

The Constitutional Revolution That Wasn't

Why the FTC Isn't a Second National Legislature

by Berin Szóka & Corbin Barthold

The Federal Trade Commission Act of 1914 did not empower the FTC to issue substantive or “legislative” rules with the force and effect of law. Reading section 6(g) to authorize such rulemakings over unfair methods of competition would broadly flout both the Act’s legislative context and the Constitution’s separation of powers. Had Congress delegated such a power at the time, this would have amounted to a constitutional revolution—one enacted in a short clause that, as both textual analysis and legislative history confirm, authorizes only procedural, housekeeping, or “interpretive” rules. Conventions of statutory drafting then in use, contemporary understandings of the nondelegation doctrine and the removal power, and indeed the Supreme Court’s recent signals regarding nondelegation all compel a narrow reading of section 6(g). Lawmakers of the Progressive Era conferred substantive rulemaking power by specifying penalties or other sanctions for violations of rules crafted by an agency. The 1914 Act provided no such sanctions, and indeed no sanctions even for violations of the Act itself; instead, it empowered the FTC only to refer violators to federal courts for a cease-and-desist order. The Act’s post-enactment history, subsequent legislative changes to it, and subsequent caselaw likewise do not warrant reading this section as establishing a substantive power. National Petroleum Refiners Association v. FTC (D.C. Cir. 1973) rests on outdated result- and policy-driven textual analysis. Modern courts would not uphold the FTC’s authority to issue rules governing unfair methods of competition

TABLE OF CONTENTS

I. Introduction.....	1
II. The FTC Act in Its Historical Context	4
A. Bedrock Constitutional Principle #1: Nondelegation.....	5
B. Bedrock Constitutional Principle #2: The Removal Power.....	6
C. Putting the FTC Act in Its Proper Context	7
D. If Section 6(g) Had Conferred Quasi-Legislative Power, the FTC Would Have Represented a Constitutional Revolution in 1914.....	9
E. Congress Crafted the FTC Act to Respect a More Rigid Nondelegation Doctrine	11
F. Reading Section 6(g) to Confer Legislative Power Violates the Nondelegation Doctrine as the Supreme Court Has Recently Signaled It Will Apply It.....	12
III. Before <i>National Petroleum Refiners</i> , Congress Signaled Its Intention to Confer Quasi-Legislative Powers by Specifying Sanctions.....	16
A. The Rise and Fall of the Sanctions/Rulemaking Convention.....	19
B. Applying That Convention to the FTC Act.....	22
IV. Post-Enactment History of the FTC Act.....	24
A. Arguments from Subsequent Legislative History Are of Little Value.....	24
B. The 1980 FTC Improvements Act Did Not Validate UMC Rulemaking.....	25
V. <i>National Petroleum Refiners</i> Stands on an Outmoded Policy- and Purpose-Driven Form of Statutory Interpretation.....	26
VI. Conclusion	28

The Constitutional Revolution That Wasn't

Why the FTC Isn't a Second National Legislature

by Berin Szóka & Corbin Barthold¹

I. Introduction

Did the Federal Trade Commission Act of 1914² empower the FTC to issue “substantive” or “legislative” rules with “the force and effect of law”³ to define “unfair methods of competition” (UMC)? The Commission first claimed such power in 1962.⁴ Eleven years later, the D.C. Circuit upheld that theory in *National Petroleum Refiners*.⁵ Now, for the first time since that decision, the FTC has initiated UMC rulemakings, seeking public comment on two petitions.⁶

¹ Berin Szóka is President of TechFreedom, a nonprofit, nonpartisan technology policy think tank. He can be reached at bszoka@techfreedom.org. Corbin Barthold is Internet Policy Counsel and Director of Appellate Litigation at TechFreedom. He can be reached at cbarthold@techfreedom.org. This paper could not have been completed without the particularly tireless assistance of TechFreedom's Andy Jung and Santana Boulton. This paper was first published in DANIEL A. CRANE, ED. RULEMAKING AUTHORITY OF THE US FEDERAL TRADE COMMISSION (Concurrences, 2022). Reprint by permission.

² Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914) [hereinafter FTC Act], <https://bit.ly/3CYwaCQ>.

³ U.S. DEP'T OF JUST., ATT'Y GEN.'S MANUAL ON THE ADMIN. PROCEDURE ACT 30 n. 3 (1947) [hereinafter Attorney General Manual], <http://library.law.fsu.edu/Digital-Collections/ABA-AdminProcedureArchive/1947iii.html>.

⁴ See *Nat'l Petroleum Refiners Ass'n. v. FTC*, 482 F.2d 672, 695 n. 29 (1973) (“The Commission first announced it would enforce the prohibitions of § 5 with the assistance of substantive rules in 1962 when it amended its Rules of Practice to provide for issuance of Trade Regulation Rules, 27 Fed. Reg. 4636, 4796 (1962).”).

⁵ *Id.*

⁶ See Petition for Rulemaking to Prohibit Exclusionary Contracts, Open Markets Institute (July 21, 2020), <https://bit.ly/3F7gEGz>; see Petition for Rulemaking to Prohibit Non-Compete Contracts, Open Markets Institute (July 21, 2020), <https://bit.ly/3mcm0aX>.

The question turns on the ambiguity of section 6(g), which provides that, among other “additional powers,” the Commission “shall . . . have power to . . . [f]rom time to time classify corporations and . . . to make rules and regulations for the purpose of carrying out the provisions of [the Act].”⁷ Agency Chair Lina Khan and former Commissioner Rohit Chopra assert that section 6(g) gives the FTC broad power to make legislative rules. They cite only *National Petroleum Refiners* and four academic articles about the case.⁸ But would the question be decided the same way today? The Commission asked this question at a 2020 workshop on UMC rulemakings. Professor Richard J. Pierce, a leading scholar of administrative law,⁹ called the decision “laughable” by today’s standards, adding: “I teach it as an illustration of something no modern court would do.”¹⁰

Reading section 6(g) as enabling the issuance of legislative rules is “laughable” for multiple reasons. First, such a reading broadly flouts both the Act’s context and the Constitution. At the time the FTC Act was passed (1914), both the nondelegation doctrine (barring Congress from handing legislative power to executive agencies) and the removal power (ensuring that the President has broad authority to remove executive-branch officers at will) were broader and more rigid than they are today. Even aside from section 6(g), the FTC Act tested these boundaries by letting the FTC enforce a broad “unfair methods” standard case by case, and by granting the FTC’s commissioners “for-cause” removal protection. The half of section 6(g) at issue here, meanwhile, lies buried in a long section detailing the FTC’s power simply to gather and report information in furtherance of its duties. To read section 6(g) as a grant of substantive (i.e., legislative) rulemaking authority is to assume that Congress, in a statute already at risk of bursting multiple constitutional seams, implanted, in a single vague sentence in an otherwise unrelated section, a further sweeping assault on the nondelegation doctrine. That is an untenable assumption. And as a matter of constitutional law, the

⁷ 15 U.S.C. § 46(g).

⁸ See Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357, 378 (2020), <https://bit.ly/3F9BTYk> (citing Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1288–89 (2011); C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 673–82 (2009); Justin Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 250–52 (2014); Sandeep Vaheesan, *Resurrecting ‘A Comprehensive Charter of Economic Liberty’: The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 651–57 (2017)).

⁹ See generally KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* (3rd ed., Little, Brown 1994).

¹⁰ Final Transcript at 296, Fed. Trade Comm’n, *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues* (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-transcript-full.pdf.

proposed reading of section 6(g) *still* violates the nondelegation doctrine, a conclusion made all the clearer by the Supreme Court’s recent decision in *Gundy v. United States*.¹¹

Second, *National Petroleum Refiners* ignored a longstanding convention holding that Congress signals its intention that an agency may issue “legislative” or “substantive” rules with the “force and effect of law” by empowering the agency to impose some sanction upon those who violated those rules.¹² This convention holds that, absent any provision for sanctions, an agency could issue only procedural (“housekeeping”) or “interpretive”¹³ rules, which do no more than “advise the public of the agency’s construction of the statutes and rules which it administers.”¹⁴ The FTC Act has *never* authorized sanctions for violations of the Act itself, and only with passage of the Magnuson–Moss Act of 1975 did Congress authorize civil penalties even for violations of regulations issued under the FTC Act.¹⁵ The 1914 Act authorized a single method for applying section 5’s prohibition of unfair methods of competition: the FTC would issue a cease-and-desist order, but it would be up to federal courts to enforce that order. Such enforcement involved no sanction whatsoever, merely the cessation of unlawful activity.

