



PHOENIX FOR ADVANCED
LEGAL & ECONOMIC
C E N T E R PUBLIC POLICY STUDIES
www.phoenix-center.org

PHOENIX CENTER POLICY BULLETIN NO. 59

Lawrence J. Spiwak, Esq.

September 2022

BITING OFF MORE THAN IT CAN CHEW?

SOME THOUGHTS ON THE FTC'S ADVANCE NOTICE OF PROPOSED RULEMAKING ON "COMMERCIAL SURVEILLANCE AND DATA SECURITY"

Abstract: On August 11, 2022, the Federal Trade Commission ("FTC") released an *Advance Notice of Proposed Rulemaking* ("ANPR") pursuant to Section 18 of the Federal Trade Commission Act to start the process to implement a sweeping set of rules to govern "Commercial Surveillance and Data Security." Rather than focus on a discrete set of subjects, the ANPR asks some ninety-five questions on a wide range of issues, producing a document that, as FTC Commissioner Noah Phillips astutely noted, "addresses too many topics to be coherent." Given the unmanageable scope of the inquiry, it seems likely that the FTC may have bitten off more than it can chew. As a result, there are several parts of the ANPR that are likely to pose serious problems with the FTC's regulatory effort. After detailing the applicable statutory requirements for FTC rulemaking, this BULLETIN highlights several of these concerns, including the lack of cost/benefit analysis, problems with adequate notice, a disregard of the FTC's 1980 *Policy Statement on Unfairness* without explanation, a disregard of both substantive and jurisdictional statutory constraints, and no consideration of the "major questions" doctrine.

I. Introduction

Long-frustrated with a perceived lack of success with case-by-case antitrust enforcement, it is no secret that Federal Trade Commission Chair Lina Khan wants to reinvigorate the Commission's dormant rulemaking powers.¹ To this end, on August 11, 2022, the Commission

¹ See, e.g., R. Chopra & L. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020); but c.f., L.J. Spiwak, *A Change in Direction for the Federal Trade Commission?*, 22 FEDERALIST SOCIETY REVIEW 304

(Footnote Continued....)

PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES

5335 Wisconsin Avenue, NW, Suite 440

Washington, D.C. 20015

Tel: (+1) (202) 274-0235 • Fax: (+1) (202) 318-4909

www.phoenix-center.org

released an *Advance Notice of Proposed Rulemaking* (“ANPR”) pursuant to Section 18 of the Federal Trade Commission Act (“FTC Act”) to start the process to implement a sweeping set of rules to govern “Commercial Surveillance and Data Security.”² Rather than focus on a discrete set of subjects manageable under any reasonable estimate of Chair Khan’s expected tenure, however, the ANPR asks some ninety-five questions on a wide range of issues, producing a document that, as FTC Commissioner Noah Phillips astutely noted, “addresses too many topics to be coherent.”³ As a result, given the unmanageable scope of the inquiry, it seems that the FTC may have bitten off more than it can chew. Indeed, there are several parts of the ANPR that are likely to pose serious problems with the FTC’s regulatory effort.

II. Background

Under Section 5 of the FTC Act, the Commission’s mandate is to protect consumers both from “unfair or deceptive acts or practices” and from “unfair methods of competition.”⁴ In the 1975 Magnuson-Moss Warranty – Federal Trade Commission Improvement Act⁵ (hereinafter “Mag-Moss”), Congress provided a detailed statutory scheme under which the Commission can promulgate “Trade Regulation Rules” to address “unfair or deceptive acts or practices.”⁶ In contrast, as there is no direct statute to govern rulemaking for “unfair methods of competition,” the Commission’s ability to promulgate substantive rules in this area is far more legally questionable.⁷

Chair Khan began to lay the groundwork for Mag-Moss rulemaking almost immediately upon taking office. In July 2021, the Commission voted along party lines (and without providing any ability for public comment) to modify its rules of practice and procedure implementing Section 18 of the FTC Act (hereinafter the “2021 Section 18 Modifications”).⁸ Among these modifications, Ms. Khan amended the agency’s rules so that she, as Chair, will serve as the Chief

(2021) (available at: <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/TDkqJyiTjOM8vH0lissq8PdHpmcKlhFCQ3xegq.pdf>); M.K. Ohlhausen & J. Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking*, U.S. Chamber of Commerce (August 12, 2021) (available at https://www.uschamber.com/sites/default/files/ftc_rulemaking_white_paper_aug12.pdf).

