

The Antitrust Source: Discussion of *Trump v. Slaughter* decision with former FTC chairs William Kovacic, Jon Leibowitz, Deborah Majoras, Timothy Muris, Maureen Ohlhausen, and Edith Ramirez—July 16, 2026.

Editor's Note: The Federal Trade Commission Act provides that FTC Commissioners, appointed by the President, can be removed by the President for "inefficiency, neglect of duty, or malfeasance in office". In 1933, President Roosevelt fired FTC Chairman William E. Humphrey due to policy disagreements rather than the statutory grounds. In the landmark 1935 decision of *Humphrey's Executor*, the Supreme Court held that the dismissal was unconstitutional.

In March of 2025, President Trump removed two Democratic FTC Commissioners—Rebecca Slaughter and Alvaro Bedoya—due to policy disagreements. Commissioner Slaughter, relying on *Humphrey's*, challenged her removal as unconstitutional. On June 29, 2026, the Supreme Court issued its decision in *Trump v. Slaughter*. The Court reversed *Humphrey's* and held that because FTC Commissioners exercise executive power they are subject to removal by the President without cause.

Six former FTC Chairs met to discuss the impact of the *Slaughter* decision on the Commission. The discussion was moderated by John Graubert of Covington & Burling LLP. What follows is a transcript of that discussion. The views expressed by the panelists do not necessarily reflect the views of their respective employers or any organization with which they are affiliated.



William Kovacic



Jon Leibowitz



Deborah Majoras



Timothy Muris



Maureen Ohlhausen



Edith Ramirez

JOHN GRAUBERT: I am delighted to welcome this extraordinary group of former FTC Chairs to discuss the impact of the Court's decision in *Trump v. Slaughter* on the operation of the FTC. We will not, for the most part, be discussing the legal or historical analysis in the opinions but rather focus on the day-to-day institutional issues.

Before we dive into some specific questions, I would like to just go around the panel and give you all a chance to give us your general impressions of what the impact of the decision on the operations of the FTC might be. I will randomly start with Edith.

EDITH RAMIREZ: I want to start off with more of a high-level personal observation that I think flows from the structural changes that we have already seen under this administration and are likely to continue to see following this decision.

To begin, the FTC as we all knew it and as Congress envisioned it would be—a multi-member bipartisan commission with fixed, staggered terms and removable only for cause—is gone.

Now, at its best, the FTC has been a nimble and dynamic agency with a reputation for rigor and consensus-based decision-making. It has been a thought leader here in the United States and around the globe. One of the strengths that stood out to me when I was leading the agency that I think drove that success was this distinct feeling that we were all rowing in the same direction and that each and every one of us in the agency was acting in good faith and trying to do our utmost for American consumers. That was our north star—serving the public interest, not a partisan agenda. The FTC's independence and bipartisan structure underpinned that.

I worry that this deep sense of mission and unity has been lost and that following the Supreme Court's ruling something akin to what we are seeing now at the FTC, a one- or two-member agency with a controversial and partisan agenda, will become the norm going forward.

DEBORAH MAJORAS: As I think about the impact on the operations of the FTC, most immediately my thoughts go to the FTC staff and what they are going through, how this might affect their morale, and the sense of confusion that they must have, because they are the ones who have to get the work done, and that is probably pretty difficult right now. What does that mean for their jobs? What does it mean for civil service protection and the like? There is a lot of uncertainty out there. Will Congress act, and if so, how can they and what can they do? I think there is a lot of uncertainty.

Beyond that, as I try to think about what the impact would be on the operations, I think there are two places to look. First, look at the current FTC. As best as I can tell, Chairman Ferguson has been operating more as an Executive Branch agency from the start, and while I am not there and I don't work with the FTC on a regular basis anymore, it appears that he and his team are left to do most of their work on a daily basis alone, like most federal agencies are, and it is on these larger decisions, in particular mergers, where there is now direction coming from the White House and the President. I am not making a value judgment about that; I am simply making an observation.

Of course, Chairman Ferguson, his fellow Commissioner, and staff are now working without any minority Commissioners, so that has to make a big difference in the day-to-day operations. We have already been seeing it over the last year or so.

The second place you can look for how the operations might change would of course be the Antitrust Division at the Justice Department, which has been operating in the Executive Branch for a very long time and has through many periods operated very effectively and without interference or whatever you want to call it from the President, who could always have done it constitutionally but for many, many years chose not to. The DOJ was given a certain amount of independence because it was thought to be better overall that the nation's law enforcement agency not appear to be so politically motivated.

That is obviously gone. The choices that are being made today—and I would argue it has been building, this has not been an abrupt change, and it has been coming for a while, but that independence has been eroded. Nonetheless, we can see that we have another antitrust agency that operates as an Executive agency. I think those are a couple of the places to look for how this could function, recognizing as I said from the beginning all of the uncertainty that surrounds us right now on the FTC.

JOHN GRAUBERT: We will try to come back and talk about some of those issues in more detail, but all good points.

MAUREEN OHLHAUSEN: I think the decision was a long time coming. It was pretty clear that this was how it was going to come out. There has been a long history with other cases foreshadowing where this was going in recognizing that the FTC was exercising Executive authority and should be under the control of the Executive. I think one of the things we saw even preceding this was that the FTC was coordinating much more closely with the White House in the previous administration as well.

