Technology Policy Institute

Fireside Chat with the New FTC Commissioners

2024 TPI Aspen Forum

Panelists:

Andrew Ferguson, U.S. Federal Trade Commission

Melissa Holyoak, U.S. Federal Trade Commission

Moderator:

William Kovacic, Global Competition Professor of Law and Policy, Professor of Law and Director, George Washington University

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Event page: **Fireside Chat With the New FTC Commissioners (youtube.com)**

Scott Wallsten:

All right. Good morning, everyone. Uh. I hope you had a good day yesterday, had a good evening last night, had fun, and are ready to start the day again. Today we're going to talk antitrust, major questions, doctrine media, free speech, and more. I just want to note, at the beginning I know lots of you have flights this afternoon. Um. But remember, the Aspen Airport is very close and very small. If you leave here even within an hour of your flight, um you'll have plenty of time to sit around at the airport doing nothing. So, you know, don't miss things because you think you have to be at the airport so early and if you miss your flight don't, don't blame me.

Um. Now one other thing quickly before we start. There was you know there's so much talk about generative AI yesterday and how people integrated into their workflows or not. I though it would be interesting to do a poll, so if you go to Slido, I don't know if you can pull that up on the board on the screen, too. You should um be able to see this poll. Uh, asking how often you use generative AI in your daily work.

So, please go to that poll and vote if you, uh and then you'll have a little piece of information for the next cocktail party you go to, um and we will pretend that this is statistically valid in a um you know an actual representation of the US population. Um. So, while you're still doing that, let me just uh set things up for the next, for the next panel which um is a conversation with uh FTC commissioners. We are very, we're honored to have them here. So, uh, Bill Kovacic will be doing the, will be the moderator. He's the uh, global competition professor of law and policy and professor of law and director of competition law center at George Washington University and of course, we're, we're thrilled to have um Commissioner Andrew Ferguson from the Federal Trade Commission and Commissioner Melissa Holyoak, also commissioner from the FTC. Uh and so, I will now just hand it over to Bill.

William (Bill) Kovacic:

Scott, uh, thanks to you and to Tom for putting this together and giving us the wonderful privilege of participating. And thank you both, Commissioner Andrew and Commissioner Melissa, for participating in the conversation. Uh, those of you who follow administrative law and government regulation know that we're in a period of the Supreme Court rethinking a number of basic propositions about the administrative process. Some of these have dealt very intimately with the FTC's authority in the AMD case, involving the Commission's ability to obtain monetary relief using Section 13B of the Federal Trade Commission Act. The FTC, by a narrow margin of 9-0, lost its fight to preserve that authority in an opinion written by Steven Breyer, who was the Commission's very best friend on the court at the time.

In the Axon case, which dealt with a somewhat more technical issue about the timing of challenges to the constitutionality of the FTC's framework—a case called Axon—the FTC, once again by a narrow margin of 9-0, lost. Uh, in an opinion written by Justice Kagan, not since 1931

had the FTC appeared before the Supreme Court and gotten shut out. Uh, if you ask when the FTC has, in two consecutive Supreme Court opinions, gotten exactly zero votes, that would be never. That's not a good sign, uh, for the future success of the agency standing before the court and an indication of its skepticism.

But there's more. Uh, Loper casts aside Chevron, and Jarkesy has some powerful things to say about the administrative adjudication process and how it operates. Uh, the Celo Law case, uh, earlier—though not directly dealing with the FTC—had some interesting and provocative hints about what the court would think about other pillars of the modern administrative state, including *Humphrey's Executor*. Uh, an important case is the CFB case dealing with the funding of the CFPB, in which the funding mechanism, which gives the CFPB remarkable insulation from congressional oversight and funding and appropriations decisions, survived.

Uh, so an opening question I'd like to ask our commissioners is, uh, to borrow a phrase from Churchill: is the FTC sailing into a gathering storm here? Uh, a gathering storm that poses some degree of peril to its basic operations, functioning, and effectiveness at a high level—is that happening? Andrew, can I begin with you?

Andrew Ferguson:

Sure. Um thanks, Bill. Uh and thanks to the institute for having me. Um, I, I, I'll stay out of the sailing metaphors and instead I, I'll say this: and I'm not going to call it a revolution in administrative law; it's sort of like a restoration. I think the majority of the court sees this as restoration rather than revolutionary. Uh and I clerked on the court in OT16, which was sort of right um when this was beginning to mature. In my view, *Free Enterprise Fund* is like the um starting gun to the to the restoration. It was the court um, sort of announcing for the first time we're going to start taking um the Appointments Clause and the removal power a lot more seriously than we had been taking it and then other stuff started to follow.

But of all the things that the court seems to care about in kind of restoring presidential authority over the administrative state and restoring congressional authority over policymaking, it's things like appointment and removal. Well, the FTC has an issue with that. *Humphrey's Executor* was about the FTC. Um, it's about administrative adjudication of private rights. Well, the FTC does that a lot, so that issue also captures the FTC. Um, uh, and, and uh, you, know claims of expertise — I think you know in terms of Chevron, the Commission doesn't typically invoke Chevron that often to defend its rulemakings. But one of the pillars of Chevron had been um about the allocation of expertise within the executive branch and the use of expertise to answer difficult um policy questions and the court has increasingly, and I think in *Loper Bright* makes very clear where it stands is starting to express pretty substantial skepticism about admin State claims to expertise.

Um, and you know this was sort of a like a bloody shirt that agencies would, would wave in litigation. You know, you'd get a statutory question, and the agency would say, “We're the experts

Congress made us the experts you guys need to defer." And at this point, point, the court is like, "We have substantial sort of like descriptive doubts about your claim to expertise. It is no longer clear to us that a lot of these giant agencies are the experts that they have long claimed and that the administrative States Defenders have long claimed."

