AAI AMERICAN ANTITRUST INSTITUTE

Competition Law Center
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Rapporteur's Report
"The FTC After *Trump v. Slaughter*"
A Joint Conference of the American Antitrust Institute and George Washington University Law School Competition Law Center (August 3, 2026)

By striking down for-cause removal provisions in Section 1 of the Federal Trade Commission Act, the Supreme Court's decision in *Trump v. Slaughter* fundamentally altered the constitutional relationship between the President and independent regulatory commissions, raising profound questions about the future structure and operation of the FTC. Because the FTC combines investigative, prosecutorial, adjudicative, and rulemaking authority within a single institution, changes to the President's removal power have implications extending far beyond personnel decisions. This conference brought together former Commissioners, academics, former agency officials, and practitioners to evaluate how Congress, the Commission, and the courts can preserve transparency, accountability, institutional integrity, and effective competition enforcement while respecting the Supreme Court's decision. Drawing on recent scholarship and reform proposals, the program explored both administrative reforms that could be implemented immediately and future legislative reforms that may be necessary to ensure the FTC remains an expert, trusted, and effective competition agency.

Introductory Remarks

Randy Stutz, President, American Antitrust Institute

Stutz began by observing that *Trump v. Slaughter* may prove to be one of the most consequential decisions in the history of the federal system of antitrust enforcement. By effecting a major constitutional change but providing relatively little guidance about the scope of its implications, the Court left difficult questions for future litigation, including what functions may still be performed independently, how courts should distinguish those functions from others, and how Congress should respond.

Stutz emphasized that, regardless of one's views on the merits of any given competition matter, there is broad consensus that enforcement decisions should be made on the merits and grounded in law, evidence, economics, and sound judgment, not political expediency, partisan goals, or favortism. In light of *Trump v. Slaughter*, we must ask how transparency, independence, accountability, and public confidence in the FTC can be preserved. The conference does not seek to relitigate *Trump v. Slaughter*, but rather to look ahead to those challenges.

William Kovacic, Professor of Law, George Washington University

Kovacic opened by observing that the time for mourning and tears is over. Rather than despair over the agency's future, we must look forward to identify constructive solutions that allow the FTC to continue its work in the face of new constitutional constraints. He reminded everyone that the FTC has previously faced major challenges during its over-100-year history yet always showed institutional resilience. We must carry on that tradition.

Kovacic then introduced the morning keynote speaker, former Commissioner Rebecca Kelly Slaughter. He noted that she would be remembered not only for being a named party in a landmark Supreme Court case but also for being a catalyst for institutional reform. He praised her for embodying what Congress had in mind for independent agencies: thoughtful deliberation, institutional perspective, legal judgment, and fidelity to the public interest.

Keynote Address: Former Commissioner Rebecca Kelly Slaughter

Slaughter began her address by noting that it was her first speech as a former commissioner and that it was "very weird" to have a landmark Supreme Court decision bearing her name. She emphasized that she did not regret challenging her dismissal by the President. She resisted the President in service of the rule of law and our constitutional structure. While it was clear from the start that the Supreme Court would be overturning longstanding precedent, *Trump v. Slaughter* forced the Court to engage publicly with competing constitutional arguments, thus allowing future generations to evaluate the reasoning and the result.

In the spirit of not relitigating her case, Slaughter focused her remarks on the future of the FTC and similar agencies. She considered the path forward through the lens of two questions: What were the practical, functional benefits served by the for-cause removal protections the Supreme Court struck down, and how can those benefits be realized going forward? Based on her tenure as an FTC Commissioner serving in various capacities, including in the majority, in the minority, and as acting Chair of the agency, she identified four core benefits and two norms associated with removal protections that she hoped could be preserved, albeit through different mechanisms.

