

**SENATE COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION**

Full Committee
Wednesday, September 20, 2023, at 10:00 A.M.

DEMOCRATIC QUESTIONS FOR THE RECORD

COVER PAGE
Melissa Holyoak

CHAIR MARIA CANTWELL (D-WA)

The State of Utah joined an amicus brief in *Illumina, Inc. and Grail, Inc.*, No. 23-60167 (5th Cir.), in which the amici states argued, among other points, that (1) Congress’s delegation of authority to the Federal Trade Commission (“FTC”) to “pick its forum as between its own administrative law judge and an Article III court[]” is unconstitutional, and (2) the FTC’s structure is unconstitutional because FTC commissioners cannot be removed by the President except for cause.

Question 1. Setting aside your participation in the amicus brief, do you believe the FTC’s structure is unconstitutional? If yes, why?

If confirmed, I will comply with Supreme Court precedent. In *Humphrey’s Executor v. United States*, the Supreme Court held that the FTC’s structure is constitutional. 295 U.S. 602, 629-30 (1935).

Question 2. Setting aside your participation in the amicus brief, do you believe the FTC’s authority to choose to bring an action before its own administrative law judge or an Article III court is an unconstitutional delegation of authority? If yes, why?

In *SEC v. Jarkesy*, No. 22-859, the Supreme Court granted certiorari to consider whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine. It is unclear how the Court will decide that question and whether its decision will impact similar questions relating to the FTC’s authority.

Question 3. Please list each and every action taken by the FTC within the past 5 years that you believe was unconstitutional, in whole or in part.

With respect to completed matters, I am unaware of any FTC action in the past five years that is unconstitutional although I have not done an exhaustive review of every FTC action during that time period. As a nominee, I am not in a position to comment on the constitutionality of any pending or active matters.

As Americans become more and more reliant on technology, privacy and data security couldn’t be more important. In 2020, the FTC entered into a record \$5 billion settlement with Facebook for its privacy violations. This past May, the FTC alleged that Meta violated the 2020 settlement, a big sign that the FTC’s \$5 billion fine was just a slap on the wrist. Companies often treat FTC fines as a cost of doing business. Plainly, government enforcement alone is not enough to protect consumer privacy.

Question 4. Do you agree that Congress should pass a privacy law that gives individuals a private right of action they can enforce in court when they have been seriously harmed by privacy violations? If no, why not?

I agree that Congress should enact comprehensive privacy legislation that includes appropriate remedies. Whether or not those remedies should include a private right of action is a question I would like to research further. If confirmed, I will confer with the FTC staff and my fellow Commissioners to better understand their views and experiences regarding privacy enforcement proceedings including how a private right of action could impact the FTC's enforcement of a data privacy law. I would also seek to understand what additional resources may be necessary for enforcement of a data privacy law and how the FTC could partner with state attorneys general on enforcement. I look forward to working with your office on this, if confirmed.

Consumers are paying prices for gasoline and diesel that are way too high. West Coast Consumers are paying well over a dollar per gallon, sometimes two dollars per gallon, more than consumers in other parts of the country. Thanks to Enron, we know energy markets can be manipulated. Congress gave the FTC anti-manipulation authority in 2007, but we have yet to see the agency use it to protect consumers from manipulative market practices.

Question 5. Will you support the FTC's use of its current authority to investigate and bring enforcement actions relating to manipulation in the transportation fuel market? If no, why?

Yes, where the facts and the law warrant such enforcement.

Question 6. Do you support giving the FTC more resources and authority to fight market manipulation that is causing Americans to pay more at the pump?

I am not privy to any current FTC investigations or actions relating to transportation fuel market manipulation. If confirmed, I will confer with the FTC staff and my fellow Commissioners and familiarize myself with FTC's ongoing investigations, if any, to determine whether there is a need for additional resources or authority.

You are a member of the Teneo Network, a network with plans to "crush liberal dominance" and a website "crafted so as not to pique the interest of Senate staffers who might look up the group if one of its members mentions Teneo during a confirmation process for a judgeship or a cabinet position" according to ProPublica reporting (see <https://www.propublica.org/article/leonard-leo-teneo-videos-documents>).

Question 7. How will your affiliation with this organization impact your ability to make independent decisions as a FTC Commissioner?

My affiliation with this organization does not and will not impact my ability to make independent decisions.

Question 8. Will you defer to the principles, beliefs, or agenda of the Teneo Network, or any other organization to which you belong, when making decisions as a FTC Commissioner?

If confirmed, I will not defer to the views of any outside organization in making decisions, but instead, I will carefully and neutrally consider the facts and legal authorities.