And, B, what expertise do you need to interpret texts of statutes? We're judges; this is literally what we're here to do. You guys aren't shedding any light on this. Um, uh, and so sort of the FTC is and also you know skepticism about um invoking sort of highly vague super general grants of rulemaking authority, um, as the basis to make rules — the FTC has that too. And so, all of the things um that the courts have started to care about — and you know, what I view as a restoration of the separation of powers and the allocation of power among the various branches — the FTC has. And so I don't know if we're "sailing into the storm," but insofar as the court is moving in a particular direction, we're right in the middle of where they're going.

William (Bill) Kovacic:

Melissa, do you share the thought that this is uh if not too melodramatically a moment of peril. Is it, is it, is it, a is it a moment of instability and perhaps doubt about the direction and effectiveness of the commission's program?

Melissa Holyoak:

I think that's a great question. Um just to add to what Andrew was talking about with Chevron, I we have dozens of statutes. Um, I'll just give you an example of one just recently a couple months ago. We have it's called the Healthcare Breach Notification, and we put out a rule. I dissented from that. And, and the question was how to define healthcare provider? And so, the example I gave, um in my descent was the, the rule provided such a broad definition it would sweep in all kinds of health apps. So, for example, a gas station that might sell Band-Aids in Aspirin that has a loyalty program all of a sudden is now a healthcare provider under this. Um and what I pointed out in my descent was look, you, C-, you have to go back to the statute. Let's look at the statute. And basically, following what Gorsuch said in Loper, which is please look at the statutory text, look at the linguistic context, look at Cannons of, of statutory interpretation and, and that's what we're going to have to do. We're going to have to show our work. We're going to have to go in and not just have some reasonable um explanation of why our, our rule looks, uh can fall within the statute. But that our that our uh explanation is the right one and we can do what we're trying to do. And in in that case, I um we were I think we are way off in terms of trying to follow the statutory interpretation and the problem is that when we take such broad sweeping definitions, and we try and do these things it really undermines our legitimacy. And so going into this storm we're taking on lots of water. I'll jump into a metaphor. I love, I love jumping into metaphors.

William (Bill) Kovacic:

Yeah. He's wrong that was a good one. Yes, we could have used mountain climbing, something else but it was a good one, yes.

Melissa Holyoak:

We're jumping in the storm we're taking on tons of water. And we want to go to Congress and, and, and get our you know our 13, our AMG authority back or, or get new authority under privacy and they're not going to give us buckets to get that water out. They're not going to give us anything. So, I think we need to be thinking about that um and the Chevron is going to help us I think get be, it's going to force us to become much more disciplined. We can't live in our agency echo chamber of, of what we think that uh how we should apply the rules.

William (Bill) Kovacic:

I thought you were going, go going to, go directly to the Muhammad Ali boxing act. Which is uh one of the 60 grab bag statutes that the FTC has not to mention horse racing, the Dolphin Protection Act, and a host of others where Congress, I guess the political science metaphor is it's the it's the 'trash can' metaphor where, where do you put it? Give it to them. And there's a lot there uh, uh to, to come back to, to, to Chevron and the way that courts look at agency decisions. Um after Chevron, how does an agency get deference? How does an agency persuade a court that it's got the expertise that Andrew was referring to before?

I sat with a group of federal judges once and asked about Chevron, and they said this is not a recordable conversation, but to us in many ways it doesn't matter. You don't demand deference; you earn it. Uh, how does the Federal Trade Commission, in perhaps a Skidmore world but in a pre-Chevron environment today, earn deference when there is some element of interpretation involved? It's asking the court to take our expertise, our interpretation; we know what we're talking about. How do you earn that deference?

Andrew Ferguson:

I think there are two answers to that. The first is, like, um, *Loper Bright* left open the possibility that, um, I think Adrien Vermes called this retail Chevron rather than wholesale Chevron—the idea that there are particular organic statutes that command courts to provide or to grant deference to agency um resolutions of statutory ambiguity, but not a general sort of superintending administrative law principle. They'll look at a particular organic act to be, "Oh, Congress tells us we need to defer to you." Um, I don't know what that looks like—Congress has never written statutes that way. It wasn't writing statutes that way before Chevron because no one knew Chevron was a thing, and after Chevron, it had no reason to write statutes that way because everyone thought Chevron was taking care of this. So, I don't know what that's actually going to look like as a formal matter, as an informal matter—look, I mean, the FTC is a big-time repeat player in the federal courts, um especially in antitrust cases. You know, in the run-of-the mine

case that the FTC is bringing to, for example, block a merger—you're probably going to wind up with a district judge who's smart and has never considered antitrust law in his or her entire life. I mean, I spent a fair amount of my career selecting and confirming federal judicial nominees. They're all hardworking and smart, but antitrust is a super narrow slice. That's important, but it's very narrow.

