



# Federal Trade Commission

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## Three Questions About Part Three: Administrative Proceedings at the FTC

**Remarks of J. Thomas Rosch\***  
**Commissioner, Federal Trade Commission**

**before the**

**American Bar Association Section of Antitrust Law Fall Forum**

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The FTC, like several other independent agencies, serves as both a prosecutor and a judge. I will focus my remarks on three issues related to this division of functions: (1) the standard that the Commission applies when, acting as a prosecutor, it votes out a complaint; (2) the standards that the Commission applies when, sitting as an appellate tribunal, it reviews decisions from Administrative Law Judges (ALJs); and (3) whether and to what extent there is anything untoward about the Commission occupying both of these prosecutorial and adjudicative roles.

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\* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. This speech is based on remarks I delivered at the 2010 ABA Annual Meeting, a copy of which is available at <http://www.ftc.gov/speeches/rosch/100805abaspeech.pdf>.

## I.

When I first came to the Commission in 2006, I was, to put it politely, underwhelmed by our litigation efforts. I didn't think we were aggressive enough and didn't litigate many of our cases the right way. The Commission is now litigating as an active prosecutor should. For example, the agency has seven competition matters in litigation at the moment, including one case before the Supreme Court.<sup>1</sup> All of this means that the Commission more and more is grappling with the "reason to believe" and public interest standards, which, under Section 5,<sup>2</sup> are the standards that the Commission applies when it acts as a prosecutor and decides to vote out a complaint. If we have a "reason to believe" that anticompetitive conduct is occurring and that the public interest is served by the suit, we can sue. I'd like to begin by offering some thoughts on those standards.

There is no statutory or regulatory definition regarding what it means to have a "reason to believe" or whether a lawsuit is in the public interest. Moreover, attempts to litigate the issue of what the FTC must do to meet those standards have gone nowhere: in its 1980 decision in *FTC v. Standard Oil of California*, the Supreme Court held that the FTC's application of the "reason to believe" standard in conjunction with voting out a complaint is not "final agency action" under the Administrative Procedure Act; instead, the Court held, it is instead "a threshold determination that further inquiry is warranted" and, as such, is not subject to judicial review.<sup>3</sup> The "reason to believe" standard is therefore committed to each Commissioner's discretion. In

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<sup>1</sup> The Androgel pay-for-delay case is before the Supreme Court; the *North Carolina Dental*, *Phoebe Putney*, *Promedica*, and *Polypore* cases are before the Court of Appeals; the *Cephalon* pay-for-delay case is before the U.S. District Court; and the *McWane* administrative proceeding is before an FTC ALJ.

<sup>2</sup> 15 U.S.C. § 45.

<sup>3</sup> *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 241 (1980).

my own mind, when presented with the question of whether or not to vote out a complaint under this standard, I ask three questions drawing on the statute's text. First, has the Bureau of Competition (or Bureau of Consumer protection) presented the Commission with enough evidence such that I can form a "reason to believe" that further investigation may as a factual and legal matter demonstrate liability? Second, is there a sound legal basis for the Bureau's theory? And third, is pursuing litigation in the "public interest"?

When parties from the outside come in to argue that the Commission lacks a reason to believe, they tend to focus – errantly in my view – on the first question and argue that, when all of the evidence is uncovered, they will prevail. The "reason to believe" standard, however, is not a summary judgment standard: it is a standard that simply asks whether there is a reason to believe that litigation may lead to a finding of liability. That is a low threshold.

In contrast, I am more likely to question whether I can vote out a complaint under 13(b) if, as a matter of law, the FTC's argument is foreclosed (in which case it doesn't matter what evidence Complaint Counsel uncovers). Of course, a federal agency, like a private litigant, is entitled to advance claims based on "a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."<sup>4</sup> Nevertheless, if a Commissioner believes that it is bad public policy to use Commission resources to advocate for such a change, that Commissioner may vote against the complaint. Likewise, perhaps the argument that is often the most persuasive to me, but is made with the least frequency, is that voting out a complaint would not be in the public interest, as Section 5 requires. That could occur in any number of circumstances, including when the conduct at issue is causing minimal consumer harm, when the case will not establish an important proposition of law (or may even establish bad law), when

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<sup>4</sup> Fed. R. Civ. P. 11(b)(2).

there is no clear remedy, where there is a denial of liability, or when the case is an otherwise poor use of the Commission's finite resources.

