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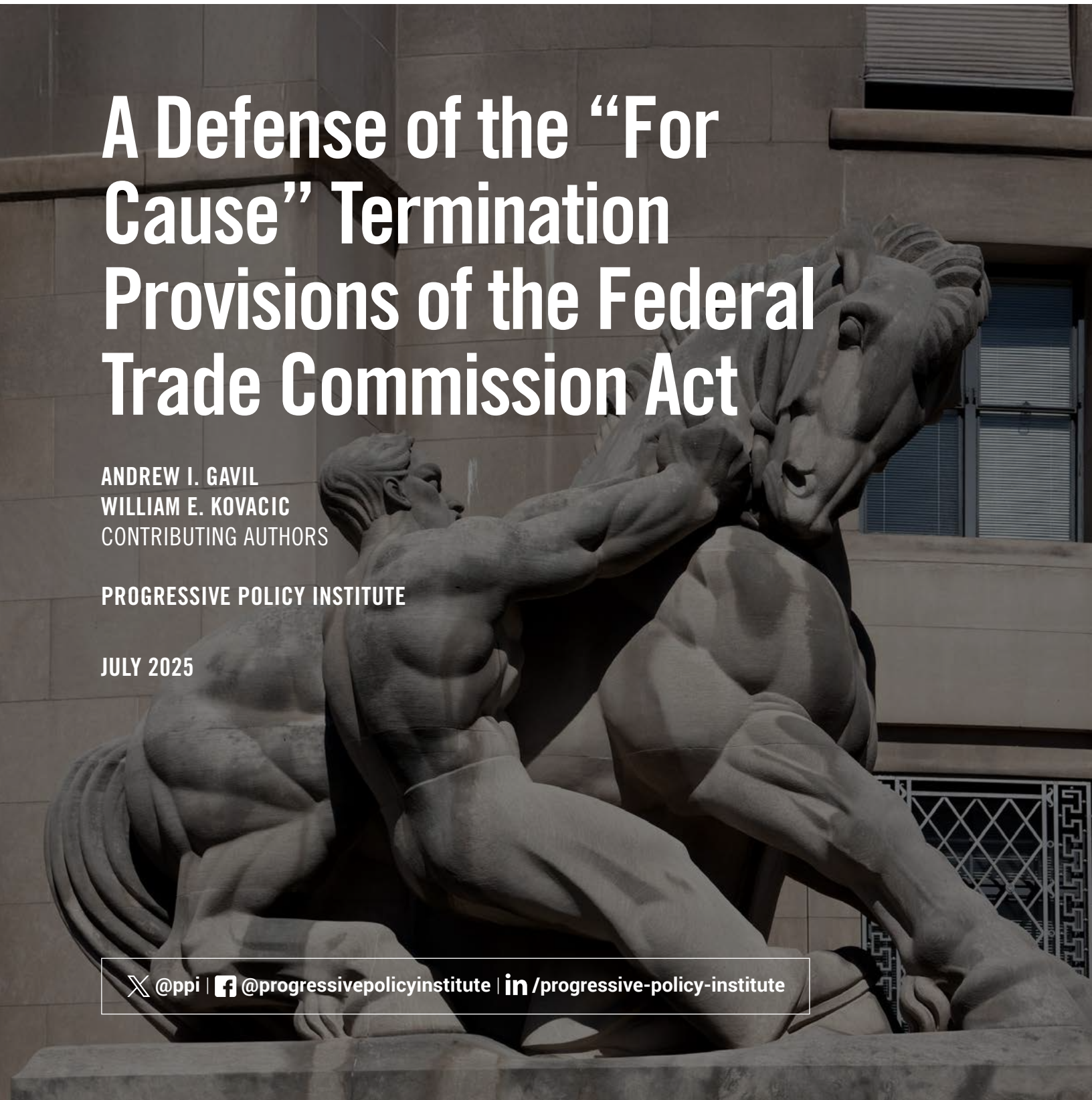

A Defense of the "For Cause" Termination Provisions of the Federal Trade Commission Act

ANDREW I. GAVIL
WILLIAM E. KOVACIC
CONTRIBUTING AUTHORS

PROGRESSIVE POLICY INSTITUTE

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INTRODUCTION

On March 18, 2025, President Donald Trump purported to dismiss Commissioners Rebecca Kelly Slaughter and Alvaro M. Bedoya from their seats on the Federal Trade Commission (FTC) without cause and prior to the expiration of their terms. His actions contravened Section 1 of the FTC Act, 15 U.S.C. § 41, which provides that "[a]ny Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office," and rested upon the bare assertion that he was exercising his authority under Article II of the Constitution.[1]

The President's assertion of authority to treat the Commissioners as "at will" employees of the Executive deliberately challenged the constitutionality of the "for cause" termination provisions of Section 1 and other similar statutes. By design, it also provoked the affected Commissioners to challenge the Administration's action in federal court, where the Administration intends to invite the Supreme Court to reconsider *Humphrey's Executor v. United States, 295 U.S. 602 (1935).* In *Humphrey's Executor,* the Court rejected a similar constitutional challenge to the FTC Act's protection against removal of commissioners except for good cause.

The attempted dismissals of the two Democratic Commissioners implicates more than the "for cause" constraints on presidential removal powers under the FTC Act, or the relative independence of the agency from political interference in its decision-making. They are instead an outgrowth of a broadly conceived and long-planned effort by the Administration to expand the Executive's power to control what has derisively been labelled the "administrative state," especially with respect to the "independent" federal administrative agencies.[2] Other relevant steps in this campaign include the Administration's attempt to shrink the federal

government and assert plenary presidential authority over the entire federal civil service, placing a wide range of personnel decisions beyond the reach of judicial review.

The Administration revealed its aims in a February 18, 2025, Executive Order titled "Ensuring Accountability of All Agencies,"[3] and in repeated efforts to dismiss commissioners and members of other federal multi-member boards. And a February 12, 2025 letter to Senator Richard J. Durbin from the then Acting Solicitor General of the Justice Department left no doubt of its view of *Humphrey's Executor*: "I am writing to advise you that the Department of Justice has determined that certain for-cause removal provisions that apply to multi-member regulatory commissions are unconstitutional and that the Department will no longer defend their constitutionality." The letter went on to refer to the FTC Act and *Humphrey's Executor*.[4]

Collectively, these actions seek to implement a charged version of the "Unitary Executive Theory," which posits that the president possesses sole and plenary authority over the Executive Branch. The theory argues that the president's authority must, *as a constitutional matter*, include unencumbered removal power. Its proponents contend that the theory has roots in the Constitutional Convention and historical practice, yet their arguments ultimately rest on inference and political theory. The Constitution provides for the president's authority to appoint commission members (with Senate approval) but is entirely silent about removal. The theory thus depends upon structural arguments about the proper distribution of authority within the government.

Critics note this lack of textual support, point to contrary history, and argue that the current version of the Unitary Executive Theory is a more recent construct, first developed and advocated in its modern form during the Reagan Administration.[5] Embraced by Project 2025, which includes a dedicated discussion of the FTC,[6] it is the theoretical basis for the Administration's effort to impose greater presidential control over administrative agencies. The campaign focuses heavily upon the "independent agencies," which, like the FTC, are defined, in part, by "for cause" protections for their board members to provide them with a degree of insulation from political interference.

The independent federal agencies will not be the sole casualties if the effort succeeds; they are merely the immediate targets. If the Supreme Court embraces the Unitary Executive Theory without qualification, it will transfer substantial additional power to the president and deprive Congress and future presidents of a valuable approach to collaborative governance that the Nation has employed broadly for more than a century. As Justice Kagan's dissent in *Seila Law* observed, it would "commit the Nation to a static version of governance, incapable of responding to new conditions and challenges."[7] Among other effects, this move will diminish the country's capacity to respond effectively to special challenges posed by the fast-expanding role that digital technology plays in the economy.[8]

The Administration would welcome such a reallocation of powers; indeed, it is the motivation for its actions and its ultimate objective. The Administration assigns primacy to a siloed conception of the three branches of the

federal government that is integral to the Unitary Executive and other, related theories. Under the silo postulate, the administrative agencies are extra-constitutional – an unauthorized "fourth" branch of government. It also denigrates the public administration model that views shared authority and collaboration between Congress and the Executive as essential to effective governance.

In the case of the FTC and other similarly structured agencies, the debate reduces to a single assertion: separation of powers dictates that the president must have plenary authority to *remove* any Commissioner without cause and without regard to their statutory term. The removal power is claimed to be absolute, regardless of the institutional design agreed to by Congress and accepted by previous presidents. By statute, that design specifies the make-up of the FTC, the terms and duration of appointments of commissioners, and the prerequisites for removal. In accordance with the Constitution, it also establishes an appointment process that requires Senate approval of Commissioners nominated by presidents.

These and other measures that limit Executive authority reflect a well-considered assessment of the appropriate allocation of tasks between the Congress and the Executive – and they are firmly anchored in the Constitution. As we describe more fully below, the original design of 1914 and its subsequent amendments still give the Executive significant control over the operation of the FTC. At issue in the debate today is not whether the Executive has any control over these institutions (it does); the question is whether that control must be unqualified.

