SECTION 5 AND "UNFAIR METHODS OF COMPETITION":

PROTECTING COMPETITION OR INCREASING UNCERTAINTY?

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TUESDAY, APRIL 5, 2016

United States Senate,

Subcommittee on Antitrust, Competition Policy, and Consumer Rights,

Committee on the Judiciary,

Washington, D.C.

The Subcommittee met, pursuant to notice, at 2:22 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Mike Lee, Chairman of the Subcommittee, presiding.

Present: Senators Lee, Tillis, Hatch, Grassley, Klobuchar, Franken, and Blumenthal.

Also Present: Senator Schumer.

OPENING STATEMENT OF HON. MIKE LEE, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman Lee. Good afternoon, and welcome to this hearing of the Subcommittee on Antitrust, Competition Policy, and Consumer Rights. Today's hearing is entitled "Section 5 and `Unfair Methods of Competition': Protecting Competition or Increasing Uncertainty?"

We are joined today by an esteemed panel of witnesses whom I will introduce shortly after I and Senator Klobuchar give our opening remarks. But before we present our opening remarks, we are going to have Chairman Grassley give his opening remarks because he has got a prior commitment.

Senator Grassley?

OPENING STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Chairman Grassley. Thank you very much for that, and the reason for doing it is I have appointments immediately, so thank you for allowing me to say a few words. Unfortunately, the schedule requires it. I am very interested in this important topic.

I share the views of many of my colleagues that our antitrust authorities should be assertive in their enforcement of the law. Vigorous enforcement of the antitrust laws helps to maintain an open, fair, and competitive marketplace. That is good not just for the American consumer; it is good for our economy.

At the same time, the laws should be clear enough so that companies can easily comply with them. Yet we have heard from many businesses that they are having difficulty understanding what could constitute a violation of the FTC Act's Section 5 unfair methods of competition.

Not knowing for sure what are the parameters of the law has a deep impact on the way a company does business. Companies need predictability and certainty to succeed. So it is critical for the FTC to explain its authority and establish a clear standard to which companies can refer as they conduct their business activities.

In that regard, a few years back, I joined several of my colleagues, including the Chairman of this Subcommittee, Mr. Lee, and House Judiciary Committee Chairman Goodlatte, in a letter urging the Federal Trade Commission to issue guidelines on the Commission's authority under Section 5 of the FTC Act.

Our opinion was, and continues to be, that the antitrust laws and their enforcement should be "transparent, fair, predictable, and reasonably stable over time." Guidance on Section 5 authority "will allow businesses to develop lawful competition policies and encourage critical innovation." I did not say so, but some of those words are quoting from our letter.

So it was a positive step when the FTC released a statement last August providing general enforcement principles with respect to unfair methods of competition under Section 5. But it was not enough. There is still a great deal of uncertainty over what constitutes a violation of Section 5.

So this hearing is very timely. It presents us an opportunity to flesh out our questions regarding the scope and application of Section 5 and what actually are unfair methods of competition. So even though I will not be here asking questions, I hope the FTC will clarify more; otherwise, legislation may be needed. And I did not thank you, but you need to--you are on top of this issue. Thank you for doing that.

Chairman Lee. Thank you, Chairman Grassley. It is good to have you with us today.

Our topic today is Section 5 of the Federal Trade Commission Act. This provision, which gives the FTC antitrust enforcement authority, makes it illegal to engage in "unfair methods of competition." It is widely believed that Congress did not intend to confine FTC's enforcement authority to conduct that violated only the Sherman Act or the Clayton Act. But there is a great deal of disagreement about what Section 5 does, in fact, encompass and does, in fact, authorize.

And whatever Congress might have intended at the time of FTC Act's passage in 1914, over a century later the meaning of this term, "unfair methods of competition," was at least as opaque as it was when the statute was first written and first enacted over a century ago.

Finally, in response to growing pressure to provide formal policy guidance on Section 5, in August of last year the Commission issued an official statement of enforcement principles regarding unfair methods of competition under Section 5 of the FTC Act.

This statement constitutes the FTC's first attempt at establishing a working definition of the bounds of Section 5. As such, the statement marked an important and helpful step forward in providing regulatory clarity to businesses seeking to compete vigorously in compliance with the antitrust laws.

In the statement, the FTC committed to three things: a focus on consumer welfare, a use of a balancing test similar to the rule of reason used in Sherman Act cases, and to mostly avoid the use of Section 5 where the Sherman or Clayton Acts would be sufficient to address the conduct at issue.

Today our aim is to continue the conversation that the Commission has helped start by addressing the obvious follow-up questions. Number one, what exactly is an unfair method of competition? Number two, what does a "framework similar to the rule of reason" look like? And, three, what does the Commission mean when it says it is "less likely to use Section 5 when the Sherman or Clayton Acts would be sufficient"?

That this conversation is essential for sound antitrust enforcement should be obvious. But it is also important because of higher principles of good governance. In his "Treatise on Law," Thomas Aquinas defined the law as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."

That last prong is what concerns us today. As Aquinas wrote, promulgation is necessary for the law to obtain its force. In order for Section 5 of the FTC Act to fulfill its purpose, consumers and businesses alike must understand its purpose, must understand the meaning of this term.

Our discussion today, as well as those we hope remain to come, both at the Commission and amongst other stakeholders, will prepare us to address additional questions. For example, if Section 5 is, in fact, significantly broader than the other antitrust laws, will the clearance arrangement between the Department of Justice's Antitrust Division and the FTC, under which various industries and markets are divvied up between the two agencies, mean that some businesses are subject to a greater regulatory burden than others? And if so, what can the agencies do to address or prevent this? And what role might Congress have to play?

These are all vital questions and ones which I look forward to hearing our expert witnesses discuss today. I am told the entire antitrust bar is gathering in D.C. this week, and I hope that members of the antitrust bar will continue these discussions as well.

Shortly before he signed the Federal Trade Commission Act into law, President Woodrow Wilson wrote, "I do not want a smug lot of experts to sit down behind closed doors in Washington and play providence to me." I agree. Today our doors are open, and this hearing is public. I look forward to the conversation.

Senator Klobuchar will now give her opening remarks, and then I will introduce and swear in the witnesses.

OPENING STATEMENT OF HON. AMY KLOBUCHAR, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator Klobuchar. Thank you very much, Mr. Chairman.

I want to thank our witnesses for joining us today. Professor Wright, there is a fellow professor of yours who was my classmate at the University of Chicago Law School, Nelson Lund. Perhaps you know him. There you go. Well, say hello.

The Federal Trade Commission does not directly enforce the Sherman Act; rather, the Federal Trade Commission Act prohibits methods of competition and empowers the Commission to prevent individuals and companies from engaging in such acts.

In describing the Commission's statutory authority, the Senate Committee Report for the FTC Act emphasizes that the Commission would "determine what practices were unfair"--and this is a quote. "There were too many unfair practices to define, and after writing 20 of them into law, it would be quite possible to invent others."

An unfair method of competition includes more than violations of the other antitrust laws. The FTC's ability to prohibit conduct that does not violate the other antitrust laws is known as its standalone Section 5 authority.

Last September, the Commission issued, as Senator Lee just discussed, a policy statement on when it would use that standalone authority. Our hearing is about that authority and the FTC's statement.

Some history is relevant. Just over a century ago, concern about concentration of economic power made antitrust enforcement a vital issue in the Presidential election of 1912.

You are just hoping that happens again, right? There we go.

Following that election, as Senator Lee noted, President Woodrow Wilson and a strong bipartisan majority in Congress believed the Federal courts had crippled the Sherman Act. To reinvigorate antitrust enforcement, Congress passed two critical pieces of legislation: the Clayton Act, which defined specifically antitrust violations; and the Federal Trade Commission Act, which created an expert body with broad authority to define and prohibit unfair methods of competition.

Just over 100 years later, there is renewed concern with economic concentration and antitrust policy. At the same time, courts have scaled back the scope of the Sherman Act. Economic thought has partially driven this retrenchment, but prudential concerns have also played a part. Courts have expressed concern about their ability to distinguish exclusionary conduct from vigorous competition and worry that treble damages will stifle innovation and aggressive competition.

These prudential developments may have been necessary, but they come with a cost. Some anticompetitive conduct may escape condemnation and burden consumers with higher prices and lower quality. Used judiciously, Section 5 standalone authority can provide an additional tool to address these problems and protect consumers.

First, the FTC can study an industry and develop expertise.

Second, Section 5 focuses on the conduct's economic impact rather than analogizing it to existing case law.

Third, Section 5's remedy is narrow: a cease-and-desist order. There are no treble damages, and follow-on actions are less likely.

Some worry that the Commission's Section 5 authority is too broad. I am not convinced. The Supreme Court disagrees with this criticism, recognizing that flexibility provides the Commission a valuable tool to address new issues.

Last August, the Commission showed restraint in its recent guidelines, which are narrower than what the Supreme Court would allow. Since the 1990s, the Commission has used its standalone authority sparingly, attacking predominantly invitations to collude and abuses of standard-essential patents.

I understand that there is a potential for abuse of the Commission's standalone Section 5 authority. At the same time, we need to consider how the Commission might use that authority to better protect competition and American consumers.

Thank you.

Chairman Lee. Thank you, Senator Klobuchar.

All right. We want to hear from each of our witnesses today. In the interest of time, I am going to dispense with the review of your bios, but needless to say, we have got a very impressive bunch here. We will hear from Professor Wright, then Professor Melamed, then Professor Wu, and, last but not least, Ms. Reeves, who, incidentally, I have to acknowledge is celebrating her birthday today.

Senator Klobuchar. Oh, what a way.

Chairman Lee. There are a lot of fun things you could be doing on your birthday. We are very grateful that you are willing to spend at least part of your birthday with us today. And turning 26 is a big step.

[Laughter.]

Ms. Reeves. Thank you.

Chairman Lee. Professor Wright?

Mr. Wright. Happy birthday, Mandy.

