

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

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

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

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

24 The fundamental contribution of the 2015 statement is
25 that it aligns the FTC's unfair methods authority with

1 modern antitrust analysis by excluding considerations of
2 non-economic goals, by tethering it to the rule of reason
3 and rigorous economic analysis and evidence that is the
4 lodestar of antitrust analysis under the traditional
5 antitrust laws, and by acknowledging that the FTC should
6 avoid using its standalone authority to reach conduct
7 already addressed by the existing antitrust laws.

8 There are indeed open questions about how the statement
9 will be applied, but the concepts ~~in the underlying~~
10 ~~antitrust laws--excuse me,~~ articulated in the traditional
11 antitrust laws ^{provide} ~~poverty~~ a good guide for interpretation of
12 the Section 5 Statement and are concepts that antitrust
13 lawyers have been counseling clients with for decades, if
14 not a century.

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

21 First, let me say that I do believe congressional
22 oversight remains critical and ensures the agency does not
23 return to prior abuses caused by ^{overly} ~~overlay~~ expansive
24 interpretations of its authority. To be clear, I do believe
25 the 2015 statement is sufficient to constrain most of those

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

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

6 [The prepared statement of Mr. Wright follows:]

1 the FTC Act to challenge an act or practice as an unfair
2 method of competition? Why, or why not?

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

6 Senator Hatch. Yes.

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

1 Section 5.

2 Mr. Wright. May I briefly answer the question?

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

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

20 Senator Blumenthal. Thank you.

21 Thanks, Mr. Chairman.

22 Chairman Lee. Senator Schumer.

23 Senator Schumer. Well, thank you, Mr. Chairman, and I
24 want to thank you all for being here. And I am, sadly, not
25 a member of this Subcommittee any longer, but I appreciate

1 Chairman Lee. Hit your button, if you would.

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

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