The Administration argues that Section 1 of the FTC Act is unconstitutional because it allegedly encroaches on *this* President's Executive prerogative. But President Woodrow Wilson and his advisors played a central part in designing the Commission and signed the FTC Act into law rather than veto it.[9] The basic model of public administration that the FTC Act adopts has received the support of subsequent presidents who approved major amendments to the Act. Moreover, the demand for still greater Executive control ignores the president's existing capacity to influence the institution's operations. The president's political party typically controls three of the Commission's five seats. The president alone has the authority to nominate FTC Commissioners, who have staggered terms so that every president is likely to have opportunities to nominate its members. And the president proposes the agency's annual budget to Congress.

The individual non-Chair FTC Commissioners exercise virtually no "Executive" power on their own. That power lies in the hands of the Chair, and the president alone has the authority to designate the Chair, who serves in that role at will. By statute and regulation, the FTC Chair is the chief executive of the Commission and has complete authority to designate the agency's senior leadership and manage its various Bureaus and Offices.[10] The Administration contends that these instruments of influence are inadequate, that the Constitution also mandates plenary removal power of non-chair Commissioners.

In this paper, we argue that "independent" is a misleading description of the relationship of the FTC to the political process.[11] Even when viewed through the lens of 2025 instead of 1935

when *Humphrey's Executor* was decided, the agency is subject to extensive oversight and control by both the president and Congress. As the Commission's authority has expanded since 1914, so too have the controls by which Congress and the Executive oversee and influence its operations. This framework, as it has evolved over 110 years, does not "unduly interfere with the functioning of the Executive Branch."[12] It is democratically accountable in numerous ways to both the Congress and the Executive.[13] The organization, procedures, and individual actions of the Commission, including the constitutionality of its structure, are also fully accountable to the federal courts.[14]

As a policy matter, Section 1 of the FTC Act remains vital to the credibility, integrity, and effectiveness of FTC decision-making and the protection of American consumers. Its consumer protection authority is unmatched in the federal government, and its importance for the U.S. economy has only increased over time.[15] With respect to its competition mission, the FTC also provides added institutional capacity, a wider range of tools, and expertise to complement the work of the Antitrust Division of the Justice Department. Subject to judicial review, the Commission has made major contributions to the development of important foundations of antitrust doctrine.[16]

Moreover, the FTC's structure is one of its key virtues. For more than a hundred years, the FTC's bi-partisan structure has facilitated collaborative decision-making, allowed for dissent, and helped to build the agency's expertise and reputation. One properly can criticize the FTC for failing to fulfill all the expectations that led Congress to create the agency in 1914. There is no basis to assert, however, that the agency has encroached on the prerogatives of the president. Its limited "independence" should not be sacrificed in the service of a debatable, formalistic interpretation of the Constitution and an activist political agenda.

I. UNDERSTANDING THE RELATIONSHIP OF THE FTC TO THE POLITICAL PROCESS

A. Origins and Institutional Design

The passage of the Federal Trade Commission Act in September 1914 took place in the early phase of experience with antitrust law in the United States and abroad. Canada adopted the first national antitrust law in 1889, and various state governments, beginning in 1887, enacted antitrust laws before the adoption of the Sherman Act in 1890. The congressional approach to designing the content of the Act and the institutions that would enforce it in the formative era was experimental. Congress chose to test various ways to formulate antitrust commands and create mechanisms for implementation. That experimentation has continued to the present with periodic adjustments to the original framework.

In considering the establishment of an administrative body to develop and apply competition law, many observers believed the first decades of enforcement had revealed serious flaws in the Sherman Act and the means for its enforcement. In particular, many legislators objected to the Supreme Court's conclusion in 1911 in *Standard Oil Co. v. United States*[17] that the Sherman Act's prohibition of "every" agreement in restraint of trade forbade only "unreasonable" concerted practices. Although the Court's decision contemplated the recognition of classes of conduct that could be deemed to be categorically unreasonable ("per

se" offenses), the *Standard Oil* formulation of the rule of reason seemed to contradict the text of the Sherman Act and usurp the lawmaking role of Congress.

In the FTC Act, Congress sought to rectify these problems by creating a body more directly within its own control. Three features of the new institution stood out.[18] First and most important, Section 5 of the Act gave the agency authority to prohibit "unfair methods of competition." This mandate expressly contemplated the condemnation of conduct not yet deemed to be illegal under prevailing interpretations of the Sherman Act (or the newly adopted Clayton Act). Section 5 would have an adaptability that would allow the Commission to prohibit behavior that new learning in economics and law identified as harmful to competition. To avoid surprises in the application of this elastic legal command, the agency's remedial powers were limited to issuing cease and desist orders. This was the essential tradeoff in the original legislative design: an expansive, scalable substantive mandate enforced through forward looking injunctions.

Second, the application of the statute would be informed by data collection and study powers. Section 6 of the Act allowed the FTC to compel the production and preparation of business records related to commercial phenomena that the Commission deemed worthy of study. The Commission was authorized to conduct such studies without reference to a specific potential infringement of the law. These market studies would give the agency special insight into the development of the economy and enable it to prepare reports and recommend legislation to Congress.

Third, the agency would be governed by a multi-member body that would serve, in effect, as a specialized trade court with responsibility to initiate and resolve Section 5 cases brought through the agency's internal administrative adjudication process. The FTC would prosecute all its cases (under Section 5 of the FTC Act or under the Clayton Act, for which the agency shared competence with the DOJ) through its internal administrative process. The FTC Act mandated political diversification (no more than three of the five members of the board could belong to a single political party) and prohibited their removal by the president except for good cause. The legislative history shows that Congress intended the board to feature extensive professional diversification, drawing upon the full range of disciplines relevant to the agency's responsibilities.

Congress envisioned that the Commission would be a complement to, and not a substitute for, the litigation by the DOJ of cases before the federal courts. The 1914 design anticipated that DOJ would continue to prosecute Sherman Act offenses, especially through the application of its criminal enforcement mandate. The FTC would provide an element of scalability to the US system by allowing the Commission to reach behavior not yet forbidden through the application of the other antitrust statutes. Section 7 of the FTC Act also permitted the agency to serve as a master in chancery in Sherman Act monopolization cases to advise the court on possible remedies.

B. Autonomy, Accountability, and Effectiveness

Commentary on the design of competition policy systems often states that antitrust agencies should be "independent" from politics.

This prescription is unhelpful in two vital respects. The first is that few (if any) of the world's competition agencies are isolated in practice from the political process. The label of "independent" inaccurately describes the status of the FTC with relation to the political branches of government; this characterization slights the myriad mechanisms by which Congress and the White House influence the agency's choice and execution of policies and programs.[19]

In 1935 in *Humphrey's Executor*, the Supreme Court ruled that Section 1 of the FTC Act was constitutional and hence that the president cannot remove FTC commissioners except for good cause. Commentary on *Humphrey's Executor* and its limits on the removal of board members often implies that the removal power is the Executive's only tool to constrain the FTC. Debates over presidential control over the FTC often invoke this strawman. *Humphrey's Executor* did not extinguish presidential influence over the behavior of the FTC or other regulatory commissions. The Executive Branch exercises the following tools to influence the FTC.

Nomination and Renomination. The president nominates board members, and can renominate incumbents. Board members also serve staggered terms, so every president will have opportunities to nominate their own choices for seats on the Commission, so institutional knowledge and expertise are retained, and so "abrupt shifts in agency leadership" are avoided.[20] This gives the White House an important measure of control over the board's composition. Nominees from the president's party routinely undergo extensive political vetting. In the ordinary case, this type of political screening goes a long way to ensure the selection of same-party commission members who are faithful to the aims of the executive and the party generally.

Designation of the Chair. Through reforms pursuant to the Reorganization Act of 1949,[21] the president has authority to designate the chair from among existing FTC members.[22] Simply by signing a letter, the president can elevate a commissioner to the position of chair and demote a chair to the status of a mere commissioner.[23] The 1949 statute and the reorganization plan that implemented the statute for the FTC in 1950 also upgraded the powers of the agency chair vis-à-vis other members of the board. The chair exercises the "executive and administrative functions of the Commission, including functions of the Commission with respect to (1) the appointment and supervision of personnel employed by the Commission, (2) the distribution of business among such personnel and administrative units of the Commission, and (3) the use and expenditure of funds."[24] Thus, since 1950, the FTC chair serves as the agency's chief operating officer, and the president has authority to designate this individual.

By his actions to enforce the President's purported firing of Commissioners Slaughter and Bedoya, Chairman Ferguson confirmed that the Chair, alone, is the chief executive and administrator of the Commission. Only on his direction could the two Democratic Commissioners have been denied access to their email, offices, staff, and resources. His co-defendant, the FTC's Executive Director, acted at the Chair's behest, as he is required to do by regulation. *See* 16 C.F.R. §§ 0.8, 0.10 (describing the authority of the Chair and the Executive Director).

Preparation of the Budget and Submission to Congress. The Commission does not submit its annual budget requests directly to Congress. Instead, the FTC and all other federal administrative bodies must provide their budget proposals to the Office of Management and Budget (OMB), which formulates the president's budget request to Congress. OMB frequently reduces the overall size of the agency's budget request and directs a reallocation of resources within the agency's budget proposal.

Screening of Agency Information Requests and Rules Proposals. Various FTC rules and information requests must be submitted to the Office of Information and Regulatory Affairs (OIRA) for review and approval. For example, the Paperwork Reduction Act compels the FTC to seek OIRA approval for information requests sent to ten or more entities in the execution of the agency's authority under Section 6(b) of the FTC Act.[25]

Control of Foreign Travel on Behalf of the United States. When visiting another country on official business, FTC employees are required to obtain "country clearance" from the resident U.S. embassy. Country clearance permits the FTC employee to enter the jurisdiction on the government's behalf and assigns the employee a Department of State "control officer." This requirement allows the State Department to prohibit foreign travel by FTC employees when, for example, the Executive Branch has concerns that FTC personnel will deviate from official positions taken by the U.S. government. This power also gives the State Department the power to withdraw the passport of an FTC employee on foreign travel and force the employee to return to the United States.

