Federal Trade Commission

Three Questions About Part Three: Administrative Proceedings at the FTC

Remarks of J. Thomas Rosch
Commissioner, Federal Trade Commission

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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.

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

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 lia

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.[5] 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

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.[6] Relative to federal appellate courts, there is arguably an even more

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."[10] 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,[11] and the Commission's factual findings are then evaluated under a "substantial evidence" standard.

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

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.

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

As the Supreme Court made clear in 2010, however, in *New Process Steel v. NLRB*,[25] a 5-member independent agency or commission that (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,[26] 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.[27] 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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[25] 130 S. Ct. 2635 (2010).

[26] *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009).

[27] 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

safeguards it did set up were intended to ameliorate the evils from the commingling of functions."[31] 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.[32] 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

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.[35]

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

power to remove Commissioners under the Federal Trade Commission Act.[42] President Hoover nominated William Humphrey for a second term

agency” to engage in executive power who was 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.[49]

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 a judge of the SEC Commissioners’ conduct (who themselves could only be removed for good cause), the Court ruled the Board unconstitutional.[50]

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 . . . .”[51] Until the PCAOB

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[49] *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.

[50] In an opinion joined by Justices Stevens, Ginsburg, and Sotomayor, Justice Breyer dissented. The dissent rejected the majority’s

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