



# The Federal Trade Commission Lacks Rulemaking Authority to Enforce the Prohibition on Unfair Methods of Competition

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The Federal Trade Commission (FTC) has proposed a ban on “non-compete clauses,” which bar departing employees from taking jobs with competitors.<sup>1</sup> The proposed rule would apply to all employees, even the highest-paid CEOs. The FTC asserts the power to make general rules that implement the prohibition on “unfair methods of competition” in section 5 of the 1914 FTC Act,<sup>2</sup> and the FTC locates the necessary rulemaking authority in section 6(g) of the FTC Act.<sup>3</sup>

The FTC relies on the interpretation of section 6(g) in the 1973 *National Petroleum Refiners* decision by the D.C. Circuit court.<sup>4</sup> The court declared that the plain meaning of section 6(g) authorized enforcement of the prohibition on unfair methods of competition by rulemaking. But the court erred by relying on words that were not in the FTC Act and by failing to appreciate the inherent ambiguity of section 6(g).

To interpret the ambiguous text of section 6(g), the court should have examined its context, the overall scheme of the FTC Act, and the relationship between the FTC Act and the contemporaneous Clayton Act. This broader inquiry indicates that Congress granted only a trivial power in section 6(g). Moreover, the rule now proposed by the FTC cannot be justified as the necessary implication of the public policy adopted by the FTC Act and the antitrust laws generally.

## THE COURT’S PLAIN-MEANING INTERPRETATION RELIED ON WORDS NOT IN THE STATUTE

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.<sup>5</sup>

Section 6 of the FTC Act collected powers the FTC “shall also have.” Section 6(g) provided: “From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.”<sup>6</sup> That is, Congress granted the power “to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act,” a power to be exercised from time to time.

In 1971, the FTC promulgated a rule requiring gas stations to post octane ratings (computed in a particular manner).<sup>7</sup> The D.C. Circuit court upheld the rule in 1973, declaring that the plain language of section 6(g) granted rulemaking authority to implement section 5.<sup>8</sup> But the court erred by relying on words in the codification of section 6(g), 15 U.S.C. § 46(g), that were not part of the statute itself.

Editors who compile the U.S. Code change many statutory cross-references to make them refer to the Code. In the first U.S. Code, published in 1926, “this Act” in section 6(g) was changed to “this subdivision of this chapter.” In the second U.S. Code, published in 1940, “this Act” became a list of Code sections that were part of the FTC Act. The text of 15 U.S.C. § 46(g) remained unchanged through the 1970 U.S. Code cited in the *National Petroleum Refiners* decision.

The D.C. Circuit court asserted that 15 U.S.C. § 46(g) “specifically provide[d] for rule-making by the Commission to implement its adjudicatory functions under Section 5 of the Act.”<sup>9</sup> And the court justified this assertion by pointing to the reference in 15 U.S.C. § 46(g) to 15 U.S.C. § 45, which is the codification of section 5.<sup>10</sup>

Because the statutory text of section 6(g) did not refer to section 5 “specifically,” the court’s plain-meaning interpretation cannot be accepted. The U.S. Code “cannot prevail over the Statutes at Large when the two are inconsistent.”<sup>11</sup> And, as it happens, 15 U.S.C. § 46(g) no longer refers to 15 U.S.C. § 45.

The 1976 U.S. Code incorporated the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act of 1975. As provided by that statute,<sup>12</sup> the editors duly inserted “(except as provided in section 57a(a)(2) of this title)” into section 6(g) before “to make rules.” At the same time, they changed “this Act” to “this subchapter” and accidentally dropped the fifth word of section 6(g), the middle “to.” Subsequent editions of the U.S. Code made no changes to 15 U.S.C. § 46(g).

## **THE COURT FAILED TO APPRECIATE AMBIGUITY IN THE WORD “AND”**

The D.C. Circuit court failed to appreciate ambiguity arising from the word “and,” which “has a distributive (or several) sense as well as a joint sense.”<sup>13</sup> This recurring interpretation problem is on the Supreme Court’s current docket.<sup>14</sup> The problem is illustrated by the example of a tax on “black and white cats.” The distributive sense lets tuxedo cats off scot-free, while the joint sense targets them.