Intervention in FTC Cases. The Department of Justice has the capacity to appear before the federal courts and intervene in cases being litigated by the FTC. The DOJ can exercise this authority to oppose positions taken by the FTC in litigation. For example, the Department submitted a brief as Amicus Curiae opposing the FTC in its monopolization litigation against Qualcomm.[26] In matters before the Supreme Court, the Solicitor General has exclusive authority to represent the agencies of the United States.[27] In exercising this power, the Solicitor General can threaten to advocate on behalf of the respondent if the SG disagrees with the position taken by the FTC. Such threats have caused the FTC to reconsider litigation strategies.[28]

This recital of executive branch control mechanisms indicates that authority to remove FTC commission members at will is not the only means by which presidents can exert control over the Commission and influence its policy choices. The governance question in the debate over removal powers is not whether the president has any control over the Commission; it relates to *how much* control the Executive requires in order to fulfill its constitutional duties.

In the discussion above, we have set out many of the tools that the executive branch can use to influence the FTC. By this review, we do not mean to overlook the important role that the Congress and the judiciary play in requiring the FTC to account for its policies and to defend its choice of specific implementation methods. Commission nominees must be confirmed by the Senate. During the confirmation process, the Senate Commerce Committee routinely instructs nominees that the Commission is an

"arm" of Congress and not independent from it.[29] Congress sets the agency's budget and provides funds (through appropriations or fees) that support the agency. The necessity to ask the Congress each year for funding is a telling characteristic of a dependent relationship. Congress also sets limits on how agencies can use appropriated funds (for example, with appropriations riders). Congressional committees regularly convene oversight hearings at which the participation of the chair and other commissioners is mandatory.[30] Congressional committees also can subpoena commission records and require agency leadership and staff to address issues related to the management of the institution.

The discussion above underscores the inaccuracy of the vocabulary used in the field of public administration to describe the status of regulatory bodies such as the Federal Trade Commission. To speak of the FTC and its regulatory counterparts as "independent" in the sense of being isolated from intense oversight from the political branches and from the courts is fiction. In constructing the FTC in 1914 and amending the framework of administrative law over time, Congress recognized that complete isolation from political oversight would be unattainable and unwise.

As Congress has given and expanded the Commission's powers, it also has established an increasingly robust accountability regime that accords substantial roles to the executive branch, the courts, and the legislature itself. Notably, as the FTC's powers have expanded over the past 110 years, so too has Congress bolstered executive branch control mechanisms. In this regard the adoption of the Reorganization Act of 1949 and the approval of Reorganization Plan No. 8 of 1950 deserve special emphasis. As described above, these measures augmented the role of the FTC chair and gave the president power to designate the chair from among incumbent FTC commissioners.[31] The 1949 statute and the implementing reorganization plans responded to recommendations prepared by the Hoover Commission on the Organization of the Executive Branch of Government and its Committee on Independent Regulatory Commissions.[32] The congressional response to the work of the Hoover Commission can be seen as part of a collaborative process through which the legislative and the executive branches of government periodically have undertaken a redistribution of oversight mechanisms, including the augmenting of executive branch influence over the FTC and similar agencies

The evolution of the control mechanisms – executive, congressional, and judicial – has sought to reconcile three competing values.[33] Some amount of agency *autonomy* is vital for effective Commission decision-making and operations. The requisite autonomy must take the form of protection from interference in the decision to investigate or prosecute or, in the case of the FTC, the adjudication and settlement of disputes. Both the DOJ and the FTC ultimately must answer to the courts in their exercise of authority. A crucial basis for seeking deference to their policy choices is confidence on the part of judges that the agencies are acting on the basis of good judgment grounded in superior expertise, evidence, and sound legal principles.[34] A court that senses that prosecutorial decisions were taken by reason of political duress will not be receptive to agency pleas that seek respect for its judgments, or the benefit of the doubt based on superior technical knowledge.

The second value to be achieved is *accountability*. An agency such as the FTC that receives substantial public funding and exercises significant regulatory powers should account for its policy choices. The legitimacy of the FTC's operations depends upon making informative disclosures about its priorities, its implementation strategy, and the outcomes of its interventions.

The third value is *effectiveness*. The FTC and other regulatory agencies periodically must seek enhancements in their funding and in their powers. Having an active, constructive relationship with the relevant political gatekeepers is necessary to have these requests received favorably. The FTC also plays valuable roles as an advisor to legislators, executive departments, and other regulators about contemplated legislation and policy initiatives taken by other government departments.[35] Here, as well, members of Congress and the heads of other departments are less likely to heed the antitrust agency's advice in the absence of a continuing relationship and a perception of expertise.

As noted earlier, there is an active debate today about the adequacy of measures that provide the FTC a needed measure of autonomy while preserving adequate mechanisms for accountability, especially to the White House. Arguments that describe the Commission as "unaccountable" to the Executive dishonestly disregard the constraining measures, described above, which give the president important means for influencing the FTC's decision making.

The suggestion of unaccountability is still more deceitful when made with respect to the Congress, which has the measures for control mentioned above and has shown its willingness to use them, often with powerful effect, since the Commission opened for business in 1915. The Commission's history contains numerous episodes of congressional intervention to cease or modify FTC litigation, studies, and rulemaking efforts – especially where the FTC was exercising its powers to expand the frontiers of competition policy.[36] Nor has Congress been reticent in using its control over appropriations – and building new limits on authority into the FTC Act – to restrict the agency's scope of activities.[37] The modern history of federal antitrust enforcement also features notable instances in which Congress has used, or threatened to use, its appropriations power to limit the activities of the Executive.[38]

II. THE ASSAULT ON THE FTC'S FOR-CAUSE REMOVAL PROTECTIONS

As we have explained in Part I, the FTC cannot fairly be characterized as an "independent" administrative agency. In multiple ways its existence, functions, and leadership are managed by Congress and the president, who together can alter the scope of its authority and its structure "at will." Like all administrative agencies, it is an expression of collaborative authority. Critics of *Humphrey's Executor* would eliminate that option in the name of "separation of powers," depriving future Congresses and presidents of similar flexibility in designing the machinery of government.

In this section, we argue that the case bought by Commissioners Slaughter and Bedoya need not present such a monumental constitutional inflection point. Any constitutional crisis has been manufactured in pursuit of an ideology that is hostile to the growth of government, and

seeks to exploit the perceived leanings of the current majority of the Supreme Court to further embed a specific methodology of constitutional interpretation and a singular definition of Executive authority. It is hardly self-evidently valid, and, if endorsed by the Supreme Court, it will have long-lasting and detrimental effects on the FTC and U.S. competition policy.

A. The Unitary Executive Theory

The critique of *Humphrey's Executor* is anchored in the "Unitary Executive Theory." In its original use, the term referred merely to the Framers' decision to create a single Executive officer – one president. *See* The Federalist No. 70 (making the case for a single president instead of a "plurality of magistrates"). As used today, however, the term is associated with a distinct, "bracingly simple idea"[39]: Section 1 of Article II of the Constitution vests all executive authority in the President: "The executive Power shall be vested in a President of the United States of America." Seemingly seductive in its simplicity, this invocation of the "Unitary Executive Theory" then posits that the president must have plenary authority to remove all federal officers exercising "executive" authority, because the president alone is vested with that power and such officers are merely an extension of the President.

But Article II does not end with Section 1. Section 2 of Article II then establishes and qualifies the president's appointment power:

> He shall have Power…by and with the Advice and Consent of the Senate… [to appoint] Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

No one has challenged the process for *appointing* Commissioners of the FTC – and it's hard to see how one could be lodged. In accordance with the Constitution, Section 1 of the FTC Act, 15 U.S.C. § 41, provides that FTC Commissioners must be nominated by the president and are subject to confirmation by the Senate. There are no constitutional provisions addressing removal authority.

Proponents of the Unitary Executive Theory appear to accept this constraint on the president's appointment authority. Their point of departure is their belief that the Constitution only authorizes three branches of government – not four – and that administrative agencies that exercise a measure of Executive, Legislative, or Judicial power are unconstitutional.[40] They further posit, therefore, that as a necessary incident to the president's Article II, Section 1 power, the president must have plenary authority to *remove* any officer of the Executive Branch who exercises "executive" authority. And, it is argued, as a matter of *constitutional law* Congress and the president acting together through legislation cannot constrain that authority by insulating the members of an administrative agency board or commission with "for cause" requirements for removal. In their view, therefore, the for-cause removal protections of Section 1 of the FTC Act are unconstitutional, and *Humphrey's Executor* must be overruled or narrowly construed.[41]

The Supreme Court has never so held. But proponents of the argument see support for their position in its divided decision in *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020).[42] Quoting from Article II, there the majority confidently declared: "Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" Continuing, it argued that "[b]ecause no single person could fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance." 591 U.S. at 203-04. Relying on its earlier decision in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477 (2010), the Court then added: "'as a general matter,'" the Constitution gives the President "'the authority to remove those who assist him in carrying out his duties,' … 'Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.'" 561 U.S. at 513-14. *Seila* continues: "The President's power to remove—and thus supervise—those who wield executive power on his behalf *follows from the text of Article II*." 591 U.S. at 204 (emphasis added). It characterized *Humphrey's Executor* as one of only two "exceptions" to this supposed "general rule." The italicized language here, however, is the focal point of the debate – the inference that plenary removal power ineluctably "follows from the text of Article II."