Some of the benefits that we have had from having a bipartisan FTC that saw itself more as an independent decisionmaker were things that I think grew out of practices and norms, perhaps from the FTC's previous tangles, when it had some bad relations with Congress and some troubles, and these norms developed around how was the best way for the FTC to proceed and how was it going to be successful.

One of the things I think we need to consider is whether the FTC can operate as an almost single-headed agency under the control of the president, much like a cabinet kind of organization. I think the answer is so far yes. The quorum rules decision made it clear that, yes, the FTC can play that role, but I think the question is, should it? Were there benefits even now that the president can remove Commissioners directly, but should an administration consider whether having an agency that is a bipartisan agency and has a deliberative character to it actually results in better outcomes for the goals of what the administration wants?

One of the things that I think is clear is that the FTC, when it operated in a bipartisan way, was more successful, certainly winning in court and I think getting congressional support for what it does, because ultimately Congress still holds the power of the purse and Congress is going to decide whether the agency should be funded to do the things it is doing.

I think there is a political decision to be made about whether having minority Commissioners, having Commissioners who can sometimes disagree with where perhaps some other parts of the administration want them to go, is that still a beneficial thing and should that be preserved? Right now it would have to be preserved just by a few norms. Will there be legislative changes to preserve that? That remains to be seen, but there were definitely benefits from having the previous setup.

JOHN GRAUBERT: Great. Let me give our readers another resource. Several of you have mentioned the role of minority Commissioners. The amicus brief that a number of you participated in before the Supreme Court had an extensive discussion of the role of minority Commissioners' dissents or potential dissents, and maybe we will talk about that a little bit later.

WILLIAM KOVACIC: Thanks, John, for putting the program together. From the time of his appointment as chair, Chair Ferguson has said, "I work for the president," and has sought to align his program completely with the preferences of the White House. I think for the balance of the administration I don't think *Slaughter* changes the world much at all because that had become the adopted policy of the Commission.

It is also difficult to see if we will have any Democrats appointed to the agency in the next two-and-a-half years. Are we going to go through the entire administration with a board of two or maybe three? Is the possibility of having the originally intended bipartisan configuration of five gone?

Congress could assert itself and say, "You are going to appoint the others, and we will use the pressure points we have to take away things you want." I think in terms of day-to-day operations this has been the president's agency since January of 2025. Without apology, the chair and his colleague, Commissioner Meador, have said that is the way it ought to work.

I think the issue we have been discussing is, what happens after the next presidential election? Do you have the reemergence of what I would call a “traditional” presidency, traditional in the sense of a president who respects the value of having some degree of autonomy within the Commission, and that even if *Slaughter* provides the power to dismiss people immediately that the new president will not exercise it? Will we see the adoption of a norm over the long term in which presidents decide not to use that tool to motivate change or induce the Commission to be one way or the other? That might happen.

We could see the new norm being “I’ve got this power, and I’m going to use it ruthlessly. I will use it across the entire span of independent regulatory agencies to ensure that the agencies bend to my will. I won’t tolerate dissent. I won’t seek to obtain the appointment of non-majority Commission members. They are a nuisance anyway, so I would love to have the unanimity that the homogenous composition of the agency provides.” That is a long way of saying that I do not think life changes much for the Commission for the next two-and-a-half years.

Debbie’s points are really important ones: What is this going to do to recruiting and capability? I just noticed what I regard as a hemorrhaging of talent, especially in senior management ranks, over the last year and a half, a very serious erosion of capabilities, and that cannot be summoned back up at will. Are you going to have an agency that perhaps wants to do bold things but just lacks the ability to do them well? I think that is a real restriction on capacity going ahead. That is a limitation on what the agency can do.

Beyond the Trump presidency, what norm or principle will presidents follow? Will they say, “I’ve got this power, and I am going to use it every chance I get,” or are they going to say, “That power exists but it is not wisely used. I am going to set it aside to establish a norm that will increase the legitimacy and respect that the agency gets, especially in front of the courts.”

JON LEIBOWITZ: Thank you, John and Lydia, for putting this panel together. It is great to see all my former colleagues, and it makes me think of the occasional times we argued, because we did, and the many times we agreed or tried to reach agreement, and did, because we believed in the importance of consensus and because we believed consensus would make for enduring decisions and outcomes. That, I think, is when the FTC is most effective.

Let me start by saying that I agree with and share the views of all of my colleagues who have spoken before. And I will give you my nuanced, even-keeled opinion of the *Trump v. Slaughter* Roberts’ opinion, which I think was deceptively revisionistic. But as often with Justice Roberts, well-written.