² *Trade Regulation Rule on Commercial Surveillance and Data Security*, Federal Trade Commission, ADVANCE NOTICE OF PROPOSED RULEMAKING; REQUEST FOR PUBLIC COMMENT; PUBLIC FORUM, 87 FED. REG. 51273 (August 22, 2022).

³ Dissent of Commissioner Noah Phillips (citations omitted), 87 FED. REG. at 51294.

⁴ 15 U.S.C. § 45.

⁵ Pub. L. No. 93-637, 88 Stat. 2183 (1975)

⁶ 15 U.S.C. § 57a.

⁷ See, e.g., M.K. Ohlhausen & J. Rill, *supra* n. 1; Spiwak, *supra* n. 1.

⁸ *Revisions to Rules of Practice*, Federal Trade Commission, FINAL RULE, 86 FED. REG. 38542 (July 22, 2021).

PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES

5335 Wisconsin Avenue, NW, Suite 440

Washington, D.C. 20015

Tel: (+1) (202) 274-0235 • Fax: (+1) (202) 318-4909

www.phoenix-center.org

Presiding Officer for rulemaking proceedings under Section 18 of the FTC Act.⁹ Further consolidating her power, the 2021 Section 18 Modifications also removed the long-standing institutional practice of having Commission staff publish a report containing an analysis of the rulemaking record and recommendations as to the form of the final rule for public comment.¹⁰

One year later, Ms. Khan dropped the other shoe: On August 11, 2022, the Commission released an *Advance Notice of Proposed Rulemaking* pursuant to Section 18 of the FTC Act to start the process to implement a sweeping set of rules to govern “Commercial Surveillance and Data Security.”¹¹ Yet the ANPR is hardly a model of either regulatory clarity or regulatory modesty. As FTC Commissioner Noah Phillips observed in his dissent, the

areas of inquiry are vast and amorphous, and the objectives and regulatory alternatives are just not there. It is impossible to discern from this sprawling document – which meanders in and out of the jurisdiction of the FTC and goes far afield from traditional data privacy and security – the number and scope of rules the Commission envisions.¹²

Given these shortcomings, the big questions are whether the Commission can draft final rules that adhere both to the detailed procedural process dictated by the FTC Act and—just as important—the procedural due process protections set forth in the Administrative Procedure Act.¹³ While these questions will ultimately be determined by an appellate court down the road, the Commission is hardly off to an auspicious start.

III. Statutory Constraints on FTC Rulemaking

Unlike other typical “ABC” independent regulatory agencies in Washington (e.g., the Federal Communications Commission, the Federal Energy Regulatory Commission, the Securities and Exchange Commission), the FTC does not have broad, plenary rulemaking authority. Quite to the contrary, under *Mag-Moss*, not only is the FTC’s rulemaking authority expressly limited to issues relating to “unfair and deceptive practices,” but Congress proscribed in excruciating detail stringent procedural requirements to which the FTC must adhere in promulgating such rules.¹⁴

⁹ *Id.*; see also 16 C.F.R. § 0.8.

¹⁰ *Id.*

¹¹ *Trade Regulation Rule on Commercial Surveillance and Data Security*, Federal Trade Commission, ADVANCE NOTICE OF PROPOSED RULEMAKING; REQUEST FOR PUBLIC COMMENT; PUBLIC FORUM, 87 FED. REG. 51273 (August 22, 2022).

¹² Dissent of Commissioner Noah Phillips, 87 FED. REG. at 51294.

¹³ 5 U.S.C. § 551 *et seq.*

¹⁴ 15 U.S.C. § 57a.

Mag-Moss prescribes a sequential three-step rulemaking process: (1) an *ANPR*; (2) then a *Notice of Proposed Rulemaking* (“*NPRM*”); and then (3) final rules. Right now, we are at “Step One” of that rulemaking process.