Benefits:

- **Protection Against Corruption.** For-cause removal protections shielded both majority and minority commissioners from the threat of removal for decisions opposed by the President or made for partisan reasons. It allowed them to fulfill their oaths to the Constitution and the laws of the United States. The absence of those protections makes commissioners susceptible to decisions designed to curry presidential favor.
- **Engagement with Opposing Views.** For-cause removal protections helped ensure membership for minority voices on the Commission. When a ruling majority engaged with dissenting voices, it led to better decision-making, even where the dissenting voices did not prevail. This internal deliberation not only protected minority voices, but it also strengthened the quality and legitimacy of majority decisions, often increasing the likelihood that the agency would prevail if a decision were challenged in court.
- **Incentive for Reaching Consensus.** The presence of minority commissioners supported by removal protections provided incentives for consensus. It encouraged chairs to seek bipartisan compromises, which helped ensure that agency actions endured over time. While unanimity is neither possible nor desirable in all circumstances, decisions reflecting consensus supported regulatory predictability favored by market participants.
- **Transparency and Accountability.** For-cause removal protection ensured the presence of a variety of voices with the freedom to express themselves. Concurring and dissenting statements permitted Congress, reviewing courts, practitioners, and the public to understand competing legal and policy perspectives, while holding commissioners individually accountable for their reasoning.

Norms:

- **Orderly Transition of Power.** Removal protections (as well as staggered terms) helped lead to institutional norms that ensured the continued presence of commissioners who could lead the agency during times of transition. Historically when a transition involved a change of party control, the outgoing chair would tender their resignation so that the incoming President could designate a new chair from among the sitting commissioners. Imagine, however, if President Trump never appoints Democratic commissioners going forward, but a Democrat is elected the next President. That President might be stuck with an agency led by the opposition party, or one with no commissioners at all if sitting commissioners are fired or resign on or before January 20, 2029.

- **Equal Access to Resources.** While not directly tied to removal protections, all FTC commissioners had access to information, and career staff treated all commissioners as their principals. When she was briefly reinstated after her initial firing, Slaughter was told that the Chair had adopted a new rule forbidding staff from communicating directly with non-chair commissioners. Equal access to information and staff should be codified going forward.

Slaughter closed by reiterating that the post-*Trump v. Slaughter* project is forward-looking. While removal protections are no longer part of the toolbox, the Supreme Court did not hold that the values underlying those protections, such as transparency, bipartisanship, or expertise, are unconstitutional. The challenge is how to enshrine and protect those values with the statutory and procedural mechanisms that remain available.

Finally, in response to an audience question about how to fight corruption given the enhanced presidential power that *Trump v. Slaughter* created, Slaughter noted that states have authorities they can exercise in our multi-level federal system. She also emphasized the need for Congress to step up. It has power over appropriations, nominations, and oversight that is currently underutilized. Finally, she noted the important role of private enforcement and a free press.

Panel 1: Preserving Independence, Bipartisanship, and Institutional Values

Moderator: Rebecca Kelly Slaughter (Former FTC Commissioner and Former Acting Chair).

Panelists: Jon Leibowitz (Former FTC Chairman), Maureen Ohlhausen (Partner, Wilson Sonsini, and Former FTC Commissioner and Acting Chair), Andrew Gavil (Professor of Law, Howard University, and Former Director, FTC Office of Policy Planning), Bilal Sayyed (Senior Competition Counsel, TechFreedom, and Former Director, FTC Office of Policy Planning).

Slaughter began the panel with a question related to her own keynote address: *What are the FTC's historical values and practices that should be preserved going forward?*

Leibowitz agreed with Slaughter's earlier observations that for-cause removal protections created benefits including the need for commissioners to engage different viewpoints, incentives to find consensus, promoting the crafting of enduring decisions, and transparency. He viewed these benefits as a virtuous cycle. He contrasted the FTC with the DOJ's Antitrust Division, noting that while there is undoubtedly vigorous internal discussion about enforcement decisions, there is no real transparency. He also observed that independent agencies had some insulation from politics which allowed the FTC, for example, to do some important work without interference from the White House, including in areas such as pharmaceutical reverse payments (i.e. "pay-for-delay") and the privacy policies of social media companies like Facebook.

Ohlhausen largely agreed with the benefits Slaughter identified, but attributed them more to historical FTC norms, not for-cause removal protections. Ohlhausen noted that some of the norms had already started to break down during the Biden Administration. As far as restoring the norms, Ohlhausen identified the need for Congress to provide more specificity, clarity, and guardrails in the laws the FTC enforces to complement the broad authority of Section 5 of the FTC Act. She cited as a successful example of this specificity the Children's Online Privacy Protection Act ("COPPA"), which has enjoyed bipartisan support. Congress needs to give the FTC much clearer direction.

