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The Model, Mission, and Future of the Federal Trade Commission

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Thank you, Bill, as always for that kind introduction. It is an honor to be with you all again.

It has been a year since I last spoke here, and it is safe to say that it has been an eventful one for the Commission. With that in mind, I would like to address a question many have been asking since the Supreme Court's decision in *Trump v. Slaughter*: what is the future of the FTC?

Before discussing the future, it is useful to revisit the past.

When Congress established the Federal Trade Commission in 1914, it sought to address the trust problem. The Industrial Revolution had generated extraordinary economic growth and created new avenues for competition, but it had also enabled firms to aggregate capital on an unprecedented scale and, in some industries, to acquire or entrench monopoly power through trusts and other combinations. As those combinations took hold across important sectors of the American economy, concern grew that firms were using harmful business practices to expand or entrench their economic power and prevent trading partners from realizing the benefits of free, fair, and open competition.

Congress initially responded to that problem by enacting the Sherman Act in 1890. But twenty-four years later, experience with the Act had exposed serious shortcomings in its judicial administration. Courts struggled to articulate stable boundaries between lawful competition and unlawful restraints, shifting between categorical prohibitions on even "reasonable" restraints of trade and an increasingly open-ended rule-of-reason framework. The Supreme Court itself was often divided, and its decisions did not consistently clarify when conduct crossed the line from competition on the merits into unlawful restraint or monopolization.

These uncertainties produced problems in both directions. Courts applied the Sherman Act to conduct far removed from the industrial trusts that had prompted its enactment, including many activities of labor unions, even as some forms of corporate consolidation escaped scrutiny. There was also concern that the law had been improperly interpreted not to reach practices whose anticompetitive effects had not yet fully materialized—to arrest harmful conduct in its incipiency, before restraints had hardened or monopoly power had fully taken hold. The rule of reason articulated in *Standard Oil* in 1911 generated an additional concern: that a vague inquiry could give courts discretion to assess restraints according to generalized notions of the "public interest," rather than maintaining a clear focus on preserving free and fair competition.

Institutional challenges compounded these doctrinal problems. Antitrust cases could take years to resolve, while business methods and competitive conditions continued to evolve. Generalist courts also lacked specialized economic and industry expertise capable of studying those developments on an ongoing basis. The result was a set of enforcement gaps: uncertainty about what the law prohibited, uneven application of the statute, and too few tools for identifying and stopping emerging threats to competition before the resulting harm became difficult—or impossible—to unwind.

To address these concerns, Congress expanded the antitrust framework by enacting the Clayton Act and, and, in parallel, created a new antitrust enforcer in the Federal Trade Commission. Central to the FTC Act was a distinct tool: the prohibition on "unfair methods of competition."

Unlike the Sherman and Clayton Acts, the FTC Act was not designed to be enforced privately; it vested a unique authority solely in the Commission. Congress entrusted the FTC with enforcing this broader mandate, which represented the core of the Commission's mission—to identify and stop conduct that threatened competitive conditions, including practices the antitrust laws had not adequately captured.

Congress therefore expected Section 5 to serve a dynamic function. The Commission's specialized expertise in investigating markets and bringing enforcement actions positioned it to reassess conduct as economic understanding evolved, whether in areas such as resale price maintenance, tying and exclusive dealing, predatory pricing, price discrimination, mergers and acquisitions, emerging business models, or other market practices affecting nascent competitors. Through this work, the FTC could develop analytical and evidentiary approaches that would ultimately aid courts in applying the antitrust laws more effectively and consistently.

To carry out this mission, Congress adopted a structure typical of the progressive era: a bipartisan commission supported by economists, attorneys, and other specialists. This model reflected early twentieth-century confidence in expert administrative bodies and technocratic determinations as to what was best for the economy. The Commission was expected to operate as an "independent" agency outside the direct control of the President and to issue orders based on its accumulated expertise to prevent practices found unlawful.[1]

Understanding this history and the flaws of the progressive era approach is critical to charting the path forward. The FTC was not created merely as an expert administrative body; it was created

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[1] The FTC's purported "independence" derives less from the Federal Trade Commission Act than from historical perception. Nothing in the statute bars the President from directing the Commission's functions, and federal law expressly subjects the FTC to presidential control in some areas, including its budget. *See* 31 U.S.C. § 1108(b)(1). The only provision of the Act that could be said to support the notion of independence was its limit on the President's power to remove Commissioners at will, which the Supreme Court held unconstitutional. Trump v. Slaughter, 146 S. Ct. 2283, 2319 (2026).

to enforce a uniquely broad competition mandate. The model was a product of its time and has neither withstood constitutional scrutiny nor lived up to its promise; the mission, however, remains the reason the agency exists, and its importance has only grown over time.

