to reach the Supreme Court. Axon brought an action in federal district court about the constitutionality of the FTC's review of its case in a Part III administrative proceeding. The district court dismissed the claim for lack of federal question jurisdiction, stating that the relative review schemes imposed by Congress displaced federal court jurisdiction. The district court's decision would require the company to raise its structural constitutional claim "during the administrative process and then renew them" if it appealed the FTC administrative decision to a court of appeals. On appeal, the Ninth Circuit acknowledged that while not every type of claim in an FTC administrative proceeding falls under its statutory-review scheme, Axon's constitutional challenges did because the scheme guaranteed them "meaningful judicial review."

The Supreme Court granted review. In the Court's decision, Justice Kagan applied the *Thunder Basin* test factors, which help determine whether a statutory review scheme divests district courts of their ordinary jurisdiction.[36] For the first factor, whether precluding district court jurisdiction "could foreclose all meaningful judicial review," the Court highlighted that, while constitutional claims could in theory be brought on appeal to the circuit courts, this ignores the fact that both parties claim a "here-and-now" injury. The very fact that either party was to go through the administrative proceeding *at all* was the alleged injury, and would remain even if the administrative proceeding was decided in their favor. Therefore, judicial review of the constitutional claims after the fact would come too late to give the parties "meaningful" judicial review.

On the second factor, whether the claim was considered "collateral" to the proceeding, the Court held much the same. The challenge to the general legitimacy of the proceedings rather than specific actions taken within the proceedings themselves rendered the challenges "collateral."

The final factor, that the claims in question were "outside the agency's expertise," was similarly found for appellants because "[t]he Commission knows a good deal about competition policy, but nothing special about the separation of powers."[37] The Court therefore remanded the case to the district court for review of the constitutional claims. On October 6, 2023, the FTC dismissed its claims against Axon, citing an "unlikely possibility of reaching a timely resolution on the antitrust merits."[38]

In a concurring opinion, Justice Thomas signaled his "grave doubts" about the constitutionality of Congress delegating adjudication of "core private rights" to administrative agencies. In closing, Justice Thomas stated that, in an appropriate case, the Court "should consider whether such schemes and the appellate review model they embody are constitutional methods for the adjudication of private rights."[39]

Due Process Concerns with the "Substantial Evidence" Standard of Review

The *Illumina/Grail* litigation in the Fifth Circuit reflected some contention over the deferential standard of review

granted to the Commission's fact finding on appeal to an Article III court. However, appellants took issue only with the Commission's decisions about the administrative record in order to provide evidence of the Commission's bias. Scholarship by Evan Bernick suggests there may be an additional, broader challenge that has yet to be raised: that the deferential standard of review provided for in the FTC Act for the court of appeal's review of Commission fact finding, *itself* could violate parties' due process rights.[40]

Universal Camera *and the "Record as a Whole.*" The FTC Act states that "the findings of the Commission as to the facts, *if supported by evidence*, shall be conclusive." This same language is found in the enabling statutes of many administrative agencies and was interpreted by the Supreme Court in *Universal Camera Corporation v. National Labor Relations Board* as "essentially identical" to the "substantial evidence" standard of review. This means that an Article III court must accept the Commission's findings of fact if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[41] And, as the Fifth Circuit stated in its *Illumina* decision, this is true "*even if* other suggested alternative conclusions may be *equally or even more reasonable and persuasive*."[42]

The *Universal Camera* decision provides a thorough account of the legislative debate over the substantial-evidence test. The Court detailed dissatisfaction in Congress with how narrowly the courts applied the test, essentially resulting in a de facto stamp of approval for NLRB fact finding. "[B]y imperceptible steps" the Court stated, courts adopted the idea that the evidence supporting a Board's result was "substantial" when the reviewing court "could find in the record evidence which, when viewed in isolation, substantiated the Board's findings."[43]

The Court held that the Administrative Procedure Act and the Taft-Hartley Act required courts to take on more responsibility for the "reasonableness and fairness" of Board decisions and that they should be "influenced by a feeling that they are not to abdicate the conventional judicial function."[44] The Court continued that, in reviewing "the record as a whole" for substantial evidence, Board findings are entitled to respect but should be set aside when the record clearly precludes the court from justifying the Board's decision based on witness testimony or the Board's "special competence."

