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# **DO EXPERT AGENCIES OUTPERFORM GENERALIST JUDGES? SOME PRELIMINARY EVIDENCE FROM THE FEDERAL TRADE COMMISSION**

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# Do expert agencies outperform generalist judges? Some preliminary evidence from the Federal Trade Commission

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In the context of US antitrust law, many commentators have recently called for an expansion of the Federal Trade Commission's (FTC's) adjudicatory decision-making authority pursuant to Section 5 of the FTC Act, increased rulemaking, and carving out exceptions for the agency from increased burdens of production facing private plaintiffs. These claims are often expressly grounded in the assertion that expert agencies generate higher quality decisions than federal district court judges. We call this assertion the expertise hypothesis and attempt to test it. The relevant question is whether the expert inputs available to generalist federal district court judges translate to higher quality outputs and better performance than the Commission produces in its role as an adjudicatory decision-maker. While many appear to assume agencies have courts beat on this margin, to our knowledge, this oft-cited reason to increase the discretion of agencies and the deference afforded them by reviewing courts is void of empirical support. Contrary to the expertise hypothesis, we find evidence suggesting the Commission does not perform as well as generalist judges in its adjudicatory antitrust decision-making role. Furthermore, while the available evidence is more limited, there is no clear evidence the Commission adds significant incremental value to the administrative law judge decisions it reviews. In light of these findings, we conclude there is little empirical basis for the various proposals to expand agency authority and deference to agency decisions. More generally, our results highlight the need for research on the relationship between institutional design and agency expertise in the antitrust context.

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I have never heard anyone argue that [the FTC] has displayed superior expertise to the courts when it comes to deciding antitrust cases.<sup>1</sup>

## Introduction

Governments and scholars have been increasingly willing to evaluate the performance of their competition and consumer protection agencies worldwide. Within the last few years alone, China,<sup>2</sup> India,<sup>3</sup> Brazil,<sup>4</sup> and the European Union<sup>5</sup> have undergone substantial institutional restructuring aimed at improving agency performance. At the same time, antitrust scholars have recently increased their focus upon the structure of competition enforcement institutions, giving rise to a burgeoning body of scholarly work.<sup>6</sup>

One critical dimension of the institutional design research agenda is how decision-making ought to be delegated between courts and agencies to best achieve the goals of competition policy. While antitrust scholars have long focused upon the importance of errors and the design of substantive legal rules to minimize error costs, relatively little attention has been paid to the myriad ways in which institutional design in general, and decision-making within expert competition agencies specifically, can improve the quality of these institutions. The organization of leadership and staff within a competition agency affects the structure of the decision-making process it undertakes. For example, the number of economists, the quality of their inputs, and the nature of their authority within a competition agency could affect agency enforcement decisions.<sup>7</sup> Indeed, throughout its history the Federal Trade Commission (FTC) has experimented with various organizational designs in hopes of incorporating the optimal level of economic influence to achieve the agency's goals.<sup>8</sup> Similarly, the European Commission (EC) has responded to calls for more coherent economic analysis through the addition of a team of PhD economists to aid the EC's Competition Directorate in improving its decision-making quality.<sup>9</sup>

<sup>1</sup> Richard A Posner, *Antitrust Law* (2nd edn, Chicago U Press 2001) 280.

<sup>2</sup> See Eleanor M Fox, 'Antitrust and Institutions: Design and Change' (2010) 41 Loy U Chi LJ 473, 476 (describing China's institutional design choices for enforcing its first comprehensive competition law in 2008); see also Daniel A Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford U Press 2011) 211.

<sup>3</sup> See Crane (ibid) 211.

<sup>4</sup> *ibid.*

<sup>5</sup> See Luke M Froeb and others, 'The Economics of Organizing Economists' (2009) 76 Antitrust LJ 569, 571.

<sup>6</sup> See, eg Crane (n 2); Daniel A Crane, 'Technocracy and Antitrust' (2008) 86 Tex L Rev 1159; Fox (n 2); Froeb and others (n 5); Michael S Gal, 'When the Going Gets Tight: Institutional Solutions When Antitrust Enforcement Resources are Scarce' (2010) 41 Loy U Chi L Rev 417; Calvin S Goldman, QC and Navin Joneja, 'The Institutional Design of Canadian Competition Law: The Evolving Role of the Commissioner' (2010) 41 Loy U Chi L Rev 535; William E Kovacic, 'Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy' (2000) 74 St John's L Rev 361.

<sup>7</sup> *ibid.*

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.*

The institutional design literature has identified a number of potential factors influencing decision-making, including whether the agency should be led by a single director or a collegiate body,<sup>10</sup> the experience held by agency heads,<sup>11</sup> the structure of enforcement,<sup>12</sup> and methods of ensuring transparency in agency decision-making.<sup>13</sup> There is no debate that theoretical potential for superior agency performance lies in its ability to harness its expertise. In practice, however, there is also little doubt that the observed design and structure of competition agencies in the USA bears little resemblance to the theoretical optimum. Holding aside the obvious and oft-discussed inefficiencies of multiple overlapping competition agencies, there appear to be other fundamental structural impediments to optimal agency performance.

To take but one example, former FTC Chairman William Kovacic has written at length about the disappointing overall quality of appointments of FTC commissioners.<sup>14</sup> While Congress envisioned a Commission comprising lawyers, business managers, and economists with superior achievements and substantial, diverse experience,<sup>15</sup> what it got was—in no small part due to political interference<sup>16</sup>—a history and pattern of appointments evidencing a systematic failure to meet those expectations.<sup>17</sup> Obviously, this is not to say that those appointed to lead the FTC are not talented professionals; it simply means the historic composition of the Commission has failed to encompass the qualities necessary to make it the leading authority in US antitrust law.<sup>18</sup>

Predicate to the question of precisely how to design competition agencies to improve their performance is the issue of precisely what locus of authority should be allocated to the expert agency. The answer to that question lies at the heart of many antitrust debates. Dissatisfied with recent changes in Sherman Act jurisprudence, some commentators have called for a shift in responsibility for shaping antitrust law from the courts to the agencies, reasserting the original vision of the FTC as an expert agency.<sup>19</sup>

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<sup>10</sup> In the USA, the FTC is led by a five-member commission, whereas the Department of Justice's (DOJ's) Antitrust Division is led by a single Assistant Attorney General.

<sup>11</sup> Kovacic (n 6) 364–69.

<sup>12</sup> *ibid* 374–83.

<sup>13</sup> *ibid* 383–91.

<sup>14</sup> William E Kovacic, 'The Quality of Appointments and the Capability of the Federal Trade Commission' (1997) 49 *Admin L Rev* 915, 951.

<sup>15</sup> *ibid* 919.

<sup>16</sup> *ibid* 939.

<sup>17</sup> *ibid* 934–35.

<sup>18</sup> *ibid* 930.

<sup>19</sup> Kovacic writes:

Congress assumed that: (1) presidents would appoint, and Congress would confirm, commissioners who were true experts in disciplines relevant to forming competition policy; (2) the agency's leadership would fully exploit the FTC's institutional potential to synthesize economic and legal learning; (3) federal judges would defer to the FTC as it designed new rules of business conduct; and (4) the FTC's analysis and reputation would command respect from business officials and their advisors.

