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FTC Independence after Seila Law

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The Future of the FTC



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INTRODUCTION

Nominally, the Federal Trade Commission is the quintessential example of a Progressive Era agency—multi-partisan, expert, and politically independent from the White House and Congress. Yet the days of the FTC’s independence may be numbered. Never mind legislative initiatives like Senator Josh Hawley’s that would sweep the FTC into the executive branch¹ and have very little chance of succeeding. The threats to the FTC’s independence come mildly from the executive branch, and strongly from the judicial branch.

From the executive branch: In this moment of intensive political focus on antitrust reform, the Biden Administration has appointed an FTC Chair intent on dramatically overhauling U.S. antitrust law in a considerably more interventionist direction. But, to accomplish a comprehensive overhaul of competition policy, the administration is calling for a “whole-government competition policy” that requires coordination among the various institutions of the administration, including independent agencies like the Federal Reserve System, the FTC, the Securities and Exchange Commission, and the Federal Communications Commission.² The administration has created a White House Competition Council including the Secretaries of various executive branches, with an open invitation for participation by the heads of various independent agencies, including the FTC Chair. The Executive Order purports to give directions to the heads of the various agencies with competition policy powers—they “*shall* consider using their authorities to further the policies set forth in section 1 of this order.” Further, the FTC is “encouraged” to consider revisions to the horizontal and vertical merger guidelines. Most strikingly, the “Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC’s statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of

* Frederick Paul Furth, Sr. Professor of Law, University of Michigan. Many thanks to Aaron Nielsen, Dick Pierce, and the other participants at the Gray Center FTC Roundtable for invaluable comments.

¹ <https://www.hawley.senate.gov/overhauling-federal-trade-commission>.

² Executive Order on Promoting Competition in the American Economy, July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.” This admonition precedes, and is subtly distinct, from a separate admonition for the FTC Chair “in her discretion” to consider whether to exercise the FTC’s statutory rulemaking authority with respect to a laundry list of competitive topics, including data collection and surveillance, third-party or self-repair, restrictions on biosimilar entry in the pharmaceutical industry, unfair competition in major Internet marketplaces, occupational licensing, and real estate listing services. Apparently, the FTC Chair should consider herself to have “discretion” as to the longer list of rule-making topics, but not as to labor non-competes.

The Biden Executive Order does not go so far as to give the FTC direct orders (as it does with respect to executive branch departments or agencies), but it leaves no doubt that the White House expects compliance. Now, in practical terms there is little doubt that the FTC Chair who was selected to carry out this sort of mandate will be willing to comply. Further, the Administration gets to select a replacement for Commissioner Chopra, who is heading over to the (newly non-independent) Consumer Financial Protection Board, and will enjoy the advantage of a Democrat majority on the five-member Commission, so the likelihood of a confrontation between the Commission and Administration is low. But the Administration’s directions to the FTC set the stage for confrontation with another branch that, while the “least dangerous” in principle, poses the greatest danger to the FTC’s independence.

From the judiciary: In *Humphrey’s Executor v. United States*,³ the United States Supreme Court paved the way for the modern administrative state by holding that Congress could constitutionally limit the President’s power to remove FTC Commissioners for political reasons.⁴ The Court held that President Franklin Roosevelt’s removal of Federal Trade Commissioner William E. Humphrey without cause contravened the Federal Trade Commission Act,⁵ which constitutionally limited the President’s removal power to “for cause” termination.⁶ Since *Humphrey’s Executor*, the FTC has been assumed to be politically independent from the President’s control.

However, Humphrey’s *Executor’s* vision for independent agencies has long been under attack, with the drum beat intensifying in recent years. Then-Judge Brett Kavanaugh launched a vigorous

³ *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

⁴ *Id.* at 629.

⁵ 5 U.S.C. §§ 41–58 (2012).

⁶ *See id.* § 41; *Humphrey’s Ex’r*, 295 U.S. at 629.

assault on *Humphrey's Executor*, arguing that the decision deserved the same overruling as the company it kept during the 1935 term.⁷ The Supreme Court continued to retrench on agency independence, holding unconstitutional provisions of Sarbanes-Oxley Act creating accounting oversight board where members of board could only be removed for cause by Securities and Exchange Commission, whose Commissioners also could only be removed for cause.⁸

And then came the not-quite coup de grâce, *Seila Law LLC v. Consumer Financial Protection Bureau*,⁹ where the Court held that the for-cause restriction of the President's executive power to remove CFPB's single Director violated constitutional separation of powers. To be sure, the Court distinguished *Humphrey's Executor* as a different case—one concerning an agency performing only “quasi-legislative” and “quasi-judicial functions,” and not said to exercise any executive power. That was a fair enough report on what the Court *said* about the FTC in *Humphrey's Executor*, but fantasy as to what the FTC actually *does*. In fact, as I have shown in previous work,¹⁰ in its antitrust capacity the FTC has historically done relatively little “judicial” work and virtually no “legislative” work, but has instead become a thoroughly executive agency, enforcing the antitrust laws against alleged violaters. Taking *Seila Law's* analytical framework and applying it to the actual facts concerning the FTC, it seems that *Humphrey's Executor*, and with it the FTC's independence from the White House, are hanging by a thread.

This Article proceeds in three parts. Part I recalls the *Humphrey's Executor* decision and its implications for the FTC and the administrative state more broadly. Part II analyzes the implications of *Seila Law* and two follow-up Supreme Court decisions—*Arthrex*¹¹ and *Collins*¹²—for the FTC's continuing independence. Part III contemplates the immediate and longer-run parameters of a post-independence world.

⁷ *In re Aiken Cnty.*, 645 F.3d 428, 441–42 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

⁸ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010).

⁹ ___ U.S. ___, 140 S. Ct. 2183 (2020).

¹⁰ Daniel A. Crane, *Debunking Humphrey's Executor*, 83 Geo. Wash. L. Rev. 1836 (2015).

¹¹ *U.S. v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).

¹² *Collins v. Yellen*, 141 S. Ct. 1761 (2021).

I. *HUMPHREY'S EXECUTOR* AND THE PROGRESSIVE VISION FOR COMMISSION INDEPENDENCE

The FTC was a Progressive Era creation designed fundamentally to alter the modalities of political control over firms and markets. As a commentator noted a decade after the Commission's creation, the FTC Act represented "a steady extension of legal control" reflecting "[t]he vast changes wrought . . . during the nineteenth century"--particularly "the introduction of new mechanical forces, the penetrating influence of science, large scale industry and progressive urbanization."¹³ Against these forces, the conventional modalities of executive law enforcement and common law adjudication were seen as ineffective. The Progressives believed that a Commission, unlike the courts and executive branch, could be proactive rather than reactive to these sprawling social and economic problems. As Justice Brandeis, a chief architect of the FTC, noted in a later dissenting opinion, FTC enforcement "was to be prophylactic. Its purpose in respect to restraints of trade was prevention of diseased business conditions, not cure."¹⁴

The Progressives also believed that the Commission would be superior to executive branch enforcement before generalist judges due to the expertise of the Commissioners. For instance, the Senate Committee on Interstate Commerce emphasized:

The work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry. It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.¹⁵

The expertise claim came straight from the Progressive-technocratic playbook, which called for the separation of politics from economic and social administration and the entrustment of decisionmaking to neutral experts—economic engineers capable of improving the performance of the market through planning based on objective scientific principles.¹⁶ As Woodrow Wilson famously put

¹³ Gerard C. Henderson, *The Federal Trade Commission: A Study in Administrative Law and Procedure* at v (1924).

¹⁴ *FTC v. Gratz*, 253 U.S. 421, 435 (1920).

¹⁵ *Id.* (quoting S. REP. NO. 63-597, at 10–11 (1914)).

¹⁶ See WILLIAM E. AKIN, *TECHNOCRACY AND THE AMERICAN DREAM: THE TECHNOCRAT MOVEMENT, 1900–1941* ix–xi (1977) (summarizing the rise and fall

it, regulators would be experts in the “science of administration” that operated “outside the proper sphere of *politics*.”¹⁷

To achieve this vision, Congress vested the FTC with trappings of technocratic independence. The Commission would have five members, not more than three of whom could be of the same party, with staggered seven-year terms. Most significantly, the FTC Act allowed the President to dismiss an FTC Commissioner only for “inefficiency, neglect of duty, or malfeasance in office.” In other words, although the President could nominate Commissioners and thereby control the FTC’s composition (with the advice and consent of the Senate) *ex ante*, the President would not have the power to steer the Commission’s conduct *ex post*. Given the length of the Commissioners’ terms of office, their bi-partisan composition, and their bent on technocratic expertise, the Commission would thereby become detached from ordinary politics.

