

**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
Andrew Ferguson

CHAIR MARIA CANTWELL (D-WA)

The State of Virginia 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 as an FTC Commissioner, I will abide by binding Supreme Court precedent. The Supreme Court has held that the FTC’s removal provisions are consistent with Article II of the Constitution. See *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). Although subsequent decisions have drawn *Humphrey’s Executor* into question, see, e.g., *Collins v. Yellen*, 141 S. Ct. 1761 (2021); *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), the Supreme Court has instructed time and again that “‘it is [the Supreme] Court’s prerogative alone to overrule one of its precedents,’” *Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016) (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001)). The Supreme Court’s “decisions remain *binding precedent* until [it] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing validity.” *Hohn v. United States*, 524 U.S. 236, 252–53 (1998).

I note that although the Commonwealth of Virginia joined the amicus brief in *Illumina, Inc. & Grail, Inc. v. FTC*, No. 23-60167 (5th Cir.), I was recused from participating in the Attorney General’s decision in that case.

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?

If confirmed as an FTC Commissioner, I will abide by binding Supreme Court precedent. The Supreme Court is currently considering whether a similar grant of authority to the SEC violates the nondelegation doctrine. See *Securities Exchange Commission v. Jarkesy*, No. 22-859 (U.S.). The Court’s decision in that case could affect the scope of the FTC’s Part 3 authority. In any event, the Supreme Court has “stated that ‘adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.’” *Elgin v. Department of Treasury*, 567 U.S. 1, 16 (2012) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994)); see also *Axon Enterprise, Inc. v. Federal Trade Commission*, 598 U.S. 175, 190 n.2 (2023) (holding federal courts have jurisdiction to consider constitutional challenges to the structure of the FTC even prior to the conclusion of agency proceedings).

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.

If confirmed as an FTC Commissioner, I will abide by binding Supreme Court precedent. I am not aware of any Supreme Court opinions, or indeed any judicial opinions, in the last five years declaring an FTC action unconstitutional.

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 support Congress enacting comprehensive data-privacy legislation. In the absence of Congressional legislation, the states, including Virginia, have passed data privacy legislation. That is consistent with our federalist structure. But the nature of data privacy on the internet is inherently a question of interstate commerce that the Constitution gives Congress the power to regulate.

The question whether to include a private right of action in a federal privacy law involves balancing a wide range of important policy considerations and is difficult to answer in the abstract. The answer would turn on considerations like the persons to whom the right would be extended; the courts to which jurisdiction to hear such claims would be granted; the definition of the elements of the cause of action; the scope and type of available remedies; the defenses available to defendants; and the extent of the resources that Congress would make available to the States and the federal government to enforce the law apart from a private cause of action. Weighing these considerations is a task that the Constitution commits uniquely to Congress. If I were confirmed, and if Congress sought the views of the FTC on this question, I would solicit the input of the Commission's career experts and my fellow Commissioners to advise Congress appropriately.

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. 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 such an investigation and enforcement action is consistent with the FTC's statutory authority.

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?

If I were confirmed, I would consult the FTC's career experts and my fellow Commissioners to determine whether additional resources or authority are needed to fulfill the FTC's mandate to protect against manipulation in the petroleum markets.

Since 2014, prescription drug prices have increased 35%, outpacing increases in wages, gas, internet service, and food. Evidence suggests that pharmacy benefit manager ("PBM") practices are part of the high drug costs.

Question 7. Would you support the FTC using its Section 5 authority over unfair or deceptive practices to investigate or bring enforcement action against PBMs? Why or why not?

Yes. If consistent with the authority conferred by Congress on the FTC, I would support using the FTC's Section 5 authority to bring enforcement actions against pharmacy benefit managers that are engaging in unfair methods of competition, or in unfair or deceptive acts or practices.

Question 8. Do you believe the FTC's authority to use its Section 5 authority to investigate or bring enforcement actions against PBMs is tied to the outcome of its current Section 6(b) study of PBMs? Why or why not?

The FTC's authority to enforce Section 5 does not turn on the results of studies commissioned pursuant to Section 6(b). Although I believe the FTC's ongoing 6(b) study is important and could be a very helpful aid to future agency action, nothing in Section 5 requires a Section 6(b) study before initiating enforcement proceedings.

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

It will not.

Question 10. 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?

I will not.

Question 11. What would the founders, leadership, or members of the Teneo Network want to keep from the Senate or Senate staffers during a confirmation process?

The language quoted above appears to be a reporter's paraphrasing of someone else's statement. I have no idea what it means. I can speak only for myself. I have provided and will continue to provide to the Senate the information it requires to consider my nomination.

