



# Federal Trade Commission

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**The Federal Trade Commission as a Law Enforcement Agency**

**Lecture given by J. Thomas Rosch\*  
Commissioner, Federal Trade Commission**

**in**

**Antitrust Economics  
ECON 420, Spring 2012  
Professor Kenneth G. Elzinga**

**University of Virginia  
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Professor Elzinga had asked me to choose my own topic for this lecture. I've been peppered with questions about what I plan to do when my term expires this September<sup>1</sup> (taking into account that the custom and practice at the

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\* 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 attorney advisor, Henry Su, for his invaluable assistance in preparing this lecture.

<sup>1</sup> See, e.g., Kirstin Downey, *FTC Commissioners Spar Publicly in Hearing on the Hill*, FTC:WATCH, Mar. 16, 2012, at 2; Jeff Bliss & Sara Forden, *FTC Commissioner Rosch Says He Will Not Seek Another Term*, BLOOMBERG BUSINESSWEEK (Jan. 23, 2012, 2:02 AM), <http://www.businessweek.com/news/2012-01-23/ftc-commissioner-rosch-says-he-will-not-see-another-term.html>.

Federal Trade Commission is for a Commissioner to soldier on until his or her successor is appointed and confirmed).<sup>2</sup> So I considered pontificating about that. Fortunately for you, though, I soon rejected that notion (because I don't have the slightest idea what I'm going to do).

It's also been suggested that the best thing I could do is to list the "best practices" of a trial lawyer based on my experiences.<sup>3</sup> I rejected that too (because I concluded I was largely responsible for rejection of the Elzinga–Hogarty analysis in my last case with Professor Elzinga (*United States v. Oracle*)).

I also know that neither topic is what Professor Elzinga had in mind. He was just being his usual kind self. He really wanted me to describe what

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<sup>2</sup> See 15 U.S.C. § 41 (2010) ("Provided, however, That upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified[.]"). This proviso was added to the Federal Trade Commission Act by the Wheeler–Lea Amendments of 1938, § 1, Pub. L. No. 75-447, 52 Stat. 111, 111 (1938). As bill co-sponsor Senator Wheeler explained, "[t]he purpose of the amendment is to maintain a full membership upon the Commission during the interim between the expiration of the term of office of a Commissioner and the appointment and qualification of his successor." 83 CONG. REC. 3252, 3254–55 (1938) (statement of Sen. Burton K. Wheeler). If a Commissioner chooses, however, to leave office promptly at the end of his or her term, the Commission can still carry on its work with less than the full complement of five Commissioners. 15 U.S.C. § 41 (2010) ("A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission.").

<sup>3</sup> For those of you who are interested in the topic of trial practice in antitrust cases, you should read my remarks in the following speeches: J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Lessons Learned from *United States v. Oracle Corp.*, Remarks at the Antitrust and the High Tech Sector Conference: Mergers, Enforcement, and Standardization (Jan. 31, 2012), <http://www.ftc.gov/speeches/rosch/120131oraclelessons.pdf>; J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Ten Lessons in Appellate Advocacy, Remarks Before the Howrey LLP Antitrust Fundamentals Seminar (Feb. 24, 2011), <http://www.ftc.gov/speeches/rosch/110224roschappellateadvocacyspeech.pdf>; J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Can Antitrust Trial Skills Really Be "Mastered"? Tales Out of School About How to Try (or Not to Try) an Antitrust Case, Remarks Before the American Bar Association Antitrust Masters Course (Sept. 30, 2010), <http://www.ftc.gov/speeches/rosch/100930roschmasterscourseremarks.pdf>; J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Litigating Merger Challenges: Lessons Learned, Remarks at the Bates White Fifth Annual Antitrust Conference (June 2, 2008), <http://www.ftc.gov/speeches/rosch/080602litigatingmerger.pdf>.

we do at the Commission and why we do it. So that is what I am going to discuss today. And my attorney advisor has designated some reading materials for you accordingly.

## I.

First, and above all, the Commission is a law enforcement agency charged with protecting competition and consumers. Our enforcement power lies principally in a federal statute commonly referred to as Section 5 of the Federal Trade Commission (FTC) Act, under which we have jurisdiction to prohibit both “unfair methods of competition” that harm competition and “unfair or deceptive acts or practices” that harm consumers.<sup>4</sup> To me, that mandate from Congress means that we should not put the cart before the horse. That is to say, we should not issue decrees that would make competition “better” or consumers “better off.”<sup>5</sup>

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<sup>4</sup> 15 U.S.C. § 45(a)(1) (2010) (declaring “unfair methods of competition” and “unfair or deceptive acts or practices” in or affecting commerce to be unlawful); 83 CONG. REC. 391, 391–92 (1938) (statement of Rep. Clarence F. Lea, co-sponsor of the Wheeler–Lea Amendments) (explaining that the proposed addition of “unfair or deceptive acts or practices” to the Commission’s Section 5 jurisdiction will relieve the agency of the burden of having to show that an “unfair practice is injurious to a competitor” and will also allow the agency to “afford a protection to the consumers of the country that they have not heretofore enjoyed”); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (observing that the addition of the phrase “unfair or deceptive acts or practices” to Section 5’s original ban on “unfair methods of competition” makes clear that Congress charged the Commission with protecting consumers as well as competition).

<sup>5</sup> For example, *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984), and *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980)—two of a trilogy of cases that the Commission lost in the early 1980s—were arguably both instances where we as an agency tried to use Section 5 to “better” competition instead of to remedy an articulable and provable violation of antitrust law. *See* discussion *infra* note 13.

Rather, as Commissioners, we must first determine that there is “reason to believe” that an enforcement target’s conduct has violated one or more of the antitrust or consumer protection laws that we enforce. Section 5 of the FTC Act makes that clear.<sup>6</sup> Only in the face of a putative violation of law is the Commission empowered to act in the public interest and to impose remedial measures.<sup>7</sup> If the Commission does otherwise, then it will be transformed from a law enforcement agency into a regulatory agency. That will not happen on my watch.

Second, Section 5 of the FTC Act is always the bedrock antitrust law that the Commission enforces. But the “ordinary” antitrust laws—the Sherman Act and the Clayton Act—are incorporated into Section 5 (or

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<sup>6</sup> 15 U.S.C. § 45(b) (2010) (“Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect[.]”).

<sup>7</sup> *See* *FTC v. Standard Oil Co.*, 449 U.S. 232, 246 n.14 (1980) (“[W]e do not encourage the issuance of complaints by the Commission without a conscientious compliance with the ‘reason to believe’ obligation in 15 U.S.C. § 45(b). . . . Without a well-grounded reason to believe that unlawful conduct has occurred, the Commission does not serve the public interest by subjecting business enterprises to [the] burdens [of the adjudicatory proceedings that ensue].”).