Further, *National Petroleum Refiners* misread the cases it cited. In each case, it was clear that the statute at issue conferred substantive rulemaking authority—not only because Congress empowered the agency to sanction violations but also because of the plain text of the rulemaking provision at issue and because of other clues found in the structure of the Act. The FTC Act is just the opposite: nothing in the Act suggests that Congress intended the FTC to make substantive rules.

Third, amendments to the FTC Act enacted after *National Petroleum Refiners* are irrelevant to what Congress intended in 1914. The only relevant congressional action confirms that Congress understood an act exactly parallel to the FTC Act *not* to confer substantive rulemaking authority.

Finally, *National Petroleum Refiners* uses an obsolete form of statutory interpretation. Although it pays lip service to the text of the law, the decision in fact treats that text as an

¹¹ 139 S. Ct. 2116 (2019).

¹² See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002), <https://bit.ly/3D0yoSd>.

¹³ “Interpretive rules” are “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.” See Attorney General Manual, *supra* note 3, at 30 n. 3.

¹⁴ *Id.*

¹⁵ Magnuson–Moss Warranty–Federal Trade Commission Improvement Act, Pub. L. No. 93-657, 88 Stat. 2183 (1975) [Hereinafter Magnuson–Moss Act]; 15 U.S.C. § 45(l).

afterthought. The ruling is driven by the court’s policy preferences, the supposed “broad purpose” that lies “behind” the statute, and the court’s sense of what Congress “really” intended. *National Petroleum Refiners* is less a judicial decision interpreting the law than a piece of legislation (complete with legislative findings) unto itself.

In short, *National Petroleum Refiners* was wrongly decided. Section 6(g) empowers the FTC to make only procedural or interpretive rules, not legislative or substantive rules defining liability. While administrative agencies have varied in their understanding of what interpretive rules do,¹⁶ the Administrative Conference of the United States, the official organ of the federal judiciary, has been clear: “[N]oncompliance with an interpretive rule should not form an independent basis for action in matters that determine the rights and obligations of any member of the public.”¹⁷ Thus, issuing interpretive rules regarding what is an unfair method of competition would have essentially the same effect upon regulated parties as issuing a policy statement: either way, the FTC must still police “unfair” competition case by case. And Congress and state legislatures must still be the ones that decide whether to proscribe as unlawful entire categories of methods of competition, either directly through legislation or by granting authority for the FTC (or state regulators) to make substantive rules.

II. The FTC Act in Its Historical Context

Statutory terms should be understood to “mean what they conveyed to reasonable people at the time they were written.”¹⁸ Further, “general terms as used on particular occasions,” in a statute, “often carry with them implied restrictions as to scope.”¹⁹ These are important principles here, because the Congress that passed the FTC Act in 1914 operated in a very different constitutional landscape than that which exists today.

Consider the state of two key constitutional doctrines in the early twentieth century: the nondelegation doctrine and the removal power. Both are vital to understanding why Congress crafted the FTC Act as it did—and why it is implausible in the extreme that Congress intended section 6(g) to confer the power to issue substantive rules. Simply put,

¹⁶ Blake Emerson & Ronald M. Levin, *Interpretive Rules in Practice*, THE REGULATORY REVIEW (Oct. 30, 2019), <https://bit.ly/3mhJ4VZ>.

¹⁷ ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, AGENCY GUIDANCE THROUGH INTERPRETIVE RULES 6 (2019), <https://bit.ly/3F0FrFH>.

¹⁸ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (Thomson/West 2012).

¹⁹ *Util. Air Reg. Group v. EPA*, 134 S. Ct. 2427, 2451 (2014) (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., dissenting); *see also* *EPIC Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) (“[A] statute’s meaning does not always ‘turn solely’ on the broadest imaginable ‘definitions of its component words.’”).

when it passed the FTC Act, Congress did not bury a constitutional revolution deep in the fine print.

A. **Bedrock Constitutional Principle #1: Nondelegation**

Since the beginning of the Republic, it has been understood that Article I, Section 1 of the Constitution, which says that Congress alone holds “all legislative Powers,” must place *some* limit on how much legislative authority Congress may hand to an executive agency. In the second half of the twentieth century, Congress would stretch that limit ever further, but in 1914 the boundaries remained firm.

The seminal statement of nondelegation is, of course, Chief Justice Marshall’s declaration, in *Wayman v. Southard*, that the legislature must set the rules and policy for all “important subjects,” but that it may leave to the executive the task of “fill[ing] up the details.”²⁰ Because “nineteenth century legislators” generally “decided not to delegate broad authority to the executive branch,” this statement long reigned, unchallenged and unquestioned.²¹

Although things began to change at the end of the nineteenth century with the rise of the populist movement, clear boundaries remained. The Interstate Commerce Commission, established in 1887, had no independent enforcement power, and it “lacked any power to *set* railroad rates.”²² Upholding portions of the Tariff Act of 1890—which merely delegated certain “yes-or-no trade decisions”²³ based on findings of fact about other nations’ tariff rates—the Court remained full-throated in its defense of the principle of nondelegation.²⁴ “That Congress cannot delegate legislative power to the President,” the Court confirmed, “is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”²⁵ Indeed, it remained the case that delegations of legislative power were “*never to be implied*”²⁶ from ambiguous statutory text.

Shortly before passage of the FTC Act, the Court, in *United States v. Grimaud* (1911), explained how the nondelegation principle applied to the distinction between an agency’s

²⁰ 23 U.S. 1, 43 (1825).

²¹ JAMES R. COPLAND, *THE UNELECTED: HOW AN UNACCOUNTABLE ELITE IS GOVERNING AMERICA* 24 (Encounter Books 2020).

²² *Id.* at 27.

²³ *Id.*

²⁴ *Field v. Clark*, 143 U.S. 649, 692 (1892).

²⁵ *Id.*

²⁶ *ICC v. Railway Co.* [hereinafter the *Queen and Crescent Case*], 167 U.S. 479, 494 (1897) (emphasis added). See Merrill & Watts, *supra* note 12, at 491 (“The *Queen and Crescent Case* suggests a nondelegation canon in the form of an ‘express statement’ rule: all grants of rulemaking authority confer only housekeeping powers, unless Congress expressly confers the power to make legislative rules.”).

ability to set its own “housekeeping” rules—rules governing its own proceedings—and an agency’s ability to set substantive rules with binding effect on the public.²⁷ “From the beginning of the Government,” *Grimaud* said, “various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power.”²⁸

As *Grimaud* explained, Congress could go beyond conferring on an agency the power to make rules to “administer” legislatively set policies, but only if Congress set the *punishments* that would accompany the violation of such rules.²⁹ Congress, in other words, could give an agency the “power to fill up the details” of a legislative policy, so long as the “fine or imprisonment” or “penalties” for a violation were either “fixed by Congress” or “measured by the injury done.”³⁰ In short, an agency had no power to set *substantive* rules unless it was doing so within a rubric of preset statutory penalties established by Congress.³¹

B. Bedrock Constitutional Principle #2: The Removal Power

The Constitution vests “the executive Power” in a single “President,”³² who must “take Care that the Laws be faithfully executed.”³³ The task of executive officers is, in Washington’s words, to “assist the supreme Magistrate in discharging the duties of his trust.”³⁴ Or, as Madison put it, “the lowest [executive] officers, the middle grade, and the highest” all “depend, as they ought, on the President.”³⁵ The First Congress confirmed this understanding—that executive officers serve at the pleasure of the President—in what’s known as the “Decision of 1789.”³⁶ It passed several bills that contained no removal clause, but that discussed who would manage the papers of a removed officer.³⁷ The traditional view holds that Congress thereby affirmed that the Constitution empowers the President to remove officers at will.³⁸ As Madison explained in a letter to Jefferson, the legislators thus

²⁷ 220 U.S. 506 (1911).

²⁸ *Id.* at 517.

²⁹ *Id.* at 517–18.

³⁰ *Id.* at 517.

³¹ *Id.*

³² U.S. CONST. art. II, § 1, cl. 1.

³³ *Id.* art. II, § 3, cl. 3.

³⁴ THE WRITINGS OF GEORGE WASHINGTON 30, 334 (John C. Fitzpatrick ed., 1939).

³⁵ 1 ANNALS OF CONG. 499 (1789) (J. Madison).

³⁶ Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1066 (2006).

³⁷ *Id.* at 1023 & nn. 7–9.

³⁸ *Id.* at 1065–66.

adopted the position “most consonant” to “the text of the Constitution” and “the requisite responsibility and harmony in the Executive Department.”³⁹

This is basically where things stood in 1914. *Myers v. United States* (1926), the first decision in which the Court squarely considered “whether under the Constitution the President has the exclusive power of removing executive officers,”⁴⁰ was still twelve years off. The notion that Congress could create “independent” officers with for-cause removal protections—let alone the notion that it could do so while handing those officers *legislative* power—remained uncertain and untested.