A recurring and related issue in the debate over an expanded role for enforcement agencies—especially the FTC—in antitrust decision-making is whether Article III courts are sufficiently equipped to handle complex antitrust cases.<sup>20</sup> Evidence indicates that complex antitrust cases involve economic analysis that is sometimes too complicated for courts to consistently decide properly.<sup>21</sup> This is due in large part to the fact that courts are unable (some suggest unwilling<sup>22</sup>) to incorporate expert economic analysis into their antitrust decisions. Some commentators have argued, based upon courts' imperfect decision-making abilities, that the FTC should have greater decision-making authority to offset courts' shortcomings in understanding the complex economic analysis required to accurately assess modern antitrust issues.<sup>23</sup>

Which institution is better equipped to analyse complex modern antitrust cases? The debate is occasionally framed in unfair terms. There is no doubt the agency comprises antitrust and economic experts well equipped to analyse all modes of business dealings; in this sense, agencies certainly have greater economic expertise than the Article III judges as a general rule. But neither the expert economists in the Bureau of Economics nor the Bureau of Competition's lawyers make decisions for the agency. Both ultimately provide inputs to the five-person Commission in a complex decision-making process. Economic and legal expertise are not the only inputs. Commissioners are political appointees that may or may not begin their terms with substantial antitrust experience.<sup>24</sup> As the ultimate decision-makers in administrative litigation, the Commission is the body to which relevant analytical information must be transmitted. Comparing the expert Commission staff to combined expertise of the Article III judge and his law clerks is not the appropriate comparison; it also misses the point.<sup>25</sup> The issue remains whether the expert

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ibid 920; see eg C Scott Hemphill, 'An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition' (2009) 109 Colum L Rev 629 (endorsing nearly unprecedented antitrust rulemaking based upon the FTC's information-gathering authority and purported expertise); J Thomas Rosch, Comm'r, Fed Trade Comm'n, The Great Doctrinal Debate: Under What Circumstances is Section 5 Superior to Section 2? (27 January 2011) (advocating for enlarging the scope of conduct falling within s 5 of the FTC Act).

<sup>20</sup> See eg ibid 673–74 (questioning the ability of courts to identify anticompetitive conduct in ambiguous circumstances and finding the FTC 'essentially by definition, is less likely to make mistakes identifying' such conduct).

<sup>21</sup> See Michael D Baye and Joshua D Wright, 'Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals' (2011) 54 JL Econ 1.

<sup>22</sup> See eg Hemphill (n 19) 674–75 ('In a key case brought by the FTC, the appeals court largely ignored the analysis employed by the agency, granted essentially no deference to its findings of fact, and indeed berated the Agency for failing to follow the appeals court's earlier rule. For the most part, courts have also ignored the results of the FTC's extensive 2002 study and its subsequent annual summary updates, as well as its amicus recommendations based on this data.'). But see Posner (n 1) 277 ('American courts are accustomed to dealing with technical questions . . . by having technical experts present evidence at trial that the judge and jury . . . is expected somehow to assimilate. This system does not work so badly as its critics maintain . . .').

<sup>23</sup> Rosch (n 19) 4.

<sup>24</sup> ibid. Kovacic (n 14) 950.

<sup>25</sup> Article III judges also receive economic inputs in the way of expert testimony through the adversarial process. On the tradeoffs between adversarial and inquisitorial regimes of judicial decision-making, see Luke M

inputs available to the Commission's decision-makers manifest themselves in the context of administrative decision-making compared to generalist judges.

This article focuses upon a narrow, but important, aspect of FTC activity: agency decision-making in administrative litigation. Beyond litigation, the FTC is also vested with information-gathering, reporting, and advisory functions.<sup>26</sup> Recent arguments that the antitrust agencies should be permitted to expand its litigation authority, however, suggest closer evaluation of this particular agency function is warranted. There is a dearth of empirical evidence to support or oppose an argument for expanding the FTC's authority, or more generally, increasing the enforcement powers delegated to competition agencies. This article seeks to fill that gap by conducting a comparative analysis of Commission and Article III judicial decisions to test what we refer to as the 'expertise hypothesis', the assumption that Commission decision-making is superior due to its greater expertise. The answer to this question implicates a number of critical issues concerning institutional design and the optimal roles of administrative agencies and courts in modern antitrust enforcement, including the proper scope of Section 5 of the FTC Act, FTC rulemaking, and the appropriate level of deference afforded to the FTC as plaintiff in federal court.

## **The expertise hypothesis: courts versus agencies**

In establishing an administrative agency, Congress evidences its decision to delegate resolution of given issues to a specialized body that is presumptively superior to the other branches of the federal government in interpreting laws and guiding policies. Congress may choose to delegate initial adjudicative authority to the agency, or it may leave the authority to the courts. A decision to vest an agency with administrative adjudicatory power is an indication that Congress believes the agency is better equipped than courts to resolve issues in which it specializes.

The primary justification for empowering agencies to adjudicate is that they possess the expertise to resolve technical questions more efficiently than if those questions were left to the judicial system.<sup>27</sup> Accordingly, for an agency to fulfil this purpose, it must systematically outperform courts in adjudicating legal issues in which it specializes. Determination of whether this hypothesis is

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Froeb and Bruce H Kobayashi, 'Evidence Production in Adversarial vs. Inquisitorial Regimes' (2001) 70 *Econ Letters* 267.

<sup>26</sup> Marc Winerman, 'The Origins of the FTC: Concentration, Cooperation, Control, and Competition' (2003) 71 *Antitrust LJ* 1, 93, 97.

<sup>27</sup> Matthew C Stephenson, 'Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts' (2006) 119 *Harv L Rev* 1035, 2042. Other justifications for delegation to agencies over courts have been proffered. For discussions of alternative justifications, see generally Margaret H Lemos, 'The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII' (2010) 63 *Vand L Rev* 363, 372–80; Stephenson, this note, at 1042–49.

true is ultimately an empirical question; however, no studies have been conducted to test the hypothesis.