As these observations suggest, the "reason to believe" standard is amorphous and can have an "I know it when I see it" feel. Nevertheless, I don't find its ambiguity to be troubling when you consider that the Commission's application of the "reason to believe" standard is not any more far afield than decisions made by other federal prosecutors. In the criminal context, a prosecutor needs "probable cause" to make an arrest, conduct a search, or obtain a warrant for an arrest, and a grand jury needs "probable cause" to vote out an indictment. Generally speaking, the Supreme Court has held that a prosecutor or grand jury has "probable cause" where "the known facts and circumstances are sufficient to warrant a man of reasonable prudence" that evidence of illicit conduct may be found – i.e., when it has a reason to believe.<sup>5</sup> More to the point, the "reason to believe" standard is consistent with standards used by prosecutors (including the DOJ's Antitrust Division) in making prosecutorial decisions in civil cases. This is all to say that while there may be some logical critiques of the FTC's practice and procedures, I don't think the "reason to believe" standard or the deliberative process (which typically follows at least six months of investigation) the FTC engages in to make that determination is one.

## II.

Next, I would like to discuss the Commission's role as an adjudicative tribunal. The most important issue in this context is the standard of review that the Commission applies when it considers appeals from decisions rendered by Administrative Law Judges (or, in Commission parlance, "Part 3 decisions"). Like any federal appellate tribunal, there are two categories of

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<sup>5</sup> *Orneals v. United States*, 517 U.S. 690, 696 (1996).

issues we must address – the standard that we should accord the ALJ’s conclusions of law and the deference we should accord the ALJ’s findings of fact.

The first issue is the easier one. It is well established that federal appellate courts review conclusions of law de novo.<sup>6</sup> Relative to federal appellate courts, there is arguably an even more powerful argument that, as an expert agency, the FTC should subject an ALJ’s conclusions of law to de novo review. The FTC’s experience dealing with the sorts of hard questions that tend to come up in the antitrust context provide it with the unique and important ability to opine on hard questions of law in the first instance when it issues a Part 3 decision. Our decisions in *Three Tenors* and *North Texas Specialty Physicians* are great illustrations.<sup>7</sup> In both cases, the FTC applied the truncated rule of reason analysis articulated in *Indiana Federation of Dentists*<sup>8</sup> (another FTC case) to deem the practices at issue “inherently suspect.” And, in both cases, the D.C. Circuit and the Fifth Circuit, respectively, agreed and adopted the FTC’s analysis.<sup>9</sup> 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.

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<sup>6</sup> *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986).

<sup>7</sup> Commission opinion, *PolyGram Holding, Inc. (Three Tenors)*, FTC Docket No. 9298 (July 24, 2003), available at <http://www.ftc.gov/os/2003/07/polygramopinion.pdf>; Commission opinion, *North Texas Specialty Physicians*, FTC Docket No. 9312 (Dec. 1, 2005), available at <http://www.ftc.gov/os/adjpro/d9312/051201opinion.pdf>.

<sup>8</sup> *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447 (1986).

<sup>9</sup> *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005); *North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 370 (5th Cir. 2008).

In contrast, I am squeamish about second-guessing an ALJ's findings of fact, especially when they are based on the credibility of witnesses. When federal appellate courts review district court decisions, they accept the district court's findings, including its determination on issues of witness credibility, unless they are "clearly erroneous."<sup>10</sup> When the Commission sits as an appellate tribunal, however, we are supposed review the ALJ's findings of fact under a de novo standard,<sup>11</sup> and the Commission's factual findings are then evaluated under a "substantial evidence" standard.<sup>12</sup> This FTC's application of the de novo standard is compelled by the Administrative Procedure Act as well as the FTC Act,<sup>13</sup> which give the agency all of the same powers that it would have had had it rendered the initial decision; these statutes therefore provide that the Commission's – not the ALJ's – findings of fact are what matters for appellate review. De novo review by the Commission is also compelled by a well-developed body of case law that holds that the Commission – not the ALJ – is responsible for resolving conflicts of testimony.<sup>14</sup>

Whatever the law may be, I am not convinced that appellate courts agree that, as a doctrinal matter, the FTC should subject an ALJ's findings of fact to a de novo review and that,

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<sup>10</sup> Fed. R. Civ. P. 52(a)(6).