Gavil noted that policy arguments for having independent agencies did not matter once the issue became constitutionalized. In any event, we are discovering that a lot of what made government work well were norms (as Ohlhausen noted), not constitutional protections. He raised the possibility that future presidents might see the value in such norms and independent agencies generally. On the other hand, once one president breaks the norms, that sets a precedent others may follow.

Sayyed said that as a matter of policy, he believes *Slaughter* was decided correctly. Like Ohlhausen and Gavil, he thought that many of the benefits Slaughter identified are achievable even without for-cause removal protections. As proof, he noted that many executive agencies function well despite the President's power to fire agency leaders at will. He also observed that agencies had drifted away from core tenets of the Administrative Procedure Act and that we may have an opportunity to re-consider how agencies should be structured. For example, some agencies might be folded into existing executive branch agencies. He also thought that there should be more transparency so that parties outside of government can hold agencies accountable.

Slaughter next posed the questions: *Should the Tunney Act be amended to apply to the FTC, and are other changes needed, such as applying it to consumer protection cases or to a decision of the agency not to prosecute?* [The Tunney Act requires the DOJ Antitrust Division to file proposed settlements of enforcement actions with a federal court to determine whether the settlement is in the public interest. Discovery and other process is available, and third parties are permitted to submit comments to the DOJ, to which it must respond.]

Leibowitz supported extending the Tunney Act to the FTC, at least in the absence of a bipartisan commission. Related to that qualification, *Gavil* suggested that the Tunney Act might be modified to apply to the FTC only where there are no dissenting commissioners (who would presumably otherwise have shared their reasons for dissenting). That might create at least a small incentive toward bipartisanship and reaching consensus.

Ohlhausen noted several questions that arise with respect to the FTC even in the absence of an expanded Tunney Act. For example, already the DOJ, which is subject to the Tunney Act, prosecutes some matters on behalf of the FTC, such as violations of the HSR Act. Where DOJ is proceeding on behalf of the FTC, does the Tunney Act already apply? In addition, the Tunney Act requires disclosure of certain party communications to members of the Executive Branch, but who are not part of DOJ. Would that apply to the FTC now that it is arguably part of the Executive Branch under the unitary executive theory?

Gavil warned of unintended consequences associated with an expanded Tunney Act. For example, if the Tunney Act were to apply to decisions not to bring a case, would that provide incentives for DOJ (or the FTC) to avoid enforcement altogether? Gavil suggested that the Tunney Act might be amended to lower the standards for states to intervene in a Tunney Act proceeding. (Currently, states must file a motion under Federal Rule of Civil Procedure 24.)

Sayyed noted that the Tunney Act itself may be unconstitutional and that if the district court rejects the proposed settlement in *HPE/Juniper*, the Trump Administration may challenge the constitutionality of the Tunney Act. *Gavil* explained that the constitutional question is narrowly drawn in that it involves whether an Article III judge could direct an Article I agency to continue litigating a case if it finds a settlement is not in the public interest.

Slaughter next asked: *Should state AG enforcement be expanded, including greater access to HSR filings, and should there be expanded private rights of action?*

Sayyed began by stating his opposition to expanded private rights of action, while also noting that they already exist with respect to the Sherman Act and Clayton Act, which cover most of the FTC's enforcement actions. As far as state AGs being an antidote to more politicized antitrust enforcement at the federal level, he noted that state AGs are elected and do act politically when bringing enforcement actions. Further, if they need more resources, Sayyed said state legislatures, not Congress, should supply them. He would rather see more transparency into the enforcement actions of federal agencies.

Leibowitz observed that state AGs are doing just fine, citing the *LiveNation* case as an example. He also agreed with Sayyed that state AGs are political. He noted that before *Trump v. Slaughter* some of the FTC's best cases were bipartisan, such as its efforts fighting reverse payments.

Ohlhausen expressed a concern about expanded private rights of action possibly leading to lower legal standards, for example, for obtaining discovery or resisting motions to dismiss. She also expressed a concern about extending private rights of action to the FTC Act's broad prohibitions against unfair methods of competition or unfair or deceptive acts or practices. Regarding her concerns about unfair methods of competition, Ohlhausen raised concerns about the FTC's on-again, off-again, on-again policy statements regarding when the FTC might exercise its Section 5 authority. She opined that the FTC has used Section 5 more as a business regulator than an antitrust enforcer. Her comment promoted responses from Gavil, Leibowitz, and Slaughter opposing Ohlhausen's view of the Section 5 policy statements and describing what those policy statements were meant to achieve.

