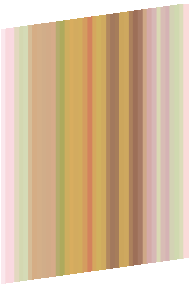

There is no statutory or regulatory definition regarding what it means to have a "reason to believe." Moreover, attempts to litigate the issue of what the FTC must do to meet that standard have gone nowhere: in its 1980 decision in *FTC v. Standard Oil of California*, the Supreme Court held that the 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 "a threshold determination that further inquiry is warranted" and, as such, is not subject to judicial review.[5] The "reason to believe" standard is therefore committed to each Commissioner's discretion. In 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 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"?

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 extending, modifying, or reversing existing law or for establishing new law”. Fed. R. Civ. P. 11(b)(2). Nevertheless, if a Commissioner believes that it is bad public policy to use Commission resources to advocate for such a change (perhaps because he/she does not agree with the change), that Commissioner may vote against the complaint. Likewise, perhaps the argument that is often the most persuasive to me yet 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 we are challenging conduct that is causing minimal consumer harm, when the case will not establish an important proposition of law (or may even establish

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i.e., when it has a reason to believe.

arguably an even more powerful argument that the FTC, as an expert agency, 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.[9] In both cases, the FTC applied the truncated rule of reason analysis articulated in *Indiana Federation of Dentists*[10] (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.[11] Had these questions been presented to a federal district court in the first instance (as they would had the DOJ brought the case), it's unlikely that the court would have been open (let alone equipped) to applying 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, I might add, that provides more predictability – into antitrust law.

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

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

[10] *Ind. Fed'n of Dentists*, 476 U.S. 447; *See also In re Mass. Bd. of Optometry*, 110 F.T.C. 549 (1988),

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

its determination on issues of witness credibility, unless they are "clearly erroneous."[12] When the Commission sits as an appellate tribunal, however, we are supposed to review the ALJ's findings of fact under a de novo standard,[13] and the Commission's factual findings are then evaluated under a "substantial evidence" standard.[14] This FTC's application of the de novo standard is compelled by the Administrative Procedure Act as well as the FTC Act,[15] 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 – and, again, not the ALJ – is responsible for resolving conflicts of testimony.[16]

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

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[12] Fed. R. Civ. P. 52(a)(6).

and that, 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.'"[17] 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."[18] 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."[19]

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

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[17] *Indiana Fed'n of Dentists*, 476 U.S. at 454.

[18] *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1062 (11th Cir. 2005)

[19] *Schering-Plough*, 402 F.3d at 1070 (emphasis added).

misrepresentations to a private, standard-setting organization.[20] Tellingly, in my view, the D.C. Circuit reached a conclusion on the question on appeal before – almost as an afterthought – so much as mentioning the deference that should be accorded to the Commission's factual findings.[21] Not surprisingly, the D.C. Circuit found those findings were based on "rather weak evidence."[22] In contrast, in those cases where the appellate court has affirmed the FTC, it has been very deferential towards our factual findings.[23]

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. The Commission does not hear the live testimony, and understandably I think, if an appellate court is looking for reasons to reverse the Commission, given that appellate courts do not generally do a de novo review of facts in other cases, they probably find it odd that the Commission gets to do just that. As such, whatever the law may require, I don't think that the appellate courts tend to look

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

[21] *Id.* at 442. The Court stated, "[w]e 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.* Only after making that finding did the Court then separately analyze the deference owed to the Commission's fact finding.

[22] *Id.* at 469.

[23] 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) (quoting *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1385 (7th Cir. 1986)). 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. *Id.* at 38.

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 be giving them any extra ammunition to reverse us.

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 a prior employment or 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 sits as an appellate tribunal and operates at full strength. One of the institutional arguments for why the FTC is perhaps 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 the same political party.[24] On a day-to-day basis, the need to create a majority forces the Commissioners to consider one another's views.[25] As I have

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[24] 15 U.S.C. § 41.

[25] 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, Fed. Trade Comm'n, "The Bipartisan Legacy" (May 8, 2003), *available at* http://www.ftc.gov/speeches/leary/050803bipartisanlegacy.pdf.

previously observed,[26] 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.

As the Supreme Court made clear in June, however, in *New Process Steel v. NLRB*,[27] a five-member independent agency or commission that sits (for whatever reason) with only two 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.[28] 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,[29] 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. I am happy to report that I have been assured by our General Counsel that in 2005, the FTC promulgated a rule (pursuant to statutory authority that differs from the NLRB's)

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[26] J. Thomas Rosch, "Rewriting History: Antitrust Not as We Know It . . . Yet,"

that provides that a two-member FTC can serve as a quorum if circumstances require.[30] This means that in those instances when we are forced to act with just two Commissioners, we are acting lawfully. *New Process Steel*

codified in Section 5 of the FTC Act.[32] At that time, as parties vociferously pointed out, there were problems from a due process perspective with the way the agency functioned. Hearing officers were typically 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.[33]

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 safeguards it did set up were intended to ameliorate the evils from the commingling of functions…".[34] To that end, the APA requires that independent administrative law judges (who are no longer subject to agency control) 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.[35] 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

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

[32] 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.

[33] Administrative Conference of the United States, Rec. 80-1 & Rep. In Supp. Of Rec. 80-1 (1980).

[34] *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41, 46 (1950).

[35] 5 U.S.C. § 554(d).

Commission appointed me to serve as the ALJ and oversee the trial,[39] 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.[40] The parties abandoned the merger before the Commission ruled on the motion.[41] Similarly, in the *Whole Foods* litigation, the Commission again appointed me to serve as the ALJ.[42] Whole Foods sued the FTC in federal court,[43] claiming that the FTC's prejudgment of the case along with its

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[39] *See* Press Release, FTC, 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*

trial schedule (which, it claimed, "rushed" Whole Foods to trial in five months) violated its due process rights.[44] Whole Foods eventually 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) violates 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

Act.[46] President Hoover nominated William Humphrey to succeed himself as a member of the Commission and he was confirmed by the Senate for a term that was to expire on September 25, 1938.[47] 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."[48] Commissioner Humphrey refused to resign so President Roosevelt terminated Humphrey's term – a fact that Commissioner Humphrey ignored by continuing to serve out his term.[49] 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,[50] 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 for good cause. In so holding, the Court distinguished between

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[46] *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

[47] *Id.* at 618.

[48] *Id.*

[49] *Id.* at 619.

[50] 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:

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 repeatedly 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 constitutionally limit the President to a good-cause removal power.[51]

The tide may be turning, however. This past term, for the first time in 20 years, the Supreme Court revisited this separation of powers issue in an appeal that challenged the legality of the Public Company Accounting Oversight Board ("PCAOB").[52] Under the Sarbanes-Oxley Act, SEC Commissioners appointed the PCAOB's members who

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[51] 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*, 33 N.Y.U. J.

were then only removable by those Commissioners 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 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.[53]

The Supreme Court, however, disagreed. In a 5-4 decision, with Chief Justice Kavan4who are twage8.0ysiage8d AOB's cency onstitutioy thoslby ov Chieor ly runnality.

are called to the Hill regularly to testify before our oversight Committee, as well as other Committees if they so require. Congress also, of course, controls our initial appropriation and, if it so chooses, can augment or strip us of our statutory authority at any moment. The Executive Branch not only nominates the Commissioners, but also (through OMB) gets the final say over the FTC's budget. Finally, not only is the agency subject to constitutional limitations, but also any decision that the Commission renders when it sits as an adjudicative body can be appealed by the respondent to any federal appellate court of its choice;[56] 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.

[56] 15 U.S.C. § 45(c).