<sup>11</sup> See, e.g., *In re Realcomp II, Ltd.*, 2009 FTC LEXIS 250, \*37 at n.11 (Oct. 30, 2009).

<sup>12</sup> 15 U.S.C. § 21(c). The Supreme Court has interpreted this to mean that the Commission's conclusion must be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). In *Indiana Federation of Dentists*, the Supreme Court held that the FTC's deferential standard is coextensive with the APA's requirement that a court defer to an agency's factual findings so long as they are supported by "substantial evidence." 5 U.S.C. § 706(2)(E); *Indiana Fed'n of Dentists*, 476 U.S. at 454 (holding that the standard of review under § 5(c) is "essentially identical" to the substantial evidence test); see also *Colonial Stores v. FTC*, 450 F.2d 733, 739-40 (5th Cir. 1971) ("The findings must stand unless they were wrong and they cannot be wrong – that is, reversibly wrong – if substantial evidence supports them.").

<sup>13</sup> See 5 U.S.C. § 557(b); 15 U.S.C. § 45(b) & (c).

<sup>14</sup> *Goodman v. FTC*, 244 F.2d 584, 590 n.5 (9th Cir. 1957) (quoting *Bristol-Myers Co. v. FTC*, 185 F.2d 58, 62 (4th Cir. 1950); *De Gorter v. FTC*, 244 F.2d 270, 272-73 (9th Cir. 1957) (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 35-7 (1952)).

more generally, they are always faithful to the substantial evidence standard. Why is that? In my view, the appellate courts' deference to the Commission's fact finding is, rightly or wrongly, bound up with their determination of whether the Commission correctly analyzed the question of law. In *Indiana Federation of Dentists*, the Supreme Court held that legal issues are "for the 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.'"<sup>15</sup> But, it seems very clear to me that when a Court wants to reject the Commission's conclusions as a matter of law, it reviews the Commission's analysis de novo and gives the Commission's factual findings little deference.

In *Schering-Plough*, for example, the Eleventh Circuit rejected the Commission's finding that a reverse payment settlement was anticompetitive. In so holding, the court took creative license with the substantial evidence standard, citing a Tenth Circuit case that preceded *Indiana Federation of Dentists* for the proposition that "we may . . . examine the FTC's findings more closely where they differ from those of the ALJ."<sup>16</sup> The Eleventh Circuit cited a pair of cases that preceded *Indiana Federation of Dentists* for the proposition that "[s]ubstantial evidence requires a review of the *entire* record at trial, and that most certainly includes the ALJ's credibility determinations and the overwhelming evidence that contradicts the Commission's conclusion."<sup>17</sup>

Likewise, in *Rambus*, the D.C. Circuit reversed the Commission's finding that computer chip manufacturer Rambus violated Section 5 of the FTC Act when it made misrepresentations

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<sup>15</sup> *Indiana Fed'n of Dentists*, 476 U.S. at 454.

<sup>16</sup> *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1062 (11th Cir. 2005).

<sup>17</sup> *Id.* at 1070 (emphasis added).

to a private standard-setting organization.<sup>18</sup> Tellingly, in my view, the D.C. Circuit reached a conclusion on the question on appeal before mentioning the deference that should be accorded to the Commission’s factual findings.<sup>19</sup> Not surprisingly, the D.C. Circuit found those findings were based on “rather weak evidence.”<sup>20</sup> In contrast, in those cases where the appellate court has affirmed the FTC, it has been very deferential to our factual findings.<sup>21</sup>

All of this has led me to conclude that the Commission should be very cautious when – if ever – it rejects the ALJ’s factual findings and, more particularly, its assessment of witness credibility. Given that appellate courts usually do not review factual findings de novo, they probably find it odd that the Commission gets to do just that, even though the ALJ – not the Commission – hears the live testimony. As such, whatever the law may require, I don’t think that the appellate courts tend to look deferentially on our decision to depart from the ALJ’s findings of fact. As such, as a strategic matter, I don’t think we should give them any extra ammunition to reverse us.

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<sup>18</sup> *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008)

<sup>19</sup> The Court stated “we hold, therefore, that the Commission failed to demonstrate that Rambus’s conduct was exclusionary, and thus to establish its claim that Rambus unlawfully monopolized the relevant markets.” *Id.* at 467. Only after making that finding did the Court then separately analyze the deference owed to the Commission’s fact finding.

<sup>20</sup> *Id.* at 469.