William (Bill) Kovacic:

You did not put that at the top of the

Andrew Ferguson:

—no, we—no. And you know, especially, you know, district judges in, in, you know, states outside of the big cities where a lot of the antitrust action tends to happen just won't have much experience with it. And so, when you've got these big billion-dollar mergers, the government saying one thing, the parties saying another, and identically credentialed economists saying the exact opposite things to this judge about the exact same set of data, um, a judge is going, how am I going to resolve this? Um, this, like, substantial—it's effectively like an ambiguity about the world. Like, we're making a prediction about competitive effects. The government says X; the other side says negative X. The government is a repeat player full of civil servants, um, has always gotten a little bit of the benefit of the doubt from judges. Judges will go, look, these people are Congress's experts in this area; this is why they're here. They have to come back to the courts all the time. They're not going to try to bs me. Um, I, you know, I'm going to weigh that a little bit in the balance. Um, that's—there's so there's like a depository of credibility that the agency has with the courts. But when the agency presses, like, very aggressive theories and then gets shellacked in the courts, that draws down from that deposit of credibility, and you don't replenish it until you get a bunch of wins. And so, I think the way that the agency, you know, earns this sort of informal form of deference is, um, it brings good cases, and it wins those cases, and that gets around courts. Court judges read The Wall Street Journal; they know about stuff happening outside of their little districts. Um, and when the agency keeps taking it on the nose in its cases, courts will start to say, you know, why would I trust these guys when they come in in these tough cases that are close? Why would I give them the benefit of the doubt? Um, and you know, I'll speak just for me, but I, I would bet Melissa mostly agrees with me. I see it as part of my role to, like, protect that deposit of credibility when deciding whether to bring cases. And if we've got a case that I think we probably have a good argument, but I don't think we're going to be able to persuade a district judge, I don't see much point in bringing it because we're just going to draw down on that deposit of credibility. The FTC is going to lose both public and judicial credibility, and we can't restore it until we get wins. Um, so I think the formal answer is I don't know what *Loper Bright* defense looks like. The chief didn't say, the concurrences didn't say. I have a hard time, frankly, imagining a statute that would meet what the chief was talking about in *Loper Bright*. But the informal deference I'm talking about, you get by picking up wins. And I

think the agency has taken a couple on the nose for the last four years, and it needs to replenish that deposit.

William (Bill) Kovacic:

Yeah, I, I had a conversation with a member of the Supreme Court, a member of the D.C. Circuit, and I asked them, do agencies have brands when they appear before you? Do they have reputations? And they looked at me and simultaneously said, hell yes! Uh, how long have you lived in Washington? Uh, they said, of course they do, and that either gives you a halo when you walk in the room or a negative halo. Uh, Melissa, you know, Andrew talked about how you have to give them confidence. How do you do in using all of your policymaking tools? You mentioned showing your work, but how do you show that we bring these to bear on these issues and we know what we're talking about, and you should listen to us?

Melissa Holyoak:

Great question, and I'd say just in addition to judicial deference, just deference to create that credibility not just with courts but with Congress, with the public. We need to have good sound economic analysis, and we need to have empirical work. That's why we have an independent Bureau of Economics, and one of our greatest tools that we've used in the past is our 6B studies that we can bring in. We have our expertise; we, we, we collect non-public information; we look at it; we're experts; we put together really wholesome reports. Um, this is—and what I was concerned with—and just a couple of weeks ago, um, I issued a dissent on this. We issued an interim report, uh, on, uh, PBMs, and unlike our fast work, which was fulsome, there was a 2005 report on PBMs that was wholesome, was empirical, was economic-based. This report was not, and um, that was what my dissent laid out. I was, I'm very concerned that we are—H—we have these predetermined conclusions, the sound bites that we want for our press release, and then we come in and fill in the details with, with report, and that's not how we should be doing things. It undermines our credibility not just with courts but with, with Congress, with the public, with markets, with, with private parties on how we're approaching these issues. I think we can—I think that we're not, you know, we're not a sunk ship; we can come back; we can right the path. But we, um, that's why I pointed this out. And I do think that we will, um, be able to finish that report and get the work done, but it needs to get done if we're going to, um, have the confidence of the public.

William (Bill) Kovacic:

I mean, when you look at the original design for the Commission in 1914, this 6B study authority was going to be a crucial tool to providing the empirical foundation for making good judgments about policy and to draw that in in a way that convinces courts. And I think, I think the reputational effect is not just at home; it's abroad. Uh, other institutions around the world read these. These are powerful soft power tools, uh, to be used. That was an important way to use this, and I, I, I, I shared your concern. And looking at the PBM study, it identifies the author simply as

being the Office of Policy Planning. You look at earlier FTC studies and ask, do these people have names? And what you had in the earlier practice is all their names are there. It identifies the people who worked on it, the main contributors. It was both a matter of pride and giving acknowledgment to them, but also accountability. Uh, that is, these are the people, not just in a defined Office of Policy Planning. I, I, I, I did not see that as a way to create again the aura of expertise that would be successful in the future. And I think I think you were right on target in raising questions about that. Um, can we come back to Humphrey for a moment? Um, if it is teetering—and there certainly are signs that it is—does it go? H, that is, if we have this conversation in five years, is it still there? And if it goes, does it matter? Andrew?

Andrew Ferguson:

Uh, I think it's gone. Um, I think Justice Thomas is right that there's basically nothing left after CA law, and I don't think it matters all that much because the ultimate check on the president's appointment and removal, um, has always been political. Um, if the president, you know, decides to, um, decapitate an agency by removing all of its leadership, um, he or she will have to suffer the, like, political consequences of that, and that's the ultimate check. Is, um, if a president wants to ruin an agency or stop its work, it has to answer to Congress, and it's not like Congress has to just take it. Um, I mean, we're not used to this now because of the current state that Congress is in, but Congress used to act collectively to defend its prerogatives against the executive branch all the time. Um, and it would threaten funding for stuff unrelated to whatever the fight was about as a form of leverage, um, to compel the president to heal. Um, and this was, this was like super common. So, uh, I mean, for my, for my own part, I operate under the assumption, um, that the president probably can, can fire me. I'm not saying that if I weren't fired, I wouldn't, you know, try to do Humphrey round two, uh, but, um, I see as the sort of the ultimate check, the same check that every other officer operates under, which is, um, you know, I'm an officer of the United States in the executive branch. Um, the FTC's arrangement within the executive branch is a little unique because it has to have Republican commissioners even if there's a Democrat president.