C. Putting the FTC Act in Its Proper Context

This is the constitutional background before which Congress passed the Federal Trade Commission Act of 1914. The FTC, the Act says, “shall be composed of five Commissioners,” who, although “appointed by the President, by and with the advice and consent of the Senate,” can be “removed by the President” only “for inefficiency, neglect of duty, or malfeasance in office.”⁴¹

Section 5 of the Act makes a sweeping claim: it declares that “unfair methods of competition in commerce are hereby declared unlawful.”⁴² It then sets forth, in excruciating detail, how the Commission shall go about prosecuting such “methods.”⁴³

Section 6 of the Act provides the Commission with a series of ancillary powers for investigating, reporting, and publicizing the “unfair methods” barred by section 5.⁴⁴ Under section 6, the Commission may, for instance, “gather and compile information”; demand that businesses “file” with the Commission “reports or answers in writing to specific questions”; “make investigation” to ensure that adjudicatory decrees are being complied with; and “make public” “information obtained” through its investigations.⁴⁵ As with the enforcement powers in section 5, the investigatory powers in section 6 are set forth in great detail.

Buried within section 6’s detailed explanation of the Commission’s investigatory powers lies section 6(g), with its single line about the Commission’s power to set “rules.”⁴⁶ Consider how

³⁹ Letter from James Madison to Thomas Jefferson (June 30, 1789), <https://bit.ly/36BYhZd>.

⁴⁰ 272 U.S. 52, 106 (1926).

⁴¹ FTC Act § 5, 38 Stat. at 718.

⁴² *Id.* at 719.

⁴³ *Id.* at 719–21.

⁴⁴ *Id.* § 6, 38 Stat. at 721–22.

⁴⁵ *Id.*

⁴⁶ *Id.*

that line sits in this image of the statutory text. Deep within this detailed section (so detailed that it clarifies how much *time* a business should have to file a report with the Commission), sitting beside a line empowering the Commission to “classify corporations” (according to whether the Commission has jurisdiction over them),⁴⁷ sits a few obscure words on making rules for “carrying out the provisions of this Act.”⁴⁸

⁴⁷ “Classification” is a key term of art in common carriage law generally and is critical to determining which corporations and services fall within the limitations imposed upon the FTC’s jurisdiction by Congress. Both section 5, governing unfair and deceptive acts and practices, and section 6, governing the Commission’s powers to investigate and issue reports, have always contained the same limitation: “common carriers subject to the Acts to regulate commerce” are excluded from the Commission’s otherwise-general jurisdiction. 15 U.S.C. §§ 45(a)(2), 46(a). “Congress established Section 5’s common-carrier exemption to avoid interagency conflict” and because “Congress did not intend the FTC to regulate common-carrier business practices.” *Fed. Trade Comm’n v. AT&T Mobility LLC*, 883 F.3d 848, 854-55 (9th Cir. 2018). In some cases, another agency responsible for administering one of “the Acts to regulate commerce” may draw a clear line by explicitly classifying something as a non-common carrier service. *See, e.g., Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C. Rcd. 4798 ¶¶ 32-33 (2002) (“The Communications Act does not clearly indicate how cable modem service should be classified or regulated . . . we herein address the classification of cable modem service for purposes of the Act.”). Absent such decisions, the classification of a particular service, and thus whether it falls within the FTC’s jurisdiction, may be unclear. By empowering the FTC to “classify corporations,” Section 6(g) allows the FTC to resolve such uncertainty not only by issuing interpretive rules that might govern future classifications, *see supra* note 13 and associated text, but also case by case (“[f]rom time to time”) in enforcement actions or investigatory orders.

⁴⁸ *Id.*

SEC. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

D. If Section 6(g) Had Conferred Quasi-Legislative Power, the FTC Would Have Represented a Constitutional Revolution in 1914

In granting the Commission the power—albeit under well-defined procedures and close court supervision—to prosecute “unfair methods of competition,” Congress was *already* undertaking a risky, novel, aggressive attack upon the traditional understanding of the nondelegation doctrine. Likewise, in granting the commissioners protection from being fired other than for “inefficiency, neglect of duty, or malfeasance in office,” Congress was *already* undertaking a risky, novel, aggressive attack upon the traditional understanding of the removal power.

Yet to read section 6(g) as granting the Commission the power to set substantive rules defining “unfair methods of competition” is to assume that Congress was not *just* trying to *test* boundaries, but that it was on something of a kamikaze mission. After all, this reading of section 6(g) would mean that Congress wanted to hand unprecedented *legislative* power to unprecedentedly *insulated, independent* executive officers without *even the safeguards of well-defined procedures or judicial supervision*. So open-ended is the term “unfair methods of competition,” in fact, that this reading would mean Congress had suddenly, in an act of startling defiance toward all governing precedent at the time, given an unaccountable mini-

legislature a roving commission (so to speak) to “do justice.” The Supreme Court has indeed recognized that the FTC wields remarkably broad powers, but even then, it was careful to emphasize that the FTC wields those powers only in a quasi-*judicial* role:

[T]he Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive but congressionally mandated standard of fairness, it, like a *court of equity*, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.⁴⁹

Reading section 6(g) to confer the power to make *legislative* rules assumes that Congress did this in *half* of a one-sentence *subsection* of detailed instructions about the Commission’s power simply to investigate, collect, and report information. Really? Look again at the statutory text. It is utterly implausible that section 6(g) was the constitutional ticking nuclear time bomb that this reading makes it out to be.

Not surprisingly, when the Act was brought before the Court in *Humphrey’s Executor v. United States* (1935), the justices did not read section 6 this way.⁵⁰ Although *Humphrey’s Executor* is famous for breaking new ground concerning the removal power, the decision reads section 6 consistent with the uncontested understanding of nondelegation that reigned at the time. “The Federal Trade Commission,” it says, was created “to carry into effect legislative policies *embodied in the statute* in accordance with *the legislative standard therein prescribed*, and to perform other *specified* duties as a *legislative or as a judicial aid*.”⁵¹ Consistent with this understanding of the Commission as a body that simply “fill[s] in and administer[s] the details embodied by” the “general standard” (i.e., “unfair methods of competition”), the Court understood section 6 as empowering the Commission to “mak[e] investigations and reports . . . for the information of Congress . . . in aid of the legislative power.”⁵² It is in *that* sense—as a maker of investigations and reports—that the Court viewed the Commission as acting as a “quasi-legislative” body.⁵³

The notion that the Commission would *make substantive rules itself* is not mentioned in, or suggested by, *Humphrey’s Executor’s* explicit reference to section 6. Such a power would have been revolutionary, as the Court’s careful effort to describe the Commission as a mere “aid”

⁴⁹ *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (emphasis added).

⁵⁰ 295 U.S. 602 (1935).

⁵¹ *Id.* at 628 (emphasis added).

⁵² *Id.*

⁵³ *Id.*

to the other branches—a maker of *reports!*—confirms.⁵⁴ Had the justices been told that, in making their landmark ruling cabining the removal power, they were affirming the for-cause protections and overall independence of true *legislators* who had been lodged in the executive branch, they would likely have been shocked.

That is just what those justices did, concluded the D.C. Circuit, in effect, in *National Petroleum Refiners*. Yet “Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law”—or, for that matter, with the Constitution.⁵⁵ Perhaps, when considered in total isolation, the term “carrying out the provisions of this Act”⁵⁶ could mean “make substantive rules about what ‘unfair methods of competition’ means.” But when that term is considered in the context of the Constitution, the specific understanding of that charter that governed in 1914, and the rest of section 6, there can be no doubt that the term refers to internal housekeeping rules.

E. Congress Crafted the FTC Act to Respect a More Rigid Nondelegation Doctrine

National Petroleum Refiners artfully sidestepped the nondelegation doctrine, burying a brief discussion of the issue at the bottom of the decision. The author of the opinion, Judge Skelly Wright, does not mention why Senator Albert Cummins, “one of the bill’s main proponents,”⁵⁷ assured his fellow Senators that the bill would not violate the nondelegation doctrine:

Every lawyer understands that we can not delegate to a commission legislative power; that when we give to an administrative body the execution of a law of Congress we must at the same time give it a standard, a guide and rule which

⁵⁴ *Id.* (“In administering the provisions of the statute in respect of ‘unfair methods of competition’—that is to say, in filling in and administering the details embodied by that general standard—the commission acts in part *quasi*-legislatively and in part *quasi*-judicially. In *making investigations and reports thereon for the information of Congress under § 6*, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary.”) (emphasis added.).