<sup>21</sup> In the *Toys ‘R Us* litigation, for example, the Seventh Circuit affirmed the FTC. In so holding, the Seventh Circuit observed that “[o]ur only function is to determine whether the Commission’s analysis of the probable effects of these acquisitions . . . is so implausible, so feebly supported by the record, that it flunks even the deferential test of substantial evidence.” *Toys ‘R Us v. FTC*, 221 F.3d 928, 934-35 (7th Cir. 2000). Likewise, in *Polygram Holding*, the D.C. Circuit affirmed the Commission’s finding that PolyGram Holding violated Section 5 of the FTC Act by entering into a series of agreements that prohibited discounts and advertising. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005). In its discussion of the legal standard it cited the *Indiana Federation of Dentists* test and the substantial evidence standard, which it later concluded that the Commission had met.

Apart from these issues, a second more esoteric, but potentially equally important, topic relating to our role as an adjudicative tribunal is what happens when the Commission is not operating at full strength (i.e., with fewer than five Commissioners). This can occur when a Commissioner is recused from a matter due to prior employment or a financial conflict, but it also can occur when there is an unfilled vacancy. From March 2008 to March 2010, for example, the FTC functioned with just four members (and without a partisan majority, with one Democrat, one Independent, and two Republicans).

From a good government standpoint, it is of course better when the Commission operates at full strength when it sits as an appellate tribunal. One of the institutional arguments for why the FTC is arguably superior to agencies that are not independent (like, for example, the Department of Justice), is premised on the Commission's structure. The FTC is headed by five Commissioners that serve staggered 7-year terms, no more than three of which can be from any political party.<sup>22</sup> On a day-to-day basis, the need to create a majority forces the Commissioners to consider one another's views.<sup>23</sup> As I have previously observed,<sup>24</sup> this structure means that the FTC as a decision-making body is less vulnerable to the political swings that the Antitrust Division is inevitably subject to. If we are only operating with two or three Commissioners, those justifications are less persuasive.

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<sup>22</sup> 15 U.S.C. § 41.

<sup>23</sup> As former Commissioner Leary observed, “[w]hen we deal with shades of gray” – as we often do – “the process is likely to produce better outcomes. It certainly nudges people toward the center.” Thomas B. Leary, Commissioner, *The Bipartisan Legacy* (June 21, 2005), *available at* <http://www.ftc.gov/speeches/leary/050803bipartisanlegacy.pdf>.

<sup>24</sup> J. Thomas Rosch, *Rewriting History: Antitrust Not as We Know It . . . Yet*, Remarks before ABA Antitrust Section Spring Meeting (April 23, 2010), *available at* <http://www.ftc.gov/speeches/rosch/100423rewritinghistory.pdf>.

As the Supreme Court made clear in 2010, however, in *New Process Steel v. NLRB*,<sup>25</sup> a 5-member independent agency or commission that sits (for whatever reason) with only 2 decision makers, may not have lawful authority to act. During a 27-month period from January 1, 2008 to March 27, 2010, there were just two NLRB Board members (from opposite political parties I might add) who together decided almost 600 cases. The other three seats sat vacant. *New Process Steel* received an unfavorable decision from the Board during this period and sued claiming the NLRB's enabling statute did not authorize the Board to delegate its powers to a two member quorum. Although the Seventh Circuit sided with the NLRB,<sup>26</sup> the Supreme Court in a 5-4 decision did not. As a result, the Board was forced to vacate all of its decisions during this 27-month period.

As you can imagine, this case gave me serious heartburn when I first learned of it. Fortunately, in 2005 the FTC promulgated a rule (pursuant to statutory authority that differs from the NLRB's) that provides that a two-member FTC can serve as a quorum if circumstances require.<sup>27</sup> This means that in those instances when we are forced to act with just two Commissioners, we are acting lawfully. *New Process Steel*, however, was certainly a wake-up call to Boards and Commissions around Washington.

### III.

Finally, I would like to turn to the most controversial issue and that is whether there is anything problematic about combining the prosecutorial and adjudicative functions, as Congress

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<sup>25</sup> 130 S. Ct. 2635 (2010).

<sup>26</sup> *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009).