Not surprisingly, the litigation prompted by the President's attempted dismissal of Commissioners Slaughter and Bedoya has focused in significant part on *Seila*. All parties concerned understand that if read broadly, it could mean the fate of *Humphrey's Executor's* has already been sealed.[43] But *Seila* distinguished the Director of the CFPB in ways that not only put some distance between *Seila* and *Humphrey's Executor*, but also left room for arguments that the Commissioners of today's FTC do not share the same characteristics as the single Director of the CFPB, leaving a path for its reaffirmance. That would also suggest the Court might stop short of a full-throated endorsement of the Unitary Executive Theory in its most rigid and extreme form.[44]

The Supreme Court appeared to reject such a maximalist approach in Morrison v. Olsen, 487 U.S. 654 (1988), which upheld for-cause protections for Independent Counsels appointed under the Ethics and Government Act. After noting *Humphrey's Executor* and observing that it and *Weiner* "reflected our judgment that it was not essential for the President's proper execution of his Article II powers that these agencies [FTC and the War Claims Commission] be headed up by individuals who were removable at will," Chief Justice Rehnquist's opinion for the majority reasoned:

> We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is *whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty*, and the functions of the officials in question must be analyzed in that light.
>
> ….[W]e cannot say that the imposition of a "good cause" standard for removal by itself *unduly trammels on executive authority*. There is no real dispute that the functions performed by the independent counsel are "executive" in the sense that they are law enforcement functions that typically have been undertaken by officials within

> the Executive Branch. As we noted above, however, the independent counsel is an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority. Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is *so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.*

Id. at 691-92 (emphasis added). By way of comparison, the Court further noted that the FTC's Commissioners are also covered by for-cause protections and that they exercise "analogous" enforcement powers. Id. at 692 n.31. In the FTC's example, the Court saw support for upholding the limited protections provided to the Independent Counsels. And it noted that "good cause" protections do not leave the president without "ample authority to assure that the counsel is competently performing his or her responsibilities in a manner that comports with the provisions of the Act." Id. at 692. "For cause" protections, in the Court's view, provide the president with a substantial degree of oversight authority. Although the Court in *Seila* tried to cabin *Morrison* by characterizing it as one of the two recognized "exceptions," *Seila*, 591 U.S. at 217, that ignores the breadth and implications of its reasoning as well as its reaffirmation of *Humphrey's Executor*.

B. Constitutional Exceptionalism for the Executive Branch?

Implementing a formalistic and "maximalist" version of the Unitary Executive Theory thus would be inconsistent with how the Court has previously approached Article II in *Humphrey's Executor, Weiner* and *Morrison*. The limited degree of flexibility they endorsed would be lost to future presidents and the Congress. It would also require a significant expansion of *Seila*. Article II, however, does not exist in isolation. Embracing the most muscular form of the Unitary Executive Theory would also be at odds with the Court's interpretations of Articles I and III of the Constitution.

Like Article II, Articles I and III commence with a general and seemingly broad pronouncement of purpose and authority.[45] The powers of each of the three branches are then more highly specified and have been understood as both affirmative grants and, by implication, constraints on each branch.[46] Although the Supreme Court, especially more recently, has tended to emphasize the importance of separation of powers in interpreting Articles I and III, it has not rigidly rejected flexibility. Instead, it has allowed for a degree of innovation in government, especially through the use of administrative agencies

For example, although the Supreme Court has consistently held that the "essential attributes of the judicial power" must be vested in an Article III court, it has approved limited use of Article I ("Legislative Courts"). In *Stern v. Marshall*, 564 U.S. 462 (2011), writing for the Court, Chief Justice Roberts maintained that "the three branches are not hermetically sealed from one another … but it remains true that Article III imposes some basic limitations that the other branches may not transgress." Those limitations have been explicated with a line of cases dating back to *Crowell v. Benson*, 285 U.S. 22 (1932), and

have not been without controversy. However, a formalist "Unitary *Judicial* Theory" would not have admitted of any such flexibility and has not been endorsed.[47]

Similarly, and most recently, the Supreme Court has rejected rigid application of the "non-delegation doctrine." In its extreme form, non-delegation could curtail the government's ability to utilize administrative agencies to implement various public policies. Although some of the Court's justices appear to favor such a rigid, absolutist approach to non-delegation – a "non-*delegable*" doctrine under which Congress and only Congress can promulgate anything qualifying as "legislation"[48] – the Court has rejected an interpretation of Article I that begins and ends with its first sentence.

In *FCC v. Consumers' Research*, 606 U.S. __, 2025 WL 1773630 (2025), the Court rebuffed a challenge to Congress' delegation of authority to the FCC to implement the universal service program – and the FCC's decision to "sub-delegate" some of the burden of administering the program. In an especially telling passage, the Court reasoned:

> Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." § 1. Accompanying that assignment of power to Congress is a bar on its further delegation: Legislative power, we have held, belongs to the legislative branch, and to no other. *At the same time, we have recognized that Congress may "seek[ ] assistance" from its coordinate branches to secure the "effect intended by its acts of legislation."* And in particular, Congress may "vest[ ] discretion" in *executive agencies* to implement and apply the laws it has enacted—for example, by deciding on "the details of [their] execution."

Id. at *8 (citations omitted) (emphasis added).

The parallel to the Article II debate should be striking. The Court does not insist that Congress, alone, must exercise "all" legislative powers, and that Congress cannot use administrative instrumentalities to exercise its "legislative Powers." Instead, it acknowledged the need for a more flexible approach provided it includes guiding principles:

> To distinguish between the permissible and the impermissible in this sphere, we have long asked whether Congress has set out an "intelligible principle" to guide what it has given the agency to do. Under that test, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." The "guidance" needed is greater, we have explained, when an agency action will "affect the entire national economy" than when it addresses a narrow, technical issue… But in examining a statute for the requisite intelligible principle, we have generally assessed whether Congress has made clear both "the general policy" that the agency must pursue and "the boundaries of [its] delegated authority." And similarly, we have asked if Congress has provided sufficient standards to enable both "the courts and the public [to] ascertain whether the agency" has followed the law. If Congress has done so—as we have almost always found—then we will not disturb its grant of authority.

Id. The Court thus has effectively rejected any "Unitary *Legislative* Theory."[49]

An unequivocal embrace of the Unitary Executive Theory would make Article II an outlier – and it would be inconsistent with the remainder of the text of Article II and with the principle of checks and balances that is also baked into the design of the Constitution. Indeed, as Justice Kagan pointed out in her dissent in *Seila*, the president's power to nominate is complemented by Congress' power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, *or in any Department or Officer thereof*." Art. I, § 8, cl. 18 (emphasis added). Congress, then, has the far better textual claim to authority over the creation, destruction, and terms of service of the officers of any department of the government. The president is given no equivalently sweeping range of authority.

Other examples abound. Although the president is the "Commander in Chief of the Army and Navy," only Congress can "declare War," "raise and support Armies," and "provide and maintain a Navy." Art. I, § 8, cls. 11-13. Without Congress, the president might have no one to command. The evident design is of collaborative, not siloed authority. As Justice Kagan noted in her dissent in *Seila*, "separation of powers is, by design, neither rigid nor complete." 591 U.S. at 265 (Kagan, J., dissenting). As noted above, Chief Justice Roberts expressed a similar view in *Stern*.

As we have already noted, then, despite the seemingly expansive first sentence of Article II, the president does not have plenary authority over the Executive Branch. Unless Congress so authorizes, the president's authority to appoint "all other Officers of the United States" requires Senate approval. It also requires the creation and funding of Executive departments and agencies in the first instance. Article II's silence as to the president's power to remove, which was a focal point of debate in *Seila* and is the focus of the debate over *Humphrey's Executor,* requires inference and atextual support to reach the desired goal of the proponents of overruling the case. Following that path would require the Court to ignore its long-standing rejection of absolutist interpretations of Articles I and III. In the face of at best ambiguous support,[50] the Supreme Court should hesitate to embrace a theory that would work such a thoroughgoing makeover of the federal government.[51]

C. Charting a Path Forward

As we have noted, proponents of overruling *Humphrey's Executor* draw encouragement from *Seila Law* and *Free Enterprise Fund*, which they view as signaling the Court's receptivity to reconsidering it.[52] Those decisions read the text of Article II generously, inferring a constitutionally mandated removal authority despite the lack of any explicit textual support for it in the Constitution. The majority in *Seila* also rejected the dissent's arguments to that effect and appeared to be attempting to cabin *Humphrey's Executor* by adding the qualification that the decision was based on the FTC as it existed "in 1935." The Administration has viewed that as an implicit recognition that today's FTC exercises greater "executive" authority than the FTC of 1935 and hence that the "for cause" removal provisions of the FTC Act present a greater challenge to presidential authority today.[53] As we have noted, however, the president's control over the agency has also increased over time, especially as it relates to the Chair of the agency, which undercuts that argument.

But, as we have noted and has been argued by Commissioners Slaughter and Bedoya, *Seila* did not seal the fate of *Humphrey's Executor*. In its specific objections to the structure of the CFPB, and its distinguishing of *Humphrey's Executor, Seila* left open the possibility of a reaffirmance of *Humphrey's Executor*, even if it is narrowed, in ways that could preserve for-cause protections for the FTC and other multi-member administrative agencies. Support for such an outcome can also be found in *Morrison*.