While the Progressive’s vision for the FTC was clear, its constitutionality was not. Did Congress have the power to create an independent agency free from the President’s control? Earlier unitary executive decisions like *Myers v. United States* suggested a negative answer.¹⁸ In *Myers*, Chief Justice Taft—a great defender of the common law and traditional executive enforcement of the law—held that the President enjoyed the constitutional power unilaterally to remove a postmaster appointed by the President with the advice and consent of the Senate. The Court reasoned that the President’s constitutional obligation to take care that the laws be faithfully executed necessarily assumed the power to remove executive officers for whose performance the President had ultimate responsibility.¹⁹ *Myers* articulated a hierarchical vision of the executive branch with the President atop, wielding plenary removal powers over officers of the United States.²⁰

The test case that became *Humphrey’s Executor* was arose from President Roosevelt’s firing of Commissioner Humphrey, who had flagrantly defied the Commission’s New Deal orientation, on October

of the technocratic movement); *see also* JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 7–8 (1938) (arguing for technocratic-administrative solutions to improve over the laissez-faire economic system).

¹⁷ Woodrow Wilson, *The Study of Administration*, 2 *POL. SCI. Q.* 197, 197, 210 (1887).

¹⁸ *Id.* at 176.

¹⁹ *Id.* at 117 (holding that the President must have some “power of removing those for whom he can not continue to be responsible”).

²⁰ *See id.*

7, 1933.²¹ Roosevelt made clear that the reasons for his firing here political, and not grounded in the statutory cause criteria.”²² Humphrey died, but his executor brought a case for back pay on the theory that Humphrey’s firing was wrongful. The case’s paltry economic stakes were overshadowed by its tremendous consequences for agency independence and the constitutional charter of the administrative state.

The Supreme Court ruled in favor of Humphrey, establishing the principle that the President may not remove FTC commissioners for political reasons, but only for good cause.²³ Justice Sutherland’s opinion rests on a quartet of observations about the nature of the FTC that ostensibly distinguish the Commission from executive branch departments. According to the Court, the FTC is (1) nonpolitical and nonpartisan, (2) uniquely expert, (3) “quasi-legislative,” and (4) “quasi-judicial,” rather than executive.²⁴ Together, these four qualities ostensibly lent the FTC a character different from that of ordinary law enforcers, hence the legitimacy of insulating commissioners from the President’s constitutional responsibility to “take Care that the Laws be faithfully executed.”²⁵ At its core, *Humphrey’s Executor* rests on the assertion that the FTC is something other than a conventional law enforcement agency and thus merits a different position in the political order than executive departments like the Justice Department that also enforce laws concerning antitrust and consumer protection.

First, the Court characterized the FTC as a politically independent and nonpartisan body. According to the Court, the FTC is “a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.”²⁶ The FTC’s independence, the Court asserted, stemmed in part from its nonpartisan nature, emphasizing that “[t]he commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality.”²⁷ In addition to its composition, the FTC’s statutory mandate was devoid of partisan taint, as “[i]t is charged with the enforcement of no policy except the

²¹ *Id.*

²² *Id.*

²³ *Id.* at 619.

²⁴ See *Humphrey’s Ex’r*, 295 U.S. at 628.

²⁵ U.S. CONST. art. II, § 3.

²⁶ *Id.* at 625–26.

²⁷ *Id.* at 624.

policy of the law.”²⁸

In addition to being politically neutral, it mattered to the Court that the FTC Commissioner’s were *experts*. “Like the Interstate Commerce Commission, [the FTC’s] members are called upon to exercise the trained judgment of a body of experts appointed by law and informed by experience.”²⁹

Finally, in contrast to executive branch agents that merely enforced the law, the FTC was not a law enforcement agency at all: “Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative.”³⁰ Because the FTC was not acting as a law enforcer, but instead as a judge and legislator, the President did not need to control FTC Commissioners in order to perform his constitutional obligation to see that the laws were faithfully executed.

A piece of important context concerns the company that the *Humphrey’s Executor* decision kept. The decision was announced on Roosevelt’s “Black Monday,” May 27, 1935, in the midst of a sweep of cases in 1935–1936 in which the conservative Supreme Court waged combat against Roosevelt,³¹ and on the same day as the *Schechter Poultry*³² decision, which invalidated crucial aspects of the National Industrial Recovery Act on nondelegation and commerce clause grounds.³³ It is striking that this decision, ostensibly reflecting the “heyday of the progressive model within the judiciary,”³⁴ came from a predominantly conservative Court intent on reigning in the power of the New Deal presidency.³⁵ The conventional account has the Progressive takeover of the Supreme Court beginning in 1937 with the repudiation of the classical liberal and laissez faire doctrines favored by the Sutherland wing of the Court,³⁶ so it is odd to think of

²⁸ *Humphrey’s Ex’r*, 295 U.S. at 624. For discussion on congressional intent that the FTC be insulated from politics, see ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 188–95 (1972).

²⁹ *Humphrey’s Ex’r*, 295 U.S. at 624 (quoting *Illinois Cent. R.R. Co. v. Interstate Commerce Comm’n*, 206 U.S. 441, 451 (1907)) (internal quotation marks omitted).

³⁰ *Humphrey’s Ex’r*, 295 U.S. at 624.

³¹ See generally Miller, *supra* note xxx, at 92–94 (discussing context of *Humphrey’s Executor* decision).

³² *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

³³ *Id.* at 541–42, 550–51.

³⁴ Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1, 100 (1994).

³⁵ See Christopher S. Yoo et al., *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 *NOTRE DAME L. REV.* 1, 88 (2004).

³⁶ See generally RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* 13 (2006).

Humphrey's Executor as symbolizing the heart of Progressive-technocratic ideology. The *Humphrey's Executor* decision was unanimous (as was *Schechter Poultry*), with McReynolds writing separately only to point back to his dissenting opinion in *Myers*,³⁷ which had argued from a constitutional history standpoint for limitations on the President's removal power.³⁸ That Justices Stone, Cardozo, and Brandeis joined without comment points to an anticentralization ideological strand in the decision—the Court's progressives in 1935 remained more in the Jeffersonian-Jacksonian camp that feared large aggregations of power, whether in the private sector or government, than later New Deal appointees who were more comfortable with the expansion of the federal government and executive branch power.³⁹

Because the coalition that decided *Humphrey's Executor* was a mixed bag of conservative classicists and populist anticentralizationists, it is perhaps best to understand the decision as accidentally or opportunistically Progressive rather than embodying true-belief Progressivism. Nonetheless, the decision articulated the heart of the Progressive vision for administrative agencies—politically detached and independent, uniquely expert and objective, and acting through a combination of political decisional modes, particularly those conventionally associated with legislatures and courts. Broadly speaking, *Humphrey's Executor* served to legitimize the modern regulatory state and remains one of the iconic judicial pillars of the technocratic, independent administrative system.⁴⁰ As

³⁷ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 632 (1935).

³⁸ See generally *Myers v. United States*, 272 U.S. 52, 178–239 (1926) (McReynolds, J., dissenting).

³⁹ An anecdote recounted by Peter Irons concerning the day of the *Schechter Poultry* and *Humphrey's Executor* decisions is telling: “Before Tommy Corcoran could depart, a Supreme Court page tapped him on the shoulder and said that Justice Brandeis would like to see him in the justices’ robing room. Brandeis wanted Corcoran to convey a message to the White House: ‘This is the end of this business of centralization, and I want you to go back and tell the President that we’re not going to let this government centralize everything. It’s come to an end.’” PETER H. IRONS, *THE NEW DEAL LAWYERS* 104 (1982).

⁴⁰ See, e.g., Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL’Y 13, 17 (1998) (asserting that *Humphrey's Executor* “ratifies the Administrative State”); Larry Kramer, *What’s a Constitution for Anyway? Of History and Theory, Bruce Ackerman and the New Deal*, 46 CASE W. RES. L. REV. 885, 926 (1996) (calling *Humphrey's Executor* one of the “administrative state’s main support beams”); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 94 (“*Humphrey's Executor* has long been viewed as the fundamental constitutional charter of the independent regulatory commissions.”); Richard H. Pildes, *Separation of Powers, Independent Agencies*,

Geoffrey Miller has put it, the decision serves as the “fundamental constitutional charter of the independent regulatory commissions.”⁴¹

II. *SEILA LAW* AND ITS CONSEQUENCES

A. *From Humphrey’s Executor to Seila Law*

Unitary executive proponents and critics of the modern regulatory state have sharply criticized the Court’s assumptions in *Humphrey’s Executor*. They have argued that, contrary to the Court’s assertion, the FTC serves quintessentially executive functions⁴² and that it impairs the President’s ability to cohesively and consistently enforce the laws.⁴³ But despite its symbolic importance as an expression of Progressive-technocratic values, the importance of *Humphrey’s Executor*’s four-prong justification as a matter of constitutional law has eroded over time. In subsequent cases, the Supreme Court expanded *Humphrey’s Executor* well beyond the limited frame presented in the 1935 opinion, seemingly calling into doubt the importance of *Humphrey’s* analytical framework.