⁵⁵ *Smith v. United States*, 508 U.S. 223, 233 (1993).

⁵⁶ FTC Act § 6, 38 Stat. at 722.

⁵⁷ *Nat’l Petroleum Refiners*, 482 F.2d at 706; Fed. Trade Comm’n, Statement of Chairman Leibowitz and Commissioner Rosch, In the Matter of Intel Corporation, Docket No. 9341, at 2 (Dec. 16, 2009), <https://bit.ly/3kU9JIL>.

it is to apply to the particular case and determine whether that particular case falls under the prohibition of the law.⁵⁸

In a footnote, the court reprints a legislative colloquy on the House floor:

Mr. SHERLEY. If the gentleman will permit, the Federal Trade Commission differs from the Interstate Commerce Commission in that it has no affirmative power to say what shall be done in the future?

Mr. STEVENS of Minnesota. Certainly.

Mr. SHERLEY. In other words, it exercises in no sense a legislative function such as is exercised by the Interstate Commerce Commission?

Mr. STEVENS of Minnesota. Yes, [t]he gentleman is entirely right. We desired clearly to exclude that authority from the power of the commission. We did not know as we could grant it anyway. But the time has not arrived to consider or discuss such a question.⁵⁹

Judge Wright dismisses this exchange, like other floor comments, as “utterly unhelpful.”⁶⁰ While the FTC Act’s legislative history is indeed complex, the text of the Act is clear: The Commission could *allege* that a particular practice in a particular case was unfair; it could even order a company to cease and desist from that practice.⁶¹ But ultimately, it would be the courts, not the Commission, that would decide what constituted an unfair method of competition.⁶² The Commission’s role would be that of a special prosecutor, not a judge—and not a legislator.

F. Reading Section 6(g) to Confer Legislative Power Violates the Nondelegation Doctrine as the Supreme Court Has Recently Signaled It Will Apply It

That an expanded reading of section 6(g) would have clearly violated the nondelegation doctrine, as that doctrine was understood *in 1914*, shows, as a matter of statutory interpretation, that that expanded reading is not the correct one. Equally important,

⁵⁸ 51 CONG. REC. 11,103 (1914).

⁵⁹ *Nat’l Petroleum Refiners*, 482 F.2d at n. 19 (citing 51 CONG. REC. 14,938 (1914)).

⁶⁰ *Id.* at 709.

⁶¹ FTC Act § 6, 38 Stat. at 719–20.

⁶² 51 CONG. REC. 11,104 (1914) (statement of Senator Cummins) (“We say that if you find that unfair competition exists then you must prevent it, but in order to ascertain what unfair competition is you must go to the courts and to the common sense of mankind, and there are many adjudications on the subject.”).

however, is the fact that, as a matter of constitutional law, the expanded reading likely violates the nondelegation doctrine *today*. Although it is true that since 1914, Congress has passed, and the Court has blessed, broad delegations of power, the nondelegation doctrine also appears set for a revival.

Gundy v. United States (2019) is the Supreme Court’s most recent statement on how much authority Congress may delegate to executive agencies.⁶³ *Gundy* upholds an “intelligible principle” test, under which Congress’s power to delegate authority is broad indeed.⁶⁴ Only eight justices heard the case, however, and only four justices endorsed the regnant standard. In a brief concurrence, Justice Alito expressed his “support” for “reconsider[ing] th[at] approach,” if and when a majority of the Court wishes to do so.⁶⁵ Justice Kavanaugh, who did not participate in *Gundy*, has expressed just such a willingness.⁶⁶ And Justice Ginsburg, one of the four justices to stand by the “intelligible principle” standard in *Gundy*, has been replaced by Justice Barrett.

Justice Gorsuch’s dissent in *Gundy*—which Chief Justice Roberts and Justice Thomas joined, and which Justices Alito, Kavanaugh, and Barrett are likely to find attractive in a future case—thus warrants more attention than an average dissent. If the executive branch may make “laws,” Justice Gorsuch notes, they will “not be few in number,” nor “the product of widespread social consensus,” nor “likely to protect minority interests,” nor “apt to provide stability and fair notice.”⁶⁷ Executive lawmaking also enables both the legislature and the executive to evade accountability, each branch blaming the other for the consequences of open-ended legislation implemented through detailed agency rules.⁶⁸ For these and other reasons, Justice Gorsuch urges the Court to end its “intelligible principle misadventure” and insists that “Congress, and not the Executive Branch, make the policy judgments” that are implemented through agency action.⁶⁹

Even when the FTC applies it only case-by-case, under a rubric of congressionally set procedural rules and close judicial scrutiny, the “unfair methods of competition” standard is,

⁶³ 139 S. Ct. 2116 (2019).

⁶⁴ See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“Applying this ‘intelligible principle’ test to congressional delegations, our jurisprudence has been driven by a practical understanding that, in our increasingly complex society, replete with ever-changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).

⁶⁵ 139 S. Ct. at 2131 (concurring opinion).

⁶⁶ See *Paul v. United States*, 140 S. Ct. 342 (2019) (Statement of Kavanaugh, J., respecting the denial of certiorari).

⁶⁷ 139 S. Ct. at 2135.

⁶⁸ *Id.*

⁶⁹ *Id.* at 2141.

post-*Gundy*, at high risk of being declared an unconstitutional over-delegation.⁷⁰ “The term ‘unfair,’” after all, “is an elusive concept, often dependent upon the eye of the beholder.”⁷¹ Indeed, as Commissioner Phillips observed last year, the term “unfair methods of competition” in section 5 is “almost the exact [same] wording” as “codes of fair competition,” the term struck down under the nondelegation doctrine in *A.L.A. Schechter Poultry Corp. v. United States*.⁷²

So there might be a nondelegation problem with section 5 no matter what. Under an expanded reading of section 6(g), the problem simply becomes all the more acute. One could say that enacting substantive competition rules under section 6(g) would amount to double-dog-daring the Supreme Court to follow through on transforming Justice Gorsuch’s *Gundy* dissent into a controlling opinion.

It is not hard to envision how, in its push to use essentially a single word, “unfair,” to expand its power over markets, the economy, and the country itself, the FTC might ultimately ensure that its authority is snapped back into bounds that are *narrower* than those that exist today. A recent case involving another vague and open-ended word, “necessary,” shows how this might occur.

That case, *Florida v. Becerra*, involved a law that gives the Surgeon General the authority to “make and enforce such regulations as in his judgment are necessary to prevent . . . the spread of communicable diseases.”⁷³ The Centers for Disease Control (CDC) argued that, so long as it concluded that a measure was “necessary” to prevent even a *risk* of interstate transmission of a disease, the statute empowered it to take any such measure it deemed fit.⁷⁴ Although the district court adopted a narrower reading of the statute, it also ruled, in the alternative, that the CDC’s preferred reading contained no “intelligible principle” and thus violated the nondelegation doctrine. As the court noted, the CDC’s reading, if accepted, amounted to “a breathtaking, unprecedented, and acutely and singularly authoritarian claim” of authority.⁷⁵

⁷⁰ See Corbin K. Barthold, *Pride Before the Fall at the FTC?*, LAW & LIBERTY (Nov. 2, 2021), <https://bit.ly/3rt3U85>.

⁷¹ E.I. Du Pont De Nemours & Co. v. FTC, 729 F.2d 128, 137–38 (2d Cir. 1984).

⁷² 295 U.S. 495, 553 (1935) (Cardozo, J., concurring). See Commissioner Noah Joshua Phillips Prepared Remarks, Fed. Trade Comm’n, Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues (Jan. 9, 2020), <https://bit.ly/2U7jGrv>.

⁷³ 554 F. Supp. 3d 1241, 1264 (M.D. Fla. 2021). See 42 U.S.C. § 264(a).

⁷⁴ *Id.* at 1278–80.

⁷⁵ *Id.* at 1280.

