

TECHFREEDOM

LAW FOR A DYNAMIC FUTURE

Comments of

TechFreedom

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At the

FTC Open Commission Meeting

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INTRODUCTION

On March 21, 2024, three 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. Comments of Berin Szóka

I’m Berin Szóka, President of TechFreedom.

In 1914, one lawmaker promised that the FTC Act would take “business matters out of politics.”¹ Yet the current Chair says “all [of the Commission’s] decisions are political.”²

In 1935, the Supreme Court said the Commission “must . . . act with entire impartiality.”³ Yet the current chair has repeatedly ignored concerns about the Commission’s impartiality and her own.

The Supreme Court also said Congress expected the FTC “to be non-partisan.”⁴ But the Commission has been a purely partisan body for the last year—for the first time in its history.⁵ Even before the two Republican Commissioners resigned, the Chair ran the agency as if they simply didn’t exist. Most petty was delaying publication of dissenting opinions until *after* the Commission had issued its press release—so that most media coverage wouldn’t include both sides.

This is worlds away from the apolitical “body of experts” the Supreme Court described in *Humphrey’s Executor*.⁶ If, as constitutional scholars widely expect, the Court overrules the case,⁷ the President could remove Commissioners at will.

¹ 51 Cong. Rec. 8857 (1914) (remarks of Sen. Morgan upon creation of the Federal Trade Commission).

² Nancy Scola, *Lina Khan Isn’t Worried About Going Too Far*, *Intelligencer* (Oct. 27, 2021), <https://nymag.com/intelligencer/article/lina-khan-ftc-profile.html>; Fox Business, *Break up Amazon as a monopoly?*, YouTube (June 23, 2017), https://www.youtube.com/watch?v=VI_DEYqWxqs.

³ *Humphrey’s Executor v. U.S.*, 295 U.S. 602, 623 (1935).

⁴ *Id.* at 624.

⁵ FED. TRADE COMM’N, COMMISSIONERS, CHAIRWOMEN AND CHAIRMEN OF THE FEDERAL TRADE COMMISSION (2023), https://www.ftc.gov/system/files/attachments/commissioners/commissioner_chart_timeline.pdf. See also Letter from TechFreedom to Chair Khan and Commissioners Slaughter, Wilson, and Bedoya (Mar. 23, 2023), <https://techfreedom.org/wp-content/uploads/2023/03/FTC-Noncompetes-Reply-Comments-Letter.pdf>.

⁶ *Humphrey’s Executor*, 295 U.S. 602, 624.

⁷ Aaron L. Nielson & Christopher J. Walker, *Congress’s Anti-Removal Power 4* (Center for the Study of the Administrative State, Working Paper No. 21-46, 2021), <https://administrativestate.gmu.edu/wp-content/uploads/2022/08/Nielson-Walker-Congress-Anti-Removal-Power.pdf> (“observers across the

The FTC's only hope of saving *Humphrey's Executor* is to function much more like the FTC of 1935. Minority Commissioners might well lose every vote, but they should at least *get* a vote, have full access to Commission documents, and not have their dissenting opinions buried. Both sides should want at least this much when they're not running the Commission—whether or not better process ultimately saves *Humphrey's Executor*.

Even if Congress can't stop the President from firing Commissioners, it *can* require the President to explain his rationale.⁸ Since 1864, such a requirement⁹ has helped to avoid the removal of any Comptroller of the Currency¹⁰ and has protected agency Inspectors General since 1978.¹¹ Requiring Congressional hearings would also help raise the political cost of Presidential meddling.¹²

Now is the time for both such amendments to the FTC Act and for internal process reforms—*before* we know who will control the FTC for the next four years. If five Commissioners speak with one voice, lawmakers just might listen.

II. Comments of Bilal Sayyed

Until the Commission's UMC Statement of Nov 22 is rescinded or revised, I encourage the Commission to apply it outside the scope of the Sherman Act, and only where competitive harm—at least—can be presumed with high confidence.

The AMERCO matter from 1985 might suggest a good set of facts. There, the Commission alleged, in part, that AMERCO, the parent company of U-Haul, used its holdings of the debt of Jartran, a competitor of U-Haul, to prevent Jartran from reorganizing under Chapter 11 of

ideological spectrum predict that the Court is preparing to overrule *Humphrey's Executor* outright, or at least limit it to its facts").

⁸ *Id.* at 5 ("the Constitution itself gives Congress an anti-removal power that is separate from Congress's disputed ability to enact statutory removal restrictions. Thus, even if the Court were to toss out *Humphrey's Executor* altogether, Congress's anti-removal power would allow some agency independence. This anti-removal power is found in Congress's ability to discourage the White House from exercising its removal power.").

⁹ 12 U.S.C. § 2.

¹⁰ Nielson & Walker, *supra* note 7, at 6-7.

¹¹ 5 U.S.C. § 3(b). Nielson & Walker, *supra* note 7, at 6 ("Although presidents occasionally remove inspectors general despite having to provide reasons, it is remarkable how often presidents do not remove inspectors general, even after a presidential transition.").