What particularly disturbed me—and the dissent picked up on this a little bit—is that one of the great things you had in the Commission when it was functioning well was a degree of insulation from political pressure. I think the Commission will continue to do important work even if it is controlled by one party exclusively, but it will be a lesser entity as a result of the *Trump v. Slaughter* decision. Why? Because whenever you have Commissioners only from one particular party, they are going to miss a valuable perspective and they won’t have quite the incentives to create lasting bipartisan decisions or outcomes that will withstand the test of time. The most important antitrust accomplishment of this century involved the Commission stopping pay-for-delay pharmaceutical deals; other major FTC accomplishments included putting irresponsible tech companies under order for saying that they would not sell personally identifiable consumer information and then doing exactly that. I am not quite so sure you would have those outcomes if you had Commissioners of only one party who were paying a lot of deference to what the White House wanted. Because different administrations were very close to the industries we brought cases against.

I will just say one more thing. John, I think even you were partly responsible for the success of the pay-for-delay initiative even though you were not terribly successful in the Fifth Circuit because that loss—not your fault of course—allowed us to create a circuit split.

JOHN GRAUBERT: Thanks a lot, Jon, for reminding me about that.

TIMOTHY MURIS: I disagree strongly that *Slaughter* was a mistake. To start, separate two points: First I support strongly multimember commissions as opposed to the Consumer Financial Protection Bureau (CFPB) model. The FTC has a strong-chair model, and the chair got even stronger in the so-called “forty years” that the progressives decry. The strong chair was crucial to success, but multimembers force even the strongest of leaders to vet their most controversial ideas with peers. Executive agencies accomplish that in a hierarchy with superiors and colleagues, while the FTC had multimembers for that function.

Second, I do not see a necessary connection between *Humphrey's Executor* and multimember commissions. We have a test in the modern commission, called Bush '41. He appointed every Commissioner in his one term in a short time. He produced the Steiger Commission and it was very well-regarded.

For those of you who do not know, minority Commissioners were in fact selected by the Bush Administration. There was no deference to the leader of the other party. That was a convention that Bill Clinton, in the shock of the Gingrich revolution, began with Trent Lott. Even that practice changed over time, hardening certainly by the first Trump Administration.

One “minority” Commissioner under Steiger was a Democrat, an economist, following a recommendation I made—I worked for Boyden Gray, the President's Counsel, in the transition. I recommended filling some of those non-Republican slots—you can only have three Republicans—with economists, and the FTC got one of those. There was also an independent Commissioner—the statute does not require two Democrats—a former FTC staffer who was reappointed after we first appointed her in the Reagan Administration.

Turning directly to *Humphrey's*, the opponents and proponents exaggerate its impact. *Slaughter* has a modest benefit; it allows the president to take control sooner. There was a Reagan deregulatory revolution and I thought that I worked for Ronald Reagan; so did Jim Miller. In the Bush '43 Administration, we stressed continuity, not revolution, consistent with “compassionate conservatism.”

Slaughter is not an existential threat. There are two questions that help address the impact. The first is: what are the so-called harms that *Humphrey's* prevented? The issue is not whether you agree with President Trump or the future president AOC; instead, it is who should control an agency that shares jurisdiction with the Antitrust Division? Will it be the dead hand of a past and perhaps defeated president acting through Commissioners he appointed or the president who won the most recent election? Considered that way, the policy case for *Humphrey's* was much weaker than its proponents claimed.

Let me give you two examples from the FTC's modern history. As we all know, the most basic rule at the FTC is that it takes three votes if you have a fully staffed Commission. Reagan's chairman took office in month nine of the Administration, but there was no working majority until month 25. In the interim, there were two hostile holdover Commissioners, one the last chairman who publicly said that his job was disruption, “to call in artillery on your own position.”

For President Clinton the problem was even worse: he could not obtain a single vote for nearly two years. There was no guaranteed open seat until 20 months into his administration, and Bob

Pitofsky did not become chairman until month 27. By delaying a new president's control of the Commission, *Humphrey's* protected the loser of the 1992 election and not the FTC.

The second question is whether the demise of *Humphrey's* ushers in unprecedented, dangerous White House control? That fear is overstated. The amicus brief that many of you signed correctly noted that there are already controls, the most important of which are the powers to nominate Commissioners and designate chairs. When a president has wanted dramatic change, as Reagan and Biden did, they acted. It took Reagan longer than Biden. The FTC, moreover, has always worked alongside multiple branches of the Administration.

The overwhelming majority of what the FTC does is not going to attract White House attention. Rare matters will, like the 2000 Columbine report or the launch of the 2003 Do Not Call Registry. I knew the telemarketers would go to the White House, and they did. I wanted the White House involved, and we launched from the Rose Garden. It was a good thing to do and extraordinarily memorable for the career staffers who were there.

I understand that the current White House is different in temperament, but what attracts its attention is hardly obvious. If you believe that *Humphrey's* made a difference in the way the current president acts or does not act, then I suspect you are in the minority.

My conclusion is that *Slaughter* is a modest addition to the toolkit that already existed, and the utility is to accelerate a new administration's ability to control the agency. You control the agency primarily by the people placed there and the agenda that they implement.