Question 9. What would the founders, leadership, or members of the Teneo Network want to keep from the Senate or Senate staffers during a confirmation process?

I have submitted all information requested by the Senate in my confirmation process and I will continue to do so. But I am not in a position to respond on anyone else's behalf.

Former FTC Commissioner Joshua Wright, who was recently accused by multiple women of sexual misconduct, is a well-known figure in the antitrust community.

Question 10. Did you have any conversations with Mr. Wright about becoming an FTC Commissioner prior to your nomination? After?

As I did with other former FTC Commissioners, I spoke with him about his experience in becoming and serving as an FTC Commissioner after Leader McConnell recommended me to the President for this position, both before and after President Biden nominated me. I have not spoken with him since I learned of those allegations in the media.

Question 11. If confirmed, will you commit to ensuring that the FTC is a workplace free of sexual misconduct.

If confirmed, I will do everything in my power to ensure that the FTC is a workplace free of sexual misconduct.

SENATOR TAMMY DUCKWORTH (D-IL)

Topic: Infant Formula Shortage

Since the February 2022 recall of Abbott formula, many families around the country are still feeling the impact of the infant formula shortage. While some progress has been made, it is difficult to say whether we have taken the necessary steps to ensure a similar crisis does not happen again in the future. I appreciate FTC moving forward with its investigation and issuing three Civil Investigative Demand (CID) requests to three infant formula manufacturers.

1. Ms. Holyoak, do you support the Federal Trade Commission's work in this area? If not how would you recommend we ensure the infant formula industry promotes effective competition and more resilient supply chains remains is a critical national priority?

Response:

Ensuring that the country does not face another infant formula shortage is critically important. I am familiar with the FTC's work on the issue but I am not privy to the details of the investigations. If confirmed, I will confer with FTC staff and support all actions where the law and the facts warrant enforcement.

2. Ms. Holyoak, if confirmed, will you commit to continuing to work with your fellow commissioners and my office on addressing this issue?

Response:

Yes.

Topic: Biometric Information Privacy Act

As some of you may know, Illinois has one of the strongest biometric privacy laws in the country, the Biometric Information Privacy Act, also known as BIPA. In fact, Commissioner Bedoya recently stated BIPA was far ahead of its time in recognizing the sensitivity of biometric data and establishing protections to guard it. I was pleased to see in May, the FTC take heed of the important of protecting biometric data and following Illinois's leadership and issuing a policy statement addressing concerns relating to the collection and use of biometric information and outlines the FTC power to act under Section 5 of the FTC Act.

3. Ms. Holyoak, do you agree with the FTC's biometric policy statement? How would you work with states, like Illinois, to protect biometric data?

Response:

I agree that the FTC should combat unfair or deceptive acts or practices relating to biometric information. The increased collection and use of biometric information raises consumer privacy and data security concerns. This is a critical area for the FTC to exercise its authority because biometric data is being used to create voice clones, deepfakes, and other fraudulent practices that significantly harm Americans, particularly the elderly. Further, the FTC has a long history of coordinating with state attorneys general. If confirmed, I will work with FTC staff to understand the FTC's pending investigations and collaborative efforts with states like Illinois. I commit to using the statutory authorities vested in the FTC by Congress to protect the privacy and security of Americans' biometric data.

Topic: Artificial Intelligence and Algorithmic Decision Making

Every day, we see more and more businesses integrate AI algorithms across their systems, including inside automated systems that process personal information. In almost all of those systems, it's unclear to the end user how their data is being used.

4. How do you see the FTC's role in ensuring AI algorithms are not used in ways that could introduce inaccuracy, bias, and even discrimination into commercial decisions that affect people's lives?

Response:

While the technological advances in AI and machine learning may be new, the FTC has experience in considering automated decision-making and its effects on Americans. In addition to its authority to enforce against unfair or deceptive acts or practices, the FTC is charged with enforcing the Equal Credit Opportunity Act, which prohibits discrimination in credit decisions, as well as the Fair Credit Reporting Act, which protects the accuracy of consumers' credit reporting information. This work can help guide the FTC as it considers application of its statutory authorities to new technologies. If confirmed, I will enforce FTC's statutory authorities relating to AI algorithms where the law and the facts support such enforcement.

SENATOR KRISTEN SINEMA (I-AZ)

Agency Authority / Artificial Intelligence. Both the threats and potential benefits of artificial intelligence (AI) are far-reaching, a phenomenon reflected in various government agencies and Congressional committees learning and addressing these issues from their particular vantage points. Some members have already raised concerns with the steps taken thus far by the Federal Trade Commission (FTC) and there is no doubt that the agency will play a significant role going forward.