The D.C. Circuit court presumed the distributive sense of “and,” so that section 6(g) means:

For the purpose of carrying out the provisions of this Act,  
the commission shall have the power, from time to time,  
(1) to classify corporations, and  
(2) to make rules and regulations.

The joint sense of “and” is familiar from legal doublets such as “cease and desist” and “rules and regulations.” With “and” having its joint sense, section 6(g) means:

For the purpose of carrying out the provisions of this Act,  
the commission shall have the power, from time to time,  
to make rules and regulations classifying corporations.

Section 6 provides few clues as to the intended sense of “and,” but one clue is that none of the other seven subsections of section 6 granted two distinct powers.

## **USING CONTEXT TO INTERPRET SECTION 6(G)**

“Words are not pebbles in alien juxtaposition; they have only a communal existence . . .”<sup>15</sup> “It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”<sup>16</sup> The juxtapositioning of “to make rules and regulations” and “to classify corporations” implies a relationship.

In 1914, the phrase to “classify corporations” meant to sort them in a consequential way.<sup>17</sup> The report of the House Committee on Interstate and Foreign Commerce accompanying H.R. 15613, which became the FTC Act, indicated that the intended consequence related to reporting and disclosure.<sup>18</sup>

Section 6(g) derived from the first clause of section 8 of H.R. 15613: “That the commission may from time to time make rules and regulations and classifications of corporations for the purpose of carrying out the provisions of this Act.”<sup>19</sup> The bill contained nothing like section 5, so rules and regulations had to serve another purpose. And that purpose would not have been to authorize reporting and disclosure requirements because section 9 of the bill did that.

Representative Horace M. Towner (R-IA) made the only contemporaneous public statement on the meaning of the first clause of section 8. He asserted that the clause permitted only rules “with regard to the classification of corporations,” and he proposed an amendment granting the FTC the power to require a uniform accounting system.<sup>20</sup> His amendment was defeated 15–71.

Representative Charles H. Dillon (R-SD) proposed two amendments. One would have allowed the FTC to prohibit “any practice which it deems unfair, any misconduct, unfair methods, unfair competition, acts of oppression, or acts of deception.” His other amendment would have empowered the FTC “to make all necessary rules, regulations, orders, and decrees for the enforcement of the powers herein granted.”<sup>21</sup> Both Dillon amendments were defeated by voice vote.

Representative Dick Thompson Morgan (R-OK), who had introduced the first trade commission bill in January 1912, proposed to make the clause read:

The commission is hereby authorized and empowered to make and establish rules and regulations not in conflict with the Constitution and laws of the United States to aid in the administration and enforcement of the provisions of this act, and may by such rules and regulations prohibit corporations subject to the provisions of section 9 of this act in conducting their business from engaging in any practice or from using any method or system, or from pursuing any policy or from resorting to any device, scheme, or contrivance that constitutes unfair competition or unjust discrimination as between competitors, individuals, or communities.<sup>22</sup>

Morgan also anticipated adding a general prohibition on “unfair competition and unfair discrimination.”<sup>23</sup> His amendment was defeated 18–50.

In proposing H.R. 15613, Representative J. Harry Covington (D-MD) had done the bidding of President Woodrow Wilson, as had Representative Henry D. Clayton Jr. (D-AL) in proposing the bill that became the Clayton Act. Both were promptly rewarded with judgeships. Judge Covington swore in the first FTC commissioners.

Wilson’s original plan included several specific prohibitions on anticompetitive conduct, which were placed in the Clayton Act. It also included a commission that would operate as “a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided.”<sup>24</sup> After the House passed both bills on June 5, 1914, Wilson changed the plan.