“borrowed by” Section 5 if you will).<sup>8</sup> So the Commission frequently enforces those laws as well.<sup>9</sup>

To be sure, from time to time, as in the *Intel* case (or the “attempted price-fixing” cases like *U-Haul*), the Commission issues what we call a “pure” or “standalone” Section 5 antitrust complaint.<sup>10</sup> But, as I said in *Intel*,<sup>11</sup> there are at least three major principles that should limit us in doing that.<sup>12</sup> The first is that, consistent with a trilogy of court cases that the Commission lost in the early 1980s,<sup>13</sup> we should not use Section 5 when to do so would

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<sup>8</sup> See *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394–95 (1953) (explaining that Section 5 “supplement[s] and bolster[s] the Sherman Act and the Clayton Act” by empowering the Commission “to stop in their incipiency acts and practices which, when full blown, would violate those Acts . . . as well as to condemn as ‘unfair methods of competition’ existing violations of them”); *FTC v. Cement Inst.*, 333 U.S. 683, 691–92 (1948) (the Court noting its consistent approval of the Commission’s interpretation of the prohibitions of Section 5 as including restraints of trade outlawed by the Sherman Act).

<sup>9</sup> See, e.g., *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 465–66 (1986) (“The factual findings of the Commission regarding the effect of the Federation’s policy of withholding x rays are supported by substantial evidence, and those findings are sufficient as a matter of law to establish a violation of § 1 of the Sherman Act, and, hence, § 5 of the Federal Trade Commission Act.”); *Fashion Originators’ Guild, Inc. v. FTC*, 312 U.S. 457, 464 (1941) (“And the Federal Trade Commission concluded in the language of the Clayton Act that these understandings substantially lessened competition and tended to create a monopoly. We hold that the Commission, upon adequate and unchallenged findings, correctly concluded that this practice constituted an unfair method of competition.”).

<sup>10</sup> Complaint § 1, *Intel Corp.*, Dkt. No. 9341 (F.T.C. Dec. 16, 2009), available at <http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf>; Decision and Order (Public Record Version), *U-Haul Int’l, Inc.*, Dkt. No. C-4294 (F.T.C. July 20, 2010), available at <http://www.ftc.gov/os/caselist/0810157/100720uhauldo.pdf>.

<sup>11</sup> Concurring & Dissenting Statement of J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, *Intel Corp.*, Dkt. No. 9341 (F.T.C. Dec. 16, 2009), available at <http://www.ftc.gov/os/adjpro/d9341/091216intelstatement.pdf>.

<sup>12</sup> See also J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Promoting Innovation: Just How “Dynamic” Should Antitrust Law Be?, Remarks Before the USC Gould School of Law 2010 Intellectual Property Institute 13–20 (Mar. 23, 2010), <http://www.ftc.gov/speeches/rosch/100323uscremarks.pdf>.

<sup>13</sup> *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 138–39, 140 (2d Cir. 1984) (holding that Section 5 cannot be applied to proscribe unilaterally adopted, but interdependent,

unsettle “settled” Sherman Act or Clayton Act case law.<sup>14</sup> The second is that, consistent with the business community’s insistence that there be certainty,<sup>15</sup> particularly in enforcement of antitrust laws governing single-firm conduct, Section 5 should be applied only to firms in highly concentrated industries, i.e., those with monopoly or near-monopoly power. The third is that, consistent with the Supreme Court’s concerns about private treble damage actions,<sup>16</sup> the Commission is (as it should be) the only one at the federal level

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business practices among manufacturers of antiknock compounds absent evidence of collusive, coercive, predatory, exclusionary, or oppressive conduct; otherwise it would open the door for the Commission, “whenever it believed that an industry was not achieving its maximum competitive potential, [to] ban certain practices in the hope that its action would increase competition”); *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980) (holding that the application of Section 5 to a widespread use of delivered pricing without a finding of either collusion among plywood producers or anticompetitive effect on plywood prices “would be to blur the distinction between guilty and innocent commercial behavior”); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980) (holding that enforcement of the Commission’s order against the respondent, a publisher of airline schedule guides, requiring that the respondent not discriminate unjustifiably between certificated air carriers and commuter airlines, “would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry” and allow the Commission impermissibly “to delve into . . . ‘social, political, or personal reasons’ for a monopolist’s refusal to deal”).

<sup>14</sup> That is because Section 5 was intended to supplement the Sherman and Clayton Acts—not to override or replace them. *FTC v. Raladam Co.*, 283 U.S. 643, 647 (1931).

<sup>15</sup> See, e.g., U.S. CHAMBER OF COMMERCE, UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FTC ACT: DOES THE U.S. NEED RULES “ABOVE AND BEYOND ANTITRUST”? 3 (2009) (“[T]here is real danger if Section 5 is used to attack conduct that the FTC and others at any other point in time have viewed as fair. . . . [T]he FTC must also provide significant notice and guidance to the business community (including hearings) before embarking on cases that are uniquely covered by Section 5.”), in *GCP: THE ANTITRUST CHRON.*, Sept. 2009, Release No. 2 (Competition Pol’y Int’l, Inc.), and available at [http://www.uschamber.com/sites/default/files/reports/0909antrust\\_0.pdf](http://www.uschamber.com/sites/default/files/reports/0909antrust_0.pdf).

<sup>16</sup> See *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 281–84 (2007) (questioning the social benefits of private antitrust lawsuits filed in numerous courts when the enforcement-related need is relatively small); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557–60 (2007) (expressing concern with the burdens and costs of antitrust discovery, and the attendant *in terrorem* effect, associated with private antitrust lawsuits).

who can apply Section 5. That is to say, there is no federal, private right of action for treble damages or other relief under Section 5.<sup>17</sup>

Third, as I've said, Section 5 authorizes a Commissioner to vote out a complaint, whether it is a litigation complaint or a consent decree, and whether it is an antitrust or consumer protection complaint, only if two conditions precedent exist: the first is that there is "reason to believe" a violation of the relevant law(s) enforced by the Commission has occurred or is occurring,<sup>18</sup> and the second is that the complaint is in the public interest.<sup>19</sup>

Applying the statute,<sup>20</sup> I have therefore dissented from issuance of an

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<sup>17</sup> *Cf.* 15 U.S.C. § 15(a) (2010) (creating a private right of action to any person who has been injured in his or her business or property "by reason of anything forbidden in the antitrust laws"); 15 U.S.C. § 12(a) (2010) (defining the "antitrust laws," however, as including the Sherman and Clayton Acts but not the FTC Act). But many States have enacted "little FTC Acts" that track the language of Section 5, incorporate Section 5 case law, and also confer private rights of action.

<sup>18</sup> 15 U.S.C. § 45(b) (2010) ("Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, . . .").