Gavil proposed that Congress consider reconstituting independent inspectors general as an arm of Congress to help provide oversight of executive branch actions—for example, as investigators for Congress, though they would not be able to enforce, since enforcement is an executive function.

Slaughter shared that in the past she was willing to go along with proposals to limit private rights of action because she expected federal enforcement would be sufficient to protect competition and consumers. That is no longer the case, given the current state of federal enforcement. She also noted that even though individual state AGs are elected, many state antitrust cases are brought on a bipartisan basis.

Slaughter's final question was *whether Congress should adopt a specific quorum requirement for the FTC (or other agencies)?*

Gavil commented that a quorum requirement looks great in theory but carries the risk that it will be gamed. For example, the President could refuse to appoint commissioners or the Senate could refuse to confirm commissioners, which could deprive an agency of the necessary commissioners to have a quorum.

Ohlhausen agreed with Gavil. She added that this quorum discussion assumes a two-party system, but that may not always be the case. In fact, the FTC has had commissioners that identified as Independents.

Sayyed expressed support for the current FTC quorum rule, which requires a majority of the commissioners to conduct agency business. He lamented the lack of quorum consistency across government agencies.

Leibowitz supported exploring quorum requirements and noted that Senator Cruz may address such requirements in a possible FTC oversight bill.

Slaughter emphasized the need for default rules for agency business in the absence of a quorum. For example, with respect to the FTC, the default rule could be that in the absence of a quorum, no merger would be cleared. She predicted that would put pressure on the President and the Senate to ensure that there was a quorum.

Panel 2: Administrative Adjudication, Legal Challenges, and Strategic Reforms

Moderator: Tom Dahdouh (AAI Public Service Fellow and Former FTC Official).

Panelists: Mary Engle (Executive Vice President, Policy, BBB National Programs, and Former Associate Director, FTC Bureau of Consumer Protection), Monica Vaca (Partner, Vaca Daffan LLP and Former Deputy Director, FTC Bureau of Consumer Protection); William Kovacic (Professor of Law, George Washington University, and Former FTC Chairman); Adam Gitlin (Chief, Antitrust and Nonprofit Enforcement Section, Office of the D.C. Attorney General, and Former DOJ Antitrust Division Trial Attorney), Joshua Sarnoff (Professor of Law, DePaul University).

Dahdouh began the panel by posing a question for the former FTC staff members: *What impact will the loss of for-cause removal protection have on FTC career staff?*

Vaca noted at the outset that FTC staff are highly professional and highly committed to the agency's mission. They have historically had to work hard to accommodate the views of five commissioners, effectively five bosses, which made the work product better. That process leads staff to anticipate and address hard questions before the agency goes to court.

Engle agreed with Vaca and added that the historical structure of the agency empowered staff to develop cases for consideration by a diverse set of commissioners. It meant an environment where everything was not top down.

Dahdouh, while agreeing with Vaca and Engle, added that historically there were guardrails at the FTC that kept the agency from bringing cases that might be struck down on First Amendment grounds. In the *Media Matters* case, however, the court found that, by going after political speech, the agency had violated the First Amendment.

Engle noted that the guardrails were especially important in advertising cases. Staff worked hard to police only commercial speech. She noted the example of Former Chairman Joe Simons, who refused a White House request to investigate political speech.

Dahdouh next asked: *What will be the impact of* Trump v. Slaughter *on the FTC's administrative adjudication?*

Kovacic started the discussion by suggesting that we examine the "Top-Ten Hits" of FTC administrative adjudication, which show the FTC having lived up to Congress's vision for the agency back in 1914. One example he identified was the FTC's *Pfizer* decision, which established the substantiation doctrine for advertising. It became a bedrock principle of advertising and was emulated by jurisdictions around the world. On the competition side, he identified the FTC's cases bringing competition law to the healthcare sector and to the professions. One such case was *American Medical Association*, which established that there was no quality control justification for allowing physicians and their associations to set fees. While competition law might have eventually been applied to healthcare and the professions, it happened more quickly because of the FTC's engagement. Another more recent example was the *Illumina-Grail* case where the FTC concluded that Illumina's acquisition of Grail harmed future competition. The industry expected the Fifth Circuit would reverse the decision on appeal, but in fact the court, in a decision written by Judge Edith Jones, deferred to the Commission's fact findings and upheld the decision.

