

COMMENT FOR THE RECORD

Comment of NetChoice on FY 2024 Federal Trade Commission Budget before the House Energy and Commerce Committee

April 2023

NetChoice is a trade association of leading internet businesses that promotes the value, convenience, and choice internet business models provide to American consumers. NetChoice has worked for over two decades to make the internet safe for free enterprise and free expression. We also work to promote the integrity and availability of the internet on a global stage and are engaged on issues in the states, in Washington, D.C., and in international internet governance organizations.

The FTC's Legitimacy Crisis

The FTC is in the midst of a growing legitimacy crisis. The Republican members of the commission have left, drawing attention to the problems faced by the Commission under Chair Khan's leadership.¹ The issues highlighted by Commissioner Wilson cast a light on the damage Chair Khan has done to the public's perception of the FTC. With the FTC's legitimacy undermined, it will be hard pressed to carry out its mission: protect the welfare of American consumers.

Chair Khan Flouts Due Process and Ethics Guidelines

The FTC was designed to be a bipartisan entity that uses its economic expertise to fairly and impartially evaluate business practices to determine whether

¹ Christine Wilson, *Why I'm Resigning as an FTC Commissioner*, WALL STREET JOURNAL (Feb. 14, 2023), <https://www.wsj.com/articles/why-im-resigning-from-the-ftc-commissioner-ftc-lina-khan-regulation-r-ule-violation-antitrust-339f115d>

a particular practice or proposed merger would negatively impact consumers.² The Commission's ability to carry out its mission depends on two things: expertise and non-partiality on the part of its members.

Chair Khan rose to prominence after publishing a law review article that focused on antitrust enforcement as it relates to Amazon.³ Since its publication, she has been widely regarded for her academic work. Chair Khan also served as the director of the Open Markets Institute, a non-profit group that comments on antitrust issues, and on various congressional committees dealing with antitrust. Doubtless, her resume demonstrates the relevant knowledge and expertise to serve on the FTC. However, despite Chair Khan's expertise, her indiscriminate participation in matters before the FTC raises both due process and ethical concerns which directly undermine the Commission's appearance of impartiality.

It is no secret that, in her prior roles, Chair Khan expressed strong views on the importance of vigorous antitrust enforcement before joining the FTC. On a bipartisan commission, strong views on the general approach the Commission should take are expected. Indeed, debate among commissioners can be healthy. However, issues of partiality arise when officials make specific comments about particular parties or matters before the Commission. Chair Khan's prior comments regularly fell into the latter category.

In 2017, Khan was the director of the Open Markets Institute. In this role, she wrote to then-FTC Chair Ohlhausen. Khan's letters to Ohlhausen pleaded for the FTC to impose a "ban on all acquisitions by [Meta]."⁴ Khan reiterated this plea in 2018 when she requested that the FTC go even further and "restructure" Meta.⁵ She made additional public statements reinforcing her view that any action Meta takes should be disfavored and deemed anti-competitive on its face.⁶ Khan made

² See generally 15 U.S.C. Subchapter I.

³ Lina Khan, Note, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017).

⁴ Press Release, Open Markets Inst., Open Markets Institute Calls on the FTC to Block All Facebook Acquisitions (Nov. 1, 2017), <https://www.openmarketsinstitute.org/publications/open-markets-institute-calls-on-the-ftc-to-blockall-facebook-acquisitions>.

⁵ Press Release, Open Markets Inst., Fines for Facebook Aren't Enough: The Open Markets Institute Calls on FTC to Restructure Facebook to Protect Our Democracy (Mar. 22, 2018), <https://www.openmarketsinstitute.org/publications/fines-for-facebook-arent-enough-the-open-market-s-institutecalls-on-ftc-to-restructure-facebook-to-protect-our-democracy>.