According to Section 18 of the FTC Act:

Prior to the publication of any notice of proposed rulemaking *** the Commission shall publish an advance notice of proposed rulemaking in the Federal Register. Such advance notice shall—(i) contain a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission; and (ii) invite the response of interested parties with respect to such proposed rulemaking, including any suggestions or alternative methods for achieving such objectives.¹⁵

Upon completion of Step One (the *ANPR*), in order to continue to Step Two (issuing an *NPRM*), Section 18(b)(3) requires the following:

The Commission shall issue a notice of proposed rulemaking ... only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are *prevalent*. The Commission shall make a determination that unfair or deceptive acts or practices are prevalent under this paragraph only if—

- (A) it has issued cease and desist orders regarding such acts or practices, or
- (B) *any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practice.*¹⁶

The key inquiry, therefore, revolves around whether there is clear evidence of “prevalence.” Thus, it is legitimate to ask whether the *ANPR* will allow the FTC to develop a sufficient record to determine whether there is a “*widespread pattern of unfair or deceptive acts or practice*” for the myriad of potential regulatory initiatives the Commission raised which, in turn, will allow it to move to Step Two of the Mag-Moss process and issue a formal *NPRM*. While the *ANPR* provides numerous citations to documents claiming the prevalence of potentially undesirable behaviors,

¹⁵ 15 U.S.C. § 57a(b)(2)(A).

¹⁶ 15 U.S.C. § 57a(b)(3) (Emphasis supplied).

whether such studies alone – authored mostly by academics and advocates – are legally sufficient to constitute “prevalence” is doubtful and, as such, more robust evidence will be required.

IV. A Problem of Scope

Without question, the *ANPR* is ambitious. Containing some ninety-five (95) questions, the *ANPR* requests information ranging from what practices companies currently use to “surveil consumers” to whether there should be a rule granting teens an “erasure mechanism,” what extent any new commercial surveillance rule would impede or enhance innovation, the administrability of any data minimization or purpose limitation requirements, the “nature of the opacity of different forms of commercial surveillance practices,” and whether the Commission has “adequately addressed indirect pecuniary harms, including . . . psychological harms.”¹⁷ The problem, however, is that in its attempt to cast the widest net possible, the FTC may have bitten off more than it can chew. Indeed, not only does the FTC give short shrift to the respective factual complexities of the myriad of issues raised in the *ANPR* (any one of which might take years to fully analyze), but the *ANPR* contains several obvious economic and legal shortcomings that immediately leap to mind which the FTC fails to address.

A. *Cost/Benefit Analysis?*

As noted above, under the express terms of Mag-Moss, the purpose of the *ANPR* is to help the FTC develop an adequate record to justify moving forward with a formal *NPRM*. However, because regulation – by its very nature – has both costs and benefits, it is incumbent upon the Commission to ask whether the proverbial “juice is worth the squeeze” to move forward with expansive formal rules – that is, do the benefits to consumers outweigh the costs of regulation on the economy? The *ANPR* does not do a particularly good job in this regard.

The FTC makes a very weak case in the *ANPR* about the economic benefits of its proposed regulations, setting forth no formal analysis but instead offering only standard tropes about how trade regulation rules could “set clear legal requirements or benchmarks by which to evaluate covered companies”¹⁸ and “foster a greater sense of predictability for companies and consumers and minimize the uncertainty that case-by-case enforcement may engender.”¹⁹ But while the FTC makes a weak case in the *ANPR* about the benefits of expansive regulation, the FTC is almost giddy in its admission that that its contemplated rules (whatever they eventually turn out to be) will be costly.

¹⁷ Dissent of Commissioner Phillips, 87 FED. REG. 51294.

¹⁸ 87 FED. REG. at 51280.

¹⁹ 87 FED. REG. at 51276.

For example, the FTC specifically admits that its goals are to raise compliance costs across the board – regardless of firms’ ability to afford these costs. As the Commission concedes, instituting rules “would incentivize *all companies* to invest in compliance more consistently...”²⁰ All companies? While large companies may have the resources to incur these increased compliance costs, it is a good bet that many smaller firms do not. As a result, these proposed rules may lead (paradoxically) to higher concentration in affected markets.²¹ The FTC should have, at minimum, put out the question of whether some sort of a small-firm exception is warranted. The Federal Communications Commission established such an exception to the reporting requirements of its 2015 *Open Internet Rules*, so a precedent for the FTC to consider doing so in the *ANPR* is certainly there.²²

Despite these concessions of higher compliance costs and the lack of any serious demonstration of benefits, the FTC only pays lip service to the cost/benefit question in the *ANPR*. In Section IV.c. of the *ANPR*, the Commission broadly “invites comment on the relative costs and benefits of any current practice, as well as those for any responsive regulation.”²³ The FTC asks, *inter alia*, to “what extent would any given new trade regulation rule on data security or commercial surveillance impede or enhance innovation?”²⁴ Similarly, the FTC asks about the “benefits or costs of refraining from promulgating new rules on commercial surveillance or data security?”²⁵

But asking the general public to propose rules is problematic.

