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**If the President Can Fire FCC Commissioners, Should the Agency Be
Restructured?**

by

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Whatever notions one may have entertained in the past—or may still entertain—regarding the Federal Communications Commission (FCC) as a so-called “independent” agency, it’s obvious that those notions may not hold true much longer. To be clear, the FCC’s supposed independence rests primarily on the claim that the agency’s commissioners may not be removed by the president without good cause and, as the Supreme Court put it in its landmark [Humphrey’s Executor v. FTC](#) (1935) decision regarding Federal Trade Commission (FTC) commissioners, that they are “free from executive control.”

In her oft-cited [Presidential Administration law review article](#) published in 2001, then-Harvard Law School Dean and now-Supreme Court Justice Elena Kagan declared that the lack of presidential removal power of the heads of independent agencies, as opposed to the heads of executive branch ones, is “the core legal difference between these entities.”

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If the president may lawfully remove commissioners of the FCC for any reason or no reason—in other words, at will—it’s difficult to maintain that the agencies are “independent” in any meaningful sense. And if this proves to be the case, it will be advisable, if not necessary, to begin considering whether and how the FCC should be structured in this brave new administrative law world.

The Trump administration early on made clear its intent to test whether a president lawfully may remove members of multimember agencies heretofore considered—at least by many relying on the *Humphrey’s Executor* precedent—to be independent and largely free from presidential control. In a [letter dated February 12, 2025](#), Acting Solicitor General Sarah Harris advised the Senate that “the Department of Justice has determined that certain for-cause removal provisions that apply to members of multimember regulatory commissions are unconstitutional and the Department will no longer defend their constitutionality.” With respect to a variety of independent agencies, including the FTC and the National Labor Relations Board (NLRB), Ms. Harris concluded that the statutory provisions purporting to restrict removal of agency commissioners to causes such as “inefficiency, neglect of duty, or malfeasance in office” are unconstitutional.

Indeed, President Trump has now dismissed two Democrat FTC commissioners and a Democrat member of the NLRB. Not surprisingly, these dismissals have been challenged as unlawful, and the cases likely are headed to the Supreme Court for ultimate resolution.

Meanwhile, there has already been an abundance of commentary by administrative law scholars, pundits, and others offering their opinions as to whether these removals are lawful. That may depend on whether the Supreme Court flat-out overrules *Humphrey’s Executor*, distinguishes it based on differences between the current and 1935 operation of agencies like the FTC, or leaves the precedent alone.

In February, I offered some [brief observations](#) regarding what might happen if President Trump sought to dismiss an FCC commissioner without cause. I concluded that the president likely would prevail. I pointed out that the Communications Act, unlike the Federal Trade Act at issue in *Humphrey’s Executor*, or the National Labor Relations Act and other “independent” agency enabling statutes, does not contain a “for cause” limitation on a president’s removal power. This key statutory distinction might mean the president would prevail even if *Humphrey’s Executor* were not overruled.

To be clear, I am not advocating the removal of any FCC commissioner of any political stripe.

But because the Supreme Court may soon rule that FCC commissioners lawfully may be removed by the president without cause, I want to suggest it makes sense to begin now to consider whether Congress should alter the structure and functions of the agency to better comport with what may be the new constitutional reality. In a world in which commissioners may be dismissed at the will of a president, the notion of agency independence, as conventionally understood, no longer holds—and the original Progressive-era idea of a multimember bipartisan commission composed of “experts” rendering decisions largely without consideration of politics is effectively demolished.

Reinventing the FCC in this new world will require much hard work. The Commission's structure has remained essentially unchanged since 1927, when Congress created the Federal Radio Commission (FRC). When Congress enacted the Communications Act of 1934, the FCC retained the same multimember bipartisan fixed-term structure as the FRC. So even aside from the potential jurisprudential developments regarding the president's removal power, given the radically changed communications marketplace in the last quarter century in which competition and consumer choice now largely prevail, a rethinking of the FCC's structure and mission is timely.

That is a project about which I expect I'll have more to say. But my hope here is to spur serious discussion and debate by suggesting, very briefly, a way of fundamentally reimagining such FCC restructuring. The Commission's functions would basically be split. Policymaking functions would be committed to a single official located in the executive branch, perhaps in the National Telecommunications and Information Agency, part of the Department of Commerce. Then, the president ultimately would be politically accountable for the policymaking functions.

The Commission, in its current multimember form, would retain responsibility for conducting adjudications and enforcement proceedings in a manner insulated from executive branch control. These remaining functions should be carried out based on the law and evidence without political interference. Because these adjudicative functions are quasi-judicial—a notable aspect of the reasoning of *Humphrey's Executor*—in rewriting the Communications Act, Congress should be able to insulate the agency's commissioners from executive branch interference and eliminate the threat of presidential removal.

Of course, this is only a bare sketch of a way of rethinking the FCC's structure and mission if it turns out the president can remove the agency's commissioners at will. But it's not too soon to begin sketching, whether on whiteboards or just in your mind.

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