There are several methods by which scholars have attempted to measure judicial performance. Citation-based studies appear commonly;<sup>28</sup> however, they have often been employed to compare the performance and reputation of individual judges and are therefore unsuitable for our purpose, which focuses upon measuring the performance of institutions rather than the individuals comprising them. Other studies use metrics that hew more closely to the performance we seek to measure in this article. These metrics seek to measure the efficiency and speed of judicial decision-making.<sup>29</sup> Some of these studies discuss the performance of specialized courts as compared to courts of general jurisdiction. For example, Jonathan Nash and Rafael Pardo have sought to compare the quality of decisions made by appellate bankruptcy judges with those of federal district courts.<sup>30</sup> They compared reversal rates of bankruptcy appellate panels (BAPs) to the reversal rates of bankruptcy decisions in federal district courts,<sup>31</sup> and they concluded courts of appeals place more weight upon the decisions of BAPs.<sup>32</sup> Jay P Kesan and Gwendolyn G Bell have sought to measure judicial performance in the context of patent cases.<sup>33</sup> They concluded increased experience with patent law is associated with increased accuracy of patent decisions.<sup>34</sup> Kesan and Bell concluded their results provided 'a real but modest case' for establishing a specialized patent court comprising experts in the field.<sup>35</sup>

Very little has been done to measure the performance of administrative agencies. Evaluations have been conducted both qualitatively and quantitatively. Richard Posner, in a 1969 article, argued that FTC hearing examiners were less efficient than federal district court judges in part due to a misconception about the virtues and vices of federal regulation.<sup>36</sup> Kovacic

<sup>28</sup> See eg Gregory A Caldeira, 'On the Reputation of State Supreme Courts' (1983) 5 *Pol Behav* 83, 83; Lawrence Friedman and others, 'State Supreme Courts: A Century of Style and Citation' (1981) 33 *Stan L Rev* 773, 773; William M Landes, Lawrence Lessig and Michael E Solimine, 'Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges' (1998) 27 *J Legal Stud* 271, 272–76; Rodney L Mott, 'Judicial Influence' (1936) 30 *Amer Pol Sci Rev* 295, 295.

<sup>29</sup> See eg Arie Y Lewin, Richard C Morey and Thomas J Cook, 'Evaluating the Administrative Efficiency of Courts' (1982) 10 *Int'l J Mgmt Sci* 401 (1982); Robert K Christensen and John Szmer, *Examining the Efficiency of the U.S. Court of Appeals: Pathologies and Prescriptions*, 1 (IEL Paper in Comparative Analysis of Institutions, Economics & Law No 4, 2011) <<http://polis.unipmn.it/pubbl/RePEc/uca/ucaiel/iel004.pdf>> accessed 2 December 2012.

<sup>30</sup> Jonathan Nash and Rafael Pardo, 'An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review' (2008) 61 *Vand L Rev* 1745.

<sup>31</sup> Parties appealing from decisions of bankruptcy courts have the option to seek review in a district court or a BAP. *ibid* 1746. BAPs are assumed to have more expertise in bankruptcy law than district courts. *ibid* 1759. Appeals from both district courts and BAPs are taken to federal courts of appeals. *ibid* 1747.

<sup>32</sup> *ibid* 1807.

<sup>33</sup> Jay P Kesan and Gwendolyn G Ball, 'Judicial Experience and the Efficiency and Accuracy of Patent Adjudication: An Empirical Analysis of the Case for a Specialized Patent Trial Court' (2011) 24 *Harv JL & Tech* 393.

<sup>34</sup> *ibid* 437.

<sup>35</sup> *ibid* 444.

<sup>36</sup> Richard Posner, 'The Federal Trade Commission' (1969) 37 *U Chi L Rev* 47.



has argued that appointed FTC commissioners have systematically failed to meet the qualifications Congress expected when establishing the FTC.<sup>37</sup> Such failure has contributed to the perception that the FTC is underqualified when it comes to specialized antitrust decision-making.<sup>38</sup> In a quantitative study, Gene A Brewer sought to measure agency performance through survey results from over eight thousand federal government employees.<sup>39</sup> As a proxy for overall agency performance, the study was designed to measure management practices within federal agencies; Brewer concluded management is deficient in federal agencies and efforts should be made to improve performance by retaining high-quality management.<sup>40</sup>

Although some work has been done to measure both judicial and agency performance, none has been done to examine whether the expertise hypothesis is true. The FTC provides an apt subject to test because of recent calls for expansion of its authority and the accompanying debate over whether to permit it. We discuss the expertise hypothesis as it relates to the FTC in the next section.

## **The FTC and the expertise hypothesis**

Congress envisioned the FTC as an agency with superior business and economic knowledge that could use its expertise to influence competition policy and guide the public in its business endeavours. Congress vested the FTC with exclusive enforcement authority of Section 5 of the FTC Act, which prohibits ‘unfair methods of competition’. This language indicates congressional intent for Section 5 to apply more broadly than the Sherman Antitrust Act and the Clayton Antitrust Act.

One of the FTC’s many responsibilities is to adjudicate the legality of conduct it believes violates Section 5. In theory, Section 5 was to encompass conduct that falls outside the scope of the Sherman and Clayton Acts but that nevertheless harms competition and consumers. In practice, the FTC’s Section 5 authority has historically been held applicable to a very narrow range of conduct in competition cases.<sup>41</sup> Though the FTC has attempted to enforce a more expansive version of Section 5, it has, in large part, failed in its endeavours.<sup>42</sup> The legacy of the FTC’s Section 5 competition enforcement

<sup>37</sup> Kovacic (n 14).

<sup>38</sup> *ibid* 951.

<sup>39</sup> Gene A Brewer, ‘In the Eye of the Storm: Frontline Supervisors and Federal Agency Performance’ (2005) 15 *J Pol Admin & Res Theory* 505.

<sup>40</sup> *ibid* 520.

<sup>41</sup> This authority is to be distinguished from the FTC’s consumer protection authority under s 5, through which it has promulgated numerous rules and brought a broad array of administrative cases.

<sup>42</sup> William E Kovacic and Marc Winerman, ‘Competition Policy and the Application of Section 5 of the Federal Trade Commission Act’ (2010) 76 *Antitrust LJ* 929, 933–34 (‘One would be hard-pressed to come up with a list of ten adjudicated decisions that involved the FTC’s application of Section 5 in which the FTC prevailed and the case can be said to have had a notable impact, either in terms of doctrine or economic effects.’).



agenda is underwhelming at best. Its most notable attempt to influence antitrust doctrine occurred in the early 1980s when it brought and lost three cases based upon Section 5 theories.<sup>43</sup>

The debate concerning the desirability of expanding Section 5's scope returns to the fundamental issue of whether the Commission's expertise renders it better situated than generalist courts to decide modern antitrust cases. Proponents of an expanded Section 5 contend Congress expected the FTC to possess the expertise necessary to overcome the Sherman Act's flaws via Section 5 enforcement.<sup>44</sup> A broad authority would allow the Commission to use its expertise to prohibit conduct having ambiguous competitive effects and to permit the FTC to fill the gaps between the Sherman Act and incipient anticompetitive conduct.

Additionally, cases decided under Section 5 are more susceptible to judicial adoption. 'The entire reason that agency interpretations receive any deference is that specialized agencies are presumed to have greater subject matter expertise than generalist judges.'<sup>45</sup> Sole enforcement authority allows courts to give more deference to the Commission on appeal. The FTC is permitted to use its superior knowledge of competitive conditions to enforce Section 5, and courts are 'more likely to trust an agency's prediction based on its superior familiarity with the type of conduct at issue.'<sup>46</sup>

The argument against judicial resolution of complex or novel antitrust cases can be summarized simply: 'The problem [with generalist federal judges] is that they're not required to be experts in antitrust law.'<sup>47</sup> Because Article III judges handle a wide array of cases, they are provided with little opportunity to refine their antitrust knowledge. Antitrust cases comprise only a small percentage of a district court docket. In contrast, the Commission was created to specialize in competition law and considers competition issues on a regular basis.