The first important decision was *Wiener v. United States*,⁴⁴ a 1958 decision involving President Eisenhower’s removal of a Truman appointee to the War Claims Commission (“WCC”).⁴⁵ Unlike the FTC tenure statute, which limited removal to for cause situations, the WCC statute was silent on removal.⁴⁶ Nonetheless, finding the War Claims Commissioner’s three-year terms to imply protection against political removal, Justice Frankfurter’s unanimous opinion for the

and Financial Regulation: The Case of the Sarbanes-Oxley Act, 5 N.Y.U. J.L. & BUS. 485, 520 (2009) (calling *Humphrey’s Executor* “truly the seminal decision of the modern administrative state”).

⁴¹ Miller, *supra* note xxx, at 94; see also Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 778 (2013) (observing that “[t]he constitutional status of independent agencies stems . . . from . . . *Humphrey’s Executor*”).

⁴² Miller, *supra* note xxx, at 93 (“It was nonsense to assert that the FTC did not act in an executive role.”).

⁴³ Justice Scalia has been a particularly sharp critic of *Humphrey’s Executor*. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 724–27 (1988) (Scalia, J., dissenting) (describing *Humphrey’s Executor* as “six quick pages devoid of textual or historical precedent”).

⁴⁴ *Wiener v. United States*, 357 U.S. 349 (1958).

⁴⁵ *Id.* at 349–50.

⁴⁶ *Id.* at 350.

Court held the President's removal unlawful.⁴⁷ The opinion pivoted from *Humphrey's Executor*, which had treated *Myers* as the background rule and articulated tailored reasons for departing from it. *Wiener* suggested instead that *Myers* was a "short-lived" and narrow aberration and that *Humphrey's Executor's* flexible and functional approach should be understood as the more general rule.⁴⁸ Only a duo—political independence and adjudicatory functions—of the *Humphrey's Executor* quartet made appearances to justify the Commissioner's tenure in office.⁴⁹

Unitary executive proponents saw a glimmer of hope for *Myers* in 1986 with the Court's decision in *Bowsher v. Synar*,⁵⁰ which held that the Gramm-Rudman-Hollings Act's⁵¹ delegation of budget-reduction duties to the Comptroller General, over whom Congress held the removal power, was unconstitutional on separation of powers principles.⁵² *Myers* re-emerged as favored, along with a renewed focus on the executive character of the removed actor: "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."⁵³ But the glimmer was short-lived, as just two years later in *Morrison v. Olson*,⁵⁴ the Court cast *Bowsher* as a case about congressional self-aggrandizement rather than presidential prerogative.⁵⁵

Morrison, in which the Court upheld the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978,⁵⁶ cast serious doubt on the continuing relevance of the *Humphrey's Executor* quartet.⁵⁷ Prosecution is manifestly a core executive function,⁵⁸ so the central thrust of *Humphrey's Executor*—recasting the FTC as something other than a law-enforcement

⁴⁷ *Id.* at 350, 356.

⁴⁸ *Id.* at 352.

⁴⁹ *See id.* at 354–55 (discussing the Commissioners' political independence from the executive and legislative branches and discussing the Commission's judicial functions).

⁵⁰ *Bowsher v. Synar*, 478 U.S. 714 (1986).

⁵¹ Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended at 2 U.S.C. §§ 900–907d, 922 (2012)).

⁵² *Bowsher*, 478 U.S. at 726.

⁵³ *Id.*

⁵⁴ *Morrison v. Olson*, 487 U.S. 654 (1988).

⁵⁵ *Id.* at 685–86.

⁵⁶ Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 2, 5, and 28 U.S.C.)

⁵⁷ *Morrison*, 487 U.S. at 689–91.

⁵⁸ *See id.* at 706 (Scalia, J., dissenting) ("[P]rosecution of crimes is a quintessentially executive function.").

agency—had to be abandoned. On the statute’s restriction of the Attorney General’s power to remove the independent counsel, Justice Rehnquist’s opinion explicitly jettisoned the “quasi-legislative, quasi-judicial” criteria:

We undoubtedly did rely on the terms “quasi-legislative” and “quasi-judicial” to distinguish the officials involved in *Humphrey’s Executor* and *Wiener* from those in *Myers*, but our present considered view is that the determination of whether the Constitution allows Congress to impose a “good cause”-type restriction on the President’s power to remove an official cannot be made to turn on whether or not that official is classified as “purely executive.”⁵⁹

Rather than the *Humphrey’s Executor* quartet, removability analysis would turn on whether the removal restriction “unduly interfer[es] with the role of the Executive Branch.”⁶⁰

The Supreme Court’s decision in *PCAOB* renewed unitary executive theorists’ hopes of a *Myers* revival—indeed, in contradistinction to *Wiener*, which attempted to bury *Myers*, Justice Roberts’s opinion in *PCAOB* refers to *Myers* as a “landmark case.”⁶¹ The 5-4 decision invalidated the Public Company Accounting Oversight Board’s (“PCAOB”) “dual for-cause” limitation, which gave for cause removal of PCAOB members to the Securities and Exchange Commission (“SEC”) and gave for-cause removal of SEC Commissioners to the president.⁶² The Court distinguished *Humphrey’s Executor* as a case that, unlike *Morrison* and *PCAOB*, did not involve “inferior officers” of the United States.⁶³ The opinion focused on the multiple layers of protection issue, declined to reconsider *Humphrey’s Executor*,⁶⁴ and left untouched its quartet of rationales.

Prior to *Seila Law*, then, the continuing relevance of *Humphrey’s Executor’s* constitutional reasoning was in substantial doubt. *Seila Law* put *Humphrey’s Executor* squarely back on the table.

⁵⁹ *Id.* at 689 (majority opinion).

⁶⁰ *Id.* at 693.

⁶¹ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010).

⁶² *See id.* at 486–87.

⁶³ *Id.* at 493.

⁶⁴ *Id.* at 483 (explaining that none of the parties had asked the Court to reconsider *Myers*, *Humphrey’s Executor*, *Morrison*, or *United States v. Perkins*, 116 U.S. 483 (1886), and that the Court would not do so on its own initiative).

B. *Seila Law*

In the wake of the 2008 financial crisis, Congress took up a proposal from then-Professor (now Senator) Elizabeth Warren and established the Consumer Financial Protection Bureau (CFPB) and tasked it with ensuring that consumer debt products are safe and transparent. “Congress also vested the CFPB with potent enforcement powers. The agency has the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court.”⁶⁵

The CFPB sits as an independent regulator within the Federal Reserve system. In establishing the CFPB’s institutional arrangement, “Congress deviated from the structure of nearly every other independent administrative agency in our history. Instead of placing the agency under the leadership of a board with multiple members, Congress provided that the CFPB would be led by a single Director, who serves for a longer term than the President and cannot be removed by the President except for inefficiency, neglect, or malfeasance.”⁶⁶ This unusual arrangement set the stage for a challenge to the CFPB’s constitutionality—could Congress create an independent agency wielding “vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S.” without the head of that board being accountable to the President’s removal power?⁶⁷ Per Chief Justice Roberts, the Court answered no.

Promisingly for unitary executive theorists, the Court began its analysis with constitutional history, George Washington, and the pronouncement that “[t]he entire ‘executive Power’ belongs to the President alone.”⁶⁸ In this scheme, “lesser officers must remain accountable to the President, whose authority they wield.”⁶⁹ Hence, “[t]he President’s removal power has long been confirmed by history and precedent,”⁷⁰ as confirmed importantly in *Myers*, and more recently in *PCAOB*.

Nonetheless, *PCAOB* had “left in place two exceptions to the President’s unrestricted removal power.”⁷¹ The second one—protections for “inferior officers” “with limited jurisdiction and tenure

⁶⁵ 140 S.Ct. at 2193.

⁶⁶ *Id.* at 2191.

⁶⁷ *Id.*

⁶⁸ *Id.* at 2197.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 2198.

and lacking policymaking or significant administrative authority”⁷²— is not germane to the FTC, so we can pass it quickly. The first one is *Humphrey’s Executor* itself.