Engle picked up on Kovacic's theme and identified several other important FTC administrative cases. She noted that not only do foreign jurisdictions use the *Pfizer* factors, but so do private, self-regulatory systems, such as the National Advertising Division of the BBB National Programs. She mentioned the FTC's 3-part test for deception in the *Colgate-Palmolive* case and the deception standard for testimonials articulated in *Cliffdale*. Another area involved unfairness, which the Commission initially addressed in the *International Harvester* case. Over time, the agency has consolidated and collected its decisions in policy statements, including for ad substantiation, deception, and unfairness.

Kovacic commented that the policies identified by Engle reflect a careful effort to consolidate the accumulated expertise of the agency as well as to take advantage of new literature in the field of information economics. He observed that no individual federal judge could have done the same thing.

Dahdouh noted other areas where a similar process of developing doctrine through careful investigation and case-by-case adjudication, including reverse payments and geographic market definition in hospital mergers. He then asked Sarnoff to address *how, in light of Trump v. Slaughter, can the FTC's adjudicative process work if it is subject to a political leader.*

Sarnoff argued that *Slaughter* left administrative law tangled, pointing to unresolved tensions between functionalism and formalism, presidential control versus agency independence, due process, and the distinctions among executive, legislative, and judicial power. He criticized Congress as too dysfunctional to check the executive, citing the administration's refusal to share information with oversight committees, and he suggested that social pressure and moral condemnation may be more effective than institutional oversight.

Sarnoff then traced the history of the president's removal power: the Constitution's Appointments Clause is silent on removal, leading to the ambiguous "Decision of 1789" and four competing theories of removal authority. The theory of inherent presidential removal power prevailed in the 1926 case *Myers v. United States*, though later cases—notably the 1935 decision *Humphrey's Executor*—carved out exceptions for independent, multi-member agencies like the FTC that perform quasi-legislative and quasi-judicial functions.

The *Slaughter* case, Sarnoff explained, adopted an expansive view of executive power that pulls agency rulemaking and adjudication under presidential removal authority, undermining the *Humphrey's Executor* framework. He contrasted the majority's reasoning—that subordinates must be removable at will for true accountability to the President—with Justice Gorsuch's concurrence, which viewed the FTC's powers as legislative and judicial rather than executive. This creates a due-process problem for administrative adjudication: if agency adjudicators aren't independent of the executive, their rulings may be constitutionally suspect.

Sarnoff closed by arguing that the Court's inconsistent reasoning has left the law in disarray, that fixing it will require social protest and constitutional reform rather than judicial self-correction, and that the likely outcome is a shift of adjudication to Article III courts, which will overwhelm the judiciary and impair effective regulation.

Dahdouh next asked *what other challenges are there to FTC adjudication, both in federal court and administratively?*

Vaca described the Supreme Court's decision in the *AMG* case, where it held that the FTC could not obtain equitable monetary relief under Section 13(b) of the FTC Act. The Court did say in *AMG* that the FTC could still use administrative adjudication to eventually obtain monetary relief. Yet just a couple of years later, the Court in the *Jarkesy* decision held that the SEC could not use administrative adjudication to assess penalties for securities fraud. Instead, because securities fraud is similar to common law fraud, a defendant charged with such fraud is entitled, under the Seventh Amendment, to a trial by jury in a federal court. The Fifth Circuit, relying in *Jarkesy*, earlier this year held in *Intuit* that the FTC could not use administrative adjudication to pursue deceptive advertising, because that kind of case is similar to common law fraud as well. As such, it can only be brought in a federal court. After *AMG* and *Intuit*, the FTC is boxed in. Its pathways to obtaining financial relief for consumers are limited to cases seeking penalties for the violations of existing FTC rules or partnering with a state that has authority under state law to seek monetary relief.

