

# Why Dissenting Statements by FTC Commissioners Matter

John E. Villafranco

October 20, 2024

Last week, the FTC, by a 3-2 vote along party lines, adopted its [click-to-cancel rule](#), which purports to make it easier to cancel gym memberships, streaming services, and the like. [We wrote about it [here](#).] The final rule will apply across the economy to any business that offers negative option plans (e.g., subscriptions) and would provide the Commission with the ability to obtain civil penalties from covered entities for any misrepresentation about the underlying product or service.

For longtime FTC watchers, this rule is a significant departure from other rules promulgated under Section 18 of the FTC Act. And while three Commissioners get to decide how the Commission interprets the law, the minority's position should not be overlooked, on this and other issues. For one thing, the minority opinion could signal where the Commission might go if there is a change in administration. For another, the minority can highlight legal questions that will need to be settled by federal courts. And we have seen quite a bit of that in recent months, as minority commissioners have made their opinions known, in a series of impossible-to-ignore dissents.

Commissioner Melissa Holyoak's dissent from the click-to-cancel rule is just the latest example. There, she argued that (1) the majority failed to follow the Magnusson-Moss rulemaking process, (2) the new rule incentivizes companies to avoid negative options by raising risks associated with such features, and (3) the Commission's changes to the prior version of the Rule likely would not withstand judicial scrutiny. She also accused FTC Chair Lina Khan of blatant electioneering:

The likely unlawful character of the rule is compounded by the Majority's race to cross the finish line. Why the rush? There is a simple explanation. Less than a month from election day, the Chair is hurrying to finish a rule that follows through on a campaign pledge made by the Chair's favored presidential candidate.

Commissioner Andrew Ferguson's dissent, presumably too hot to be served, was left to cool a bit with the FTC website stating that it would be "forthcoming." Perhaps the delay was required so he could sharpen his pencil, having worn it to the nub drafting his Dissent and Concurrence in the *H&R Block* matter. That statement, issued this past Friday afternoon, considered whether the dual-layer removal protections afforded FTC Administrative Law Judges required the disqualification of the ALJ. While Commissioner Ferguson ultimately concurred in the denial of the disqualification motion, he wrote at length explaining his view that the dual-layer protections violate the Vesting and Take Care Clauses of Article II of the Constitution.

Commissioner Ferguson's statement elicited a sharp rebuke from two of his colleagues. Chair Lina Khan, with Commissioner Alvaro Bedoya joining, [wrote](#):

Strikingly, [Commissioner Ferguson's] positions all point in the direction of undermining the FTC and its authorities . . . While disagreement and debate among Commissioners is a

longstanding FTC tradition, never in modern history has a Federal Trade Commissioner gone to such lengths to declare that core institutional features of the FTC are unconstitutional.

To which Commissioner Ferguson [replied](#) “I reject the Chair’s insistence on supine deference to her policy preferences and legal theories.”

This exchange, while a bit chippy, merely concerns the latest dissent in what is a growing number. During the period 2019 to present, by our count, there have been 101 dissenting statements by commissioners compared to 34 during the previous five years. [There were just 19 during the five-years that Jon Leibowitz was Chair, from 2009 to 2013.] And many of those dissents (others, outside the count, in the form of statements, articles, and pointed concurring opinions) have been not only fattened with in-depth legal analysis, but oftentimes, prickly. Who can forget Commissioner Wilson’s “noisy exit,” appearing as an OpEd in the *Wall Street Journal*, resigning her position while accusing Chair Khan and her Democratic colleagues of unethical, illegal, and unconstitutional conduct?

### **So What?**

A fair question – the dissent, after all, in whatever form it takes, is the losing side of a winner-take-all argument. Little more than shouting into the wind. If this is your perspective, however, you are missing the point.

As an initial matter, the law, as interpreted by a majority of the Commission, is *not* settled. A dissent, by its very definition, signals a lack of consensus and encourages greater scrutiny. A well-written dissent might persuade a future commissioner or a federal court that the current majority’s position is mistaken. It could also capture public attention, raising awareness and prompting public discourse, which could bring about changes in policy. And it could alert Congress to take a closer look at an issue or a regulatory agency, which we’ve seen, as various committees and subcommittees in the House of Representatives have conducted oversight hearings in recent years focused on the FTC.

Many of these oversight hearings have occurred in the wake of *AMG Capital Management*, during a period when the FTC has become more aggressive and has advanced novel legal theories. The majority has been clear that it would shrug-off any courtroom losses, believing that there is value in bringing a case, even if it is a loser, provided it signals to Congress that the law needs changing.

These efforts have been met with vociferous dissents that are a marked departure from the rather staid statements of commissioners past. Some might even say that recent dissents sound as if they emanate from the British House of Commons rather than the FTC. You guess which is which -- HOC or FTC?

1. “A sheep in sheep’s clothing.”
2. “The majority is correct that [the law] permits damages. The majority, though is not entitled to its own facts.”
3. “The Gentleman’s smile was like the silver plate on a coffin.”
4. “He has the gift of compressing the largest number of words into the smallest amount of thought.”
5. “The majority’s litany of mostly unpublished district court decisions that do not address the question are a non sequitur. Then again, carefully reading cases has not been the majority’s strong suit these last three years.”

6. "A modest man, who has much to be modest about."
7. "The majority is correct that, as a practical matter, the government has the ability to extort that to which it is not entitled under law. As we have said on other occasions, though, just because we can does not mean that we should."

