

## Trump's War on Consumer Protection, Humph(rey)

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We have been following closely developments with the Consumer Financial Protection Bureau (“CFPB”) and the Trump/Musk administration (see [here](#) and [here](#)), and while we have a few updates on the CFPB, Trump and Musk have taken another swing at making consumers more vulnerable to the excesses of our economy by attempting to “fire” two Democratic Federal Trade Commission (“FTC”) commissioners.

The FTC has a hybrid mission to regulate the marketplace – its Bureau of Competition addresses antitrust and anti-competitive concerns, and its Bureau of Consumer Protection works to ensure that consumers are not subject to unfair or deceptive acts or practices. The FTC is a commission and it is intended to have five commissioners, no more than three of which may belong to the party of the President. While the President appoints the commissioners, whether Democratic or Republican, but the FTC is an independent agency and is not under the Executive Branch. In fact, the Supreme Court decision that established the unique status of an independent agency (as compared to an executive agency) was [Humphrey’s Executor](#), which was decided in 1935 and was focused upon the removal of an FTC commissioner by President Franklin D. Roosevelt because Roosevelt did not agree with that commissioner’s politics.

As reported by several news organizations, the letter received by FTC Commissioners Alvaro Bedoya and Rebecca Slaughter from President Trump stated that their “continued service is inconsistent with my Administration’s priorities.” And yet, every single Commission vote since the inauguration (and there have been several votes) was unanimous, meaning that all commissioners – the Republicans and the Democrats voted exactly the same way. The similarity between this action by Trump and the actions taken by Roosevelt is too strong to ignore, so this means that Trump is directly asking the Supreme Court to strengthen the Executive Branch by overruling [Humphrey’s Executor](#) and doing away with independent agencies altogether. Because [Humphrey’s Executor](#) is still valid precedent, the legal validity of the firings of the FTC Commissioners is questionable, which is why many characterize the firings as “attempted” firings.

If this all sounds familiar to folks who are more focused on the CFPB, [this letter sent yesterday to Trump](#) challenging the firing of the FTC Commissioners from twenty-six Senators explains the connection between the FTC and the CFPB: “Ninety years ago, the Supreme Court held that Congress’s authority to create bipartisan, multimember, expert commissions—and specifically the FTC—“cannot well be doubted” because “it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence. . . .” In a 2020 decision involving whether Congress could insulate the single director of the Consumer Financial Protection Bureau from at-will removal by the President, the Supreme Court declined to revisit this precedent, finding important differences between the CFPB and the FTC, including that the FTC has multiple expert members to ensure the Commission retains relevant expertise at all times, that each President can influence the makeup of the Commission by nominating new members and appointing the Chair (as you have already done), and that the Commission is funded through the traditional appropriations process that the President may influence.”

The CFPB and the FTC are the only Federal agencies that have primary missions to protect consumers in the marketplace, and Trump and Musk have effectively rendered each organization powerless at this point. With only two remaining commissioners at the FTC, the agency does not have the ability to establish a “quorum” of commissioners and therefore cannot take action in the marketplace. Of particular concern, beyond the importance of the FTC’s work in ensuring that everyday transactions made by American consumers are free from unfair or deceptive practices, hobbling the FTC’s antitrust capabilities as well makes it that much easier for the biggest corporations to control markets and engage in anti-competitive behavior, which always drives up costs and can even impact the freedoms and rights of Americans.

On the CFPB front, things have not improved much, although there are scattered reports that more CFPB staff have been called in to work on “statutorily-required” activities. In the lawsuit brought by the union that includes CFPB employees against the administration, Judge Amy Berman Jackson heard arguments last week regarding whether a preliminary injunction should be granted to stop the firing of CFPB staff. While she has not yet rendered her decision, she did extend the temporary restraining order that was already in place. Meanwhile, Trump’s nomination of Jonathan McKernan to become the actual Director of the CFPB is proceeding through the Senate approval process.