STATEMENT OF JOSHUA D. WRIGHT, PROFESSOR, ANTONIN SCALIA SCHOOL OF LAW AT GEORGE MASON UNIVERSITY, ARLINGTON, VIRGINIA

Mr. Wright. Chairman Lee, Ranking Member Klobuchar, and members of the Subcommittee, thank you for the opportunity to appear before you today. My name is Josh Wright. I am a professor of law at the, at least as of a few days ago, Antonin Scalia Law School at George Mason University and Senior Of Counsel at Wilson Sonsini Goodrich & Rosati. Until August 2015, I was a Commissioner of the FTC. Before diving into the subject matter of today's hearing, I want to make clear that the views I express here are only my own.

The FTC's "Section 5 problem," as it relates to the FTC's standalone authority, is one that has been near and dear to my heart for quite some time. My perspective on the FTC's standalone Section 5 authority is based upon my observations as a four-time alumni of the FTC in positions ranging from staff intern in the Bureau of Economics to eventually Commissioner, as an antitrust law professor and economist, and most recently, as a Commissioner who made a Section 5 Statement a priority throughout my tenure at the agency--and voted for it, along with Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeny.

Almost exactly 3 years ago, I announced in one of my very first speeches as a Commissioner that a Section 5 Statement was my highest priority for my tenure at the Commission. I also declared that I was very optimistic that that particular Commission together could end the century-long failure the agency had experienced in articulating its views on the appropriate application of its signature statute in unfair methods of competition cases.

Fortunately, I was right. I am very proud of the bipartisan 2015 Section 5 Statement that emerged from the hard work, compromise, and cooperation with my colleagues at the Commission, and especially Chairwoman Ramirez.

I do not think it is surprising that members of the antitrust community have largely welcome the statement as a step in the right direction, describing it as exactly that, as a huge achievement, a major win for the American consumer who will benefit from the increased stability this policy creates.

I am also very grateful to the Subcommittee for its bipartisan support of the Section 5 Statement at the time it was adopted. I have no doubt the Subcommittee's interest in the FTC generally and its Section 5 enforcement authority particularly helped spur the sitting Commissioners to the compromise forged in the 2015 statement.

The fundamental contribution of the 2015 statement is that it aligns the FTC's unfair methods authority with modern antitrust analysis by excluding considerations of non-economic goals, by tethering it to the rule of reason and rigorous economic analysis and evidence that is the lodestar of antitrust analysis under the traditional antitrust laws, and by acknowledging that the FTC should avoid using its standalone authority to reach conduct already addressed by the existing antitrust laws.

There are indeed open questions about how the statement will be applied, but the concepts in the underlying antitrust laws--excuse me, articulated in the traditional antitrust laws poverty a good guide for interpretation of the Section 5 Statement and are concepts that antitrust lawyers have been counseling clients with for decades, if not a century.

Today's hearing is about the future of the Section 5 enforcement in light of the statement. Let me offer a few brief thoughts, discussing in greater detail in my written testimony, concerning four options Congress might consider with respect to oversight of the FTC's unfair methods authority.

First, let me say that I do believe congressional oversight remains critical and ensures the agency does not return to prior abuses caused by overlay expansive interpretations of its authority. To be clear, I do believe the 2015 statement is sufficient to constrain most of those potential abuses. To that end, Congress might consider codifying the statement to cement this understanding of its authority as it did with the FTC's unfairness statement, which set forth the boundaries of the agency's ability to prohibit unfair acts or practices on its consumer protection side of the house.

Second, I do believe that the FTC's administrative litigation process advantages remain worthy of your attention. When the FTC bargains in the shadow of the threat of litigation, the shadow is a long and imposing force. After all, the FTC has ruled for itself in administrative litigation in approximately 100 percent of its cases over the past 30 years.

Some defenders of this statistic point out that this perfect win rate could just mean that the Commission is really good at picking cases. LeBron James is really good at basketball. He makes about 70 percent of his free throws with no defense. For the Commission to maintain a perfect win rate in vigorously defended litigation is not just really good. It is a serious problem that I think invokes questions about the fundamental fairness of our administrative litigation system.

Third, Congress can encourage the FTC to be more transparent by requiring the agency to produce closing statements after investigations wherever possible.

Fourth, Congress can play an important role in ensuring the excellent work by the economist in the Commission influences Commission decisionmaking at the highest levels.

Thank you for your time, and I am happy to answer any questions.

[The prepared statement of Mr. Wright follows:]

Chairman Lee. Thank you.

Professor Melamed.

STATEMENT OF A. DOUGLAS MELAMED, PROFESSOR OF THE PRACTICE OF LAW, STANFORD LAW SCHOOL, STANFORD, CALIFORNIA

Mr. Melamed. Chairman Lee, Ranking Member Klobuchar, and distinguished members of the Subcommittee, thank you for the opportunity to testify today.

The antitrust laws have a vital role in promoting robust, decentralized marketplace competition and thereby enhancing both our economic well-being and our economic liberty. Those laws best perform that function by articulating sound, unambiguous legal principles that deter anticompetitive conduct without deterring procompetitive conduct.

In my view, the "unfair methods of competition" prong of Section 5 of the Federal Trade Commission Act should, as a general matter, be used only to enable the Federal Trade Commission to enforce the Sherman Act and the Clayton Act. Construing Section 5 to give the FTC broader discretionary authority over competition matters would, I believe, undermine the purposes of the antitrust laws for four related reasons that I discuss in greater detail in my written statement.

First, any such broader authority would be unavoidably ambiguous. The language of the statute is, on its face, almost meaningless. The ambiguity will not be eliminated by judicial decisions the way the ambiguities in the statutory language of the Sherman Act and Clayton Act have been resolved by thousands of cases over the past 100-plus years. And those ambiguities cannot be eliminated by any realistic FTC guidelines.

While I appreciate Commissioner Wright's effort to find concrete meaning in the recent guidelines, I think he is optimistically reading his preferences into those guidelines for reasons I would be glad to discuss as the hearing proceeds.

The ambiguity in Section 5, if it is understood to give the Commission general discretionary authority, will undermine the deterrence function of the antitrust laws, which depend on businesses knowing which conduct is legal and which is not, and would result in businesses being deterred from procompetitive conduct for fear of later being found to have violated Section 5.

Second, to the extent that the FTC has broad authority under Section 5, it will be tempted to use Section 5 to bring difficult cases instead of pursuing those matters under the Sherman Act or the Clayton Act, and that will diminish the FTC's important role in contributing to the development and evolution of the antitrust laws in response to new learning and new economic developments.

Third, it is undesirable as an institutional matter, as a matter of competition policy, and as a matter of equity and fairness among businesses for the FTC to apply to the industries in which it enforces antitrust laws substantive rules that are different from those applied by the Justice Department to the industries in which it enforces the antitrust laws.

Fourth, standalone Section 5 matters cannot be litigated in Federal court and must instead be litigated in administrative proceedings before the FTC. The FTC Commissioners function as both prosecutors and judges in those proceedings, and because of the unavoidable human problem of confirmation bias, those proceedings, as Commissioner Wright just said, do not provide for the kind of reliable fact finding and decisionmaking needed for optimal antitrust law enforcement. If antitrust law is to send unambiguous signals to the business community, it must do so through antitrust law as applied by antitrust enforcement decisions, not just as written in the abstract.

In my view, the arguments in favor of construing Section 5 broadly do not overcome these problems. In the first place, I do not believe that the statutory language or the legislative history of Section 5 require the FTC both to construe the statute more broadly than the Sherman Act and the Clayton Act are presently construed, by contrast to the way they were construed in 1914, and to exercise its discretion to enforce any such broad construction of the statute.

It is hard to think of truly anticompetitive conduct that both is likely to injure competition in interstate commerce and literally beyond the reach of the antitrust laws for reasons other than a deliberate decision by Congress to exempt the matter from the reach of the antitrust laws. While there might be one or a couple of narrowly circumscribed and precisely stated matters of that type, perhaps so-called invitations to collude, the list is surely very short and does not justify broad authority for the FTC to construe Section 5 more broadly than the Sherman Act and the Clayton Act. Better would be to use the fact-finding and research capabilities of the FTC to which Senator Klobuchar construed to have the FTC develop new antitrust theories consistent with the broad principles of those laws to reach new kinds of conduct in the modern economy.

Ultimately, I think the case for an expansive reading of Section 5 comes down to whether the statute should be used to proscribe conduct that is within the reach of the Clayton Act or the Sherman Act, but that the FTC fears will not be found to violate those statutes because the legal theory is unprecedented or the courts have embraced contrary precedent or the facts are unclear. In my view, the FTC should not use Section 5 to circumvent what it regards as bad precedent or to avoid difficult Sherman Act or Clayton Act litigation. It should instead work within those laws and endeavor to improve them where it thinks it needs to do so.

Thank you.

[The prepared statement of Mr. Melamed follows:]

Chairman Lee. Thank you, sir.

Professor Wu.

STATEMENT OF TIM WU, ISIDOR AND SEVILLE SULZBACHER PROFESSOR OF LAW, COLUMBIA LAW SCHOOL, NEW YORK, NEW YORK, AND SENIOR ENFORCEMENT COUNSEL AND SPECIAL ADVISOR TO THE ATTORNEY GENERAL OF NEW YORK

Mr. Wu. Thank you very much, Chairman Lee, Ranking Member Klobuchar, Senator Franken, and Senator Hatch. Thank you for inviting me today. I want to say up front that these are only my own views, not the views of the Attorney General of New York or of the Federal Trade Commission, where I also used to work.

I also just want to briefly take a moment to honor the memory of former Commissioner Tom Rush, who a Republican architect of Section 5 practice and passed away last Thursday.

So if the FTC's Section 5 practice was once wide-ranging, over the past 30 years, I think the FTC has found its niche and has turned Section 5 of the FTC Act into what I would call a "scheme-busting statute." I take the question today presented as whether the enforcement of this scheme-busting statute is protecting competition, and if it does, whether it might nonetheless be introducing too much uncertainty.

Based on the review of the last 30 years, three decades or so, of the sort of modern age of Section 5 enforcement, I think that Section 5 has grown, matured, and come to provide an important competition for--important protections for competition beyond those in the Sherman or Clayton Acts. I also think that it does so without introducing a level of uncertainty that is unusual--sorry, it does so without introducing a level of uncertainty that is exceptional for antitrust law or the American legal system in general. In fact, as it stands, I would say that Section 5 has become less uncertain than other antitrust laws, particularly Section 2 of the Sherman Act.