The Court began its analysis of *Humphrey’s Executor* with the caveat that case was “decided less than a decade after *Myers*,”⁷³ the sort of observation that often precedes the idea that the subsequent case is less deserving of stare decisis respect.⁷⁴ *Humphrey’s Executor* announced a limited exception to *Myers* that depended “on the characteristics of the agency before the Court.”⁷⁵ Chief Justice Roberts then observed that “[r]ightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising ‘not part of the executive power.’”⁷⁶ Two implications jump out: First, the Court was unwilling to endorse the *Humphrey’s Executor* Court’s institutional understanding of the FTC. Second, the “as it existed in 1935” proviso suggests that the Court would be willing to reconsider the FTC’s constitutional status as it exists *today*.

The Court then proceeded to repeat the views of the FTC that had legitimated its independence from the President’s removal power:

[I]t was “an administrative body” that performed “specified duties as a legislative or as a judicial aid.” [I]t acted “as a legislative agency” in “making investigations and reports” to Congress and “as an agency of the judiciary” in making recommendations to courts as a master in chancery. [I]“To the extent that [the FTC] exercise[d] any executive function[,] as distinguished from executive power in the constitutional sense,” it did so only in the discharge of its “quasi-legislative or quasi-judicial powers.”

The Court identified several organizational features that helped explain its characterization of the FTC as non-executive. Composed of five members—no more than three from the same political party—the Board was

⁷² *Id.* at 2199 (citation omitted).

⁷³ *Id.* at 2198.

⁷⁴ See, e.g., *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 48 (1977) (overruling restrictions *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) as an “abrupt and largely unexplained departure from *White Motor Co. v. United States*, 372 U.S. 253 (1963), where only four years earlier the Court had refused to endorse a per se rule for vertical restrictions”).

⁷⁵ 140 S. Ct. 2198.

⁷⁶ *Id.*

designed to be “non-partisan” and to “act with entire impartiality... The FTC's duties were “neither political nor executive,” but instead called for “the trained judgment of a body of experts” “informed by experience... And the Commissioners’ staggered, seven-year terms enabled the agency to accumulate technical expertise and avoid a “complete change” in leadership “at any one time.”

In short, *Humphrey’s Executor* permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power.⁷⁷

The Court thus allowed the FTC to remain distinguished from the CFPB on the terms of *Humphrey’s Executor*. The FTC, being “a mere legislative or judicial aid” that did “not wield substantial executive power” could remain constitutionally insulated from the President’s removal powers.⁷⁸

The majority opinion thus allowed *Humphrey’s Executor* to linger on its own ostensible terms. Concurring in part, Justices Thomas and Gorsuch would apparently have gone further and overruled *Humphrey’s Executor*, which they found “an unfortunate example of the Court’s failure to apply the Constitution as written.”⁷⁹ In their view, “*Humphrey’s Executor* laid the foundation for a fundamental departure from our constitutional structure with nothing more than handwaving and obfuscating phrases such as ‘quasi-legislative’ and ‘quasi-judicial.’”⁸⁰ “It is hard to dispute that the powers of the FTC at the time of *Humphrey’s Executor* would at the present time be considered ‘executive,’ at least to some degree.”⁸¹

The only possible surprise about Justices Thomas and Gorsuch’s concurrence is that Justice Kavanaugh didn’t join it given his explicit call for overruling *Humphrey’s Executor* while on the D.C. Circuit. Perhaps he felt that such a step was unnecessary, since the majority opinion had already so undermined the prior opinion’s rationale.

⁷⁷ *Id.* at 2199.

⁷⁸ *Id.* at 2200.

⁷⁹ *Seila Law*, 140 S. Ct. at 2212 (Thomas, J., concurring part and dissenting in part).

⁸⁰ *Id.* at 2216.

⁸¹ *Id.* at 2217.

The *Seila Law* dissenters—Justice Kagan joined by Justices Ginsburg, Breyer, and Sotomayor—also understood the stakes for *Humphrey’s Excutor*. They emphasized that the CFPB statute was “identical” to FTC Act and that in *Humphrey’s Excutor* nothing turned “on any of the agency’s organizational features.”⁸² They observed the majority’s suggestion “that the FTC was a different animal when this Court upheld its independent status,” and stressed that, even in 1940, the Commission had powers that were effectively executive, such as running investigations, bringing administrative charges, and conducting investigations.⁸³ The dissenters also stressed that the relevant point of comparison was “the present-day FTC, which remains independent even if it now has some expanded powers.”⁸⁴ Or, they might have said, it remains independent *for now*.

C. *Collins* and *Arthrex*

Two more Supreme Court opinions handed down at the end of the 2020-21 term suggest further implications for the FTC’s constitutional independence from the executive branch. *Collins* involved the Federal Housing Finance Agency (FHFA), “an independent agency” tasked with regulating the Fannie Mae and Freddie Mac mortgage financing companies.⁸⁵ Like the CFPB, the FHFA has a single director, appointed by the President with the advice and consent of the Senate, who the President could remove only for cause.⁸⁶ Justice Alito’s majority opinion found that *Seila Law* made “all but dispositive” the unconstitutionality of the removal restriction.⁸⁷ “The FHFA (like the CFPB) is an agency led by a single Director, and the Recovery Act (like the Dodd-Frank Act) restricts the President’s removal power.”⁸⁸ None of the following facts was sufficient to distinguish the FHFA from the CFPB: the FHFA had more limited authority than the CFPB; the FHFA acts as a receiver or conservator and hence somewhat like a private party; the regulated entities were federally chartered; or the FHFA statute offered only modest tenure protection. The President’s removal power over the FHFA must be plenary.

Unlike *Seila Law* and *Collins*, *Arthrex* involved an Appointments

⁸² 140 S. Ct. at 2234.

⁸³ *Id.* at n.10.

⁸⁴ *Id.*

⁸⁵ 141 S. Ct at 1770.

⁸⁶ *Id.*

⁸⁷ 141 S. Ct. at 1783.

⁸⁸ *Id.* at 1784.

Clause issue rather than the removal power, but it drew heavily on *Seila Law* and *PCAOB* to continue the trend of cases asserting the constitutional imperative of Presidential power over officials performing executive functions. At issue was the constitutionality of the Patent Trial and Appeal Board, which consists of Administrative Patent Judges who conduct inter partes review of patent validity.⁸⁹ Arthrex argued that APJs were principal officers and that their appointment by the Secretary of Commerce, rather than by the President with the advice and consent of the Senate, was therefore unconstitutional.⁹⁰ Per Chief Justice Roberts, the Supreme Court agreed. Although Congress had designated APJs as inferior officers, the Court found this designation inconsistent with “the nature of their responsibilities.”⁹¹ Because APJs had the power to issue final decisions on behalf of the United States without review by their nominal superior or any other principal officer, they were exercising the powers of principal officers.⁹² The availability of judicial review in Article III courts could not save the APJ system: “The activities of executive officers may “take ‘legislative’ and ‘judicial’ forms, but they are exercises of—indeed, under our constitutional structure they must be exercises of—the ‘executive Power,’ ” for which the President is ultimately responsible.”⁹³

D. Implications for the FTC

Are *Seila Law* and its progeny the handwriting on the wall for the FTC’s independence? If the answer turns on head counting, the magic number is five and we are already to three. Another way of answering the question is by matching the characteristics attributed to the FTC in *Humphrey’s Executor* and called out again in *Seila Law* and asking whether they remain genuine characteristics of the Commission. Here, the answer the answer is mixed, but leans decidedly toward no.

A key distinction between CFPB and FTC, raised by the *Seila Law* majority and dismissed by the dissenters, is its organizational structure. Whatever the similarity in their functions, the FTC’s multi-partisan, multi-member, long-term and staggered term nature marks it as different from the CFPB. If formal organizational structure marks a genuinely dispositive line, then the FTC’s independence seems to

⁸⁹ 141 S. Ct. at 1977.

⁹⁰ *Id.* at 1978.

⁹¹ *Id.* at 1980.

⁹² *Id.* at 1981.

⁹³ *Id.* at 1982.

remain secure.