Unfortunately, many practitioners and past leadership came to conflate the model with the mission itself. What Congress created as a broad, dynamic mandate to police unfair methods of competition grew narrower in practice, while defense of the model itself occupied center stage.

It is important to be candid about the constitutional concerns the model raised, as well as the practical downsides that arose from features of that model. Certainly, some features of that model, such as the value of expertise and informed deliberation, remain deeply important. They raise no constitutional concerns and continue to strengthen our law enforcement work and the day-to-day efforts of our staff. But the elements which raise serious constitutional concerns as identified by the Supreme Court in *Trump v. Slaughter*, particularly the Commission's purported "independence" from democratic accountability and the potential it creates for overreliance on administrative process, have, in my view, significantly hampered the agency in carrying forward its mission.

Those constitutionally problematic features elevated technocratic judgment and administrative process from means of advancing the Commission's mission into ends in themselves, while fostering a degree of institutional insularity and dogmatism. In turn, preserving the model became the goal even when it came at the expense of the mission.

The cost of this approach was a tendency of leadership to favor matters presenting comparatively clear paths to victory over cutting edge enforcement challenges. The result, ironically, was that the FTC's enforcement of Section 5 failed to deliver clearer guidance on where to draw the line in determining when competitive practices violate the antitrust laws and the FTC Act itself. In that sense, features originally intended to help the Commission fulfill its mission instead became a rationale for avoiding the development of standalone Section 5 doctrine and the types of cases that could correct judicial missteps in interpretating and applying the other federal antitrust laws.

In the Commission's early decades, it brought several cases targeting unfair methods of competition—what we would now describe as standalone Section 5 matters.[2] But after the 1938 Wheeler-Lea Amendment expanded Section 5 to prohibit unfair or deceptive acts or practices, the Commission's use of Section 5 in competition cases began to significantly narrow.[3] Over time, conduct treated as "unfair methods of competition" focused on targeting the kinds of restraints of trade that were well understood to violate the Sherman and Clayton Acts. Indeed, some former Commissioners even went so far as to argue that Section 5 be strictly limited to

[2] *See, e.g.*, FTC v. Gratz, 253 U.S.; FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); FTC v. Klesner, 280 U.S. 19 (1929).

[3] William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 1001, 1005 (2010); *see* Wheeler-Lea Act, ch. 49, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. §§ 41–58).

traditional antitrust claims and used on only very rare occasions.[4] But Supreme Court precedent makes clear that Section 5 is not so limited, and Congress explicitly instructed the FTC, through the statute's text, to pursue all "unfair methods of competition," not just those that overlap with the federal antitrust laws.[5]

This trend culminated with in the Commission's 2015 policy statement on unfair methods of competition.[6] The statement effectively made convergence of Section 5 and the Sherman Act a matter of official policy for the Commission. As reflected in its own terms, the statement focused more on defending the Commission's institutional authority to develop Section 5 doctrine as an "expert administrative body" than on explaining the substance of that doctrine. It did little to define what constitutes a standalone Section 5 violation or to provide concrete examples of an unfair method of competition, whether by grappling with the relevant case law or drawing on the Commission's own enforcement history. And by effectively collapsing Section 5 into Sherman and Clayton Act enforcement, the statement subordinated the substantive meaning of "unfair methods of competition" to a broader effort to defend the FTC's purported status as a so-called independent agency.

Thus, despite a clear statutory and Congressional directive to police such methods, the tendency to treat Section 5 as conterminous with the Sherman and Clayton Act became ensconced in how the FTC approached competition enforcement. Most FTC non-merger antitrust cases were pled as Sherman Act violations that "therefore" also violated Section 5. The result was that over time the Commission's competition program became almost indistinguishable from that of the Antitrust Division.

Having shifted its focus towards refining its own internal processes and maintaining independence from the other parts of the executive branch, these features of the model began to eclipse the mission. Section 5's educational and developmental role—defining the contours of unfair methods of competition through law enforcement and reassessing business practices in light of emerging market realities—gradually receded.

Chairwoman Khan's tenure, in particular, exposed why the whole model championed by progressives was a sham. She ran the Commission as a personal platform, subordinating its mission to her own ambitions. Her severe mismanagement of Commission resources and reckless disregard of its core investigative functions in pursuit of political headlines are in a

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[4] JOSHUA D. WRIGHT, PROPOSED POLICY STATEMENT REGARDING UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FTC ACT 6 (2013); Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 J. ANTITRUST ENFORCEMENT 1, 9 (2013).