There is evidence supporting the view that antitrust cases involving complex economic issues are too difficult for Article III judges to analyse properly.<sup>48</sup> Professors Michael Baye and Joshua Wright recently conducted a study of antitrust cases in Article III courts, and they concluded that, even where judges have some economic training, they are no better at deciding antitrust cases

<sup>43</sup> See *El du Pont de Nemours and Co v FTC*, 729 F 2d 128 (2d Cir 1984); *Official Airline Guides, Inc v FTC*, 630 F 2d 920 (2d Cir 1980); *Boise Cascade Corp v FTC*, 637 F 2d 573 (9th Cir 1980); see also Kovacic and Winerman (n 42) 942 (explaining that in each case 'the court found that the Commission had failed to make a compelling case for condemning the conduct in question').

<sup>44</sup> Rosch (n 19) 14 ('Congress enacted Section 5 of the FTC Act at the same time it created the Federal Trade Commission because it anticipated that the FTC would serve as an expert appellate body in Section 5 cases.').

<sup>45</sup> Tad Lipsky, Workshop on Section 5 of the FTC Act as a Competition Statute (17 October 2008).

<sup>46</sup> Daniel Crane, Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel (19 January 2010).

<sup>47</sup> Rosch (n 19) 14.

<sup>48</sup> Baye and Wright (n 21).

involving complex economic analysis than judges with no economic training.<sup>49</sup> Relying upon conclusions such as this one, commentators have called for the FTC to exercise its Section 5 authority in complex cases more frequently. The essence of the argument is that more-advanced economic training is necessary to successfully resolve complex cases. Because a low level of economic training adds no value in such cases, commentators conclude judicial disposition is inadequate; therefore, they turn to the FTC on the basis of its expertise.

## **An empirical study of the FTC's expertise**

### ***Data and methodology***

Our primary data are information extracted from judicial opinions. We attempted to collect every reported decision in which an ALJ published a ruling on the merits of a substantive antitrust claim between 1976 and 2010. This sample includes 74 cases. We also attempted to gather every reported decision in which an Article III federal district court judge published a ruling on the merits of a substantive antitrust claim between 1977 and 2007. This sample included 644 cases,<sup>50</sup> bringing the total to 718 cases altogether. For each case, we record the original decision of the ALJ or federal district court judge, whether the decision was appealed, and whether the decision was reversed. For the ALJ decisions that were appealed, we also included an indicator for whether the subsequent decision made by the Commission had been appealed and whether the Commission decision resulted in a reversal.

We coded a number of characteristics about each of these 718 cases, including the type or types of antitrust claims involved (merger, monopolization, price fixing, Robinson-Patman, or multiple claims), identity of the plaintiff (FTC, DOJ, private party, or state attorney general), which party prevailed, the year the decision was issued, and for cases brought in federal district court, the procedural stage in which the case was decided (motion to dismiss, summary judgment, trial, or any post-trial motion). We also include data regarding additional information for the decisions made by the ALJ, the Commission, and Article III judges that was not universally applicable to all three types of decisions. For the Article III decisions, we determined whether the issuing judge had received specialized training on economics or antitrust by the Law and Economics Center (LEC). For the ALJ and the Commission decisions, we determined the political party of the President when the case was decided.

<sup>49</sup> *ibid.*

<sup>50</sup> The data including antitrust opinions of federal district court judges was originally compiled and analysed in Baye and Wright (n 21).

These data are potentially useful for measuring the performance level of the ALJ and the Commission compared to the performance level of Article III judges. The data can also be useful for determining how the Commission performs relative to the ALJ and whether subsequent review by the Commission adds value to the ALJ decisions. Our primary measure of the quality of an initial court's decision is a party's decision to appeal. Thus, we estimate the probability of a specific initial court decision's being appealed as a function of whether the decision-maker is the Commission, an Article III judge, or an ALJ, the type of case, the judge's economic training where applicable, the political control of the FTC, and the year.

Appeals are an imperfect but useful indicator for whether the initial court made an economic error. Baye and Wright explain the value of the appeals measure with a revealed preference argument—that is, the appeal rate is a signal generated by actual costs incurred by the parties who, informed by their own economic experts, have determined the initial court committed a reversible error.<sup>51</sup> There are, of course, many reasons for a party to appeal any initial court decision. However, *ceteris paribus*, an appeal signals that at least one party believes it can convince a higher court an error has occurred. In other words, a higher appeal rate implies the decision-maker has issued more opinions that leave at least one party feeling strongly enough to invest in the opportunity for another decision-maker to decide that he has committed a reversible error.<sup>52</sup> For these reasons, we use appeal as our primary quality measure.<sup>53</sup>

Reversal rates are also commonly relied upon in the judicial performance literature.<sup>54</sup> Reversal rates also contain some information on the quality of the underlying decision, but there are several drawbacks to using reversals rather than appeals.<sup>55</sup> Perhaps most importantly, because reversals are necessarily

<sup>51</sup> *ibid* 5.

<sup>52</sup> The appeal rate's value as an indicator of quality may be greater in antitrust than other substantive fields of law. One potential concern with its value as a proxy for quality decision-making is that the 'error' in the underlying decision can be legal or procedural, rather than economic in nature and thus not allow proper inference concerning the economic expertise of the underlying decision. However, modern antitrust law's effects-based approach creates unique overlap between legal and economic inquiries, relative to other areas of the law. For example, the legal inquiry under s 7 of the Clayton Antitrust Act, 15 USC 18 (2006), is whether the proposed transaction will 'substantially lessen competition', a test that has taken on an exclusively economic interpretation that equates a violation of this standard with a reduction in consumer welfare.

<sup>53</sup> Other proxies for judicial performance are sometimes used, including publication rate, citations, invocations, time to issue a decision and reversal rates. For a summary of this literature, see Stephen J Choi, Mitu Gulati and Eric A Posner, *How Well Do Measures of Ability Predict Judicial Performance?: A Case Study Using Securities Class Actions* (Univ of Chi Law Sch Law & Econ, Olin Research Paper No 519 & NY Univ Sch of Law, Law & Econ Research Paper No 10-18, 2011), <[http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3001&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3001&context=faculty_scholarship)> accessed 2 December 2012.

<sup>54</sup> See eg Baye and Wright (n 21); Nash and Pardo (n 30); Kimberly A Moore, 'Are District Court Judges Equipped to Resolve Patent Cases?' (2010) 15 *Harvard JL & Tech* 1; R Polk Wagner and Lee Petherbridge, 'Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance' (2004) 152 *U Pennsylvania L Rev* 1105; Christian A Chu, 'Empirical Analysis of the Federal Circuit's Claim Construction Trends' (2001) 16 *Berkeley Tech LJ* 1075.

<sup>55</sup> See Baye and Wright (n 21) (discussing the relative merits of appeals as opposed to reversal rates).

conditioned on the decision's being appealed in the first place, sample size is reduced significantly in specifications that use it to measure the quality of an initial court's decision. Nonetheless, we report results using both appeals and reversals.