So while I am an academic, I do like cases, and I thought I would just focus on one example of Section 5 enforcement to give a sense of what the law can do.

Let us return to the early 1990s when we can take a look at a company named Dell, which was then a rising computer company of increasing influence. Dell decided to join a standards group that was trying to figure out some kind of computer bus standard to deal with the problem of new graphic processors. So Dell was influential. It went to the standards group and proposed a new standard that met with acceptance.

It also told the committee that it had no intellectual property that had any bearing on this particular standard. But the fact was that, in fact, Dell had lied to the standards committee, that, in fact, it had secretly or unpublicly got itself a patent. And then only when the standard was adopted by millions of computers did Dell reveal that it had a patent over the standard and went around asking everyone to pay up.

This kind of case has become, in my view, a seminal or central kind of Section 5 case. The conduct at issue was deceptive, it was nefarious, not unlike the unfair deceptive acts and practices litigation.

There is nothing really defensible or procompetitive with what Dell did. We do not have what Professor Melamed was talking about, the sort of procompetitive/anticompetitive. Everyone thought that this was just bad for competition, and particularly bad for the standards processes, because once you have actors messing with the standards process, no one begins to trust the standards process at all. So it hurt consumers, hurt competition, and so the FTC took action under Section 5.

Now, I should say it is not necessarily impossible that the FTC could have taken action under Sherman Act's Section 2, but it would have been strange litigation and potentially an unsuited litigation. Section 2 was designed fundamentally for the classic trust-busting, industry-wide monopolies like Standard Oil, like the American Tobacco Company more than 100 years ago. It is not well suited for the more subtle business of policing a standards process.

It leads to--its classic remedy is the breakup, and in this day and age, it almost invariably leads to follow-on litigation.

So I think the Dell litigation is a good example--this is from the 1990s--almost a seminal of the kind of thing that Section 5 was meant to do, an uncompetitive scheme with clear harm and flagrant conduct, that is what Section 5 has come to target.

Now, let me just say in my last few seconds here, this question of uncertainty. When you look at the last 30 years of Section 5 practice, the defendants in these cases are engaged in conduct that is nefarious, that is deceptive, that is oppressive. They are on notice they must be at some legal risk, if not from the FTC, from some agency. Some of them are--it could be a State Attorney General. It could be a Federal prosecutor. So the idea that there is no notice provided I think is really misstated.

And, second of all--I will say this to conclude--I do not see any reason to see that Section 5 is any more uncertain than Section 2 of the Sherman Act, which has the vague standard of monopolization.

So thank you very much for listening to my remarks.

[The prepared statement of Mr. Wu follows:]

Chairman Lee. Thank you.

Ms. Reeves.

STATEMENT OF AMANDA P. REEVES, PARTNER, LATHAM & WATKINS LLP, WASHINGTON, D.C.

Ms. Reeves. Chairman Lee, Ranking Member Klobuchar, and distinguished members of the Subcommittee, thank you for inviting me to testify before you today. I present this testimony on my own behalf, and my views do not reflect those of my law firm, Latham & Watkins, or its clients.

There is no question that when Congress gave the FTC authority to go after unfair methods of competition, Congress handed the FTC a powerful and, like all of the antitrust laws, an ambiguous tool. The question for today is whether the guidance that the FTC has provided regarding how it will use Section 5 remains so undefined that it does more harm than good.

In light of both the FTC's very limited use to date of its freestanding Section 5 authority and its continued efforts--[microphone off]--actually having the chilling--[microphone off]--insofar as it chills--[microphone off].

Now, part of that may be because conduct that might be chilled is also chilled by the Sherman Act, which is to say that risky conduct is risky.

Further, while the FTC's use of Section 5 has certainly drawn critics, its use has been sparing and overwhelmingly confined to conduct associated with price-fixing attempts, such as invitations to collude and unjustifiable information exchanges, and as has been referenced, the standard-setting world.

Indeed, since the 1990s, and outside of the invitation-to-collude context, the FTC has used Section 5 in just roughly half a dozen cases. Additionally, the penalty for violating Section 5 is a cease-and-desist order. There is no monetary fine, the FTC does not seek disgorgement, and there is no vehicle for a follow-on Federal class action.

Now, there is, to be sure, follow-on class action risk at the State level, and those cases can impose a significant cost. Those State class action risks exist regardless, however. And so while I get that there is something to the FTC calling out conduct in a consent and framing it up for the class action bar, I am, again, not convinced that procompetitive conduct is chilled because of the risk that those cases may bring.

Second--and this surprised me while I was at the FTC--I do see private parties availing themselves of Section 5 when they believe it is a credible and appropriate tool to combat anticompetitive conduct. And by private parties, I mean large corporations.

During my time working for Commissioner Rush, a Republican himself who pushed for a very vigorous use of Section 5, we routinely heard from large companies that encouraged the FTC to use Section 5 to go after conduct that they believed harmed competition and was, arguably, outside of the Sherman Act's reach.

Likewise, I have encouraged companies that perceived themselves to be the victims of anticompetitive conduct that is not squarely covered by the Sherman Act to raise concerns with the FTC precisely because of its Section 5 authority. It is a tool not just for the FTC, but for third parties to reap the benefits of as well.

Third, I would like to address the FTC's August 2015 statement, which I view as a significant step forward in the Section 5 debate.

Now, prior to that statement, if I was asked to explain what the framework is that the FTC would apply to analyzing whether something violated Section 5, I was left to describe what the FTC had done to date in the invitation-to-collude cases and the half a dozen others, and then look at various speeches and try and form a concrete view on where each Commissioner stood on Section 5--and I thank Commissioner Wright and the numerous other Commissioners for the wealth of speeches they have provided on this topic--and then make a guess.

So what we now have from the FTC is a statement basically saying they will apply the rule of reason, which is a framework with a rich body of law and 125 years of precedent. It compels a showing of anticompetitive effects and allows a company to defend its conduct by arguing that its conduct was justified by a legitimate business purpose. That is progress forward, in my view.

Now, does it mean that we can all now say with confidence what conduct will and will not violate Section 5 with precision? No. But that is a flaw that exists with the rule of reason and antitrust law more generally to the extent the courts have chosen to adopt balancing tests. And as between a world with a flexible Section 5 and one with no Section 5 that allows conduct beyond the Sherman Act's reach to cause anticompetitive effects and go undetected, I believe the approach Congress originally adopted has served us well.

In closing, the statement is not perfect, and I am sympathetic to those that say they would like to see more. But it is a start, and it is a very good start. As the title of this hearing notes, if the question is whether the FTC's recent actions protect competition or increase uncertainty, I am very comfortable that the FTC has done the former.

Thank you for your time today, and I look forward to answering your questions.

[The prepared statement of Ms. Reeves follows:]

Chairman Lee. Thank you very much.

Ms. Reeves, why don't we start with you? I'd like to know from you if you can distill it down in, I do not know, two or three sentences what in your mind is an "unfair method of competition" as that term is used in Section 5.

Ms. Reeves. So I was a little glib in my remarks. So if I had previously been asked this prior to the statement, I would have defaulted to the rule-of-reason framework, in part because that is what governs Section 1, but also following the D.C. Circuit's en banc decision in <u>Microsoft</u> that provides a framework for Section 2 as well. And I think in general, when practitioners do not have a clear framework from which to operate on, they tend to retreat to the rule-of-reason framework. So a showing of anticompetitive effects, the burden then shifting to the defendant or the target of the investigation to show that their conduct is justified by a legitimate purpose and then a weighing of those two factors.

Chairman Lee. Is it surplus then? Is it statutory surplus if we are going to use the same framework there that we use elsewhere?

Ms. Reeves. Understood. No, I do not think so because, again, I do think that there is conduct that will not fit perfectly within Section 1 or Section 2. So if the common law does not reach conduct that has an anticompetitive effect and is not justified, then I do not think it is surplus.

Chairman Lee. Got it. Thank you.

I would like to ask the other witnesses as well. Professor Wu, how would you describe it?

Mr. Wu. Yeah, it is a good question. My only mild difference with Ms. Reeves is I would say there is a heightened--from the cases over the last 30 years, a heightened conduct requirement than what you see in Section 5 cases. That is, they tend to require conduct that is flagrant, nefarious, deceptive, coercive. I think it has focused a lot on the conduct; hence, the unfair method. And then something that has consumer harm, and that is what I would call an "unfair method of competition." So it has some elements in common with the business tort, but with proven harm to competition.

Chairman Lee. Professor Melamed?

Mr. Melamed. I do not have a clue, and I think the two inconsistent answers that we just heard from Ms. Reeves and Professor Wu begin to shed light on why.

I want to make two further points, if I can, drawing on what they said to elaborate this.

Ms. Reeves said, well, it would be based on the rule of reason. Leave aside the ambiguity in that. One thing I can say that I think is unambiguous is that the N-Data case--and probably Bosch and Google as well, although I do not know them as well--would not be found wrongful under the rule of reason because they did not entail injury to competition within the meaning of the rule of reason.

Now, let me explain, if I can on that, by referring to Professor Wu's reference to the Dell case. As he described the Dell case, which I believe was an accurate description, Dell deceived the standard-setting body, caused the standard-setting body by its deception to include its technology in the standard, and thereby gained market power by having the monopoly technology. Those were the elements sufficient to state a claim under Section 2 of the Sherman Act, wrongful conduct that creates monopoly power that otherwise would not exist. So that should have been brought as a Sherman Act case.

Now, N-Data, and maybe Bosch and Google, however, had a different attribute, and that is that the wrongful conduct did not create the market power; it happened after the monopolies were created by the standard-setting body, with no allegation of misdeeds at the standard-setting body.

So that conduct, first of all, was not even a method of competition within the ordinary meaning of "competition," of the words, because it was not about competition at all. The premise of the case was that these companies had a monopoly and did not face competition. That was about exploiting a monopoly. There was no injury to competition that would satisfy any rule-of-reason test in those cases, which I believe both Professor Wu and Ms. Reeves would say were properly brought under their inconsistent understandings of Section--of what "unfair method of competition" means.

