

Comments of

TechFreedom

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INTRODUCTION

On May 18, 2023, four of TechFreedom’s legal scholars delivered remarks at the FTC’s Open Commission Meeting. Their oral remarks are presented here, lightly edited for clarity.

I. Remarks of Berin Szóka

I’m Berin Szóka, President of TechFreedom. In 2011, President Barack Obama declared: “Our regulatory system must allow for public participation and an open exchange of ideas.”¹ These are two different things, and the FTC isn’t really doing either.

In 2015, the FTC issued its first policy statement on unfair methods of competition. It recently rescinded and replaced that statement.² It never sought public comment, as it’s done on merger guidelines. But it *should* have. Former Democratic FTC Chair Bob Pitofsky said so in 2008,³ as did Republican Commissioner Maureen Ohlhausen in 2015.⁴

Open-mic sessions are no substitute for written comments. But comments aren’t enough. The FTC needs to hear a back-and-forth. That’s why the Federal Communications Commission has *required* reply comments in *all* rulemakings for 75 years.⁵ The FTC itself allowed for the filing of rebuttals before the Magnuson-Moss Act required them.⁶

¹ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011). *See also* Office of the Press Secretary, *Executive Order 13563—Improving Regulation and Regulatory Review*, THE WHITE HOUSE (Jan. 18, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improvingregulation-and-regulatory-review>.

² Press Release, Fed. Trade Comm’n, *FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act* (July 1, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act>; Press Release, Fed. Trade Comm’n, *FTC Issues Statement of Principles Regarding Enforcement of FTC Act as a Competition Statute* (Aug. 13, 2015), <https://www.ftc.gov/news-events/news/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act-competition-statute>.

³ Transcript of Fed. Trade Comm’n Workshop, *Section 5 of the FTC Act as a Competition Statute* at 67 (Oct. 17, 2008) (“If the FTC, by the way, is going to publish a rule along this line or any line, it should be put out for public comment so that people can react to it.”) (Robert Pitofsky).

⁴ Dissenting Statement of Commissioner Maureen K. Ohlhausen Regarding the FTC Act Section 5 Policy Statement at 5 (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735371/150813ohlhausendissentfinal.pdf

⁵ 47 C.F.R. § 1.213(c) (1958). The FCC’s rule is now codified at 47 C.F.R. § 1.415(c) (2022).

⁶ Prior to the enactment of the Magnuson-Moss Act, the FTC already “did, as a matter of actual practice, offer far more in the way of procedural privileges” than was required by Section 553 of the Administrative Procedure Act. *See* William D. Dixon, *Rulemaking and The Myth Of Cross-Examination*, 34 ADMIN. L. REV. 389 (1982). As Assistant Director for Rules and Guides and Chief Presiding Officer, Dixon had presided over the FTC’s Mag-Moss hearings. “Without exception,” he explained, the FTC “held hearings on proposed rules, afforded a rebuttal period before the record closed, and provided an opportunity to submit questions to the presiding officer to be asked of witnesses testifying at the hearings.” *Id.* at 393.

TechFreedom recently requested a rebuttal round in the non-compete rulemaking, the most significant in FTC history.⁷ The Commission has ignored us.

Workshops could also facilitate an open exchange of ideas, but only if the Commission gives participants enough time to explore hard issues. The series of 14 workshops organized by my colleague Bilal Sayyed in 2018 and 2019 offers a good model. Most were multiday.

Most critical will be how the FTC conducts the hearings required by the Magnuson-Moss Act in consumer protection rulemakings. The Commission recently released the agenda for the first Mag-Moss hearing held in a new rulemaking in decades.⁸ Thirteen speakers get just five minutes each. Claiming that there were no disputed issues of material fact, the Commission authorized no cross-examination.⁹ So the hearing officer will be merely a timekeeper. That's not a hearing; it's just another open-mic session.

Despite broad consensus on stopping impersonation fraud, hard questions remain on how to craft a rule that won't affect comedians, actors, or even kids' Halloween costumes. If the Commission won't allow a real exchange of ideas even on such an uncontroversial rulemaking, why should anyone expect it to do so in more complex rulemakings, such as commercial surveillance?

The Commission must do more to meet President Obama's standard for open and participatory government.