<sup>19</sup> *Id.* ("[A]nd if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, . . ."). *See, e.g., Raladam*, 283 U.S. at 649 ("Thus, the Commission is called upon first to determine, as a necessary prerequisite to the issue of a complaint, whether there is reason to believe that a given person, partnership or corporation has been or is using any unfair method of competition in commerce; and that being determined in the affirmative, the Commission still may not proceed unless it further appear that a proceeding would be to the interest of the public, and that such interest is specific and substantial." (*citing* *FTC v. Klesner*, 280 U.S. 19, 28 (1929))). *See also id.* at 654 ("A proceeding under § 5 is not one instituted before the Commission by one party against another. It is instituted by the Commission itself, and is authorized whenever the Commission has reason to believe that unfair methods of competition in commerce are being used, and that a proceeding by it in respect thereof would be to the interest of the public. Acting upon its belief, the Commission issues charges and enters upon an inquiry which, of course, it has jurisdiction to make.").

<sup>20</sup> My own application of the "reason-to-believe" standard incorporates the "public interest" mandate as a subsidiary question, and separately asks (1) whether there is enough evidence to form a reason to believe that further investigation may as a factual and legal matter demonstrate liability, and (2) whether there is a sound legal basis for the theory of liability and harm we are pursuing. *See* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *So I Serve as*

antitrust complaint (including some complaints challenging mergers) when I have concluded that there is no reason to believe there is a violation of the statutory or case law,<sup>21</sup> or when that would violate the Supreme Court's admonitions about fomenting private antitrust litigation.<sup>22</sup> I have also dissented from accepting what I consider to be "cheap" consent decrees in consumer protection cases (consent decrees that yield little or nothing to redress the injuries allegedly caused to millions of consumers) on the ground that those decrees are contrary to the public interest.<sup>23</sup>

Beyond that, I have recently discovered a consent decree in which the Commission staff accepted an enforcement target's express denial of liability. (I can't mention the matter by name or say anything further about the case at this time because it is as yet nonpublic.) Relatedly, Section 2.32 of our Rules of Practice provides boilerplate language permitting the staff to accept on a routine basis a target's assertion that it does not admit that the law has been

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Both a Prosecutor and a Judge – What's the Big Deal?, Remarks before the ABA Annual Meeting 3 (Aug. 5, 2010), <http://www.ftc.gov/speeches/rosch/100805abaspeech.pdf>.

<sup>21</sup> See, e.g., Dissenting Statement of J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Pool Corp., Dkt. No. C-4345 (F.T.C. Nov. 21, 2011), available at <http://www.ftc.gov/os/caselist/1010115/111121poolcorpstatementrosch.pdf>; Dissenting Statement of J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Lab. Corp. of Am., Dkt. No. 9345 (F.T.C. Nov. 30, 2010), available at <http://www.ftc.gov/os/adjpro/d9345/101201lapcorpdissentstatement.pdf>.

<sup>22</sup> See, e.g., Statement of J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Concurring in Part and Dissenting in Part, McWane, Inc., Dkt. No. 9351 (F.T.C. Jan. 4, 2012), available at <http://www.ftc.gov/os/adjpro/d9351/120104ccwanestatement.pdf>.

<sup>23</sup> See, e.g., Statement of J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Concurring in Part, Dissenting in Part, to the Stipulated Final Order for Permanent Injunction and Monetary Judgment Against Defendants Jeffrey Segal and Michael Workman, FTC v. Freedom Foreclosure Prevention Servs., LLC, Dkt. No. CV-09-1167-PHX-FJM (D. Ariz. filed Nov. 24, 2009), available at <http://www.ftc.gov/os/2009/11/091124roschstmt.pdf>.

violated as alleged in the complaint.<sup>24</sup> I consider this language (as does the Securities and Exchange Commission)<sup>25</sup> to be tantamount to a denial of liability.<sup>26</sup> I will therefore dissent from, or not participate in voting out, any decree containing an express denial of liability. Moreover, I will shortly be circulating a proposal to my fellow Commissioners to amend Section 2.32 so that, at a minimum, it follows the SEC's approach to this issue. I simply do not see how any of us can conclude there is "reason to believe" that a violation of law has occurred, or that the issuance of a complaint or acceptance of a decree is in the public interest, when the staff has accepted an express denial from the proposed respondent.<sup>27</sup>

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<sup>24</sup> 16 C.F.R. § 2.32 (2011) ("The agreement may state that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint.").

<sup>25</sup> 17 C.F.R. § 202.5(e) (2011) ("The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur. Accordingly, it hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings. In this regard, the Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.").

<sup>26</sup> See Letter from J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, to Hon. Renee Marie Bumb, U.S. Dist. Judge, Dist. of New Jersey 1 (Mar. 21, 2012), *submitted in* FTC v. Circa Direct LLC, No. 1:11-cv-02172-RMB-AMD (D.N.J.), and available at <http://www.ftc.gov/speeches/rosch/120321bumbcircadirect.pdf>.

<sup>27</sup> While it may make sense for parties to a settlement of *private* litigation to include such denial language in their agreement, it does not make sense for the Commission to do so in a settlement of *public law enforcement* proceedings. Indeed, Rule 408 of the Federal Rules of Evidence, which is intended to promote compromises and settlements, appears to recognize that distinction. Although Rule 408 says that "conduct or a statement made during compromise negotiations about [a disputed] claim" is inadmissible "either to prove or disprove the validity or amount of [the] claim or to impeach by a prior inconsistent statement or a contradiction," it does not apply to such conduct or statement "when offered in a criminal case and *when the negotiations [are] related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.*" FED. R. EVID. 408(a) (emphasis added).

That brings me to a fourth subject. It has to do with whether we, as the Commission, are prisoners of the agency staff. Or—to put it more bluntly—whether we are just a “rubber stamp” for the staff. Thank heaven, we are not, or at least I am certainly not. I say “thank heaven” because I can truthfully tell a reporter who is asking about the status of a matter at the staff level that I don’t have a clue about its status. But beyond that, it enables me to keep a pledge that I made at my Senate Committee confirmation hearing that I would not be the staff’s pawn.<sup>28</sup>

There are at least three reasons that I can confidently say I have kept that pledge during the six-plus years that I have served as a Commissioner. To begin with, we, as a Commission, routinely cross-examine the staff about how it intends to plead and try a case before we issue a complaint. If, as in the *Laboratory Corp. (LabCorp)* antitrust case, I conclude that the staff may depart from the Commission’s intent in pleading a case, I’ll dissent from

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<sup>28</sup> *Nominations of J. Thomas Rosch and William E. Kovacic to Be Commissioners of the Federal Trade Commission: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 109th Cong. 22 (2005) (Response of J. Thomas Rosch, nominee, to question from Sen. Ted Stevens, Chairman, S. Comm.), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg26352/pdf/CHRG-109shrg26352.pdf> and referenced in 151 CONG. REC. 1198 (digest Nov. 14, 2005):

Q: But let me ask you this, I’m hearing more, and more about a staff driven agency. Now you both were members of the staff, do you think this Commission ought to be a staff driven entity, or should the priorities be set by the Commission itself, rather than by the staff. Mr. Rosch?

