



Federal Trade Commission

The Great Doctrinal Debate: Under What Circumstances is Section 5 Superior to Section 2?

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Over the last several years, I've spoken out about the virtues of Section 5 as a vehicle for challenging single-firm conduct. I've suggested that with Section 5 at its disposal, the Commission should think long and hard before challenging single-firm conduct under a Section 2 theory. Today, with this esteemed panel, I'd like to find out whether others agree with me. To start the conversation, I'll therefore offer my views on why I believe Section 5 is superior to Section 2 in hopes others will respond.

Before I turn to that, however, I'd like to begin by clarifying one important point. As a technical matter, the Commission doesn't have authority to challenge anticompetitive conduct under the Sherman Act; it only has authority to proceed under Section 5 of the FTC Act, which

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my former attorney advisor, Amanda Reeves, for her invaluable assistance in preparing this paper.

prohibits “unfair methods of competition.”¹ As a practical matter, given Section 5’s breadth, the Commission routinely uses Section 5 to challenge conduct that violates the Sherman Act.² (In those cases, incidentally, if you read the complaint it’s clear what we are talking about because we’ll use words and phrases like ‘illegal agreement’, ‘monopolization’, or ‘attempted monopolization.’) When I discuss Section 5, I’m not referring to those Sherman Act cases that are technically pled as Section 5 violations, but rather to the rare, but important case in which the Commission challenges conduct beyond the Sherman Act’s limits under the theory that that conduct, whether or not it constitutes a violation of the Sherman Act, constitutes an “unfair method of competition.” It is these free-standing or independent Section 5 claims and their relationship to Section 2 of the Sherman Act that are the focus of my remarks today.

I.

First, I believe a major virtue of Section 5 is that it enables the Commission to hold firms liable for anticompetitive conduct where the Sherman Act does not. In this vein, I’ve often said that Section 5 more generally provides a better vehicle to resolve unsettled questions of law. Some have construed this to mean that anytime a hard question of law arises under Section 2, I believe we should duck the hard questions and run to Section 5. Let me explain my thinking here a bit more.

¹ 15 U.S.C. § 45(a)(1) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”).

² The Supreme Court has consistently interpreted Section 5 as broader than the other antitrust statutes. *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986) (“The standard of ‘unfairness’ under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons.”) (citations omitted); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972); *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394-95 (1953) (“the [FTC Act] was designed to supplement and bolster the Sherman Act and the Clayton Act to stop in their incipiency acts and practices which, when full blown, would violate those Acts”) (citation omitted).

There are certain instances where existing Sherman Act precedent might potentially lead a court to find that a firm is not liable for certain conduct under Section 1 or Section 2. This could be the case in an invitation to collude case brought under Section 1, for example, or a course of conduct case brought under Section 2. In these cases, if the Commission believes that the firm's conduct has anticompetitive effects (or is likely to have anticompetitive effects, as in the invitation to collude context) and those anticompetitive effects are not outweighed by a procompetitive business justification, Section 5 provides an appropriate vehicle. Some may say that the Commission should stick to the Sherman and Clayton Acts in these contexts, but from a doctrinal standpoint, I don't think that's right. In these cases, if we shoehorn the facts of the case into a Sherman Act framework, we run the risk of either making bad law (to bring an unusual case within the ambit of existing precedent) or, alternatively, losing the case even though the firm's conduct is causing anticompetitive effects because of precedent³ that's ill-suited to the conduct at issue. If that's the result and we have a better mousetrap at our disposal, we're not doing our job as prosecutors very well by eschewing the better mousetrap. In my view, the Commission does a greater service in these hard cases by declaring the practice to be a Section 5 violation provided that we clearly explain why the conduct constitutes an unfair method of competition so that future parties are on notice.⁴

³ I believe that the case law under Section 2 of the Sherman Act may be "binding" (1) when there is a Supreme Court decision squarely on point or (2) when those regional federal appellate courts that have weighed in on an issue agree that Section 2 should be interpreted and applied in a certain way. It should be noted that both instances are the exception rather than the rule.

⁴ See, e.g., Amanda Reeves, *Conduct-Specific Tests? How the Federal Trade Commission Can Reframe the Section 5 Debate*, CPI ANTITRUST CHRON., February 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1562734.