In a passage that (as here shortened) could easily be applied to an unchecked reading of “unfair methods of competition,” the court marveled at some of the implications of the CDC’s unchecked reading of “necessary to prevent the . . . spread of communicable diseases”:

[T]he [modern] law of the United States on non-delegation has . . . [enabled] an argument . . . about whether Congress, based on an ambiguous sentence or two in a statute, can bestow on an executive agent the power indefinitely to halt the operation of, and perhaps destroy, an entire industry or several industries or perhaps the industries of the entire nation, destroy businesses and lives dependent on industry, . . . or otherwise alter the course, history, prosperity, and health of the nation[.]⁷⁶

If it were pegged to the jurisprudence of the Sherman Act, starting with the consumer welfare standard, the phrase “unfair methods of competition” could not lead to the results contemplated in this passage. But if left to mean whatever the agency *says* it means, then the phrase certainly could. It would enable an independent commission—a group of “unelected, electorally unaccountable, and largely anonymous executive agents”⁷⁷—to halt industries, destroy businesses, and otherwise alter the course of the nation. Whatever it takes to stamp out “unfairness.”⁷⁸

The FTC of late seems to be in a rush to insist that the word “unfair” should indeed mean whatever the Commission wants it to mean. That is the message sent by the agency’s attempt to detach itself from the Sherman Act through its repeal of the Unfair Methods of Competition Policy Statement.⁷⁹ It is also the message sent when the chair urges the agency to see itself as a “body whose work shapes the distribution of power and opportunity across our economy.”⁸⁰

The agency’s section 5 power may be in peril no matter what the agency does. Nothing could force the issue faster, however, than an effort to assert broad rulemaking authority under section 6(g). Such an effort would send the agency hurtling toward conflict with the

⁷⁶ *Id.* at 1286.

⁷⁷ *Id.*

⁷⁸ Perhaps the weak but still extant protections of property in the Fifth and Fourteenth Amendments would prevent the worst excesses. But *cf.* KURT VONNEGUT, HARRISON BERGERON (1961) (in which the 211th, 212th, and 213th amendments to the Constitution enable the Handicapper General, by making all Americans equal in every respect, to ensure that there truly are no “unfair methods of competition”).

⁷⁹ See Fed. Trade Comm’n, Press Release, FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act (July 1, 2021), <https://bit.ly/3ilp6bH>.

⁸⁰ Memo from Chair Lina M. Khan to Commission Staff and Commissioners Regarding the Vision and Priorities for the FTC 2 (Sept. 22, 2021), <https://bit.ly/3uqtBXL>.

nondelegation doctrine. And if the agency insisted on sliding down that chute, it might well find itself with less power at the bottom than it had at the top.⁸¹

III. Before *National Petroleum Refiners*, Congress Signaled Its Intention to Confer Quasi-Legislative Powers by Specifying Sanctions

Professor Richard J. Pierce, the administrative law expert who told the FTC's 2020 workshop that the reasoning of *National Petroleum Refiners* was "laughable," has company among leading experts in administrative law in deriding the case. Columbia Law Professor Thomas Merrill and University of Washington School of Law Professor Kathryn Tongue Watts challenged Judge Wright's analysis in a 2001 article published in the *Harvard Law Review*.⁸² Merrill and Watts conclude:

The legislative history of the [FTC Act] . . . provides significant evidence that Congress did not intend to grant legislative rulemaking authority to the FTC. Judge Wright nevertheless pronounced this history to be "ambiguous" regarding the meaning of Section 6(g), and then relegated the details to an appendix for the especially diligent reader to consult. Such ambiguity, he said, was not enough to overcome "the plain language of Section 6(g)," which, "read in light of the broad, clearly agreed-upon concerns that motivated passage of the Trade Commission Act, confirms the framers' intent to allow exercise of the power claimed here." In the end, Judge Wright adopted what amounted to a new canon: unless the legislative history reveals a clear intent to the contrary, courts should resolve any uncertainty about the scope of an agency's rulemaking authority in favor of finding a delegation of the full measure of power to the agency.⁸³

National Petroleum Refiners, Merrill and Watts lament "provided the roadmap for a more general erasure of the convention"⁸⁴ that had guided Congress for decades in drafting legislation:

Starting around World War I, Congress began following a convention for indicating whether an agency had the power to promulgate legislative rules. Under this convention, the requisite textual signal was provided by the inclusion of a separate provision in the statute attaching "sanctions" to the

⁸¹ See Corbin K. Barthold, *Regulator Beware: Will FTC chairwoman Lina Khan's aggressive posture invite a judicial rebuke?* CITY JOURNAL (Dec. 2, 2021), <https://bit.ly/3EgRW6A>.

⁸² See Merrill & Watts, *supra* note 12.

⁸³ *Id.* at 556–57.

⁸⁴ *Id.* at 557.

violation of rules and regulations promulgated under a particular rulemaking grant. If the statute prescribed a sanction, then the authority to make “rules and regulations” included the authority to adopt legislative rules having the force of law. If the statute did not include a sanction, the authority to make “rules and regulations” encompassed only interpretive or procedural rules.⁸⁵

This convention was clearly satisfied by the statute at issue in all but two of the cases cited by *National Petroleum Refiners*. Five statutes authorized monetary fines or imprisonment for violations of regulations issued thereunder.⁸⁶ Two statutes authorized the revocation of licenses or permits.⁸⁷ One of the statutes explicitly provided that an agency’s rules could be substantive and binding.⁸⁸ As for the two exceptions, in one of them the court simply did not address whether the agency had substantive rulemaking authority,⁸⁹ and, in the other, as we

⁸⁵ *Id.* at 493. Merrill & Watts continue: “The ‘sanctions’ took various forms. The clearest case, of course, was when Congress imposed criminal or monetary civil penalties on persons who violated an agency’s regulations. On other occasions, however, the sanctions might take the form of the forfeiture or destruction of property, the revocation of licenses, or the denial of benefits. In contrast, if the statute was silent regarding the legal consequences for failure to conform to regulations, it was understood as granting the agency the power to make only housekeeping rules.” *Id.* at 493–94.

⁸⁶ *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), involved the Truth in Lending Act of 1968, which imposed stiff fines and imprisonment for those who failed to disclose information required by any regulation issued under the Act. Consumer Credit Protection Act, Pub. L. No. 90-321, § 105, 82 Stat. 146, 151 (codified as amended, 15 U.S.C. § 1601 *et seq.*). In *Public Service Comm’n of State of New York v. FPC*, 327 F.2d 893, 897 (D.C. Cir. 1964), the appeals court upheld a regulation issued by the Federal Power Commission defining the criteria for issuing temporary certificates of authority to gas producers in emergencies. The Natural Gas Act’s “General Penalties” provision authorized a daily penalty of up to \$500 for violations of any regulation made by the Commission. Natural Gas Act of 1938 (NGA), Pub. L. No. 75-688, § 21(b), 52 Stat. 821, 833 (codified at 15 U.S.C. § 717 *et seq.*). In *Morgan Stanley & Co. v. Securities Exch. Comm’n*, 126 F.2d 325 (2d Cir. 1942), the Second Circuit upheld SEC rules involving the Public Utility Holding Company Act, Public Utility Act of 1935, Pub. L. No. 74-333, § 29, 49 Stat. 803. PUHCA authorized monetary fines up to \$200,000 and imprisonment up to two years for “[a]ny person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this Act.” *Id.* The Motor Carrier Act authorized fines up to \$500 for violations of the agency’s regulations, Motor Carrier Act of 1935, Pub. L. No. 74-255, § 222(a), 49 Stat. 543, 564, and the Supreme Court upheld the Interstate Commerce Commission’s authority to issue binding substantive rules under the Motor Carrier Act in *Am. Trucking Ass’ns v. United States*, 344 U.S. 298 (1953). *U.S. Nat. Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943), upheld the FCC’s authority to make substantive rules under the Communications Act of 1934, Pub. L. No. 73-416, which imposed stiff fines for rule violations, 47 U.S.C. § 502.

⁸⁷ Communications Act of 1934 § 312(a) (revocation of broadcast licenses); Motor Carrier Act of 1935 § 212(a) (revocation of permits and licenses).

⁸⁸ Natural Gas Act § 16, 52 Stat. at 830 (“For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters”). See generally *Service Comm’n of State of New York v. FPC*.

⁸⁹ *United States v. Oregon*, 366 U.S. 643, 647–48 (1961). Judge Wright also relies on the Supreme Court’s declaration in *SEC v. Chenery Corp.* (1947) that “[t]he function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future,” *Nat’l Petroleum Refiners*, 482 F.2d at 692 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947)). As

shall see, the Supreme Court—operating long after the convention was forgotten—left the matter far from resolved.⁹⁰

The FTC Act of 1914, by contrast, is a clear-cut example of the convention identified by Merrill and Watts in action. Congress did not provide for sanctions for violations of regulations issued under the Act (or, indeed, even for violations of the Act itself). Under section 5, the key provision of the FTC Act, the Commission was “empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.”⁹¹ Section 5 spelled out, at length, how this process was to work: the Commission would, upon “reason to believe” that someone was violating the Act, issue an order designating the matter for hearing, hold the hearing, and, if it concluded that a violation had occurred, issue a cease-and-desist order.⁹² The Commission had no power to enforce its own orders or impose any sanction upon anyone who violated them, only the power to ask a federal court to enforce such orders.⁹³ Congress was unmistakably clear on this point: “The jurisdiction of the . . . court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.”⁹⁴ The Act authorized the courts, not the FTC, to impose penalties, and only upon those who refused to comply with subpoenas issued by the FTC, those who made false statements to the FTC, corporations that failed to file reports ordered by the FTC, or employees of the FTC who divulged information obtained by the Commission.⁹⁵ No penalties could be imposed for violation of a cease-and-desist order.