A: I think Mr. Chairman that the priorities ought to be set by the Commission. I think we’re well advised to get input from the staff. That was the way it was when I was there before, I would expect that it would be that way in the future. . . .

issuance of the complaint.<sup>29</sup> If, as in the recent *Asset Acceptance* consumer protection case, the staff can't state in words of one syllable a "deception" or "unfairness" theory with which I agree, I'll also vote against issuance of the complaint.<sup>30</sup> Or, if the staff cannot describe a trial strategy that I, as a trial lawyer, have seen work, I would also vote against issuance of the complaint.

More specifically, I am firmly convinced that the best plaintiffs' antitrust lawyers try a case the right way: they rely on a simple but comprehensible storyline that narrates the competitive effects. If the lead attorney can't summarize a compelling storyline that plays up our strengths and responds to our weaknesses in a few concise sentences, then I won't vote out the complaint. It is as simple as that.<sup>31</sup>

The best plaintiffs' antitrust trial lawyers also do a terrific job of figuring out *how* to tell that story—in other words, which witnesses and documents will be the most persuasive. They rely on adverse witnesses' documents and other statements. In fact, they almost always begin their cases by calling as witnesses the opposing party's CEO or Chairman. One benefit to this approach is that is that these key witnesses are in a defensive

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<sup>29</sup> Dissenting Statement of J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Lab. Corp. of Am., Dkt. No. 9345 (F.T.C. Nov. 30, 2010), available at <http://www.ftc.gov/os/adjpro/d9345/101201lapcorpdissentstatement.pdf>.

<sup>30</sup> See Press Release, Fed. Trade Comm'n, Under FTC Settlement, Debt Buyer Agrees to Pay \$2.5 Million for Alleged Consumer Deception (Jan. 30, 2012) (noting my voting no for both the complaint and the proposed consent decree), <http://www.ftc.gov/opa/2012/01/asset.shtm>.

<sup>31</sup> See J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Consummated Merger Challenges: The Past Is Never Dead, Remarks Before the ABA Section of Antitrust Law Spring Meeting 14 (Mar. 29, 2012), [http://www.ftc.gov/speeches/rosch/120329springmeeting\\_speech.pdf](http://www.ftc.gov/speeches/rosch/120329springmeeting_speech.pdf).

posture from the get-go and are unable to lead off with a canned explanation for why the conduct or transaction is procompetitive.<sup>32</sup> Starting with the defendant's senior executives is also useful because they are hostile witnesses, so the agency can cross-examine them and control the testimony.<sup>33</sup>

Great plaintiffs' antitrust trial lawyers do not rely on customer witnesses or other third party witnesses except as frosting on the cake; much less do they rely on affidavits from those witnesses to make their cases. Why is that? Customer and competitor witnesses are not easy to control, for one thing. In addition, courts sometimes perceive that customers have a built-in bias against the merger or conduct under challenge.<sup>34</sup> Also, it's difficult to

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<sup>32</sup> One of the things that only executives for the opposing side can reveal to a judge or jury, under the crucible of cross-examination, is their actual intent behind a challenged transaction or conduct. As courts have recognized, intent evidence is relevant in an antitrust case because it can assist a trier of fact in forming an inference as to the likely anticompetitive effects. *Brown Shoe Co. v. United States*, 370 U.S. 294, 329 n.48 (1962) (“Although it is ‘unnecessary for the Government to speculate as to what is in the ‘back of the minds’ of those who promote a merger,’ . . . evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger.”) (citation omitted); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 372 (1933) (“Good intentions will not save a plan otherwise objectionable, but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences.” (citing *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918))). *Accord* *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1047 (D.C. Cir. 2008) (Tatel, J., concurring).

<sup>33</sup> 16 C.F.R. § 3.41(d) (2011) (making clear that only adverse witnesses “may be interrogated by leading questions and may also be contradicted and impeached by the party calling him or her”); FED. R. EVID. 611(c) (making clear that leading questions should be allowed on cross-examination and “when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party”).

<sup>34</sup> *See, e.g.*, *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1299 (W.D. Mich. 1996) (regarding the testimony of managed care payers with skepticism because such witnesses are not disinterested and because managed care discounts are “are hardly the sort of benefit the antitrust laws are designed to protect”), *aff'd*, 121 F.3d 708 (6th Cir. 1997); *FTC v. Owens-Illinois, Inc.*, 681 F. Supp. 27, 38 (D.D.C.) (observing that the opinions of customer witnesses, as expressed in their affidavits, “must be viewed in light of their actual behavior”), *vacated as moot*, 850 F.2d 694 (D.C. Cir. 1988).

present customer testimony in a fashion that is not cumulative, on the one hand,<sup>35</sup> and is representative, on the other hand.<sup>36</sup> Finally, customer witnesses can very rarely be used to present documentary evidence. Use of competitors as primary storytellers raises similar but even more substantial concerns.

Lastly, in my view, the best crafted stories place little, if any, emphasis on complex economic formulae. When I see an econometric formula (which thankfully, Professor Elzinga did not use), my eyes start to glaze over, and I believe that's the way courts and juries view this evidence too. Granted, it may be necessary to call an economist to offer testimony on any actual anticompetitive effects from the challenged conduct or transaction. But this

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<sup>35</sup> FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: ... undue delay, wasting time, or needlessly presenting cumulative evidence.”); FED. R. EVID. 611(a)(2) (“The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: ... avoid wasting time”); *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1408 (7th Cir. 1991) (“Trial courts have discretion to place reasonable limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence.”) (citing Rules 403 and 611); Vaughn R. Walker, *Merger Trials: Looking for the Third Dimension*, 5 COMPETITION POL'Y INT'L 35, 45 (Spring 2009) (“A special brand of judicial skepticism is reserved for a parade of witnesses beating the same drum.”).

<sup>36</sup> *United States v. Engelhard Corp.*, 126 F.3d 1302, 1306 (11th Cir. 1997) (“No matter how many customers in each end-use industry the Government may have interviewed, those results cannot be predictive of the entire market if those customers are not representative of the market.”); *Feesers, Inc. v. Michael Foods, Inc.*, 632 F. Supp. 2d 414, 445 (M.D. Pa. 2009) (holding that “testimony presented by Defendants from a few customers who did not find price significant” should not be given “the same weight, particularly where as here, there is other evidence suggesting that price is quite important to other customers in the same industry”); *United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172, 192 (D.D.C. 2001) (“Without more information, the Court simply cannot determine whether these 50 declarations are representative of the shared hot site client base.”). *See also* Vaughn R. Walker, *Search for a Competition Metric: the Role of Testimony from Customers, Competitors and Economists*, 2-1 COMPETITION L. INT'L 3, – (2006) (“Even when this testimony is given by live witnesses in the courtroom, the choice of customers is almost always a product of selection bias. Seldom does it appear that the customers’ views represent the general customer population.”).