It is also important to highlight an important limitation of our analysis. Our sample contains only litigated cases generating published opinions. It is well known these cases are not representative of the population of underlying disputes.<sup>56</sup> Likewise, some cases may show up in the data as 'not appealed' because they are settled prior to an appellate opinion. In this case, a decision to appeal may indicate heterogeneous beliefs regarding initial judicial error. This sample selection does not impact our ultimate research question: how well do courts and agencies decide the cases in front of them? However, cases are not randomly assigned to courts and agencies. Systematic differences between cases the FTC chooses to litigate in federal district court versus administrative proceedings could influence both appeal and reversal rates. Furthermore, as we shall discuss, differences in standards of review between courts and agencies may bias our comparisons between Commission and judicial decision-making.

### *Empirical strategy*

Our goal is to provide some empirical evidence testing the expertise hypothesis, namely, that expert agency decision-making will be superior to decision-making by generalist judges. Advocates have relied upon the expertise hypothesis to justify increased delegations of power to administrative agencies and increased judicial deference to those agencies' decisions. In the antitrust context specifically, the expertise hypothesis has provided the primary intellectual basis for arguments for aggressive and expansive use of the FTC's Section 5 authority outside the bounds of the Sherman Act,<sup>57</sup> agency rulemaking,<sup>58</sup> and increased deference to FTC decisions in federal court.<sup>59</sup> We are not aware of any empirical studies comparing the relative performance of judges and agencies; there is, however, a relatively small but growing literature focusing upon the relationship between judicial specialization and performance.<sup>60</sup> We test the expertise hypothesis by way of comparing the adjudicatory decisions of two different sets of decision-makers.

We first compare the decisions of federal district court judges and FTC Commissioners. This comparison has a number of intuitively appealing

<sup>56</sup> George L Priest and Benjamin Klein, 'The Selection of Disputes for Litigation' (1984) 13 JLS 1.

<sup>57</sup> See eg Rosch (n 19).

<sup>58</sup> See eg Hemphill (n 19).

<sup>59</sup> See eg Daniel A Crane, 'Technocracy and Antitrust' (2008) 86 Tex L Rev 1159, 1206–10.

<sup>60</sup> Rochelle Cooper Dreyfuss, 'The Federal Circuit: A Case Study in Specialized Courts' (1989) 64 New York L Rev 1; Rochelle C Dreyfuss, 'Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes' (1995) 61 Brooklyn L Rev 1; Jeffrey W Stempel, 'Two Cheers for Specialization' (1995) 61 Brooklyn L Rev 67; Nash and Pardo (n 30).

features. First, both sets of decisions are appealed to federal courts of appeals. Second, most variants of the expertise hypothesis in the competition context appear to have precisely this comparison in mind.<sup>61</sup> Congress intended and designed the FTC to be an expert agency with specialized knowledge and resources unavailable to generalist judges; it is that expertise and specialized knowledge that Congress and proponents of the expertise hypothesis presume will increase the quality of inputs into the Commissioners' decision-making processes and thus also increase the quality of the outputs. Third, the Commission reviews ALJ decisions *de novo*, and thus its own decisions, like the district courts, are not bound by prior fact-finding.<sup>62</sup> Comparison of judicial and Commission decisions allows a fairly intuitive and direct test of the expertise hypothesis.

This comparison also suffers from some important limitations. Perhaps the most important is that Commission decisions are afforded greater deference than district court decisions by federal courts of appeal on review.<sup>63</sup> Furthermore, cases come to the Commission after a full administrative trial. While the Commission need not afford ALJ decisions significant deference, the fact that cases must go through a full trial before they can be appealed to the Commission, and perhaps ultimately to a federal court of appeals, is an important difference between the two sets of decisions. Administrative cases in which defendants are willing to incur the costs of a full administrative trial and Commission review, including the costs of delay, may be systematically more likely to contain reversible error than federal district court decisions in the sample.

Our second comparison takes a different approach, ignoring federal court decisions and focusing upon differences between ALJ and Commission decisions. The intuition of this approach is to try to estimate the 'marginal product' of Commission decision-making. We attempt to isolate the incremental impact of Commission input into the agency decision-making relative to ALJ decision-making without Commission input. Put simply, our sample of

<sup>61</sup> See eg Crane (n 2) 132–43 (discussing the increased influence of antitrust juries and generalist trial judges, *inter alia*, and methods by which the FTC can restore its norm-creative role and harness its 'substantial advantages over the institutional realities of private litigation'); Rosch (n 19) 15 ('In [*Polygram* and *Indiana Federation of Dentists*, the appellate courts] agreed and adopted the FTC's analysis. Had these questions been presented to a federal district court in the first instance, it's unlikely that the court would have been open (let alone equipped) to apply a more novel form of analysis in the first instance.'). But cf, eg Kovacic (n 14) 942–43 (discussing the failure of reviewing courts to adopt novel Commission analyses due to its perceived lack of expertise).

<sup>62</sup> See 16 CFR s 3.54 (2011) (FTC Rule of Practice permitting the Commission to, upon appeal from an initial decision, 'exercise all the powers which it could have exercised if it had made the initial decision'); see also *In re NC Bd of Dental Exam'rs*, 2011 WL 6229615, at \*14 (FTC 7 December 2011) ('The Commission reviews the ALJ's findings of facts and conclusions of law *de novo*.')

<sup>63</sup> See *FTC v Ind Fed'n of Dentists*, 476 US 447, 454 (1986) ['The legal issues presented . . . are . . . for courts to resolve, although even in considering such issues the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as unfair.' (internal quotation marks omitted)]. However, greater deference to Commission decisions should bias estimates of the impact of Commission decision-making on appeal and reversal rates downward.

FTC administrative litigation involves three types of cases: cases where the ALJ decision was not appealed to the Commission, cases where the ALJ decision was simply affirmed by the Commission, and cases where the ALJ decision was reversed or significantly modified by the Commission. We test whether, controlling for other potential factors, Commission decisions changing ALJ opinions have different appeal or reversal rates than those ALJ decisions the Commission simply affirms or leaves untouched.

This second comparison indirectly tests the expertise hypothesis. It does not evaluate Commission decisions relative to those issued by district court judges. Rather, this approach tests the expertise hypothesis from a different perspective, attempting to identify evidence of the Commission's expertise over ALJs in its decisions. While this approach avoids some of the limitations inherent in comparing administrative adjudication to litigation in federal court, it does not completely avoid limitations associated with selection effects because the FTC chooses the cases it brings in administrative litigation as opposed to federal court.