<sup>27</sup> 16 C.F.R. § 4.14 (2010). *See also* 70 Fed. Reg. 173, 53296-97 n.3 (citing *Falcon Trading Group v. SEC*, 102 F.3d 579 (D.C. Cir. 1996) (upholding a similar SEC rule providing that where the number of Commissioners in office is less than three, a quorum shall consist of the number of members in office who are not recused)).

did when it created the FTC. To put a finer point on it: as a matter of law, is there something wrong with the Commission acting as a prosecutor when it votes out a complaint and then sitting as an independent tribunal when it considers an appeal following a hearing before an ALJ?

Congress apparently didn't think so. When it established the FTC in 1914, it intended for the FTC to serve the dual roles of prosecutor and judge<sup>28</sup> – a view that it codified in Section 5 of the FTC Act.<sup>29</sup> At that time, there were problems from a due process perspective with the way the agency functioned. Hearing officers were often subordinate employees of the agency who could be hired and fired based on their decisions, and there was no internal separation required between the Commission and the hearing process.<sup>30</sup>

In 1946, however, Congress enacted the Administrative Procedure Act. As the Supreme Court has since observed, the APA's fundamental purpose was "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge . . . . [T]he

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<sup>28</sup> As Representative Covington, who authored the original bill to create the FTC, declared in 1914:

The function of the Federal Trade Commission will be to determine whether an existing method of competition is unfair, and if it finds it to be unfair, to order discontinuance of its use. In doing this, it will exercise power of a judicial nature. . . . It would seem clear that the determination of the question whether a method of competition is unfair is not a determination purely of fact, but necessarily involves the determination of a question of law. The Federal Trade Commission will, it is true, have to pass upon many complicated issues of fact, but the ultimate question for decision will be whether the facts found constitute a violation of law against unfair competition. In deciding that ultimate question the Commission will exercise power of a judicial nature . . . .

51 Congressional Rec. 15, 14931-33 (1914).

<sup>29</sup> 15 U.S.C. § 45. Section 5 empowers the FTC to issue a complaint when it has "reason to believe" that an unfair method of competition or an unfair or deceptive act or practice has occurred. Then, after a hearing, Section 5 further empowers the FTC to make "findings as to the facts" and to issue a "cease and desist" order against any such violation.

<sup>30</sup> Administrative Conference of the United States, Rec. 80-1 & Rep. in Supp. of Rec. 80-1 (1980).

safeguards it did set up were intended to ameliorate the evils from the commingling of functions.”<sup>31</sup> To that end, the APA requires that independent administrative law judges conduct the initial hearings and that the Commission then handle appeals. The APA prohibits agency employees who participate in the investigative or prosecutorial functions from playing a role in the decision-making process.<sup>32</sup> This structure has been subject to constitutional attacks on two fronts.

First, parties have claimed that lodging the legislative, prosecutorial, and judicial functions in one agency violates their due process – a claim that has repeatedly fallen on deaf ears. For example, in 1948 the Supreme Court held that the mere fact that the Commission members had previously testified before Congress about the legality of a party’s pricing scheme did not disqualify the Commissioners from providing a fair tribunal in a subsequent investigation of that same party.<sup>33</sup> Likewise, in 1975, the Supreme Court rejected a claim that a state agency’s power to investigate and adjudicate the same matter was a due process violation, observing that, “[t]he initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues do not result in a procedural due process violation.”<sup>34</sup>

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<sup>31</sup> *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41, 46 (1950).

<sup>32</sup> 5 U.S.C. § 554(d).

<sup>33</sup> *FTC v. Cement Institute*, 333 U.S. 683 (1948).

<sup>34</sup> *Withrow v. Larkin*, 421 U.S. 35, 58 (1975). The federal appellate courts have likewise repeatedly recognized that, by functioning in a quasi-prosecutorial, quasi-judicial dual role, the FTC does not violate litigants’ procedural due process. *See, e.g., Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968) (holding that the Commission did not violate a party’s due process rights by issuing a press release that was critical of the party’s conduct following the issuance of a complaint, noting that “[i]t is well settled that a combination of investigative and judicial functions within an agency does not violate due process”); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 79 (10th Cir. 1972) (rejecting Kennecott’s argument that the Commission could not give it a fair hearing because of the Commission’s extensive prior