evidence will be far more persuasive if you have other testimonial and documentary evidence to back it up.<sup>37</sup>

A second reason why we do not merely “rubber stamp” the staff’s recommended enforcement challenges, is that federal district judges, who preside over preliminary injunction proceedings that the Commission brings under Section 13(b) of the FTC Act,<sup>38</sup> do not hesitate to second-guess the Commission if they think that we have erred in issuing an administrative (or district court) complaint. Decisions on point include those in the *LabCorp* case,<sup>39</sup> the *Western Refining* case,<sup>40</sup> the *Whole Foods* case,<sup>41</sup> the *AndroGel* case,<sup>42</sup> and the *Lundbeck* case.<sup>43</sup> So our pretrial decisions about the pleadings and trial strategy are backstopped by the federal district courts.<sup>44</sup>

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<sup>37</sup> See, e.g., Walker, *supra* note 35, at 46 (explaining his view that in *United States v. Oracle Corp.*, “[t]here was a disconnect between the economic analysis the government sought to relate and the storytellers it brought to court.”).

<sup>38</sup> 15 U.S.C. § 53(b) (2010).

<sup>39</sup> *FTC v. Lab. Corp. of Am.*, No. SACV 10-1873 AG (MLGx), 2011 U.S. Dist. LEXIS 20354, 2011-1 Trade Cas. (CCH) ¶ 77,348 (C.D. Cal. Feb. 22, 2011).

<sup>40</sup> *FTC v. Foster*, No. Civ. 07-352 JB/ACT, 2007 U.S. Dist. LEXIS 47606; 2007-1 Trade Cas. (CCH) ¶ 75,725 (D.N.M. May 29, 2007).

<sup>41</sup> *FTC v. Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007), *rev’d*, 548 F.3d 1028 (D.C. Cir. 2008).

<sup>42</sup> *In re AndroGel Antitrust Litig.*, 687 F. Supp. 2d 1371 (N.D. Ga.), *clarified*, No. 1:09-cv-00955-TWT, 2010 U.S. Dist. LEXIS 113593 (N.D. Ga. Sept. 16, 2010), *appeal pending*, No. 10-12729-DD (11th Cir. argued May 13, 2011).

<sup>43</sup> *FTC v. Lundbeck, Inc.*, Nos. 08-cv-6379 & 08-cv-6381, 2010 U.S. Dist. LEXIS 95365 (D. Minn. Aug. 31, 2010), *aff’d*, 650 F.3d 1236 (8th Cir.), *reh’g en banc denied*, Nos. 10-3458 & 10-3459 (8th Cir. Nov. 22, 2011).

<sup>44</sup> Section 13(b) of the FTC Act can be understood as articulating two standards—one for the Commission and one for the district court. First, the standard for the Commission is the familiar reason-to-believe standard of Section 5; specifically, the Commission may seek an injunction in federal court if it has reason to believe that a violation of law has occurred or is about to occur, and if it determines that enjoining such conduct pending the conclusion of

Our administrative decisions are also subject to judicial review by a federal appellate court, often of the enforcement target's own choosing.<sup>45</sup> Those appellate courts likewise don't hesitate to reverse us when they think we got it wrong.<sup>46</sup> Cases on point include the D.C. Circuit's decision in *Rambus*;<sup>47</sup> the Eleventh Circuit's decisions in the *Schering* and recent *Phoebe Putney* cases;<sup>48</sup> and the Eighth's Circuit's affirmance of the district court's decision against us in *Lundbeck*.<sup>49</sup> So the Commission is not cloistered with its staff. To the contrary, our decisions can be (and are) second-guessed every

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administrative proceedings would be in the public interest. 15 U.S.C. § 53(b) (2010). But that reason-to-believe determination alone does not guarantee success in court; a trial judge must still make an independent determination that the Commission has made a "proper showing" that an injunction would be in the public interest, taking into consideration the Commission's "likelihood of ultimate success" and weighing the equities involved. *Id.* See *FTC v. Freeman Hosp.*, 69 F.2d 260, 267 (8th Cir. 1995) (observing that "Congress expected courts to use independent judgment in reviewing preliminary injunction applications under Section 13(b)"). This requires an inquiry into whether the Commission "has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978).

<sup>45</sup> 15 U.S.C. § 45(c) (2010) ("Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business[.]").

<sup>46</sup> *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989) (Posner, J.) ("We set to one side the cynical though perhaps realistic speculation that since the Commission is both the instigator and the trier of the cases filed before it, the decision to seek a preliminary injunction is a good predictor of the likely outcome of the administrative proceeding. There is always judicial review to curb any tendency of the Commission to succumb to the temptations implicit in its being, in a sense, a judge in its own cause. There is also rapid turnover among Commissioners.").

<sup>47</sup> *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1171 (2009).

<sup>48</sup> *FTC v. Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369 (11th Cir. 2011), *petition for certiorari filed*, No. 11-1160 (U.S. Mar. 23, 2012); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 548 U.S. 919 (2006).

<sup>49</sup> *FTC v. Lundbeck, Inc.*, 650 F.3d 1236 (8th Cir.), *reh'g en banc denied*, Nos. 10-3458 & 10-3459 (8th Cir. Nov. 22, 2011).

step of the way. Judicial review includes—importantly—the Commission’s interpretation and application of Section 5 to “unfair methods of competition” and “unfair or deceptive acts or practices.”<sup>50</sup>

Just in the last two years, I not only dissented from, or voted “no” for, the *LabCorp* case,<sup>51</sup> but also the *McWane* and *Pool Corp* “exclusive dealing” cases,<sup>52</sup> and the *Omnicare* merger case.<sup>53</sup> In many instances, moreover, I issued separate statements explaining why I differed from my colleagues. As I say, I have also dissented from a host of consumer protection decrees that I have considered “cheap” and therefore contrary to the public interest.<sup>54</sup> So I have not been a “shrinking violet” or otherwise in thrall of the staff (or my colleagues, for that matter). This does not count the instances in which the federal trial or appellate courts have disagreed as well.

Let me turn to a fifth subject concerning the work that we do at the Commission. Although I have said the Commission should be a law enforcement agency instead of a regulatory agency, I would be remiss if I did

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<sup>50</sup> *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) (recognizing that while, to be sure, the Commission has “an influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations[,] . . . the words “deceptive practices” set forth a legal standard and they must get their final meaning from judicial construction.”); *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304, 314 (1934) (reaffirming that “it is for the courts to determine what practices or methods of competition are to be deemed unfair,” but at the same time recognizing that that exercise requires giving weight to the Commission’s expert determination on the issue (citing *FTC v. Gratz*, 253 U.S. 421, 427 (1920))).

<sup>51</sup> See Rosch, *LabCorp*, *supra* note 21.

<sup>52</sup> See Rosch, *McWane*, *supra* note 22; Rosch, *Pool Corp.*, *supra* note 21.