William (Bill) Kovacic:

There's a political diversification.

Andrew Ferguson:

—that's right—and, at least some scholars have questioned the qualifications requirements for, uh, as a violation of the president's appointment power, but most think they're okay. Um, and if the president, you know, decides to just fire the Republican commissioners as Republicans, A, he still has to appoint Republicans to replace them, and B, he has to suffer the political consequences. Um, and look, I mean, you know, I don't think the agency fared well publicly for the more than a year that it had only Democrat commissioners. It undermined its credibility. Um, Congress was constantly criticizing the FTC as a single party—as you know, basically a single

party servant of the Democrat Party, um, and it wasn't good for the agency. And I think, you know, especially if you polled, like, the staff, for example, they love having Republican commissioners. They love the fact that there's some, um, diversity of thought. They love the fact there are people who push back on, on some of the more aggressive theories. I mean, I've written like 15 statements since I joined the commission, and most of them have been either dissents or concurrent that were basically dissents. Um, and I mean, I did two this week. Um, and you know, and I think that that's, like, that's sort of how the commission is, um, supposed to operate. But at least for my part, I operate under the assumption that the president will fire me if I do something that he thinks is truly firable. And I operate under that assumption because I think the writing has been on the wall for some time that if they get *Humphrey's Executor* back, they're going to say Congress cannot interpose itself between the president and his principal officers. The Executive Branch can't function if Congress is constantly shielding people who are supposed to answer directly to the president, which Melissa and I technically do, from his control. That's how you get a freewheeling independent bureaucracy that ends up answering to nobody.

William (Bill) Kovacic:

Yeah, when I was chair, I thought that five commissioners were four too many. Uh, on many days, they—

Andrew Ferguson: You're not the only chair that thinks that I think.

Melissa Holyoak:

<Laughs>

William (Bill) Kovacic:

No, they tend to—they tend to think that. And at the same time, if you're a mere commissioner, you always think you'd be a better chair than the chair. I mean, that happens all the time, uh, but that's, uh, that's all right.

Melissa Holyoak:

<Laughs>

William (Bill) Kovacic:

You don't have to remark on that, but that's how I felt.

Melissa Holyoak:

Uh, would you like—you wanted to change the name to the Federal Trade Chair?

William (Bill) Kovacic:

That's right, that's right, that's right. With advisors, you know, they could be extended advisors.

Melissa Holyoak:

<Laughs>

William (Bill) Kovacic:

Glad to hear your views right in the trash—here we go. Uh.

Melissa Holyoak:

<Laughs>

William (Bill) Kovacic:

But, uh, does Humphrey mean anything to you, Melissa? Do you think that if it disappears, it affects the way that you and others would approach your job?

Melissa Holyoak:

Um, no, I don't think it would. I think for all the reasons that Andrew was talking about, um, I don't think it would. I, I also think, um, I agree with the courts. There's a healthy bit of skepticism for these independent agencies. It's really, um, difficult to sort of to accept that with, um, our system of government, with our constitution, there are not four branches of government. And so it is, uh, difficult because of the democratic accountability and democratic principles to have these separate independent agencies. I think from my role and my perspective, um, I do think, um, I, that we can— that tension can be relieved in some bit by following closely to the statutes, uh, that authorize our, um, our actions. That we, if we adhere closely to those, that we are actually, um, making sure that we are following what Congress intended us to do. Um, and in particular, making sure—I think a good example of that is, um, not just in our rulemaking adjudications but thinking about this sub-regulatory guidance that is coming out from the agency. Um, that scares me a lot because that is where you have all of the—it's like triple insulation from, from, in some of these respects. And so, I'm paying close attention to ensure that that kind of, um, sub-regulatory guidance, um, doesn't get out of hand.

William (Bill) Kovacic:

Yeah, Baron points out that the statute says no more than three from one political party, so it means you can pick people from other parties, people who are so-called Independents. In the modern custom, you do have to get those through the minority party, uh, basically in the Senate, so they have some view about who's going to be acceptable there.

Andrew Ferguson:

Yeah, just one more thing on this: lawyers have a tendency to think very, um, uh, to think very abstractly about stuff like this. Like, oh, if *Humphrey's Executor* goes, the president can just start firing everyone. That is not how this country works. The president, if he fires people, is going to have to go to the Senate and get the Senate to sign off on his new nominees. And I worked in the

Senate for a fair amount of time doing a lot of nominee stuff, including refusing to sign off on nominees. It's hard. It's very hard. And if the, you know, president is spending tremendous political capital on trying to defy *Humphrey's Executor*—for my own, speaking only for myself, I think that would be great. I think *Humphrey's Executor* has been very bad for the government. But if the president wants to do that, he then has to go to the Senate, whose power he's justified, and ask them to fill the seats with the people he or she would like to appoint. That's very difficult. And so, the general response of defenders of *Humphrey's Executor*, which is like pandemonium—the president, you know, canning dozens and dozens of people overnight—I think, A, I'm not sure that would be the worst thing of all time for the president to sort of assert control over the bureaucracy since he's answerable to the people. I'm not sure that'd be a bad thing; it's just also totally unrealistic. It's not how politics in the United States has ever worked.

William (Bill) Kovacic:

Isn't some amount of autonomy, though, in the decision to prosecute, really important in this respect? We talked about deference before. You're standing before the court and you're saying we bring together the full power of our expertise and analysis; it's integrated into our decision. If it appears as though the decision to prosecute was the result of having a gun at the head—you're going to bring this case, and do it because I want to punish an enemy—the court really won't defer to extortion; they're going to defer to deference. Isn't it important to have some element of autonomy that the agency can point to, to say in doing things that really hurt, we made up our own minds on this?