Question 1. Under its current authorities – including but not limited to enforcement actions – what role do you believe the FTC is to play in the regulation of artificial intelligence? What roles do you believe different parts of the FTC should play for the agency to best address these evolving issues?

The FTC's mission is to protect Americans from deceptive or unfair business practices and from unfair methods of competition through law enforcement, advocacy, research, and education. To fulfill this mission, the FTC must stay abreast of technological advancements relating to artificial intelligence. Understanding these issues is critical not only for investigating and enforcing the FTC's competition and consumer protection mandate, but also for educating consumers.

Question 2. Do you believe that the FTC is at risk of going beyond its statutory authority in the approach it has taken to AI to date?

The FTC is currently engaged in investigations and enforcement actions relating to AI to which I am not privy. I look forward to being briefed on these matters by FTC staff and my fellow Commissioners, if confirmed, and to understanding better the various bases for these actions.

Question 3. In your view, where should Congress best concentrate its attention to ensure that the FTC has the proper resources and authorities to fulfill its statutory mandates for the American people in the AI space?

While the technological advances in AI and machine learning may be new, the FTC has experience in considering analogous technologies like automated decision-making and its effects on Americans through the Equal Credit Opportunity Act and the Fair Credit Reporting Act. This work can help guide the FTC as it considers application of its statutory authorities to new technologies. If confirmed, I will enforce FTC's statutory authorities relating to AI algorithms where the law and the facts support such enforcement. To better understand what resources or additional tools are needed, I would want to discuss these issues with FTC experts and my fellow Commissioners, if I am confirmed. I would also seek to maintain a continued dialogue with Congress on these matters.

Section 13(b) Authority and Congressional Action. The FTC's loss of its 13(b) authority has certainly altered how the agency operates.

Question 4. In your view, based on how the agency has operated since the ruling, what should Congress do to address this problem and protect consumers?

The ability to recover equitable monetary relief in court to make consumers whole is an important and effective tool for enforcers. I generally support Congress's efforts to restore this tool.

SENATOR BEN RAY LUJÁN (D-NM)

1. The FTC is an *independent* agency with a statutory mandate to both protect consumers and promote competition. As an independent agency, the FTC is able to act without pressure from elected officials, political appointees, or special interests. In your view, why is it important to maintain the *independence* of the FTC?

The FTC is charged with protecting Americans from deceptive or unfair business practices and from unfair methods of competition. In fulfilling its mandate, the FTC should focus on protecting Americans and faithfully and neutrally applying the law across all industries. If confirmed, I will not defer to the views of any outside organization in making decisions, but instead, I will carefully and neutrally consider the facts and legal authorities.

SENATOR JOHN HICKENLOOPER (D-CO)

Section 5 of the FTC Act. Section 5 of the Federal Trade Commission Act (FTC Act) grants the Commission authority to protect consumers from “*unfair or deceptive acts or practices in or affecting commerce*”. The FTC has used its authorities under Section 5 (15 U.S.C. 45) to issue rules prohibiting certain practices that harm consumers and collect civil penalties from companies who violate established rules.

Question. Do you believe the FTC has used its authorities under 15 U.S.C. 45 appropriately? If not, in what instances do you believe the FTC has used its authorities beyond the scope of Section 5 of the FTC Act? If confirmed, how would you apply the FTC’s authorities under Section 5 when considering proposed rulemakings?

Response:

The FTC has authority to issue rules addressing unfair or deceptive acts or practices. The FTC issues such rules pursuant to the procedures set forth in Section 18 of the FTC Act. *See* 15 U.S.C. § 57a. The FTC may only issue such rules if the unfair acts or practices are prevalent. If confirmed, I would faithfully follow the statutory requirements set forth in Section 18 for unfair or deceptive acts or practices rulemaking.

FTC & Consumer Welfare Standard. The “consumer welfare standard”—where individuals benefit from consuming goods and services—has been used by courts when evaluating the potential impacts and antitrust implications that a proposed corporate merger may have on consumers. In today’s modern economy, consumers can benefit from goods and services in the physical and digital domains, which has raised questions about whether U.S. antitrust laws have kept pace.

Question. If confirmed, how would you apply the consumer welfare standard in future proposed transactions brought before the FTC? Would you consider other impacts of proposed transactions on consumers?

Response:

The FTC reviews proposed transactions and takes action to prevent anticompetitive mergers or acquisitions where the transaction would substantially lessen competition. In analyzing a proposed transaction, courts assess a range of factors including reduced output, decreased product quality, stifled innovation, higher prices, and other effects. To that end, the current antitrust laws are sufficiently broad and flexible to address emerging technologies including digital markets. If confirmed, I would enforce competition laws under applicable statutory authorities and legal precedent.