“The failure to provide any sanction for the violation of rules adopted under section 6(g),” Merrill and Watts conclude, “along with the placement of the rulemaking grant in section 6, which conferred the FTC’s investigative powers, clearly suggests that Congress intended the rulemaking grant to serve as an adjunct to the FTC’s investigative duties, regarding which Congress had not given the agency the authority to act with the force of law.”⁹⁶ In 1975, Congress amended the FTC Act to empower the agency to impose civil penalties upon those

Judge Wright acknowledges, however, “[t]here was no question that the SEC in *Chenery* had substantive rule-making powers.” *Id.* at 683.

⁹⁰ See *infra* at 12–13.

⁹¹ FTC Act § 5, 38 Stat. at 719.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 720.

⁹⁵ *Id.*

⁹⁶ Merrill & Watts, *supra* note 12, at 504–05.

who violate orders of the Commission,⁹⁷ but the current section 5(l) would be irrelevant to Merrill and Watts’s analysis of how the convention applied to the FTC Act even if the provision had been included in the 1914 Act: under section 5(l), sanctions apply not to violations of FTC regulations (or even to violations of the Act itself), but to violations of court orders imposed for previous violations of the Act. This is roughly akin to penalties for contempt of court,⁹⁸ and a far cry from indicating that Congress intended *regulations* issued by the Commission to have substantive effect.

A. The Rise and Fall of the Sanctions/Rulemaking Convention

Merrill and Watts trace the evolution of the convention by conducting a comprehensive survey of legislation enacted in the Progressive and New Deal eras.⁹⁹ They summarize its history:

The convention . . . gradually developed around the second decade of the twentieth century as Congress created new administrative entities and considered what kind of rulemaking authority to give them. Moreover, as we shall see, the convention was never explicitly memorialized in an authoritative text, such as a statute, a legislative drafting guide, or a prominent judicial decision. It remained part of the unwritten “common law” of legislative drafting in the first half of the twentieth century. Accordingly, the only way to establish the existence of the convention is to examine a significant number of regulatory statutes and their associated legislative histories, supplemented by contemporary writings by knowledgeable participants in the legislative and administrative processes.¹⁰⁰

This convention has its roots in two Supreme Court decisions: *United States v. Eaton* (1892) held that a “sufficient statutory authority should exist for declaring any act or omission a criminal offense,”¹⁰¹ and suggested that if Congress “ma[de] it a crime to violate a regulation adopted by an agency,” Congress “would have to speak ‘distinctly’ in criminalizing failures to

⁹⁷ Magnuson–Moss Act, *supra* note 15, 15 U.S.C. § 45(l).

⁹⁸ *Id.*

⁹⁹ Merrill & Watts, *supra* note 12, at 495 n. 129 (“We began by identifying and analyzing numerous nineteenth- and early twentieth-century regulatory statutes, which we located through a variety of sources, including case law, legal articles and books about rulemaking, and by scanning the United States Code’s Popular Name Table, which lists acts and the years in which they were enacted. We next identified those regulatory statutes that include facially ambiguous rulemaking grants and sought to determine whether there was any authority discussing whether these grants conferred legislative or merely housekeeping powers.”).

¹⁰⁰ Merrill & Watts, *supra* note 12, at 495.

¹⁰¹ 144 U.S. 677, 688 (1892).

abide by agency regulations.”¹⁰² While *Eaton* relied “on a blend of nondelegation and lenity precepts,”¹⁰³ *United States v. Grimaud* (1911)¹⁰⁴ “framed its analysis exclusively in terms of whether the delegation was permissible.”¹⁰⁵ The pertinent passage runs as follows:

When Congress [has] legislated and indicated its will, it [can] give to those who were to act under such general provisions “power to fill up the details” by the establishment of administrative rules and regulations, the violation of which [can] be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.¹⁰⁶

Another case we quoted in that section, the *Queen and Crescent* case, is also pertinent.¹⁰⁷ The Interstate Commerce Act of 1887 empowered the Interstate Commerce Commission to declare whether a given railroad rate was reasonable. At issue in the *Queen and Crescent* case was whether the Act further empowered the ICC to set future rates through rulemaking. The Court concluded that it did not. Although whether the Act granted the power was debatable, the Court explained, such grants of rulemaking power are “never to be implied.”¹⁰⁸

The convention ultimately fell into obscurity because it was never codified. Merrill and Watts explain:

The most remarkable aspect of this drafting convention is that modern administrative lawyers are not aware of its existence. . . . In administrative law, as in other areas of American law, legal knowledge is transmitted through the study of appellate opinions. With no opinion to flag the issue, questions about the meaning of ambiguous rulemaking grants were ignored in post-World War II treatises and instructional materials devoted to administrative law. As a result, knowledge of the convention died out. When, in subsequent years, the Supreme Court occasionally encountered cases that implicated the meaning of such rulemaking grants, none of the parties alerted the Court to the existence

¹⁰² Merrill & Watts, *supra* note 12, at 500 (quoting *Eaton*, 144 U.S. at 688).

¹⁰³ *Id.*

¹⁰⁴ 220 U.S. 506 (1911).

¹⁰⁵ Merrill & Watts, *supra* note 12, at 501.

¹⁰⁶ 220 U.S. at 517.

¹⁰⁷ 167 U.S. 479 (1897).

¹⁰⁸ 167 U.S. at 494.

of the convention, even if it would have been in their interests to do so—presumably because their lawyers did not know about it.¹⁰⁹

Again, most of the cases cited by *National Petroleum Refiners* involved statutes that would clearly have satisfied the convention, had the court in question applied it; instead, in each case, the court came up with reasons for interpreting a grant of rulemaking authority to be substantive in nature.¹¹⁰ And in inventing such specious reasons, those courts laid the groundwork for the confusion to which Judge Wright gave voice.

Merrill and Watts note only one statute that the Supreme Court has held to confer substantive rulemaking power that would not have satisfied his convention. In *National Labor Relations Board (NLRB) v. Wyman-Gordon Co.* (1969), the Supreme Court upheld the Board’s ability to make substantive rules under the National Labor Relations Act of 1935 (NLRA).¹¹¹ Merrill and Watts call the decision “[p]erhaps the most influential judicial stimulus to use legislative rulemaking.”¹¹² Judge Wright claimed that *Wyman-Gordon* “hinted that there may be circumstances where agency policy innovations should be made *only* in rule-making proceedings.”¹¹³ He also invoked a 1973 appellate decision in *Bell Aerospace* reaching the same conclusion.¹¹⁴ But shortly after *National Petroleum Refiners*, the Supreme Court overruled *Bell Aerospace*, reaffirming that the NLRB could announce new interpretations of its statute through adjudication—*without* addressing whether the Board could issue legislative rules.¹¹⁵ The NLRB returned to operating purely through adjudication for the next three decades. In 1991, the Supreme Court upheld a legislative rule promulgated by the NLRB under section 6(a) of the 1935 law.¹¹⁶ This provision, declared the Court without further explanation, was “unquestionably sufficient to authorize the rule at issue.”¹¹⁷ Indeed, as Merrill and Watts note, that question simply was not raised at all.¹¹⁸

¹⁰⁹ Merrill & Watts, *supra* note 12, at 472.

¹¹⁰ See *supra* notes 86-89.

¹¹¹ 394 U.S. 759 (1969).

¹¹² Merrill & Watts, *supra* note 12, at 567.

¹¹³ *Nat’l Petroleum Refiners*, 482 F.2d at 682.

¹¹⁴ *Id.* at 682–84 (citing *Bell Aerospace Div. of Textron, Inc. v. NLRB*, 475 F.2d 485 (2d Cir. 1973)).

¹¹⁵ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

¹¹⁶ *American Hosp. Ass’n v. NLRB*, 499 U.S. 606, 609–10 (1991).