## Results

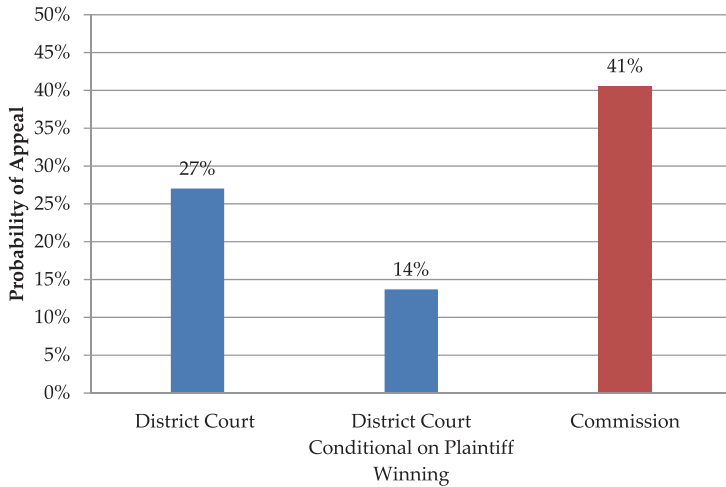
In this section, we present simple differences in means followed by probit regression analysis for each of our two comparisons.

### *Federal Trade Commissioners versus Generalist Judges*

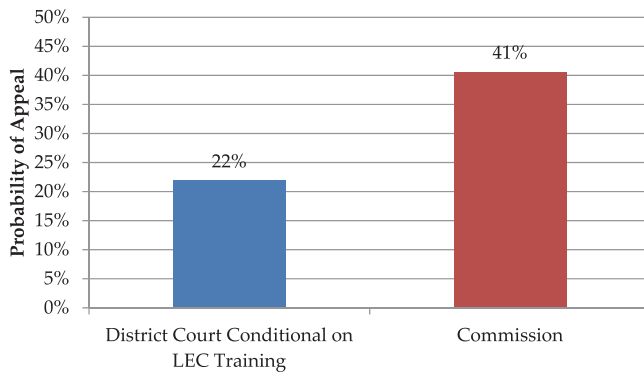
#### *Means comparisons*

We begin with some simple comparisons of the means to explore the differences in the appeal rates for Commission decisions and Article III judicial decisions. [Figure 1](#) reports the results. Aside from including the appeal rate for the Article III judges and the Commissioners, the appeal rate for the Article III judges, conditional on the plaintiff winning, is also included. In our sample, cases decided by the Commission are 14 per cent more likely to be appealed than are cases decided by Article II judges. The difference is statistically significant at the 5 per cent level. The contrast between the Commission's appeal rate and the Article III judges' appeal rate conditional on the plaintiff winning the Article III case is greater and more statistically significant than the unconditional comparison. Commission decisions are 27 per cent more likely to be appealed than are the conditional cases by the Article III judges. The difference is statistically significant at the 1 per cent level and, in practical terms, quite large. The parties involved in FTC litigation are 25 per cent more likely to be disgruntled enough to appeal their case to the circuit court of appeals.

[Figure 2](#) compares Commission appeal rates with those of Article III judges with basic economic training. LEC-trained judges' opinions are appealed at a



**Figure 1.** District court and Commission appeal rates (unconditional and conditional on plaintiff prevailing).

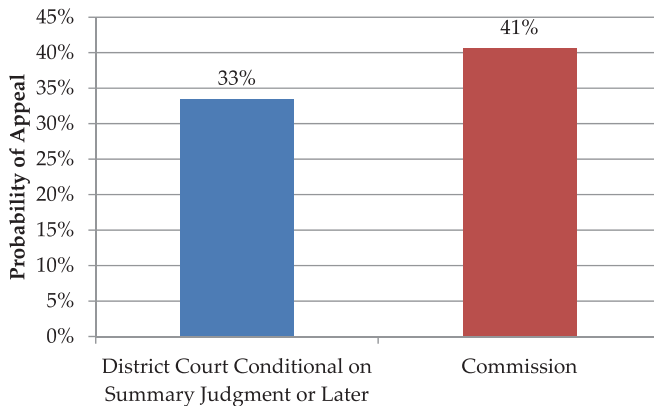


**Figure 2.** District court and Commission appeal rates (conditional on LEC training).

rate 5 percentage points lower than the decisions of their untrained Article III colleagues and a full 19 percentage points less frequently than those of the Commission. This difference is statistically significant at the 1 per cent level.

One important difference between Commission decisions and decisions authored by district court judges is that, as discussed above, the Commission's *de novo* review takes place after a full administrative trial in front an ALJ. Thus, it might be the case that different stages of factual development drive differences in appeal rates. For a preliminary examination of this possibility,





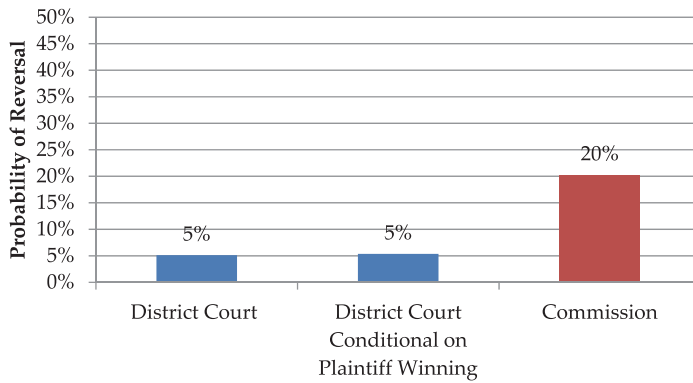
**Figure 3.** District court and Commission appeal rates (summary judgment or later).

Figure 3 reports appeal rates of Commissioners and Article III judges in antitrust cases conditioned upon limiting the judicial sample to decisions at or after the summary judgment stage. Judicial appeal rates are only 8 percentage points lower than the Commission's, and the difference is not statistically significant.

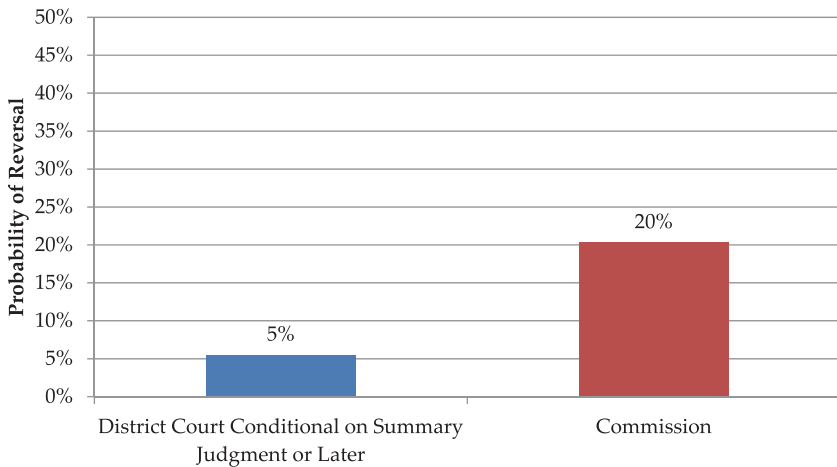
While we prefer comparisons based upon appeals rather than reversals, we note that we obtain similar, though less drastic, results when we use reversals. Figure 4 shows that Commission opinions are reversed 20 per cent of the time and decisions by Article III judges are reversed only 5 per cent of the time. The Article III judges' reversal rate is nearly identical to a subset of Article III judge decisions conditional on the plaintiff winning at trial. This 15 per cent point difference is statistically significant at the 1 per cent level.