First, as a general proposition, regulation can be used to deter entry, so it is not unreasonable to expect some parties to propose rules that would be detrimental to their competitors. Whether the FTC’s current leadership could, or is even interested in, sifting through such tactics remains to be seen.

More to the point, it is not the public’s job to propose rules; it is the Commission’s. Under the plain language of the FTC Act, an *ANPR* must detail the “objectives which the Commission seeks

²⁰ 87 FED. REG. at 51280 (emphasis supplied).

²¹ See G.S. Ford, T.M. Koutsky and L.J. Spiwak, *Competition After Unbundling: Entry, Industry Structure and Convergence*, 59 FEDERAL COMMUNICATIONS LAW JOURNAL 331 (2007).

²² *In the Matter of Protecting and Promoting the Open Internet*, FCC 15-24, REPORT AND ORDER ON REMAND, DECLARATORY RULING, AND ORDER, 30 FCC Rcd. 5601 (rel. March 12, 2015) at ¶¶ 172-175; and expanded by *In the Matter of Small Business Exemption From Open Internet Enhanced Transparency Requirements*, FCC 17-17, ORDER, 32 FCC Rcd. 1772 (rel. March 2, 2017).

²³ *ANPR* at Question 24, 87 FED. REG. at 51282.

²⁴ *ANPR* at Question 26, *id.*

²⁵ *ANPR* at Question 29, *id.*

to achieve” and detail the “possible regulatory alternatives under consideration by the Commission.”²⁶ To paraphrase former FTC Commissioner Orson Swindle’s dissent to the FTC’s *Report to Congress on Fair Information Practices in The Electronic Marketplace* over twenty years ago, the Commission “owes it” to the public “comment more specifically on what it has in mind” before it proposes rules that will require firms to comply with breathtakingly broad [edicts] whose details will be filled in later during the rulemaking process.”²⁷

In addition, without proposing specific regulatory alternatives, it is impossible for the public to model (albeit informally) the cost/benefits of the proposed alternatives. Again, we return to the core statutory purpose of the *ANPR* contained in Section 18: to develop an adequate record which will allow the FTC to determine whether they can proceed to Step Two and issue a formal *NPRM*. By asking such nebulous questions about cost/benefit analysis across a wide array of issues in the *ANPR*, it remains unclear whether a sufficient record will be developed even on a single issue.

Finally, the Commission makes only passing reference to regulatory obsolescence, implying that these sweeping rules, if enacted, are here to stay. In the Commission’s view, rules are not obsolete when—assuming market dynamics shift—the costs ultimately outweigh the benefits. Instead, the Commission essentially asks the public how best it can *continue to regulate* if market circumstances change, even if those circumstances point to reducing regulatory intervention.²⁸ It is a well-accepted maxim that firms are not passive recipients of regulation—behaviors will adjust to the regulation, perhaps in worse ways than now. Thus, the issue is not one of not regulatory evasion; that is a certainty. The issue is how the agency responds to such changes in behavior, which should be part and parcel of any cost/benefit analysis.

B. Adequate Notice

Another concern is that the *ANPR* pushes the limits of providing adequate notice and an opportunity for comment. According to the *ANPR*, interested parties have sixty days from the date of publication in the Federal Register to file comments. Moreover, the FTC held a single workshop on September 8, 2022 (Day 17 of the sixty-day comment period) consisting of two panels plus some brief time for abbreviated oral comments from the public at large ostensibly to help flush out the ninety-five questions posited in the *ANPR*. Given the breadth and scope of the *ANPR*—not to mention the sheer respective complexities of the myriad of issues involved—it is

²⁶ 15 U.S.C. § 57a(b)(2)(A).

²⁷ Dissenting Statement of Commissioner Orson Swindle in *Privacy Online: Fair Information Practices in the Electronic Marketplace: A REPORT TO CONGRESS, FEDERAL TRADE COMMISSION* (2000) (available at: <https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission-report/swindledissent.pdf>).