The debate about *Humphrey's Executor* may soon be resolved by the Supreme Court. If *Humphrey's Executor* is abandoned, the President will immediately obtain a degree of authority no other president has ever had over the full range of administrative agencies. Given its actions to date, the current Administration can be expected to terminate whatever non-party board members remain, and even more actively direct the policies of the agencies as outlined in its EO. The bi-partisan, deliberative, expert model will be abolished.

We have heard it argued that *Humphrey's Executor* is not a significant constraint on the president. It has never been difficult, for example, to fashion a "cause" for dismissal and therefore its demise will not be consequential. If that is true, however, the case for overruling it is weaker, not stronger – if for cause protections are *pro forma* requirements, they do not encroach on presidential authority in any significant way. Moreover, it can also be argued that formal constraints, such as for cause protections, may not be necessary to provide a degree of independence for actors within the Executive Branch. The Justice Department, for example, has long benefited from less formal acknowledgments of its independence.

We are strongly of the view, however, that norms matter. For-cause protections for administrative agency board members and commissioners are important, precisely because they help to reenforce norms. Until this Administration, for cause protections have supported an independence norm that promotes integrity in government, impartial decision-making, and the rule of law. As Justice Kagan noted in her dissent in *Seila*, "Insulation from political pressure helps ensure impartial adjudications. It places technical issues in the hands of those most capable of addressing them. It promotes continuity, and prevents short-term electoral interests from distorting policy."[54]

Even weak fences can deter crossing boundaries best left intact. And they can have spillover effects to benefit agencies that lack the same statutory protections. *Humphrey's Executor* is just such a norm-bolstering fence. The willingness of the current Administration to reject this and other norms that constrain Executive authority should not obscure the reality that presidents have respected the norm for 90 years to the considerable benefit the government and the country.

Nevertheless, taking into account the possibility that the Supreme Court may revisit *Humphrey's Executor*, Congress ought to begin now to consider how it might respond to a decision by the Court either to endorse or abandon the administrative model that has been used at least since the creation of the Interstate Commerce Commission in 1887. Congress' willingness to create administrative agencies and to invest them with various responsibilities was conditioned on that model. It need not silently accede to the transfer of that authority to the president. The President should not assume

that the complete administrative apparatus of the federal government as it now exists is his to shape and direct without constraint.

Depending on the scope of a Supreme Court decision, Congress might instead reconsider the nature, number, and scope of authority of the affected agencies, adopt reforms, or impose budgetary constraints. It will not be helpless to act. If the Executive and the Court agree that the president must have at-will termination authority, Congress can decide to convey less (or different) authority on administrative agencies. The overruling of *Humphrey's Executor* should be viewed as the opening position in a negotiation, not a surrender. It will be time to renegotiate the administrative agency bargain.

In this section, we hypothesize different scenarios and potential strategies for responding to a Court decision, however it is decided.

i. What if *Humphrey's Executor* is Reaffirmed?

In *Marbury v. Madison*, the Supreme Court famously proclaimed that where there is a right, there is a remedy.[55] Perhaps the weightiest issue to be resolved if *Humphrey's Executor* is saved is that of remedy: what remedy will be available to the wrongly terminated Commissioner? The Court did not address that issue in *Humphrey's Executor* because Commissioner Humphrey had died. Moreover, the President quickly filled his seat on the Commission, even though litigation was ongoing. Hence, for both reasons, the only remedy available to Humphrey's estate was backpay.

Commissioner Bedoya "resigned" on June 9, 2025. By doing so, he took restoration of access to his office off the table as a potential remedy. Depending on how long Commissioner Slaughter is willing to litigate, however, her claim may present the issue not addressed in *Humphrey's Executor*: will the courts be willing to enter a permanent injunction restoring her to her office for the remainder of her term?[56]

If the only remedy available to Commissioner Slaughter is backpay, even a reaffirmation of *Humphrey's Executor* would be a pyrrhic victory. Such a ruling would roughly align with contract law principles that govern the wrongful termination of employment contracts: the wrongfully terminated employee typically is entitled to damages in the form of lost salary; courts seldom require specific performance of an employment contract. Reinstatement to the previously held position is exceptional relief, rarely granted. The current President and his successors will gladly treat FTC Commissioners as at-will employees and have the Treasury shoulder the consequences of their actions. Claims for damages against the government might then be channeled through the Court of Federal Claims.

Let us suppose that the Supreme Court is unwilling to order restoration of access to the resources necessary to fulfill a wrongly locked-out Commissioner's duties as a remedy. If the underlying meaning of *Humphrey's Executor* was to limit relief to the recovery of lost wages, the decision never was a serious constraint on the president. Ironically, such an interpretation also undercuts the case for overruling the decision today.

ii. What if *Humphrey's Executor* is Narrowed or Overruled?

There are multiple possible consequences if the Administration is successful in persuading a

majority of the Court that for-cause protection for the FTC's Commissioners is unconstitutional. First, it will suffer the consequences of handing the same measure of authority it seeks for itself to future administrations regardless of political party. Empowering itself will empower all future administrations. No incumbent president can safely assume that the country unwaveringly will elect like-minded presidents in the future.

That, in turn, may lead to thorough-going politicization of the administrative process. Each new administration will have the authority to replace every member of every Board and Commission. Far wider swings in policy can be anticipated (a concern of the Court in *Seila*), along with reduced stability in regulations over time, and significant business uncertainty. As some commentators have argued, the economy will suffer, too.[57] The policy logic of granting an agency some degree of autonomy is that elected officials – presidents and legislators – might be tempted to compel agencies to use their regulatory power in ways that service narrow parochial interests rather than the common good.

In the field of semi-autonomous U.S. regulators, this is the reason why proposals to fire the chair of the Federal Reserve Board create acute anxiety in financial markets. We do not assert that the FTC stands on the same footing as the Fed in terms of its perceived importance to the economy. The Commission's powers are broad and potent enough, however, to warrant concern if they were to be placed at the disposal of a single elected official who could use them to reward friends, punish adversaries, and distort the scope of their authority to conform to a policy agenda unrelated to their statutory authority.

We note that concerns about the partisan, destructive exercise of regulatory power explain why there has emerged an international norm that endorses measures that afford leaders of regulatory agencies some protection against political intervention that seeks to determine the selection of cases and investigations and the resolution of specific matters.[58] In the deliberations of international organizations that play a role in developing norms, both U.S. federal antitrust agencies have embraced adherence, by law or by custom, to a principle of autonomy that insulates competition officials from political intervention that would dictate the exercise of prosecutorial authority.[59] The repudiation of this principle in judicial decisions and in Executive branch statements in the United States likely will weaken the resolve of other nations to create governance structures to resist destructive political intervention in the work of their competition authorities. Among other consequences, such a development generally will impair the prospects for success of U.S.-based businesses that operate abroad.

We also foresee that the repudiation or narrow reading (limiting recourse by wrongfully locked-out Commissioners to monetary relief) of *s* will lead to an inevitable erosion (and possible demise) of the FTC's administrative adjudication mandate. We doubt courts will regard the agency as a legitimate vehicle for the adjudication of competition and consumer cases if its members are subject to termination at will – where the president, for example, can threaten to fire commissioners who fail to bring cases, not bring cases, or resolve disputes in the manner that the president prefers. The quality of the agency's decisions and its influence before the courts – in administrative adjudication and in federal district court

litigation – depends heavily on its reputation for high technical skill and superior professional judgment. That influence likely will evaporate if the courts perceive the agency to be acting, without apology, at the behest of the president (or to be serving the express wishes of powerful legislators). If *Humphrey's Executor* falls, so too will the FTC's role as a trade regulation court.

If administrative adjudication authority withers or disappears, the FTC's competition mandate may founder, as well. The administrative adjudication of cases under the FTC's unfair methods of competition mandate was an essential rationale for the Commission's creation in 1914. This was the heart of an experiment with administrative dispute resolution as an alternative to case-by-case adjudication in the federal courts – the prosecutorial model employed by the Justice Department in the enforcement of the Sherman Act. The main reason to have a multimember board lead the agency, rather than a single executive, was for the board to function as a specialist, and deliberative, trade regulation tribunal. Without administrative adjudication, the FTC would be doing essentially the same thing that DOJ does in the antitrust arena – bring cases directly in district court. It would then appear to be redundant, at least with respect to its antitrust authority.[60]

The demise of *Humphrey's Executor* also could set in motion a basic rethink of the residual mechanism that would likely survive to carry out the agency's consumer protection role, especially its promulgation of substantive rules. The model of a multimember, bipartisan, expert board will collapse if the protection against at-will dismissal disappears. As is the situation today, the incumbent administration might not even nominate out-of-party commissioners. The commission positions themselves will be perceived as less desirable, except for those with political ambitions with the party in power, and the overall attractiveness of public service will be undermined. The mere presence of a multimember board will not increase the respect that courts give the Commission when it appears before them to defend rules. The very rationale for having a multimember board, rather than a single administrator, will become hard to discern.

Finally, a future administration that is inclined to rebuild the lost institutional knowledge will have to work with the hollowed out remains of the federal government that has been left to them – and that is an intended consequence of the attack on *Humphrey's Executor.* The current Administration wants to impede any future effort to reconstruct government as it now exists. The lost institutional knowledge will be difficult if not impossible to resurrect and the risk of repetition will discourage talented and knowledgeable future agency personnel at all levels from seeking to engage in public service.