II. Remarks of Andy Jung

I'm Andy Jung, a Legal Fellow at TechFreedom.

Firms like Alphabet, OpenAI, and Stability AI provide AI tools to the public for no charge. These AIs help users accomplish a wide variety of tasks, including writing code, conducting research, and generating images of French bulldogs painted by Rembrandt.¹⁰

⁷ Letter from TechFreedom to Lina Khan, Chair, FTC, et al. (Mar. 23, 2023), <https://techfreedom.org/wp-content/uploads/2023/03/FTC-Noncompetes-Reply-Comments-Letter.pdf>.

⁸ Trade Regulation Rule on Impersonation of Government and Businesses, Notice of Informal Hearing, 88 Fed. Reg. 19024 (Mar. 30, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-03-30/pdf/2023-06537.pdf>.

⁹ *Id.* at 19025.

¹⁰ Christopher McFadden, *ChatGPT: 30 incredible ways to use the AI-powered chatbot*, INTERESTING ENGINEERING (Feb. 1, 2023, 1:00 PM), <https://interestingengineering.com/innovation/chatgpt-30-incredible-ways-to-use>; "Early Thoughts on Generative AI", Prepared Remarks of Commissioner Alvaro M. Bedoya Before the International Association of Privacy Professionals at 4 (Apr. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/Early-Thoughts-on-Generative-AI-FINAL-WITH-IMAGES.pdf.

Lawmakers clamor for new laws governing AI. This week, several senators proposed a new regulatory agency.¹¹ But the notion that “AI is unregulated” is a “myth.”¹² The FTC already oversees AI, as Chair Khan and Commissioner Bedoya have noted.

In April, Chair Khan and officials from the DOJ, CFPB, and EEOC released a joint statement asserting that their “agencies’ enforcement authorities apply to” AI.¹³ Specifically, the FTC’s unfair and deceptive trade practice laws apply.¹⁴

The Commission may initiate enforcement actions against AI companies for deceptive claims¹⁵ and “unfair” actions which substantially injure consumers.¹⁶ Additionally, the Commission may promulgate rules prohibiting specific unfair or deceptive AI practices.¹⁷ Either way, the Commission would have to show that the practice “is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”¹⁸

AI tools provide a variety of benefits to consumers and competitors in the marketplace. The Commission must weigh these benefits as it continues to probe the depth and breadth of its authority over AI. In that vein, I encourage the Commission to consider establishing a Federal Advisory Committee to inform and advise the agency’s regulatory agenda on this new and innovative technology.

¹¹ *Oversight of A.I. Rules for Artificial Intelligence: Hearing Before the Subcomm. on Privacy, Technology, and the Law of the S. Comm. on the Judiciary*, 117th Cong. (2023) (statements of Sen. Lindsey Graham, Sen. Cory Booker, & Sen. Peter Welch), <https://www.judiciary.senate.gov/committee-activity/hearings/oversight-of-ai-rules-for-artificial-intelligence>; *Transcript: Senate Judiciary Subcommittee Hearing on Oversight of AI*, TECH POLICY PRESS (May 16, 2023), <https://techpolicy.press/transcript-senate-judiciary-subcommittee-hearing-on-oversight-of-ai/>.

¹² Bedoya, *supra* note 11, at 15.

¹³ Lina Khan et al., JOINT STATEMENT ON ENFORCEMENT EFFORTS AGAINST DISCRIMINATION AND BIAS IN AUTOMATED SYSTEMS at 1 (Apr. 25, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-chair-khan-officials-doj-cfpb-eoc-release-joint-statement-ai>.

¹⁴ 15 U.S.C. § 45; Bedoya, *supra* note 11, at 15.

¹⁵ FED. TRADE. COMM’N, FTC POLICY STATEMENT ON DECEPTION (1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

¹⁶ FED. TRADE. COMM’N, FTC POLICY STATEMENT ON UNFAIRNESS (1980), <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness> (“To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.”).

¹⁷ 15 U.S.C. § 57a.

¹⁸ 15 U.S.C. § 45(n).

III. Remarks of Santana Boulton

I'm Santana Boulton, Legal fellow at TechFreedom.