On the other hand, if the organizational question is functional rather than formal, it remains far from clear that the FTC qualifies for independence even on organizational terms. As I argued in a prior article, cited twice in Justice Thomas's concurring opinion, the FTC has been anything but a non-partisan and independent agency in fact.⁹⁴ Although the Commission is operationally independent from the President, it has shown itself largely subservient to Congress's purse strings in important ways,⁹⁵ as Congress deliberately structured it to be.⁹⁶ Empirical work shows that Congress exerts its influence to control the FTC's ideological trajectory, to push it in particular enforcement directions.⁹⁷ For example, an empirical study analyzing FTC enforcement during the 1969–1979 period found that the FTC consistently chose policy programs that followed the expressed will of the FTC's oversight committees in Congress, particularly by embarking on more aggressive enforcement programs in response to congressional pressure.⁹⁸ Another study found that case dismissals at the FTC were nonrandomly concentrated on defendants headquartered in the home districts of congressmen on committees and subcommittees with budgetary and oversight jurisdiction over the FTC, suggesting that influential congressmen leveraged their budgetary power over the FTC to shield powerful constituents from enforcement actions.⁹⁹

The same goes for the idea that the FTC is distinguished from other organs of government by its unique expertise. As I previously showed, the FTC cannot claim any expertise advantage over its closest

⁹⁴ *Crane*, *supra* n. xxx at xxx.

⁹⁵ William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869, 881–88 (1988); Kovacic, *supra* note **Error! Bookmark not defined.**; Roger L. Faith et al., *Antitrust Pork Barrel*, in PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION, *supra* note **Error! Bookmark not defined.**

⁹⁶ *Id.* at xxx. As Senator Albert Cummins, a leading backer of the FTC Act, explained, the FTC was to be “a commission at all times under the power of Congress” and “always subordinate to Congress.”

⁹⁷ Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 788, 792 (1983). *But see* Terry M. Moe, *An Assessment of the Positive Theory of ‘Congressional Dominance,’* 12 LEGIS. STUD. Q. 475, 476–77 (1987) (criticizing Weingast & Moran study); Timothy J. Muris, *Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control*, 94 J. POL. ECON. 884, 884–89 (1986) (same).

⁹⁸ Kovacic, *supra* note **Error! Bookmark not defined.**, at 63–65, 82–86, 89–93.

⁹⁹ Faith et al., *supra* note 95, at 19, 22, 26.

executive branch analog—the Justice Department’s Antitrust Division—except in particular market sectors, where the expertise comes from the FTC’s historical experience based on an informal market-division arrangement with the Antitrust Division.¹⁰⁰ Historically, FTC Commissioners have not been leading experts in their fields when appointed and have not stayed at the Commission long enough to acquire expertise.¹⁰¹ Bill Kovacic’s comprehensive study of the FTC Commissioners over time found a striking “paucity” in the quality of the appointments.¹⁰² Kovacic found that only a handful of appointees to the FTC had distinguished experience or training in competition or consumer protection.¹⁰³

All of that is to say that any serious inquiry into the FTC’s actual functioning as opposed its org chart would find that it is not apolitical, genuinely independent, or comparatively expert. But, as the *Seila Law* dissenters observed, those claims about the FTC’s organizational status may have been little more than window dressing in *Humphrey’s Executor*, and to the *Seila Law* majority as well. Far more important were the agency’s *functions*—whether the Commission acts as “a mere legislative or judicial aid” that did “not wield substantial executive power—”¹⁰⁴ a point repeated in *Arthrex* where the Court again emphasized the importance of looking at an agency’s actual functions.¹⁰⁵

If whether the Commission acts as “a mere legislative or judicial aid” that does “not wield substantial executive power is the test, then game, set, match, the FTC’s independence from the President’s removal power is unconstitutional. It cannot be seriously maintained today that the FTC is anything like a legislative aid to Congress or a judicial aid to the Justice Department, or that it does not “wield substantial executive power.” As I previously showed, the FTC is neither primarily legislative nor adjudicatory, but instead acts primarily as an executive law enforcement agency.¹⁰⁶

On the “legislative” side, two different things could be meant.

¹⁰⁰ See *The Enforcers*, FED. TRADE COMM’N, <http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers> (last visited Oct. 17, 2015).

¹⁰¹ See Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 768 (2005).

¹⁰² William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915, 917 (1997).

¹⁰³ *Id.* at 916–17.

¹⁰⁴ 140 S. Ct. at ____.

¹⁰⁵ 141 S. Ct. 1980.

¹⁰⁶ Crane, *supra* n. xxx at ____.

One is that the original design for the FTC envisioned that the Commission would serve as a legislative helper to Congress by conducting investigations and rendering reports that could become blueprints for future legislation. It is probably in that sense that the *Seila Law* court referred to the Commission’s function as a legislative “aid.” To be sure, the Commission does conduct market investigations and prepare reports, which some people in Congress may sometimes read, but that is a very small part of the Commission’s overall workload. Read the FTC 2021 Budget request to Congress.¹⁰⁷ In 185 pages justifying the agency’s existence, you will find nary a reference to preparing reports as legislative blueprints for Congress. Rather, you will find a detailed account of the Commission’s *law enforcement* activities against bad guys.

A second sense of “legislative” would be the Commission’s rule-making authority. Its chartering statute in 1914 statute gave the FTC the authority to “make rules and regulations for the purpose of carrying out the [FTC Act’s] provisions,”¹⁰⁸ but it remained unsettled until 1973 whether this general provision applied only to procedural or noninvestigatory rulemaking, or whether it also applied to substantive rules fleshing out the open-ended prohibition of Section 5 of the FTC Act.¹⁰⁹ In 1973, the U.S. Court of Appeals for the D.C. Circuit held that Section 46(g) gave the FTC the power to promulgate trade regulation rules with the effect of substantive law.¹¹⁰ Two years later, the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act of 1975 (“Magnuson-Moss”)¹¹¹ gave the FTC the power to frame substantive trade regulation rules in furtherance of its consumer protection mission, although with heightened notice and comment procedural requirements.¹¹²

Despite the Progressive ambitions for an actively legislative agency and eventual affirmation by the federal courts of its substantive rulemaking power, the FTC’s substantive rulemaking activity has been quite limited.¹¹³ For its first forty-nine years, until the passage

¹⁰⁷ [FTC Submits Annual Budget Request, Performance Plan and Performance Report to Congress | Federal Trade Commission.](#)

¹⁰⁸ 15 U.S.C. § 46(g) (2012).

¹⁰⁹ *E.g.*, Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 551–55 (2002).

¹¹⁰ Nat’l Petroleum Refiners Ass’n v. FTC, 482 F.2d 672, 673, 698 (D.C. Cir. 1973).

¹¹¹ Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended at 15 U.S.C. §§ 2301–2312 (2012)).

¹¹² *See id.*

¹¹³ The FTC may issue both substantive rules and those controlling procedural

of Magnuson-Moss, the FTC issued a few rules mostly related to discrete, industry-specific statutory grants of rulemaking authority under such statutes as the Wool Products Labeling Act of 1939,¹¹⁴ the Fur Products Labeling Act of 1951,¹¹⁵ and the Textile Fiber Products Identification Act of 1958.¹¹⁶ It promulgated few substantive rules related to its core mission under Section 5 of the FTC Act.¹¹⁷ Following Magnuson-Moss, the FTC embarked on a temporary surge of rulemaking activity regarding consumer protection, but continued to ignore completely its power to pass substantive antitrust rules.¹¹⁸

The antitrust side is arguably more relevant when evaluating the assertions made in *Humphrey's Executor*, because the FTC only had antitrust powers at the time the case was decided and would not receive its consumer protection mandate until the Wheeler-Lea Amendments three years later.¹¹⁹ Over the course of its first century, the FTC promulgated exactly one substantive antitrust rule (in 1968),¹²⁰ which it apparently never enforced.¹²¹ In its original capacity and only capacity at the time of *Humphrey's Executor*, the FTC has not been quasi-legislative at all.

matters internal to the agency. See FTC OPERATING MANUAL ch. 7, <http://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch07rulemaking.pdf>.

¹¹⁴ Wool Products Labeling Act of 1939, ch. 871, 54 Stat. 1128 (1940) (codified as amended at 15 U.S.C. § 68 (2012)); 16 C.F.R. pt. 300 (2015).

¹¹⁵ Fur Products Labeling Act, ch. 298, 65 Stat. 175 (1951) (codified as amended at 15 U.S.C. § 69 (2012)); 16 C.F.R. pt. 301 (2015).

¹¹⁶ Textile Fiber Products Identification Act, Pub. L. No. 85-897, 72 Stat. 1717 (1958) (codified as amended at 15 U.S.C. § 70 (2012)); 16 C.F.R. pt. 303 (2014).

¹¹⁷ See Mark E. Budnitz, *The FTC's Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation*, 46 CATH. U. L. REV. 371, 415–16 (1997) (noting the “trivial” rules made before Magnuson-Moss).

¹¹⁸ See *id.* at 416–17 (noting that the FTC used its rulemaking ability to address unfair and deceptive practices, not antitrust).