A latter-day knight-errant named George Rublee had drafted an alternative to H.R. 15613 that was introduced by his friend Representative Raymond B. Stevens (D-NH). The Stevens bill prohibited “unfair competition” and created enforcement powers. When the bill got no traction, Rublee used his contacts to get a meeting with President Wilson. At a second meeting on June 10,

Wilson announced his support for Rublee's idea. On June 13, a substitute for H.R. 15613, containing Rublee's draft of section 5, was reported by the Senate Committee on Interstate Commerce.

After the Senate passed its substitute bill, a conference committee produced a compromise, and Rublee revealed that he had drafted it in a letter to Louis D. Brandeis.<sup>25</sup> Section 6(g) in the compromise bill was a slightly revised version of the first clause of section 8 in the House bill, and the intent behind section 6(g) must have been the same as the intent behind the first clause of section 8.

### **USING THE OVERALL STATUTORY SCHEME TO INTERPRET SECTION 6(G)**

"In expounding a statute, [a court] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."<sup>26</sup> In looking at the whole FTC Act, one must consider how the pieces were put together.

Neither the House bill nor the Senate bill granted the power of competition rulemaking, as everyone who considered the issue has concluded. The House bill, under Wilson's original plan, prohibited nothing and granted no enforcement power over marketplace conduct. The Senate bill, under Wilson's new plan, did both, but it did not confer any power "to make rules and regulations."

The reconciliation of the bills was governed by the *Manual of the Law and Practice in Regard to Conferences and Conference Reports*. Section 29 barred inclusion of anything in a conference report that had not been passed by either house of Congress. Because neither had granted rulemaking power, the conference report could not have done so. A single member of Congress could have torpedoed a conference report flouting the rules just by raising a point of order.

No hint of competition rulemaking power can be found in the conferees' comments when they presented their report. Senator Albert B. Cummins (R-IA) announced: "There are just two changes of real materiality in the bill."<sup>27</sup> Neither was a new power to make competition rules, which would have been by far the most significant change in the bill had it been inserted.

The central issue in the long Senate debate on H.R. 15613 was whether section 5 impermissibly delegated legislative power. Cummins had argued:

This bill does not propose to invest the commission with any legislative power. The commission will not exercise any quasi-legislative authority; it will not under any circumstances or any conditions prescribe what a person or a corporation shall in the future do; it will not attempt to declare in what practices one engaged in commerce may in the future indulge. Its sole function is to determine the fact whether a given practice, a given method, is unfair competition.<sup>28</sup>

Section 5's other leading proponents had made similar representations to assuage constitutional-ity concerns. Senator Francis G. Newlands (D-NV) argued: "Congress would not delegate legislative power to the [Federal] trade commission by requiring it to apply a general rule against unfair competition to particular facts, conditions, and circumstances."<sup>29</sup> Senator Henry F. Hollis (D-NH) contended that section 5 laid "down a general rule of action under which the commission shall proceed" and that the "commission is empowered and directed to apply this rule to particular situations and circumstances."<sup>30</sup>

Judge Covington presented the conference report to the House with no mention of section 6(g), but he felt obliged to assure members that section 5 did not delegate legislative power. In doing so, he asserted that the bill "leaves the character of the illegal acts to the definition of the courts" and that "The Federal trade commission will have no power to prescribe the methods of competition to be used in future."<sup>31</sup>

The interpretative canon *expressio unius est exclusio alterius* also is apt: "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."<sup>32</sup> Section 5 devoted 1,120 words to procedure for case-by-case adjudication, and Congress cannot plausibly have intended that section 5 would be enforced in a completely different manner for which no procedure was specified.

## **USE OF CONNECTION WITH THE CLAYTON ACT TO INTERPRET THE FTC ACT**

Rules enforcing the prohibition of "unfair methods of competition" are likely to be categorical prohibitions, which George Rublee opposed. He believed that the competitive impact of practices depended on circumstances, and he put forward section 5 as a substitute for the Clayton Act's specific prohibitions. He even ghost-wrote editorials for *Harper's Weekly* (July 13 and August 8, 1914) attacking the Clayton Act prohibitions. The Senate followed Rublee's lead by excising the prohibitions, although they were restored in conference.