JON LEIBOWITZ: I agree with you that certainly it is not an existential crisis for the FTC insofar as it can continue to do much of the work that it always does on consumer protection and antitrust. And I actually think in some ways, though certainly not in all matters, this Commission has come back within the guardrails from its Biden-era predecessor. But look: I never thought when I was the chair that I worked for President Obama. I voted for him, I admired him enormously, and I was very grateful that he made me the chair, but I felt like what he wanted me to do and also what Congress expected our Commission to do was to effectuate the goals that we thought were most important within our jurisdiction on behalf of consumers. I was the only Democrat on the Commission when I became chair. Pamela leaned Democrat, but she was Independent, and Tom Rosch and Bill were Republicans on the Commission. I never felt like the minority Commissioners had "control" over me because, bottom line, we typically had a consensus about the things we wanted to do, we all respected each other and staff, and there was an appropriate level of deference to the Chair.

I do believe when you have a Commission that is only composed of members of one party, which is, as Bill points out, what we are likely to have now and what we had for a couple of years under President Biden, that is not a good Commission.

DEBORAH MAJORAS: I am never going to say to you, Jon, that I do not think you and Pam were really valuable to our discussions because I agree with you, I think we worked together and tried to get consensus. That meant sometimes changing our views and so on.

The thing I keep coming back to with the argument you made, and I wonder: would you then argue that the Antitrust Division has made less credible decisions because they did not have that?

I was at the Antitrust Division before I was at the FTC, and we had incredibly robust discussions there, just in a different way. That is what I come back to, not that having minority Commissioners is not valuable, but aren't there other ways, and won't the nature of the people we hire in these agencies use ways to kick the tires? I am not saying you are wrong, but I want to hold that up there.

JON LEIBOWITZ: Let me respond to this briefly. I think when you and Hew [Pate] were in the Anti-trust Division you made very thoughtful decisions.

Occasionally Tom and probably occasionally you, and occasionally at the FTC, we would over-rule staff. And in a case like *Maytag/Whirlpool*, it would be good to have a dissent out there. I do not think that is a terrible thing if it is respectfully done.

I would also say that we lived in a period when we all believed in not just the rules but also the norms and traditions of both agencies. If you look at the Justice Department right now, there are certainly allegations that some decisions have been made because of the relationships with the people who are importuning the head of the Department or the White House.

My own view, and very few people share this, is that independent agencies—and certainly the Supreme Court doesn't—are enormously valuable because they take decisions to some extent out of politics and put them in the hands of rational, expert people, and those people can disagree, but for the most part those decisions are generally very good ones.

DEBORAH MAJORAS: Because of the people you put in those positions and not necessarily because of the structure.

JON LEIBOWITZ: When you put in virtuous people like yourself, they make generally very good decisions. No one makes perfect decisions, and we can all recall decisions we have made or our Commission had made in the past that we might have pulled back a little bit if we could have, but when you have less virtuous people, a Commission is a great way to balance that, both by being able to dissent and being able to push internally for consensus through threat of dissent.

JOHN GRAUBERT: Let me see if I can follow up a bit more on this idea of control. Certainly it is a good backdrop to think about agencies that are understood to be Executive Branch agencies like the Antitrust Division that have operated at some periods of time with some degree of independence.

Roberts' decision speaks frequently of broad terms like "general administrative control," but he did not make the president the chair of the Commission. The president may be able to fire Commissioners, but what do we think that control looks like on a day-to-day basis? What does it really mean that the president now has control?

WILLIAM KOVACIC: I think the most significant feature is the ability to remove members of the board that the president does not like. As Tim mentioned before—those of us who submitted the brief on behalf of former chairs tried to attack the straw man that suggested that the president before the *Slaughter* decision was helpless. A very sad part of the debate was the suggestion that the president had no power.

Of course, the president had a lot of power. The president could say, "Chair, nice job, thank you, you are now a mere Commissioner," and move that around. That was a significant form of intervention.

Others were the review of the budget and the ability to grab your passport and say, "You are not going to the OECD because you have been speaking off-topic and out of line." The president had a lot of power before.

I would admit that that is not quite as significant as being able to say, "You're dismissed," and to send you away. At the FTC the president is not asserting the ability to sit in the chairs that we occupy during the Commission meetings, but the president is asserting very strongly now the ability to determine what the people who sit in those chairs will do.

EDITH RAMIREZ: The other dimension to this question about presidential control is who will be the nominees? Are you going to get someone leading the agency like the current chairman, who from the outset pledged his loyalty to President Trump? It is no longer the FTC; it is now the Trump-Vance FTC. So, depending on who is appointed as chairperson, will the president need to exercise the ultimate authority granted by the *Slaughter* case, or is there going to be such close alignment like we are seeing today that it is unlikely the president will have to exercise much direct control? Currently, for example, although the agency continues to perform certain core, traditional antitrust and consumer protection work, significant resources are also being devoted to a highly partisan agenda.

JOHN GRAUBERT: Let's follow up on that. Although the current FTC is certainly closely aligned with the White House, will future Commissions necessarily have to follow that path? If the White House calls up and says, "I want you to sue company X" or "I want you to not sue company X," will future chairs have to say fine, or will there be some play in the joints?

MAUREEN OHLHAUSEN: I think two things: One, I definitely want to endorse Tim's point about the ability to change direction at a Commission at the turn of an administration as someone who did not have a majority when I was acting chair for about a year and a half. Fortunately, some of the norms of bipartisanship and also agreement on what the goals are of consumer welfare helped mitigate that.