⁶ See e.g., Sway, Opinion, She's Bursting Big Tech's Bubble, N.Y. TIMES (Oct. 29, 2020), <https://www.nytimes.com/2020/10/29/opinion/sway-kara-swisher-lina-khan.html?showTranscript=1> (transcript).

similar statements in the Majority Staff Report from the House Subcommittee on Antitrust. In this report, which she co-authored, Khan remarked that Meta, as well as Amazon, Apple, and Google, engaged in “anticompetitive mergers” by acquiring start-up companies to augment their own virtual reality ventures.⁷

Why do Khan’s prior statements matter? Because Meta has been the subject of an FTC investigation into its supposedly anti-competitive practices on precisely this issue when it sought to acquire Within Unlimited. And, despite her extensive and direct statements criticizing Meta, and calling for a ban on *all* acquisitions – regardless of their impact on the consumer welfare – Khan refused to recuse herself from these matters even when her recusal was directly requested.⁸

This failure to recuse did not go unnoticed, nor was it looked upon favorably by all members of the Commission. Indeed, Commissioner Wilson, then the only remaining Republican member, issued a strong dissent outlining the dangerous repercussions Khan’s continued involvement in such cases would have on the FTC’s legitimacy and, ultimately, its ability to protect consumers.⁹

Due Process

Due process is fundamental to the American legal system. It guards against arbitrary government usurpation by ensuring that laws are passed in a fair and predictable manner. Due process also requires that judges and adjudicators issue decisions based on law rather than personal whims, views, or desires. In adjudicatory proceedings, such as an FTC review, the core requirements of due process are neutrality and fairness. When either is impossible, the adjudicator is obliged to recuse from the matter. Indeed, due process not only requires recusal when there is *actual* bias but also when there is a *reasonable suspicion* of bias or unfairness.¹⁰

No reasonable observer could look at her history of remarks and think she would be able to set aside her prior, consistent condemnation of the company and

⁷ MAJORITY STAFF REPORT AND RECOMMENDATIONS OF H. SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (2020).

⁸ Petition for Recusal of Chair Lina M. Khan from Involvement in the Proposed Merger between Meta Platforms, Inc. and Within Unlimited, Inc., FTC No. 221-0040 (July 25, 2022).

⁹ *Federal Trade Commission*, In the Matter of Meta Platforms, Inc. and Within Technologies, Inc. Docket No-9411 (Dissenting Statement of Wilson).

¹⁰ *American Cyanamid Co. v. F.T.C.*, 363 F.2d 757, 767 (6th Cir. 1966).

judge the proceedings impartially as the law requires.¹¹ Despite Chair Khan's contentions to the contrary, her prior conclusions and statements do indicate a pre-judgment of the facts in the Meta/Within matter and therefore violate due process. Accordingly, due process requires Chair Khan's recusal in any Meta-related matter.

Chair Khan's situation is far from unique. Prior commissioners have been required to recuse themselves when they expressed views on companies and issues pending before the commission. In *Cinderella*, the D.C. Circuit considered whether indirect statements about matters pending before the committee were sufficient to require recusal. The court found that they were.¹² Such references, even without expressly naming the parties and using only hypothetical situations, were sufficient to indicate Chair Dixon's bias. Bias was found even though Chair Dixon, in those same remarks, questioned the FTC's jurisdiction to address the issues he raised.¹³

When comparing Chair Dixon's comments to those Chair Khan made about Meta, she was far more direct. She spoke in no uncertain terms when she stated that Meta should be forbidden from making any market acquisitions, and that Meta was engaged in "anticompetitive behavior" when looking to enter the virtual reality space. It is immaterial that, unlike Chair Dixon, Chair Khan's remarks were given prior to the Meta/Within investigation. As the circuit courts have routinely recognized, the key inquiry is not timing but whether remarks may give the impression that a matter has been pre-judged.¹⁴ Khan's remarks clearly demonstrate pre-judgment on her part.

Due process is clear. Chair Khan should have recused herself based on her prior statements about Meta. She did not. As a result, the FTC's legitimacy was damaged.

Ethical Obligations

At her confirmation hearing, Chair Khan stated that she would "seek the guidance of the relevant ethics officials at the agency and proceed accordingly"

¹¹ *Cinderella Career & Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959), *cert. denied*, 361 U.S. 896 (1959)).

¹² *Id.* at 589-90.

¹³ *Id.* at 591-92.

¹⁴ *Id.* at fn. 10 (noting that timing can be used to infer relevance of commentary to the pre-judgment inquiry).

should she be asked to recuse from any matter before the Commission.¹⁵ As the Meta case illustrates, Chair Khan has either failed to ask for guidance, or she has ignored the relevant guidance from the FTC ethics staff. Yet neither relieve her of her ethical obligations.

In relevant respects, the federal ethics standards mirror the obligations imposed by due process. Just as due process is concerned with whether a reasonable inference of bias may be drawn, the federal ethics standards ask whether a reasonable person would question the official's impartiality in the matter.¹⁶ As explained above, Chair Khan's prior work and public statements would indisputably raise questions of her impartiality to a reasonable observer.