When section 5 faced opposition in the Senate, Rublee wrote a July 10 memo for the president on how to defend it. Among many other things, he explained that

Whether competition is unfair or not, depends in a peculiar degree upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances.

If you make a rigid definition applicable to everybody in the whole United States, you will stop some things which you would choose under some circumstances to encourage, if you could only look far enough into the unknown; and some things which you would like to stop will slip through the meshes of your definition.<sup>33</sup>

The House conferees borrowed from Rublee’s memo: “Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances.”<sup>34</sup> And the rationale for creating an expert agency was that it would be best for evaluating the circumstances of particular cases.

## **THE MAGNUSON-MOSS ACT IS IRRELEVANT**

The Magnuson-Moss Act did not add to—or detract from—the FTC’s authority to enforce section 5’s prohibition of “unfair methods of competition.” In a new section 18, the original House bill added procedures for making rules to enforce section 5’s other prohibition—that of “unfair or deceptive acts or practices”—and it deleted from section 6(g) everything after “classify corporations.”<sup>35</sup> The original Senate bill did neither of those things.

The compromise was to add without taking away. The conference report noted: “The conference substitute does not affect any authority of the FTC under existing law to prescribe rules with respect to unfair methods of competition in or affecting commerce.”<sup>36</sup>

The only substantial statement made in either house before final vote was by Representative Jim Broyhill (R-NC), and it included the following:

The rulemaking provision, I might add, does not affect any authority the FTC might have to promulgate rules which respect to “unfair methods of competition” including, of course, antitrust prohibitions. I myself do not believe that the FTC has any such authority. I am advised that there is a passing reference in the appellate court decision in the Octane Post-ing case, to the effect that the FTC may have some kind of authority to issue some kind of antitrust rules. But the case, of course, did not deal with antitrust rules. Antitrust rules would obviously have a far more pervasive effect than rules defining unfair or deceptive acts or practices, and I would feel very uncomfortable giving such antitrust rules the same effect as this bill gives consumer practice rules. Accordingly, we have made clear that the new bill does not deal with the antitrust laws.<sup>37</sup>

## **NON-COMPETE CLAUSES ARE NOT INHERENTLY ANTICOMPETITIVE**

Non-compete clauses can be anticompetitive but are not inherently so. Thus, the FTC’s proposed ban is not akin to the Sherman Act’s per se rule against price fixing, bid rigging, and allocation of customers or markets. Those practices are inherently anticompetitive.<sup>38</sup> When Congress chose the policy of competition,<sup>39</sup> the per se rule was a logical implication.

Non-compete clauses allow employers to recoup investments in job training and general education. For high-level employees, non-compete clauses also protect against using companies' trade secrets against them. In both ways, non-compete clauses can promote competition, and non-compete clauses can be the only workable way to promote competition in such ways because the right to quit is inalienable.<sup>40</sup>

The FTC concluded that the available evidence indicates that non-compete clauses are anticompetitive under most real-world circumstances, and the FTC decided that the best policy is to ban non-compete clauses under all circumstances. The certainty and simplicity of a general rule can make it the best policy, even if it produces some undesirable results, but adopting such a rule is a quintessentially legislative choice, which Congress has not made.

## **CONCLUSION**

In view of the unanimous Supreme Court decision in *AMG Capital Management*,<sup>41</sup> which holds that the FTC has no power to seek equitable monetary relief, a court surely would not strain to find rulemaking powers in section 6(g). And a court would presume that Congress does not “hide elephants in mouseholes.”<sup>42</sup> To be sure, section 6(g) was a mousehole; it accounted for less than 5 percent of section 6, and it was the hole for the tiny mouse of classifying corporations.

Section 6(g) derived from a bill that did not contain section 5, and not a scintilla of evidence from the legislative history connects it to section 5. In contrast, the legislative history provides copious evidence that section 5 was to be enforced through case-by-case adjudication rather than categorical rules. Section 6(g) authorized rules and regulations for the forgotten task of classifying corporations.