The discussion above begs a larger question about whether the existing model of FTC policymaking that combines adjudication, rulemaking, research and advocacy, is worth preserving. In this paper we do not undertake the full reckoning of credits and debits that a complete assessment of the FTC's performance and potential for future would require. We mention one consideration that ought to give pause to policymakers and commentators who might applaud or merely shrug off the potential consequences we have outlined above. A vital ingredient of a successful competition policy system is its adaptability and flexibility.

There is widespread recognition that efforts to address commercial phenomena arising from the application of digital technology require contributions from the fields of competition policy, consumer protection, and data protection.[61] There is a single agency in the world that houses all three policy domains under one roof. All of these are supported by an unsurpassed capacity to gather data (through Section 6(b) of the FTC Act) and apply exceptional research and analysis capabilities (mainly resident in the Bureau of Economics and supported by technologists). Given the issues that confront competition, consumer protection, and privacy policy today in the digital realm, this strikes us as a bad time to give up on the FTC model.[62]

iii. Reforms to Consider

As we have noted, if *Humphrey's Executor* is preserved, but the only remedy the Court is willing to entertain is backpay, the rights it recognized will be of little consequence. Congress could, in that instance, respond to bolster the remedies available to wrongly barred commissioners. For example, Congress could amend Section 1 of the FTC Act to add:

> No funds shall be allocated from the Treasury to award backpay or similar compensation to a Commissioner if an Article III court finally determines that they were wrongfully barred from office. And no candidate nominated to replace such Commissioner shall be deemed eligible for consideration by the Senate pending the outcome of their legal challenge during the period of the Commissioner's statutory term.

This approach would directly invoke Congress "power of the purse" and the Appointments Clause to increase the chances that a court might find irreparable harm for purposes of granting a motion for preliminary or permanent injunctive relief. And, by eliminating the option of money damages and constraining the approval process for replacement Commissioners (we note that President Roosevelt promptly replaced Commissioner Humphrey to remove the option of restoration of his position), it might increase the chance that a permanent injunction would be the remedy for an ultimately successful challenge.

There could also be unintended consequences. A president who applauds the demise of the FTC will not be concerned by congressional moves to withhold appropriations for the FTC when the chief executive fails to appoint new commissioners. Appropriation-based threats are likely to succeed only if they reduce outlays for activities that the president values. Congress would have to target programs that the president desires to sustain or expand.[63] In other words, it would need to be in a position to bargain.

If *Humphrey's Executor* is overruled, however, more extensive reforms might be considered, including whether to eliminate the agency entirely rather than leave it in the hands of the Executive. More limited reforms might be directed at the scope of the agency's authority or its operational rules. In the spirit of checks and balances, these reforms could impose specific consequences for any president's abuse of at-will terminations.

One possible procedural reform is to legislate quorum rules that make the exercise of the Commission's powers contingent on the presence of a full, bi-partisan complement of

commission members.[64] Such a step could disable the agency in periods in which vacancies arise (e.g., due to the death or retirement of a commissioner) and the confirmation of a successor takes place. But this possible disability would not disturb a president who disagrees with the agency's policy missions and welcomes its inactivity. It might also lead to delays that would harm the private parties eager to secure agency decisions. These restrictions and other congressional measures to punish wrongful terminations may not be effective if the president prefers that the FTC be disabled or abolished. One also could ask whether the Supreme Court might view these indirect constraints as unconstitutional impingements on the functions of the Executive.

A more substantial reform could involve expanding the right of action under Section 5 to include state attorneys general and private plaintiffs, perhaps with the right to recover attorneys' fees and double or triple damages. Unlike the Sherman and Clayton Acts, since its inception, the FTC has had exclusive authority to enforce Section 5. If the bi-partisan model of enforcement is abandoned, Congress might consider expanding the range of actors who can enforce its prohibitions as a countermeasure to protect against default and facilitate the continued evolution of Section 5's prohibitions. A private right of action was an innovation of the Sherman Act and might be considered for the FTC Act.

Finally, we note that the Tunney Act, 15 U.S.C. § 16, which currently applies only to the Justice Department, could be extended to require increased transparency for FTC settlements. The Tunney Act was adopted as a "sunshine law" in response to perceived political interference by the White House to induce the Antitrust Division to settle an antitrust case during the Presidency of Richard Nixon. If extended, it might similarly seek to protect against efforts by the White House to undermine sound antitrust enforcement through efforts to influence the outcome of cases pending before the FTC.

CONCLUSION

A great deal has been written explaining and rebutting the Unitary Executive Theory as it might apply to *Humphrey's Executor*. Many briefs have now been filed in the multiple lawsuits prompted by the President's intentional effort to provoke a test of *Humphrey's Executor* before the Supreme Court. And, as we have noted, some of the justices already seem eager to overrule it.

A complete review of the case law, literature, and briefs is beyond the scope of this paper. Our goal is more modest. Focusing our attention on the FTC, we hope to raise awareness that the arguments for the Unitary Executive Theory are more political than constitutional, and that overruling *Humphrey's Executor* would substantially alter the balance of power within the federal government and undermine the capacity of the FTC to carry out its missions. Congress, and hopefully more members of the Court itself, should be alert to those consequences if the Court is squarely presented with the fate of *Humphrey's Executor*.

To point out the obvious, overlooked in the debate about *Humphrey's Executor* is that an alternative path was always available to the President. If a president objects to the law he is sworn to execute, the Constitution provides him with a solution: legislation. As was true in 1914 and 1949, the President could have made his arguments to the Congress for eliminating for

cause protections. Instead, he placed his bet on the Supreme Court, bypassing the Congress and seeking to limit its authority by judicial decree. One benefit of a legislative proposal to change the statutory removal protection would be to inspire a full debate about the respective roles of the Executive, the Congress, and the courts in overseeing the operation of the FTC and similar agencies. This would focus needed attention on the appropriate delegation of powers to a regulatory authority, the best mechanism for governance of these agencies, and, more generally, the place of the traditional model of semi-autonomous regulatory bodies in the nation's system of public administration.

ABOUT THE AUTHOR

Andrew I. Gavil, a Contributing Author for PPI, is Professor of Law at Howard University School of Law; former Director, Office of Policy Planning, Federal Trade Commission.

William E. Kovacic, a Contributing Author for PPI, is Global Competition Professor of Law and Policy; Professor of Law; Director, Competition Law Center, George Washington University Law School; former Chair, Federal Trade Commission.

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Notes and References

1 As of the date of this writing, the district court has granted Commissioner Slaughter's motion for summary judgment, declaring her purported firing to be unlawful and enjoining the FTC's Chair, Commissioners, and Executive Director from "interfering with [her] right to perform her lawful duties." It also concluded that Commissioner Bedoya's claims became moot upon his resignation. Slaughter v. Trump, _F. Supp.3d _, 2025 WL 1984396 (D.D.C. 2025). Motions to Stay were filed in both the district court and the court of appeals, and a Notice of Appeal was also filed. On July 21, 2025, the D.C. Circuit issued an administrative stay, and ordered full briefing on the Defendants' Motion for a Stay that will conclude on July 29, 2025. *See* https://media.cadc.uscourts.gov/orders/docs/2025/07/25-5261LDSN.pdf. While that briefing was in progress, on July 24, 2025, the district court denied the government's Motion for a Stay, which was still pending before it, concluding that "the court refuses to allow Defendants to continue breaking the law while this litigation proceeds…."

2 Justices Gorsuch, Thomas, and Alito have made their views clear, and their palpable hostility to administrative agencies has surfaced in several cases addressing the scope of the judicial, legislative, and executive powers. *See, e.g., FCC v. Consumers' Research,* 606 U.S. __, 2025 WL 1773630, at *40 (2025) (Gorsuch, J., dissenting) (citations omitted):

> Today, the "vast majority" of the rules that govern our society are not made by Congress, but by Presidents or agencies they struggle to superintend…. Those rules reflect not the public deliberations of elected representatives, but the concerns of small cadres of elites. And as those cadres turn over from administration to administration, the rules revolve, too, inflicting whiplash on those who must live under them. If there is any consistency over time, it may be because Presidents and their deputies do not always call the shots: Lower level officials, unknown to the public and sometimes even to the White House, now make many of the rules we live by.

3 Exec. Order No. 14215, Ensuring Accountability for All Agencies (Feb. 18, 2025), https://www.whitehouse.gov/presidential-actions/2025/02/emsuring-accountability-for-all-agencies/

4 Sarah M. Harris, Acting Solicitor General, U.S. Department of Justice, Letter to the Hon. Richard J. Durbin regarding Restrictions on the Removal of Certain Principal Officers of the United States (Feb. 12, 2025).

5 *See, e.g.*, John Harrison, *The Unitary Executive and the Scope of Executive Power*, 126 Yale L.F. 374 (2016), https://www.yalelawjournal.org/forum/the-unitary-executive-and-the-scope-of-executive-power (recounting the development of the theory in the Justice Department's Office of the Legal Counsel during the Reagan Administration and the role of Justice Alito in developing it when he was a Deputy Assistant Attorney General there and later advocating it on the Court). Expressions of some of the policy concerns that have animated the modern formulation of the Unitary Executive Theory can be found in academic articles and reports that appeared earlier in the 20th century. One notable example is President's Committee on Administrative Management, Report on Administrative Management in the Executive Branch (1937). Headed by Louis Brownlow, a public administration scholar, the Committee gave a damning assessment of the independent regulatory agencies. The Committee said the independent commissions "constitute a headless 'fourth branch' of government, a haphazard deposit of irresponsible agencies and uncoordinated powers." *Id.* at 67. The Committee explained: "They do violence to the basic theory of the American Constitution that there should be three major branches of the Government and only three. The Congress has found no effective way of supervising them, they cannot be controlled by the President, and they are answerable to the courts only in respect to the legality of their activities." *Id.* Another passage of the report added: "But though the commissions enjoy power without responsibility, they leave the President with responsibility without power... The commissions produce confusion, conflict, and incoherence in the execution of the President's policies." *Id.* at 68.