And if you look at the way the Commission tried to rationalize it in N-Data, they said, well, it could create a demoralization of standard setting if this kind of wrongful exploitative conduct takes place. Well, the demoralization standard, which has no counterpart in normal competition law, is boundless. You could bring Section 5 cases against shareholder activists on the ground that they are going to reduce the likelihood that corporations will invest in the law inefficient conduct for the benefit of consumers over the long haul, and that will demoralize corporate America. Or you could bring a Section 5 case against those who oppose shareholder activists on the ground that they are interfering with shareholder rights and that demoralizes the efficiency of our capital markets. It is a boundless principle, and, therefore, the answer to your question is I do not have a clue what it means.

Chairman Lee. Thank you.

Professor Wright?

Mr. Wright. I think I have a clue, but let me say an important point here. So I am going to agree with one of

Professor Melamed's propositions about the post-statement world of Section 5 enforcement and disagree with the other. But the more important point, so N-Data and the Dell case, there is Section 2 law involving cases where deception is the but-for cause, deception of a standard-setting body is a but-for cause of acquiring monopoly power. Section 2 law is very clear, that if one can prove those facts, it violates Section 2.

In my own view, the current statement acknowledges if there is Section 2 law that covers this, it is more appropriate for the agency to use the traditional antitrust laws than to use Section 5. I happen to agree with Professor Melamed's characterization of Section 2 law covering the type of conduct that Professor Wu mentioned.

On the other hand, the type of case about activist shareholders or some sort of broad set of non-economic concerns--Can I bring a Section 5 case to address climate change or income inequality?--you only have to go back in FTC's history 20, 30 years, when this was essentially the majority view of the Commission. I think the first element of the statement clearly takes those sorts of cases off the table. It says harms that are cognizable under the traditional antitrust laws, but for some reason, the traditional antitrust laws do not cover it.

I think there are cases that fit those two requirements. I have voted for cases that fit those two requirements. The important point about the statement is Professor Melamed and I may disagree about whether the rule of reason fits some conduct. What the statement change is is we have now agreed upon a method to resolve our dispute. The agency has said the rule of reason governs. If I have got such a case and the agency says, "I am going to sue you under Section 5," we have a statement that we can bring into court, we can bring to a Federal judge upon appeal, and say, "This is what the agency says the statute means." I do not think this violates the rule of reason. You do. Let us do what litigants do and have it decided in front of an Article III court, ultimately. That I think is the great benefit of the statement.

Chairman Lee. Thank you. I have got a follow-up to that one, but we have got other Senators here, and I do not want to be a ball hog. But when we come back in a second round, I am going to ask you as a follow-up matter what the Commission meant when it said that it is less likely to bring a standalone Section 5 case when the other provisions of antitrust law would be sufficient.

Senator Klobuchar?

Senator Klobuchar. Okay, very good. I was going to do a little lightning round here, trying to put this in a little more specific terms, but it has been a great nerd-out for many of us up here.

So prior to the statement issued last August, so this is pre-statement, how do you think--how would you characterize how the Commission used its authority over the last 20 to 25 years when you look back at it? I will give you three choices: judicious, overreaching, or narrow. So what do you think the answer is, Professor Wright?

Mr. Wright. Overreaching.

Senator Klobuchar. Overreaching? Yes.

Mr. Melamed. Judiciously overreaching. Judicious because they used it rarely, but when they used it, they often overreached.

Senator Klobuchar. Okay.

Mr. Wu. I think it was underenforced. It was used narrowly, judiciously, and underenforced.

Senator Klobuchar. Okay.

Ms. Reeves. I would say judiciously.

Senator Klobuchar. Okay. So that is the past, and now we are in the present, and I think that at least I know you two here at the beginning here have--you seem to agree about when they should use its standalone authority, but you do not agree about the impact of the statement. So I am just thinking for the general consumer, and I will use one example here from some work Senator Grassley and I are doing with pharmaceuticals. But I think they just--I think people are starting to see all these mergers and some of the issues that I raised earlier in my opening statement, and so what do you think now with the statement in hand, the statement exists? I guess I will start with you two at the end. What do you think is the best way we can move forward now to better use the FTC's authority that they have to protect consumers? If you were there as a Commissioner--we have one former here--what would you do to best protect consumers in light of these mergers and what may be anticompetitive conduct that we are starting to see, with that statement in hand? Ms. Reeves?

Ms. Reeves. So I think the touchstone of any use of Section 5 has to be a finding of anticompetitive effects or very likely anticompetitive effects, which is to say they are about to happen. And so the FTC in the pharmaceutical context has certainly been a leader in developing and bringing the law not just in the pay-for-delay context but also in a variety of other more branded versus generic contexts recently, pushing the envelope on the refusal to deal law and a variety of other things under Section 1 and Section 2.

I think the FTC has to continue to be judicious if it wants to continue to maintain its authority, but I think its first and foremost obligation is to the consumers. So I would, if I were the FTC, continue to balance those two needs of seeking to vet out anticompetitive effects while doing so in a responsible way that would ensure the Commission would not lose its power.

Senator Klobuchar. Okay. Professor Wu?

Mr. Wu. Well, I would say there is a lot going on in the pharmaceutical drug industry that it is hard to think that Section 5 solves all the problems. But one of the particular problems we have seen is efforts to block competition from generics using a variety of tools--

Senator Klobuchar. Right, the pay-for-delay.

Mr. Wu. Pay-for-delay is one example, but also use of restrictive distribution mechanisms where you abuse something like the FDA's special REMS procedures, specialty pharmacies and so forth.

Senator Klobuchar. You talk about Turing Pharmaceuticals in your own testimony.

Mr. Wu. I did talk about them, and there is another example where, you know, a company buys--knowing that it has some restricted distribution, manages to raise the price by 5,000 percent. These are clear instances of consumer harm. It is not clear there is a good Sherman Act remedy for them.

Senator Klobuchar. Right, so you think it might actually be a better case for the FTC. It is an example of that standalone authority being helpful.

Mr. Wu. Exactly. That is why I think Section 5 could be very useful in trying to--I am not saying it is impossible to use the Sherman Act, but I return to the fact that I do not think the--like we somehow captured natural law, like the be-all and end-all was the Sherman--I guess this is the lightning round, so I should speed up, but, you know, this was like everything was perfectly captured when--

Senator Klobuchar. This is why we try not to cite cases. And you did not. That was a good. Okay. Professor? And it is always good to have a Minnesotan here on the panel.

Mr. Melamed. Thank you. Well, the first thing I would say is it should not use its standalone Section 5 authority to go after any matter that is within the reach of the antitrust laws. In other words, it should not use it to avoid a difficult, a novel, or a losing antitrust case just because it--

Senator Klobuchar. Because the Justice Department could not do it. You are saying that--

Mr. Melamed. Well, because it could not do it, and because there are probably good reasons why the antitrust laws are--

Senator Klobuchar. But do you agree with Professor Wu, though, that they have some standalone authority to pursue like the Turing Pharmaceuticals' restricted distribution schemes that really would not fit the antitrust model?

Mr. Melamed. Well, I think, first of all, we have to ask would the antitrust laws apply to the--is there a viable, a potentially viable antitrust claim there? If so, leave Section 5 alone.

Now, if we are beyond the reach of the antitrust laws and then you are asking what additional authority might they use in the standalone Section 5 context, I would say maybe there is some narrow room for it if you find unambiguously bad commercial conduct like an invitation to collude and if you conclude that using standalone Section 5 authority is the best way to go after it, which it often is not. It is just kind of a cheap, easy, home-court way of avoiding hard thinking.

In the standard abuse cases, for example, I think there are creative antitrust theories that the agencies could be using to put pressure on the standard-setting body to self-police, to go after transfers of patents to other parties and so forth. That is a lot better, it seems to me.

Senator Klobuchar. Okay. That was to the point. Thank you.

Did you want to--I just wanted to hear one response before we go to you, Professor Wright, and then I will end.

Mr. Wright. All right.

Senator Klobuchar. Professor Wu, if you could just--

Mr. Wu. Sure--

Senator Klobuchar. --respond to that definition he gave us. What was it again? Cheap, home--what was it--home-court--

Mr. Melamed. That was perhaps an ad lib.

Senator Klobuchar. Well, they sort of enjoyed it. What was it again?

Mr. Melamed. I do not know. The record will show what it was. It is probably something like a cheap, home-court end run around the antitrust law.

Senator Klobuchar. All right. Professor Wu?

Mr. Wu. I do not understand Professor Melamed's theory that seems to suggest the Sherman Act preempts the FTC Act. It was passed later.

Senator Klobuchar. Yes.

Mr. Wu. The FTC Act came later. It is a separate basis of authority, and the fact--you know, there is no principle of law that says, well, this could be a Sherman Act case; therefore, it is, you know, impossible or somehow forbidden to bring it as an FTC Act case. I just do not understand the legal theory to understand that.

Senator Klobuchar. Right. Okay. All right--

Mr. Melamed. Imprudent.

Senator Klobuchar. All right. Professor Wright?

Mr. Wright. Okay. So I think the important point about the development of Section 5, I mean, to--I think I am going to split the difference here, which is the development of Section 5 is important. It has failed thus far. There is no Section 5 standalone theory affirmed by a court of appeals over the last 56 years. Zero. We have not influenced the law. We have not done anything with Section 5 that has been a productive use in terms of influencing doctrine.

The important point, if we are going to do that, is to not allow Section 5 to substitute for the type of rigor and economic evidence we use in the rest of our cases. Professor Melamed fears that there are examples of exactly that in the past 10, 20 years of the FTC Section 5 history. I agree. But I think the most important thing for the FTC to do to identify future Section 5 cases is to keep in mind that 5 does not mean we substitute away from economic rigor. We use our research and reporting function to find good cases and bring them.

Senator Klobuchar. Okay. All right. Thank you very much, all of you. That was a good discussion. And no cases were mentioned. Thank you.

Chairman Lee. Senator Hatch.

Senator Hatch. Thank you, Mr. Chairman.

Mr. Wright, do you believe that the Commission's August 2015 Statement of Enforcement Principles was an adequate explanation of the Commission's authority under Section 5 of the FTC Act to challenge an act or practice as an unfair method of competition? Why, or why not?

Mr. Wright. I am not sure if I caught everything in the beginning. Why or why not is this an adequate exposition of the Commission's authority?