<sup>53</sup> Press Release, Fed. Trade Comm’n, *FTC Sues to Block Omnicare’s Bid to Buy Rival Pharmacy Provider PharMerica*, (Jan. 27, 2012) (noting my voting no for the administrative complaint), <http://www.ftc.gov/opa/2012/01/omnicare.shtm>.

<sup>54</sup> See Press Release, *supra* note 30.

not mention its advocacy work in both its antitrust and its consumer protection missions.

The Commission maintains an active Policy Planning organization and a Bureau of Economics that work in tandem with both the Bureau of Competition and the Bureau of Consumer Protection.<sup>55</sup> Those offices regularly submit comments on pending legislation.<sup>56</sup> Their work in warning the States not to shelter anticompetitive activities is especially valuable, and I don't recall dissenting from any of those submissions.

Another aspect of our advocacy work is the Commission's filing of amicus curiae briefs, sometimes on our own and sometimes in conjunction with the Department of Justice or another agency. Our Office of General Counsel usually takes the lead on these briefs. Recent examples include—on the competition side—amicus briefs addressed to the Third Circuit in the *K-Dur Antitrust Litigation*,<sup>57</sup> to the Federal Circuit in *Tivo Inc. v. EchoStar Corp.*,<sup>58</sup> and to the Supreme Court in *Caraco Pharmaceutical Laboratories*,

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<sup>55</sup> See *About the Office of Policy Planning*, FED. TRADE COMM'N, <http://www.ftc.gov/opp/about.shtm> (last visited Apr. 3, 2012); *About the Bureau of Economics*, FED. TRADE COMM'N, <http://www.ftc.gov/be/about.shtm> (last visited Apr. 3, 2012).

<sup>56</sup> See *Advocacy Filings by Date*, FED. TRADE COMM'N, [http://www.ftc.gov/opp/advocacy\\_date.shtm](http://www.ftc.gov/opp/advocacy_date.shtm) (last visited Apr. 3, 2012).

<sup>57</sup> Brief of the Federal Trade Commission as Amicus Curiae Supporting Appellants and Urging Reversal, *In re K-Dur Antitrust Litig.*, Nos. 10-2077, -2078 & -2079 (3d Cir. May 18, 2011), available at <http://www.ftc.gov/os/2011/05/110518amicusbrief.pdf>.

<sup>58</sup> Brief of Amicus Curiae Federal Trade Commission on Rehearing En Banc Supporting Neither Party, *Tivo Inc. v. EchoStar Corp.*, 646 F.3d 869 (Fed. Cir. 2011) (No. 2009-1374), available at <http://www.ftc.gov/os/2010/08/100802tivoechostarbrief.pdf>.

*Ltd. v. Novo Nordisk A/S*;<sup>59</sup> and on the consumer protection side—an amicus brief addressed to the Fifth Circuit in *St. Joseph Abbey v. Castille*.<sup>60</sup> I will have more to say about our brief in *K-Dur* a little bit later.

## II.

In addition to our law enforcement and advocacy work, the Commission also gets involved from time to time in policymaking, for example, through the issuance of “policy” reports. It is easy to overlook those because they are so often intertwined with politics. To be sure, the President and the Senate are prohibited by statute from appointing and confirming more than three of the five Commissioners from the same political party.<sup>61</sup> For that reason, we are often referred to as an “independent” or “nonpartisan” agency.<sup>62</sup> As I testified before a House Appropriations subcommittee several weeks ago, however, that just means that none of us is importuned by the majority to vote or not vote as we wish. It does not mean that our political views are necessarily aligned. As I put it in my testimony, it just means that each of us gets a “fair hearing.” As far as I’m concerned, that’s all we as Commissioners can ask for

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<sup>59</sup> 566 U.S. —, 2012 U.S. LEXIS 3106 (Apr. 17, 2012) (No. 10-844), slip opinion *available at* <http://www.supremecourt.gov/opinions/11pdf/10-844.pdf>.

<sup>60</sup> Amicus Curiae Brief on Behalf of the U.S. Federal Trade Commission in Support of Neither Party, *St. Joseph Abbey v. Castille*, No. 11-30756 (5th Cir. filed Dec. 16, 2011), *available at* <http://www.ftc.gov/os/2011/12/111216stjosephamicusbrief.pdf>.

<sup>61</sup> 15 U.S.C. § 41 (2010).

<sup>62</sup> *See Humphrey’s Ex’r v. United States*, 295 U.S. 602, 624 (1935).

and it means that we act collegially.<sup>63</sup> Let me give you some instances when we have disagreed politically and, therefore, on specific policies.

First, in December 2010 the Commission's Bureau of Consumer Protection issued a staff report on consumer privacy.<sup>64</sup> In that report, the Bureau purported to recommend, among other things, that the Commission rely on the "unfairness" prong of Section 5 instead of the "deception" prong in protecting consumers from "unwarranted" invasions of their privacy,<sup>65</sup> and that the Commission support new and as-yet-unspecified "Do Not Track" mechanisms.<sup>66</sup> Several of my colleagues jumped on the bandwagon supporting those proposals. Although I concurred in the decision to issue the report for public comment, I wrote a separate statement explaining my difference of views.<sup>67</sup> Among other things, I did not think my colleagues knew what they were talking about: not only was the new "unfairness" paradigm

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<sup>63</sup> See *Budget Hearing – Federal Trade Commission: Hearing Before the Subcomm. on Fin. Servs. and Gen. Gov't of the H. Comm. on Appropriations*, 112th Cong. (2011) (testimony of J. Thomas Rosch, Comm'r, Fed. Trade Comm'n), available at <http://thomas.loc.gov/video/house-committee/hsap/20907249> and <http://thomas.loc.gov/video/house-committee/hsap/20909065> (video) and at [http://corporate.cqrollcall.com/content/372/en/Congressional Transcripts](http://corporate.cqrollcall.com/content/372/en/Congressional_Transcripts) (transcript – subscription required).

<sup>64</sup> Press Release, Fed. Trade Comm'n, FTC Staff Issues Privacy Report, Offers Framework for Consumers, Businesses, and Policymakers (Dec. 1, 2010), <http://www.ftc.gov/opa/2010/12/privacyreport.shtm>.

<sup>65</sup> FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE 19–20, 40 & n.111 (2010), available at <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf> [hereinafter PRELIMINARY PRIVACY REPORT].

<sup>66</sup> *Id.* at 66.