Secondly, I think there has always been the issue that the FTC operates as part of a bigger structure of government as well as DOJ—Debbie made this point too—depending on what the president is asking and why they are asking that. Jim Rill, former head of the Antitrust Division, would give an example of where there were national interests like foreign policy interests at play, where there was a decision at the antitrust division based on an administration determination that we don't think this would be a good case to challenge because of these wider national interests.

I think you have to ask if this is something like what the Tunney Act was directed at, where it was the Nixon Administration and the ITT scandal, or is it the question of whether the FTC gets to act totally insulated from these wider U.S. government interests?

TIMOTHY MURIS: The phone call John references was on his list of questions to consider, and it reminded me of a day long ago. Indeed, Bill has written about this date, and will probably remember exactly what I am talking about. April 11, 1962, an important day in antitrust history.

The subject was steel and the event was President Kennedy's regular press conference, at which he was one angry man. He denounced the price increase that U.S. Steel led, joined by some major competitors. My family had recently moved to California from Massillon, Ohio, where my dad was a steelworker and union member. He changed his blue collar for a white one and became Director of a Boys' Club of America.

What I learned later—the Kennedy Library has audio of these press conferences—is that in his seven-minute attack, during the sixth minute he states: "The Department of Justice and the Federal Trade Commission are examining the significance of this action in a free, competitive economy." If that is not the president of the United States telling the FTC what to do, I do not know what is!

In the event, it turned out that the president's 36-year-old younger brother, who happened to be the attorney general, moved quicker than the FTC because, in the immortal words of Hans Gruber from the first *Die Hard* movie, he had "the FBI." The FBI showed up at the offices of the steel companies.

The FTC actually had a consent agreement—Bill is an expert here too—involving basing point pricing, which was a major issue seventy-five years ago. What the Commission's actual role became was unclear, but in any event the industry retreated quickly.

Presidents under *Humphrey's* repeatedly asked the FTC to investigate other price increases, especially energy. And Maureen mentioned foreign policy. There was a dispute that involved the State Department and the Antitrust Division. If it had been an FTC investigation that annoyed State, I am sure the same dispute would have happened.

Cal Collier, having left the FTC as General Counsel to work in OMB before he eventually became FTC chairman, met with President Ford to discuss agency budgets. Among several issues, at the President's request, they discussed the FTC's significant case aimed at dismembering the oil industry.

JOHN GRAUBERT: I want to ask Bill in particular, what is going to happen with standalone Section 5 authority in competition cases?

WILLIAM KOVACIC: It is not a source of authority that has been used extensively, so it is not as though we are looking at a historical downpour of cases that is going to turn into a trickle. It has been used in a relatively small number of instances, sometimes important ones. There are lots of possibilities for using it more extensively than it has been used in the past, but it seems to me that this is another instance in which you have always had historical cautions on the part of the agency about how to use it.

This goes back to the roots of the agency where you can ask whether Section 5 was a sustainable element of policymaking. You had a deliberate mandate to the Commission to adjust the boundaries of doctrine, to go beyond existing doctrine, and the Commission was told, "You are going to use it, not for cut-and-dried matters. That is going to be the Department of Justice. We expect you to use it in what might be called 'experimental situations,' to move boundaries over time."

That is authority that is packed with political dynamite to use day-in and day-out. You can step back and ask, "Is that a sustainable mandate given all of the interests that immediately are mobilized to challenge it?" The Commission's approach historically, with a few exceptions, has always been pretty cautious. The instances in which I would say there has been the greatest grief have been the ones in which you did have political pressure.

We have just been talking about some of the political pressure. When Congress set up the agency and spoke about independence, it was not talking about itself. The discussion about independence from the Congress has always been focused on the other end of Pennsylvania Avenue, and I think all of us who had the confirmation experience were asked at some point by the committee a question asked for decades: "You understand, don't you, that you are an arm of Congress?" The correct answer to that question is, "Absolutely. I got it."

The wrong answer is, "Oh, no, Senator, you don't understand. We are independent." You would be asked to leave the room, think about it for a while, and come back.

Congress has always viewed itself as free to change the direction of the agency as it wants, and they have used that authority in different instances. The *Exxon* case is a painful example of that, and there have been others where Congress was deeply involved in shaping the decision to prosecute.

I imagine for the future it is authority that is used very cautiously with one exception, and that is there was a serious effort that Edith and her colleagues made to put some guardrails around how

it was used. Lina abandoned them with gusto, and now you have a chair who says, “I’m glad that there aren’t guardrails there because I have in mind a variety of approaches that can be used to apply this authority, and I’m quite happy to do it.”

This is where the president’s political or social agenda can come directly into play. We will call in Joe Simons and say, “I want you to bring unfairness cases against those in the political realm who tell lies.”

Joe said, “That’s really a bad idea. I’m not going to do it.”

In a more recent example, do you want to bring the larger social policy agenda that I think all of us regarded as being a form of kryptonite that drives you into dangerous, hazardous circumstances, and say: “We don’t. That is a bad use of our authority given all kinds of other things we can do.” I think a president who wanted to push the agency in a particular direction can say, “You’ve got the tool to do it, it’s right there, go ahead.”