¹¹⁹ See Ira M. Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 453–54 (1964).

¹²⁰ Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 16 C.F.R. pt. 412 (1968); C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 678 (2009). Max Huffman argues that the FTC's petroleum market manipulation rule, 16 C.F.R. pt. 317 (2015), promulgated in November 2009, could also be understood in part as an antitrust rule. Max Huffman, *Gen Next Antitrust? Reviewing Daniel Crane*, The Institutional Structure of Antitrust Enforcement, ANTITRUST & COMPETITION POL'Y BLOG 1, 3 (Sept. 19, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201067.

¹²¹ Royce Zeisler, *Chevron Deference and the FTC: How and Why the FTC Should Use Chevron to Improve Antitrust Enforcement*, 2014 COLUM. BUS. L. REV. 266, 281.

On the consumer protection side, the FTC has been more active in rulemaking, although with important qualifications. The FTC has issued twenty rules pursuant to specific Acts of Congress authorizing the FTC to regulate particular industries or practices, such as the sale of wool products or automotive fuel ratings.¹²² These include some of its most popularly known rules, such as the Do-Not-Call Registry Rule¹²³ and the Children’s Online Privacy Protection Rule.¹²⁴ It has also promulgated a batch of rules concerning the Fair Credit Reporting Act, also pursuant to a specific delegation from Congress.¹²⁵ The FTC has promulgated only sixteen trade regulation rules—rules designed to implement the agency’s core organic mission to prevent deceptive and unfair trade practices and unfair methods of competition. Six of these rules were promulgated from 1965 to 1979,¹²⁶ including five during the 1970s, a period that corresponded with the passage of Magnuson-Moss and optimism that the FTC could address broad swaths of the consumer protection landscape through regulation.¹²⁷ In the late 1970s, the FTC’s rulemaking agenda suffered a serious setback as the ordinarily friendly *Washington Post* labeled the agency the “national nanny”¹²⁸ over a series of proposed consumer protection rules, culminating in its proposed “kidvid” rules relating to advertising to children.¹²⁹ As political will turned sharply against the kidvid rules, the FTC was forced to back down.¹³⁰ Following the kidvid debacle,

¹²² See 16 C.F.R. subchapter C (2015).

¹²³ Telemarketing Sales Rule, 16 C.F.R. § 310.1 (2015) (implementing Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101–6108 (2012)).

¹²⁴ Children’s Online Privacy Protection Rule, 16 C.F.R. § 312.1 (2015) (implementing Children’s Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506 (2012)).

¹²⁵ 16 C.F.R. §§ 310.4, 313.16 (2015).

¹²⁶ Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 16 C.F.R. pt. 408 (1965); Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets, 16 C.F.R. pt. 410 (1971); Use of Prenotification Negative Option Plans, 16 C.F.R. pt. 425 (1973); Power Output Claims for Amplifiers Utilized in Home Entertainment Products, 16 C.F.R. pt. 432 (1975); Preservation of Consumers’ Claims and Defenses, 16 C.F.R. pt. 433 (1977); Labeling and Advertising of Home Insulation, 16 C.F.R. pt. 460 (1979).

¹²⁷ Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended at 15 U.S.C. § 2301–2312 (2012)).

¹²⁸ Editorial, *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22.

¹²⁹ Children’s Advertising, 43 Fed. Reg. 17,967 (Apr. 27, 1978); see also J. Howard Beales III, *Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present*, 12 GEO. MASON L. REV. 873, 878–79 (2004).

¹³⁰ Beales, *supra* note 129, at 879–80 (describing termination of rulemaking by FTC

the pace of trade regulation rulemaking slowed. The FTC promulgated four rules during the 1980s,¹³¹ three rules during the 1990s,¹³² and only three rules since 2000.¹³³

But maybe this will now change. FTC Chair Lina Khan has made no secret of her desire to proceed with unfair methods of competition rulemaking.¹³⁴ Despite the D.C. Circuit's *National Petroleum Refiners* decision, whether the FTC in fact has that power remains subject to question. At a minimum, it seems unlikely that the FTC will begin to issue unfair methods of competition rules at a pace that would justify the view that its primary character can be described as "quasi-legislative."

On the "quasi-judicial" side, there are also two possible meanings. What the *Seila Law* majority focuses on, which was also the primary sense in which this concept was used in *Humphrey's Executor*,¹³⁵ is Section 7 of the FTC Act, which allows district courts to refer Department of Justice antitrust cases to the FTC to sit as a "master in chancery" and determine the appropriate form of relief.¹³⁶ Several related powers, alluded to more indirectly in *Humphrey's Executor*,¹³⁷ include Section 6(c), which calls for the FTC to monitor compliance with antitrust decrees obtained by the Justice Department,¹³⁸ and Section 6(e), which allows the Attorney General to request that the FTC "make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law."¹³⁹

in response to political pressure).

¹³¹ Care Labeling of Textile Wearing Apparel, 16 C.F.R. pt. 423 (1983); Credit Practices, 16 C.F.R. pt. 444 (1985); Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. pt. 455 (1985); Retail Food Store Advertising and Marketing Practices, 16 C.F.R. pt. 424 (1989).

¹³² Ophthalmic Practice Rules, 16 C.F.R. pt. 456 (1992); Funeral Industry Practices, 16 C.F.R. pt. 453 (1994); Cooling-Off Period for Door-to-Door Sales, 16 C.F.R. pt. 429 (1995).

¹³³ Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 C.F.R. pt. 436 (2007); Mail or Telephone Order Merchandise, 16 C.F.R. pt. 435 (2011); Disclosure Requirements and Prohibitions Concerning Business Opportunities, 16 C.F.R. pt. 437 (2011).

¹³⁴ Rohit Chopra & Lina M. Khan, *The Case for Unfair Methods of Competition Rulemaking*, 87 U. Chi. L. Rev. 357 (2020).

¹³⁵ See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 621 (1935).

¹³⁶ 15 U.S.C. § 47 (2012).

¹³⁷ See *Humphrey's Ex'r*, 295 U.S. at 621.

¹³⁸ 15 U.S.C. § 46(c).

¹³⁹ *Id.* § 46(e).

While these chancery-like powers make the FTC “quasi-judicial” in theory, practice has been entirely different. The powers simply have not been used, largely because the FTC and Justice Department have become rival enforcement agencies that have little interest in ceding power to one another. Indeed, the only instance of the use of the equity power of which I am aware is a 1962 letter to the chairman of the FTC, referring a decree matter to the FTC under Section 6(c), in which the Attorney General stated that the section had been “virtually unused since its enactment in 1914.”¹⁴⁰ To this Author’s knowledge, that power has been unused again since that time.

The FTC’s other “quasi-judicial” capacity concerns its power to hear matters administratively. Under its original statutory mandate, which was still in place at the time of *Humphrey’s Executor*, the FTC had no power to sue in federal district court.¹⁴¹ It could bring only administrative actions and then seek to have those orders enforced by a court of appeals.¹⁴² Conversely, defendants who lost before the Federal Trade Commission could seek vacatur of the Commission’s order in a Court of Appeals.¹⁴³ The *Humphrey’s Executor* Court was thus correct in observing that the FTC wielded quasi-judicial powers in principle.

Legislative changes within three years of the *Humphrey’s Executor* decision began a trend that gradually reduced the FTC’s adjudicatory character significantly. The Wheeler-Lea Amendments of 1938 granted the FTC new powers to act as a party-litigant in federal district court.¹⁴⁴ The thrust of the FTC’s new power under Section 13 was to seek a preliminary injunction maintaining the status quo pending the filing of an administrative complaint.¹⁴⁵ Thus, a preliminary injunction obtained under Section 13 dissolves automatically if, within the time specified by the district court (not to exceed twenty days), the FTC fails to file an administrative complaint.¹⁴⁶ Writing immediately in the wake of the Wheeler-Lea Amendments, the eminent trade scholar Milton Handler believed that, although the statutory language was unclear, “an injunction can not be

¹⁴⁰ *United States v. Int’l Nickel Co. of Can.*, 203 F. Supp. 739, 741 (S.D.N.Y. 1962).

¹⁴¹ Federal Trade Commission Act of 1914, Pub. L. No. 63-203, 38 Stat. 717, 719–20 (1914).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ 15 U.S.C. § 53(a).

¹⁴⁵ *Id.* § 53(b).