Indeed, this was exactly what I had in mind when I supported the Commission’s decision to vote out a complaint against Intel under a Section 5 course-of-conduct theory.⁵ An anticompetitive course of conduct is not generally a free-standing theory of liability under Section 2—in fact, the vast majority of federal courts that have considered a course-of-conduct claim as a viable theory of liability under Section 2 have rejected it.⁶ There are arguably good policy reasons for why such a theory should not reside under Section 2. Moreover, absent prompt Supreme Court review (something that is highly unlikely in most contexts, but especially in the antitrust context), I’m not convinced the federal courts would have a much easier time identifying the elements of such a claim; it’s not as if the defense or plaintiffs’ bars would be of any thoughtful assistance. In contrast, the Commission is uniquely suited to act as a neutral arbiter and make the hard decision about when a monopolist (or near monopolist) has engaged in an anticompetitive course of conduct in violation of Section 5.

In Intel, for example, the Commission had the benefit of engaging in an extensive investigation before ever filing suit to determine whether there was, in fact, reason to believe that an anticompetitive course of conduct existed (as opposed to just filing suit as private plaintiffs may attempt to do). The Commission was then able to bring its expertise to bear by allowing the

⁵ Concurring and Dissenting Statement of Commissioner J. Thomas Rosch, *In re Intel Corp.*, Docket No. 9341 (Dec. 16, 2009), *available at* <http://www.ftc.gov/os/adjpro/d9341/091216intelstatement.pdf>.

⁶ Most courts that have considered course-of-conduct claims have condemned such claims as “monopoly broth” or as alleging that “0 plus 0 equals 1.” *See, e.g., Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1366-67 (Fed. Cir. 1999); *Cal. Computer Prods., Inc. v. Int’l Bus. Mach.*, 613 F.2d 727, 746 (9th Cir. 1979); *MCI Commc’ns. Corp. v. AT&T Co.*, 708 F.2d 1081, 1177 (7th Cir. 1983) (Wood, J. concurring in part and dissenting in part); *City of Groton v. Conn. Light & Power Co.*, 662 F.2d 921, 928-29 (2d Cir. 1981). *But see Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1306-10 (D. Utah. 1999) (allowing plaintiff to pursue a course of conduct theory under Section 2); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 78 (D.C. Cir. 2001) (“We need not pass upon plaintiffs’ [cumulative effect] argument, however, because the District Court did not point to any series of acts” that show a course of conduct).

Commission and the Bureaus of Competition, Consumer Protection, and Economics to debate whether the application of a course-of-conduct theory to the facts that the staff had uncovered was appropriate. And, had the Commission had the opportunity to render a decision, I had hoped that we would have identified the precise elements of such a claim—just as the Supreme Court did in *Brooke Group*,⁷ for example, when it identified the elements of a predatory pricing claim.

Apart from the doctrinal benefits, I also believed that a course-of-conduct claim was proper under Section 5 as opposed to Section 2 because, while such a claim could be far-reaching, Intel (or any other firm with comparable market power) would rarely be subject to the threat of treble damages so long as the course-of-conduct claim was based exclusively on Section 5. So, as I'll discuss in a moment, in many respects, proceeding under Section 5 created less exposure for Intel and had less of a chilling effect than a decision blessing a course-of-conduct claim under Section 2 would have had. For these reasons, in supporting litigation of a course-of-conduct claim under Section 5, I didn't see the Commission as "ducking" bad law; rather, I saw us as using our authority to reach a particular category of conduct that the Sherman Act generally did not and should not reach.

The rest of my thinking here as to why Section 5 is in some cases a better vehicle than Section 2 is based on the insistence by the private bar and firms that there should be clarity respecting their vulnerability to liability under the antitrust laws. I look at the existing Section 2 law and I see very little clarity. For example, the Supreme Court's decision in *Tampa Electric*⁸ articulated a number of factors that should be considered in determining whether an exclusive dealing arrangement is illegal. That decision has, in turn, spawned such diverse exclusive

⁷ *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993).