But this was a relatively narrow holding. The Supreme Court essentially held that "substantial evidence" has to be based on *everything* in the administrative record, not simply the evidence that supports the findings of the agency.

In *Trans Union Corp. v. FTC*, the D.C. Circuit expanded on the substantial-evidence standard. Here, the credit reporting agency challenged an FTC finding that banks asked about the existence of a consumer's "tradeline" (a set of personal identifying information) because it is a factor in determining that consumer's credit eligibility. Trans Union argued that this was incorrect: banks did not ask for a consumer's tradeline to *determine* their credit eligibility. Rather, they asked so that they could try to find out if the consumer had enough information to *make* an eligibility determination. The Court held that the factual accuracy of the statement was irrelevant because "our task is limited to determining whether substantial record evidence supports the Commission's finding . . . Because the record contains such evidence, we have no basis for questioning the Commission's decision."

Crucially, the *Universal Camera* and *Trans Union* decisions provide guidance for how courts are to review the administrative record, but are silent on the issue of *how* the administrative record is created in the first place.

The FTC and the "Record as a Whole." Because an FTC administrative proceeding may differ greatly from that of a federal court, it is possible that the FTC's record could be substantially different from what would appear in the record of an Article III adjudicatory proceeding on the same case. But as the case law above suggests, even when courts review the "record as a whole," they tend to analyze the factual accuracy of statements within the four corners of the FTC's record itself. Bernick has argued that the substantial-evidence standard creates due process concerns.

For example, appellant in Illumina's Clayton Act Section 7 case before the Fifth Circuit specified several instances where the Commission made procedural decisions that the merging parties claimed would not pass muster in an Article III court. Appellant brief argued that the FTC: (i) relied on nonparty testimony given in proceedings that neither Petitioners nor counsel were permitted to attend; and (ii) relied on deposition testimony where the witness testified in the administrative trial or was otherwise available to testify. Appellant argued neither would be permitted in an Article III court under Rule 32(a) of the FRCP, which governs the use of depositions in court proceedings.[45] Appellant also claimed the FTC relied on an economist that the ALJ found unqualified, refused to consider contradictory evidence from its own witness, and ultimately overrode the opinion of the ALJ as a whole. Although Illumina ultimately chose to divest Grail and not to appeal the Fifth Circuit's decision, it is notable that the facts laid out in the appellants' counterclaims seem to align with the solicitation in Justice Thomas's concurrence in *Axon*.

Illumina's argument is an example of how future parties might make the claim that the substantial-evidence standard of review violates their due process rights under the Fifth Amendment. The deferential standard given to the FTC's fact finding is based on the expected neutrality of the FTC as an enforcement agency. But what happens if the Commission's record includes evidence that arguably would not pass muster in an Article III court (or does not include things that would)? And as IQVIA argued in an affirmative defense to its proposed acquisition of Propel Media, what if, even though the Commission is designed to be bipartisan by statute, it functionally operates with three Commissioners all from the same political party?

These open-ended questions may provide fodder for future parties to challenge the constitutionality of the Commission's decisions. Future parties may adopt Bernick's view that the substantial-evidence standard fails to account for these potential biases, and in doing so, places the responsibility of upholding merging parties' due process rights in the hands of the very body charged with bringing an enforcement action and creating the record in the first place.

Conclusion

The FTC serves an important role in the preservation of the U.S. free enterprise system of market competition. Recently, the FTC has been under constitutional attack in myriad ways. A legal scholar offers yet another ground to challenge the constitutionality of the FTC, arguing that the standard of review in Article III courts is too deferential to the Commission in violation of the Due Process Clause. As the Fifth Circuit's decision in *Illumina* suggests, full consideration of these constitutional challenges might require reaching the Supreme Court. ■

[1] *See, e.g.*, SEC v. Cochran (consolidated with Axon Enterprises, Inc. v. FTC), 598 U.S. 175 (2023) (challenging parts of the SECs agency structure as unconstitutional); SEC v. Jarkesy, No. 22-859 (U.S. Nov. 29, 2023) (challenging whether agency adjudication violates the nondelegation doctrine); Loper Bright Enterprises v. Raimondo, No. 21-5266 (U.S. Jan. 17, 2024); and Relentless, Inc. v. Department of Commerce, No. 22-1219 (U.S. Jan. 17, 2024) (seeking a narrowing or reversal of "Chevron Deference" as adopted by the Supreme Court in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.,* 467 U.S. 837 (1984)). The U.S. Supreme Court heard oral arguments in *Loper Bright Enterprises* and *Relentless* on January 17, 2024.