Senator Hatch. Yes.

Mr. Wright. So what I think the statement does is allows the standalone authority to exist outside the scope of the traditional antitrust laws, but provides boundaries for how expansive it can be interpreted. Those boundaries were missing. There was general agreement that they included invitation-to-collude cases, but there was no true meaning of exactly what sort of framework, how the FTC would even think about expansive interpretations that went outside the bounds of the traditional antitrust laws. What the statement does is say the concept, the rule of reason, the cost-benefit analysis on a consumer welfare basis that is the lodestar of antitrust analysis in the traditional antitrust laws will be how we think about these cases and how we think about what constitutes those violations. I think that is a significant step forward and also lets parties know, exactly like they counsel under the traditional antitrust laws, how the agency will be thinking about what constitutes an unfair method of competition. Because of that, and because there had been no such definition for 100 years, I think it is an incredibly good start.

Senator Hatch. Well, in your view, why is case-by-case adjudication, which has resulted in a workable body of case law in the context of the Sherman Act, insufficient to develop the reasoned body of law in the context of Section 5 of the FTC Act?

Mr. Wright. That is a fantastic question. The answer is because there is no litigation in Section 5. The body of law--it is not the common law. I teach the common law. I have got a couple of my law students behind me. When we teach contract law, I go in and say this is a breach and this is not a breach. We learn where the line is because we have got cases that come out on both sides.

What the FTC does, with the power of its administrative litigation authority, it says if we sue you under our administrative authority, we are going to win. Our win rate is 100 percent. We will compile a list of consents as high as you would like. Some of them are great, and I voted for them. Some of them I voted against. Some of them I think were fantastic for consumers, and some not. But the body of law, the consents that emerge from that process do not have the virtues of the common law because they come from a very different process.

Senator Hatch. Okay. Let me ask this question of both you and Mr. Melamed. The Commission's Statement of Enforcement Principles allows the Commission to challenge acts or practices that are deemed likely to harm either competition or the competitive process. Now, this suggests that an act or a practice may be found unlawful if it is deemed likely to cause harm to the "competitive process" even if it does not cause harm and is not likely to harm competition.

Now, I have two questions on this point. First, do you believe that this is a proper reading of the FTC Act? That is, do you believe that the Act authorizes the Commission to block actions that harm the "competitive process" but that do not actually harm the competition? And, second, based on your experience with the Commission and the principles set forth in the Commission's statement, under what circumstances do you believe that the Commission would deem an act or practice that neither harms nor is likely to harm competition to be a violation of Section 5?

Mr. Wright. Thank you. It is a great question, and one that gave me some consternation at the time we were drafting the statement over precisely what to think about the "or" clause in that term.

My own view--and I think I am going to still try not to cite cases, but my own view is that if you look through rule-of-reason cases in antitrust jurisprudence over the past 125 years, harm to competition or harm to the competitive process are close synonyms in terms of the actual effect of that jurisprudence. I do not think there is a body of antitrust law that treats those things as substantively different or qualitatively different. Harm to the competitive process and harm to the competition per the rule of reason under the antitrust laws I treat and I think the Commission treats and I think ultimately any Article III court reviewing such a case would deem to be synonymous.

Senator Hatch. Mr. Melamed?

Mr. Melamed. I agree with Professor Wright that in antitrust jurisprudence those terms are often used interchangeably, and I do not think there is a significant difference among them. And I think there is a fairly well understood meaning in antitrust jurisprudence.

My concern is that that meaning does not seem to affect the way the Commission has applied Section 5 in recent years. There certainly was no harm to the competitive process or to competition in the N-Data case. Arguably, there is not in the invitation-to-collude cases because nothing happened, it did not affect competition, and by the time the case is brought, it could not, because it was an artifact of history.

So the problem is not that those words have no meaning in the antitrust context. It is that given the history of the Commission, they have no meaning in the Section 5 context.

Senator Hatch. Thank you. I am sorry I did not have time to ask questions of you other two. Chairman, my time is up.

Chairman Lee. Senator Franken.

Senator Franken. Thank you, Mr. Chairman.

Professor Wu, at last month's hearing, several colleagues and I raised concerns about antitrust enforcement of anticompetitive unilateral conduct. I am particularly worried about Internet giants that are using their positions as dominant media platforms to stifle competition and inhibit the free flow of information.

Professor, how can Section 5 standalone authority be used to address anticompetitive behavior that may not look like traditional antitrust conduct? In other words, as companies employ new and technologically advanced ways of edging out their competitors, how do we ensure that they are held accountable?

Mr. Wu. It is a good question. Thank you, Senator Franken. The idea of the Internet from its beginning was that it was widely believed, especially on the Web, that every 3, 4, or 5 years some new company would come along and challenge the old company, and this is what made it such a vibrant economic space. And I think there is some disturbing signs that that has started to change, that some of the companies that have been very successful have found ways to prevent being unseated by new competitors. And so I think it is a worthy topic for consideration by all the antitrust laws.

I think Section 5 gives a particular--I mean, some of these cases are very complicated. They involve obviously new technologies. And I think Section 5 has a counterintuitive utility in the sense that it is a much more surgical remedy than some of the other Sherman Act remedies or Sherman Act laws, like Section 2, which, as we discussed earlier, was originally meant for these industry-spawning monopolies and whose classic remedy was the breakup of the entire company.

I think there are areas where the FTC in particular could police platform policies and make it clear what is forbidden and prevent some of the most egregious efforts to try to discourage competition in the online space. So I think there is some utility in investigations in that area.

I know in some of the FTC investigations of online companies, Section 5 thinking became very important and was, without mentioning any particular cases or names, very important in discouraging--

Senator Franken. Okay.

Mr. Wu. What is that?

Senator Franken. That is fine with me if you--

Mr. Wu. Well, I will give you an example. I think in the Google investigation, for instance, there was a number of Section 2 issues out there. But one of the things that I think that the FTC found quite egregious was Google's practice of stealing all the reviews from TripAdvisor and Yelp and then creating its own clones of TripAdvisor and Yelp and then kind of representing that the reviews were actually Google's.

So, again, it goes back to this idea that Section 5 comes to mind when there is particularly egregious conduct, unscrupulous conduct, and, you know, that could have been a Section 2 case, but it was handled I think a lot better. Section 5 was mentioned. Google said, you know, we are not going to do that anymore, and the whole matter went away.

So I think it is often a much more surgical remedy for dealing with these kind of fast-moving, dynamic industries like the high-tech industries.

Senator Franken. Well, thank you. And speaking of that, this is largely about high-tech industries, which is privacy.

Mr. Wu. Right.

Senator Franken. And I am talking about access to information about what personal data are being collected by companies and how that data is being treated and who companies are sharing data with as a matter of--something that I think people should have a fundamental right to know.

Unfortunately, I do not think the law has kept pace with rapidly advancing technologies, and every week I hear reports of companies collecting and monetizing Americans' incredibly sensitive personal information, everything from their location data to their face print. And they are doing it without the knowledge or the consent of consumers.

So one tactic I frequently use is to simply ask these companies to provide more information on their privacy policies, which are often vague, confusing, and misleading, maybe all deliberately.

In recent years, the FTC has also taken a more active role in holding technology companies liable for deceiving their consumers about what they are and are not doing with their personal information, and I hope as a result of this enforcement, other companies will establish strong and transparent privacy policies.

Again, Professor Wu, I know that today's hearing is focused on unfair methods of competition and not unfair and deceptive practices, but can you discuss the importance of Section 5 as a whole in permitting the FTC to address some of the most egregious behaviors regarding privacy by companies?

Mr. Wu. Certainly, Senator Franken. I want to point out--and you have highlighted this--the FTC is the Nation's chief and primary privacy agency, and I think this hearing in general speaks to the importance particularly in an era where the privacy bar has changed so much. You know, even just by virtue of the way technology was 100 years ago or 50 years ago, the threats to privacy were so much less.

So I think the importance of this hearing is understanding the need for a strong and dynamic and, indeed, well-funded Federal Trade Commission that is up to this. And the link between the two sides of the Section 5 authority I think speaks to this.

One of the things that one notices about the Section 5 unfair methods enforcement is it very often is triggered by deceptive practices, you know, things that would also have a consumer protection angle. So I think it is important that both of these functions are housed in the same agency which has as its prime mandate consumer protection and is thinking about things a little differently than the Justice Department or other agencies which are not as focused on consumer protection and what it means to live in this country in this century. So thank you very much.

Mr. Melamed. Senator, may I make a brief comment in response to--

Senator Franken. That is up to the Chairman.

Mr. Melamed. Chairman, thank you. I think hearing the colloquy with Professor Wu really illuminates what in my view is at the core of this issue about Section 5. Professor Wu talks about bad conduct that we need to prevent. He talks about remedies that are available to the Commission and contrasts it to remedies that were contemplated 100 years ago under the Sherman Act. I think what he is talking about implicitly is regulation of the economy to achieve a desired end state.

I am talking about law enforcement, about legal principles that will send signals to the millions of economic actors in our decentralized marketplace and thereby promote optimal competition. And it seems to me the issue about Section 5 comes down ultimately to that. Do you want a law enforcement regime for competition law, as I do? Or do you want the potentially heavy-handed Government regulation to protect consumers, as I think proponents of an aggressive Section 5 want?

Senator Franken. Just one response to this.

Mr. Wu. Oh, you want a responder?

Senator Franken. Well, I do not know, it just seems that Section 5, as the way Professor Wright wrote it, wrote the explanation of it, does have a little bit of flexibility to go outside of Sherman, and that is the whole purpose, seems to be the purpose of it. And when you have, instead of regulating the Internet with these specific privacy things, it is sort of you know it when you see it. And that seems to be the FTC.

I am sorry, Mr. Chairman, to go over, but I think we are in a substantive point, and would Professor Wu care to--would it be okay?

Chairman Lee. Fair question.

Senator Franken. Okay. Thank you.

Mr. Wu. Thank you. Sure. You know, I am no--I do not think regulation should be a dirty word, but I do not think that is what the FTC does. I think its practice reminds me more of what I do in my current job, which is I work for the New York State Attorney General, which is focused on flagrant, notorious conduct that is clearly harmful. And that is what I think the FTC is doing, and I think the advantage of Section 5 is that it makes sure the agency is not stuck on a concept like monopolization. Monopolization is bad, but it is not the only competitive harm in the universe.