²⁸ *ANPR* at Question 95, 87 FED. REG. at 51285.

reasonable to ask whether a sixty-day comment period and a single workshop is adequate to develop a sufficient record to proceed to a formal *NPRM* under Section 18 (when adequate notice of Commission intent takes on even greater significance). As noted above, the *ANPR* raises a myriad of complex issues, any one of which might take years to fully analyze.

Adding to the morass, FTC leadership appears not to be interested in serious legal or economic analysis, instead preferring to turn this rulemaking proceeding into nothing more than a plebiscite. To wit, not only did Commissioner Alvaro Bedoya plead with viewers of the FTC's September 8 workshop to file comments, but he specifically (and repeatedly) emphasized that "you do not need to be an expert to comment in this process."²⁹ For those of us who have extensive experience in the regulatory arena, we should not be surprised with the result of such a plea: history demonstrates that many comments filed in politically-charged rulemaking proceedings (which this proceeding certainly is) are mostly "clicktivism" sponsored by assorted constituencies that provide little meaningful or substantive insight. As such, it is hard to be optimistic about the quality of the record the *ANPR* process will produce.³⁰

Another concern relating to adequate notice and comment the *ANPR* sluffs over is how exactly the informal hearing process mandated by 18(b)(1) will work if the Commission decides to move forward with a formal *NPRM*. Conducting such an informal hearing is no small task. Under Section 18(c)(2), not only are interested people entitled to "present [their] position orally or by documentary submission (or both)," but if "the Commission determines that there are disputed issues of material fact" – actual disputes, given the complexity of the issues raised in the *ANPR*, which will be both inevitable and plentiful – parties are allowed "to present such rebuttal submissions and to conduct ... cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues."³¹ Traditionally, to ensure impartiality, these informal hearings were conducted by an Administrative Law Judge. Last summer, however, Chair Khan bestowed this responsibility upon herself, effectively making herself judge and jury.³² As the *ANPR* is silent about this matter, how this revised informal hearing process will work is anyone's guess. However, as Ms. Khan is presumably familiar with Section 18, we can at least hope that she recognizes that any failure to

²⁹ Comments of Commission Alvaro Bedoya at the September 8, 2022 FTC Workshop at 2:29 (available at: <https://kvgo.com/ftc/commercial-surveillance-sep-8>).

³⁰ See Spiwak, *supra* n. 1; L.J. Spiwak, *Curbing 'Clicktivism' at the Federal Communications Commission*, THE HILL (September 19, 2017) (available at: <http://thehill.com/opinion/technology/351082-curbing-clicktivism-at-the-federal-communications-commission>).

³¹ 15 U.S.C. § 57a(c)(2).

³² 2021 Section 18 Modifications, *supra* n. 8.

provide a fair and dispassionate informal hearing in accordance with the FTC Act could provide ample grounds for remand on appeal.

C. Rejecting Its 1980 Policy Statement Without Explanation

As a general proposition, before the government intervenes in the market, it is incumbent upon it to demonstrate the specific market failure(s) that it seeks to remedy. While the FTC took great pains in the *ANPR* to lay out a long list of conduct it believes are innately harmful to consumers,³³ the Commission must do more than simply provide an airing of the grievances.

Since 1980, the Commission's approach to what constitutes an "unfair or deceptive act or practice" has been guided by the Commission's *1980 Policy Statement on Unfairness*.³⁴ According to this *Policy Statement*, the Commission will only pursue Section 5 cases when it determines that three fundamental criteria are met:

- (1) The injury to consumers is substantial;
- (2) The injury must not be outweighed by any offsetting consumer or competitive benefits that the practice also produces; and
- (3) The injury must not be one which consumers could not reasonably have avoided.³⁵

Although the *ANPR* highlights a myriad of alleged harmful conduct, the *ANPR* is bereft of any discussion of these criteria.

This omission is legally problematic. As noted above, under the express language of Section 18, the FTC may only move to a formal *NPRM* unless it first finds that there is a "widespread pattern of unfair or deceptive acts or practices."³⁶ Traditionally, the Commission determines what constitutes an "unfair or deceptive act or practice" based on the analytical framework contained in its *1980 Policy Statement*. Yet, via its silence regarding the application of the *1980 Policy Statement* in the *ANPR*, is the general public to infer that the *Policy Statement* is no longer in force? It is a well-accepted maxim in administrative law that while an administrative agency is free to change its policy so long as it provides a reasoned explanation, an agency must also

³³ See, e.g., 87 FED REG. at 51273-77.