⁸ *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

dealing decisions as *Dentsply*,⁹ on the one hand, and *Barr v. Abbott Laboratories*,¹⁰ on the other hand. Similarly, with respect to bundling, there is *LePage's*,¹¹ which differs from *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories*,¹² which in turn differs from *PeaceHealth*.¹³ With respect to loyalty discounts, compare the very different analyses by the Eighth Circuit in *Concord Boat*¹⁴ and the D.C. Circuit in *Microsoft*.¹⁵ With respect to deception, the Third Circuit's decision in *Broadcom Communications v. Qualcomm, Inc.*¹⁶ is hard to reconcile with the D.C. Circuit's decision in *Rambus*.¹⁷

Against this backdrop, the Commission has three choices when presented with a case that it has reason to believe involves conduct with anticompetitive effects that may be plausibly cast as arising under Section 2. First, it can litigate the case in the federal district court of its choosing under a Section 2 theory. The advantage here is that the Commission has an opportunity to add additional clarity to the law, provided it persuades a district court that it is right. The disadvantage is that, as a practical matter, clarity is all but impossible because clarity in most Section 2 contexts will only come with Supreme Court review, which is highly unlikely.

Second, the Commission can litigate the case in a Part 3 administrative trial under Section 2. The advantage here is that if there's an appeal to the Commission, it can author an

⁹ *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005).

¹⁰ 978 F.2d 98 (3d Cir. 1992).

¹¹ *LePage's Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003) (en banc).

¹² 420 F. Supp. 455, 469 (S.D.N.Y. 1996).

¹³ *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895, 905 (9th Cir. 2007).

¹⁴ *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000) (applying essentially a predatory pricing test).

¹⁵ 253 F.3d at 68-74 (analyzing loyalty discounts as a species of exclusive dealing).

¹⁶ 501 F.3d 297 (3d Cir. 2007).

¹⁷ *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

opinion describing why a particular practice should create liability under Section 2. (This, incidentally, is the most powerful argument to me for why we should litigate these cases under Section 2 in the first place.) The disadvantage, of course, is that if we rule against the respondent, the respondent can forum shop its way to the circuit with the binding precedent that is most favorable to it, therefore immediately nullifying any opinion we issue. To be sure, the Commission can then attempt to relitigate the same issue under Section 5, but at that point, I have to wonder if we are using our resources wisely. This, after all, was precisely the option we had in the wake of the D.C. Circuit's unfavorable Section 2 decision in *Rambus*. Suffice it to say, the Commission thought the case had dragged on long enough and made the decision that it was best to fold up its tent and go home.¹⁸

Third, the Commission can sue in Part 3 under a Section 5 theory. From a prosecutorial standpoint, Section 5 has far fewer downsides because Section 2 law is so thin. In fact, the only downside I see here is that an appellate court may rule that Section 5 does not cover the conduct at issue, which I frankly don't view as a downside because then the Commission, the defense bar, and firms have clarity once and for all on the scope of Section 5 and whether or not a particular category of conduct creates liability and under what circumstances.

Some may say that the Commission has a fourth option which is to sue in Part 3 under both Section 2 and Section 5, as the majority elected to do in *Intel*. To be honest, the trial lawyer in me hasn't yet been persuaded that a tag-along Section 2 claim will ever make sense if the Commission's goal is to actually win a Section 5 case. The minute we allege both claims, the respondent has the upper hand because it can go before the ALJ (and ultimately an appellate

¹⁸ Order Returning Matter to Adjudication and Dismissing Complaint, *In re Rambus Inc.*, Docket No. 9302 (May 12, 2009), available at <http://www.ftc.gov/os/adjpro/d9302/090512orderdismisscomplaint.pdf>.

court, if necessary) and get a ruling on the Section 2 claim. Once a court finds that conduct is protected under Section 2, I think a federal court is going to be hard pressed to say the same conduct is nevertheless inappropriate under Section 5. The reason for this is that the core of any Section 5 argument must be that the Commission has special expertise to add and that, for whatever reason, the conduct should not be subject to damages. Once the Commission has proffered the Section 2 claim, it has severely undercut these arguments. It was for this reason, in addition to the others that I discussed above, that I dissented from the Commission's decision to challenge Intel's conduct under Section 2.¹⁹

II.