And I should say, by the way, I am also a fan of the policy statement for that reason of focusing the agency in its law enforcement capacity on threats to consumer welfare.

So I think it is an enforcement agency. I actually think the FTC is more like a State Attorney General practice than a pure regulatory agency. And I think it will have a very important function in the decades to come.

Senator Franken. Okay. But I kind of think it as a regulatory agency as well. Thank you.

Chairman Lee. Senator Tillis.

Senator Tillis. Thank you, Mr. Chair, and thank you all for being here.

Professor Wright, one question that I had has more to do with the process that led up to the policy statement. I think the Commission did not seek public comment or go through the typical kind of rulemaking process. Can you give me the rationale behind that to not seek stakeholder input in the process of trying to refine it and maybe to remove some of the ambiguity that we seem to be talking about today?

Mr. Wright. Sure. So I think as a sort of procedural starting point, one is because it's not a rule. It is informal guidance that expresses the views of the Commissioners about what the statement means. I think that our decision as an agency on process was consistent with what we have done for informal guidance in a lot of other settings.

That said, I take the criticism about process and taking input from stakeholders very seriously. As a Commissioner, a number of times at the agency I thought that we had perhaps rushed to judgment or not gotten enough information and used all of our research and reporting authority to get the information we needed to make a decision, and I was vocal when that was the case.

Section 5 I do not think is that kind of dispute. The debate over Section 5, there have been--in the 2 years alone leading up to the vote on Section 5, there was something along the lines--I knew the number better before, but it is over 2,000 pages of ink spilled by academics and practitioners and Commissioners. There are hundreds of speeches from Commissioners since the 1980s articulating their view of Section 5. The scope of Section 5 unfair methods of competition authority may be the most well documented intellectual debate in the history of the agency. My sense is leading up to the vote, both inside the agency and outside, it was pretty well known where just about everybody sat. So in my view, the Commission acted with a more full set of information than it normally does in important policy debates. But I do appreciate the spirit of that concern. I just think as applied, we were in the right place, had a full set of information, and the statement did what it the four Commissioners who voted for it intended it to do.

Senator Tillis. And this could be for anyone, but do you think that there is anything that the Commission should do to provide additional guidance with respect to the policy statement? Ms. Reeves?

Ms. Reeves. I will begin on that one and to follow up a bit on what Professor Wright just said. I agree, by the way, with everything he said about the process in terms of acknowledging the need for a formal process, but also the fact that there was an exhaustive dialogue, I would say at least from my perspective on the outside, up to that point.

There is also a little bit of sort of "Let us get the show on the road mentality," which is sort of getting to your question, which is to say the benefit of what has now begun is there is now something to shoot at. There is a statement that provides a standard, and we can sit here and debate whether it is right or wrong, but the sort of formal discussion is officially commenced around one piece of paper as opposed to however many trillions of pages have been spilled on this topic to date.

And so in terms of what the Commission can do going forward, I think one thing that would certainly be beneficial is, just as it has done with other guidelines, including the horizontal merger guidelines, which I think are overwhelmingly viewed as a success, is think about updating the guidelines from time to time, and in conjunction with that process, engage in a similar process as it does with the horizontal merger guidelines in terms of holding workshops and hearings and the sort of formal yet still informal dialogue that it does to produce a guideline or a policy statement.

Senator Tillis. Do you have any reason to believe that they feel like that is necessary?

Ms. Reeves. I think they have heard the message loud and clear. Having worked both at the FTC and been now on the other side as someone who has always, you know, got something to complain about to the FTC, I think that they appreciate that there is a desire for transparency. And I think the challenge, which is why it took so long getting to this point--Bill Kovacic held a workshop in 2008 which is where I think you could say it was sort of the genesis of this. I think the challenge is figuring out the right forum, and, look, I think a lot of people hoped that the guidelines would be a lot longer. But I am not actually sure that there would have been benefit in that. You can imagine a form of guidelines that starts to describe conduct with more specificity as being potential violations of Section 5 that certainly on the business community side folks may not like.

So you have sort of got to be careful what you wish for if you want a lot more guidance, and that is why I think sort of resorting to the first principles, as the Commission did, is a very responsible way to start and look over time. If more examples can be distilled, that is helpful. If more principles can be discerned, that is a good thing. But I think the Commission, at least from my perspective, knows what people want.

Mr. Melamed. I think--

Senator Tillis. Mr. Chairman, with your approval.

Mr. Melamed. I am sorry.

Chairman Lee. Go ahead.

Mr. Melamed. I think the guidelines are a very modest step in the right direction. The good news is they do cabin the conversation between the private sector and the Commission to some extent. The bad news is they may suggest the Commission is serious about Section 5 and make it a more worrisome ambiguity for the business community than it was before the guidelines were issued.

As to what the Commission should do now, if possible, it should eliminate the many ambiguities in those guidelines, not by more detail but by more clarity.

For example, Commissioner Wright in his proposed guidelines that preceded the actually guidelines suggested that they should limit themselves to conduct that "injures competition" as that term is used in the antitrust laws. That has some meaning after thousands of cases. Those qualifying words are not in the guidelines. I assume that reflects the unwillingness of the majority to agree to limit the "injure competition" phrase in that way, so now the "injure competition" phrase is almost meaningless. And I think they should clarify that. They should clarify what they mean by "sufficient" to rely on the antitrust laws, what they mean by "will be guided by the rule of reason."

All of these are ambiguities that I hope will be clarified someday.

Mr. Wu. If it is all right, briefly. I would suggest that guidance would probably best come through enforcing the law at this point. I think that the debate has been had, and there are a lot of anticompetitive abuses in the economy at this point. And I think the FTC should take aim at some low-hanging fruit and eventually be willing to take it to the courts and see how it goes. And I think that will provide the greatest clearance of all.

I would be confident the FTC would be upheld in court if it chose--you know, with the right kind of case, and I think that is where the guidance should come from, as opposed to abstract discussions as to what this might mean or that might mean. We will see it happen in the case.

Chairman Lee. Professor Wright looks like he is going to explode unless he--

Mr. Wright. Yes. I hope my lean was not giving it away. I certainly agree with Professor Melamed that I prefer my proposed guidelines to the compromised product, but I do not think that is--I proposed them. But I do think in terms of where the agency should go, there are ambiguities in the guidelines because in part they have not been used. I think to some extent I agree with Professor Wu that as the guidelines are used.

One of the things that has happened, because there was not a statement, the agency was afraid to litigate cases that it should bring, and it was able to get consents in cases that it should not bring. All sorts of, I think, misguided enforcement attempts on both sides. And I think one of the benefits of the guidelines and, indeed, the benefit of a short set of guidelines, brief in part because they incorporate by reference explicitly the traditional antitrust laws and the traditional rule of reason, I think what the agency should do is the way it thinks about case selection in the rest of its cases. We use our research and reporting function. We use the fact that inside the agency we have the best set of economists that exist inside a Government agency anywhere. Think rigorously about economic evidence. Think about identifying cases that would do well also in Federal court, and target our resources there.

Chairman Lee. Thank you.

Thank you for your patience, Senator Blumenthal.

Senator Blumenthal. Thank you, Mr. Chairman.

I want to pursue the line of questioning that Senator Franken began, perhaps beginning with you, Professor Wu. As you know, the FTC recently investigated Google, and you remarked on the investigation and its close with a relatively lenient remedy, some have said a non-remedy. And a number of people, including experts, criticized it in 2013 because of the lack of formal charges. And the allegation there was that Google essentially was presenting search results in a way that benefited itself more than consumers. I think that is a somewhat oversimplistic way of characterizing a more complex set of allegations, but you and Professor Luca of the Harvard Business School examined whether consumers preferred Google's search results or more unbiased organic search results, and you found that consumers preferred the unbiased organic search results by a very significant margin--perhaps not surprisingly.

I wonder if you have followed the practices of Google since then and whether there has been any change in conduct.

Mr. Wu. Right, so I will say one or two things about that.

So one of the, I think, challenges of the FTC's investigation of Google is that there were not strong--there was not at the time strong evidence of consumer harm. Google made the argument--and I think it was a fairly convincing argument--that its improvements, universal search as it was called was, in fact, preferred by consumers and overall better, and I think that was one of the reasons that the case was closed.

I think our subsequent research using more advanced methods suggests that, you know, some of what Google is doing, particularly in the local thing--so I do not want to say this generally. I think if you do a search for weather in Washington, you find out it is cold instantly. That is quite obviously good for consumers. If I had known that, I would have brought a bigger coat. But I think that what has been proven is that in certain areas Google is manipulating its search in an anticompetitive way. And I think that evidence makes a difference, and I think Google is at this point in a different position than it was then.

So maybe that is all I wanted to say. I think there is stronger evidence of consumer harm now than there was when the FTC did the investigation.

Senator Blumenthal. In fact, it caused you to change your view of the situation, did it not?

Mr. Wu. I felt differently after seeing the results of the testing showing that there was much more evidence of consumer harm than we had access to at the FTC.

Senator Blumenthal. Shouldn't the FTC change its view as well?

Mr. Wu. I think it would--I cannot speak for inside. I think it would be worthwhile for the FTC to pay attention particularly to the local market. I understand why they are--you know, having closed an investigation, it might not want immediately to get to it, but I think it should seriously consider the new data and ask whether what is going on in local in particular is anticompetitive.

I think it is clear that there is--and this is not only a Section 5 question but a Section 2 question as well. There is a company here with a dominance, and it is having a strong influence on competition so, therefore, has some of the trademarks of a traditional antitrust investigation.

Senator Blumenthal. To most consumers, local searches are the most meaningful kind of searches. They do not search in San Francisco for a good restaurant when they live in New York.

Mr. Wu. That is right. I think local has become an incredibly important part and is sort of the nexus of, as you said, how all businesses are found. And, you know, the idea of one--not only, you know, online businesses, but if you are looking for a good restaurant, you are looking for a good place to get a beer or whatever, you know, get your shoes fixed, and so local is turning into an important thing. And I think it is an area that should have vigorous FTC or Justice Department oversight.

