

What's Next at FTC Following Firings of Democratic Commissioners?

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It's been a week since the [Trump administration](#) fired FTC Commissioners Slaughter and Bedoya because their "continued service on the FTC is inconsistent with . . . administration priorities." In the days since, we've been considering the consequences of the White House's action to the Commission and businesses subject to its jurisdiction, some of which are detailed [here](#) and [here](#).

What if a court holds that the firings were illegal?

FTC did not waste time changing Slaughter and Bedoya's [official FTC biographies](#) to identify them as "former Commissioners." Both have resolved to challenge their dismissals, teeing up another challenge to for-cause removal restrictions, which the [Department of Justice](#) and [White House](#) have characterized as unconstitutional. But because the Supreme Court has not overturned *Humphrey's Executor*, we anticipate that lower federal courts may follow the reasoning in *Wilcox v. Trump*, where a court earlier this month held that the President's firing of a NLRB member was unlawful.

Until the United States Senate confirms Mark Meador, the President's nominee to fill a Republican vacancy on the Commission, or the Supreme Court overturns *Humphrey's Executor*, which held that principal officers of independent agencies may be removed only for cause, any vote by the now-two-member Commission may be vulnerable to challenge. This creates uncertainty for parties appearing before the Commission and for industry looking to the Commission for guidance on the agency's interpretation of the laws it enforces. Just last week, we saw [FTC remove more than three years'](#) of business blog posts, only to restore them days later. Still other controversial blogs from recent years, like the one [announcing](#) that FTC regarded browsing data to be sensitive under all circumstances, are no longer available.

What about recusals?

Prior to joining the Commission, FTC Chairman Ferguson and Commissioner Holyoak served as Solicitors General of Virginia and Utah, respectively. Their state-level work exposed them to non-public facts regarding ongoing state matters, which in turn required that they recuse themselves from certain matters pending before the Commission. For example, in FTC's ongoing administrative litigation against several prescription drug benefit managers regarding insulin availability, Ferguson and Holyoak are [recused](#). That leaves the agency without a sitting Commissioner able to review a motion for a summary decision, evaluate the ALJ's initial decision, or determine certified questions, as detailed in the agency's Part III Rules.

Can Chairman Ferguson change FTC's Rules of Practice?

The Administrative Procedure Act does not require FTC to provide the public with notice and comment opportunities about the agency's "organization, procedure or practice." Although FTC chose to issue an Notice of Proposed Rulemaking in 2008 when it significantly updated its Part III Rules "to minimize delay and improve the quality of the administrative decision-making process," it has made other changes to its rules without providing similar opportunities for comment. With the support of Commissioner Holyoak, Chairman Ferguson could likewise proceed to quickly update the FTC's Rules of Practice, including to consolidate additional powers in his office or resolve [any concerns](#) regarding the Commission's quorum.

Kelley Drye's [FTC practice](#) is monitoring these and related developments as we evaluate how to best represent our clients' interests before the Commission.