*Answers: 1-HOC, 2-FTC, 3-HOC, 4-HOC, 5-FTC, 6-HOC, and 7-FTC.*

### **Dissents Can Be Predictive**

With a close election just a few weeks away, what was a minority position could become the majority position in a matter of months. If that were to occur, recent dissents provide a basis to predict the direction the Commission might take.

We have seen this before. Among the many important recent dissents, Commissioner Rebecca Slaughter and former Commissioner Rohit Chopra articulated policy positions and legal theories that were adopted by the current majority (*see, e.g.*, Slaughter's [dissent In the Matter of FTC v Facebook](#), Chopra's [dissent In the Matter of Google LLC and YouTube LLC](#) ).

Looking forward, it is plain to see the groundwork laid by Commissioners Wilson and Phillips when they dissented to various Mag-Moss rulemaking efforts regarding commercial surveillance, negative options, and junk Fees. For example:

- [Wilson/NegOption](#) ("I appreciate staff's steadfast efforts to protect consumers from deceptive negative option practices. I might have supported a tailored rule to address the negative option marketing abuses prevalent in our law enforcement experience that consolidated various legal requirements. This proposal instead attempts an end-run around the Supreme Court's decision in AMG to confer de novo redress and civil penalty authority on the Commission for Section 5 violations unrelated to deceptive or unfair negative option practices.");
- [Wilson/JunkFees](#) ("[T]he version of the ANPR we discuss today is sweeping in its breadth; may duplicate, or contradict, existing laws and rules; is untethered from a solid foundation of FTC enforcement; relies on flawed assumptions and vague definitions; ignores impacts on competition; and diverts scarce agency resources from important law enforcement efforts.");
- [Wilson/Surveillance](#) ("Chair Khan's public statements give me no basis to believe that she will seek to ensure that proposed rule provisions fit within the Congressionally circumscribed jurisdiction of the FTC. Neither has Chair Khan given me reason to believe that she harbors any concerns about harms that will befall the agency (and ultimately consumers) as a consequence of her overreach."); and
- [Phillips/Surveillance](#) ("I cannot support an ANPR that is the first step in a plan to go beyond the Commission's remit and outside its experience to issue rules that fundamentally alter the internet economy without a clear congressional mandate. That's not 'democratizing' the FTC or using all 'the tools in the FTC's toolbox.' It's a naked power grab.").

More recently, we have seen Commissioners Ferguson and Holyoak register thoughtful dissents laying out their views of the Health Breach Notification Rule and Non-Compete Clause Rule.

- [Holyoak/HBNR](#) ("The Health Breach Notification Rule that the Commission adopts today exceeds the Commission's statutory authority, puts companies at risk of perpetual noncompliance, and opens the Commission to legal challenge that could undermine its institutional integrity."); and

- [Ferguson/Non-Compete](#) (“[the Non-Compete Clause Rule] is by far the most extraordinary assertion of authority in the Commission’s history. It categorically prohibits a business practice that has been lawful for centuries. It invalidates thirty million existing contracts. It redistributes nearly half a trillion dollars of wealth. And it preempts the law of forty-six States.”)

Commissioners Holyoak and Ferguson also have written significant dissents and issued statements about the Commission’s attempts to extend the scope of unfairness, means and instrumentalities liability, the extension of the FTC’s unfairness authority to unfair discrimination claims, and the threatened use of the FTC’s Penalty Offense Authority.

- [Ferguson/Rytr](#) (“Treating as categorically illegal a generative AI tool merely because of the possibility that someone might use it for fraud is inconsistent with our precedents and common sense. And it threatens to turn honest innovators into lawbreakers and risks strangling a potentially revolutionary technology in its cradle.”);
- [Holyoak/Rytr](#) (“The ‘critical element’ for primary liability ‘is the existence of a representation, either by statement or omission, made by the defendant . . . .’ The complaint does not allege facts showing that the draft outputs were misrepresentations, much less that such draft outputs were Rytr’s misrepresentations.”);
- [Holyoak/Coulter](#) (“Absent Congressional authorization, the Commission should not attempt to broaden the FTC’s unfairness consumer protection authority into a comprehensive civil rights authority—a new standard of liability that may have unintended and pernicious consequences.”); and
- [Ferguson/Asbury](#) (“The majority’s disparate treatment of *Asbury* and *Coulter* is a particularly stark example of a dangerous trend taking hold in the Commission. The majority has developed a penchant for pressing aggressive and novel theories in complaints it knows will not be litigated and relying on those unadjudicated complaints as a form of precedent for subsequent Commission action.”).
- In [remarks](#) delivered at the National Advertising Division annual conference in New York last month, Commissioner Holyoak argued that the agency would be misusing its authority under Section 5(m)(1)(b) if it tries to impose civil penalties for conduct that is dissimilar to conduct previously found to be unlawful in Commission orders. (“I am concerned that by predicating settlements merely on stock notices—no matter crucial distinctions between the recipient’s business practices and the conduct described in the notice—the Commission has effectively engaged in a backdoor rulemaking.”)

All of this is to say, dissents matter, whether they are principally motivated by sincere disagreement on the law or policy, the desire to provide a “roadmap for advocates to take-up” (Chair Khan’s words from *H&R Block*), a preview of legal arguments for judges to consider, or yes, politics. To ignore them is to limit your understanding of the legal and policy issues facing the Commission today, and lower your gaze on what potentially could emerge on the horizon.