¹⁴⁶ *Id.* § 53(b).

sought independently of a proceeding by the Commission.”¹⁴⁷ In time, however, the FTC would obtain new statutory authority to seek injunctions without going through administrative proceedings at all. In 1973, Section 13 was amended to add a proviso that, with time, would become the rule rather than the exception: “[I]n proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.”¹⁴⁸ Eventually, the courts interpreted the language of Section 13(b) to permit a district court to grant a permanent injunction even though the Commission never brought an administrative action.¹⁴⁹

Two years later, in 1975, Congress granted the FTC additional powers to seek monetary relief, primarily for consumer protection violations.¹⁵⁰ The Commission could seek consumer redress in federal court for “dishonest or fraudulent” practices, but only after an administrative proceeding.¹⁵¹ However, the Commission soon fell into the habit of obtaining effective monetary relief without administrative action by suing in federal district court seeking asset freezes and mandatory injunctions requiring the defendant to return assets to defrauded consumers.¹⁵² This use of the federal courts’ injunctive power became known as the “Section 13(b) Fraud Program.”¹⁵³ In combination with other institutional pressures and strategic considerations, it had the effect over time of shifting the FTC’s enforcement activities in the consumer protection field from internal adjudication to executive enforcement in federal district court.¹⁵⁴

¹⁴⁷ Handler, *supra* note **Error! Bookmark not defined.**, at 106.

¹⁴⁸ 15 U.S.C. § 53(b).

¹⁴⁹ *United States v. JS & A Group, Inc.*, 716 F.2d 451, 457 (7th Cir. 1983) (“[W]e hold that section 13(b) of the FTC Act authorizes the Commission to seek, in a proper case, and the court to grant, after proper proof, permanent injunctive relief, irrespective of whether a Commission proceeding regarding the alleged violations is pending or contemplated.”); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1110–11 (9th Cir. 1982); *United States v. Nat’l Dynamics Corp.*, 525 F. Supp. 380, 381 (S.D.N.Y. 1981).

¹⁵⁰ 15 U.S.C § 57b; *see also* J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST L.J. 1, 1–2 (2013) (detailing the events leading up to the 1975 amendments to the FTC Act).

¹⁵¹ 15 U.S.C § 57b(a).

¹⁵² Beales & Muris, *supra* note 150, 3.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 4 (describing the increasing use of the Section 13(b) Fraud Program and increasing amount of redress ordered); *id.* at 22 (explaining that FTC could have accomplished asset freezes in the district court and then returned to the administrative forum, but there was little reason to use such a clunky procedure).

Due to various reasons I have described elsewhere,¹⁵⁵ agency adjudication has become a smaller part of the FTC’s work in recent decades. My prior empirical project studied FTC enforcement action in recent decades and found that 1,183 cases proceeded in federal court and 909 before the agency.¹⁵⁶ In total, 1,524 cases ended in consent degrees without any adjudicatory activity at all, whether in court or before the agency, and 475 cases saw adjudicatory activity in federal district court. Over the eighteen-year period studied, only 79 cases of agency adjudication were identified—just over four a year. It concluded that adjudication is a vanishingly small aspect of what the FTC does.

So if the FTC is not primarily involved in legislation (whether as an aid to Congress or as an independent rule-making agency) or adjudication (whether sitting as a special master in equity to aid the Justice Department or adjudicating its own cases internally), what is it doing? The answer is given plainly in the FTC’s 2022 budget request to Congress, when the Commission described how its 1,140 employees were deployed. 512 of them were tasked to “identify and take actions to address deceptive or unfair practices that harm consumers,” and another 453 to “identify and take actions to identify anticompetitive mergers and practices that cause harm to consumers.” That is to say, 85% of the Commission’s staff are involved in traditional law enforcement. The two other categories of FTE assignment—conducting research or consumer outreach, and collaborating with domestic and international partners—also contain elements of enforcement. They do not describe a primarily legislative or adjudicatory agency. The *Seila Law*’s recitation of *Humphrey’s Executor* view of the FTC—that it “performed legislative and judicial functions and was said not to exercise any executive power”—bears zero resemblance to the actual FTC.

Any pretense that the FTC is not primarily a law enforcement agency recently was given the lie by Judge Boasberg’s decision rejecting Facebook’s argument that FTC Chair Lina Khan should have been recused from voting out a complaint against Facebook because of her work in compiling anti-Facebook evidence in the House Judiciary Committee and her prior academic writing.¹⁵⁷ Judge Boasberg observed that Chair Kahn was acting as *a prosecutor* rather than a judge with respect to her vote on authorizing the filing of an amended complaint, and therefore that the neutrality standards

¹⁵⁵ Crane, *supra*.

¹⁵⁶ Crane, *supra*.

¹⁵⁷ *FTC v. Facebook, Inc.*, 2022 WL 103308, at*18 (Jan 11, 2021).

applicable to adjudicators did not apply.¹⁵⁸ “Prosecutor” is an apt description of the Commissioners’ role most of the time.

One final point of potential distinction between the FTC and the CFPB that bears analyzing concerns the *Seila Law* Court’s observation that the CFPB has the authority to “seek restitution, disgorgement, and injunctive relief, as well as civil penalties up to \$1,000,000 (inflation adjusted) for each day that a violation occurs.”¹⁵⁹ Thus, the CFPB Director has “the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in *Humphrey’s Executor*.”¹⁶⁰

True enough, at the time of *Humphrey’s Executor*, the FTC’s powers were solely equitable—and essentially limited to equity’s injunctive power to order defendants to comply with the law. Further, the Supreme Court recently ruled that the FTC lacks power under Section 13(b) of the FTC Act to seek disgorgement as an equitable remedy.¹⁶¹ The *AMG* decision has, for now, frustrated the FTC’s ability to seek the billions of dollars in disgorgement that it has sought (and obtained) in some recent cases, but that does not mean that the FTC today lacks the power to seek significant monetary penalties. The FTC has significant civil penalty authority in its consumer protection capacity, as evidenced by the \$5 billion fine it recently meted on Facebook for violations of consumer privacy.¹⁶² From 2000 to 2018, the Commission secured over \$400 million in civil fines for consumer protection violations.¹⁶³ Moreover, the House of Representatives has passed the Consumer Protection and Recovery Act (H.R.2668), which would give the FTC the disgorgement authority that the Supreme Court denied it in *AMG*. With or without that authority, the FTC is already in a position to demand significant sums of money from companies that violate consumer protection law.

In short, very little of what the *Humphrey’s Executor* court said about the FTC was true at the time, and most of it that was arguably true at the time is no longer true. The FTC is for all intents and purposes an executive law enforcement agency.

¹⁵⁸ *Id.* at *20.

¹⁵⁹ 140 S. Ct. at 2193.

¹⁶⁰ 140 S. Ct. at 2200.

¹⁶¹ *AMG Capital Management, LLC v. FTC*, ___ U.S. ___ 141 S. Ct. 1341 (2021).

¹⁶² [FTC Imposes \\$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook | Federal Trade Commission.](#)

¹⁶³ [Data Sets | Federal Trade Commission \(ftc.gov\).](#)

Under the logic of *Seila Law*, it should not be divorced from the President’s removal power.

III. FTC INDEPENDENCE GOING FORWARD

So now what? For now, the FTC remains constitutionally independent from the President’s removal power because the Court declined to say otherwise in *Seila Law*. But, of course, it was the CFPB, not the FTC, that was actually before the Court, and it said plenty to cast doubt on *Humphrey’s Executor*. A bet on *Humphrey’s Executor’s* survival should come with a significant premium for risk. What would be the effects on the FTC’s independence and enforcement agenda should the Supreme Court finally discard *Humphrey’s Executor* and hold that FTC Commissioners are removable by the President for political reasons? The effects, both short-run and long-run, could be considerable.

A. Short-run Remedial Risks

An immediate effect of *Seila Law* is to cast a pall over FTC enforcement actions. Should the Supreme Court ultimately rule that the FTC must be accountable to the President’s removal power, the party that successfully brought that challenge (and others currently bringing such a challenge) might be entitled to dismissal of the case or vacatur of any prior decisions. Remedy was a secondary issue in *Seila Law*—whether the civil investigative demand at issue should be quashed, or whether it had been sufficiently ratified by a Director accountable to the President.¹⁶⁴ Following remand, the CFPB’s new Director Kraninger, “now removable by the President without cause,” ratified the Board’s past action against *Seila Law*.¹⁶⁵ En banc, the Ninth Circuit held that post-hoc ratification sufficient to overcome the unconstitutional taint of the prior Board action, but four judges of the court dissented.¹⁶⁶ In the dissenters’ view, the prior CFPB’s unconstitutional structure rendered the enforcement action irremediably tainted.