The second argument I've advanced for why Section 5 is superior in some contexts to Section 2 is that there's no private right of action to sue for Section 5 violations. I understand that not everyone agrees with me on this and some may believe that follow-on class actions are inevitable so let me explain my thinking here as well.

When Congress enacted Section 5, it made two findings that are directly relevant to the class action debate. First, Congress considered and rejected a provision that would allow private plaintiffs to sue for treble damages. In rejecting such a provision, several members of Congress noted that Section 5's breadth and the fact that it allowed the Commission to identify "unfair methods of competition" on a case-by-case basis made it unfair to penalize firms with treble damages for conduct that they didn't know was clearly circumscribed by Section 5.²⁰ Therefore,

¹⁹ Concurring and Dissenting Statement of Commissioner J. Thomas Rosch, *In re Intel Corp.*, Docket No. 9341 (Dec. 16, 2009), available at <http://www.ftc.gov/os/adjpro/d9341/091216intelstatement.pdf>.

²⁰ 51 CONG. REC. 11,379-80 (1914) (remarks of Sen. Cummins) (expressing concern that those who violate the act without moral turpitude should not be unfairly punished); *id.* at 13,114 (remarks of Sen. McCumber) (finding treble damages against unsuspecting violator is harsh penalty); *id.* at 13,119 (remarks of Sen. Williams) (expressing concern that businesspeople

Congress instead decided that violations of Section 5 should be subject to *prospective* remedies only. Private plaintiffs, of course, have rights under the Clayton Act to seek retrospective and punitive remedies – something that is wholly inconsistent with the Section 5 framework.

Second and relatedly, Congress only provided the Commission with prospective remedies because it intended for the Commission to use Section 5 to reach novel or incipient conduct. Congress believed the Commission would be an expert agency and, as such, could identify the sort of “one-off” or “out-of-round” conduct that Section 5 should reach.²¹ In so doing, it trusted the Commission to exercise its prosecutorial discretion and not just use Section 5 to sue for any conduct that could superficially be cast as an “unfair method of competition.”

Private plaintiffs’ lawyer may not feel so constrained. To the contrary, the Supreme Court held in *Twombly* that the private plaintiffs’ bar sometimes pleads antitrust claims with the primary objective of leveraging the enormous costs of litigation through trial into a substantial

performing established business practices not be punished retroactively for actions redefined as unfair or unlawful).

²¹ The report of the Senate Commerce Committee described the task of the new agency:

One of the most important provisions of the bill is that which declares unfair competition in commerce to be unlawful The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers’ Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.

S. REP. NO. 597, 63d Cong., 2d Sess. at 13 (1914) (Senate Commerce Committee Report). For a discussion of the legislative history of Section 5 more generally, see Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003); Neil Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. REV. 227, 235-36 (1980). For a contemporary account, see GERARD C. HENDERSON, *THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* (1924).

settlement.²² Thus, it makes sense to me that Section 5 should only be a tool for the Commission.

It was my reading of this legislative intent that was at the root of both of my statements in the two Section 5 cases that the Commission brought this year. In June, I joined the majority's statement in the settlement of the *U-Haul* invitation to collude case.²³ In that case, the staff uncovered evidence of an invitation to collude, but absolutely no evidence of an agreement.²⁴ I felt it was important to make that point clear to reduce the likelihood that the private class action bar would be tempted to sue U-Haul and Budget under Section 1. Similarly, as I already explained, I wrote separately in *Intel* to emphasize that I believed a complaint premised on a course-of-conduct theory should only be cognizable under Section 5.²⁵ While the knee-jerk reaction to that statement appears to have been that I was taking a more aggressive approach to antitrust enforcement, I believed that insofar as we were trying to limit Intel's exposure and the ultimate reach of any Commission opinion more generally, proffering a course-of-conduct theory under Section 5—rather than Section 2—was actually more conservative.

²² *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (“[I]t is self-evident that the problem of discovery abuse cannot be solved by careful scrutiny of evidence at the summary judgment stage, much less lucid instructions to juries, . . . the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”) (internal quotations and citations omitted).