Just as due process demanded her recusal, so too do federal ethics requirements. Chair Khan's failure to recuse violates both aspects of the law and damages the FTC's reputation and its legitimacy.

As with Chair Khan's involvement in the recent Meta/Within inquiry, the same issues arise when we turn our attention to her involvement in matters pertaining to Amazon.¹⁷ Of course, foremost among the indicators here is Khan's law review article that brought her to prominence, *Amazon's Antitrust Paradox*. In it, she directly criticizes Amazon's business strategies and suggests different ways in which Amazon should be brought to heel.¹⁸ Chair Khan's perspective on Amazon has not changed. She has consistently reiterated her position on the company through both her later scholarship¹⁹ and her work as counsel to the House Subcommittee on Antitrust.²⁰

¹⁵ Senator Mike Lee, *Senator Lee Questions FTC Nominee Lina Khan on Rulemaking, Antitrust Views*, YOUTUBE (April 21, 2021), https://www.youtube.com/watch?v=PQSeqIW_3r8.

¹⁶ 5 C.F.R. §§ 2635.101(b)(14); § 2635.501(a).

¹⁷ Motion to Recuse Chair Lina M. Khan from Involvement in Certain Antitrust Matters involving Amazon.com Inc., *Federal Trade Commission* (June 30, 2021), <https://s3.documentcloud.org/documents/20981708/1-recusal-petition-by-amazoncom-inc.pdf>.

¹⁸ Lina Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

¹⁹ Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 985-97 (2019).

²⁰ MAJORITY STAFF REPORT AND RECOMMENDATIONS OF H. SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (2020).

NetChoice has previously addressed the positive benefits of Amazon’s practices under the consumer welfare standard.²¹ The merits or demerits of a particular strategy are, of course, up for honest debate and resolution. But those discussions, when held by government agencies, must comply with the due process, comport with the ethical requirements of impartiality, fairness, and be decided by an adjudicator who has not previously made up her mind on the issue. Chair Khan’s previous work, just as it did for Meta, demonstrates that no reasonable observer could believe she is unbiased when evaluating issues related to Amazon.

Chair Khan Permitted “Zombie Voting”

In late 2021, Commissioner Rohit Chopra, a democrat, departed from the FTC. Thereafter, the Commission was evenly divided between Republicans and Democrats. Therefore, if the two parties wanted to reach any sort of majority, they would have to work together. That is, until Chair Khan came up with an alternative solution.

As *Politico* reported, Chair Khan thought of another way to hold on to power and her majority control over the Commission: “zombie voting.”²² This is a practice where, although no longer on the commission, former-Commissioner Chopra’s initial vote was recorded in the agency’s final determination. Prior to Chopra’s exit, he had preliminarily noted his votes in as many as 20 pending matters. By retaining Chopra’s vote, Khan was able to hold on to policy victories that otherwise would have been deadlocked.²³

It is axiomatic that once a government official leaves his or her post, that former official may no longer exercise the authority of his former office. Yet, the FTC’s “zombie voting” practice permitted this to occur. Not only does the practice flout common sense, zombie voting also violates well-settled law.

²¹ NETCHOICE, AGGRESSIVE COMPETITION IN DIGITAL MARKETS: PROOF OUR ANTITRUST LAWS WORK (Sep. 2020), <https://netchoice.org/wp-content/uploads/2020/09/NetChoice-Response-to-House-Antitrust-Hearing.pdf>.

²² Leah Nysten, ‘Zombies’ to the rescue: The arcane voting that could save the Dems’ political agenda, *POLITICO* (Nov. 08, 2021), <https://www.politico.com/news/2021/11/08/voting-rule-democrats-antitrust-519767>

²³ Press Release, *Federal Trade Commission*, FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers (Oct. 25, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive-mergers>.