In *Seila Law*, the Supreme Court declined to address the ratification question because it “turn[ed] on case-specific factual and

¹⁶⁴ 140 S. Ct. at 2211.

¹⁶⁵ *Consumer Financial Protection Bureau v. Seila Law LLC*, 997 F.3d 837, 842 (9th Cir. 2021) (Bumatay, J. dissenting from denial of rehearing on banc).

¹⁶⁶ *Id.*

legal questions not addressed below and not briefed” before the Court.¹⁶⁷ The Supreme Court returned to that question in *Collins*, holding that the subsequent ratification of the prior decision by a director (Acting Director, in the facts of *Collins*) who was removable at the will of the President could remove the constitutional taint of the prior decision made by a director insulated from removal except for cause, at least if the harm to the defendant had not yet been completed at the time of the new director’s ratification.¹⁶⁸ Subsequent ratification by a constitutionally legitimate (in the sense of removable at the will of the President) director thus seems to limit the potential disruptive effect of *Seila Law* on ongoing agency business.

But much remains unresolved. In both *Collins* and *Seila*, the subsequent ratification was by a newly appointed director (or Acting Director, in *Collins*). Would the taint of unconstitutionality have been removed if the same director who had issued the prior decision simply reissued it after the judicial decision on removability? There is no clear answer. Presumably, the injury in fact suffered by the subject of an adverse agency decision by a decision-maker unconstitutionally insulated from the President’s removal power is that, if the decision-maker had been properly subject to the removal power, her decision might have been different. Having already made the prior adverse decision, should the decision-maker be counted on to consider a new decision without the overhang of her prior decision? The Supreme Court considered a similar question in *Lucia v. SEC*,¹⁶⁹ deciding that an unconstitutionally appointed administrative law judge (“ALJ”) should not be assigned to hear the same matter again even if after a new, constitutional appointment. Justice Kagan observed that the ALJ “cannot be expected to consider the matter as though he had not adjudicated it before” and that “the old judge would have no reason to think he did anything wrong on the merits.”¹⁷⁰ On the other hand, in dialogue with Justice Breyer’s concurring opinion, she also noted that a new officer may not be required for “every Appointments Clause violation” and that if “the Appointments Clause problem is with the Commission itself, so that there is no substitute decisionmaker, the rule of necessity would presumably kick in and allow the Commission

¹⁶⁷ *Seila Law*, 140 S. Ct. at 2208 (plurality opinion).

¹⁶⁸ 141 S. Ct. at 1781 (“[i]f the statute does not restrict the removal of an Acting Director, any harm resulting from actions taken under an Acting Director would not be attributable to a constitutional violation.”).

¹⁶⁹ 138 S. Ct. 2044 (2018).

¹⁷⁰ *Id.* at 2055, 2055 n.5.

to do the rehearing.”¹⁷¹ In support of this proposition, Justice Kagan cited *FTC v. Cement Institute*,¹⁷² in which the Court held that the same Commission could conduct industry-wide investigations and subsequently engage in proceedings against a defendant on the same legal and factual questions since there was no practical way of separating the Commission’s investigatory and adjudicatory functions.

So maybe this means that, if the Supreme Court should overrule *Humphrey’s Executor* and hold FTC Commissioners removable by the President, the Commission simply has to ratify its prior decisions and get on with business. Since that issue was not squarely presented in *Lucia*—Justice Kagan’s comments were dicta—the issue remains formally unresolved. But even if subsequent ratification by the same Commissioners revives a previously unconstitutional order, there is no guarantee that the Commission will ratify its prior decisions. Years would pass from the moment of a constitutional challenge to a Commission decision to final decision on the constitutional question. In the interim, vacancies or changes in the Commission’s composition could make it impossible for the Commission staff to secure subsequent ratification from a Commission majority, particularly given the current, deeply partisan division on the Commission.

The upshot is that every company or individual against whom the FTC takes enforcement action is walking around with a potential “get out of jail free” card in their pocket. At a time when the Commission is apparently embarking on a considerably more aggressive enforcement agenda, *Seila Law* and its progeny could represent a major roadblock to the FTC’s agenda.

B. Long-Run Institutional Consequences

Beyond the short-term remedial issue, there are important questions about what it would mean for the FTC to become accountable to the President’s removal power. Perhaps it wouldn’t change much at all. Some commentators have argued that the focus on removal power as the fulcrum of independence or control is misplaced, since Presidents face practical and political constraints on removing even executive officers whom they have the clear right to

¹⁷¹ *Id.* at 2055 n.5.

¹⁷² 333 U.S. 683, 700-03 (1948).

remove.¹⁷³ Witness President Trump’s seemingly odd reluctance to fire Cabinet officers like Attorney General Jeff Sessions, whom the President characterized as incompetent, disloyal, and out of step but allowed to linger on in office.¹⁷⁴ On the other hand, President Biden’s firing of Social Security Commissioner Andrew Saul, a Trump holdover who refused to resign, suggests that the President’s newfound removal powers may be wielded aggressively even in nakedly political cases.¹⁷⁵

On the other hand, giving the President removal powers over the Commissioners on a multi-member, multi-partisan commission could affect the commission’s dynamics by permitting the President to remove holdover commissioners from the opposite party and replace them with a more pliable “loyal opposition.” This power could be particularly useful to avoid commission stalemates resulting from vacancies—a situation that has occurred with some frequency in recent decades and has, at times, disabled the Commission from advancing the Chair’s agenda. For example, consider a period during which the Commission is down to four members—two of the President’s party and two of the other party—and is therefore at a stalemate. Further assume that the opposing party controls Congress and therefore may delay or refuse confirmation of the President’s same-party nominee to fill the fifth seat. In such a circumstance, the opposing party essentially holds a veto over the Commission doing any business of a controversial nature. With the removal power, the President could remove one of the two opposition Commissioners, thus breaking the stalemate immediately and creating bargaining leverage for the appointment of the new same-party Commissioner.

Beyond partisan issues, affording the President a removal power over FTC Commissioners could result in more fluid coordination on antitrust matters between the FTC and Justice Department’s Antitrust Division, which share a considerably overlapping mandate. At times, the agencies have bickered significantly and publicly, most recently when the Antitrust Division filed an *amicus curiae* brief opposing the FTC’s monopolization case against Qualcomm.¹⁷⁶ Although the

¹⁷³ Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 628-33 (2010).

¹⁷⁴ Rebecca Savransky, *Trump does not intend to fire Sessions: report*, The Hill (June 8, 2017).

¹⁷⁵ See Lisa Rein, *Biden fires head of Social Security Administration, a Trump holdover who drew the ire of Democrats*, Washington Post (July 11, 2021).

¹⁷⁶ *Brief of the United States of America as Amicus Curiae in Support of Vacatur*, No. 19-16222 (9th Cir. 2019).

removal power would not eliminate all inter-agency strife, it would likely reduce the likelihood that the agencies would take publicly opposing positions.

Clarifying that the FTC works for the President—which is, after all, the symbolic and perhaps practical meaning of the removal power—would also make sense of directives like President Biden’s Executive Order on Competition, which is where this Article began. At present, it is questionable practice for the President to issue directions to an agency over which he has no control.¹⁷⁷ Granting the President the removal power would clarify the President’s authority to direct the activities of the FTC,¹⁷⁸ which in turn could facilitate the sort of coordination on competition policy that President Biden’s Executive Order envisions.

But, of course, the price of Presidential control would be the loss of FTC independence. The *Humphrey’s Executor* narrative envisioned Commission independence as a powerful force for the superior administration of the law. Neutral expertise, political detachment, and technocratic continuity are the ostensible virtues that stand to be lost with the assertion of Presidential control. If they ever existed.

CONCLUSION

Seila Law is significant for taking *Humphrey’s Executor* at face value—as Chief Justice Roberts wrote, by “tak[ing] the decision on its own terms, not through gloss added by a later Court in dicta.”¹⁷⁹ If the accuracy of the *Humphrey’s Executor* Court’s description of the FTC’s institutional arrangement and functions is the necessary condition for its continuing independence, then that independence is in significant peril. No one could seriously argue that the FTC is anything like a mere legislative and judicial aid to Congress and not a law enforcement agency performing executive functions. If *Seila Law* means what it says, the President may soon have removal power over FTC Commissioners.

¹⁷⁷ See Adrian Vermeule, *Conventions of Agency Independence*, 113 Colum. L. Rev. 1163, 1216-17 (2013); Extending Regulatory Review Under Executive Order 12866 to Independent Regulatory Agencies, Office of Legal Counsel (Oct. 8, 2019).

¹⁷⁸ Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205 (2014).

¹⁷⁹ 140 S. Ct. at xxx n. 4.