²³ Statement of Chairman Leibowitz, Commissioner Kovacic, and Commissioner Rosch, *In re U-Haul Int'l, Inc.*, FTC File No. 081-0157 (June 9, 2010), available at <http://www.ftc.gov/os/caselist/0810157/100609uhhaulstatement.pdf>.

²⁴ Analysis to Aid Public Comment, *In re U-Haul Int'l, Inc.*, FTC File No. 081-0157, at 3 (June 9, 2010), available at <http://www.ftc.gov/os/caselist/0810157/100609uhaulanal.pdf> (“If the invitation is accepted and the two firms reach an agreement, the Commission will allege collusion and refer the matter to the Department of Justice for a criminal investigation. In this case, the complaint does not allege that U-Haul and Budget reached an agreement. . .”).

²⁵ Concurring and Dissenting Statement of Commissioner J. Thomas Rosch, *In re Intel Corp.*, Docket No. 9341 (Dec. 16, 2010), available at <http://www.ftc.gov/os/adjpro/d9341/091216intelstatement.pdf>.

Getting to the critiques of my views on class actions, I understand that some may agree that Congress did not intend for follow-on class actions in the Section 5 context, but suggest that, as a practical matter, that is a moot point, given that the private plaintiffs' bar will always find a means to sue if it really wants to. While I believe the jury is still out on this (in part because we have not used Section 5 enough to know for sure), I'm not convinced this critique holds much water.

Let me review the legal options for follow-on class action relief. The first and best option from the class action bar's standpoint is a suit under the Sherman Act. In other words, it can take our allegations under Section 5 and plead that the same conduct violates Section 1 or Section 2. If we are doing our job at the Commission, it should not be worth their time to do this, however. In an invitation to collude case, the Commission has necessarily not found evidence of an agreement – an essential element of a Section 1 case. Thus, provided we make clear the fact that our months—and sometimes year-long—pre-complaint investigation did not yield any evidence of an agreement when we pursue an invitation to collude case (as we did in both the separate statement and analysis to aid public comment in *U-Haul*), a plaintiff should not possibly be able to pursue a follow-on Section 1 case. Section 5 cases based on a unilateral conduct theory are trickier for sure because the Section 2 law is relatively unsettled, so a plaintiff may try to recast our Section 5 theory as a Section 2 theory; however, if we are doing our job and casting Section 5 cases as products of Section 5 as opposed to Section 2, the likelihood of that happening should be reduced. In any event, I haven't seen enough proof that this is occurring to know for sure.

The biggest threat of follow-on relief most likely comes from state “little FTC Acts.” Indeed, this was the concern that Commissioner Kovacic expressed in his dissent from the *N-*

Data settlement.²⁶ However, an exhaustive study of state “little FTC Acts” has found that most of these statutes have such significant limitations that there is little likelihood of follow-on litigation.²⁷ In any event, in the wake of the few Section 5 cases that the Commission has brought thus far—including *N-Data*,²⁸ *Valassis*,²⁹ and *U-Haul*³⁰—there have not been any follow-on suits, so until there is more evidence that “little FTC Acts” actually have deleterious

²⁶ Dissenting Statement of Commissioner William E. Kovacic, *In re Negotiated Data Solutions*, File No. 051-0094 (Jan. 23, 2008), available at <http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf>.

²⁷ See Justin J. Hakala, *Follow-On State Actions Based on the FTC’s Enforcement of Section 5 at 7* (Wayne State Univ. Law Sch., Working Paper Grp., Oct. 9, 2008), available at <http://www.ftc.gov/os/comments/section5workshop/537633-00002.pdf> (“[T]he follow-on actions that are possible are not numerous enough, nor are they certain enough, to give the Commission or the courts cause for concern.”). A review of state “little FTC Acts” on file with the National Association of Attorneys General similarly shows that the possibilities of follow-on state court litigation from FTC Section 5 cases are quite limited. Only nineteen states have a private right of action, and only eleven of those have a multiple damages provision. Of the eleven states, only two have mandatory trebling (Alaska and Hawaii). Two states (North and South Carolina) have mandatory trebling only if the violation was willful or knowing. One state (Wisconsin) has mandatory doubling, and two (New Hampshire and Massachusetts) have mandatory doubling with a possibility for more damages if the violation was willful or knowing. The rest of those eleven (Vermont, Rhode Island, Montana and Washington) have discretionary trebling, and one of those (Washington) has a cap of \$25,000. It should be noted that at least one state supreme court (California) has specifically held that the state’s version of the FTC Act is designed to be as broad as Section 5 of the FTC Act. *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999) (Defining unfair competition as “conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.”). *But see Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (Cal. Ct. App. 2001) (narrowing California’s unfair competition provision so that conduct permissible under federal antitrust law could not violate the state’s unfair competition provision).