JOHN GRAUBERT: Bill—Justice Gorsuch’s very interesting concurring opinion suggested this—I think you have commented that we are looking at a nondelegation issue here.

WILLIAM KOVACIC: Oh, it’s coming. *Slaughter* was only the first depth charge. You can hear others splashing into the water, and that is one of them.

The Chief Justice’s comment about the “otherworldly, expansive quality” of Section 5 was not an endorsement of Section 5. The other shocks that are coming are going to involve delegation, for example, and they are going to look at that grant of authority and ask, “Was this inherently infirm from the day it was signed in September 1914?” I think there are a lot of members of the Court who are inclined to say, “Yes, it was.”

JOHN GRAUBERT: That might be a limitation on discretion.

DEBORAH MAJORAS: I will tell you something that is fascinating, particularly given the case that was also decided about the Fed. When I was FTC chairman, the White House had a rule that no one was allowed to call and talk to me about their views from the White House unless they went through the Counsel’s Office, so there was an effort to keep us independent.

One day I was meeting with the Fed chair (this was before we had the CFPB, so the banking agencies and FTC all still had a bit of consumer protection authority over banks and other financial institutions). He came to my office and asked, “Would you please bring such-and-such under Section 5?”

I said, “No, I cannot do that.”

He asked, “Debbie, you can’t or you won’t?”

I said, “I won’t,” given that I thought it would be dangerous to take Section 5 that far.

He left it there and life went on, but I chuckle as I think about it now, given the two decisions about executive authority that the Supreme Court just decided.

MAUREEN OHLHAUSEN: Can I weigh in on Section 5? With unfair methods, Bill, you are saying they won’t bring it, but the broad policy statement is still on the books and clearly not rescinded, I think for the reasons that you mentioned, wanting to have all this discretion. Gorsuch’s concurrence really highlights this. This is an enormous grant of power that Congress has handed over to the Executive.

Even putting social programs aside, when Edith did her Section 5 policy statement, which had some very good things in it, I dissented. I was very concerned about *Official Airline Guides*. That

was an FTC UMC case that basically made entities design products in ways the FTC thought would improve competition. Even if you are not a rival in a market, it said if you designed your product differently or made it differently and it would help competition, it was an unfair method of competition not to do so. It is so unbounded that it concerns me that it could be used to regulate business conduct quite broadly.

I'll mention that when I first started at the FTC in the General Counsel's Office in the 1990s and asked, "What about the nondelegation doctrine?" everyone laughed at me. That was a long time ago. This will be the next battle.

JOHN GRAUBERT: Justice Gorsuch was suggesting that Congress did not know it was giving this authority to the Executive, and now we have another area that is hanging out there in that same vein, Part 3. Are we going to have any more Part 3 adjudications, and if so, can the president now say how he or she wants the case to come out? What about Part 3?

JON LEIBOWITZ: Let me take that, but let me first respond to defend Section 5 in the sense that it should be broader than the antitrust laws. When Congress created the FTC, they wanted us to use—and it is utterly clear when you go back to the legislative history, which most of us have done—Section 5 in a way to stop unfair methods of competition. And that is as important now as it was then because the antitrust laws have become very cramped. I think the FTC is basically the only plaintiff that has won Supreme Court antitrust cases—thank you, Tim, thank you, Bill, thank you, Maureen—in the last twenty-five years.

I actually think Section 5 used appropriately—and Bill has dissented against the majority on Section 5 cases—and more broadly than the antitrust laws is fine and good. Used in a way that is inappropriate and does not apply intelligent judgment is bad, and that is what I think we are all most concerned about.

WILLIAM KOVACIC: Congress did not confront the political feedback loop that was going to be working if the Commission did what it had in mind.

JON LEIBOWITZ: I agree with you there.

WILLIAM KOVACIC: That was a bad blind spot.

JON LEIBOWITZ: Go back and look at *Keppel & Brothers*. It is about unscrupulous business conduct, and it led to the 1939 amendments to give clear consumer protection authority to the FTC, but if you want to go back and cite that case and maybe you have a judge who is going to indulge an FTC in some crazy theory, that would not be a good thing. I agree with you about the crazy feedback loop that can push people to support their stakeholders rather than apply good judgment.

On Part 3, in light of the *Intuit* case, and I probably need to say on the record that I was one of Intuit's counsel—even if there are some open questions, I think it is very hard for a Commission to use Part 3 anymore. How do you use it, trying to divine what the historical precedent would have been from 1773 without risking a case, particularly in the areas that Bill has cited as being most important. And I agree, those are often the cases that are on the edge, the cases where you can make important new law.

I think Part 3, until there is some clarification—and maybe a legislative clarification might work, though I am not sure it would—is going to be in a difficult-to-use limbo. I hope someone can correct me on that, but I think that is where it is.

TIMOTHY MURIS: On Part 3, two points. First, the overwhelming majority of cases are not going to rise to the White House's interest, but suppose President AOC, to raise her again, wanted to make sure that her people attacked Big Tech. There are many ways to do that, but if a case was in litigation, I assume that they would be smart enough not to interfere, and give the respondent another reason to challenge the result in court. Presumably she would pick the FTC leaders and they would know what their job is.