SENATOR RAPHAEL WARNOCK (D-GA)

Antitrust Enforcement. The Federal Trade Commission (FTC) plays a critical role in antitrust enforcement across many sectors, including in the defense industry. Unlike in other sectors, however, defense industry contractors are often federal government entities that derive their revenue from taxpayer dollars. This creates a special responsibility for the government to ensure competition in these markets, especially considering the essential role of the defense industrial base in our national security.

Question: How do you view the significance of enforcing antitrust laws in ensuring fair competition, innovation, and cost-effectiveness in defense procurement?

Answer:

The antitrust laws protect competition across all industries including the defense industry. Robust competition in the defense industry serves both the Defense Department and the American taxpayer by leading to lower prices, higher quality goods and services, and more innovation.

Question: How would you prioritize and approach this issue if confirmed as an FTC nominee?

Answer:

If confirmed, I would seek to understand from FTC experts what the FTC is currently doing with respect to these issues and how best to proceed. I am committed to vigorously enforcing the antitrust laws where the facts and the law warrant such enforcement.

Frauds and Scams. According to the FTC's Consumer Sentinel report for 2022, Georgia had the highest per-capita rate of fraud reports in the nation.¹

Question: If confirmed, how would you prioritize and approach the issue of combatting frauds and scams?

Answer:

If confirmed, I would combat frauds and scams through investigation, enforcement, consumer education, and collaboration with law enforcement partners. The FTC recently published a Request for Information seeking comments on how the FTC can more effectively collaborate with state attorneys general to educate consumers regarding fraud. I look forward to reviewing the comments submitted in response to the Request and implementing effective strategies to improve collaboration and outreach, if confirmed.

Question: What steps you believe the FTC should take to combat frauds and scams as new technologies, including generative artificial intelligence, may enable bad actors to create more sophisticated scams while using fewer resources?

¹ https://www.ftc.gov/system/files/ftc_gov/pdf/CSN-Data-Book-2022.pdf at 20.

Answer:

Fraudsters and scammers are taking advantage of new technologies like artificial intelligence to personalize scam texts and emails, or clone voices of family or friends, often targeting the most vulnerable Americans, such as the elderly. The FTC must stay abreast of these technologies and effectively adapt enforcement and outreach.

Consumer Data Sales. Last year, the FTC brought a lawsuit against a data broker alleging that the company acquired consumers' precise geolocation data and then marketed it in a form that allowed both current and prospective clients to track consumers' movements to and from sensitive locations like places of worship and health clinics.² The complaint charged that this conduct represents an unfair trade practice, in violation of the FTC Act. Part of the FTC's consumer protection authority is educating consumers and businesses about their rights and responsibilities, especially in relation to the security of their data.

Question: What steps can the FTC take within its statutory authority to protect and educate consumers about the sale of precise geolocation data?

Answer:

Most consumers are unaware of the collection and sale of their precise geolocation data. The FTC's website educates consumers on how and why websites and apps track consumers and what consumers can do to eliminate tracking. If confirmed, I would want to understand from FTC staff how to improve these education efforts.

Question: What can Congress do to better inform consumers about the business-to-business sale of their data?

Answer:

This is an issue on which, if confirmed, I would seek insight from FTC staff and my fellow Commissioners. If confirmed, I would welcome a dialogue with Congress regarding consumer education on data privacy.

² <https://www.ftc.gov/legal-library/browse/cases-proceedings/ftc-v-kochava-inc>.

SENATOR PETER WELCH (D-VT)

1. Earlier this year, I along with my colleague Senator Bennet, reintroduced the Digital Platform Commission Act to help centralize how our government oversees and regulates social media platforms. This bill would create a new independent agency of subject matter experts to provide comprehensive regulation of digital platforms to protect consumers, promote competition, and defend the public interest. The bill was updated this Congress to incorporate regulations related to artificial intelligence (AI).

- a. What do you believe is the appropriate role, if any, of the FTC in addressing the potential harms of social media platforms—including addressing practices like algorithmic boosting, extensive data collection, and concentration among platforms?

Response:

The FTC has brought enforcement actions relating to unauthorized data collection, as well as antitrust claims, against social media platforms. In addition, the FTC is currently engaged in a 6(b) study regarding how social media and video streaming services collect and use data. I look forward to understanding the results of this study and would support continued investigation and enforcement of social media platforms where the facts and the law warrant such enforcement.

- b. If confirmed, what steps would you take to bolster accountability at, and more effectively regulate, Big Tech companies?

Response:

To effectively protect consumers from unfair or deceptive acts or practices and anticompetitive conduct in the digital markets, the FTC must stay abreast of technological advancements and adapt enforcement and outreach accordingly.