[2] The relevant proposed transactions associated with these claims are: (i) Meta's acquisition of Within, Order Granting in Part Motion To Strike at 12, FTC v. Meta Platforms Inc., 654 F.Supp.3d 892 (N.D. Cal. 2023) (No. 5:22-cv-04325-EJD) (ii) Axon Enterprise's acquisition of VieVu, Order Dismissing Complaint, Axon Enter. Inc., FTC Docket No. 9389 (Oct. 6, 2023); (iii) Intercontinental Exchange's ("ICE") acquisition of Black Knight, Decision and Order, Intercontinental Exchange, Inc., FTC Docket No. 9413 (Nov. 3, 2023); (iv) Amgen's acquisition of Horizon Therapeutics, Decision and Order, Amgen Inc., FTC Docket No. DO9414 (Dec. 14, 2023); (v) IQVIA's proposed acquisition of Propel Media, Opinion & Order: re: Motion to Strike Defendants' Constitutional and Equitable Affirmative Defenses at 14, FTC v. IQVIA Holdings Inc., No. 23 CIV. 06188 (ER) (S.D.N.Y. 2023); (vi) Illumina's attempted acquisition of Grail, Illumina, Inc. v. Fed. Trade Comm'n, 88 F.4th 1036 (5th Cir. 2023); and (vii) Novant Health's proposed acquisition of Lake Norman Regional Medical Center and Davis Regional Medical Center, Administrative Part 3 Complaint, FTC Docket No. 9425 (Jan. 25, 2024). On November 11, 2023, defendant Welsh Carson Entities filed a motion to dismiss a case brought by the FTC in the Southern District of Texas against itself and U.S. Anesthesia Partners, claiming that the case should be dismissed on statutory and pleading grounds, and in the alternative, under an Article II unconstitutional delegation of powers theory.

[3] 15 U.S.C. § 41.

[4] 5 U.S.C. § 7521(a), (b)(1).

[5] 561 U.S. 477, 514 (2010).

[6] Brief for Appellant at 17, Illumina, Inc. v. Fed. Trade Comm'n, 88 F.4th 1036 (5th Cir. 2023).

[7] *See* U.S. Const. art. I, § 1 ("[a]ll legislative Powers herein granted shall be vested in a Congress of the United States").

[8] *See* J.W. Hampton, Jr. & Co. v. U.S., 276 U.S. 394 at 409 (1928).

[9] *See* 15 U.S.C. § 53(b)(1)-(2) (emphasis added).

[10] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 25 (1932); Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943); United States v. Diggins, 36 F.4th 302, 319 n. 19 (1st Cir. 2022).

[11] *See* 15 U.S.C. § 45(b); 15 U.S.C. § 53(b)(1)-(2).

[12] *See* Jarkesy v. SEC, 34 F.4th 466, 460-61 (5th Cir. 2022).

[13] U.S. Const. art. III, § 1 (emphasis added).

[14] *See* Stern v. Marshall, 564 U.S. 462, 484 (2011).

[15] Respondents in *Novant/Norman & Davis* have similarly claimed a violation of Article III as an affirmative defense, but stated simply that adjudication of the complaint by an ALJ and the Commission violates Article III and the doctrine of separation of powers. *See* Answers and Defenses of Respondent Novant Health, Inc., FTC Docket No. 9425 (Feb. 8, 2024).

[16] 15 U.S.C. § 45(c).

[17] As with its other constitutional affirmative defenses, respondents in *Novant/Norman & Davis* alleged generally that the FTC's "procedures and its administrative proceedings" violate the parties' due process rights. *See* Answers and Defenses of Respondent Novant Health, Inc., FTC Docket No. 9425 (Feb. 8, 2024). Defendants in *Meta/Within* similarly claimed that commencement of the action against Meta by the FTC was a violation of Meta's due process rights and that this barred the FTC from continuing the action. See Respondent's Answer and Affirmative Defenses, FTC Docket No. 9411 (August 2022).