¹¹⁷ *Id.*

¹¹⁸ Merrill & Watts, *supra* note 12, at 570, note two reasons for this: “First, the pathbreaking opinions of Judges Wright and Friendly that had treated ambiguous rulemaking grants as presumptively authorizing legislative rules had by then been on the books for a decade or more. Second, although *Wyman-Gordon* did not expressly consider the NLRB’s rulemaking powers under section 6(a), the opinions in that case, as well as the

If those challenging the NLRB rule had bothered to raise the question, the Court might well have reached the opposite conclusion. For Merrill and Watts, the “legislative history of the NLRA substantiates [the] conclusion” that the Act should not have been interpreted to confer substantive rulemaking power.¹¹⁹ At most, a court reconsidering the NLRA would likely conclude that section 6(a) authorized rulemakings not to create liability, but to protect against it. Section 8(2), the only provision of the act to reference section 6(a)’s rulemaking powers, created a safe harbor from section 8’s general provisions regarding unfair labor practices, allowing an employer to “permit[] employees to confer with him during working hours without loss of time or pay.” Thus, whatever rulemaking power section 6(a) confers, the NLRA differs fundamentally from the FTC Act: only after authorizing “administrative rules” in a freestanding provision (§ 6(a)) and specifying a narrow substantive application of such rules (§ 8), does the NLRA authorize enforcement of the Act through adjudication (§ 10).¹²⁰ The FTC Act does the opposite: it bars unfair methods of competition (§ 5(a)(1)), describes the agency’s adjudicatory process in exquisite detail (§ 5(b)–(f)), then briefly mentions rulemaking among many “additional powers” of the FTC (§ 6(g)).¹²¹

B. Applying That Convention to the FTC Act

In *United States v. George* (1913), the Supreme Court applied *Grimaud* to strike down a substantive regulation issued by the General Land Office. Each of the four statutory provisions invoked as authority for the regulation, concluded the Court, “confer[red] administrative power only”—and “indubitably so.”¹²² One of them bears a striking resemblance to section 6(g): “The Commissioner of the General Land Office . . . is authorized

Court’s treatment of the rulemaking versus adjudication issue in *Bell Aerospace*, implicitly suggested that the NLRB possessed legislative rulemaking powers. Thus, by the time the Court decided *American Hospital* in 1991, counsel for the Association no doubt concluded it was not worth the effort to challenge the NLRB’s exercise of legislative rulemaking powers.”

¹¹⁹ “Upon consideration of different versions of the bill, one Senator made a proposal to limit the NLRB’s rulemaking powers under what became section 6(a) to such ‘reasonable rules and regulations as may be necessary to carry out the provisions of this Act.’ However, the proposal was rejected because, according to a Senate memorandum, ‘in no case do the rules have the force of law in the sense that criminal penalties or fines accrue for their violation, and it seems sufficient that the rules prescribed must be “necessary to carry out the provisions” of the act.’ The *Final Report* of the Attorney General’s Committee of 1941 confirms this legislative history: it notes that the NLRB’s ‘power to “make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this chapter” has been assumed to extend only to matters of procedure.’” *Id.* Merrill & Watts, *supra* note 12, at 511 (citing ATTORNEY GENERAL’S COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 98 n. 18 (1st Sess. 1941)) (internal citation omitted).

¹²⁰ National Labor Relations Act, Pub. L. No. 74-198, §§ 6(a), 8, 10, 49 Stat. 449 (1935).

¹²¹ See FTC Act 15 U.S.C. § 45. Subsection references correspond to the current version of the Act, to which Congress has added subsections.

¹²² 228 U.S. 14, 20 (1913).

to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for.”¹²³

Congress’s decision, the very next year, not to include any sanction for violations of the FTC Act, let alone rules issued by the FTC, thus speaks clearly about its intentions. As Merrill and Watts conclude:

Neither *Eaton* nor *Grimaud* spoke directly to the question of how facially ambiguous rulemaking grants should be interpreted. Nevertheless, the decisions established points of reference that Congress could use in signaling whether particular grants authorized rules and regulations having the force of law. If Congress specifically provided that the violation of a regulation would result in the imposition of sanctions, such as criminal penalties, then the rule would have the force of law (*Grimaud*). If Congress did not so provide, an agency could not enforce the rule with criminal penalties (*Eaton*), and it was doubtful whether it could be enforced with any type of civil sanction.¹²⁴

National Petroleum Refiners, noted Merrill and Watts, failed to recognize a key difference in the precedents it relied on: “the rulemaking grants in those cases, unlike Section 6(g), were coupled with statutory provisions imposing sanctions for rule violations.”¹²⁵ Merrill and Watts’s explanation speaks for itself:

The failure to provide any sanction for the violation of rules adopted under section 6(g) [or, indeed, even of the FTC Act itself], along with the placement of the rulemaking grant in section 6, which conferred the FTC’s investigative powers, clearly suggests that Congress intended the rulemaking grant to serve as an adjunct to the FTC’s investigative duties, regarding which Congress had not given the agency the authority to act with the force of law.

The legislative history of the Act supports the conclusion that the FTC’s rulemaking grant did not confer legislative rulemaking authority. Section 6(g)’s general rulemaking grant originated in the House Bill of 1914, which conferred only investigative powers, such as the power to require reports from corporations and to classify corporations. In contrast, the bill that passed the Senate granted adjudicative and investigative powers but included no rulemaking provision at all. When the conference committee met, the only

¹²³ *Id.* at 22 n. 2.

¹²⁴ Merrill & Watts, *supra* note 12, at 502.

¹²⁵ *Id.* at 556.

rulemaking provision under consideration was the one included in the House bill. Under established practices for reconciling bills in conference, the committee could not have granted the FTC legislative rulemaking powers because neither bill had done so.¹²⁶

IV. Post-Enactment History of the FTC Act

The FTC Act has been amended on several occasions. Its post-enactment legislative history does not supply any basis for reading section 6(g) to confer substantive rulemaking power.

A. Arguments from Subsequent Legislative History Are of Little Value

Chair Khan, former Commissioner Chopra, and Professor Gus Hurwitz, whose work Khan and Chopra cite, rely on congressional actions after 1914 to support their conclusion that Congress,¹²⁷ in 1914, intended to confer substantive rulemaking authority upon the FTC. Yet as the Supreme Court has declared, “the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”¹²⁸ This is especially so when Congress enacts new legislation touching upon earlier legislation whose precise meaning is “still to be authoritatively determined” and remains “a subject of speculation.”¹²⁹ This was, and remains, the case for section 6(g)—with the Supreme Court having declined to review *National Petroleum Refiners* and with no other appellate court having ruled on the question.

Nor can we infer anything, as Hurwitz does, from a 1974 conference committee’s rejection of a House proposal that appeared to suppose the existence of (and to curb) FTC rulemaking authority.¹³⁰ Such decisions to reject legislative language are inherently unreliable indicators of congressional intent. As the Supreme Court observed when addressing one such instance: “Whether Congress thought the proposal unwise . . . or unnecessary, we cannot tell; accordingly, no inference can properly be drawn from the failure of the Congress to act.”¹³¹ Here, that is doubly true: Congress decided (i) *not* to enact a proposal that (ii) might, or might not, have accurately reflected the actual state of the law. That lawmakers in 1974 *might* have thought that the FTC *might* have had UMC rulemaking authority does not actually tell us whether the Congress that enacted the FTC Act intended to confer such power in 1914. As Justice Scalia once put it, “[a]rguments based on subsequent legislative history,

¹²⁶ *Id.* at 504–05.

¹²⁷ Chopra & Khan, *supra* note 8; Hurwitz, *supra* note 8.

¹²⁸ *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

¹²⁹ *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 348–49 (1963).

¹³⁰ H.R. REP. NO. 93-1107 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7727.

¹³¹ *United States v. Price*, 361 U.S. at 312.

like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote.”¹³²

B. The 1980 FTC Improvements Act Did Not Validate UMC Rulemaking

Hurwitz also discusses the FTC Improvements Act of 1980.¹³³ If anything, this law tells us even less about whether the FTC may make “unfair methods” rules than does what happened in 1974. As Hurwitz notes, the 1980 Act was passed in response to the FTC’s “extensive and often controversial rulemaking” following passage of the Magnuson–Moss Act of 1975.¹³⁴ “The FTC had become the second most powerful legislature in the country,” Hurwitz continues, trying to “ban all advertising directed at children as unfair,”¹³⁵ which “famously led *The Washington Post* to declare that the FTC had assumed the role as ‘National Nanny.’”¹³⁶ The 1980 Act placed new restrictions on the FTC’s UDAP rulemaking authority, stripped the FTC of authority to make rules for (among other things) children’s advertising, and gave Congress a temporary veto on all FTC rules.