The Constitution establishes three separate branches of government. In each of the Constitution's first three articles, it vests the legislative, executive, and judicial authority of the United States in a Congress, a President, and a Supreme Court, respectively. It does not vest that power in the people who hold those offices but in the offices themselves. It is the occupation of these offices that permits individual occupants to exercise the legislative, executive, or judicial powers. Once an individual leaves office, however, he may no longer exercise the power he previously wielded.²⁴

Zombie voting, as permitted under Chair Khan, clearly violated this well-settled expectation that leaving an office disqualifies an individual from exercising the power of that office. Perhaps one of the most prominent examples of the proper application of this principle came in 2016 after Justice Antonin Scalia's death. The Court heard a number of high-profile and ideologically divisive issues that term. Prior to his death, Justice Scalia participated in oral arguments, conferenced with the other justices, and recorded his preliminary vote in several pending cases. However, in the cases which were still pending at the time of his death, Justice Scalia's vote was not reflected in the Court's final opinion because he no longer occupied his office.²⁵

It should go without saying that an inferior officer, established by one of our three branches of government, cannot exercise his authority after leaving office any more than a president can after the conclusion of his second term.²⁶ This principle is implicit in the statute governing how the FTC is supposed to operate.²⁷ Chair Khan should have understood this fundamental principle and refrained from recording Commissioner Chopra's votes on matters which were released after he left the FTC.

By violating these basic norms, Chair Khan once again called the FTC's legitimacy into question.

Ramifications

²⁴ *Yovino v. Rizo*, 139 S.Ct. 706, 710 (2019) (explaining that federal judges may only exercise judicial authority so long as they remain on the bench); *See also, Jezerinac v. Dioun*, 168 Ohio St.3d 286, 2022-Ohio-509, 198 N.E.3d 792, at ¶ 17-19 (explaining that judicial power resides in the office, not the occupant).

²⁵ *See e.g., Friedrichs v. Cal. Teachers Ass'n.*, 578 U.S. 1 (2016) (Judgment affirmed by an equally divided Court.).

²⁶ *See* U.S. Const. Amend. XXII.

²⁷ *See* 16 C.F.R. § 4.14(b) & (c).

Chair Khan’s tenure on the FTC has been marked by numerous radical departures from established agency norms. Chair Khan’s norm-breaking behavior floods the market with uncertainty as businesses are left wondering whether the FTC might pursue action against them—not because a particular decision violates the law and harms consumers, but because they have incurred the wrath of a government official.

The uncertainty Chair Khan has inserted into the market is not limited to just those businesses with which she has a long-standing and well-documented grudge. As Rep. Jim Jordan noted, Chair Khan has been harassing other companies, like Twitter, by making “inappropriate and burdensome demands” that exceed its statutory authority.²⁸

These abuses, coupled with her blatant disregard for the nature of government power and due process, paint an alarming picture of an FTC that thinks it knows better than both the legislature and the courts,²⁹ one unconcerned with its mission to protect consumers and content to throw markets into disarray to satisfy the various grudges and vendettas of its chair.

Rather than reward such behavior with an unprecedented budget increase, Congress should exercise its authority to rein in Chair Khan’s excesses.

Resolutions

Until the American people’s confidence in the FTC can be restored, NetChoice urges Congress to rein in the FTC by, at a minimum, denying Chair Khan’s unprecedented budget increase request. Additional measures to rein in Chair Khan’s excesses may require further cutting of the FTC’s budget or placing direct supervision over the agency’s actions.

To restore the FTC’s legitimacy and ensure it pursues its proper mission—to protect consumer welfare—NetChoice proposes the following inquiries be made into Chair Khan and the FTC. Based on the inquiries’ results, Congress should take all steps necessary to restore the FTC’s proper role.

²⁸ Letter from Representative Jim Jordan, Chairman of the House Judiciary Committee, to the Honorable Lina Khan (April 12, 2023), <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2023-04-12-jdj-to-khan-ftc-subpoena-cover-letter.pdf>.

²⁹ Corbin K. Barthold, *Thumbing Their Nose*, CITY JOURNAL (Apr. 13, 2023), <https://www.city-journal.org/article/the-unaccountable-federal-trade-commission>

First, Congress should investigate the FTC's and other agencies' reported use of fellowships to skirt federal hiring practices.

Second, Congress should investigate the FTC's recusal policy and whether Chair Khan has properly complied with that and other ethics guidelines.

Third, Congress should investigate the FTC's reported use of so-called zombie votes.

Fourth, Congress should take significant steps to force the FTC to respond to requests from Congress and Freedom of Information Acts.

Fifth, Congress should avoid increasing funding of the FTC until the FTC shows it will be a responsible steward of taxpayer money.

And finally, Congress should continue to investigate the FTC's role in potentially targeting Twitter for politically motivated investigatory and enforcement action because of the service's change in ownership and moderation policies.

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As always, we stand ready to work with Congress to achieve good policy outcomes for the country. We appreciate your consideration of our views and are happy to provide further information.

Sincerely,

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