The overabundance of data in the modern world, warned Swiss scientist Conrad Gessner, is overwhelming; it is “confusing and harmful” to the mind.¹⁹ Of course, he was talking about the printing press, not artificial intelligence.²⁰ The Commission has been asked to stop the release of AI tools.²¹ But applying the precautionary principle to AI development²² would have real costs. And Section 5(n) of the FTC Act requires the FTC weigh “countervailing benefits to consumers or to competition.”²³

Competition in AI is increasingly global. Cracking down on AI could help America’s global rivals and harm our national security. American companies are already using automatic threat assessment and developing tools to detect malware and data breaches.²⁴ AI tools can help protect American weapons systems from cyberattack.²⁵

Consumers also stand to benefit from AI innovation. Consider AI’s medical benefits. New drug development is extremely expensive and time consuming.²⁶ If even *one* treatment is discovered with the help of AI tools, those benefits must be accounted for.

¹⁹ Vaughan Bell, *Don't Touch That Dial!*, SLATE (Feb. 15, 2010, 7:00 AM), <https://slate.com/technology/2010/02/a-history-of-media-technology-scares-from-the-printing-press-to-facebook.html>.

²⁰ *Id.*

²¹ *In the Matter of OpenAI, Inc.*, CAIDP Complaint (Mar. 30, 2023). See also Press Release, Center for AI and Digital Policy, CAIDP Files Formal Complaint with FTC (Mar. 30, 2023), <https://www.caidp.org/cases/openai/> (“CAIDP urges the FTC to open an investigation into OpenAI, enjoin further commercial releases of GPT-4, and ensure the establishment of necessary guardrails to protect consumers, businesses, and the commercial marketplace.”).

²² See Makena Kelly, *Congress hates Big Tech—but it still seems optimistic about AI*, THE VERGE (May 16, 2023, 5:18 PM), <https://www.theverge.com/2023/5/16/23726119/congress-ai-hearing-sam-altman-openai> (“Some lawmakers have already introduced bills to restrict the use of AI across industries.”).

²³ 15 U.S.C. § 45(n) (“The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and *not outweighed by countervailing benefits to consumers or to competition*. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.”).

²⁴ See Brandon Pugh, *AI's key role in cybersecurity and national security*, THE HILL (May 16, 2023), <https://thehill.com/opinion/congress-blog/4003351-ais-key-role-in-cybersecurity-and-national-security/>.

²⁵ *Id.* (“However, the notion that these threats cannot be addressed without AI and the benefit it provides is gaining traction.”).

²⁶ Ekaterina Pesheva, *Can AI transform the way we discover new drugs?*, HARVARD MEDICAL SCHOOL (Nov. 17, 2022), <https://hms.harvard.edu/news/can-ai-transform-way-we-discover-new-drugs>.

More generally, research suggests that AI tools could help less skilled workers the most, increasing competition and rebuilding the middle class.²⁷ This Commission cannot afford to discount this new technology's benefits to low-wage workers.

Like any new technology—but even more so—AI will create a wide variety of both costs and benefits. The FTC can't explore these tradeoffs through 2-minute blocks of prepared remarks. It needs to hold workshops that allow experts from multiple fields and with diverse perspectives to dialogue with each other. And in rulemakings, the FTC will benefit from the open exchange of ideas that is only possible if the Commission allows for reply comments.

IV. Remarks of Bilal Sayyed

In November 2018, the Office of Policy Planning, under the direction of then-Chairman Simons, and working closely with the Bureaus of Competition, Consumer Protection and Economics, held a two-day hearing on *Algorithms, Artificial Intelligence, and Predictive Analytics*.²⁸

Those two days of presentations and discussion remain the best public discussion of how AI and related tools will impact the Commission's mission. The Commission should build on that record.

In 2019, after review and discussion of the record with my then-colleagues in OPP, I did not believe we²⁹ had sufficient expertise in or with these tools to advise the Commission with

²⁷ Greg Rosalsky, *What if AI could rebuild the middle class?*, NPR PLANET MONEY (May 9, 2023, 6:30 AM), <https://www.npr.org/sections/money/2023/05/09/1174933574/what-if-ai-could-rebuild-the-middle-class>.