These decisions have not stopped parties from arguing that the FTC's procedures violated their due process rights. In *Inova/Prince William*, the Commission challenged a merger between the only two hospitals in the relevant geographic market.<sup>35</sup> The Commission appointed me to serve as the ALJ and oversee the trial<sup>36</sup> and I recused myself from the Commission's decision to vote out a complaint. Notwithstanding my recusal, the parties claimed that because I had participated in the investigation (with my prosecutorial hat on), my appointment as a judge violated their due process rights and requested that I recuse myself from participating as ALJ.<sup>37</sup> The parties abandoned the merger before the Commission ruled on the motion.<sup>38</sup> Similarly, in the *Whole Foods* litigation, the Commission again appointed me to serve as the ALJ in the administrative proceeding. Whole Foods sued the FTC in federal court,<sup>39</sup> claiming that the

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contacts with Congress on the subject matter at issue in the appeal and explaining that Congress designed the FTC to combine the functions of investigator, prosecutor, and judge and that "the courts have uniformly held that this feature does not make out an infringement of the due process clause of the Fifth Amendment").

<sup>35</sup> Complaint, Inova Health Sys. Foundation, Docket No. 9326 (May 8, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080509admincomplaint.pdf>.

<sup>36</sup> See Press Release: FTC Designates Commissioner J. Thomas Rosch as ALJ in Case Challenging Inova Health System Foundation's Acquisition of Prince William Health System, Inc. (May 9, 2008), available at <http://www.ftc.gov/opa/2008/05/inovafyi.shtm>. Agency rules allowed the FTC to do so. See 16 C.F.R. § 3.42(a).

<sup>37</sup> Respondents' Motion to Recuse Commissioner J. Thomas Rosch as Administrative Law Judge, Inova Health System Foundation, Docket No. 9326 (May 23, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080523respmorecuseroschasalj.pdf>.

<sup>38</sup> Press Release, Inova Health System, Inova Health System, Statement from Inova Health System and Prince William Health System About the Proposed Merger (June 6, 2008), available at <http://www.inovanewsroom.org/statement-from-inova-health-system-and-prince-william-health-system-about-the-proposed-merger/>. Prior to the parties' abandonment, I had certified the parties' motion and attached a statement that explained why I believed the parties' motion lacked merit. See Order Certifying Respondents' Motion to Recuse the Commission and Accompanying Statement by J. Thomas Rosch, Inova Health System Foundation, Docket No. 9326 (May 29, 2008), available at <http://ftc.gov/os/adjpro/d9326/080529ordercert.pdf>.

<sup>39</sup> Prior to filing in federal court, Whole Foods moved to disqualify any member of the Commission from serving as an ALJ on the grounds that the Commission's statements made in

FTC's prejudgment of the case violated its due process rights.<sup>40</sup> Whole Foods dismissed its due process claim when it became clear that it was going to settle the case.

In contrast to the constitutional due process claims, there has been a more active debate in the federal courts about whether the FTC's structure (and the administrative state more generally) violate the U.S. Constitution's separation of powers. The Constitution's framers divided power – legislative, executive, and judicial – in three branches of government. While that seems like a straightforward division of power, the Constitution's checks and balances framework – and Congress's attempt to mimic that framework by creating a web of additional inter-branch checks and balances each time it creates a new “independent” governmental entity – raise a host of questions. Foremost among those is whether when Congress establishes an independent agency or commission in one branch with power that belongs to another, does it unconstitutionally vest legislative, executive, or judicial power in that entity?

In one of its earliest decisions on this issue,<sup>41</sup> its 1935 decision in *Humphrey's Executor*, the Supreme Court considered whether Congress could constitutionally limit the President's

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conjunction with the preliminary injunction proceedings showed that the Commission had prejudged the matter. See Respondents' Motion to Disqualify the Commission as Administrative Law Judge and to Appoint a Presiding Official Other than a Commissioner, Whole Foods Market, Inc., Docket No. 9324 (Aug. 22, 2008), available at <http://www.ftc.gov/os/adjpro/d9324/080822respmodisqualifycomm.pdf>. The Commission rejected Whole Foods' argument. See Order Denying Respondents' Motion to Disqualify the Commission, Whole Foods Market, Inc., Docket No. 9324 (Sept. 5, 2008), available at <http://www.ftc.gov/os/adjpro/d9324/080905order.pdf>. Tellingly, Whole Foods did not move to disqualify the entire Commission from hearing an appeal on these same grounds – a fact that, in the Commission's view, severely undercut the merits of its “prejudgment” claim. Notwithstanding the Commission's finding, the Commission subsequently named a new ALJ to oversee the trial proceedings after the scheduling order was in place. Order Designating Administrative Law Judge, Whole Foods Market, Inc., Docket No. 9324 (Oct. 20, 2008), available at <http://www.ftc.gov/os/adjpro/d9324/081020order.pdf>.