[5] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 245–46 (1972).

[6] FED. TRADE COMM'N, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (2015).

category of their own and nearly bankrupted the agency.[7] "Independent" became an excuse for incompetence.

But the deeper irony is that independence did not insulate the Commission from politics so much as insulate it from correction. Had the FTC been answerable to the President in the ordinary way, the White House may have reined in its Chairwoman.

At the same time, this focus on the Commission's alleged independence coincided with growing judicial skepticism toward that very model. The Supreme Court began re-examining New Deal-era precedents and adopted a more deliberate approach to questions involving Article II, the role of administrative agencies within our system of checks and balances, and the separation of powers. *Humphrey's Executor* was already being narrowed, and its core holding openly questioned in *Morrison v. Olson*.[8] After *Free Enterprise Fund* in 2010 and *Seila Law* in 2020, what remained of *Humphrey's Executor* was, as Chief Justice John Roberts put it, little more than a "dried husk."[9]

These developments signaled a sustained judicial reassessment of the constitutional and institutional premises underlying the progressive era's blind faith in technocratic rule. For those who have been paying attention, the only surprise in the *Slaughter* decision is that it took so long to get here.

Against that backdrop, the Court's holding in *Slaughter* confirms what has long been obvious: *Humphrey's* was wrongly decided and the American people have a constitutional right to control the policy and direction of the Federal Trade Commission through their duly elected representative, the President of the United States.

And there are certainly reasons to celebrate the *Slaughter* decision. In our constitutional system, the ultimate check on executive governance is democratic accountability—elections. Congress writes the laws and appropriates funding for their enforcement; courts serve as neutral arbiters to ensure prosecutors prove their cases. But when it comes to policy, the American people determine the course with their votes. Elections permit the public to hold the President responsible for how the laws are administered. And notably, when the American people elect a President, they select one and reject the others. They do not elect a committee. They do not elect a backup to second-guess his decisions. There is no "minority President" to write dissents undermining the efforts of the actual President to carry out the will of the people. *Slaughter*

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[7] *See, e.g.*, Statement of Commissioner Mark R. Meador at 1–2, *In re* Non-Alcoholic Beverages Price Discrimination Investigation, Matter No. 2210158 (May 22, 2025).
[8] Morrison v. Olson, 487 U.S. 654, 689 n.28 (1988). *See also* Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935).
[9] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513–14 (2010); Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 217–218 (2020); *see* Oral Argument at 1:35:15, Trump v. Slaughter, 146 S. Ct. 2283 (2026) (No. 25-332), https://www.supremecourt.gov/oral_arguments/audio/2025/25-332.

restores the FTC to that basic framework and, in doing so, frees the Commission to focus more fully on its statutory mission.

In some sense, the label "independent agency" sounds relatively benign and suggestive of an approach that put law over politics. But, as a practical matter, it is not at all apparent that defense of the model ever truly delivered on that goal. Independence can too easily become insulation from the consequences of democratic choice. For too long, questions about the contours of the FTC's institutional model threatened to overshadow questions about what the Commission should be doing. By resolving that structural debate for the FTC, *Slaughter* redirects attention to the substance of the Commission's work and the understanding that the FTC is, first and foremost, a law enforcement agency tasked with policing unfair methods of competition.

Regardless of how one feels about that model and its constitutional implications, *Slaughter* definitively settled that the Commission cannot operate outside the direct oversight of the democratically elected President. Accordingly, the model that previously operated is simply a product of a bygone era, a vestigial artifact of history and no longer sound as a matter of law. The question before us today, therefore, cannot be how to return to that legally invalid model or how the FTC should have been configured in the past. Rather, the question we must answer is: how should the Commission fulfill its statutory responsibilities within the framework that now exists?

What then is the future of the Federal Trade Commission post-*Slaughter*?

Moving forward begins with and centers on restoring Section 5's independent function. The prohibition on unfair methods of competition was meant to develop through enforcement. By applying Section 5 to evolving market practices and confronting difficult questions about where to draw the line, the Commission can once again focus on effective enforcement, which can in turn provide clear guidance and play the gap-filling role Congress originally envisioned when it created the FTC.