²⁸ Complaint, *In re Negotiated Data Solutions LLC*, Docket No. 4234 (Sept. 23, 2008), available at <http://www.ftc.gov/os/caselist/0510094/080923ndscomplaint.pdf>.

²⁹ Complaint, *In re Valassis Commc’ns, Inc.*, Docket No. 4160 (Apr. 28, 2006), available at <http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisComplaint.pdf>.

³⁰ Complaint, *In re U-Haul Int’l, Inc.*, Docket No. 4294 (July 20, 2010), available at <http://www.ftc.gov/os/caselist/0810157/100720uhhaulcmpt.pdf>.

consequences for our Section 5 enforcement, I have no reason to consider the hypothetical risk of those actions to be a real threat.

III.

Third, I'd like to explain why I believe the Commission's expertise validates its use of Section 5 in certain unusual or anomalous cases that are not good candidates under Section 2. I've periodically heard people say that this argument is silly because the Commission is no more expert than the DOJ and that, in any event, my dumping on federal district court judges is without merit.

For starters, I don't think anyone at the FTC would ever suggest that our counterparts at the Antitrust Division are somehow less expert or less equipped to make decisions on hard questions of antitrust law. That would be ridiculous. The real problem is not that the lawyers, economists, and senior officials at the Antitrust Division aren't first rate in their own right, but it is that the FTC is an independent regulatory commission and the Antitrust Division is not. The DOJ is solely a prosecutor that must prove its cases to a federal district court. There is an entire body of administrative law—and, indeed, a substantial piece of the U.S. Federal Government—that is based on the fundamental principle that administrative agencies are entitled to deference when they act within the scope of their expertise. To put a finer point on it, the issue in this context is not that the Antitrust Division is not smart enough to use Section 5; it's that it doesn't have the procedural mechanisms in the form of the ability to sue before an ALJ followed by an appeal to a full, five-member independent commission to use Section 5 as Congress intended.³¹

³¹ Section 5's legislative history suggests that Congress did not want Section 5 authority to be vested in the Executive Branch, since doing so could potentially lead to wide policy swings after each election. A Senate Commerce Committee report quoted its chairman's observation that an executive branch agency can be subject to "shifting officials," "varying policies," and policy changes that are sometimes "purely political in character." S. REP. NO. 597, 63d Cong., 2d Sess.

What the Antitrust Division does have is authority to sue in federal district courts. I've spent plenty of time ragging on generalist federal district courts in the past, but I'm not sure I've ever quite explained why I find them so problematic from a Section 5 perspective. The reason, again, is not that district court judges aren't generally very smart and accomplished—many of them are among the brightest minds in the country. The problem is that they're not required to be experts in antitrust law, and, when it comes to Section 5, 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.

I understand that from time to time some may look at the FTC's composition and say that any given Commission is less expert than other Commissions, but generally speaking, you will find more of a wealth of antitrust expertise at the FTC than in the federal district courts. Indeed, it's safe to say that if a newly-appointed Commissioner shows up at the FTC without a deep background in antitrust law, they get a crash course in it. Moreover, any doubt in my mind as to whether the Commission's administrative decision-making process adds real value to the development of antitrust law was erased by the appellate decisions in *Three Tenors* and *North Texas Specialty Physicians*.³² In both cases, the FTC applied the truncated rule of reason analysis articulated in *Indiana Federation of Dentists*³³ (another FTC case) to deem the practices

at 6 (1914) (quoting remarks of Senator Newlands). In contrast, Congress thought that an independent, multi-member administrative commission would not suffer from the same disadvantages. "One of the chief advantages of the proposed commission over the [predecessor] Bureau of Corporations lies in the fact that . . . its decisions, coming from a board of several persons, will be more readily accepted as impartial and well considered." *Id.* at 11.