¹² Nielson & Walker, *supra* note 7, at 7 ("Congress can . . . strategically precommit to procedures that raise the White House's political costs, such as by ensuring (by rule or perhaps even statute) that removed officials will receive a public opportunity to defend themselves in Congress and criticize the President's "mal-administration.").

the Bankruptcy Code. According to the complaint, U-Haul and AMERCO “engaged in acts and practices that were inconsistent with U-Haul’s legitimate interests as a creditor, and in fact were intended primarily to delay or prevent Jartran’s reorganization as a competitor.”¹³

This is within the more general theory of “cheap exclusion” that runs through cases like Rambus, Unocal, and Biovail during the tenure of Chairman Muris, none of which were standalone Section 5 cases, but which seem at least presumptively anticompetitive without necessarily meeting the requirements of a monopolization claim.

Separately, today the Commission will discuss the staff’s report on the causes behind supply chain disruptions. One factor that may be relevant is consolidation among non-U.S. suppliers that supply into the United States.

As the Commission considers the staff’s report, I hope it revisits the Commission-created “foreign-to-foreign” exemption in the HSR Rules,¹⁴ as I proposed at the October 2022 open meeting.¹⁵ In short, acquisitions of a non-controlling interest in a non-U.S. entity, by a non-U.S. person, regardless of the amount of sales into the United States either or both firms have, are exempt from the notice and waiting period requirements of the HSR Act.

With the U.S. supply chain being substantially foreign-based, this exemption should be reconsidered.

III. Comments of Andy Jung

Good morning. I’m Andy Jung, Associate Counsel at TechFreedom.

In February, the Commission asked for further public comment on amending the impersonation rule.¹⁶ Today, I want to address the elephant in the Zoom room: Section 230.

The Commission proposes *greatly* expanding the rule’s scope, first to prohibit impersonation not only of businesses and government officials, but also private citizens. Second, liability would extend “to parties who provide goods and services with . . . reason to know that those

¹³ AMERCO, 109 FTC 135, 135 (1987).

¹⁴ 16 CFR 802.51(b)(1).

¹⁵ *TechFreedom Delivers Remarks at FTC Open Meeting*, TECHFREEDOM (Oct. 20, 2022), <https://techfreedom.org/techfreedom-delivers-remarks-at-ftc-open-meeting/>.

¹⁶ Trade Regulation Rule on Impersonation of Government and Businesses, 89 Fed. Reg. 15072 (proposed Mar. 1, 2024) (to be codified at 16 C.F.R. 461), <https://www.govinfo.gov/content/pkg/FR-2024-03-01/pdf/2024-03793.pdf>.

goods or services will be used in” unlawful impersonations.¹⁷ The proposed rule speaks of “Means and Instrumentalities” of impersonation but does not provide definitions.¹⁸

These broad terms would cover services like Photoshop, as well as generative AI tools, which may be the Commission’s primary target.¹⁹ The Commission proposes penalizing *the providers of online services* used by third parties to generate impersonations like AI-generated deepfakes.

But Section 230, a federal law, immunizes Internet services from liability for content they are not responsible for developing.²⁰ Lawmakers and public policy experts are currently debating to what extent Section 230 immunizes generative AI providers from liability for their tools’ outputs.²¹ The courts have not yet ruled on these questions.

If the FTC issues anything like the proposed rule, it will have to litigate the Section 230 question. Yet the supplemental notice does not discuss or seek comment on Section 230 *at all*.

The Commission should not short-circuit the comment process. Stakeholders can provide feedback on whether the rule is sound policy *and* help the FTC defend the rule in court if it decides to proceed. Why *wouldn’t* the FTC want that kind of help?

Respectfully submitted,

¹⁷ *Id.* at 15073.

¹⁸ *Id.* at 15083.

¹⁹ The Commission’s press release on the rulemaking hints at the generative AI angle. *FTC Proposes New Protections to Combat AI Impersonation of Individuals*, FTC (Feb. 15, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-proposes-new-protections-combat-ai-impersonation-individuals>. The supplemental notice, however, only mentions artificial intelligence once, in a footnote. Trade Regulation Rule on Impersonation of Government and Businesses, 89 Fed. Reg. 15072, 15082 n.98. (proposed Mar. 1, 2024) (to be codified at 16 C.F.R. 461).

²⁰ 47 U.S.C. § 230.

²¹ Letter from TechFreedom to Majority Leader Schumer and Minority Leader McConnell (Dec. 11, 2023), <https://techfreedom.org/wp-content/uploads/2023/12/S.-1993-Coalition-Letter-December-11-2023.pdf>

[E]ven proponents of Section 230 disagree on whether and to what extent the law immunizes GenAI providers from treatment as the publisher of their tools’ outputs. While some argue that Section 230’s protections logically extend to the output of GenAI tools, others—including Section 230’s authors—take the position that GenAI tools create new content that the tools’ purveyors are responsible for ‘developing,’ at least ‘in part.’ Still others would argue that the question of whether Section 230 extends to GenAI output depends on the context in which it was used.

_____/s/____

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