<sup>40</sup> Complaint for Declaratory and Injunctive Relief, Whole Foods Market, Inc. v. FTC, No. 1:08-cv-02121 (D.D.C. Dec. 8, 2008), available at <http://legaltimes.typepad.com/files/whole-foods-complaint.pdf>. Whole Foods also asserted that the “rushed” trial schedule violated its rights.

power to remove Commissioners under the Federal Trade Commission Act.<sup>42</sup> President Hoover nominated William Humphrey for a second term as a member of the Commission, and he was confirmed by the Senate for term that was to expire on September 25, 1938.<sup>43</sup> In 1933, however, President Franklin Roosevelt wrote Humphrey and asked him to resign because “the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection.”<sup>44</sup> Commissioner Humphrey refused to resign so President Roosevelt terminated Humphrey’s term – a decision that Commissioner Humphrey ignored by continuing to serve out his term.<sup>45</sup> Humphrey died while in office and his estate sued the United States to recover his salary from the time of his termination until his death.

In a decision that is generally considered to provide the constitutional foundation for the administrative state,<sup>46</sup> the Court held that Congress did not violate the separation of powers when it established the Federal Trade Commission and limited the president’s removal power except

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<sup>41</sup> See also *United States v. Perkins*, 116 U.S. 483 (1886); *Myers v. United States*, 272 U.S. 52 (1926).

<sup>42</sup> *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

<sup>43</sup> *Id.* at 618.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 619.

<sup>46</sup> Some have also speculated that the decision was the Supreme Court’s response to an overly-activist President. See *Morrison v. Olson*, 487 U.S. 654, 724 (1988) (Scalia, J., dissenting) (noting that *Humphrey’s Executor* “was considered by many at the time the product of an activist, anti-New Deal Court bent on reducing the power of President Franklin Roosevelt”). Indeed, Justice Jackson, who had been Roosevelt’s Attorney General, later remarked:

I really think the decision that made Roosevelt madder at the Court than any other decision was that damn little case of *Humphrey’s Executor v. United States*. The President thought they went out of their way to spite him personally and they were giving him a different kind of deal than they were giving Taft.

*Synar v. United States*, 626 F. Supp. 1374, 1398 n.27 (D.D.C. 1986) (per curiam) (quoting E. Gerhart, *America’s Advocate: Robert H. Jackson* 99 (1958)).

for good cause. In so holding, the Court distinguished between administrative officials who performed “purely executive” functions (such as postmasters) and those officials who performed “quasi-legislative” and “quasi-judicial” functions (such as Federal Trade Commissioners). The Court held that, as to the former, the President had absolute removal power, but that, as to the latter, Congress could constitutionally limit the President’s power. In *Humphrey’s Executor’s* wake, the Supreme Court has held that the administrative framework does not violate the Constitution so long as the President nominates and the Senate confirms the principal officers, with the caveat that Congress may limit the President to a good-cause removal power.<sup>47</sup>

The tide may be turning, however. In 2010, the Supreme Court revisited this separation of powers issue in an appeal that challenged the legality of the Public Company Accounting Oversight Board (“PCAOB” [pronounced “peek-a-boo”]).<sup>48</sup> Under the Sarbanes-Oxley Act, SEC Commissioners appointed the PCAOB’s members, who were then removable by those Commissioners only for good cause. At issue in the appeal was whether Congress impermissibly intruded on the Executive Branch’s authority under Article II in violation of the Constitution’s separation of powers principle by empowering decision-makers at this “agency within an

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<sup>47</sup> Indeed, to date, the only cases in which the Supreme Court has held the structure of an administrative agency unconstitutional involved attempts by Congress to insert itself directly into the appointment process or to directly control an agency’s decisions through a veto-like power. Richard H. Pildes, *Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act*, 5 NYU J. Law & Bus. 485 (2009) (citing *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (direct congressional participation in agency decision-making); *Bowsher v. Synar*, 478 U.S. 714 (1986) (direct congressional involvement in removal process); *INS v. Chadha*, 462 U.S. 919 (1983) (direct congressional veto over agency decisions); *Buckley v. Valeo*, 424 U.S. 1, 1 (1976) (direct congressional participation in appointment process); *Myers v. United States*, 272 U.S. 52 (1926) (direct Senate participation in removal)).