Senator Blumenthal. So let me just conclude with this question. If, in fact, Google is preferring its own property and if, in fact, there is consumer harm, which was not apparent to you before--

Mr. Wu. Right.

Senator Blumenthal. --shouldn't there be a basis for Section 5 enforcement action?

Mr. Wu. You know, as with everything, these cases are complicated, but I think the Federal Trade Commission should be looking at this, or the Justice Department, or both.

Senator Blumenthal. Do any members of the panel disagree?

Mr. Melamed. Well, Senator, I hate to disagree with a colleague about bringing the <u>Microsoft</u> case 15 years ago, but I think I do--if I understand the facts, and I am relying on this colloquy for the facts. Surely, the fact that consumers would prefer a slightly different product cannot be the basis for prudent Government intervention.

Senator Blumenthal. That is correct, and I am interrupting you only because--and I apologize. I almost never interrupt a professor, not to mention a former esteemed colleague. But it is not just consumers preferring or wanting one service over another. It is Google in effect denying free choice or preferring one of its properties. Am I correct, Professor Wu? In other words, if you are relying on our colloquy for the facts, there is more than just what you have just stated.

Mr. Wu. Well, I think they are not in a position to have the choices, so it has some similarity to the <u>Microsoft</u>

situation in the sense that--also because--I mean, this is--we do not have the full facts in front of us, but some of these sites may threaten the--may ultimately serve as a threat to the search paradigm, which is where Google has the most market power. And so they are concerned there is a certain monopoly maintenance kind of aspect to it similar to the Microsoft case. You know, we have not briefed all the facts here, so I think it--

Senator Blumenthal. Yes, I would stress we do not know all the facts, and I am putting both of you in a somewhat unfair position by asking you for views. But I am happy to let you proceed. Sorry to interrupt.

Mr. Melamed. All I was going to say is surely the fact that consumers would prefer a different product or set of circumstances from their supplier cannot be enough. We all want to get the same product cheaper with more bells and whistles attached to it. And if the seller is imposing a different product on the consumer because he finds it more economical to do so, it seems to me that is how the marketplace is supposed to work.

If the facts are that a monopoly is using some anticompetitive means to exclude a rival and aggrandize its market power, then, of course, we have the making of a Section 2 case such as some case you and I and others brought against Microsoft. But that does not require

Section 5.

Mr. Wright. May I briefly answer the question?

Senator Blumenthal. As my colleague said, it is up to the Chairman. He is the one who--

Mr. Wright. I will keep it quick, and I appreciate it. I would just like to say maybe as the sort of economist on the panel, I have read Professor Wu's paper, and there are other papers. Papers are a drop in a literature, and we generally rely on the literature for our basis of evidence. I would think that for a discussion--I did not participate in the Google case. I came on board after, and so, you know, my dog is sort of--I do not have a dog in that particular fight. But I will say I think it would be a dangerous assumption to make that the very excellent Bureau of Economics inside the agency, who is incredibly concerned with identifying consumer harm, has the methods and the skill and presumably access to data to do it was sort of not focused on the right question. And so I do not want to let that part of what they do pass by the discussion.

Senator Blumenthal. Thank you.

Thanks, Mr. Chairman.

Chairman Lee. Senator Schumer.

Senator Schumer. Well, thank you, Mr. Chairman, and I want to thank you all for being here. And I am, sadly, not a member of this Subcommittee any longer, but I appreciate the time for being here and the good job that you and Senator Klobuchar do on this issue.

I cannot stay long, but I wanted to swing by to say hello to a proud and well-respected New Yorker, Professor Tim Wu. And I thought I would share with the Committee his nickname in New York. His name is "Superwuster."

[Laughter.]

Senator Schumer. That is his handle on Twitter, and throughout New York he is known as "Superwuster." He has done a great job both inside and outside academia, impressive on many fronts. He has been of great help to the tech startup community in New York, which all of you know from my work on patent reform and other things I care very deeply about.

He is the one, this man, the "Superwuster," he coined the term "net neutrality," but did a lot more than that in that area and has helped push forward it, and I am so glad that we have achieved it. I know there is probably a disagreement on this Committee and on this panel whether net neutrality was a good idea. I happen to think it was and was one of the original supporters of it. And I think Professor Wu for that and all the work he has done to protect universal access. So I just wanted to be here to thank you for your thoughts on antitrust enforcement.

I would like to ask Professor Wu and then maybe the others on the panel briefly a question, before I have to go, which bothers me.

So we have a great deal of discontent in America economically, and one of the great problems we face is the number of good-paying jobs. Economics, median income is still declining. It creates the sourness in the land which we are seeing in parts of the Presidential campaign. And one of the great mysteries is, okay, if you look at standard Adam Smith economics, you would say, okay, well, all this competition and automation and super-efficiency, yes, it holds down wages and it holds down good-paying jobs, new good-paying jobs--you know, when things are more efficient, you do not need so many workers, and you do not need to pay the workers that much. Oh, but theory, it should all be made up for by falling prices. But it seems to me--and, obviously, no one has done a comprehensive study--that we do not see those falling prices in a lot of areas. And a couple of places where mergers have been allowed, where the prices are going up, are drugs, airlines. Even though oil prices are going down, I would still argue that the stickiness in oil prices--in other words, when the market price on the market goes up, it takes a lot longer for--a lot quicker for it to be reflected at the pump than when the price for oil worldwide goes down. It takes a long time for it to go down. In my view, that is maybe because we only have a handful of big oil companies.

So I would like first Professor Wu to comment on that general situation--I know it is not exactly the topic of today's hearing--and then hear what the others might have to say briefly.

That is my only question, Mr. Chairman.

Mr. Wu. Sure. Well, thank you. I appreciate the preamble very much. Very generous.

Senator Schumer. Well, the main reason is not all that nice praise but to let them know you are the "Superwuster."

Mr. Wu. Yeah, all the other ones were taken.

[Laughter.]

Mr. Wu. "Superwuster." So I think there is--what you are referring to really is there is a whole--I think there is a wholesale rethinking of some of the economics which dominated the late 20th century and the assumption that if we adhere to the principles of essentially mainly laissez-faire capitalism that we would see a decrease in prices and things would get better for everybody. But I think that has not worked out the way people thought, and there is a wholesale rethinking, and it is, you know, in a tiny way reflected in the Section 5 hearing. But I think it also was reflected, should be reflected across the antitrust law and, frankly, across economic policy in the United States Government.

One of the areas where antitrust might make a big difference is how it approaches concentration, you know, allowing mergers. I think a lot of the mergers, when you look back at them, you know, some were fine, but some of them really have done very little for the consumer and simply both made things--

Senator Schumer. Name one.

Mr. Wu. Well, I will just say the airline industry as a whole. I mean, I think that most people feel very strongly that there used to be more competition and things, and you just get stuck. I do not know where you start. Hospital mergers, you look at the statistics on hospital mergers, and the results are the prices go up and more patients die. There is no upside except for some people make more money.

And I think that sort of lax antitrust policy has contributed, particularly in merger review--I do not point the finger at either party. I think it is--right, I understand that. I think it is an ideological thing, and I think it is time for rethinking. I think we are at a similar period of crisis as we were 100 years ago when the FTC Act was passed, and we would--you know, to say that we can just go in with the same solutions and expect to have better results is crazy. The people of America are demanding something better, and I think it is the duty of the Government to come up with it.

Senator Schumer. Let us hear from--

Mr. Melamed. Well, I am a Democrat, Senator Schumer. I largely agree with--

[Laughter.]

Mr. Melamed. I largely agree with what Professor Wu said. There clearly seem to be some data suggesting that there has been underenforcement, particularly in the merger area, in airlines and hospitals--well, hospital underenforcement is in large part attributable to an inhospitable judicial environment as the agencies lost a lot of cases. I was involved in one of them some years ago. Probably at least the folklore was reflecting local community belief that the local hospital or the local doctors are somehow heroes and we should not interfere. Maybe that view has changed. But there clearly is a lot of data to suggest that antitrust has in some ways, in the merger area in particular, been underenforced. And I think the agencies should--I imagine they are, but they certainly should be reexamining the criteria they are using and be more vigorous in enforcing the Sherman Act and the Clayton Act. I agree with that.

Senator Schumer. Do either Ms. Reeves or Professor Wright disagree with what basically Professor Wu and Professor Melamed have said? By the way, would you like to let us know your Twitter handle, Professor Melamed? No, it is all right.

Mr. Melamed. I actually signed up for Twitter, but I do not remember what my handle is.

[Laughter.]

Senator Schumer. One of my favorites, my friend Sherrod Brown, who is from Ohio, his is "DamnYankees." He hates the New York Yankees.

Ms. Reeves. I have one that I believe I signed up for but have never used, and it was "AntitrustGirl." So there you go.

[Laughter.]

Senator Schumer. Oh, excellent.

Ms. Reeves. That one is taken. Sort of two observations I would add on merger enforcement and then bringing it back to the topic today.

The first is that I think the agencies are in an extremely aggressive posture. They are working very hard. It may be that they do not have enough people to do everything they want to do. I know every time I interact with an agency staffer, they are pulled three or four different ways and are working on multiple litigations. The DOJ has been litigating right and left. The FTC right now is litigating Staples-Office Depot down the street. They are preparing to challenge the Advocate-NorthShore Hospital merger in the north suburbs of Chicago.

So to bring it back to today, sometimes in Section 5 the discussion tends to come up, Why do we need both agencies? And one of the refrains that I think is particularly relevant here is sort of an odd benefit of two agencies, which is competition among them. So if aggressive antitrust enforcement is a priority, there is a benefit to two agencies, and so far, if the FTC sees the DOJ is bringing a lot of cases, you better bet that they are looking for cases, too.

Senator Schumer. But according to Professor Wu and Professor Melamed, even with the two agencies, we have not had enough enforcement, particularly in the merger area. Do you agree?

Ms. Reeves. My sense is there are probably more cases that the staff would like to bring, but, again, they lack the resources.

Mr. Wright. If I can make a small point about the FTC.

Senator Schumer. Professor Wright.

Mr. Wright. And I do not know my Twitter handle. It has "Professor Wright" somewhere in it.

Chairman Lee. Just for the record, it is @profwrightgmu.