Figures 5 and 6 report comparative reversal rates when we condition judicial reversal rates on economic training and decisions at or after the summary judgment stage. The differences remain stable at approximately 15 per cent; judicial reversal rates are substantially lower, providing some preliminary evidence contrary to the expertise hypothesis. The difference is statistically significant at the 1 per cent level.

These means comparisons provide preliminary evidence suggesting the Commission's decisions are more likely to be appealed and reversed than those of Article III generalist judges. Taken at face value, the comparison implies that on this particular margin of performance—adjudicatory decision-making—Commissioners do not perform as well as district court generalists. However, these differences in appeal and reversal rates may be the result of omitted variables or sample selection. In the next section, we use a probit regression



**Figure 4.** District court and Commission reversal rates (unconditional and conditional on plaintiff prevailing).

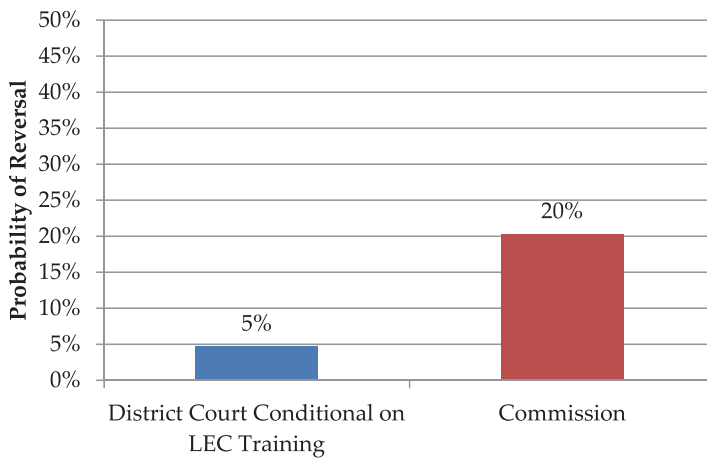


**Figure 5.** District court and Commission reversal rates (summary judgment or later).

framework to control for other factors that may reasonably influence the appeal and reversal rates of the Commission and Article III judges.

### *Baseline probit regressions*

In each of our regressions, the dependent variable is *APPEAL*, an indicator that equals one if the initial decision is appealed and zero otherwise. We also run each specification using *REVERSAL* rather than appeal as the dependent variable. Our primary independent variable of interest is *COMMISSION*, a dummy variable that equals one when the Commission is the relevant



**Figure 6.** District court and Commission reversal rates (conditional on LEC training).

**Table 1.** Baseline probit regression probability of appeal or reversal ( $N=688$ )

	Appeal				Reversal	
	(1)	(2)	(3)	(4)	(5)	(6)
Commission	0.135** (2.32)	0.180* (1.65)	0.166 (1.50)	0.141** (2.39)	0.152*** (4.21)	0.153*** (4.16)
Type			0.123 (0.01)	0.009 (0.75)		0.013 (0.21)
Year dummies	No	Yes	Yes	No	No	No

\* denotes statistical significance at the 10% level

\*\* denotes statistical significance at the 5% level

\*\*\* denotes statistical significance at the 1% level

decision-maker and zero otherwise (in this case, an Article III federal district court judge issued the decision). The regressions also include a set of controls that are potentially predictive of the appeal and reversal rates, including a time trend (YEAR) and dummy variables for the type of claim (eg price-fixing, merger, or monopolization). Table 1 reports marginal effects and robust  $z$ -statistics.

Specification 1 is our baseline model, which is similar to the unconditional mean comparisons in Figure 1, except that it controls for time trends and type of case. Recall that Commission appeal rates were approximately 14 percentage points higher than that for district judges. The results are similar in magnitude and significance, with Commission decisions being appealed 13.5 percentage

**Table 2.** Subsample probit regression probability of appeal or reversal conditioned on the plaintiff winning sample includes only Federal District Court decisions where plaintiff prevailed ( $N=237$ )

	Appeal				Reversal	
	(1)	(2)	(3)	(4)	(5)	(6)
Commission	0.268*** (4.39)	0.344*** (2.80)	0.343*** (2.77)	0.270*** (4.34)	0.149*** (3.32)	0.149*** (3.43)
Type			0.001 (0.03)	0.012 (0.07)		0.012 (1.12)
Year dummies	No	Yes	Yes	No	No	No

\*\*\* denotes statistical significance at the 1% level

points relative to the baseline appeal rate of Article III judges. Point estimates range from 13.5 to 18.0 percentage differences, depending upon the specification; results are robust to including controls for either type of case or time trends, but fall just outside conventional levels of significance when controlling for both simultaneously. Reversal rate regressions are consistent, with Commission decisions resulting in a reversal rate 15 percentage points higher than the baseline for federal district court judges. The basic story that emerges from Table 1 is that the Commission, contrary to the expertise hypothesis, has a significantly higher appeal and reversal rate than federal district court judges.

There are a number of potential differences between the FTC as an administrative agency and federal courts that could bias estimates of the difference in appeal and reversal rates. One critical difference is that an overwhelming majority of Commission decisions favour the plaintiff (ie the FTC). Thus, appeals from Commission decisions may be systematically different in quality or other dimensions from the distribution of cases from which appeals from district court opinions are drawn. One possibility is that the Commission is uniquely situated to select winning cases; another is that its record in this regard reflects exploitation of its substantive and procedural powers as an administrative agency rather than anything about quality of cases. In either event, one reasonable approach to dealing with this concern is to compare Commission decisions to a truncated sample of federal district court decisions including only those where the plaintiff has prevailed. Table 2 presents these results. The gap between Commission and judicial appeal rates becomes even larger in this limited sample, ranging from 26.8 to 34.4 percentage points. The gap in reversal rates remains stable at approximately 15 percentage points. Thus, it does not appear that systematic differences in case selection by plaintiffs in federal court and the FTC in administrative litigation drive the Commission’s higher appeal and reversal rates.

**Table 3.** Subsample probit regression probability of appeal or reversal conditioned on the plaintiff winning sample includes only decisions at or after summary judgment ( $N = 237$ )

	Appeal				Reversal	
	(1)	(2)	(3)	(4)	(5)	(6)
Commission	0.071 (1.12)	0.107 (0.90)	0.089 (0.74)	0.076 (1.19)	0.148*** (3.74)	0.141*** (3.77)
Type			0.016 (0.83)	0.014 (0.89)		0.007 (0.85)
Year dummies	No	Yes	Yes	No	No	No

\*\*\* denotes statistical significance at the 1% level

A second important institutional difference between administrative litigation and federal court decisions in our sample is that, because cases reaching the Commission have undergone a full trial on the merits whereas our sample of judicial decisions includes the full panoply of pre- and post-trial motions, the former enjoy a much more fully developed factual record. This difference could potentially impact observed appeal and reversal rates. For example, the Commission's access to a fully developed factual record could enable it to make more accurate decisions on average than district court judges operating with less information, thus lowering the Commission's relative appeal rate. To account for this possibility, we also run our baseline regressions on the Commission decisions and a subsample of district court decisions limited to those at the summary judgment stage or later. Table 3 presents results. Here, appeal rate results lose significance, suggesting that controlling for these differences in case development equalize Commission and judicial performance; however, the reversal rate gap remains constant with Commission reversal rates approximately 15 percentage points higher than that of the district court judges.