Melissa Holyoak:

Well, I, I don't—I'm not so sure, and I say that only because that's how the Department of Justice works, and they continue to work well. And I think, oh, because when we're bringing these cases, we want, we want to be successful; we want to win in court. We think about all of those things. There are some, um, you know, also political ramifications to, to doing that as well. And so, I do think those pressures are going to to, point us in the right direction.

Andrew Ferguson:

Uh, but you know, if you're right, Bill—and I think that's not a bad—I mean, look, I litigated AT&T Time Warner. I'm not the only person in this room that litigated AT&T Time Warner.

William (Bill) Kovacic:

How'd that turn out?

Andrew Ferguson:

Uh, well, we won.

Melissa Holyoak:

<Laughs>

Andrew Ferguson:

I'll leave what happened after that to the companies. Um, but one of the things we tried to make a big deal of was, um, the president said lots of very nasty things about CNN

William (Bill) Kovacic:

Sure.

Andrew Ferguson:

And it invoked antitrust. CNN judge into—we didn't—the discriminatory prosecution motion—but we at least got it into the water. But I think the point is even if you're right that independence, you know, the appearance of sort of an independent prosecutorial decision matters to the courts, that's in the president's interest too because the president doesn't want to march his agencies off to court to get them, you know, shellacked and have a court say, "I am not allowing this prosecution to go forward because I think the president is manipulating things behind the scenes." So, the president then has an equal incentive to promote this appearance of independence. What I think we don't want is, um, parts of the government that are actually independent from the president, who is the only person in the four million-person branch of government that answers to the people. I don't—Melissa doesn't. You didn't when you were chair. The only way that people constrain the executive branch is by electing the president. And if people are allowed to do things and he can't have a say in it, that's just not good for government.

William (Bill) Kovacic:

Of course, I, I'd attack the assumption in my own question to both of you about whether, uh, agencies today with *Humphrey's* are indeed independent. I've never thought that an agency that had to beg for money every year in front of Congress was independent. Uh, uh nor did I think that the president's ability to sign a document that says, "Mr. Chair, Mr. Ferguson, you're now a commissioner; holy oh, you're now the chair," I always saw that as a pressure point that, uh, that matters.

Andrew Ferguson:

Well, if you read the legislative history of the FTC Act, Congress loved the idea that the president wouldn't control them, and Congress would. Congress was like, "We will oversee them, and we will control their budgets, and that means we're in charge of this agency, not the president." I think that design is terrible; that's a terrible way to run the government. But, like, this was quite intentional.

William (Bill) Kovacic:

I don't know if both of you got this question, but I did before the Senate Commerce Committee: "Mr. Kavas, you understand, don't you, that you are an arm of Congress?"

Melissa Holyoak:

<Laughs>

William (Bill) Kovacic:

The correct answer to that question is yes, I do, Senator, with great clarity. The wrong answer is no, I'm not, I'm independent,

Melissa Holyoak:

<Laughs>

William (Bill) Kovacic:

… and once you approve this, I get to do what I want; you can't remove me, and neither can the president. That was the wrong answer. For that, you get sent outside to think about it for a while and come back in.

Andrew Ferguson:

<Laughs>

Melissa Holyoak:

So that wasn't the right answer. The right answer was, yes, Senator, I'm happy to come back anytime you would like, anytime,

Andrew Ferguson:

<Laughs>

William (Bill) Kovacic:

Anytime, and I look forward to continuing the conversation. Uh, but, you know, there have been a couple of questions that have raised, uh, just I thought maybe a comment on earlier cases that the commission's decided and have made their way through the administrative process successfully to the Supreme Court. Um, one of them that stands out is the Cement Institute, and it stands out to me in a couple of ways. One, the Supreme Court did basically take Melissa's framework and said, "You guys did everything right; you did the studies, you did earlier cases, you incrementally built a foundation, you wrote a really good opinion, and this is precisely the kind of thing we expected the Federal Trade Commission to do in extending the boundaries for Section 5.

Bravo, good job." Within two years, Congress had extracted a promise from the Federal Trade Commission that said, "You will never invoke Cement Institute or the triangle case that went

with it. You will never invoke these as a basis for challenging non-collusive independent but parallel conduct. You won't do it, or we'll turn that place into the biggest three-sided swimming pool in the city." And the commission promised, "No, we won't do it." It came back to bite it later on, so that the, the oversight—that is, the constraint on the discretion—comes not just from both ends of the avenue. I think, I think a dilemma for the commission is that when it does things that push the boundaries, you're really going to get the feedback loop through Congress that says, "Don't do this." **"**It's something new." Well, yeah, you told us to do new things, or are there constraints from the executive branch? Um, it goes both, both directions. Uh, one last question about—and it's contained in some of the questions here uh—which is the, um, an issue raised yesterday about the flexibility and adaptability of a regulatory system. That it should be agile, it should be flexible in dealing with artificial intelligence and other new developments.

That, that the second you'd write a statute—even if it was highly specified—you'd have the same problem you'd have in trying to write a highly specified contract. It would always be incomplete; there would always be gaps. You can't write the perfectly specified contract. So, you try to write the —how do you write a statute that says we want agility, we want flexibility? We know you're going to have to be changing the boundaries over time if that's a desirable approach for public policymaking. How do you write that in a way—and perhaps say Federal Trade Commission, you implement it? How do you write a statute that has those elements of adaptability and flexibility built into them but necessarily involves interpretation and adaptation in a way that avoids major questions and avoids a delegation problem? How do you do that?

Andrew Ferguson:

I don't know. Um, look.