³⁴ *FTC Policy Statement on Unfairness* (December 17, 1980) (available at: <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness>).

³⁵ *Id.*

³⁶ 15 U.S.C. § 57a(b)(3).

“display awareness that it *is* changing position.”³⁷ As the Supreme Court expressly held, an “agency may not ... depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”³⁸ But that is exactly what the FTC is trying to do in the *ANPR*: ignore its own *1980 Policy Statement* and declare conduct it doesn’t like to be an “unfair or deceptive act or practice” by fiat. Thus, by any reasonable standard, the FTC’s conspicuous silence regarding the *1980 Policy Statement* hardly passes legal muster and calls into question its efforts to enact sweeping regulation over the entire U.S. economy.

D. Ignoring Statutory Constraints

The *ANPR* also makes clear that the Commission desires to expand rulemaking beyond “deceptive acts and practices” as limited by *Mag-Moss* to cover also “unfair methods of competition” (“UMC”).³⁹ As the Commission states, it invites comment:

on the ways in which existing and emergent commercial surveillance practices harm competition and on any new trade regulation rules that would address such practices. Such rules could arise from the Commission’s authority to protect against unfair methods of competition, so they may be proposed directly without first being subject of an advance notice of proposed rulemaking.

As noted above, the FTC’s ability to engage in UMC rulemaking stands on questionable legal authority.⁴⁰ Chair Kahn, however, appears to believe that legal authority is no limitation on her regulatory efforts.

More troubling is that the *ANPR*, by its own terms, ignores the four corners of the FTC’s enabling statute, the Federal Trade Commission Act. As Commissioner Phillips points out, the *ANPR* contemplates issues that go “well beyond” deceptive acts and practices as proscribed by the FTC Act, “including to common business practices we have never before even asserted are illegal.”⁴¹ As just one example, Commissioner Phillips notes that the *ANPR* “reaches outside the jurisdiction of the FTC” by “seeking to recast the agency as a civil rights enforcer” even though “the FTC Act does not mention discrimination.”⁴² As the Supreme Court held in *NAACP v. Federal*

³⁷ See, e.g., *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis in original).

³⁸ *Id.*

³⁹ See *ANPR* at n. 47, 87 FED. REG. at 51276

⁴⁰ Ohlhausen and Rill, *supra* n. 1; Spiwak, *supra* n. 1.

⁴¹ Phillips Dissent, 87 FED. REG. at 51295.

⁴² *Id.*

Power Commission close to fifty years ago, because an agency “must take meaning from the purposes of the regulatory legislation” – even though eliminating racial discrimination may be a worthy social goal – the precise requirements of Section 18 do not give the FTC “a broad license to promote the general welfare.”⁴³

E. “Major Questions” Doctrine

Finally, we have the looming Constitutional elephant in the room: does the FTC’s effort to promulgate sweeping data security rules for the entire U.S. economy violate the “major questions” doctrine?

On June 30, 2022—nearly six full weeks before the FTC dropped its *ANPR*—the Supreme Court issued its seminal opinion in *West Virginia v. EPA*.⁴⁴ In this case, the Court laid out its latest and most comprehensive analysis of the “major questions” doctrine. Simply stated, under the “major questions” doctrine an administrative agency is prohibited from extending its reach beyond the power Congress has expressly delegated to it. While this determination is made on a case-by-case basis, the central inquiry of the “major questions” doctrine hinges upon the “history and the breadth of the authority that [the agency] has asserted,” and whether the “economic and political significance” of that assertion provides a “reason to hesitate before concluding that Congress” meant to confer such authority.⁴⁵ Or, as Chief Justice Roberts stated more directly:

Agencies have only those powers given to them by Congress, and “enabling legislation” is generally not an “open book to which the agency [may] add pages and change the plot line.” We presume that “Congress intends to make major policy decisions itself, not leave those decisions to agencies.”⁴⁶

It should be noted that at the same time Ms. Khan rolled out her aggressive plan for sweeping trade regulations, Congress was (and, of this writing, continues to be) in the throes of negotiating a federal privacy law.⁴⁷ Yet by issuing such a sweeping *ANPR*, it is apparent that Ms. Khan does

⁴³ *NAACP v. Federal Power Commission*, 425 U.S. 662, 669 (1978).