<sup>67</sup> Concurring Statement of J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Issuance of Preliminary FTC Staff Report *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers* (Dec. 1, 2010), in PRELIMINARY PRIVACY REPORT, *supra* note 65, App. E.

revolutionary, but it conflicted with what we had told Congress in the 1980s about the breadth of our consumer-protection “unfairness” jurisdiction.<sup>68</sup> Moreover, the then-available Do Not Track proposals were plainly not ready for prime time.<sup>69</sup>

Several weeks ago the Commission (not just the staff) issued a “final” Report on Privacy that embraced these proposals plus a few others.<sup>70</sup> This time I dissented, pointing out again (1) that “unfairness” was an elastic and elusive concept, (2) that consumers themselves might favor privacy in polls but reject it in practice, and (3) that the proposed new privacy framework based on “unfairness” instead of deception went beyond our representations to Congress about how we would apply the consumer-protection “unfairness” prong.<sup>71</sup> I also pointed out that there were many unanswered questions about Do Not Track, including what it meant—whether it simply meant Do Not Target Advertising or whether it meant Do Not Collect consumer data.<sup>72</sup> I

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<sup>68</sup> *Id.* at E-4–E-5 & n.9.

<sup>69</sup> *Id.* at E-6. *See also* J. Thomas, Comm’r, Fed. Trade Comm’n, Do Not Track: Privacy in an Internet Age, Remarks Before the Loyola Chicago Antitrust Institute Forum 18–21 (Oct. 14, 2011), <http://www.ftc.gov/speeches/rosch/111014-dnt-loyola.pdf>; J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Information and Privacy: In Search of a Data-Driven Policy, Remarks Before the Technology Policy Institute Aspen Forum 9–10 (Aug. 22, 2011), <http://www.ftc.gov/speeches/rosch/110822aspeninfospeech.pdf>.

<sup>70</sup> Press Release, Fed. Trade Comm’n, FTC Issues Final Commission Report on Protecting Consumer Privacy (Mar. 26, 2012), <http://www.ftc.gov/opa/2012/03/privacyframework.shtm>; FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (2012), available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf> [hereinafter FINAL PRIVACY REPORT].

<sup>71</sup> Dissenting Statement of J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers (Mar. 26, 2012), *in* FINAL PRIVACY REPORT, *supra* note 70, App. C at C-3–C-4.

<sup>72</sup> *Id.* at C-5–C-6.

also noted that insofar as the report called for legislation (or FTC rulemaking), those calls were at odds with the report's assertion that all it proposed was a list of "best practices" for self-regulation.<sup>73</sup> Additionally, given that the report talked extensively about additional workshops involving stakeholders to occur later this year,<sup>74</sup> I wondered how the Commission could issue a "final" report before those workshops had occurred.

Second, for several years the Commission has been waging a judicial and legislative "crusade" against so-called "pay-for-delay" settlements of lawsuits triggered by generic pharmaceutical firms challenging brand-name pharmaceutical companies' patents. These are settlements in which the brand-name company pays the generic firm to delay its entry into the market (usually to a date on or after the brand-name company's patent has expired).

At the Commission's behest and in connection with a provision in H.R. 3962, known as the Affordable Health Care of America Act,<sup>75</sup> the Congressional Budget Office (CBO) "scored" (or estimated) that an outright ban on such settlements would save the federal government \$1.8 billion dollars in direct spending on prescription drugs over a ten-year period from 2010 to 2019.<sup>76</sup> The CBO also estimated the *same* amount of savings in direct

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<sup>73</sup> *Id.* at C-8; see FINAL PRIVACY REPORT, *supra* note 70, at iii, vii & 1.

<sup>74</sup> FINAL PRIVACY REPORT, *supra* note 70, at 13, 14, 56–57, 64, 73.

<sup>75</sup> Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 2573 (2009) (as passed by the House and placed on the Senate calendar), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr3962pcs/pdf/BILLS-111hr3962pcs.pdf>.

<sup>76</sup> Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Rep. John D. Dingell (Nov. 20, 2009) (attaching a revised estimate of the budgetary impact of H.R. 3962, the

federal spending, however, in connection with different legislation, S. 369,<sup>77</sup> which, instead of banning such settlements outright, would have imposed a rebuttable presumption of anticompetitive effects and given the settling parties an opportunity to show that the procompetitive benefits outweigh the anticompetitive effects.<sup>78</sup>

As I have explained elsewhere, I am in favor of legislation that would not ban the settlements outright but would instead simply shift the burden of proof to the settling parties to justify their settlement.<sup>79</sup> I have been able to persuade my colleagues that this is an acceptable course instead of an outright ban, as seen in the amicus brief we filed in *K-Dur*.<sup>80</sup> However, my colleagues have continued to claim that shifting the burden of proof in this

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Affordable Health Care for America Act, including the impact of section 2573 of the bill (protecting consumer access to generic drugs); see Table 4 at 11, line item 2573), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/107xx/doc10741/hr3962revised.pdf>.

<sup>77</sup> Preserve Access to Affordable Generics Act, S. 369, 111th Cong. § 3(a) (2009) (as reported by the Senate Committee on the Judiciary), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111s369rs/pdf/BILLS-111s369rs.pdf>.

<sup>78</sup> CONG. BUDGET OFFICE, COST ESTIMATE: S. 369, PRESERVE ACCESS TO AFFORDABLE GENERICS ACT 1, 2, 3 & 4 (2010) (as amended), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/110xx/doc11040/s369.pdf> and at [http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/115xx/doc11582/s369\\_updated\\_table.pdf](http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/115xx/doc11582/s369_updated_table.pdf). The CBO also estimated that the legislation would reduce overall expenditures for prescription drugs by consumers by about \$6 billion over the same ten-year period. *Id.* at 6. The CBO has since increased its estimate of the savings in direct federal spending to \$4.0 billion over the ten-year period from 2012 to 2021. CONG. BUDGET OFFICE, COST ESTIMATE: S. 27, PRESERVE ACCESS TO AFFORDABLE GENERICS ACT 1 (2011), available at <http://aging.senate.gov/publications/s27.pdf>.

<sup>79</sup> J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Pay-for-Delay Settlements, Authorized Generics, and Follow-on Biologics: Thoughts on the How Competition Law Can Best Protect Consumer Welfare in the Pharmaceutical Context, Remarks Before the World Generic Medicine Congress 7–9 (Nov. 19, 2009), <http://www.ftc.gov/speeches/rosch/091119/worldgenerics.pdf>.

<sup>80</sup> Brief of the Federal Trade Commission as Amicus Curiae Supporting Appellants and Urging Reversal at 22–28, *In re K-Dur Antitrust Litig.*, Nos. 10-2077, -2078 & -2079 (3d Cir. May 18, 2011), available at <http://www.ftc.gov/os/2011/05/110518amicusbrief.pdf>.

fashion would save consumers “billions” of dollars, citing the CBO estimate and a January 2010 Commission staff study.<sup>81</sup>

Based on this claim, it was suggested that the burden-shifting legislation be hooked to the Defense Authorization Bill, a time-honored method on the Hill for getting less popular legislation enacted into law. I dissented from that suggestion too. I observed that pay-for-delay legislation ought to be considered on its own merits.<sup>82</sup> Moreover, I pointed out that the CBO estimate was based (at least originally) on the premise that there would be a complete ban on the settlements, not simply a burden-shifting, and that consumer or taxpayer savings from the latter legislative approach were entirely speculative since they would depend on how frequently the parties could justify their settlement.<sup>83</sup>

Third, several years ago, my colleagues voted to issue an interim report that questioned the competitive implications of “authorized” generics, which are generic versions of a branded drug offered by or through the manufacturer of the brand.<sup>84</sup> That scrutiny was supposedly warranted by two concerns. The first was that authorized generics might rob generic firms of

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<sup>81</sup> Fed. Trade Comm’n, Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions (2010), available at <http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf>.