Melissa Holyoak:

<Laughs>

Andrew Ferguson:

I mean, I—in my, uh, admittedly overlong non-compete dissent, half of it was about non-delegation. Um, and I mean, look, I, I, I—for my own part as a commissioner, I take very seriously that the principal policymaking branch of the federal government is Congress. Um, and that it needs to be that way because Melissa and I do not have a constituency. Um, we are, you know—well, most of us are ensconced within the Beltway, disconnected from the people we're governing. Um, we don't answer to them; they can't control us. If we get it wrong, all we hear about it are in lawsuits. Um, and I, for that reason alone, along with a bunch of other formal constitutional reasons, it is super important in my view that Congress said, decide what conduct is prohibited, what conduct is required, and the agencies enforce those prohibitions and those mandates and fill in small gaps.

Um, I think, I mean it was obvious as early as Schechter Poultry because the court has a long discussion about the non-delegation problem inherent in Section 5. Um, that there are significant constitutional limits on how flexible Congress can write its laws because of the importance in a self-governing society of accountability between the people who decide what conduct is prohibited and what is required and those who are compelled to obey those restrictions. And so, I think sort of the height of progressive New Deal era governance, which is we write general ideas into statutes, we appoint these experts who will all live inside of 495 in Washington and set the rules for the country—the courts, they're not very important. Um, and they were there in the 30s and 40s and 50s and 60s and 70s and 80s; they started to not get there in the 90s, and I think largely thanks to President Trump and Leader McConnell, the courts are just not down for this sort of progressive view of government, which is Congress comes up with ideas and then the president decides how to implement them on the ground.

Um, so I think that the boundaries within which you can write flexible statutes—when they were doing this sort of beginning in 1914 and onward—have narrowed in just the last 20 years. For my own part, I think that's a good thing because, um, I think that those boundaries implement values of self-government, which I think are the ultimate constitutional values are that we govern ourselves. Um, and I think that that is less true when bureaucrats like me are deciding what conduct is required and what conduct is prohibited. So, I don't know how to write those statutes, and I think it has gotten harder just in the last 15 years.

Melissa Holyoak:

I think that's right.

William (Bill) Kovacic:

Please.

Melissa Holyoak:

Um, on the—I think Section 5, though, has been, I think, a good example of something that's been flexible and has provided some guardrails in terms of going after unfair um acts and practices uh that harm consumers—that consumers can avoid that um with countervailing benefits. Like that balancing test and that flexibility can be applied. We have seen, even just recently, to artificial intelligence, um, our consumer protection um bureau has filed complaints uh related to artificial intelligence, mostly just uh deceptive um practices relating to marketing—telling folks, "Hey, my product has artificial intelligence in it when it doesn't," things like that. So, it can, it can adapt. Um, it, it's—um, it probably can't, can't conquer the world and can't do everything, so, um, the Congress does have to go in and think about many different things and, and try to craft that same type of flexibility to other areas, and it's difficult. I, I don't know how they do it; it's really hard. Um, and I think they're going to um struggle with that. I think we'll see how they um do that with privacy, data security. I know that they're trying to grapple with that right now.

William (Bill) Kovacic:

Let me, uh, let me ask where—we've got about a little more than five minutes left. A question—we've been talking about things that are a bit hazardous, a bit difficult. What do you see to be the high ground? Melissa, if I could start with you, that is, what should be the priorities? What do you see that is not currently on the agenda? What would you like to see the focus of the agency be going ahead?

Melissa Holyoak:

I mean, priority number one, absolutely has to be protecting consumers. Absolutely, our antitrust enforcement has to look at competitive effects and consumer harm. That is the load star, lone star of antitrust enforcement; it has always been and has to remain there. What I don't want to see is efforts where there is we're, we're going after trying to attack uh antitrust or enforcement where that does not exist, and we should not be doing that. As an enforcement agency, it's always difficult to determine where resources go; it is a constant balance. We want to look at where the greatest consumer harm?

You want to look at the resources to actually try and redress that. You need to look at what will it take, in terms of resources—not just man-hours, but, but experts and the likelihood of success in all of that. In, in that trying to, to weigh all of those factors and make a determination is very difficult. Um but I would want to focus all of our, our bulk of our efforts on um where we know that there's the greatest um consumer harm. And in antitrust, it's mo-more often than not going to be horizontal, horizontal unilateral effects that are where we see the greatest consumer harm. Um in consumer protection, it's going to be the, be fraud, and it's going to be for the most vulnerable, which I think includes children, elderly, some other populations. That's where I would focus our efforts; that's uh what we do best, and that's where I think the FTC should, should remain focused.

William (Bill) Kovacic:

Andrew, what do you think's the high ground? What would you put on the list of priorities to be pursued?

Andrew Ferguson:

I, uh, there's been a lot of talk, like six years now, um that the current antitrust laws are insufficient to confront the novelty of big tech. Um, and I-I have some skepticism about that. Um and I think there's a lot of work that sections one, two, and seven—even under like current understandings of the law—could be doing that simply wasn't being done. Um I mean, we did this in the states; we brought a big section two suit with the United States against Google for its ad tech monopoly. Melissa brought a similar one a year before Virginia did. Um it wasn't like a novel theory; it wasn't trying to expand the boundaries of section two. It was just sort of doing work that people had generally not wanted to do for a variety of reasons that I won't get into, um

basically a variety of credential and political reasons. Um but I-I think, um you know, look, I, I, I want very vigorous uh antitrust enforcement. Uh I think the antitrust laws have gone under-enforced generally for the last um ten years, but I don't want to throw the baby out with the bathwater. I think there's a ton of work that traditional antitrust could be doing that wasn't being done. And I think before the agencies and the president are going to Congress and ask for a new suite of antitrust laws or a new suite of consumer protection laws, I think we have to exhaust the boundaries of existing law, which we have not done. Um and so, I want a um you know, I want vigorous antitrust enforcement.