Senator Klobuchar. That is because Professor Wu was sort of trash-talking you--

Mr. Wright. We have a thing we do.

Senator Klobuchar. Just to put it on the record, Professor Wright--this is from Tim Wu--"I have been waiting for you, Professor Wright. We meet again at last."

[Laughter.]

Mr. Wright. It is normally in net neutrality hearings where we throw things at each other.

Senator Schumer. I had Phil Arita for antitrust at Harvard Law School, and it was never as much fun as this last 5 minutes.

Mr. Wright. Let me say about the FTC and merger enforcement, I think on the overall level of merger enforcement activity, I think it is right that a close look at the evidence would suggest underenforcement in some areas and overenforcement in some others. The point I would like to make about the FTC is that one of the reasons we know about the outcomes in hospital mergers is because the FTC economists did the work that suggested we are losing these cases. But there are big price effects.

I think as antitrust law and antitrust policy takes an empirical turn, what we want to know--and we now have the data, and we did not have it 20, 30, 40 years ago--is where do we want more and where do we want less. If--and I think what Ms. Reeves is exactly right--the FTC, for example, needs more people, the people that it needs are not the litigators. The ratio of lawyers to economists in the building is 6:1, maybe 7:1 for competition lawyers. I think what the agency needs, if anything, if we are going to target enforcement, is more economists.

Senator Schumer. Is that generally agreed? I see a lot of head shakes. Yes.

Ms. Reeves. I would say litigators as well, but that may be because Josh is an economist and I am a litigator. I would just echo something--

Senator Schumer. You had your turn over at the FTC.

[Laughter.]

Ms. Reeves. I know. May I make one quick--

Senator Schumer. Please.

Ms. Reeves. The point Josh just made about the work that the FTC did on the economic side on the hospital side, they did a tremendous retrospective study looking back at why they were losing the hospital mergers. That is a unique benefit of the FTC and the ability to do those studies, and in response to your question, I think that is a really unique benefit of the FTC, is the ability to do those studies. To the extent there are areas of underenforcement, I think the right way to identify them is through that process. It has resulted in a very significant period of hospital merger enforcement for the FTC.

Senator Schumer. Thank you, Mr. Chairman. I appreciate the extra time to have the witnesses speak.

Chairman Lee. Thank you, Senator Schumer.

I had to look it up a moment ago. That is how I found Professor Wright's Twitter handle. I usually do not make a practice of memorizing Twitter handles of witnesses before the Subcommittee. But I had to look it up because I had to find out whether it was "The Superwuster" or just "Superwuster," and it is the latter. It is sort of like Prince or Bono or Cher.

[Laughter.]

Chairman Lee. Which means at some point you are likely to change "Superwuster" to an unpronounceable symbol. Then you will be the "Professor formerly known as `Superwuster.'"

Senator Klobuchar. Thank you for that Minnesota reference.

Chairman Lee. Anytime.

All right. Professor Wright, let us get back to you and the question that I was addressing with you on the first round. Tell me what the Commission meant, what it means in the August 2015 statement when the Commission says it is "less likely" to bring a standalone Section 5 action where other antitrust laws would be sufficient.

Mr. Wright. It is a great question and I think an important one, because I think one of the themes of our conversation--

Chairman Lee. Hit your button, if you would.

Mr. Wright. One of the themes of our conversation across the board has been this relationship between the existing antitrust laws and when we use the standalone authority. In my initial proposed guidelines, my preferred position is if the existing laws address the conduct, we shall not, should not, and should never use Section 5.

That is not the statement that emerged in what is the third prong of the current statement. But it is, I think, a less strong version of what really is in spirit the same attempt, which is to get the agency to acknowledge that where the existing antitrust laws already address conduct, that it is more appropriate for the agency to go to Federal court and use the existing antitrust laws than it is for the agency to use resources for its standalone authority. I think "less likely," at least how I read it--and I want to be careful to say I am not speaking for the--I do not know what was in my colleagues' mind, but I will speak to my view as somebody who voted for that language and thought a lot about it, which is that the "less likely" language is an acknowledgment and recognition by the agency that where the existing antitrust laws apply to and address conduct, there is less of a need for a public enforcement antitrust--a public agency to fill that space, and that it is less appropriate for the agency to target such conduct as a standalone violation.

That is certainly what I meant; I think this falls into the category of the four or five areas where experience with the statement is going to tell us, much like it did with the merger guidelines or the unfair acts or practices guidelines or the deception guidelines, how courts and parties are going to react to these things. I certainly hope that they adopt the interpretation that I favor, but the important point, once again, is I think we have got an agreed-upon message and language that parties, if not pleased with the FTC's interpretation of the statute, can take into court. And I think that is the main benefit of the settlement.

Chairman Lee. Professor Wu?

Mr. Wu. So I regret to say I kind of agree with Professor Wright, which makes our showdown a little bit disappointing. But I think that he makes a good point, which is I think if something is a straightforward Sherman Act Section 1 or Section 2 case, it is true that there is no good reason to bring it as a Section 5 case. I mean, technically it is a Section--we will skip over that little aspect. But, you know, there is really no reason to try to do it, especially if you are just trying to avoid a precedent you do not like or something.

On the other hand, I do not stand--and I think that this is where I do disagree with both the gentlemen to my right. I have had this kind of preemption idea that if it is plausibly or possibly a Sherman Act case, you should not use Section 5. I do not think that is right, and one of the reasons I think that is that there are a lot of clever lawyers in this town, and even more clever economists, and Section 2 is pretty broad, too. I mean, you can call a lot of things--if you have very fancy versions of market definition, you can find a monopoly almost under the kitchen sink. And so it is plausible that almost anything is also plausibly a Section 2 case. But some of those cases I think are better Section 5 cases, and I think the corpus of Section 5 law, which I believe should be developed on the basis of the policy statement, it gets deprived if we say, well, if it could be a Section 2 case, we should not do it.

And I have said earlier that if you do not--if you are concerned about too much follow-on litigation, if you are concerned about treble damages, Section 5 should be your law. You know, you should be someone who thinks seriously about asking the FTC to use this law as opposed to Section 2. Section 2 is a big battleship, you know, kind of remedy. It is heavy. It is meant for breaking up gigantic trusts. I think there are times that Section 5 should be used.

Chairman Lee. Is market power required?

Mr. Wu. For Section 5?

Chairman Lee. For Section 5.

Mr. Wu. Well, Section 5 requires harm, and harm is extremely--competitive harm or harm in the competitive process, and it is very rare that you are going to have competitive harm unless there is market power. You know, if you have a little shop--if you have an anticompetitive practice practiced by, you know, a little hot dog stand, it is only likely to hurt himself. And so I think that in almost any case the FTC would bring--I do not think it should be a strict filter because it is possible someone could do something that would, for example, destroy a standards process, which would have a huge impact without having their own market power. But in almost all the cases, market power would be necessary to finding the kind of anticompetitive effects that the policy statement requires.

Chairman Lee. Professor, do you agree?

Mr. Melamed. No, I do not think I agree, or I disagree with much, I think, of what Professor Wu just said.

When you have a matter that could be brought under the Sherman Act, maybe a difficult case, an unprecedented case, but it could be brought under the Sherman Act, and you instead bring it under Section 5, what you give up is the opportunity to make Sherman Act precedent that can then be enforced by private plaintiffs, by both antitrust agencies, by State governments around the country, and that will for that reason serve as an effective deterrent of similar kinds of anticompetitive conduct by other parties in the future and will really promote competition throughout the economy.

If you bring it under Section 5, you do not have that benefit. So you are really bringing a one-off case involving the individual defendants, and no more than that. And proponents of Section 5 make the point that Professor Wu alluded to in defense of it, in defense, I guess, of bringing novel, unanticipated cases under Section 5. They say, well, there is no treble damage liability so what is the harm to the unexpecting defendant? Well, if there is no deterrent benefit, then all you are talking about is bringing a case to regulate two companies. And I think the premise is wrong in any event, because I can tell you, as a lawyer who has represented parties in Section 5 proceedings, the injunctive remedies that the Commission has sought in those proceedings in many ways, in some cases, are much more worrisome to companies and potentially much more destructive to their business than any exposure to treble damages.

So I do not think Section 5 is as toothless as Professor Wu says, and yet I do think it still has the fundamental problem that it is now widely enough enforced so that cases under Section 5 have the benefit of promoting the evolution of the Sherman Act, which really does serve a deterrence function to promote competition throughout the economy.

Chairman Lee. Anything to add, Professor Wright?

Mr. Wright. I think I agree with both of them, so my answer will be boring. So I will stop.

Chairman Lee. Okay. Ms. Reeves?

Ms. Reeves. I would just add, as the sort of debate back and forth here suggests, when I saw that language and having not been at the Commission, part of my interpretation of "less likely" is that there is a very practical issue, which is to say it is unclear in many cases if you could bring a case under Section 1 of Section 2. And it is not simply is there a question of whether or not we could prevail. It is a question of whether or not the facts and circumstances are something that Section 1 or Section 2 contemplated.

And so I think if you have a standard that says the Commission is not going to bring an act or practice unless--challenge an act or practice unless it could not be brought, you generate a huge internal discussion as to whether or not you could. And my sense if you are having that debate anyway. So my interpretation of that language was that it was to address this practical problem of not knowing whether or not Section 1 or Section 2 would support a cause of action.

And just in response to a point Professor Melamed made, so to the extent Section 5 is used in these contexts of high-tech companies to go after novel conduct, I actually think there is a benefit to the fact that you are not subjecting those companies to the follow-on class actions, but also creating a body of law well beyond Section 5, because people are not on notice yet. So I think Section 5 does potentially serve a more conservative vehicle for challenging novel conduct.

Chairman Lee. Thank you.

Senator Klobuchar?

Senator Klobuchar. I am fine. I really appreciate all of your answers, and it has been a lively and interesting hearing. Thank you.

Chairman Lee. Senator Tillis?

[No response.]

Chairman Lee. I want to thank all of you for coming. This has been very enlightening, and we have had great lively and civil discourse. I appreciate it very much.

The Subcommittee will stand adjourned.

[Whereupon, at 4:06 p.m., the Subcommittee was adjourned.]

C O N T E N T S