My second point on pure Section 5 is an issue that Bob Pitofsky raised. If someone goes nuclear on Section 5, as the Khan statement that is still on the books allows, then the law is different for industries depending on the clearance agreement. Historically, that fear has been more theoretical than real. The benefit of *Slaughter* is that if some White House wanted, you would now have another vehicle to address the issue.

Most White Houses have various cabinet counsels and other procedures to resolve disputes. I worked in three different White Houses, and disputes over issues occur frequently among agencies, even rarely involving antitrust. For example, two cabinet secretaries went after Bill Baxter on the AT&T case. That was extremely rare, but there are vehicles for resolution. Perhaps something as important as aggressive use of unfair methods fits, although in the history of the FTC there has rarely been such usage.

JOHN GRAUBERT: In the few minutes we have left, I want to ask about the impact of the decision on some specific relationships, the first being the relationship with international institutions and enforcers. How are they going to perceive what this means for the FTC?

WILLIAM KOVACIC: It is really bad news. For a long period of time we have been telling the world that extensive direct political intervention is a bad way to run a competition policy system. The audience for this is not the traditional, well-established agencies; it is the 100 new ones since 1990, where you have a history of direct political intervention, and our message has been that you want some insulation from that kind of direct intervention, either as a matter of law or as a norm that you want to adopt. That has been seen as important, as preserving the confidence of investors, and gravitating toward the development of what we would very broadly call the rule of law.

When pushed by their governments to do things, the heads of these agencies have the ability to say, "The United States does not do it that way." And here is this 2016 statement from the OECD, where the FTC and DOJ submitted a paper together, saying that some measure of autonomy from political interference is a good thing, and the Department of Justice itself joined that statement.

Neither agency would say that today. The moral authority that the United States has had around the world in trying to establish ways of behavior is severely diminished by *Slaughter*, and I take on all of the footnotes we have been attaching to *Slaughter* about how in some ways perhaps there has been an overreaction to it, and maybe I have been part of that as well, but you go abroad and you start seeing the erosion of widely accepted norms that we helped promote. Indeed, in other major Western countries like the United Kingdom, you see the principle of norms itself tottering as well. I think in the international world this is unambiguously bad news.

TIMOTHY MURIS: I understand the thrust of where you are headed, but when Lina Khan went to Europe and said the previous forty years were nonsense, she was greeted as Obama was in Europe. What do you make of her reception and how do you reconcile that?

WILLIAM KOVACIC: The Biden statement, the one with the Executive Order, to put it politely was severely unfortunate but to be more dramatic I think calamitous. That is a slander on so many officials who went to work for the Obama Administration and Clinton Administration and basically tossed them all under the bus and said they had done a bad job.

By the way, internationally when you say things like that, what is the reaction? Foreign officials say, “My god! Here is a system that rarely has a lucid interval and can make a good judgment and is so prone to getting it wrong. For forty years in a row? Why should we ever listen to these people who are so inherently deranged?”

The American tradition in far too many transitions in my lifetime of saying, “My predecessors are a bunch of idiots, and you have to burn it down in order to build it up in the right way,” is a very unfortunate tradition, and it does not induce foreign governments to say, “Gee, I want to follow them.”

JON LEIBOWITZ: But you know what? Tim never said that about Bob. Maureen never said that about Edith, the person who preceded her. We had a period of time when we really believed in working toward consensus.

WILLIAM KOVACIC: Absolutely, Jon. We had some really good transitions. We have had some horrible transitions too.

JON LEIBOWITZ: I agree with that, and we all believe in the institutions as much or more than we believe in our own views.

WILLIAM KOVACIC: I regard the Muris-Pitofsky duet in the *Antitrust Law Journal* as being an incredibly constructive effort to put that together. Tim’s first speech is a testimonial to what Bob had done. When Anne Bingaman became head of the Antitrust Division in 1993, her early speeches say, “I look at the photographs on the walls of the Department and there I see Bill Baxter, who was my teacher at Stanford. I see a whole host of officials.” She mentions people outside of her own party and says, “I am so proud to sit in this office.” That is a long way from saying, “For forty years we got it all wrong.”

We have had some really good transitions, but we have had some wretched ones too, and the bad ones so often create doubt about what we are all about.

DEBORAH MAJORAS: Let’s remember something. The reason why these transitions were not optimal is not because we don’t like them, because they make us feel bad, or because we think we all did it the right way. It is because ultimately it is not good for businesses and markets and their need for greater certainty and continuity in order to run well and ultimately for consumers to be protected. Those kinds of swings and slanders and so on really do not make for effective policy when we are trying to support a market economy.

EDITH RAMIREZ: But isn’t that what we are losing here? No question, there are examples of bad transitions in the past, but we will no longer have a multimember bipartisan Commission with staggered terms, which by design tends toward continuity, stability, and the preservation of institutional history. That is now gone, and we can look at what has already happened at the agency to see some of the negative effects. Granted, the politicization of the agency commenced during the Biden Administration.