Um uh and I, I think there's a ton of work that both parties just weren't doing and can do under existing law, particularly with regard to sort of the like novel business practices of large technology firms that can be done. And I don't think we necessarily need to be clamoring for a revolution in antitrust law to address a lot of the concerns that consumers have about these companies.

William (Bill) Kovacic:

Maybe a closing question for you, and then we'll take a few more questions from the, the audience here. A big theme of the discussion yesterday was the fragmentation of policymaking in a number of policy domains. Uh we have, as you know, two federal agencies with a shared mandate for competition law—not exactly equivalent, but largely overlapping. We have state governments uh that also have antitrust enforcement authority for their own state laws and for the federal laws. And by the way, uh with your presence on the board, it's the first time that the Federal Trade Commission has had two individuals who have served in such senior levels of policymaking within their state governments. So, we have a uniquely deep perspective from the states represented on the commission; we've never had that before in its glorious 115-year history or so.

Um. What can be done to improve coordination among them? There was a call for some process to achieve a greater sense of consensus about the direction of policy, setting priorities, uh maybe planning how resources might be allocated, but to achieve what other jurisdictions have: the European Competition Network and the UK Competition Network. Do you have thoughts about what could be done to realize the possibilities of better performance, joining up some of these institutions, uh maybe to avoid unnecessary conflicts, to improve coordination, to enhance performance? What might be done?

Melissa Holyoak:

Um, that's a great question. Uh, I when I was with Utah, um as a state enforcer, we participated in a lot of multi-state actions, and there's great benefit to that: to have many states come together to pool resources, to for to bring on different attorney, attorneys, and just even financially to be able to share the costs of all of that. Um, it can be very difficult though too because you no longer, you really have 50 different sovereigns—or 50 plus—um who are trying to make

decisions and to, to bring everyone together. Um they, it comes with its own um uh difficulties and complexities in terms of getting that done. Uh I worked at—when I was with the state, I also worked with the FTC. Oftentimes, um those would mostly come with respect to merger reviews that were happening in the state, and we would coordinate with them. Uh those have their own challenges as well um in terms of the FTC wanting to pursue some things that maybe we didn't agree with and we'll see, I see that now on the other side. I'm like, "No, no, no, we want to work with you!"

So, it's difficult to um se- seen it from both perspectives. In terms of working together better, that I think there could be better coordination. I think as Andrew and I have seen, often times these multi-states they're not, they come together because these are my best friends, these other states and this is how—who I want to be litigating with for the moment um. And so it does—it's not as if there, you know it's always open to every state to join for those reasons because it can be difficult to, to sort of to pursue litigation and, and have that um. And so, I think there could be some, probably some greater coordination among the states in terms of opening up to others and um with the FTC. Probably, I think some coordination could come with just even more regular meetings in, in to understand what the states are thinking of, what the FTC um is thinking about um in ter—in being able to pull resources and go after these things together.

William (Bill) Kovacic:

Andrew, thoughts about how to deal with the fragmentation issue?

Andrew Ferguson:

I do not think so. I totally agree with everything Melissa said, that was a very accurate accounting of how the state processes work. Um uh I'm not sure that I share the drive for a centralizing regulatory power. I'm not sure the fragmentation is bad, and frankly, um looking at rates of innovation in Europe and rates of innovation in the United States, I'm not sure the European model of governance is great for America. I love that America continues to innovate, that new companies are popping up all the time, um that a huge swath of our top market cap companies are quite recently created. Um and I think that is in no small part due to the fact that we have fragmented regulatory power outside of the federal government into the states. That there isn't always perfect coordination, and it leaves gaps. I think there's a fair amount of innovation that takes place in those gaps, and sort of the European bureaucratic drive for centralized, highly rationalized, superintending regulatory power, I'm not sure—I'm not sure it's great for America. I think I am not sure that the fragmentation, which is undoubtedly part of the constitutional design, should be treated as a fault rather than a feature.

William (Bill) Kovacic:

So that if you have a retail merger and you've got one federal case going, you have two state cases running in state court, there's no upward bound on the right number of cases —

Andrew Ferguson:

Yeah, that there that, that—

William (Bill) Kovacic:

—for that merger.

Andrew Ferguson:

There probably are, um but my preference would be for regulatory fragmentation. Because I think if we drive for centralizing control, it just means control in Washington, and um I don't think that's good for innovation. And I don't think that's good for innovation is the American spirit, is sort of what like drives our incredible innovating um impulse. And I think Washington-controlled, centralized regulatory authority is not good for that.

William (Bill) Kovacic:

Let's take two questions from the audience and uh let's see. Please.

Audience member:

I would ask: uh the coordination among the States makes sense, but where did the mandate come from for the FTC to travel to Europe? Those companies— is that kind of coin?

Melissa Holyoak:

I think, with respect to foreign policy, that is absolutely within the purview of the executive, and that and that we should be following the president's lead on that. Um I don't think we should be undermining American markets, American institutions by going abroad and saying, "You know what? This case wouldn't work in the United States. Maybe you should bring it." I don't— I absolutely don't believe that we should.

William (Bill) Kovacic:

So, DOJ could do that, not the commission.

Melissa Holyoak:

<Laughs>

Andrew Ferguson:

I'm going to give the answer that I gave in an interview to basically the same question, which is: um ma- markets are global. A huge number of American companies participate in global markets, working with our colleagues in foreign countries to try to figure out market effects—totally appropriate. Asking foreign uh regulatory authorities on the sly to do our dirty work when we don't think we can do it, wildly inappropriate—terrible for American companies, terrible for

innovation. And um uh so, look, working with our foreign colleagues is an absolute necessity in the 21st century. Having them do the stuff we don't think we can get away with—outrageous.

