

# Firings of Democratic Commissioners Leave FTC In Flux and Tee Up Revisiting of *Humphrey's Executor*

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As news hit last night that President Trump fired the two remaining Democratic FTC Commissioners Alvaro Bedoya and Rebecca Slaughter, many questions abound. Would Commissioners Bedoya and Slaughter contest the dismissals? (The answer there appears to be an emphatic yes – with both issuing statements last night to that effect.) Another question: what will this mean for day-to-day operations at the Commission, including the ability for the FTC to continue to bring actions with only two commissioners of the same party, an issue my colleagues cover in a separate post [here](#).

Perhaps the biggest question – with implications far beyond our day-to-day advertising and privacy worlds – is whether the Supreme Court will overturn its 1935 decision in *Humphrey's Executor*, a decision that forms the longstanding constitutional basis for independent agencies like the FTC, Consumer Product Safety Commission (CPSC), Securities and Exchange Commission (SEC), Federal Communications Commission (FCC), Equal Employment Opportunity Commission (EEOC), and the National Labor Relations Board (NLRB), amongst others. As a refresher, in *Humphrey's Executor*, the Supreme Court upheld the insulation of FTC Commissioners from removal by the President at will – finding that the Constitution permits Congress to create expert independent agencies led by a group of principal officers removable only for cause.

The Supreme Court, however, has been chipping away at the scope of that holding – finding, for example, in *Seila Law LLC v. CFPB* in 2020 that Congress's insulation of the CFPB Director for removal only for "inefficiency, neglect of duty, or malfeasance in office" was unconstitutional and distinguishing *Humphrey's Executor* on the grounds that the FTC is a multi-member body of experts balanced along partisan lines, appointed to staggered terms, and performing only "quasi-legislative" and "quasi-judicial functions." Assuming last night's dismissals ultimately reach the Supreme Court, the justices will be faced with the question of whether to overturn *Humphrey's Executor* altogether – a move that Justices Thomas and Gorsuch already endorsed in a concurring opinion in *Seila Law*.

Meanwhile, other federal courts remain bound by *Humphrey's Executor* and have generally applied it to rebuke President Trump's attempts to dismiss members of independent agencies on similar grounds. Most recently, a judge for the District Court for the District of Columbia applied *Humphrey's Executor* to invalidate the removal of Gwynne Wilcox from the NLRB (*Wilcox v. Trump*). Similar decisions have been reached upholding removal restrictions for the CPSC, the Merit Systems Protection Board, and the FTC.

As we wait to see how this progresses in court, we will of course also be watching to see how this plays out on the ground at the FTC. Assuming the dismissals are upheld in the interim, one

immediate consequence will be the likely absence of dissents from forthcoming actions. In the last administration under Chair Khan, dissents were issued frequently and furiously by then-minority Commissioners Ferguson and Holyoak to voice disapproval and highlight legal questions underlying certain actions, as discussed [here](#). If there are only two sitting commissioners of the same party - with a third Republican likely to be confirmed by the Senate soon in Mark Meador - the likelihood for dissents becomes remote.

We also anticipate that state attorneys general will become more proactive if the dismissals of the Democratic Commissioners are upheld and the FTC becomes an inherently more political body. We plan to cover likely state AG priorities in the wake of the recent dismissals in a separate post coming soon, along with a recap of the FTC's first 50 days under Chair Ferguson.