But enforcement is not the only part of the FTC's mission. Congress also gave the Commission broad powers to study markets and put its expertise to work beyond the cases the Commission itself brings. Section 6 of the Act permits the Commission to conduct market- and industry-wide inquiries, compel information, publish its findings, and make recommendations to Congress. Section 7 goes further still. Congress expressly contemplated that federal courts could draw upon the FTC's expertise in antitrust litigation, authorizing a court to refer a case to the Commission to serve as a "master in chancery" in determining an appropriate form of decree. That authority is particularly relevant today, as recent Section 2 enforcement in the *Google Search* and *Google Ad Tech* cases has underscored the difficulty courts have encountered in fashioning appropriate remedies that effectively address the competitive harms caused by monopolization. The FTC has also been involved in various amicus efforts in the past year, as demonstrated by positive case developments in the areas of generic drug competition, monopoly broth claims, and competition in aftermarkets.[10] The broader point is an important one: the Commission's expertise was never intended to exist solely for the benefit of the Commission itself.

History also bears out this point. Between 1918 and 1998, FTC investigations and studies helped spur at least fifteen Acts of Congress, including major reforms such as the Packers and Stockyards Act, the Securities Act, the Robinson-Patman Act, the Celler-Kefauver amendments, and the Children's Online Privacy Protection Act.[11] These examples span much of the Commission's history and illustrate one of the principal ways in which the FTC has translated its accumulated expertise into durable legal reform.

That tradition should inform the Commission's path forward. The FTC should deploy its expertise and advocacy wherever it can most effectively advance its competition mission—by developing the law through difficult enforcement cases, illuminating emerging competitive problems through rigorous study, assisting courts and other enforcers where its expertise can add value, and giving Congress the factual record and analysis necessary to determine when legislative action is warranted.

The FTC's deep expertise in diagnosing competition concerns, together with its longstanding ability to study industries and publish its findings, makes it uniquely positioned to inform competition policy and legislative reform across a wide range of issues. Exercising these tools through democratically accountable processes underscores the legitimate authority and vital role the Commission continues to hold. And it is precisely why the FTC in the post-*Slaughter* era has a historic opportunity to shape more effectively the contours of antitrust law and competition policy—not only in the United States, but around the world.

So let me close by returning to a basic point. We are a law enforcement agency charged by Congress with a unique statutory mission: to steward and invigorate antitrust enforcement by policing unfair methods of competition. We cannot, and should not, operate as unaccountable technocrats attempting to micromanage the economy. We are enforcement officials accountable within our constitutional system, including to the democratically elected President. Our responsibility is to faithfully discharge the duties Congress has assigned to us and, consistent

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[10] Brief for the United States as Amicus Curiae Supporting Petitioners, Hikma Pharms. USA Inc. v. Amarin Pharma, Inc., 146 S. Ct. 1391 (2026) (No. 24-889); Brief for the United States as Amicus Curiae, Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC, 146 S. Ct. 1485 (2026) (No. 24-917); Brief of the Federal Trade Commission as Amicus Curiae in Support of Neither Party, Surgical Instrument Serv. Co. v. Intuitive Surgical, Inc., 2026 LX 433075 (9th Cir. 2026) (No. 25-1372).

[11] Ewin L. Davis, Comm'r, Influence of Federal Trade Commission's General Investigations (Feb. 9, 1938) (attributing the passage of the Export Trade Act, Packers and Stockyards Act, Grain Futures Act, Perishable Agricultural Commodities Act and subsequent amendments, Radio Act, Federal Communications Act, Securities Act, Public Utility Holding Company Act, Federal Power Act, and Robinson-Patman Act to advocacy and research efforts of the FTC, all within the first 25 years of the agency's history); Paul A. Pautler, *A History of the FTC's Bureau of Economics*, 28 RSCH L. & ECON. 143, 152–53, 175 (2018) (additionally naming the Webb-Pomerene Export Trade Act, Natural Gas Act, Securities and Exchange Act, and the Celler-Kefauver Act as influenced by agency reports, and the Hart-Scott-Rodino Act of 1976 as evolving from the FTC's 1969 merger pre-notification program); FED. TRADE COMM'N, IMPLEMENTING THE CHILDREN'S ONLINE PRIVACY PROTECTION ACT: A REPORT TO CONGRESS 2–3 (2007).

with the Constitution, to carry out the enforcement priorities of the President. Now that it operates in a constitutionally licit way, the Commission is better positioned than ever to deliver on that promise. I am not only optimistic for the future of the FTC, I am excited. Our best days are ahead of us, and the greatest beneficiaries will be the American people.

Thank you all for taking the time to be here today. I hope you enjoy the rest of the conference.