Melissa Holyoak:

I absolutely agree.

William (Bill) Kovacic:

Maybe not dirty work, maybe God's work in some instances. But, uh take, sorry, take one more, please. Oh, Sky, we had a question here first.

Sky:

Yes, I'm actually going to give the mic over to Harold; he had some great questions in Slido.

William (Bill) Kovacic:

Harold.

Herold:

Hi! Yeah, um wow, um and looking forward to our panel on admin law. Um but uh um, I just have to ask about one thing in particular, which is this notion that agencies have brands that judges make decisions on whether those—how is that not the opposite of the rule of law, judging each case on its merits? Even if you think an agency generally doesn't do a good job, the notion that you're just going to ignore um their, their findings— I mean, if we said in a criminal case, "Yeah, this, this guy's a convict; I mean we just know he's guilty," we wouldn't have to worry about a specific you know. How does that—how do you reconcile this, this concept of not treating an individual agency decision as an individual agency decision, where you seriously dig into the work of staff to determine its level of expertise, with this notion of, "Well, we just don't like a particular agency because we think they're all over the place"?

William (Bill) Kovacic:

We'll close with that, Melissa then Andrew.

Melissa Holyoak:

I don't disagree with you in terms of the rule of law. The judge should, should take all of what's happening, uh should take the case as it is, and look at that. I, I think the judges, though, if they see a novel um theory come before them and can see that those other novel theories in other courts have been rejected, that's going to play into their decision-making. Um but also, it's not that a brand doesn't just affect the courts; I think it affects everything. I think it impacts Congress and how they view what we're doing—whether there's legitimacy, whether we should be provided additional resources, funding authority. Um it, it impacts markets and private parties—

how they perceive things, whether there's certainty, um which I think that they deserve in the markets to be able to, to run their businesses.

William (Bill) Kovacic:

Andrew?

Andrew Ferguson:

I think that's a straw man version of what we were saying, with all due respect. I mean, I don't know any judge who would look at the caption and be like, "Oh man, the FTC? They're definitely going to lose." I think what happens is the FTC and a super sophisticated party represented by exceptionally talented lawyers are disagreeing on some very complicated question. The judge is going, "Gosh, how should I resolve this? This is really, really hard." On the one hand, I have these lawyers from wherever representing these whoever saying the FTC is totally wrong, and on the other hand, I have the FTC saying, "No, you're right; you should trust our expertise." But I look at these other courts, and they're not trusting the agency's expertise. I'm not sure that I should on this complex, difficult question either. Um and that's, that's totally A, that's totally normal. B, anyone who's ever had to litigate an APA case— and I've litigated a lot— knows that's exactly how this goes. These often res- resort or are reduced to some very complicated factual question in which the agency doesn't have the greatest statutory argument but is waving around its expertise. If the agency's reputation is very good, it has more cla— a stronger claim to expertise than if its reputation is very bad. Um and that is, that is how all litigation in the APA, outside the APA, works. If someone comes in with a reputation in the judiciary for not getting it right, that will affect judicial decision-making in close and difficult questions—especially as is true in most FTC cases when the other side is super sophisticated and has very good lawyers.

William (Bill) Kovacic:

My, my only gloss on what my fellow commissioners have had to say is that, uh, there are so many instances in which you're ultimately asking the court to trust your good judgment. You have difficult, problematic issues that, say, in mergers, involve difficult predictions about the future. In tech matters that involve abuse of dominance, if you're talking about remedies, what's going to work, what might not work, in many ways, you're putting your accumulated experience on the table before the courts and saying, "This is our interpretation of what's happened, and with respect to uncertainties about the future, this is our best judgment about them, and you can trust us."

Andrew Ferguson:

Yep.

William (Bill) Kovacic:

And I don't see that as being a transgression of the rule of law; I see it as being giving judges confidence that your judgment about the future is a sound one. In that respect, yes, agencies do have brands; they have reputations. And in that respect, a judge might say, "I'm affected by what you've done in earlier cases."

Harold:

Uh. Does it work in reverse? I mean, everything that Judge Leon laughed at in the AT&T merger came true. Prices did go up; people got fired, all of these other—do judges then have a responsibility to look back and said, "Hey, we doubted the agency, but the agency prediction that we laughed at turned out to be totally right"?

William (Bill) Kovacic:

The obligation, I think, exists for there to be a rigorous program of expost evaluation—

Melissa Holyoak:

Yes.

William (Bill) Kovacic:

—where agencies look at past experiences, where academic hubs do, and come back to courts and say, "In case you're interested,

Herold:

Yeah.

William (Bill) Kovacic:

— your prediction about the future was precisely dead wrong." And in future cases, to say, "This is why," because we do these expost assessments. You can trust us when we advise you about what to do about the next—

Andrew Ferguson:

And in similarly situated future vertical merger cases. Who, who—the government will make that argument; they will be like, "We were right about AT&T, and the other side was wrong." That should count into your analysis of our predictions of the future. This is how— this is, this is so commonplace in litigation, I don’t know how to you know like, explain it more. This is how it always goes, always.

William (Bill) Kovacic:

I think the commission marshaled those arguments very well in Alumina, which is the case. If you were going to a betting shop about what was going to happen in the Fifth Circuit, you'd say, "I bet on Alumina all the way," and they lost; they got skunked across the board on all the

arguments. I think that's an instance in which the commission was able to marshal this expertise and say, "We know what we're talking about; you can trust us here." Well, join me in thanking our panelists. And by the way, don't go away—there's a great panel coming up. Thank you.

Melissa Holyoak:

Thank you, Bill.