## **ABOUT THE AUTHOR**

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## NOTES

1. Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).
2. 15 U.S.C. § 45(a)(1).
3. 15 U.S.C. § 46(g).
4. Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).
5. *Caminetti v. United States*, 242 U.S. 470, 485 (1917).
6. Federal Trade Commission Act, ch. 311, § 6(a), 38 Stat. 717, 722 (1914).
7. The FTC relied on section 6(g) just as it does now, and it relied on both of the prohibitions in section 5. Since 1938, section 5 has prohibited “unfair or deceptive acts or practices” as well as “unfair methods of competition.” The former empowers the FTC’s consumer protection mission.
8. Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 685–86, 689, 691, 693, 697–98 (D.C. Cir. 1973).
9. *Nat'l Petroleum Refiners*, 482 F.2d at 676.
10. *Nat'l Petroleum Refiners*, 482 F.2d at 676 and n.7.
11. *Stephan v. United States*, 319 U.S. 423, 426 (1943) (per curiam).
12. Pub. L. No. 93-637, title II, § 202(b), 88 Stat. 2183, 2198 (1975).
13. Bryan A. Garner, *A Dictionary of Modern Legal Usage*, 3rd ed. (Oxford: Oxford University Press, 2011), 639; see *Weinberg v. Waystar, Inc.*, Del. Supreme Ct., \_\_\_ A.3d \_\_\_, No. 274, 2022, Valihura, J. (Mar. 16, 2023); Reed Dickerson, *The Fundamentals of Legal Drafting*, 2nd ed. (Boston: Little, Brown 1986), section 6.2.
14. *United States v. Pulsifer*, 39 F.4th 1018 (8th Cir. 2022), cert. granted (Feb. 29, 2023) (No. 22-340).
15. *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)).
16. *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989).
17. See William L. Clark and William L. Marshall, *Marshall on the Law of Private Corporations* (Chicago: Callaghan and Co. 1912), section 10.
18. Interstate Trade Commission, H.R. REP. No. 63-533 (1914), 3–4.
19. H.R. REP. No. 63-533, 12.
20. 51 Cong. Rec. 9047–48 (1914).
21. 51 Cong. Rec. at 9056.
22. 51 Cong. Rec. at 9047.
23. 51 Cong. Rec. at 9049.
24. *Trusts and Monopolies, Address of the President of the United States Before a Joint Session of Congress, Tuesday January 20, 1914*, H.R. Doc. No. 63-625 (1914), 6..
25. See Arthur S. Link, *Wilson: The New Freedom* (Princeton, NJ: Princeton University Press 1956), 441 and note 79.
26. *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1850); see *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220–21 (1986).
27. 51 Cong. Rec. 14768 (1914).
28. 51 Cong. Rec. 12916 (1914).

29. 51 Cong. Rec. 11084 (1914).
30. 51 Cong. Rec. 12146, 12147 (1914).
31. 51 Cong. Rec. 14929, 14932 (1914).
32. *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929); see *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).
33. George Rublee, Memorandum Concerning Section 5 of the Bill to Create a Federal Trade Commission (July 10, 1914) (transmitted to the President by Interior Secretary Franklin K. Lane), <https://www.wlf.org/wp-content/uploads/2021/07/Rublee-1914-Memo-to-Lobby-for-the-Passage-of-Section-5.pdf>.
34. Federal Trade Commission, H.R. REP. No. 63-1142 (conference report to accompany H.R. 15613) (1914), 19.
35. See Consumer Product Warranty and Federal Trade Commission Improvement Act, H.R. REP. No. 93-1107 (1974), 12-16, 74, 77-80.
36. Consumer Product Warranty and Federal Trade Commission Improvement Act, SEN. REP. No. 93-1408 (conference report to accompany S. 356) (1974), 32.
37. 120 Cong. Rec. 41407 (1974).
38. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927).
39. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951).
40. See *Pollock v. Williams*, 322 U.S. 4, 18 (1944); James Gray Pope, "Contract, Race, and Freedom of Labor in the Constitutional Law of Involuntary Servitude," *Yale Law Journal* 119, no. 7 (2010): 1474.
41. *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).
42. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).