Table 4 reports regressions limiting the sample of judicial decisions to those authored by LEC-trained judges; in other words, each of the judges in the subsample have had at least some basic economic training. Previous research indicates basic economic training improves judicial performance in the form of lower appeal and reversal rates.<sup>64</sup> The appeal rate gap increases slightly in the most basic specification to 18.9 percentage points while the Commission's reversal rates compared to trained judges remains stable at approximately 15 percentage points.

<sup>64</sup> See Baye and Wright (n 21).

**Table 4.** Subsample probit regression probability of appeal or reversal conditioned on LEC-trained judges sample includes only decisions of LEC-trained judges ( $N=197$ )

	Appeal				Reversal	
	(1)	(2)	(3)	(4)	(5)	(6)
Commission	0.187*** (2.73)	0.089 (0.59)	0.089 (0.58)	0.185*** (2.64)	0.156*** (3.28)	0.156*** (3.12)
Type			-0.017 (-0.67)	-0.003 (0.02)		0.000 (-0.01)
Year dummies	No	Yes	Yes	No	No	No

\*\*\* denotes statistical significance at the 1% level

While the expertise hypothesis predicts lower appeal and reversal rates for the Commission relative to generalist district judges *ceteris paribus*, we consistently observe higher appeal and reversal rates for the Commission that are robust to controls for type of case, time trends, and a variety of robustness checks designed to control for unobservable differences in cases brought through administrative litigation rather than in federal district court.

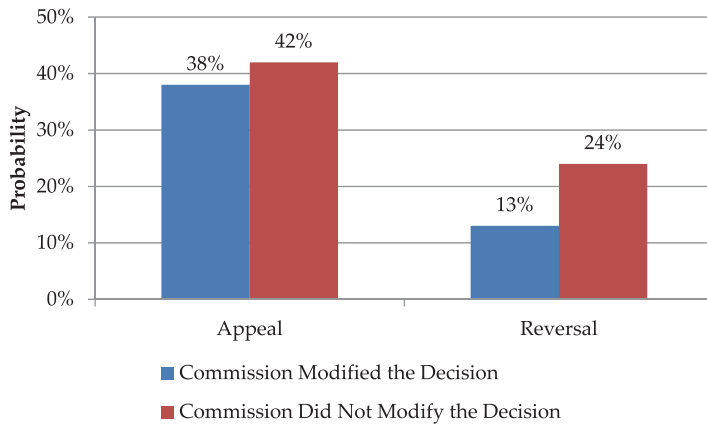
***Commissioners versus ALJs***

We now turn to our second approach to evaluate the expertise hypothesis—comparing appeal and reversal rates for ALJ decisions left untouched by the Commission with those the Commission modifies or reverses.

*Mean comparisons*

Once again, we will begin with a simple comparison of means to explore the differences in appeal rates when the Commission modifies the ALJ ruling and when it does not. Figure 7 reports the appeal rates. There is only a 3 per cent difference in the appeal rates when the Commission modifies the ALJ ruling and when it does not modify the ALJ ruling. There is an 11 per cent difference in the reversal rates conditional upon whether or not the Commission modified the ALJ decision. Neither difference is statistically significant.

These simple comparisons only weakly suggest value added from the Commission relative to ALJ decisions; the differences in appeal and reversal rates are not statistically significant, which is at least partially attributable to the relatively small sample size of Commission decisions. Once again, the relationship between the decision-maker (ALJ or Commission) and appeal and reversal rates may be the result of omitted variable bias or sample selection effects. In the next section, we use a similar probit regression framework to control for other possible influences and isolate the impact of Commission modification of ALJ rulings on appeal and reversal rates.



**Figure 7.** ALJ and Commission appeal and reversal rates

**Table 5.** Baseline probit regression ALJ versus commission decisions ( $N = 69$ )

	Appeal		Reversal			
	(1)	(2)	(3)	(4)	(5)	(6)
Commission	0.079	0.069	0.003	-0.296	-0.335	-0.003
	(0.79)	(0.69)	(0.02)	(-1.02)	(-1.13)	(-0.02)
Type		0.024			0.081*	0.028
		(0.91)			(1.79)	(0.87)
Year dummies	No	No	No	Yes	Yes	No

\* denotes statistical significance at the 10% level

### Baseline probit regressions

Our data for analysing administrative cases in a regression framework are naturally limited to the number of such cases brought by the Commission in the relevant time period ( $n = 69$ ). Recall that the comparison of means reported in [Figure 7](#) indicates the Commission's incremental impact on ALJ decisions is to reduce the appeal rate by 4 percentage points and the reversal rate by 9 percentage points. While neither of those differences is statistically significant at conventional levels, this is likely attributable to our small sample size. Thus, we consider the comparisons of means suggestive of a modest improvement in agency performance attributable to Commission-level expertise relative to ALJs. Applying the same baseline regression framework as in [Tables 1–4](#), [Table 5](#) reports results. Predictably, in light of sample size, the difference in appeal and reversal rate remains insignificant.



## Conclusions

Expertise has long been the touchstone of administrative agency performance. In the context of antitrust agencies, like others, the expert inputs are translated into outputs including adjudicatory decisions, rulemaking, consents, advocacy, and amicus briefs. An often overlooked aspect of understanding agency performance and its relationship to expertise is institutional design. The so-called expertise hypothesis posits that the institution with more expert 'inputs' will consistently produce higher quality outputs. That assumption suffers from the Nirvana Fallacy as it lacks a basis without an analysis of the institutions and processes translating those inputs to outputs. Inability of an agency to translate its expertise into high-quality decision-making renders it at best ineffective and at worst costly to society, and institutional design has the potential to hinder the flow of information from an agency's staff to its decision-makers.

In the context of US antitrust law, many commentators have recently called for an expansion of the FTC's adjudicatory decision-making authority pursuant to Section 5 of the FTC Act, increased Commission rulemaking, and carving out exceptions for the agency from increased burdens of production facing private plaintiffs. These claims are often expressly grounded in the expertise hypothesis. The relevant question is whether the expert inputs available to generalist federal district court judges through expert evidence, amicus briefs, and economic training, among other sources of such expertise, translate to higher quality outputs and better performance than produced by the Commission in its role as an adjudicatory decision-maker.

Many appear to assume that agencies have courts beat on this margin. To our knowledge, while oft-cited as a reason to increase the discretion of agencies and the deference afforded them by reviewing courts, no one has provided empirical support for this claim. We seek to fill that gap, and contrary to the expertise hypothesis, we find the evidence suggests the Commission does not perform as well as generalist judges in its adjudicatory antitrust decision-making role. Furthermore, while the available evidence is more limited, there is no clear evidence the Commission adds significant incremental value to the ALJ decisions it reviews. In light of these findings, there is little empirical basis for the various proposals to expand agency authority and deference to agency decisions. More generally, our results highlight the need for research on the relationship between institutional design and agency expertise in the antitrust context.