Vaca noted that another challenge is the Third Circuit's decision in *FTC v. Shire ViroPharma*, which held that the FTC cannot even get into federal court unless the challenged conduct is ongoing or is about to occur. Under that decision, the FTC could not pursue conduct that had been completed. *Dahdouh* added that *Shire ViroPharma* is especially problematic for cases alleging collusion, which has often ceased before the FTC learns about it.

Dahdouh then asked *Gitlin* where *Congress should enable third parties, including states AGs, to bring more cases, including under Section 5 of the FTC Act?*

As a general matter, *Gitlin* thought that would be useful, though he noted a small and large challenge. The small challenge is logistical. In merger cases, states face difficulties accessing HSR merger-review materials, since current law requires merging parties to waive confidentiality before states can see more than cursory information. Merging parties are increasingly reluctant to grant these waivers. Gitlin noted that Congress could fix this fairly easily.

Gitlin identified the big challenge as resources. Antitrust litigation has become extremely expensive, meaning wealthier states can litigate more effectively than poorer ones, and even collective state action faces funding and staffing limits. Gitlin noted that while some state AGs are Democrats and some are Republicans, their offices tend to cooperate closely and reach bipartisan consensus on enforcement priorities, even across ideologically different states like Texas and California.

As for allowing states to bring cases directly under the FTC Act, Gitlin noted that many states already have “baby FTC Acts” modeled on federal law, though enforcement powers vary by state. In addition, while a few states have authority to do studies similar to the FTC’s 6(b) studies, it might help if Congress were to extend that authority to all states. Gitlin rejected the framing of states as mere “tagalongs” to federal enforcement, arguing states are co-equal enforcers whose cooperation—handling local witnesses, coordinating with regional regulators—has often been essential to federal cases. He also framed expanded state powers not as a replacement for FTC enforcement but as reinforcement in an increasingly resource-constrained enforcement environment.

Dahdouh next asked *whether Congress should authorize private rights of action under the FTC Act?*

Vaca responded that that would be very helpful, especially given cutbacks in FTC enforcement power. She noted that there are many skillful consumer protection lawyers who would take up this mantle. She expressed concern, however, that Congress would be reluctant to create private rights of action under the FTC Act. She also suggested that the FTC could become a resource for both states and private enforcement given its expertise and its databases.

Sarnoff added that another reason to look for alternatives is to ensure continued enforcement in the face of corruption or incapacity at the federal level. Such changes would likely need to be passed by Congress given the current administration’s hostile view of private enforcement.

Kovacic closed the conference with some final thoughts:

He sketched two broad scenarios. In the first, presidents possess the legal authority to remove commissioners at will but choose not to exercise it fully, recognizing that doing so would undermine the agency's effectiveness and its credibility before appellate courts, which rely on trusting the agency's accumulated expertise and professional judgment. Under this "sanguine" scenario, the removal power becomes largely dormant, used only in extreme cases of misconduct, and the constitutional principle at stake in *Slaughter* matters less in practice because presidents restrain themselves out of respect for the institution.

In the second, more troubling scenario, presidents of both parties fully exploit their removal authority to eliminate commissioners they find obstructive, effectively disabling bipartisan decision-making. Kovacic raised related structural vulnerabilities Congress might need to address: whether presidents could hollow out the agency simply by leaving vacancies unfilled indefinitely, whether Congress can legislate quorum requirements or use appropriations leverage to compel timely appointments, and whether adopting a European-style mechanism—allowing third parties to sue over inadequate agency action or inaction—might provide a check on executive control.

Kovacic noted the FTC's historical evolution, observing that Congress and the Commission adapted the agency's remedial powers over time (e.g., gaining the ability to recover money, not just issue cease-and-desist orders) even though these expansions departed from the FTC Act's original 1914 vision centered on administrative adjudication. He argued that any case for preserving or expanding the FTC's authority must start by demonstrating the concrete value the agency has delivered historically. He emphasized that the FTC is uniquely positioned as the only single federal body handling competition, consumer protection, and data protection together—capabilities he viewed as vital for regulating the digital economy. He urged that debates over splitting or restructuring the FTC's functions be grounded in careful, evidence-based examination of the agency's track record rather than resignation. Finally, he exhorted the audience not to default to abandoning the institution, but instead to pursue realistic, ambitious alternatives—suggesting that genuine effort in this area may yield unexpectedly valuable results.

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