⁴⁴ *West Virginia v. EPA*, 142 S.Ct. 2587 (2022).

⁴⁵ *Id.* at 2607-08.

⁴⁶ *Id.* at 2609 (citations omitted).

⁴⁷ See, e.g., C. Lima, *The Debate Over a Privacy Bill Is Inching Forward On Capitol Hill*, WASHINGTON POST (April 13 2022) (available at: <https://www.washingtonpost.com/politics/2022/04/13/debate-over-privacy-bill-is-inching-forward-capitol-hill/>); A. Ng, *Pelosi Expresses Reservations About Bipartisan Privacy Bill*, POLITICO (September 1, 2022) (available at: <https://www.politico.com/news/2022/09/01/speaker-pelosi-reservations-privacy-bill-00054559>); S. Sluis, *The Big Story: Where's The National Privacy Law?* ADXCHANGER (September 8, 2022) (available at: <https://www.adexchanger.com/podcast/the-big-story/the-big-story-wheres-the-national-privacy-law>).

not like the pace of legislative progress. Unfortunately, that is not her call to make. As Justice Gorsuch noted in his concurrence to *West Virginia v. EPA*, although “lawmaking under our Constitution can be difficult”, our Founders deliberately made enacting laws difficult by design in the Constitution “to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives during their consideration, and thanks to all this prove stable over time.”⁴⁸ Equally important, noted Justice Gorsuch, the “need for compromise inherent in this design also sought to protect minorities by ensuring that their votes would often decide the fate of proposed legislation—allowing them to wield real power alongside the majority.”⁴⁹

Which brings us back, once again, to issues of scope. As noted throughout, the *ANPR* is hardly a focused document; rather, spanning some ninety-five questions, the *ANPR* casts an exceptionally wide net about how the FTC can regulate the American economy. By any reasonable standard, therefore, courts should greet the FTC’s broad assertion of “‘extreme regulatory power over the national economy’ with ‘skepticism.’”⁵⁰

Given the preceding discussion, the “major questions” doctrine looms large over the FTC’s efforts. Yet, what is so striking is that the *ANPR* makes absolutely no mention about the impact of the “major questions” doctrine anywhere in the document. Again, as the *ANPR* was released nearly six weeks after the Supreme Court issued its ruling in *West Virginia v. EPA*, the conspicuous absence of any mention of the major questions doctrine speaks volumes about the FTC’s intentions.

V. Conclusion

Of course, there is always the chance that Congress will enact legislation that will render the *ANPR* moot, or the Commission, if it moves to a formal *NPRM*, will attempt to be more focused in its regulatory effort. There is even the possibility that the agency might bag the whole rulemaking effort on its own motion. As the FTC points out in the *ANPR*, if the Commission opts not to proceed to Step Two and issue a formal *NPRM*, then comments received as the result of the *ANPR* “will help to sharpen the Commission’s enforcement work and may inform reform by Congress or other policymakers, even if the Commission does not ultimately promulgate new trade regulation rules.”⁵¹ But based on the Commission’s actions to date and public comments by current FTC leadership, we shouldn’t bet on it.

⁴⁸ *West Virginia v. EPA*, 142 S.Ct. at 2618 (Gorsuch J. concurring) (citations omitted).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 87 FED. REG. at 51277.

Chair Kahn plainly wants to transform the FTC but the *ANPR*'s broad and poorly-specified agenda may stand in her way. A more targeted approach—choosing a few issues that may have bipartisan support, might be more productive and a better use of FTC resources. Chair Kahn's tenure is finite, and the *ANPR*'s broad scope may be a hurdle to her proposed reforms. Besides, what one FTC Chair does via rulemaking can be reversed by the next, especially if the regulations are viewed as partisan in nature. Whether Chair Kahn has bit off more than she can chew remains an open question, but one thing is certainly clear: Chair Khan's appetite for regulation is insatiable, and the *ANPR* represents one big bite towards this end.

PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES

5335 Wisconsin Avenue, NW, Suite 440

Washington, D.C. 20015

Tel: (+1) (202) 274-0235 • Fax: (+1) (202) 318-4909

www.phoenix-center.org