[18] *See* Brief for Appellant at 23, *Illumina*, 88 F.4th 1036 (5th Cir. 2023) (No. 23-60167) (citing *Withrow v. Larkin*, 421 U.S. 35, 47, 48 (1975)); *Illumina*, 88 F.4th at 1047.

[19] *See* Williams v. Pennsylvania, 579 U.S. 1, 8 (2016) (emphasis added). To our knowledge, following the FTC's dismissal of the administrative complaint against Axon on 10/06/2023, IQVIA's affirmative defenses were stricken with prejudice on 10/31/2023, and Illumina announced its divestiture of Grail, Novant's affirmative defense is the sole remaining due process claim against the FTC.

[20] Brief for Appellant at 24, *Illumina*, 88 F.4th 1036 (5th Cir. 2023), citing *Axon*, 598 U.S. 175, 215 (2023) (Gorsuch, J., concurring). It is worth noting that Illumina's reply brief contends that "The Commission" acted as prosecutor and judge of its own case, without noting a particular person at the Commission who was engaged in both, which appears to be the key point of the *Williams* decision.

[21] *See* In re Murchison, 349 U.S. 133, 136 (1955).

[22] See relevant affirmative defenses and counterclaims in the *ICE/Black Knight, Axon/VieVue, Amgen/Horizon,* and *Illumina/Grail* cases. Note that Illumina's complaint discusses the differential procedural and evidential standards discussed in this section, but use particular examples to provide evidence of "bias" rather than discussing them as due process violations in the abstract. *See id.* at 25-26.

[23] Interestingly, Appellants in the *Illumina/Grail* appeal quote from a pre-hearing transcript wherein the ALJ stated "the rules were changed after I came to the [FTC] because of rulings I continually made applying [the] Federal Rule[s] of Evidence," citing Pre-Hearing Tr. 66.

[24] *See* 15 U.S.C. § 45(b).

[25] *See* 88 FR 42872.

[26] *See* 15 U.S.C. § 45(c).

[27] Here, the *Novant/Norman & Davis* parties argued only that the Commission's procedures give "unfettered discretion to the FTC to arbitrarily subject Novant to administrative proceedings in addition to, or in lieu of, proceedings before an Article III judge." *See* Answers and Defenses of Respondent Novant Health, Inc., FTC Docket No. 9425 (Feb. 8, 2024).

[28] *See* Tennessee v. Lane, 541 U.S. 509, 522 (2004); Heller v. Doe, 509 U.S. 312, 320 (1993).

[29] *See generally* Humphrey's Executor v. U.S., 295 U.S. 602 (1935).

[30] *See id.* at 618.

[31] *See id.* at 619.

[32] *See id.* at 625.

[33] *See id.* at 628.

[34] *See id.* at 629.

[35] *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2206 (2020).

[36] *See* 28 U.S.C. § 1331.

[37] *Axon*, 598 U.S. at 195.

[38] Order Dismissing Complaint, Axon Enter. Inc., FTC Docket No. 9389 (Oct. 6, 2023)

[39] *Id.* at 204 (Thomas, J., concurring).

[40] *See* 15 U.S.C. § 45(c); Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?,* 16 GEO. J.L. & PUB. POL'Y 27 (2018).

[41] *See* Universal Camera Corp. V. N.L.R.B., 340 U.S. 474, 477 (1951); *see also* Biestek v. Berryhill, 139 S.Ct.1148, 1157 (2019) (holding that there is no categorical rule that the testimony of a vocational expert refusing a request for underlying data does not qualify as substantial evidence).

[42] *Illumina*, 88 F.4th at 1046 (emphasis added; internal quotation marks omitted).

[43] *See Universal Camera*, 340 U.S. at 478.

[44] *See id.* at 490.

[45] *See* Brief for Appellant at 25-26, *Illumina*, 88 F.4th 1036 (5th Cir. 2023) (citing Fed. R. Civ. P. 32(a)(1)(A), 32(a)(4)).