²⁸ This was the 7th of 14 hearings on Competition and Consumer Protection in the 21st Century. For materials related to the hearings, see *Federal Trade Commission Announces Hearings on Competition and Consumer Protection in the 21st Century* (Jun. 20, 2018), https://www.ftc.gov/system/files/attachments/hearings-competition-consumer-protection-21st-century/hearings-announcement_0_0.pdf and *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/system/files/attachments/hearings-competition-consumer-protection-21st-century/hearings-announcement_0_0.pdf. For materials related to the hearing on *Algorithms, Artificial Intelligence and Predictive Analytics*, see *FTC Hearing # 7: The Competition and Consumer Protection Issues of Algorithms, Artificial Intelligence, and Predictive Analytics* (Nov. 13-14, 2018), <https://www.ftc.gov/news-events/events/2018/11/ftc-hearing-7-competition-consumer-protection-issues-algorithms-artificial-intelligence-predictive>. In conjunction with this hearing, OPP sought public comment on more than two dozen enforcement and policy questions. OPP also received presentations from or had meetings with persons and organizations we thought useful to inform our substantive understanding of the issues up for discussion.

²⁹ That is, the staff of OPP and, more broadly, the staff of the Commission, to whom I mean no disrespect. This was simply an area where the agency had very limited experience and knowledge. I believe this is still true, notwithstanding the Commission's success in retaining experts in AI. My understanding is that currently the agency has only ten staff members that it characterizes with the undefined term "technologists," although I also understand it is committed to hiring more such staff. Interview of FTC Chair Lina Khan at the *On With Kara Swisher* podcast (May 15, 2023), <https://nymag.com/intelligencer/2023/05/on-with-kara-swisher-ftc-chair-lina-khan-on-ai-and-musk.html>.

any depth of sophistication on how AI would or should impact the Commission's law enforcement or policy agenda and how the Commission's law enforcement and policy agenda would affect the development of AI and related tools.

As then-Director, I was preparing a recommendation to the Commission that it establish a standing Federal Advisory Committee³⁰ to inform and advise the Commission staff, the Chairman, and Commissioners on the likely impact of AI on the Commission's law enforcement and policy agenda, and the impact of the Commission's agenda on the development of AI.

The Commission's rules implementing the requirements of FACA require, among other things, that an advisory committee have broad participation³¹, meet in public³², and receive comment from the public.³³ The advisory committee can also be charged with answering a series of questions and to produce one or more final reports or recommendations to the Commission.³⁴

³⁰ Federal Advisory Committee Act, 5 U.S.C. App 1, et. seq. The Commission has incorporated into its rules the requirements of the Federal Advisory Committee Act. See 16 C.F.R. § 16.1, et. seq. The Commission has rarely used such advisory committees. I believe the last such committee was chartered in 1999, and it reported to the Commission in 2000. See *FTC Establishes Advisory Committee on Online Access and Security* (Dec. 16, 1999), <https://www.ftc.gov/news-events/news/press-releases/1999/12/ftc-establishes-advisory-committee-online-access-security> and *Final Report of the FTC Advisory Committee on Online Access and Security* (May 15, 2000), <https://govinfo.library.unt.edu/acoas/papers/finalreport.htm>. The Commission has recently established an advisory committee pursuant to the Stop Senior Scams Act with respect to scams affecting seniors. *FTC to Convene First Meeting of Scams Against Older Adults Advisory Group on Sept. 29* (Sep. 12, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-convene-first-meeting-scams-against-older-adults-advisory-group-sept-29>.

³¹ 16 C.F.R. § 16.3(a)(3).

³² 16 C.F.R. § 16.7(e).

³³ 16 C.F.R. § 16.7(g).

³⁴ 16 C.F.R. § 16.6.

No recommendation was made to the Commission,³⁵ but I believe this remains a good idea, and I encourage this Commission to give it serious consideration and to solicit, from the public, recommendations of persons to participate in such a committee on AI. It is not an alternative to the hiring of more technologists or other experts, but a complement and supplement that would have limited impact on the Commission's budget.³⁶

Respectfully submitted,

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³⁵ I did not forward my draft recommendation because of the disruption caused by COVID.

³⁶ Members of an advisory commission are not compensated. 16 C.F.R. § 16.16.