You were an adjunct law professor at the Antonin Scalia School of Law at George Mason University in 2019 and 2021, which is the same law school where former FTC Commissioner Joshua Wright, who was recently accused by multiple women of sexual misconduct, worked until Summer of 2023 when he resigned. His alleged behavior was purportedly an "open secret" at the law school.

Question 12. Did you have any conversations with Mr. Wright about becoming an FTC Commissioner prior to your nomination? After?

Before my nomination, I occasionally discussed antitrust issues with Mr. Wright but do not recall any conversations about my becoming a Commissioner. After my nomination, we had limited communications about the nomination. I spoke with other former Commissioners about my nomination as well.

Question 13. If confirmed, will you commit to ensuring that the FTC is a workplace free of sexual misconduct.

I commit without reservation to doing everything I can to keep the FTC free of sexual misconduct, if confirmed.

SENATOR TAMMY DUCKWORTH (D-IL)

Topic: Infant Formula Shortage

Question 1: 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. Mr. Ferguson, 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: Promoting competition in the market for infant formula—and for all other markets in which mothers participate to care for their children—is a critically important function of the FTC's competition mandate. Although I lack access to the information underlying the FTC's decision to issue the CIDs you describe, I support the FTC taking action consistent with its Section 5 authority to promote competition for infant formula. If confirmed, I would work quickly with FTC staff to get up to speed on these important issues.

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

Response: Yes.

Topic: Biometric Information Privacy Act

As 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 when it issued 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. Mr. Ferguson, do you agree with the FTC's biometric policy statement? How would you work with states, like Illinois, to protect biometric data?

Response: In the absence of federal legislative action, States like Illinois have taken the lead in protecting consumer data. That is exactly what our Constitution contemplates. Illinois—and the vast majority of other States to have taken up privacy legislation, including Virginia—appropriately treat biometric data as sensitive data. This apparent consensus on the treatment of biometric data as sensitive data subject to the highest level of protection demonstrates why Congress should take action to address this important issue of interstate commerce.

In the absence of Congressional action, the FTC should take enforcement actions regarding the use of biometric data where the facts make clear that the collection, use, or transfer of those data violates Section 5's prohibition on unfair methods of competition, or where collection, use, or transfer constitutes an unfair or deceptive act or practice.

As a state law enforcer, I am particularly sensitive to the FTC's relationship with the States. The FTC frequently collaborates with state law enforcers to great effect. If confirmed, I would work to promote further collaboration.

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: The FTC should enforce its statutory mandates regarding AI practices as vigorously as it does for every other industry. If the use of AI constitutes an unfair method of competition or an unfair or deceptive act or practice, or violates some other statute the FTC enforces—for example, the Equal Credit Opportunity Act's prohibition on discrimination in the extension of credit—the FTC should take enforcement action consistent with the law.

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?

Answer. I believe the FTC should vigorously enforce the statutes Congress has charged it with enforcing, and that it should go no further than Congress has expressly authorized it to go. Congress has charged the FTC with enforcing the laws prohibiting unfair methods of competition and unfair or deceptive acts or practices. The FTC should initiate enforcement actions regarding artificial intelligence only insofar as the use of artificial intelligence constitutes an unfair method of competition or an unfair or deceptive act or practice, or violates some other law that the FTC enforces. For example, it has become clear that AI can be used to create deepfakes, voice clones, and enhance the sophistication of email phishing schemes that primarily target elderly Americans. This is a critical area on which the FTC should focus its enforcement resources, consistent with its Section 5 authority.

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?

Answer: Both in its enforcement and rulemaking proceedings, the FTC should always remain well within the bounds of the authority granted to it by Congress. If confirmed, I would work hard to ensure that the FTC would act only where Congress has clearly authorized it to act, and only in the manner Congress has authorized it to act.

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?

Answer: If confirmed, I would consult with the career staff and with other Commissioners to determine whether the FTC has the resources it needs to carry out its congressional mandate successfully. If more resources are required to enforce existing authorities, or if additional authority is needed to protect consumers, I would work with Congress to obtain those resources and that additional authority.

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?

Answer: The authority the FTC believed it had under Section 13(b) of the Federal Trade Commission Act was a critical part of the FTC's enforcement toolkit. The FTC invoked that authority to recover billions of dollars in restitution and disgorgement for consumers. I believe Congress should pass legislation authorizing the FTC to obtain court-ordered monetary relief for consumers injured by unfair or deceptive acts or practices.

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?

Congress has tasked the FTC with protecting consumers from unfair methods of competition and from unfair or deceptive acts and practices. The FTC cannot perform that duty unless it acts in the best interest of American consumers, rather than at the behest of special interest groups or other self-interested actors.