6 Project 2025, Mandate for Leadership: The Conservative Promise 869-81 (Paul Dans & Steven Groves eds., 2023). The chapter on the FTC is included in Section 5, which is dedicated to "Independent Regulatory Agencies." It specifically invites "revisiting" *Humphrey's Executor. Id.* at 873.

7 *Seila* Law LLC v. Consumer Financial Protection Bureau, 591 U.S. 197, 263-64 (2020) (Kagan, J., dissenting).

8 In many ways, the FTC is uniquely well suited to play a leading role in the design and application of programs that bring competition policy, consumer protection policy, and privacy policy to bear upon the diagnosis and resolution of problems arising in the digital economy. William E. Kovacic, *Adaptable Platforms for Platform Regulation: The Role of the Federal Trade Commission,* 7 J. L. & Innovation 167 (2024) (hereinafter *Adaptable Platforms*). As described in this paper, repudiation of *Humphrey's Executor* likely will set in motion a series of developments that will deny the FTC the ability to perform this role.

9 Wilson's formative role in the creation of the Federal Trade Commission is recounted in Marc Winerman, T*he Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L.J. 1 (2003) (hereinafter *Origin of the FTC*).

10 "The Chair of the Commission is designated by the President, and, subject to the general policies of the Commission, is the executive and administrative head of the agency." 16 C.F.R. § 0.8. *See also* §§ 0.9-0.20 (specifying the FTC's organizational structure, Offices, and Bureaus, all of which are under the Chair's direction and control). There are no regulations specifying the authority of non-Chair Commissioners and, as we explain, *infra*, Part I, they have little if any independent authority. Citing the example of the FTC, then Judge Kavanaugh highlighted this limitation on authority for members of multimember boards and argued that it distinguishes them from single director agencies, such as the CFPB, which was at issue in the case before the D.C. Circuit and in *Seila*:

> A single-Director independent agency concentrates enforcement, rulemaking, and adjudicative power in one individual. By contrast, multi-member independent agencies do not concentrate all of that power in one individual. The multimember structure thereby helps to prevent arbitrary decisionmaking and abuse of power, and to protect individual liberty. The point is simple but profound. In a multi-member independent agency, no single commissioner or board member can *affirmatively* do much of anything. Before the agency can infringe your liberty in some way—for example, by enforcing a law against you or by issuing a rule that affects your liberty or property—a majority of commissioners must agree.

PHH Corp. v. Consumer Financial Protection Bureau, 881 F.3d 75, 183-84 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (emphasis original), *citing* Edith Ramirez, *The FTC: A Framework for Promoting Competition and Protecting Consumers*, 83 Geo. Wash. L. Rev. 2049, 2053 (2015).

11 William E. Kovacic, *Symposium Editor's Essay: Building a Better U.S. Competition Policy Corridor*, 85 Antitrust L.J. 217, 229-35 (2023). *See also* Gary Gensler & Lev Menand, *Presidential supremacy over administrative agencies, in* CEPR Press, The Economic Consequences of the Second Trump Administration: A Preliminary Assessment 52 (2025) ("independent" agencies are better understood as "semi-autonomous"), https://cepr.org/publications/books-and-reports/economic-consequences-second-trump-administration-preliminary.

12 *Seila* Law LLC v. Consumer Financial Protection Bureau, 591 U.S. 197, 217 (2020).

13 We note that it is at best disingenuous to argue that to be democratically accountable administrative agencies must be fully accountable to *the president*, who is the elected representative of "the people." Use of the Electoral College means that the president may not represent a majority of Americans (he or she can in fact be the choice of less than a majority). If democratic accountability is the core rationale for at-will removal authority, it should lie with the Congress.

14 *See* Axon Enter., Inc. v. FTC, 590 U.S. 175 (2023).

15 On the evolution of the FTC's consumer protection mandate (including its responsibility for data protection), see Chris Jay Hoofnagle, Federal Trade Commission Privacy Law and Policy (2016); J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 Geo. Wash. L. Rev. 2157 (2015); Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection,* 83 Geo. Wash. L. Rev. 2230 (2015); Kovacic, *Adaptable Platforms, supra* note 10, at 116-17; Neil W. Averitt, *The Meaning of 'Unfair Acts or Practices' in Section 5 of the Federal Trade Commission Act*, 70 Geo. L.J. 225 (1981).

16 One noteworthy example is the development of jurisprudence concerning the application of antitrust law to the health care sector. *See* FTC v. Actavis, Inc., 570 U.S. 136 (2013); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986); Hospital Corp. of Am. v. FTC, 907 F.2d 1381 (7th Cir. 1986); Am. Med. Ass'n v. FTC, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982). *See also* North Carolina State Bd, of Med. Examiners v. FTC, 574 U.S. 494 (2015); FTC v, Phoebe Putney Health Sys., Inc., 568 U.S. 216 (2013).

17 221 U.S. 1 (1911).

18 Winerman, *Origins of the FTC, supra* note 11.

19 William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Accountability, and Effectiveness*, 100 Iowa L. Rev. 1085 (2015) (hereinafter *Independent Agency*).

20 This distinguishes the FTC from the CFPB's single director, who had a fixed five-year term that could exceed that of the president – a factor that led the Court in *Seila* to object to the CFPB's design. *Seila*, 591 U.S. at 203, 218 (distinguishing the CFPB from the FTC on that ground).

21 P.L. 109, 63 Stat. 203, 81st Cong., 1st Sess. (June 20, 1949). The implementing measure for these reforms was Reorganization Plan No. 8 of 1950, 15 Fed. Reg. 3175 (May 21, 1950). Before 1950, the members of the Commission selected their own chair.

22 It has become common practice for the president to designate a new or acting chair of the president's political party on the day a new president is inaugurated. If a seat on the Commission is open, the president may also nominate a new Commissioner that he or she intends to designate as Chair once confirmed.

23 *See supra* note 12.

24 Reorganization Plan No. 8 of 1950, *supra* note 23.

25 44 U.S.C. §§ 3501-3521. For discussions of its scope and applications, see https://www.congress.gov/crs-product/IF11837; https://pra.digital.gov/.

26 Brief of the United States of America in Support of Appellant and Vacatur, FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020), https://www.justice.gov/atr/case-document/file/1199191/dl?inline.

27 If the Solicitor General declines to represent the FTC in an appeal before the Supreme Court, the FTC has authority to represent itself. In FTC. v. Indiana Federation of Dentists, 476 U.S. 447 (1986), the FTC represented itself before the Supreme Court after the Solicitor General had declined to take the case.

28 One of the authors (Kovacic) was an attorney at the FTC and an advisor to the case team that litigated Borden, Inc. v. FTC, 674 F.2d 498 (6th Cir. 1982). In *Borden*, the court of appeals upheld an FTC decision that found that Borden had engaged in illegal predatory pricing in the market for reconstituted lemon juice. Borden sought certiorari from the Sixth Circuit decision. While the certiorari petition was pending before the Supreme Court, the Solicitor General informed the FTC that it was inclined to support the petition and advocate for Borden before the Supreme Court. Fearing that the Court would reverse the court of appeals decision, the FTC agreed to accept an order that watered down the obligations imposed by the agency's original decision. Upon the motion of Borden and the SG, the Supreme Court vacated the cert petition, and the parties entered the weakened order. Borden, Inc., [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶21,995 (Mar. 1, 1983). Similarly, the Justice Department opposed the FTC's Petition for a Writ of Certiorari in Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005). *See* https://www.justice.gov/atr/case-document/file/495576/dl. The DOJ's position prevailed.

29 Kovacic & Winerman, *Independent Agency, supra* note 21, at 2095-96 & n.35.

30 On many occasions, one of the authors (Kovacic) testified before congressional committees, frequently on the topic of pricing for gasoline and other refined petroleum products. On the intensity of congressional hearings for FTC witnesses on petroleum matters, see David A. Hyman & William E. Kovacic, *Consume or Invest: What Do/Should Agency Leaders Maximize?*, 91 Wash. L. Rev. 295, 305-06 (2016).

31 Section 3 of Reorganization Plan No. 8 states: "The functions of the Commission with respect to choosing a Chairman from among the membership of the Commission are hereby transferred to the President."

32 *See* Sidney M. Milkis, The President and the Parties: The Transformation of the American Party System Since the New Deal 160 (1993) (concluding that the 1950 reorganization plan for the FTC and similar plans for other agencies "eventually eroded the independent regulatory commission's autonomy").

33 Kovacic & Winerman, *Independent Agency, supra* note 21, at 2090-91; Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1198 (2000).