³² *Polygram Holding, Inc. v. FTC* (Three Tenors), 416 F.3d 29 (D.C. Cir. 2005); *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 370 (5th Cir. 2008).

³³ *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986).

at issue “inherently suspect.”³⁴ In both cases, the D.C. Circuit and the Fifth Circuit, respectively, 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. Yet because the FTC supplied the courts with a well-crafted roadmap, the FTC was able to introduce a different form of doctrinal analysis—and one that, I might add, provides more predictability—into antitrust law.

I believe that if and when the Commission has the opportunity to issue an opinion in a Section 5 case, it will at some point have the ability to similarly use the administrative litigation and decision-making process to influence the law in the manner that Congress intended.

IV.

Fourth and finally, I know I am a voice in the wilderness here, but as I said in my *Intel* statement, documents that illuminate a party’s intent or demonstrate evidence of multiple anticompetitive practices should be relevant in assessing liability under Section 5. This is because the types of causes of action that arise under Section 5 may involve incipient conduct (in which case, intent is really the bulk of what we should assess) or other more troubling conduct that the Commission does not trust to a civil jury (as, for example, in the course-of-conduct case). My concern is that if we challenge these types of conduct under Section 2, this evidence may not be considered as probative as it should be.

³⁴ *In re PolyGram Holding, Inc.*, 136 F.T.C. 310 (July 24, 2003), available at <http://www.ftc.gov/os/2003/07/polygramopinion.pdf>; *In re N. Tex. Specialty Physicians*, 140 F.T.C. 715 (Nov. 29, 2005), available at <http://www.ftc.gov/os/adjpro/d9312/051201opinion.pdf>.

To be sure, the Supreme Court’s decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* holds that such an intent would be relevant in a Section 2 case.³⁵ Moreover, in a 1984 decision, the Second Circuit held that a respondent’s state of mind is not only relevant, but also must be taken into account to determine whether the respondent’s conduct constitutes an “unfair method of competition” under Section 5.³⁶ Yet some Section 2 decisions have said that an analysis of the defendant’s intent is irrelevant in a Section 2 case.³⁷ And in light of the Supreme Court’s decided distrust for civil juries and private plaintiffs in *Twombly* and *Credit Suisse*,³⁸ I’m not convinced that a federal court would depart from that view.

So if evidence of intent and multiple anticompetitive practices provides the best evidence of conduct that the Commission has reason to believe is having anticompetitive effects, what is the Commission to do? Again, I believe that the answer is that we should litigate Section 5 cases in a Part 3 administrative trial. Under that approach, both sides avoid ever appearing before a jury, yet all of the probative evidence can come in without fear that a private plaintiff will use it to force an inequitable settlement. This seems to be the only way to responsibly prosecute a case where the Commission believes such evidence is relevant to proving liability.

³⁵ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985) (stating that defendant’s practices “support[ed] an inference that [the defendant] was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival”).

³⁶ *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 138-40 (2d Cir. 1984).

³⁷ See, e.g., *A.A. Poultry Farms v. Rose Acre Farms*, 881 F.2d 1396 (7th Cir. 1989) (Easterbrook, J.).

³⁸ *Twombly*, 550 U.S. at 557-60 (observing that Rule 8 prohibits plaintiffs from using “a largely groundless” claim to go on fishing expeditions to up the ante on settlement negotiations); *Credit Suisse Sec.(USA) LLC v. Billing*, 551 U.S. 264, 281-82 (2007) (stating in part that preemption was needed to remedy the fact that “antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries” who were apt to err in the hard line drawing needed to separate the legal from the illegal and reach inconsistent results).

* * * * *

I've now given you my defense of why I believe that in some contexts, Section 5 provides a superior mechanism to Section 2 for challenging unilateral conduct. In closing, I'd like to offer one final thought for your consideration. As it currently stands, the FTC's Section 5 expertise is supposed to be irrelevant to clearance discussions. Is that right? I personally don't think so because, for all of the reasons that I have expressed here, I think there is a lot the Commission can add as a prosecutor as a result of its Section 5 authority. I'd be curious, however, if others agree.

Let the debate begin.