<sup>48</sup> *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010). Congress created PCAOB in the Sarbanes-Oxley Act of 2002, following several major financial and accounting scandals. The PCAOB registers public accounting firms, establishes auditing and ethics standards, conducts inspections and investigations of registered firms, and imposes sanctions as needed.

agency” to engage in executive power who are twice-removed from the President. In a 2-1 decision, with Judge Kavanaugh writing a lengthy dissent (in which he characterized the case as “*Humphrey’s Executor squared*”), the D.C. Circuit upheld the PCAOB’s constitutionality.<sup>49</sup>

The Supreme Court, however, disagreed. In a 5-4 decision, with Chief Justice Roberts writing for the majority, the Court rejected the D.C. Circuit’s separation of powers analysis and held that the PCAOB’s removal provisions were unconstitutional. The Court reasoned that the “added layer of tenure protection” (in the form of the Commission) between the President and the Board and the fact that the Commission could only remove the Board members for “good cause” effectively insulated the Board from the President’s supervision, making it virtually impossible for the President to control it. Finding that the President was not the ultimate judge of the Board’s conduct, but was instead only the judge of the SEC Commissioners’ conduct (who themselves could only be removed for good cause), the Court ruled the Board unconstitutional.<sup>50</sup>

What does this suggest for the future? It’s too soon to say. At the Supreme Court level, it may be the case that administrative agencies will come under greater scrutiny. Justice Scalia has long criticized the Court’s separation of powers decisions on the grounds that *Humphrey’s Executor* authorized the creation of a “headless fourth branch” of government by recognizing “independent” agencies that are, in his words, “*within* the Executive Branch (and thus authorized to exercise executive powers) independent of the [President’s] control . . . .”<sup>51</sup> Until the PCAOB

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<sup>49</sup> *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008). The D.C. Circuit subsequently voted 5-4 to deny en banc review.

<sup>50</sup> In an opinion joined by Justices Stevens, Ginsburg, and Sotomayor, Justice Breyer dissented. The dissent rejected the majority’s assumption that removal authority was the key way in which the President maintained authority and control over “inferior officers” in independent agencies.

<sup>51</sup> *Mistretta v. United States*, 488 U.S. 361, 424 (1989) (Scalia, J., dissenting in 8-1 decision); see also *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C 1986) (per curiam) (“It has in any event always been difficult to reconcile *Humphrey’s Executor’s* ‘headless fourth branch’

decision, Justice Scalia had remained in the minority when it came to separation-of-powers issues. Whether a majority of the Court is really interested in revisiting administrative state's constitutional underpinnings or whether the PCAOB case was an outlier remains to be seen.

At a more practical level, however, I think it is safe to say that – whatever our critics may say – the FTC retains several layers of supervision by all three branches. We are often called to the Hill to testify before our oversight Committee, as well as other Committees. Congress also controls our appropriations and can augment or strip us of our statutory authority at any time. The Executive Branch not only nominates the Commissioners, it also plays an important role (through OMB) in determining the FTC's budget request to Congress. Finally, not only is the agency of course subject to constitutional limitations, but any decision that the Commission renders when it sits as an adjudicative body can be appealed by the respondent to the regional federal appellate court of its choice.<sup>52</sup> If the right to engage in unfettered forum shopping does not provide oversight by the judicial branch, I don't know what does. For all of these reasons, I think the FTC's structure is not only constitutionally sound, but optimal. It certainly is an improvement over the structure that houses our friends down the street at the Antitrust Division.

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with a constitutional text and tradition establishing three branches of government . . .”). As I read Justice Scalia's opinions, his principal critique is that the Constitution divides power among the three branches and any entity that exercises executive, legislative, or judicial power must be fully accountable to the head or heads of the relevant branch. Simply put, assuming the FTC and the independent counsel serve (at least part, if not entirely) Executive Branch functions, if the President has to wait for an FTC Commissioner or independent counsel to act so egregiously so as to warrant removal for “good cause,” the President is not really in charge of the Executive Branch functions; Congress (by implementing the good cause standard) or, worse, the politically unaccountable independent agency or counsel, is in charge. That reassignment or sharing of power, in Justice Scalia's view, is contrary to the separation-of-powers framework.

<sup>52</sup> 15 U.S.C. § 45(c).