For example, to circle back to what Debbie was saying, and what I was getting at in my initial comments, look at the impact it has had on staff and the numerous staff departures. The “brain drain” that we have had at the agency has been absolutely abysmal. I think we all know very talented staff who would have definitely stayed at the agency had it not been for the highly politicized environment. Going forward, are we going to see the kind of long-term investments that the agency made in the past—like the ones that led to significant privacy protections for consumers or increased competition in the pharmaceutical industry? Is that ever going to happen again post the *Slaughter* decision?

WILLIAM KOVACIC: I wonder because if you look at the relay race that ultimately got us to *Actavis* from—

TIMOTHY MURIS: I agree with much of what you say, and I want to reinforce what Edith said. We need to understand how much the FTC changed during Khan. Using public data from OPM, if you start when President Biden was elected, the beginning of fiscal 2021, and end when President Trump is elected again, 53 percent of the people are new. If you ignore that first year, the change is still 47 percent for three years. Either change is quite dramatic! Then, when you take the first year under the second Trump term with DOGE and other restraints, the number jumps to over 60 percent. The change is not just people, but the Biden FTC changed elsewhere. Lina Khan blew up established norms. She disrespected Congress and minority Commissioners. And the neo-Brandeisians deeply distrusted the career staff. Howard Beales and I wrote about all this for the Competitive Enterprise Institute in 2024. With the substantive changes and the massive brain drain, it is just not the same place. The FTC we know took very long to build up, but it was much easier to tear it down.

JON LEIBOWITZ: When you take a job as Commissioner or chairman, if you cannot occasionally vote against what your party wants or urge the Commission to do something that is not what the people who put you there would like you to do, you really should not have this job. I am not saying we did it all the time and I am not saying we were not mindful of what the administration and our party writ large wanted, but if you can't do what you think is right over objections from your party you should not be an FTC Commissioner, and that is a thing that may very well be gone in the future.

JOHN GRAUBERT: We have mentioned DOJ from time to time and the overlap in the competition functions. Is the FTC going to survive as a separate agency? If there are structural changes, what will those look like? Who is going to end up enforcing the FTC Act, which I am guessing is not going to be repealed? Do you want to start with DOJ?

WILLIAM KOVACIC: I think it is inevitable that we will have a further debate at some point about whether we have two agencies in the antitrust space. I think that is coming.

TIMOTHY MURIS: And the consumer protection space, Bill.

WILLIAM KOVACIC: I think so. I am thinking that as a matter of national policy we must have a national consumer protection authority. I am assuming we must have a nationwide data protection authority even if we do not have a nationwide data protection omnibus law. The consumer protection and privacy functions it seems to me have to march on.

You could spin off the privacy mandate I suppose, but I am thinking you want to keep those together, and there are some interesting complications that come about when you take them apart. My view, looking at what is happening in various jurisdictions, is that the good answers to lots of policy issues involving tech platforms, artificial intelligence, and the future involve an intersection of competition, consumer protection, and privacy. There is one agency on Earth right now that does them all.

I think this is a uniquely bad time to spin off the competition mandate for the FTC, but to the extent that the FTC's competition work so closely resembles in function and form what the Department is doing it becomes awfully easy for Congress to say, "Move it down the street." As long as you give us something back on the committees that allows us to continue to get the respect that we have gotten from private parties, it is easy to make that move. It is not one that I would welcome, but it is coming.

JON LEIBOWITZ: To paraphrase The Who, I think the FTC "kids will be all right" in the end. There are lots of reasons. There will be debates about the future of the FTC, but at the end of the day I am confident that unless you get rid of the filibuster it is hard to see how you will get sixty votes to eliminate either of the Commission's jurisdictions.

MAUREEN OHLHAUSEN: Harkening back to some of our earlier conversation, what if there is a time period at the beginning of an administration when there is no quorum or no Commissioner because they were all from the other party and they have been fired? Because of DOJ, the antitrust work can just be handled by DOJ, and I don't know if FTC staff could be detailed over to DOJ.

I think the real problem could come where the function is only under the FTC Act, such as on the consumer protection side. DOJ does not mirror that. If there is no Commissioner to take action and you need to have votes to bring complaints, to settle, to issue rules, things like that—will there be the cessation of those functions?

If that happens, then I think you might get some pressure to start figuring this out. We have the DOJ backstop for antitrust law and maybe the FTC can send some people across the street to help them with that. We do not have that in the same way with the consumer protection function under the FTC Act. We have the states. They can do some consumer protection stuff and DOJ can do some, but no one else enforces the FTC Act on the consumer protection side federally.

JOHN GRAUBERT: You mentioned the states, and the state attorneys general have been quite active in the last few years. Could they pick up the slack? They have little FTC Acts.

MAUREEN OHLHAUSEN: They do, but I think there are real benefits to having a federal consumer protection enforcer in a way that a state cannot, unless you have a multistate kind of thing. I think there are some interesting issues there, but it just creates a potential freeze at least federally.

DEBORAH MAJORAS: John, if you are asking if they can pick up the slack, obviously they have the little FTC Acts and so on, but if part of what people are saying is that you want people acting who have some insulation from political pressure, do you think that elected state attorneys general have no political pressure? I will leave that question with you.

JOHN GRAUBERT: Thank you all again for an excellent discussion. ●