Given this background, what are the chances that the 1980 Act tacitly endorsed section 6(g) “unfair methods” rulemaking? Did Congress pass the 1980 Act simultaneously (i) to act on its white-hot rage at the FTC’s overreaching UDAP rules and (ii) to implicitly endorse the notion that the FTC may embark on grand new adventures in the realm of “unfair methods” rulemaking? To ask the question is to answer it. It is illogical to conclude that Congress reined in the FTC’s UDAP rulemaking authority with one hand but anointed the FTC a maker of “unfair methods” rules with the other. To further conclude, as one adopting this line of thought is obliged to do, that Congress made it *easier* to pass UMC rules than UDAP rules is downright perverse.

¹³² *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., dissenting):

In some situations, of course, the expression of a legislator relating to a previously enacted statute may bear upon the meaning of a provision in a bill under consideration—which provision, if passed, may in turn affect judicial interpretation of the previously enacted statute, since statutes *in pari materia* should be interpreted harmoniously. Such an expression would be useful, if at all, not because it was subsequent legislative history of the earlier statute, but because it was plain old legislative history of the later one.

Second paragraph of a footnote blockquote.

¹³³ Hurwitz, *supra* note 8, at 235–36.

¹³⁴ See Hurwitz, *supra* note 8 and associated text.

¹³⁵ Hurwitz, *supra* note 8, at 235. See generally J. Howard Beales III, Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present (Mar. 2, 2004), <https://www.ftc.gov/news-events/news/speeches/advertising-kids-ftc-regulatory-retrospective-advises-present>.

¹³⁶ *Id.*

V. *National Petroleum Refiners* Stands on an Outmoded Policy- and Purpose-Driven Form of Statutory Interpretation

“Our duty,” Judge Wright says at the outset of *National Petroleum Refiners*, “is not simply to make a policy judgment.”¹³⁷ The FTC, after all, “is a creation of Congress, not a creation of judges’ contemporary notions of what is wise policy.”¹³⁸

But those lines are just a feint. True, Judge Wright opens his opinion with a perfunctory examination of the FTC Act’s text. Even on its own terms, the section—as Judge Wright concedes—fails to establish that the housekeeping-rules-only reading of section 6(g) is “implausible.”¹³⁹ But in any event, after that desultory and inconclusive opening nod to the text has been made, the mask slips. Throughout the rest of his lengthy opinion, Judge Wright returns, again and again, to policy considerations. Over and over, he praises the “invaluable resource-saving flexibility” of rulemaking. According to Judge Wright:

“[U]se of substantive rule-making is increasingly felt to yield significant benefits. . . . Increasingly, courts are recognizing that use of rule-making to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication.”¹⁴⁰

“[C]ontemporary considerations of practicality and fairness . . . certainly support the Commission’s position here.”¹⁴¹

“Such benefits are especially obvious in cases involving the initiation of rules of the sort the FTC has promulgated here.”¹⁴²

“[T]he policy innovation involved in this case underscores the need for increased reliance on rule-making rather than adjudication alone.”¹⁴³

“[The FTC] has remained hobbled in its task by the delay inherent in repetitious, lengthy litigation To the extent substantive rule-making . . . is likely to deal with these problems . . . [it] should be upheld as [allowed under the FTC Act].”¹⁴⁴

“[T]he Commission will be able to proceed more expeditiously, . . . and . . . more efficiently with a mixed system of rule-making and adjudication[.]”¹⁴⁵

¹³⁷ *Nat’l Petroleum Refiners Ass’n*, 482 F.2d at 674.

¹³⁸ *Id.*

¹³⁹ *Id.* at 685.

¹⁴⁰ *Id.* at 681.

¹⁴¹ *Id.* at 683.

¹⁴² *Id.*

¹⁴³ *Id.* at 684.

¹⁴⁴ *Id.* at 690.

¹⁴⁵ *Id.*

“[C]ourts have stressed the advantages of efficiency and expedition which inhere in reliance on rule-making instead of adjudication alone.”¹⁴⁶

Rulemaking, on this view, was the wave of the future, and all fashionable and enlightened judges understood as much. Why not, therefore, insert into statutes, wherever possible, the power to make substantive rules? Whether the defenseless texts could in fact bear such a reading appears, to Judge Wright, to have been a secondary concern at best.

When not engaging in his own, independent analysis of the costs and benefits of rulemaking, Judge Wright repeatedly invokes the FTC Act’s amorphous “policies” and “purposes”:

“[R]ejecting the claim of rule-making power would run counter to the broad policies . . . that clearly motivated Congress in 1914.”¹⁴⁷

“[T]he broad, undisputed policies which clearly motivated the framers of the [FTC] Act of 1914 would indeed be furthered by our view[.]”¹⁴⁸

“[R]ule-making is not only consistent with the original framers’ broad purposes, but appears to be a particularly apt means of carrying them out.”¹⁴⁹

The FTC needs rulemaking power “to do the job assigned . . . by Congress.”¹⁵⁰

Here again, Judge Wright strays from the task at hand—determining what the *text* of the FTC Act means. A judge may not appeal to a statute’s “purpose” on the false cry that he is divining what the legislators “really” meant. “[N]o legislation pursues its purposes at all costs. . . . [I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.”¹⁵¹ Once again, the missing ingredient through most of Judge Wright’s long document—the only ingredient that truly matters—is the statutory text.

Judge Wright’s opinion in *National Petroleum Refiners* is a museum piece. It is a fossilized specimen of an extinct species of statutory interpretation. Its usefulness, to a judge trying to understand the FTC Act today, is zero. Modern judges may not let their rulings be driven by “policy,” or by statutory “purpose,” or by the sense of personal satisfaction they would gain from handing down statute-expanding decrees. Courts have “no roving license” to rewrite a

¹⁴⁶ *Id.* at 692.

¹⁴⁷ *Id.* at 695.

¹⁴⁸ *Id.* at 686.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 697–98.

¹⁵¹ *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987).

statute on the assumption that “Congress ‘must have intended’ something broader.”¹⁵² Judges are “expounders of what the law *is*,” not “policymakers choosing what the law *should be*.”¹⁵³

VI. Conclusion

If the FTC issues substantive rules claiming the force and effect of law, those rules will be challenged. Once in court, the FTC will find itself in a terrible bind. The agency will try to build its case on *National Petroleum Refiners*; but that decision, the agency will quickly discover, is a pile of sand. The case reflected the assumptions of its time. Statutory interpretation has changed profoundly since 1973. Today, courts recognize that “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”¹⁵⁴

It would be difficult to imagine a larger elephant than the power to issue legislative rules, rules that claim the force and effect of law,¹⁵⁵ and that can declare the practices of almost any business in America “unfair.” Making such a value judgment is a job for Congress, the democratically accountable holder of all “legislative Powers” under the Constitution. It is simply unfathomable that the Congress of 1914 would have delegated this power to the FTC in so sly a fashion, without any debate over whether the Constitution permitted so sweeping a delegation—all without even imposing any sanctions for violations of the Act, let alone violations of rules issued under the Act. This would have been nothing less than a constitutional revolution.

And it would be difficult to imagine a smaller mousehole than section 6(g), an “additional power” to “classify corporations and . . . to make rules and regulations for the purpose of carrying out the provisions of this Act.”

Had such an elephant been hiding in such a mousehole, the Supreme Court certainly would have noticed it in *Humphrey’s Executor*.¹⁵⁶ Were the Court to confront such a creature today, it would say once again what Congress understood so clearly in 1914: Congress could not delegate such sweeping power to any regulatory agency even if it wanted to. At a minimum, the Court would expect Congress to speak clearly before it attempted to confer legislative power upon an agency.

¹⁵² *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014).

¹⁵³ *EPIC Sys. Corp.*, 138 S. Ct. at 1624.

¹⁵⁴ *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001).

¹⁵⁵ Attorney General Manual, *supra* note 3, at 30 n. 3.

¹⁵⁶ *See supra* note 50 and associated text at 6.

Lawmakers in the Progressive era followed a simple convention for doing so—explicitly imposing sanctions for rule violations. That the Congress of 1914 included no such sanctions in the FTC Act tells us what lawmakers understood the text of section 6(g) to mean: that the FTC would issue no more than “housekeeping” or “interpretive” rules,¹⁵⁷ not rules with the force and effect of law. Congress did not, in short, create a second national legislature.¹⁵⁸

¹⁵⁷ See *supra* notes 13 & 14 and associated text at 2.

¹⁵⁸ See BERIN SZÓKA & GEOFFREY A. MANNE, THE FEDERAL TRADE COMMISSION: RESTORING CONGRESSIONAL OVERSIGHT OF THE SECOND NATIONAL LEGISLATURE, REPORT 2.0 OF THE FTC: TECHNOLOGY & REFORM PROJECT 57–60 (2016), <http://docs.house.gov/meetings/IF/IF17/20160524/104976/HHRG-114-IF17-Wstate-ManneG-20160524-SD004.pdf>.