34 In the case of competition policy, this has also come to mean sound economic principles. The creation and operation of the Bureau of Economics has been crucial in providing the FTC with the enhanced internal capacity necessary to evaluate all forms of anticompetitive conduct. It also illustrates how the agency has adapted over time to build the capacity necessary to implement its missions and has served as a model for many other jurisdictions. For a history of the Bureau, see Paul Pautler, A History of the FTC's Bureau of Economics (2015), https://www.antitrustinstitute.org/wp-content/uploads/2018/08/FTC-Bureau-of-Economics-History_0.pdf.

35 Andrew I. Gavil, *The FTC's Study and Advocacy Authority in Its Second Century: A Look Ahead*, 83 Geo. Wash. L. Rev. 1902 (2015); James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 Antitrust L.J. 1091 (2005).

36 This is most evident in the notable episodes where Congress or the courts have rebuked the Commission for the exercise of its adjudication authority under Section 5 of the FTC Act. See William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act,* 76 Antitrust L.J. 929 (2010).

37 On the history of congressional moves to restrict the FTC's authority (or threaten to restrict the agency's powers), see William E. Kovacic, *Congress and the Federal Trade Commission*, 57 Antitrust L.J. 869 (1988); William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement,* 17 Tulsa L.J. 587 (1982).

38 Two modern examples stand out. In 1983, Congress enacted an appropriations restriction that forbade the Justice Department from using any resources to advocate to the Supreme Court that the Court should abandon the rule of per se illegality for resale price maintenance. This measure prevented William Baxter, the Assistant Attorney General for Antitrust, from discussing the wisdom of the per se ban or responding to questions from the Court about the rule during oral argument. For a discussion of this episode, see Andrew I. Gavil, et. al., Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 934 (5th ed. 2024); Michael W. Dolan, *Congress, the Executive, and the Court: The Great Resale Price Maintenance Affair* of 1983, 45 Pub. Admin. Rev. 718 (1985). In early 2002, the DOJ and the FTC proposed a new framework for deciding how the agencies would allocate competition matters between them as part of the interagency "clearance" process. One key legislator opposed the new framework and threatened to obtain a significant reduction in the budget for the entire Justice Department if the framework were put in place. The threat induced the DOJ to withdraw from the proposed arrangement. Kovacic & Winerman, *Independent Agency, supra* note 21, at 2104.

39 Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Future & Present*, 2021 Sup. Ct. Rev. 83.

40 *Seila*, 591 U.S. 247-48 (Thomas, J., concurring). *See generally* Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive: Presidential Power from Washington to Bush (2008). For a review and partial critique of Calabresi and Yoo's conclusions, see Richard J. Pierce, *Saving the Unitary Executive Theory From Those Who Would Distort And Abuse It: A Review of The Unitary Executive by Stephen G. Calabresi and Christopher Yoo*, 12 U. Pa. J. Const'l Law 593 (2010).

41 For an argument that the Unitary Executive Theory is inconsistent with history, see Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 Stan. L. Rev. 175, 228 (2021) ("the historical record simply and powerfully contradicts the contention … that the removal power is an inherent component of the executive power vested in the President.").

42 Supporters also see signs of approval in Trump v. Wilcox, 145 S.Ct. 1415 (2025) (granting stay of permanent injunction against President's purported termination of member of NLRB and member of Merit Systems Protection Board, albeit without any mention of *Humphrey's Executor*).

43 Justice Thomas, joined by Justice Gorsuch, was ready to so hold. *Seila*, 591 U.S. at 238 (Thomas, J., concurring in part and dissenting in part).

44 Sunstein and Vermeule describe "minimalist" and "maximalist" ways to read *Seila*. They also maintain that its approach is best described as "constitutional common law," rooted more in structural than textual interpretation. Sunstein & Vermeule, *supra*, note 41, at 84, 86.

45 Article I, § 1 starts with "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Similarly, Article III, § 1 begins with "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

46 *See*, e.g., Nixon v. Administrator of General Services, 433 U.S. 425 (1977) (upholding the constitutionality of the Presidential Recordings and Materials Preservation Act, rejecting the argument that it violated the principle of separation of powers).

47 For discussions of the scope of permissible use of Article I courts, see SEC v. Jarkesy, 603 U.S. 109, 127-32 (2024) (case did not fall within the "public rights" exception that would permit agency adjudication); CFTC v. Schor, 478 U.S. 833 (1986) (CFTC's assumption of jurisdiction over common law counterclaims did not violate Article III). Writing for the Court, Justice O'Connor explained: "Among the factors upon which we have focused are the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.") *Id.* at 851. Today's Court might not articulate the standard in the same way.

48 West Virginia v. EPA, 597 U.S. 697, 142 S.Ct. 2587, 2616-26 (2022) (Gorsuch, J., concurring).

49 The connection between these two lines of cases and *Humphrey's Executor* is acknowledged by Justice Thomas in *Seila*, although he would support eliminating the flexibility they reflect for all three branches. *Seila*, 591 U.S. 247-48 (Thomas, J., concurring). He also joined Justice Gorsuch's dissent along with Justice Alito in *Consumers' Research*. 606 U.S. __, 2025 WL 1773630, at *25, *41 (Gorsuch, J., dissenting) (advocating a more categorical non-delegation doctrine). As Professor Crane has observed, the connection is original: *Humphrey's Executor* and *A.L.A. Schechter Poultry Corp v. United States*, 295 U.S 495 (1935), a foundation of the non-delegation doctrine, were decided the same day. See Daniel A. Crane, *Debunking Humphrey's Executor*, 83 Geo. Wash. L. Rev. 1835, 1845-46 (2015). The Court distinguished *Schechter*, however, in *Consumers' Research*.

50 In her *Seila* dissent, Justice Kagan concluded that, with respect to the president's removal authority, "the Framers advocating ratification had no single view on the matter." 591 U.S. at 270 (Kagan, J., dissenting).

51 Criticizing *Seila*, one commentator has argued that a maximalist embrace of the Unitary Executive Theory would also pave the way for autocracy. David M. Driesen, *The Unitary Executive in Comparative Context*, 72 Hastings L.J. 1, 3 (2020) (footnote omitted):

> It turns out that heads of state working to substitute autocracy for constitutional democracy obtain centralized control over key government agencies, such as the prosecution service. This centralized control enables them to protect corrupt regime supporters, persecute political opponents, tilt the electoral playing field, and shrink the public space for debate and opposition. The experience of autocrats undermining democratic government strongly suggests that creating a unitary executive paves the way for autocracy. A despotic President who obtains sole control over the executive branch of government will likely use his authority to entrench himself in power and undermine democracy and the rule of law upon which it depends.

52 They also cite to Myers v. United States, 272 U.S. 52 (1926), which predated *Humphrey's Executor*, and which invalidated restrictions on the president's authority to remove postmasters. But they tend to downplay Weiner v. United States, 357 U.S. 349 (1958), which upheld an award of backpay for a member of the War Claims Commission who was dismissed without cause.

53 For a similar argument, see Crane, *supra* note 51, at 1851-68 (arguing that the FTC has departed from its original design and functions today largely as a law enforcement agency which potentially undermines the stated rationale for *Humphrey's Executor*).

54 *Seila*, 591 U.S. at 282-83 (Kagan, J., dissenting).

55 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

56 The district court's July 17, 2025 Order sought to accomplish that goal by requiring the FTC Chair and the FTC's Executive Director "to provide Ms. Slaughter with access to any government facilities, resources, and equipment necessary for her to perform her lawful duties as an FTC Commissioner during the remainder of her term." Although the Order declares that the President can only remove her for cause, as provided in the FTC Act, the injunction portion of the Order is directed solely at FTC personnel. The President is not ordered to do anything.

57 *See* Gensler & Menand, *supra* note 13, at 56-62. The authors identify four areas of concern that will likely have economic consequences: policy oscillation, extractive policy, risks to the rule of law, and increased risk of policy and adjudicative errors and delay.

58 *See* Competition Committee, Organization for Economic Cooperation and Development, \Secretariat Background Paper on the Independence of Competition Authorities – From Designs to Practices 5 (Nov. 21, 2016) ("the strong need for regulatory commitment and stability in competition law and policy makes independence a necessary condition for the effectiveness of competition authorities").

59 See Competition Committee, Organization for Economic Cooperation and Development, Global Forum on Competition, Contribution from the United States Regarding Independence of Competition Authorities – From Designs to Practices (Nov. 7, 2016) ("It is generally understood in the international antitrust community that antitrust agencies (like other law enforcement agencies) should be 'independent,' in the sense that their actions should be based on the facts and the law, and not on political considerations."), https://www.justice.gov/atr/case-document/file/979216/dl?inline.

60 *See* Jonathan Nuechterlein, *You're Fired: How Direct Presidential Control Makes the FTC Redundant* (May 6, 2025), https://techpolicyinstitute.org/publications/antitrust-and-competition/youre-fired-how-direct-presidential-control-makes-the-ftc-redundant/.

61 *See*, e.g., Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, 120 Yale L.J. F. 647 (2021) (discussing links between competition and data protection policies).

62 This argument is developed more fully in Kovacic, *Adaptable Platforms, supra* note 10.

63 A bolder proposal would include "any wrongly terminated Commissioner shall be entitled to restoration in office for the remainder of their term."

64 The statutes for some federal regulatory agencies specify a quorum. For example, the quorum for the Federal Communications Commission is three commissioners. 47 U.S.C. § 154(h) ("Three members of the Commission shall constitute a quorum.").

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PROGRESSIVE POLICY INSTITUTE
1919 M Street NW,
Suite 300,
Washington, DC 20036

Tel 202.525.3926
Fax 202.525.3941

info@ppionline.org
progressivepolicy.org