Oral Statement of Commissioner Melissa Holyoak

In the Matter of the Non-Compete Clause Rule
Matter Number P201200
Delivered at the Open Commission Meeting
April 23, 2024

Article I of the Constitution vests "[a]ll legislative Powers" in Congress.[1] "[B]y vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure 'not only that all power [w]ould be derived from the people,' but also 'that those [e]ntrusted with it should be kept in dependence on the people.'"[2] While many lament the gridlock in Congress, the lawmaking process was designed to be difficult and to include "many accountability checkpoints."[3] Allowing Congress to divest its legislative power to the Executive Branch bypasses those checkpoints and compromises the integrity of the Constitution's separation of powers.[4] Yet courts tolerate legislative delegations to agencies only to "fill in statutory gaps," and apply various doctrines to keep such limited delegations in check.[5]

The modern administrative state may be accustomed to the ease and breadth of legislative rulemaking,[6] but an agency should not lose sight of these constitutional proscriptions and should, therefore, approach legislative rulemaking with circumspection—lawmaking is an extraordinary power and agency lawmaking tests the delicate balance of separation of powers.[7]

With these important constitutional issues in mind, a threshold question must be answered for the Non-Compete Clause Rule ("Final Rule"): Does the Commission have authority to promulgate legislative rules under Section 6(g) of the FTC Act? I believe the answer is no and therefore I respectfully dissent. Further, even assuming, *arguendo*, the Commission has such rulemaking authority, I believe there is no clear congressional authorization under Section 5 of the FTC Act for promulgation of the Final Rule and therefore agree with Commissioner Ferguson's reasons for rejecting the Rule.

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[1] U.S. Const. Art. I.
[2] *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 737-38 (2022) (Gorsuch, J., concurring) (quoting The Federalist No. 37, 227 (J. Madison)).
[3] *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring).
[4] *See W. Virginia*, 597 U.S. at 739 (Gorsuch, J., concurring) ("Permitting Congress to divest its legislative power to the Executive Branch would 'dash [this] whole scheme.'") (quoting *Dep't of Transp.*, 575 U.S. at 61 (Alito, J., concurring)).
[5] *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (explaining that in "policing improper legislative delegations[,]" "hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines").
[6] *See City of Arlington, Tex. v. F.C.C.,* 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) ("The administrative state 'wields vast power and touches almost every aspect of daily life.'") (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd*., 561 U.S. 477, 499 (2010)).
[7] *See e.g*., *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab*., 142 S. Ct. 661, 665 (2022) (per curiam) ("Administrative agencies are creatures of statute" and "accordingly possess only the authority that Congress has provided.").

The Commission asserts that "Section 5 and Section 6(g), *taken together*, empower the Commission to promulgate rules for the purpose of preventing unfair methods of competition."[8] Turning first to Section 6(g), the original Act gave the Commission the power "[f]rom time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of the Act."[9] Based on the plain language in Section 6(g), I am persuaded that a reviewing court would interpret Section 6(g), as supported by the text and structure of the FTC Act, to authorize only *procedural* or internal operating rules, not substantive legal rules.[10]

To support its argument that the FTC Act confers competition rulemaking authority to the Commission, the majority relies heavily on the reasoning found in *National Petroleum Refiners Association v. FTC*.[11] That reliance is misplaced. The court there approached its interpretation of Section 6(g) quite differently than a court would approach the issue today, reasoning that courts must interpret statutes "liberally" to construe "broad grants of rule-making authority."[12] But *National Petroleum*'s framing and approach to statutory interpretation and delegation questions fell out of favor decades ago.[13]

The Commission's and congressional action in the decades after the passing of the FTC Act further persuade me that the original understanding of Section 6(g) cannot be reconciled with the Commission's present course of action. Contrary to the Commission's various claims in the Final Rule, for decades after the enactment of the FTC Act in 1914, the FTC interpreted the statute as "conferring only the power to conduct adjudications and investigations and not as conferring any power to issue legislative rules."[14] And after *National Petroleum*, Congress passed the Magnuson-Moss Warranty Act, which imposed strict requirements for legislative rulemaking regarding unfair or deceptive acts or practices.[15] The Commission claims these provisions left undisturbed the FTC's authority to issue legislative rules governing unfair methods of competition, but provides no explanation why Congress would impose heightened requirements for *unfair* acts or practices

[8] Non-Compete Clause Rule ("Final Rule") at 24 (emphasis added).
[9] FTC Act, Pub. L. No. 63-203, § 6, 38 Stat. 717, 722 (1914).
[10] Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit,* 75 Admin. L. Rev. 277, 298-99 (2023) (setting forth reasons for interpreting Section 6(g) as conferring the authority to write procedural rather than substantive rules).
[11] 482 F.2d 672 (D.C. Cir. 1973).
[12] *Id.* at 680. Indeed, rather than requiring affirmative evidence of a conferral of legislative rulemaking authority, the Court "framed the question as whether there was affirmative evidence *not* to confer power to make legislative rules." Merrill, *supra* note 10, at 303 (citing *Nat'l Petroleum Refiners Ass'n*, 482 F.2d. at 673, 691).
[13] *See, e.g.*, Kristin Hickman, *The Roberts Court's Structural Incrementalism*, 136 Harv. L. Rev. F. 75, 77 (2022) ("In 1978, renowned administrative law scholar Kenneth Culp Davis described formal separation of powers, rule of law, and nondelegation principles as 'barriers to the development of the administrative process' and the modern administrative state (and judicial review thereof) …. [T]he Roberts Court by contrast takes seriously formalist conceptions of separation of powers, rule of law, and nondelegation principles.").
[14] Merrill, *supra* note 10, at 301; *see also* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 549 (2002); *see also* David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 925 (1965).
[15] Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975).

while leaving undisturbed *unfair* methods of competition.[16] Unless of course Congress did not believe that the FTC had competition rulemaking authority.

My dissent today should not be interpreted to mean that I endorse all noncompete agreements. To the contrary, I would support the Commission's prosecution of anti-competitive noncompete agreements, where the facts and law support such enforcement.[17] However, "no matter how important, conspicuous, and controversial the issue, … an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."[18] That is why I am particularly disappointed that the Commission dedicated the Commission's limited resources to a broad rulemaking that exceeds congressional authorization and will likely not survive legal challenge. Those resources would be better used to identify and prosecute—including in collaboration with States' attorneys general—anticompetitive non-compete agreements using broadly accepted theories of antitrust harm.[19]

For these reasons I am persuaded that Section 6(g) and Section 5 do not authorize the Commission to issue the Final Rule. Thank you.

[16] More importantly, Congress did not—contrary to the Commission's claim—ratify the *National Petroleum* decision by not expressly overruling it. Clear Congressional authorization does not come from silence. Congress's silence in Section 6(g) did not authorize rulemaking authority, nor did Congress's silence after *National Petroleum* ratify such authority.

[17] My concern over the potential harm from noncompete agreements is not an endorsement of the Final Rule's sweeping claims and characterization of the available evidence on the harms of noncompete agreements.

[18] *Food & Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 161 (2000) (internal citations omitted).

[19] Some comments submitted in response to the Notice of Proposed Rulemaking that I reviewed describe facts and circumstances that would suggest liability under traditional antitrust theories of harm.