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: Congress in Section 18 of the Federal Trade Commission Act has carefully delineated the FTC’s authority to promulgate rules regarding unfair or deceptive acts or practices in or affecting commerce. See Magnusson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. 93-637, § 202, 88 Stat. 2183, 2193–98 (1975) (codified at 15 U.S.C. § 57a). The FTC may issue rules to address unfair or deceptive acts or practices that are “prevalent” in the markets. 15 U.S.C. § 57a(b)(3). The Act also requires the FTC to follow special procedures for any Section 18 rulemaking. If confirmed, I would work hard to ensure that the FTC does not exceed Congress’s grant of rulemaking authority, and that it complies with all the procedural safeguards imposed by Congress.

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 enforces the Clayton Act, which prohibits mergers the effect of which “may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18. In determining whether a merger may substantially lessen competition or tend to create a monopoly, courts and the Commission consider a wide variety of factors—including market share; probable effects on price and output; the effect on input markets, including the risk of monopsony; potential effects on product quality and innovation; and the effect of the merger on potential entrants. If confirmed, I would vigorously enforce the Clayton Act’s prohibition on anti-competitive mergers.

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: Promoting competition and innovation in our defense markets is critically important not only to protect taxpayer resources, but also to ensure a ready supply of materiel and the industrial infrastructure to produce it in the event of armed conflict. Our antitrust laws are the principle means Congress has chosen to promote competition and protect innovation in our markets, including our defense markets. Vigorous enforcement of the antitrust laws in the defense markets is therefore a critical part of the FTC's statutory mandate.

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

Answer: If I were confirmed, I would work with the FTC's staff and my fellow Commissioners to ensure the FTC was doing everything its resources allow to promote competition in these important markets.

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: Preventing and combatting frauds and scams is one of the FTC's most critical missions. As a state law enforcer, I am keenly aware of the important role that state attorneys general play in protecting consumers from fraud and scams. The FTC has a long history of collaborating with state attorneys general to protect consumers. If confirmed, I would work to promote further collaboration with state law-enforcement officials to protect consumers from frauds and scams.

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?

Answer: As scammers and fraudsters become more sophisticated, the FTC must do its level best to keep pace. The FTC recently established the Office of Technology in part to ensure that the FTC could stay up to speed on technological developments, including artificial intelligence. I believe this is a step in the right direction. If confirmed, I would work with my fellow

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

Commissioners to ensure the FTC continues adapting its enforcement tools to new technology and practices.

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: The collection of consumer data, including precise geolocation data, generally happens in the background of consumer transactions without the consumer's awareness. Consumers have even less insight into the aggregation and sale of those data. The FTC has taken steps to educate consumers, and I support taking further efforts to educate consumers. Insofar as the collection, aggregation, or sale of precise geolocation data constitutes an unfair method of competition or an unfair or deceptive practice or act, the FTC has statutory authority to bring enforcement actions.

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

Answer: The regulation of the collection, aggregation, and sale of consumer data is a critical question of interstate commerce that is appropriately the subject of federal legislation. I support congressional action to educate consumers on the collection, aggregation, and sale of consumer data, and to protect the privacy of those data.

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

SENATOR PETER WELCH (D-VT)

1. What are your thoughts on the impact AI will have on competition in the technology sector, and what do you believe is the appropriate role of the FTC in reducing the anticompetitive effects of AI in the technology sector?

Response: Like many new technologies, AI presents opportunities both to foster innovation and efficiency, and to assist bad actors carrying out monopolistic schemes, frauds, and scams. The FTC has a long history of adapting its enforcement tools to confront changing technologies and new markets. I believe that AI is one example in a long line of technological advancements to which the FTC must adapt its enforcement tools.

2. If confirmed, how would you approach mitigating the potential harms of artificial intelligence?

Response: The FTC's mission is to police unfair methods of competition and unfair or deceptive acts or practices. Congress first mandated that mission more than a century ago. The FTC has consistently adapted to execute that mission in the face of substantial and constant changes in technology. If confirmed, I would work closely with the FTC's expert staff and my fellow Commissioners to ensure that the FTC enforcement tools keep pace with changes in technology, and to vigorously enforce Section 5 when artificial intelligence is used in furtherance of unfair methods of competition or unfair or deceptive acts or practices.

3. Do you believe AI will increase competition or will it lead to further consolidation?

Response: It is difficult to predict the competitive effects of AI given the almost infinite number of uses to which AI may eventually be put. Like many new technologies, AI may promote competition in some instances and degrade it in others.