<sup>82</sup> J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Letter to the Editor, POLITICO (Nov. 9, 2011, 1:35 PM), <http://www.politico.com/news/stories/1111/67963.html>. The text is also available at <http://www.ftc.gov/speeches/rosch/111109ltonleibowitz.pdf>.

<sup>83</sup> *Id.*

<sup>84</sup> FED. TRADE COMM’N, AUTHORIZED GENERICS: AN INTERIM REPORT (2009), available at <http://www.ftc.gov/os/2009/06/P062105authorizedgenericsreport.pdf>.

their incentives to develop their own generic versions and to challenge the brand-name companies' patents.<sup>85</sup> The second was that brand-name companies might use a promise not to offer authorized generics as a form of “payment” for delay in illegal pay-for-delay settlements with generic firms.<sup>86</sup>

I questioned the underlying premise of both concerns. I said that the existence of authorized generics meant that there would be more competition than there would otherwise be in the generic drug marketplace.<sup>87</sup> I noted that as matter of economic theory, more competition would lead to lower, not higher, prices in that market. Additionally, I said that if the abandonment of that additional competition were indeed being used by the brand-name firms to “pay” for delay, the way to attack that use of authorized generics was to challenge the settlements themselves.<sup>88</sup> In its recent final report on authorized generics, the Commission acknowledged that the increased competition resulting from authorized generics did cause prices in the generic drug marketplace to be lower, rather than higher.<sup>89</sup> Moreover, the agency dropped any suggestion of banning the existence of authorized generics on the basis that abandonment of that threat was being used by brand-name

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<sup>85</sup> *Id.* at 2.

<sup>86</sup> *Id.*

<sup>87</sup> Concurring Statement of J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, on the Release of the Commission’s Interim Report on Authorized Generics 1 (June 24, 2009), <http://www.ftc.gov/os/2009/06/P062105authgenconcurringrosch.pdf>.

<sup>88</sup> *Id.* at 3.

<sup>89</sup> FED. TRADE COMM’N, AUTHORIZED GENERIC DRUGS: SHORT-TERM EFFECTS AND LONG-TERM IMPACT ii–iii (2011), available at <http://www.ftc.gov/os/2011/08/2011genericdrugreport.pdf>.

companies to “pay” a generic firm for abandoning its challenge to the brand-name company’s patents.<sup>90</sup>

Let me give you one more example of political differences leading to different policy positions within the Commission. It relates to the Patient Protection and Affordable Care Act of 2010, aka “Obamacare.”<sup>91</sup> Supporters of that legislation originally claimed that “Accountable Care Organizations” (ACOs) would save billions of dollars and result in higher quality care. In fact, that is what the Congressional Budget Office predicted when it “scored” the ACO part of Obamacare.<sup>92</sup> I considered ACOs, however, to be nothing more than a species of “clinical integration,” and I wondered whether we had done the right thing by allowing that kind of integration (instead of “financial integration”) to justify a more relaxed approach to antitrust enforcement under our Health Care Guidelines.<sup>93</sup> Sure enough, supporters of

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<sup>90</sup> *Id.* at vi.

<sup>91</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). This Act was amended a few days later by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

<sup>92</sup> CONG. BUDGET OFFICE, BUDGET OPTIONS VOLUME I: HEALTH CARE 72–74 (Dec. 2008) (estimating \$5.3 billion in savings over ten years), available at <http://www.cbo.gov/ftpdocs/99xx/doc9925/12-18-HealthOptions.pdf>. In a more recent analysis, the Center for Medicare and Medicaid Services (CMS) estimated \$470 million in Medicare savings in the first four years of the program.

<sup>93</sup> J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Accountable Care Organizations: What Exactly Are We Getting?, Remarks Before the ABA Section of Antitrust Law Fall Forum (Nov. 17, 2011), <http://www.ftc.gov/speeches/rosch/111117fallforumspeech.pdf>.

Obamacare (which most of my colleagues on the Commission were) moved to relax the Guidelines as to ACOs.<sup>94</sup>

I opposed any special treatment of ACOs. First, I pointed out that in one retrospective study, CMS (the executive branch agency that administers the Medicare program) conceded that consumer savings from ACOs were likely to be “minimal.”<sup>95</sup> Second, I said that the “one-size-fits-all” quality metrics in CMS’s regulations were ill-suited to measure health care quality.<sup>96</sup> Those remarks were not challenged. Beyond that, a recent article in the *Huffington Post* (no conservative publication) asserted that the biggest driver of increased health care costs was likely to be increased market concentration.<sup>97</sup> So, in my view (seconded by the *Huffington Post*), we had no business relaxing our Health Care Guidelines for ACOs at all.

In summary, the fact that we are first and foremost a law enforcement agency does not mean that the Commission is an apolitical agency. And

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<sup>94</sup> See Jon Leibowitz, Chairman, Fed. Trade Comm’n, Remarks at the FTC/CMS Workshop on Accountable Care Organizations (Oct. 5, 2010), <http://www.ftc.gov/speeches/leibowitz/101005acoremarks.pdf>.

<sup>95</sup> See Dep’t of Health & Human Servs., Centers for Medicare & Medicaid Servs., Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations, 76 Fed. Reg. 67,802, Table 8 (Nov. 2, 2011) (codified at 42 C.F.R. § 425 (2011)), available at [http://www.ofr.gov/OFRUpload/OFRData/2011-27461\\_PL.pdf](http://www.ofr.gov/OFRUpload/OFRData/2011-27461_PL.pdf) [hereinafter Final CMS Regulations].

<sup>96</sup> J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, The One-Size-Fits-All Approach of the Affordable Care Act, Remarks Before the 2012 InterSession Health Policy Symposium, Cornell University Sloan Program in Health Administration (Jan. 19, 2012), <http://www.ftc.gov/speeches/rosch/120119cornellhealthpolicy.pdf>.

<sup>97</sup> Jeffrey Young, *Health Care Costs Seen as Concern by Regulators with Rise in Hospital Mergers*, *Huffington Post* (Feb. 23, 2012, 12:15 PM), [http://www.huffingtonpost.com/2012/02/22/health-care-costs\\_n\\_1294631.html](http://www.huffingtonpost.com/2012/02/22/health-care-costs_n_1294631.html).

sometimes politics leads to differences in policy judgments among the Commissioners.

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Thank you for inviting me to talk to you today and for listening to me, and I'll take any questions you may have.